

## **The complaint**

Mr K complains about the way Aviva Life & Pensions UK Limited has offered to settle an incapacity claim he made on a group income protection insurance policy.

Mr K is represented by Mr B.

## **What happened**

The background to this complaint is well-known to both parties. So I've simply set out a brief summary of what I think are the key events. I'd like to reassure both parties though that I've carefully considered the timeline of events, their submissions and all of the evidence that's been provided.

Mr K is insured under his insurer's group income protection insurance policy.

In 2017, Mr K became unfit to work. In 2018, he made an incapacity claim on the policy. Aviva turned down Mr K's claim, because it didn't think Mr K had provided enough evidence to show he was incapacitated in line with the policy terms.

Subsequently, in August 2021, Mr K saw Mr H, an independent medical examiner (IME) and consultant occupational health physician. Mr H concluded that Mr K had likely been unfit to work in 2018 and 2019, but that he'd been fit to begin a phased return to work, with adjustments, at some point in 2020.

Mr K made a complaint to us about Aviva's decision to turn down his claim. Another ombudsman made a final decision in October 2021. She felt that based on Mr H's report, there was enough information to show that Mr K had been incapacitated between 2018 and at least June 2020. So she directed Aviva to pay Mr K backdated benefit until at least June 2020. She said that Aviva would need to explain to Mr K how it calculated any partial benefit past that date. Mr K accepted the ombudsman's decision and so Aviva admitted Mr K's claim and paid backdated benefit, which ended June 2020.

However, based on Mr H's report, Aviva concluded that Mr K had been fit to work on a phased basis from July 2020 onwards. But Mr K hadn't returned to work and so under the terms of the insurance contract, it didn't consider that any benefit was payable after this date. Nonetheless, in November 2021, it got in touch with Mr K's employer to offer to pay Mr K proportionate benefit outside of the policy terms if he engaged with a return to work plan.

Mr K maintained he wasn't fit for work and so Aviva didn't pay proportionate benefit.

In May 2022, Mr K saw another IME, Mr W, a consultant who was a specialist in Mr K's particular illnesses. Mr W concluded that Mr K hadn't been fit to work at any time since 2017. He also stated that he didn't consider Mr K would be fit to return to work either full or part-time for the foreseeable future. Aviva considered Mr W's report and recommenced paying Mr K incapacity benefit from April 2022.

Mr B asked us to consider a new complaint about Aviva's proposed settlement of Mr K's

claim.

Following the provision and consideration of evidence and continued communications between the parties, Aviva went on to make the following offer of settlement:

- Full benefit between 18 October 2020 and 13 August 2021 (the date of Mr H's report);
- Full benefit during January 2022.

Our investigator ultimately reached the following conclusions:

- There wasn't sufficient medical evidence to show that Mr K was fit to return to work either full or part-time during 2020 or prior to the date of his appointment with Mr H, on 28 July 2021. Aviva hadn't sent Mr K's employer a copy of a return to work plan until 5 November 2021, so Mr K hadn't had an opportunity to engage with the plan until that date. Therefore, the investigator recommended that Aviva should pay Mr K full benefit between July 2020 and 5 November 2021, together with interest;
- Mr H's report did indicate that Mr K was fit to return to work on a phased basis and this was the most persuasive, contemporaneous medical evidence available at the time. So the investigator felt it would've been reasonable for Mr K to have engaged with the plan at the time (as the policy terms required him to), but he hadn't felt able to return to work. As such, our investigator didn't think it would be reasonable to direct Aviva to pay proportionate benefit for a period when Mr K hadn't attempted a return to work in line with Mr H's recommendations;
- Medical evidence from Mr K's treating doctor in his home country showed that Mr K had been incapacitated in line with the policy terms during January 2022. Aviva felt Mr K would've been fit to return to work between this point and April 2022, if he'd resumed medication. However, the investigator didn't think there was enough medical evidence to show this was the case. So she recommended that Aviva should pay Mr K full benefit for the period January to April 2022, together with interest.

Neither party accepted the investigator's recommendations. In brief, Aviva disputes that benefit should be paid between July and October 2020, or for the period between August and November 2021. It didn't comment on whether benefit should be paid for the full January to April 2022 period. Mr B felt Aviva should pay benefit for the full period and he also considers that Aviva should pay Mr K's legal costs.

The complaint's been passed to me to decide.

### **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 agree with our investigator's recommendations and I'll explain why.

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 carefully considered, amongst other things, the contract terms and the available evidence, to decide whether Aviva has treated Mr K fairly.

First, it seems to me that while there has been a great deal of correspondence and ongoing communications while the complaint has been with us, some main issues have already been resolved and Aviva has made offers for time periods which were previously in dispute. This means I think there are only a few key issues I now need to decide. These are: a) was it fair

for Aviva not to pay benefit between July and October 2020, b) was it fair for Aviva to conclude Mr K was fit to work between August 2021 and January 2022, c) was it fair for Aviva not to pay benefit for the period February to April 2022 and d) should Aviva pay Mr K's legal costs? I'll deal with each issue in turn.

*Was it fair for Aviva to decline to pay benefit between July and October 2020?*

It's common ground that following the receipt of Mr H's report, in August 2021, Aviva admitted Mr K's claim between 2018 and June 2020. However, it concluded that after June 2020, Mr K was fit to return to work on a phased basis. Mr K disagrees. I've thought about this very carefully and I've considered all of the available medical evidence.

In summary, Mr H felt that Mr K '*seemed*' to have improved in 2020. So Mr H said that he '*imagined*' that Mr K could have been able to commence a slow phased return '*sometime*' during that year. Aviva has appeared to have placed some weight on this particular finding.

However, I note that Mr H preceded this finding by stating: '*I am apprehensive to provide a definitive opinion with regards to retrospective medical fitness to work because it entirely depends on his level of functioning at any given time.*'

I can understand why Mr H was reluctant to provide a definitive finding on this point, given he didn't assess Mr K until the end of July 2021. I don't find 'sometime' in 2020 to be a clear indication that Mr H felt Mr K most likely had been fit to return to work from July 2020 onwards. And Mr K's medical records present a mixed picture of his health during the relevant period. I've seen no persuasive medical evidence which shows, on balance, that during this period, Mr K was fit to return to work.

Once Aviva had admitted the claim, the responsibility effectively shifted to it to show that Mr K no longer met the policy definition of incapacity. As I've explained, I don't think there's sufficient medical evidence to show that Mr K was no longer incapacitated between June and October 2020. Therefore, I don't think Aviva has shown it was fair and reasonable for it to conclude that Mr K wasn't entitled to full benefit between July and October 2020.

*Was it fair for Aviva to conclude that Mr K was fit to work between August 2021 and January 2022?*

It's clear that Mr K feels strongly that the medical evidence he's provided shows that he wasn't fit to commence a phased return to work in August 2021. Mr H concluded, at this point, that Mr K was: '*medically fit to perform the material and substantial duties of his usual occupation on a part-time basis. A slow graduated return to work will be beneficial...*'

Mr H went on to set out a detailed, proposed return to work plan, set out over a 19-week period. He also suggested reasonable adjustments which Mr K's employer could make to facilitate Mr K's return to work.

I appreciate Mr W stated that Mr K hadn't been fit to work since 2017. And that Mr K says another treating specialist stated that Mr K was just as incapacitated in August 2021 as he'd been in 2018. However, I'm not a medical expert and so I need to consider the expert evidence of Mr K's treating doctors, and other experts in the relevant fields, to decide which I find more persuasive.

In this case, I'm mindful that Mr W didn't have the opportunity to examine Mr K until April 2022 – several months after Mr H had assessed Mr K. This means that his medical opinion on Mr K's fitness for work prior to that date was based on retrospective reporting of Mr K's symptoms at a time when Mr K's condition had deteriorated. It wasn't contemporaneous

medical evidence of Mr K's fitness to work in August 2021. I note too that Mr K has maintained that his specialist in his home country is prohibited by law from providing a medical opinion on his fitness to work.

I appreciate that Mr W is a specialist in the conditions which have caused Mr K's periods of incapacity. But I need to bear in mind that Mr H is a consultant physician in occupational health and therefore an expert in occupational medicine. And on balance, I find his report from August 2021 very persuasive evidence that Mr K most likely was fit to start a slow, phased return to work in line with Mr H's suggested plan. That means I think it was fair and reasonable for Aviva to conclude that Mr K wasn't incapacitated in line with the policy terms at the point Mr H assessed him and wrote his report.

As such, I think it was fair for Aviva to decline to pay Mr K incapacity benefit for the full period of his claim. If Mr K had returned to work in line with Mr H's recommendations, Aviva would've been liable to pay proportionate benefit, reflecting the reduction in Mr K's pay due to the drop in his earnings. Indeed, the policy terms require an insured beneficiary and their employer to take any reasonable action required following medical advice or adjustments to enable a return to work. But Mr K didn't return to work following Mr H's report. And so, I think it was fair for Aviva to conclude that neither full benefit nor proportionate benefit was due.

Nonetheless, like the investigator, I too think it would be fair and reasonable for Aviva to pay Mr K full benefit between June 2020 and 5 November 2021, rather than limiting benefit to the date of Mr H's report. That's because that's the date Mr K's employer was provided with a copy of the return to work plan and was in a position to offer to implement the reasonable adjustments which had been recommended. While I accept that Aviva isn't responsible for the employer's actions, I don't think it would be fair to have expected Mr K to return to work until a phased plan had been agreed and adjustments had been made.

*Was it fair for Aviva to decline to pay benefit between January and 7 April 2022?*

Following the receipt of further medical evidence from Mr K's treating doctor, Aviva now accepts that Mr K did meet the definition of incapacity for the whole month of January 2022. However, it doesn't agree that he met the definition of incapacity between the end of January 2022 and April 2022. Mr K had experienced symptoms of light-headedness after he'd ceased taking medication, which had led to the period of accepted incapacity. But Aviva felt that these symptoms would have resolved once Mr K began to re-start his medication.

I don't think there's enough medical evidence to show that Mr K's condition had improved sufficiently between the end of January 2022 and April 2022 which meant he was no longer incapacitated. This conclusion appears to be more based on Aviva's assumptions. In the absence of clear medical evidence which shows that Mr K wasn't incapacitated between January 2022 and April 2022 (when Aviva accepts that Mr K was totally incapacitated after 6 April 2022), I don't think it was fair for Aviva to decline to pay benefit for this broadly full three-month period.

*Should Aviva pay Mr K's legal costs?*

It's clear Mr B feels strongly that Mr K required legal representation in order to make his complaint. However, this service is free to use, there's no need for representation and we're proud of being accessible to our consumers. Mr K was previously able to bring a complaint about his claim without legal representation and so I think he was reasonably aware that he didn't need legal assistance to bring this complaint to us. In the circumstances then, I don't find it would be fair or reasonable to direct Aviva to pay Mr K's legal costs.

*Summary*

In summary, I don't think that it was fair for Aviva to decline to pay benefit for the period July 2020 to October 2020; to decline to pay benefit between 13 August and 5 November 2021 and to decline to pay benefit between January and April 2022. So I now direct Aviva to pay Mr K's claim for incapacity benefit for each of these periods, in line with the remaining terms and conditions of the policy. Aviva will need to add interest to each of these monthly benefits at a rate of 8% simple per annum, from the date each payment was due until the date of settlement.

I make no award for Mr K's legal costs.

### **My final decision**

For the reasons I've given above, my final decision is that I uphold this complaint.

I direct Aviva Life & Pensions UK Limited to:

- Pay Mr K's incapacity claim for the period July 2020 until 5 November 2021;
- Pay Mr K's incapacity claim between January and April 2022;
- Add interest to each monthly benefit payment at an annual rate of 8% simple, from the date each payment was due until the date of settlement.

If Aviva considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr K how much it's taken off. It should also give Mr K a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 10 October 2023.

Lisa Barham  
**Ombudsman**