

The complaint

Mr S complains that Phoenix Life Limited has failed to continue with the payment of a Waiver of Premium (“WOP”) benefit that forms part of his pension plan.

What happened

Mr S holds pension savings with Phoenix. The pension plan was originally sold to him by Abbey Life. But that firm is now the responsibility of Phoenix, so it is Phoenix that needs to deal with this complaint. In my decision, for ease, I will generally just refer to Phoenix, but due to their nature, some historic terms and conditions information will refer to Abbey Life.

When he took out his pension plan Mr S elected to pay WOP premiums. I will discuss the specific terms of that benefit later in this decision, but at a very high level, WOP provided for any monthly pension contributions to continue to be paid should Mr S be off work through ill-health for a period of more than six months.

Mr S contracted a serious illness in March 2020, and as a result he spent more than four months in hospital, much of which was in intensive care. Due to complications arising from that illness Mr S has been left with what his consultant describes as permanent neurological deficits. And subsequent to the medical episode Mr S has required surgery to both his hands that has also left some permanent residual loss of function.

Phoenix accepted Mr S’s WOP claim in March 2021, but advised him that its medical advisors would continue to review the claim at regular intervals. Phoenix requested some further information from Mr S about his health, and the activities of his business, in June and July 2021. Following a review of that information Phoenix wrote to Mr S to advise that it would be discontinuing his WOP benefits.

Mr S complained to Phoenix about its decision. Phoenix explained that, in line with the relevant terms and conditions he hadn’t shown, to the satisfaction of Phoenix, that he remained prevented from undertaking work. It said that Mr S had confirmed he was “directing operations of his pre-disability employment in a limited capacity, and receiving an income”.

Mr S’s complaint has been assessed by one of our investigators. He looked at the terms and conditions that Phoenix had said were applicable to the WOP benefit. He thought that the medical evidence supported Mr S’s claim that he was unable to work due to his ongoing illness. So he thought that Mr S’s complaint should be upheld and he asked Phoenix to reinstate Mr S’s WOP plan, together with refunding the pension contributions Mr S had made since the WOP benefit had been terminated.

Phoenix didn't agree with that assessment. It said that the terms and conditions of the benefits said that if Mr S was in receipt of any earned income, from any source, the WOP had to cease. But when the investigator asked for a copy of those terms, Phoenix said that its response had been in error. It said that its decision to terminate the claim had nothing to do with Mr S's medical condition, or whether he had an income. Instead Phoenix said that it was relying on clause 7(b) of the terms and conditions. It noted that Mr S admitted being involved in the day to day running of his business. And so, no matter how small that involvement was, Mr S "is not, to the satisfaction of Phoenix [their emphasis] prevented from work so the claim fails." It says that approach is consistent with how it treats other claimants in the same position.

The investigator issued a further assessment. He noted that Mr S had clarified his working activities saying that his business was not actively trading and no new projects were being undertaken. And routine matters, such as the payment of bills, were being performed by Mr S's wife and daughter. So the investigator remained of the view that the complaint should be upheld and Mr S's WOP benefit reinstated.

Phoenix still didn't agree with that conclusion. It sent us an alternative set of terms and conditions. It said that for the claim to succeed Mr S would need to be unable to perform ALL the duties he would have undertaken before his illness. Whilst it accepted there would be parts of the role Mr S could no longer perform due to his illness, it thought some aspects could continue such as sending/receiving emails and telephone calls, reviewing business accounts, making decisions, and making quotations for ongoing or new projects.

So, as the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process. If Mr S accepts my decision it is legally binding on both parties.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr S and by Phoenix. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

I think it would first be appropriate for me to set out my understanding of Mr S's current health situation, and the impact it has on his ability to undertake paid work. In doing so I have carefully considered the reports I have been sent from his medical practitioners. And in addition I have reviewed information provided by Mr S about the work he was doing before his illness, the work he is able to do now, and the extent of the weekly rehabilitation activities that his doctors have directed him to undertake.

Before his illness, Mr S has explained that he ran a building consultancy firm, identifying suitable properties for investors and project managing their renovation. He says that since his illness the business has not taken on any new work, and the limited activities he has undertaken, with extensive support from his wife and daughter, have been to simply perform basic administrative functions or support his customers to identify alternative contractors to resolve problems on previous projects. Mr S confirms that, during the recent pandemic, and on the advice of his accountant, he received furlough payments via the Coronavirus Job Retention Scheme.

It seems clear to me that the medical evidence, and Mr S's testimony, shows that he is not able to undertake the work that he previously did before his illness. Given he was effectively self-employed, as he was the sole director of his own limited company, I think the extent of his ability to work can be reasonably demonstrated by the lack of activity of his company. I have seen nothing to suggest that Mr S's testimony, that his business has not taken on any new work since his illness, is untrue. So that would support a conclusion that Mr S has been unable to perform any meaningful work since his illness.

As I mentioned earlier, Phoenix appears to have had some difficulty in determining the specific test that it should apply when considering whether Mr S is entitled to benefits under his WOP policy. It initially told Mr S that his claim had been terminated since he was "directing operations of his pre-disability employment in a limited capacity, and receiving an income". It later provided us with what it said were the relevant terms and conditions (dated December 1996) that suggested the test should be that Mr S was "prevented from carrying out the duties of his Employment prior to disablement".

In response to our investigator's first assessment, Phoenix initially told us that the test it now thought should apply was whether Mr S was in receipt of any earned income, from any source. It later agreed that was incorrect and provided a new set of terms and conditions. Those said that the relevant test was once more that Mr S was "prevented from carrying out the duties pertaining to his employment prior to disablement." It noted that those terms didn't say how many of the duties Mr S needed to be unable to perform. It said that no matter how small Mr S's activities were, his claim would fail if he undertook any tasks.

And finally, in response to our investigator's second assessment, Phoenix provided a further set of terms and conditions. Those showed the relevant test to be that Mr S is "prevented from carrying out the duties pertaining to his employment prior to disablement and is not following any other gainful occupation."

At the outset I must say how concerning it is that, on four separate occasions, Phoenix has provided us, and Mr S, with different explanations of the test it is applying when considering his WOP claim. That cannot give me, or Mr S, any confidence that the claim is being considered properly and in line with the relevant provisions of Mr S's policy.

But, given the importance of accurately identifying the test that should be applied to Mr S's claim, I asked Phoenix to provide what it considers to be the definitive terms of the WOP policy, together with evidence that those terms apply to Mr S. It has told us that Mr S's pension plan commenced in April 1997. So the terms applicable to his plan were those first sent to us, and dated December 1996.

The applicable terms, that Phoenix has said it is relying on, appear in section 7(b) of those terms. They say;

“Abbey Life will waive payment of Regular Contributions payable during periods of disability prior to the Policyholder attaining the Waiver of Contribution Benefit Expiry Age shown on Page 1 of the Policy if the Policyholder becomes disabled through sickness or injury such that to the satisfaction of Abbey Life, he or she is prevented from carrying out the duties pertaining to his or her Employment prior to disablement.”

I’ve thought carefully about how those terms apply to Mr S’s current situation. I do not agree that a fair interpretation of the terms would suggest that if Mr S was able to perform even the smallest part of his pre-disability employment his WOP claim should fail. The WOP policy is clearly designed to support consumers who experience a cessation of their normal income due to being unable to work through illness or other disability. It seems clear, as I explained earlier, that Mr S’s illness has meant he is unable to perform any income generating activities for his company. And given the lack of other staff to perform those activities, the normal work that took place before the illness has ceased. And so I think that leads to a logical conclusion that Mr S’s ability to earn income from that company has similarly stopped. And this is further supported by what Mr S has told us about there being no active trading, or new projects, from which any income might reasonably arise.

I have considered that Mr S received furlough payments for some of this period. But I think the very nature of that scheme suggests that Mr S wasn’t working at that time. Furlough payments could only be made to employees that weren’t performing any aspects of their role for the company. So I cannot agree with Phoenix that Mr S receiving furlough payments suggests that he was still working, or able to work, at that time. There is no consideration in the relative terms to whether or not income is being received – just that a consumer is disabled such that he is unable to carry out the duties of his employment.

There is a further aspect of the terms and conditions that I need to consider. The terms that Phoenix has said apply to this claim also require the prevention of employment to be proved “to the satisfaction of Abbey Life [now Phoenix]”. Clearly, regardless of what I say in this decision, it could be argued that Phoenix would not be satisfied that the claim had been proven.

But I am required to decide this complaint on the basis of what I think is fair and reasonable. And, since I am minded that it is unfair for Phoenix to conclude that Mr S hasn’t been prevented from carrying out the duties relating to his employment prior to his disablement, I think it would be unfair for Phoenix to not apply those findings to its consideration of his claim. So I am satisfied that it is reasonable to direct Phoenix to pay Mr S’s claim.

Phoenix is entirely at liberty to continue to review Mr S’s eligibility for his WOP benefit as time goes on. The medical evidence Mr S has provided suggested that, at that time, he was unable to work in any capacity. But it accepted that, given the relatively new nature of Mr S’s illness, the prognosis for any meaningful recovery and return to work was uncertain. I would however expect Phoenix to take my comments in this decision into consideration when it completes any future assessment of Mr S’s claim. Should Mr S be unhappy with the results of any future review, he would be free to make a new complaint about that decision.

There is no doubt that the termination of Mr S’s WOP claim, at a time when he was dealing with serious and on-going health problems will have caused him distress and inconvenience. So to compensate him for that I am directing that Phoenix should pay Mr S an additional sum of £300.

Putting things right

Phoenix should reinstate Mr S's WOP claim and commence paying him the applicable benefits under his plan.

Phoenix should additionally compensate Mr S for any benefits he should have received since the claim was terminated. Phoenix should add simple interest at a rate of 8% per annum to each of these amounts from the date they should have been paid to the date of settlement. HM Revenue & Customs requires Phoenix to take off tax from this interest. Phoenix must give Mr S a certificate showing how much tax it's taken off if he asks for one.

Phoenix should additionally pay Mr S the sum of £300 in respect of the distress and inconvenience its handling of his WOP claim has caused to him.

My final decision

My final decision is that I uphold Mr S's complaint and direct Phoenix Life Limited to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 8 March 2023.

Paul Reilly
Ombudsman