

The complaint

Mrs S complains that Unum Ltd turned down an income protection claim she made on her employer's group insurance policy.

What happened

Mrs S was a member of her employer's group income protection policy. She was insured on an 'own occupation' basis. The policy deferred period was set at 26 weeks.

In January 2020, Mrs S' GP had issued a fit note stating that Mrs S was fit to work reduced hours. Mrs S had a diagnosis of fibromyalgia and suffered from shoulder and foot pain, amongst other things. She was referred to occupational health and underwent regular reviews with an occupational health adviser. The adviser also concluded that Mrs S was fit to work reduced hours. They recommended that her employer should provide specialist equipment to enable Mrs S to carry out her role. However, on 12 November 2020, the occupational health adviser concluded that Mrs S was no longer fit to work, and she was then signed off by her GP. In November 2020, Mrs S' employer made an income protection claim on her behalf. Mrs S returned to work on a phased basis in April 2021, but ultimately, her employment ended on 1 October 2021.

Unum assessed Mrs S' claim. It referred to a policy term which required claims to be made within a specified time limit – in particular, that a claim had to be notified within 90 days of the end of the deferred period. In this case, Unum considered that Mrs S' deferred period had ended on 20 July 2020. But the claim form hadn't been completed until 22 November 2020 – which was more than 90 days later. Unum's clinical team considered the available medical evidence to decide whether Mrs S had met the policy definition of incapacity during the deferred period. But it felt that much of the evidence was based on self-reporting and that given the delay in the claim being notified, it wasn't able to approach the treating practitioners to clarify whether Mrs S had been incapacitated during the deferred period. So it concluded that its position had been prejudiced by the late notification and it turned down the claim.

Mrs S was unhappy with Unum's decision and so she asked us to look into her complaint.

Our investigator thought that Mrs S' complaint should be upheld. He thought that the way Unum had defined the term 'incapacity' was unclear. That's because it required a member not to be performing any occupation at all. As Mrs S had been working reduced hours up until November 2020, the investigator didn't think it was fair for Unum to treat her deferred period as having begun on 20 January 2020, when Mrs S was fit to work only reduced hours. He felt the deferred period should be treated as having begun in November 2020, when Mrs S was signed-off from work and that Unum should reassess the claim on that basis.

Unum didn't agree with our investigator's view. It said that the intention of the incapacity requirement was to ensure that a member wasn't claiming sick pay for their insured role, whilst working in another job elsewhere. And it said that if it applied the investigator's interpretation of the incapacity clause, then members who weren't fit to work full-time hours wouldn't be able to make claims for proportionate benefits.

But in an attempt to resolve the complaint, Unum agreed to treat 18 November 2020 as the start of Mrs S' deferred period, which it said meant that the deferred period would've ended on 18 May 2021. So it agreed to pay Mrs S' employer income protection benefit for the period 19 May 2021 up until the date her employment ended, so that her employer could make any necessary national insurance and income tax deductions.

Mrs S didn't accept Unum's offer. She felt that Unum ought to treat her deferred period as having begun in January 2020 when she first began to work reduced hours. But she said that as her employer had pro-rated her 26-week sick pay entitlement in line with her working hours, her sick pay had only ended in December 2020. So she considered that Unum ought to pay income protection benefit between January and October 2021.

I issued a provisional decision which explained the reasons why I thought Unum's offer was fair. I said:

'First, I'd like to reassure both parties that whilst I've summarised the background to this complaint and the detailed submissions that have been provided to me, I've carefully considered all that's been said and sent. Within this decision though, I haven't commented on each point that's been made and nor do our rules require me to. Instead, I've focused on what I think are the key issues.'

The relevant regulator's rules say that insurers must handle claims promptly and fairly. And that they mustn't turn down claims unreasonably. So I've considered, amongst other things, the terms of Mrs S' policy and the available evidence, to decide whether Unum has treated her fairly.

I've turned to consider the policy terms and conditions, as these form the basis of Mrs S' employer's contract with Unum.

The deferred period

The policy states that Unum will pay income protection benefit if a member is unable to work due to incapacity. In order for benefit to be paid, a member needs to show that they've been incapacitated for the entire deferred period, which in this case, is six months.

Unum has defined what it means by incapacity. The policy says for own occupation cover:

'A member is incapacitated if we are satisfied that they are:

- Unable by reason of their illness or injury, to perform the material and substantial duties of the insured occupation; and are*
- Not performing any occupation.'*

Our investigator felt that it had been unfair for Unum to treat Mrs S' deferred period as beginning on 20 January 2020, as at that time, she had still been working in her own occupation, albeit on reduced hours. So he thought this term was ambiguous and that the deferred period should begin from the point at which Mrs S was entirely signed-off, which he concluded was 18 November 2020. He felt this was a more favourable interpretation of the policy terms.

I don't agree with our investigator's view on this point. I note that page 33 of the policy clearly states:

'The deferred period can be....

Periods where because of illness or injury a member works part-time or on restricted duties or in a lower paid role.'

In my view, it's clear then that periods where a member is working reduced hours as a result of their illness or injury can form part of their deferred period. And indeed, I think it would be less favourable to conclude that a part-time worker who had reduced their usual hours due to their illness or injury wouldn't be entitled to begin their deferred period until they'd been totally signed-off. I find Unum's point here more persuasive – that the intention of the second incapacity requirement is to ensure that a member isn't working elsewhere during their period of absence.

Mrs S' employer reported that Mrs S' period of absence began on 20 January 2020. This date ties-in with the GP's fit note which stated that Mrs S was fit to work reduced hours. I understand that her fulltime pattern changed quite markedly and continued to be significantly reduced over a number of months. That being the case, I think it was fair for Unum to conclude that Mrs S was unable to perform the material and substantial duties of her insured occupation from that date and that therefore, her deferred period began on 20 January 2020. I note too that Mrs S doesn't appear to dispute this either.

As such then, in order for benefit to be payable, Unum needed to be satisfied that Mrs S was incapacitated for the full 26-week deferred period (up until 20 July 2020) and after that date. I appreciate Mrs S believes that as her employer decided to pro-rata her sick pay up until December 2020, meaning it was broadly spread over 11 months rather than six, her deferred period should be accordingly extended.

However, I don't think there's any term in her employer's contract with Unum which requires it to extend the six-month deferred period in the event that the employer chooses to extend sick-pay provision. Mrs S' employer's insurance contract with Unum and Mrs S' sick-pay entitlements under her employment contract with her employer are two separate and distinct issues. This means I don't think I could fairly find that Unum must extend the deferred period until the end of December 2020 because of the way Mrs S' employer chose to structure her sick-pay entitlement. And so I'm persuaded that it was fair for Unum to treat the deferred period as having ended on 20 July 2020.

Did Mrs S make her claim too late and was Unum prejudiced by any late reporting?

Page four of the policy user guide lists a set of 'risk factors' which members should be aware of. One of these states:

'If you do not notify us of a claim within the specified time limits, benefit payments may be delayed or deferred. We can refuse liability if you do not notify us of a claim within 90 days of the end of the deferred period.'

Page 30 of the policy sets out details about 'Making a Claim'. This section includes the following terms:

'Late notification

If we are notified of a claim after the end of the deferred period, our ability to manage the absence and assess the claim may be affected.

You must provide us with a completed employer claim form and a completed employee claim form before a member has been incapacitated for:

10 weeks for deferred periods of 26 weeks or more.

If we are notified of a claim after the end of the deferred period (but less than 90 days later), we have the right to pay benefit from the date we receive the notice.

If we are notified of a claim later we have the right not to pay benefit.'

In this case, Mrs S' deferred period began on 20 January 2020 and so a claim ought to have been made within 10 weeks – which I calculate to be 30 March 2020. The deferred period ended on 20 July 2020. I've calculated that the 90-day period after the deferred period ended on 18 October 2020. But Mrs S and her employer didn't complete the claim form until 22 November 2020 – over a month later and substantially more than 90 days after the deferred period ended. This means that under the contract terms, Unum was entitled to decline to pay benefit.

It isn't unusual for income protection insurers to include time provisions in their policies. And these clauses are designed to ensure that insurers are able to access relevant medical information they need to assess whether a claim is payable in a timely way. In this case, despite the fact that the claim was submitted more than 90-days after the end of the deferred period, Unum decided to assess the medical evidence it did have to decide whether there was enough to show Mrs S had been incapacitated. I think this was a fair and appropriate response from Unum.

I've also looked carefully at the available medical evidence. Mrs S' notes show that her GP issued Mrs S with a fit note in January 2020 which stated that she was fit to work reduced hours. This note was valid for five weeks. No further fit notes appear to have been issued by the GP between January 2020 and November 2020, when Mrs S was signed-off. I can see that Mrs S was seen by a consultant rheumatologist throughout the relevant period and was treated for fibromyalgia, but there's no indication in the specialist's evidence that Mrs S' illness meant that she was prevented from working full-time hours.

It's clear that the occupational health adviser did consider that Mrs S wasn't fit to work full time hours during the deferred period, and afterwards and I've carefully borne this in mind. Unum considers though that these reports are based on Mrs S' self-reported symptoms to the adviser. And due to Covid-19, many of those appointments took place over the phone, which meant that the adviser couldn't fully assess Mrs S' presenting condition. So it doesn't think there's enough objective medical evidence available to show that Mrs S was prevented from working during the deferred period. Based on the evidence I've seen; I don't think this was an unreasonable position for Unum to take.

And given the late notification of the claim, Unum concluded that it had been prejudiced because it wasn't able to obtain enough medical evidence to clarify whether Mrs S had been incapacitated during the deferred period. It's generally a policyholder/member's responsibility to provide enough evidence to show they have a valid claim on their policy, although in practice, insurers may often obtain the evidence they need on a member's behalf. But in this case, I don't think it was unreasonable for Unum to conclude either that the evidence it did have didn't clearly show that Mrs S had been incapacitated or that given the time that had passed, it wouldn't be in a position to gather such evidence. On that basis, I don't think it acted unreasonably by relying on the late notification clause to turn down this claim.

For completeness, I'd add that while Mrs S' GP did later write to Mrs S' employer and suggest it offer her a new role with reduced hours, the treating consultant didn't appear to indicate that he felt Mrs S was unfit for work. I say that because in his letter of 25 January 2021, the consultant said: 'For patients with fibromyalgia, we always encourage them to

remain in employment, even if that is for reduced hours.’ He made no specific finding that Mrs S was incapacitated from working, or that she was medically required to work part-time hours. So even taking the later medical evidence into account, which appears to have been sent to Unum after its initial decline of the claim, I still don’t think it acted unfairly in deciding that Mrs S hadn’t shown she’d been incapacitated for the full deferred period.

Unum’s offer

Based on the investigator’s assessment, Unum agreed to make an offer of settlement to Mrs S. It agreed to effectively treat Mrs S’ deferred period as having ended in May 2021 and it agreed to pay benefit from that date up until the date Mrs S’ employment ended. That’s because after that date, Mrs S was no longer entitled to cover under the group protection scheme.

In my view, this offer is a fair one. Strictly, Unum has no liability to pay benefit for Mrs S under the terms of the insurance contract. That’s because I think it was entitled to conclude her deferred period ended on 20 July 2020 and I don’t think it was unreasonable for it to conclude that she hadn’t shown she was incapacitated throughout the deferred period. So I think its offer is made outside of the policy terms and is therefore reasonable in all of the circumstances. As Unum’s contract was with Mrs S’ employer, I think it’s entitled to pay the applicable benefit to Mrs S’ previous employer so that it may calculate any necessary deductions. Overall, I don’t think there are any reasonable grounds upon which I could direct Unum to pay anything more.’

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

Unum didn’t respond to my provisional decision.

Mrs S accepted my provisional findings.

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.

As neither party has provided any further representations or evidence, I see no reason to change my provisional decision.

So my final decision is the same as my provisional decision and for the same reasons.

My final decision

For the reasons I’ve given above and in my provisional decision, my final decision is that I think Unum has made a fair and reasonable offer of settlement.

I direct Unum Ltd to pay benefit for Mrs S’ claim from 19 May 2021 until 1 October 2021.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs S to accept or reject my decision before 4 January 2023.

Lisa Barham
Ombudsman