

The complaint

Mr G complains that Assicurazioni Generali SpA (AGS) has turned down an incapacity claim he made on a group income protection policy.

Mr G's represented by a solicitor, but for simplicity, I'll refer simply to Mr G.

What happened

Mr G was insured under his employer's group income protection policy. AGS became the policy insurer in November 2018. Mr G was employed as a Compliance Manager and Director and had joined the employer in 2017. The policy provided Mr G with cover for his 'own occupation'. The specified deferred period was 26 weeks.

In 1997, Mr G had been diagnosed with an eye condition, which caused progressive deterioration. In August 2018, Mr G let his employer know that his condition was causing him some difficulty in carrying out his role and so he was referred for a vocational rehabilitation assessment under his employer's old income protection policy scheme. The assessor recommended some adjustments.

And in April 2019, Mr G's role was amended to also include a 'Global Ambassador' function, which was considered to be a more strategic function. However, Mr G said that given his management duties, he hadn't been able to fulfil the ambassador duties.

Mr G's eyesight continued to deteriorate and in February 2020, he was signed off sick from work. He said he was no longer able to carry out the substantial and material duties of his role. His employer made an income protection claim on the policy on Mr G's behalf.

AGS turned down Mr G's claim. Ultimately, it concluded that while Mr G was unable to carry out the duties of his previous role as a result of his eye condition, he hadn't shown that he was unable to fulfil the substantial and material duties of the Global Ambassador role. And it wasn't satisfied that Mr G had provided enough evidence to show there'd been a deterioration in his eye condition during the relevant period. So it concluded that Mr G hadn't shown he met the policy definition of incapacity.

Mr G was unhappy with AGS' decision and he asked us to look into his complaint.

Our Investigator thought that Mr G's complaint should be upheld. She felt the available medical evidence demonstrated that Mr G's vision had deteriorated.

And she was also persuaded that Mr G's treating specialist had provided evidence to show that Mr G met the policy definition of incapacity. So she recommended that AGS should pay Mr G's claim, together with interest of 8%. However, she wasn't persuaded that AGS should cover Mr G's legal expenses and neither did she think it needed to cover consequential losses Mr G had said he'd incurred. Nor did the Investigator consider that AGS ought to pay Mr G any compensation for its handling of the claim.

Neither AGS nor Mr G accepted the Investigator's recommendations. I'll briefly summarise their responses below:

AGS' response

- It didn't dispute that Mr G had a progressive condition. But its decision to decline the claim was based on an assessment of it in line with the policy terms and conditions and its understanding of what Mr G's job role was;
- Following Mr G's vocational assessment by the old policy insurer, the new Global Ambassador role had been created. This had a focus on training and reduced screen time and AGS considered that this was the role it was insuring;
- But Mr G actively and knowingly chose not to perform the new role when it was created and this had been evidenced in a performance review. Instead, he'd prioritised the compliance role and continued to perform eye-intensive tasks. So it didn't think he'd taken reasonable steps to mitigate eyestrain and fatigue, which had resulted in his absence;
- It didn't agree that there was little evidence to show that Mr G had changed his job role and referred to a letter from his manager. This stated that Mr G's duties as compliance manager had been decreased, while his role as director of compliance had been expanded. The letter also said that Mr G had been named as a Global Ambassador to provide an emphasis on training and teaching others. And it felt Mr G's social media profile supported its position;
- It felt that the applicable test to show incapacity wasn't just whether Mr G's condition prevented him from carrying out the duties of his role; but also to demonstrate that eyestrain and fatigue left Mr G incapable of working. It concluded there wasn't enough medical evidence to show that Mr G was incapable of carrying out the Global Ambassador role;
- And it wasn't persuaded that Mr G had provided evidence of a material change in his eye condition during the relevant period. It didn't agree that the eye tests Mr G had undergone showed why he was capable of work on one day and not on the next. It wasn't persuaded Mr G had shown evidence of physical or cognitive functionality;
- While it accepted Mr G had provided evidence from his treating specialist which stated that Mr G couldn't perform the duties of his role; it considered this evidence referred to the compliance manager role rather than the Global Ambassador role. It was therefore not thought to be relevant evidence;
- It was concerned that the Investigator hadn't considered that Mr G worked over his contracted hours and that again, he hadn't taken reasonable steps to mitigate his symptoms.

Mr G's response

- Mr G considered that in addition to the backdated claim payment with interest, he should also be entitled to an award for compensation; consequential loss and his legal fees;
- He also considered that AGS should be required to pay the claim on an ongoing basis;
- He said he'd been suffering from anxiety and depression as a result of the decline of the claim;
- He'd had to access capital to cover his expenses while the claim wasn't being paid, in the form of an equity release loan. This had meant his previous lender had charged him an early repayment charge of around £8900;
- Given Mr G's eye condition and the complexity of the claim; it had been reasonable and necessary for him to seek specialist legal support and so he felt a costs award should be made in respect of his legal costs;
- He felt AGS had lied to manufacture a reason to decline the claim;
- And he requested that any award should set out an explicit account of factors such as the precise calculation of backdated simple interest payments on missed annuity payments, and the contractual application of backdated RPI uplifts etc.

My first provisional decision

I issued my first provisional decision on 22 July 2022. In my provisional decision, I set out the reasons why I intended to uphold Mr G's complaint. I said:

'First I'd like to reassure Mr G and AGS that while I've summarised the background to this complaint and all of the detailed submissions which have been sent to us, I've carefully considered all that's been provided. In making my decision though, I haven't commented on each and every point either party has made and nor do our rules require me to. Instead, I've focused on what I consider to be the key issues.'

The relevant regulator's rules say that insurers must handle claims promptly and fairly. And they mustn't turn down claims unreasonably. So, I've thought about, amongst other things, the terms of Mr G's policy and the available medical evidence, to decide whether AGS handled Mr G's claim fairly.'

I've first considered the terms and conditions of Mr G's policy, as these form the basis of his contract with AGS. Mr G's employer made a claim on his behalf for incapacity benefit, given he wasn't fit for work. So I think it was reasonable and appropriate for AGS to consider whether Mr G's claim met the policy definition of incapacity. I've turned then to look at AGS' definition of 'incapacity'. This says that the definition of incapacity:

'means the Definition of Incapacity specified in the Policy Schedule in respect of the Members or any group of Members. This is the 'test' against which the validity of any claim will be measured.'

Mr G's policy schedule states incapacity means that:

'As a result of illness or injury, the Member is incapable of performing the Material and Substantial duties of their occupation, and they are not carrying out any other Work or occupation.'

This means that in order for AGS to pay incapacity benefit, it must be satisfied that it's a policyholder's illness which prevents them from carrying out the material and substantial duties of their own occupation.

It's a general principle of insurance that it's for a policyholder to show they have a valid claim on their policy. This means it was Mr G's responsibility to provide AGS with enough evidence to demonstrate that his illness had led to him being unable to carry out the material and substantial duties of his occupation.

AGS assessed the evidence Mr G provided in support of his claim and concluded that it didn't indicate that he was unable to carry out the material and substantial duties of the role that it believed it was insuring. Or that he met the policy definition of incapacity in this regard. So I've next looked at the available medical and employer's evidence to assess whether I think this was a fair conclusion for AGS to draw.

What was Mr G's insured role?

It's common ground that Mr G was diagnosed with a degenerative eye condition many years ago. AGS doesn't dispute either Mr G's diagnosis or prognosis. Instead, it seems to me that the key issue I need to decide is whether it was fair for AGS to treat Mr G's insured role as a Global Ambassador. And based on what I've seen so far, I don't think it was for reasons I'll go on to explore.

I've first considered Mr G's claim form. This says that Mr G was unable to carry out the following aspects of his role:

'Review of contracts, review / creation of spreadsheets, reading and writing numerous emails, extensive use of systems requiring me to read text. These activities and other requiring any moderate-significant amount of reading put severe strain on my eyes leading to chronic fatigue. See attached note for further information.'

Mr G stated that his job role was as a Compliance Sales Director and set out his usual duties and working hours. It also set out the adjustments his employer had already made to make his employment more comfortable. Mr G said that his essential duties were as a compliance director, with the primary responsibilities of compliance manager and in addition, as a Global Ambassador. Mr G's employer also completed part of the claim form. I note that the employer stated that Mr G's role was as a Compliance Sales Director. They noted that Mr G's precise duties were:

'Reviewing and creation of spreadsheets. Significant volume of email review and response. Use of systems and reading text. Reading and reviewing contracts, audits, conference calls and attending occasional international meetings. (Mr G's) role also involves managing 2 Compliance Managers.'

The employer also said that the physical demands of Mr G's role were:

'Extensive use of vision required for accuracy in all activities. This has resulted in extreme fatigue due to the physical strain.'

Additionally, the employer noted on the claim form that in April 2019, Mr G's role was adjusted to include an ambassadorial role, with a view to a more strategic focus. But it went

on to say:

'However, such was the volume of work required as the sales compliance director...there was not the capacity for Mr G to take on the ambassadorial duties.'

And Mr G's employer said: '(Mr G) is no longer able to carry out all fundamental aspects of his role due to his condition. Carrying out these activities caused (Mr G) to experience significant stress and fatigue.'

In my view, the information set out on the claim form in respect of Mr G's role clearly states that Mr G's main role was as a compliance director, including management duties. It seems the ambassadorial function was added to his role in April 2019.

Moreover, Mr G's employer (including his main line manager and HR business partner) have provided additional evidence in support of Mr G's claim. I'll summarise what I consider to be the key points each has made:

Mr G's line manager said that he'd: 'substantially decreased (Mr G's) duties associated with compliance manager and...expanded his duties as compliance director. (Mr G) was also named as Global Ambassador.'

The HR business partner responded to AGS as follows:

'Adjustments were attempted in-role to try and introduce ambassador duties alongside (Mr G's) core compliance duties. These additional duties were introduced to try and leverage the skills and experience (Mr G) had to provide an emphasis over time on training others and sharing knowledge. The hope was that these in-role adjustments would eventually reduce the eyesight-intensive activities. However, the core responsibilities within his Compliance Director role remained.'

She continued:

'(Mr G) was carrying out the role of Compliance Director for which he was employed. The additional hours (Mr G) was working was partly due to the additional time activities would take due to his condition. (Mr G's) role is very eyesight intensive, and requires detailed review of contracts, spreadsheets and email usage.'

Mr G's manager said:

'Having carefully reviewed the contents of the FOS complaint, I confirm that all of the statements made by Mr G in relation to the material and substantial duties of his employed occupation are accurate.

In particular, I refer to comments made in relation to the nature and purpose of Mr G's role being primarily focused and measured on revenue-generation.

In addition, Generali's characterisation of Mr G's role and duties does not reflect the reality of his employed occupation.'

In a further letter to our service (which has already been shared with AGS), Mr G's line manager stated:

'The characterisation of Mr G's role as having been largely or entirely transformed to a training and education role, requiring very little in the way of eyesight-intensive duties is plainly false...

When I referred to...compliance manager duties and said that these were exhausting his available capacity, I was referring to compliance-related duties performed by Mr G in his role as compliance director, a role which I have referred to throughout and made clear was his job title...

Further the ambassadorial duties constituted a very small component of Mr G's duties (around 15%) which were secondary to those associated with his core revenue function as director of compliance.'

Taking together the totality of the detailed evidence provided by Mr G and his employer, I'm currently satisfied that Mr G's insured role was as a compliance director. I don't think it was reasonable for AGS to maintain that Mr G's main role was a Global Ambassador given the evidence his employer has provided during the life of this claim. While I accept Mr G's employer arranged for reasonable adjustments to be made for his condition following his rehabilitation assessment in 2018 and the inclusion of the ambassador role in April 2019, I don't think it's fair to say that these changes represented a whole new role. In my view, the employer has made it very clear that the ambassador role was very much a small addition to Mr G's duties, which was ultimately intended to reduce the eyesight-intensive tasks he was involved in carrying out. As such then, I currently find that AGS should assess whether Mr G is prevented from carrying out the material and substantial duties of a compliance director.

Has Mr G provided evidence that he is incapacitated from carrying out his role?

AGS seems to suggest that during the relevant period, Mr G didn't suffer a significant deterioration in his eyesight. So I've carefully considered the available medical evidence on this point.

In November 2020, Mr G's consultant ophthalmic surgeon wrote the following:

'Since January 2017 Mr G's visual acuity has worsened from (RE 5/60, LE 6/60) to 2/60 in both eyes. This is equivalent to almost 70% deterioration of his central vision in less than four years...

The impact of this degree of vision-loss to any individual would be profound. Given that Mr G's' prior visual acuity was already severely diminished such that he was registered severely sight impaired / blind, the relative magnitude of the worsening and impact on his ability to read cannot be overstated.

Compared to his last visit in December 2018 (RE 3/60 ,LE 6/60) the rate of overall deterioration has significantly accelerated.'

In October 2021, Mr G's visual acuity in both eyes was noted to be 1/60.

It seems to me then that the medical evidence points to a clear and significant deterioration in Mr G's condition during both the life of the policy and of the claim.

The available medical evidence also supports a clear conclusion that Mr G meets the policy definition of incapacity for his insured role. I say that because his consultant surgeon has unequivocally stated the following:

'As stated within our letter dated 9th April 2020, we did not expect a patient with Mr G's condition, prognosis and visual acuity as of December 2018 to be able to perform the duties that were described within his letter dated 6th May 2020 in relation to a PHI claim.

Having also reviewed Mr G's job description for the role of (compliance sales), we do not

consider him able to perform these duties either, especially given the severe deterioration of his condition since 2018 and future prognosis.

It therefore remains our clear opinion that Mr G meets the definition of incapacity, which we understand to be “As a result of illness or injury, the Member is incapable of performing the Material and Substantial duties of their occupation, and they are not carrying out any other work or occupation”.

While AGS says it doesn't consider the surgeon's letter to be relevant evidence, as it doesn't think the surgeon assessed Mr G's capacity against the correct job role, I disagree. And in March 2022, Mr G's consultant surgeon provided further evidence which says:

'For the avoidance of doubt, what I was referring to is the material and substantial duties of the role described within Section C of Mr G's complaint.

Furthermore, the continued deterioration of Mr G's vision, as detailed within the medical report of 20 October, reinforces my opinion that Mr G clearly meets the policy definition of Incapacity.'

Mr G's surgeon is an expert in his field, working at a specialist hospital, who has treated Mr G for a number of years and observed his condition. He has commented on the deterioration of Mr G's condition and the resultant impact on Mr G's ability to carry out his role. In my view, he is best placed to decide whether Mr G's illness prevents him from working and whether or not his condition has worsened. So I've placed weight on the consultant's comments in reaching this provisional decision.

Taken together with Mr G's and his employer's comments about the duties of his role, I currently find that Mr G's condition prevented him from carrying out his substantial and material duties, despite the adjustments that had already been made for him. This means I'm presently satisfied that Mr G has provided enough evidence to demonstrate that he meets the policy definition of incapacity.

I appreciate AGS feels that Mr G failed to take reasonable steps to mitigate his condition, such as reducing his hours or reducing the management function to focus on the ambassador role. I've thought carefully about this. And I've relied particularly on Mr G's manager's comments in this regard. He said:

'It is true that as his eyesight worsened, Mr G tried to manage his role by working particularly long hours. But the implication that reducing his hours to a 9-5 schedule would have helped him perform more of the material and substantial duties of his role is absurd...

The business had to...determine the best use of (Mr G's) reduced capacity. It was never in doubt that...Mr G's time would be best spent on his core revenue-generating duties as Compliance Director.'

It seems to me then that Mr G had little choice but to focus on his core role. And by his account, which I find both plausible and persuasive, Mr G said that he was working more hours because his tasks were eyesight-intensive and therefore, both took longer and caused him intense fatigue. It doesn't seem fair then for AGS to consider these as reasonable factors to rely on to decline Mr G's claim.

As such, I currently think the fair outcome in regard to the claim is for AGS to accept Mr G's incapacity claim from the date the deferred period ended on 3 August 2020 and to backdate claim payments from that date. It's open to AGS to periodically review Mr G's claim and to request further evidence to determine whether or not it should remain in payment. AGS will

also need to add interest to the backdated settlement at an annual rate of 8% simple from the date of each payment was due until the date of settlement.

Should AGS cover Mr G's legal fees and consequential loss?

I understand how strongly Mr G feels that his legal fees should be paid and I've given a great deal of thought to this issue. I understand that Mr G is registered blind and that in order to bring his complaint to us without representation, he'd have needed to provide verbal evidence. However, as our Investigator explained, we are a free, informal accessible service, which is able to make adjustments for the needs of our customers. And our file suggests that Mr G has been able to communicate with us separately to his solicitor. So on this basis, I'm currently not persuaded that Mr G needed a solicitor to bring his complaint to us and it follows that I'm not minded to award Mr G's legal costs.

Mr G has also claimed for consequential losses, in the form of an early repayment charge he paid following the early repayment of his mortgage. He says this was to raise capital because the decline of the claim left him without access to funds. The 8% interest award I've outlined above is designed to compensate consumers for the loss of access to money they were entitled to and may often reflect a consumer's consequential losses. 8% simple interest is generally higher than many high street bank savings rates. And by my calculation, an award of 8% simple interest on the backdated claim payments I intend AGS to make to Mr G is likely to exceed the early repayment charge he has incurred. So I'm not intending AGS to pay any further award in this regard.

I do, however, invite further submissions and evidence on this point.

Should AGS pay Mr G compensation for distress and inconvenience?

Our Investigator didn't think AGS needed to pay Mr G compensation for his trouble and upset. However, I disagree on this point. While I acknowledge that the impact of Mr G's condition on his ability to work is always likely to have caused him significant upset, I currently think that AGS' handling of the claim added to this. In my view, AGS had enough information from the outset to accept and to pay Mr G's claim and its decision not to do so has undoubtedly caused Mr G significant additional anxiety about his lack of income. I note too that in Mr G's treating doctors have stated that his employment situation has in part caused Mr G to suffer from anxiety and depression.

So I currently think that AGS should pay Mr G compensation to reflect the trouble and upset he was caused by its poor handling of the claim, in the amount of £500.'

I also recommended that if the total claim payment I intended to direct AGS to pay was more than our award limit of £355,000, it should pay the balance. I said that this recommendation wasn't part of my determination or award and that AGS didn't have to accept it. And I explained that it was unlikely that Mr G could accept my decision and then go to court to ask for the balance.

I asked both parties to send me any further evidence or comments they wanted me to consider.

AGS provided us with a breakdown of the backdated payments it'd calculated Mr G would be due, together with RPI increases and the interest which would be due. It didn't dispute my provisional findings. This calculation was sent to Mr G.

Mr G and his representatives made some additional submissions. In particular, they had concerns about the potential award cap I had outlined in my provisional decision. They

raised concerns as to how acceptance of any final decision might affect Mr G's ability to bring a new complaint to our service, if AGS were to terminate the claim once it had paid the maximum award limit I could make. They consider that our approach on this matter is wrong and referred to case law which they felt supported their position.

Following ongoing correspondence with our Investigator, who referred to other case law which was relevant to our award limits, Mr G let us know that he'd instructed his representative not to continue to contest this point. He stated that he didn't think it would be productive to prolong our complaints process, by arguing over a point which he and our service were unlikely to agree on. He wished to reserve all rights in this regard.

Mr G said he strongly believed that he was entitled to consequential loss and legal cost awards and struggled with my assertion that he could've described his complaint and provided evidence over the phone. But he said he saw little value in reiterating these points and that his priority was to progress this matter to decision. Again, he reserved his rights in this regard.

Mr G asked me to address two specific issues. First, he believed that AGS had presented a false premise for turning down his claim. It had initially declined the claim because it said there was no evidence of a material deterioration in Mr G's vision between 2017 and 2019. But Mr G said that AGS had been aware of medical records which showed the worsening of his condition. And he said he couldn't see any evidence that AGS had provided a reasonable explanation for this. He felt it spoke to the issue of whether his complaint had been handled fairly and reasonably. He didn't accept that this had been benign negligence on AGS' part. He also asked me to specifically address AGS' changing grounds for the decline of his claim throughout the claims and complaint process.

My second provisional decision

I issued a second provisional decision on 11 November 2022. In that decision, I explained why I was still intending to uphold Mr G's complaint. I said:

'I'm grateful for the detailed submissions Mr G and his representatives have provided to us in response to my provisional decision. Whilst I have summarised the contents of those submissions, I've carefully considered these representations.

AGS hasn't provided any substantive evidence which indicates that it disputed my first provisional findings, nor that it had any specific concerns. But in the interests of clarity, I will now briefly expand on the reasons I gave for finding that AGS had acted unfairly and unreasonably when it turned down Mr G's claim.

It remains the case that the key issues for me to determine here are first whether AGS has correctly assessed the claim against Mr G's actual, insured job role. And secondly, whether it has fairly and reasonably assessed the claim in line with the policy terms.

I've set out above the definition of incapacity which was set out in Mr G's policy schedule. For completeness, I've restated this definition, together with definition of incapacity which is set out in the contract itself:

The contract says that incapacity:

'means the Definition of Incapacity specified in the Policy Schedule in respect of the Members or any group of Members. This is the 'test' against which the validity of any claim will be measured.'

Mr G's policy schedules provides the following definition of incapacity:

'As a result of illness or injury, the Member is incapable of performing the Material and Substantial duties of their occupation, and they are not carrying out any other Work or occupation.'

Page 31 of the contract sets out a further definition of incapacity. This says incapacity/incapacitated means:

'means, in the opinion of Generali, Incapacity or Incapacitated in accordance with the Definition of Incapacity specified in the Policy Schedule.'

AGS has defined what it means by the 'material and substantial' duties of an insured person's role as follows:

'means duties that are normally required for the performance of a Member's occupation and cannot reasonably be omitted or modified by their Employer.'

The contractual definition of incapacity provides AGS with some discretion. But AGS has an implied duty to exercise that discretion in good faith and not capriciously or arbitrarily. And it must act rationally.

It's clear that the parties' main point of dispute is what role AGS was insuring. Mr G stated in the claim form I've referenced above that his role was as a Compliance Sales Director. He set out the duties he was responsible for within the claim form and these were broadly mirrored by the Compliance Sales Director job description AGS was sent by Mr G and his employer and which I've looked at closely.

For clarity, these duties do appear to have been highly eye-sight intensive. The evidence from Mr G's employer shows that following assessment, it attempted to make practical and reasonable adjustments to allow Mr G to carry out his role. And that it decided to adjust Mr G's role as a Compliance Sales Director to include a Global Ambassadorial role. Mr G's employers have provided compelling evidence, which I've quoted directly above, which shows that Mr G's main role continued to be that of a Compliance Sales Director. I'll repeat the quote I set out in my (first) provisional decision, which clearly stated that:

"The characterisation of Mr G's role as having been largely or entirely transformed to a training and education role, requiring very little in the way of eyesight-intensive duties is plainly false...

When I referred to...compliance manager duties and said that these were exhausting his available capacity, I was referring to compliance-related duties performed by Mr G in his role as compliance director, a role which I have referred to throughout and made clear was his job title...

Further the ambassadorial duties constituted a very small component of Mr G's duties (around 15%) which were secondary to those associated with his core revenue function as director of compliance.'

In my view, the evidence from Mr G and his employer was clear and detailed enough to highlight to AGS that his role was that of a Compliance Sales Director, with an expanded adjustment to include the Global Ambassador function. I think the evidence was so compelling that AGS ought to have accepted from the outset that Mr G's insured and main role remained as a Compliance Sales Director. And that accordingly, it ought reasonably to have considered whether Mr G was prevented from carrying out the material and substantial

duties of a Compliance Sales Director, with a small focus on the secondary ambassadorial duties. In treating Mr G's insured role as the Global Ambassador role, I don't think AGS acted fairly or reasonably and I don't find it placed appropriate weight on the relevant evidence to determine the role Mr G was carrying out.

So I've next turned to consider whether Mr G has provided enough evidence to show he's incapable of carrying out the material and substantial duties of his role as a Compliance Director, with an ancillary function as a Global Ambassador.

For ease of reading, I've again referred to the duties Mr G's employer referred to in the claim form and those which were detailed in Mr G's job description. These include:

'The Director of Compliance...with the primary responsibilities of managing Compliance Manager's, targeting, forecasting, deal construction, and negotiation. In addition, as Global Compliance Ambassador - Education; Targeting; Program Creation; Evangelism and Training. This is a senior and high level role. The role is fast paced, with high volume of paperwork and high intensity.'

For the sake of brevity, I won't set out each specific job role Mr G was required to carry out. But I note that his duties included: reviewing large analytical spreadsheets; calculating pricing; reading and responding to data; reviewing and QA of audit data; internal management and forecasting.

As I explained in my first provisional decision, Mr G's treating consultant ophthalmic specialist clearly stated that he'd reviewed Mr G's job description for his role in compliance sales. It seems, on balance, most likely that the consultant reviewed the job description which has been made available to me. I find this evidence from the consultant who has been most close to Mr G's care and with the best understanding of his visual deterioration and capacity, to be highly persuasive evidence to show that Mr G was incapable of carrying out the material and substantial duties of his insured role.

I've carefully considered the main duties I've referred to above. It seems to me that each of these duties required a high-level of screen-time and were likely to require a high degree of accuracy. Given the consultant's clear evidence on the deterioration in Mr G's vision, I find it's most likely that Mr G's condition did mean he was incapable of carrying out the material and substantial duties of his role – including the additional global ambassador function which had been created for him. I note that his employer had tried to make adjustments for Mr G's condition to enable him to continue to work, but I'm satisfied that the medical evidence points to Mr G meeting the policy definition of incapacity.

For clarity, I'd also add that I remain persuaded by the employer's evidence that Mr G wouldn't have been in a position to reduce his hours to focus on the ambassador role, or that that particular facet of his overall job package was the priority. It's clearly stated that Mr G's time was best spent on the Compliance Director's role. It seems there was little scope for him to accordingly reduce his screen-time hours. And as I've reiterated, I find Mr G was incapable of performing the Compliance Sales Director's role.

So it remains the case that I still don't find that AGS acted fairly or reasonably when it turned down Mr G's claim. As such, I remain persuaded that the fair outcome is for AGS to accept, backdate and pay Mr G's claim from the date his deferred period ended and pay interest on the backdated payments at an annual rate of 8% simple from the date each payment was due, until the date of settlement.

In August 2022, AGS provided a settlement breakdown, showing the backdated claim payments, together with the interest which would have accrued on them at that point. For

completeness, AGS told us that the backdated benefit due from August 2020 to August 2022 would be £181,294.31. The interest payable at that point would be £14,909.95.

As I explained in my provisional decision, where an award may exceed our maximum limit, which in this case is £355,000, I may recommend the business pays the balance. But this recommendation is not part of my determination or award, so AGS doesn't have to accept my recommendation.

It's clear that Mr G and his representatives have concerns as to how the maximum award limit may affect Mr G's position in the future. In my first provisional decision, I set out some practical considerations which Mr G might wish to think about before accepting my final decision. While I acknowledge Mr G's concerns, it's not possible for our service to determine whether it would have jurisdiction to consider any future complaints which might be brought by Mr G, as it would depend on the nature and scope of that particular complaint. It remains the case that Mr G may wish to take further legal advice when deciding whether or not to accept my decision.

Legal costs and consequential losses

As I set out in my provisional decision, we are a free and accessible service. This means that Mr G didn't need legal representation to bring his complaint to us. Whilst I appreciate he may not have been able to submit all of his evidence in exactly the same format without engaging a solicitor, we are able to make adjustments for our customers' needs. But Mr G had already engaged his solicitor before referring the complaint to us. He told us he was sight-impaired, that he'd prefer phone contact and to correspond with his solicitor. It remains the case though that Mr G has been able to communicate with us independently of his solicitor. I'd still have been able to review all of the material evidence I've relied on which was also provided to me as part of AGS' complaint submission. And I'd still have reached the same decision based on the same evidence if Mr G had brought the complaint to us without representation. So I still find, on the specific facts of this complaint, that Mr G could've brought his complaint to us without the need for a solicitor. Therefore, I don't plan to award his legal fees.

Turning to Mr G's consequential losses, as I explained, the interest award of 8% simple which I intend to make on Mr G's backdated claims payments is, in part, designed to compensate consumers for their lost access to money and to reflect some consequential losses. As I set out above, by my calculation, I considered that Mr G's interest award would've exceeded the early repayment charge he incurred. The calculation AGS has since provided to us shows that the interest payment of £14,909.95 more than compensates Mr G for his mortgage charge of £8939.02. And I've seen no persuasive evidence that Mr G incurred any further consequential losses which were either directly attributable to AGS' decline of his claim or which could've been reasonably foreseen to have flowed from it. This means I'm not making an award for Mr G's consequential losses.

AGS' handling of the claim

It's very clear that AGS didn't handle this claim fairly or reasonably. As Mr G says, AGS provided multiple rationales for turning down the claim and its grounds for declination did evolve throughout the claims process. I explained in my provisional decision that I thought AGS had had enough information from the outset to accept Mr G's claim. And I was persuaded that the evidence demonstrated that Mr G clearly met the policy definition of incapacity. And so it follows that I do think there were clear failings in its handling of the claim, and I don't think it met its regulatory obligation to handle claims fairly.

On that basis and recognising the impact the decline of the claim had likely had on Mr G,

I proposed to award £500 for his distress and inconvenience. I remain satisfied that this award is fair and proportionate and takes into account the errors AGS made when it assessed Mr G's claim and the evidence he provided. Neither party has made any further submissions on this point and so my award here is unchanged. The claims process has been made needlessly difficult for Mr G by AGS and I don't doubt the impact this had on him. As I've explained, the available evidence shows that Mr G suffered depression and anxiety and his doctor told us that this was contributed to by the handling of this claim.

Overall, I've decided that AGS acted unfairly when it turned down Mr G's claim.'

Again, I asked both parties to send me any additional evidence or information they wanted me to consider.

Mr G's further response

Mr G pointed out that he had been expecting to receive a final decision, rather than a second provisional decision. He stated that in response to my first provisional decision, he'd specifically asked me to comment on two points. First, AGS' ever-changing rationale for turning down the claim, which he noted I had considered in my second provisional decision. And second, that AGS' decision letter had falsely claimed that there was no medical evidence to show his vision had deteriorated between 2017 and 2019, despite clear evidence to the contrary. He said that further delays in issuing a final decision would be very painful for him.

AGS' response

AGS provided the following email response:

'Please take this email as confirmation that Generali accept the Ombudsman's findings and provisional decision and will continue to pay the claim until such time that the FOS maximum award limit has been reached. After this point we do not accept any further liability of the claim.'

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've decided to uphold Mr G's complaint for the same reasons set out above and in both of my provisional decisions. As AGS has accepted my provisional findings, I see no reason to explore my reasoning again in full depth.

However, it's clear that Mr G feels that I failed to address one of his complaint points – namely that AGS wrongly stated that there was little evidence to show his vision had deteriorated between 2017 and 2019. In my first provisional decision, I explained that I considered that the medical evidence from Mr G's treating specialist, dated November 2020, clearly showed that Mr G's vision had deteriorated during the relevant period. I was and remain satisfied that the medical evidence points to a clear and significant deterioration in Mr G's vision during that timeframe. And so this failure by AGS to fully assess the available and persuasive medical evidence from Mr G's treating specialist was something I took into account when assessing AGS' overall handling of the claim and was factored into the compensation I proposed to award for the distress and inconvenience I concluded Mr G had been caused by AGS' handling of the claim. I'd add though that we're not the regulator and so we have no power to fine or punish the financial businesses we cover – even where we identify that errors have clearly and unnecessarily been made.

AGS has now confirmed it will pay Mr G's claim up to our maximum award limit of £355,000, at which point, it says it accepts no further liability for the claim. As I set out above, where an award may exceed our award limits, we may recommend that a business pay the balance. But this recommendation is not binding on either party and so a business may decide not to accept such a recommendation.

As AGS has since clarified its position in this regard, it's open to Mr G to now decide whether or not to accept this final decision. I've previously explained that Mr G may wish to seek legal advice before deciding whether or not to do so. It's still the case that it's not possible for our service to determine now whether it would have jurisdiction to consider any future complaints which might be brought by Mr G, as it would depend on the nature and scope of that particular complaint. But I'd reiterate that it's unlikely that if Mr G accepts this final decision, that he could go to court to ask for the balance to be paid.

My final decision

For the reasons I've given above and my provisional decisions, my final decision is that I uphold Mr G's complaint.

I direct Assicurazioni Generali SpA to:

- Accept, backdate and pay Mr G's claim from the date his deferred period ended;
- Pay interest on the backdated payments at an annual rate of 8% simple from the date each payment was due, until the date of settlement;
- Pay Mr G £500 compensation.

If the amount produced by the calculation of the award I've outlined above is more than £355,000, I recommend that AGS pays Mr G the balance.

This recommendation is not part of my determination or award. AGS doesn't have to do what I recommend. It's unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G may want to get independent legal advice before deciding whether to accept my decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 11 January 2023.

Lisa Barham
Ombudsman