

The complaint

Mr W complains that Unum Ltd has turned down an incapacity claim he made on his employer's group income protection insurance policy.

What happened

The background to this complaint is well-known to both parties. So I haven't set it out in detail here. Instead, I've set out a summary of what I think are the key events.

Mr W is insured under his employer's group income protection policy. The policy provided cover in the event that Mr W was unable to work in his own occupation, as a result of illness or injury. The deferred period was 26 weeks.

In December 2021, Mr W was signed-off from work by his GP, suffering from a 'stress-related problem'. In April 2022, as Mr W remained unable to return to work, his employer made an incapacity claim on Mr W's behalf.

Unum requested medical evidence to allow it to assess the claim. It calculated that Mr W's deferred period would end in June 2022 and so it determined that Mr W needed to show he'd been incapacitated due to illness for the whole of the deferred period. Having considered the medical evidence, it didn't think there was enough medical evidence to show that Mr W was clinically limited or functionally restricted from performing his own occupation. And it considered that Mr W's absence was down to situational stress caused by a number of personal stressors. So it didn't think Mr W had met the policy definition of incapacity and it turned down his claim.

In June 2022, Mr W began a phased return to work through Unum's vocational specialist support team. However, in November 2022, he was signed-off again. He was diagnosed with fibromyalgia on a background of anxiety and depression. So he asked Unum to review his claim.

Unum maintained that there wasn't enough medical evidence to show that Mr W had been incapacitated throughout the whole deferred period. And it said it couldn't begin a linked period of incapacity following Mr W's diagnosis, because Mr W's employer had opted to cancel the income protection policy from 1 November 2022 onwards.

Mr W was very unhappy and distressed by Unum's decision and so he asked us to look into his complaint.

Ultimately, our investigator recommended that Mr W's complaint should be upheld. He felt the medical evidence showed that even though Mr W hadn't been diagnosed with fibromyalgia until November 2022, he'd been suffering from symptoms of fibromyalgia throughout the deferred period and beyond. And he noted that fibromyalgia can be triggered by stress. So he concluded that Mr W had shown he met the policy definition of incapacity for the entirety of the deferred period. Therefore, he recommended that Unum should accept and pay Mr W's claim, together with interest.

I issued a provisional decision on 16 November 2023, which explained the reasons why I thought it had been fair for Unum to turn down Mr W's claim. I said:

'First, I'd like to reassure Mr W that while I've summarised the background to his complaint and his detailed submissions to us, I've carefully considered all that's been said and sent. I'm very sorry to hear about the circumstances that led to Mr W needing to make a claim and I don't doubt what a worrying and upsetting time this has been for him. I was also sorry to read about the impact of Mr W's poor health on him and the distressing nature of his symptoms. However, having considered all of the evidence, I don't agree with the conclusions our investigator reached and I'm not bound to agree with him. I need to make a decision which I consider to be fair and reasonable in all the circumstances.'

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 this policy and the available medical evidence, to decide whether Unum handled Mr W's claim fairly.

I've first considered the terms and conditions of the policy, as these form the basis of Mr W's employer's contract with Unum. Mr W'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 Unum to consider whether Mr W's claim met the policy definition of incapacity. This says:

'A member is incapacitated if they are unable to perform the material and substantial duties of their insured occupation because of illness or injury.'

This means that in order for Unum to pay Mr W incapacity benefit, it must be satisfied that he had an illness or injury which prevented him from carrying out the material and substantial duties of his own occupation.

The policy says that Unum will begin to pay incapacity benefit after the end of the deferred period. This means that in order for benefit to be paid, Mr W needed to have been incapacitated in line with the policy terms for the entire deferred period and afterwards.

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 W's responsibility to provide Unum with enough medical evidence to demonstrate that an illness had led to him being unable to carry out the duties of his own occupation for the full 26-week deferred period between December 2021 and June 2022.

Unum assessed the evidence Mr W provided in support of his claim, including seeking the opinion of its clinical staff. While it sympathised with Mr W's position, it concluded that he wasn't suffering from a functionally impairing illness which prevented him from carrying out his role. Instead, it felt that Mr W was suffering with a reaction to a number of upsetting personal stressors, which most likely didn't amount to a defined medical problem. So I've next looked at the available medical and other evidence to assess whether I think this was a fair conclusion for Unum to draw.

I've first looked at the claim form completed by both Mr W and his employer. Mr W's employer noted that Mr W's 'fit notes say stress-related problem, he has attributed to family circumstances. His (close relative) is also very ill and requires full time support from him.' In brief, Mr W set out his personal situation, which included supporting a close family member with a terminal diagnosis, a close relative with a neurological disorder and family bereavement, among other stressors. He noted 'I am a physical, mental and emotional wreck – I am off work with stress.' He also listed some physical symptoms, including IBS, swollen joints, painful tendons, itching and nerve pain.

Next, I've considered Mr W's GP records and the fit notes for the full deferred period. Each of the fit notes issued between December 2021 and May 2022 state that Mr W was signed-off work with a 'stress-related problem.'

On 31 December 2021, Mr W's GP noted that Mr W had a 'stress-related problem'. They noted that Mr W was 'physically and mentally exhausted' by his caring responsibilities and that they felt 'the stress was getting on top of him' They stated that Mr W was 'under too much stress – I am aware of what it has done to him in the past and I do not want him to go to work.'

Around two weeks later, Mr W sought assistance for irregular breathing. The practitioner recorded that Mr W had a lot of stress at that time and that he would benefit from psychological therapies.

In early February 2022, Mr W's GP noted: 'under stress at the moment...his frame of mind is such that he just procrastinates, he has lots of things on his plate...the symptoms he describes are anatomically not related.' The records refer to Mr W's bereavement and his close relative's illness.

On 5 April 2022, the GP records again recorded a diagnosis of 'stress-related problem'. The GP said that Mr W 'was still feeling like an emotional wreck, having to deal with the aftermath of (bereavement and family illness). Still has non-specific pain [sic] the hands, itching all over the place, tingling over the body, pain in left hip as well...explained to patient that symptoms are not specific and that the intermittence of the symptoms are unlikely to be related to pathology and are likely related to stress.'

Based on the medical evidence available to it when it first assessed Mr W's claim, Unum concluded that he hadn't shown he had an impairing illness which showed he met the policy definition of incapacity. It doesn't appear that Mr W appealed Unum's decision at that point.

Mr W was able to return to work on a slow, phased return on 23 June 2022. I've seen the evidence Mr W provided about the nature of his duties and his working location and I'm aware that he wasn't carrying out the full material and substantial duties of his role during the period of his phased return.

However, it's clear that in November 2022, Mr W was diagnosed with fibromyalgia and that a couple of months earlier, his GP had also diagnosed Mr W with mixed anxiety and depressive disorder. It appears that he went on to be prescribed an anti-depressant medication. And it was at this point that Mr W asked Unum to reconsider its position. I've looked closely at the medical evidence which followed the end of Mr W's deferred period.

On 8 September 2022, Mr W's GP referred him to rheumatology. The referral letter says that Mr W 'presented with ongoing aches and pains in multiple joints for a few years now...he does suffer with anxiety and depression, but is not currently on any treatment.' The letter referred to Mr W being concerned that his symptoms matched with fibromyalgia.

The rheumatologist's report, dated 23 November 2022, provides a diagnosis of fibromyalgia, anxiety and early osteoarthritis of his hands. They concluded:

'The clinical picture is in keeping with early osteoarthritis of the hands and fibromyalgia on a background of anxiety...I have encouraged him to address his anxiety which will be exacerbating his symptoms...I will write to him with the results of his investigations but have otherwise discharged him to your care.'

I've thought very carefully about all of the evidence that's been provided and which was

available to Unum when it made its final decision on Mr W's complaint. It's important I make it clear that I'm not a medical expert. In reaching a decision, I must consider the evidence provided by both medical professionals and other experts to decide what evidence I find most persuasive. It isn't my role to interpret medical evidence to reach a clinical finding – or to substitute expert medical opinion with my own - and it would be inappropriate for me to do so.

It's clear that Mr W was suffering from symptoms which can also be indicative of both a significant mental health condition and a physical illness. I'm conscious that Mr W had previously been diagnosed with depression (in the months prior to the claim) and that he was ultimately diagnosed with fibromyalgia. I appreciate too that Mr W has told us that his GP has since told him that his symptoms were always caused by fibromyalgia and that they'd be prepared to put this in writing.

But, I have to bear in mind the contemporaneous medical evidence which was available to Unum when it assessed the claim and when it issued its final response to Mr W's complaint. For the majority of the full deferred period, Mr W's GP noted that Mr W was suffering from a stress-related problem. They didn't conclude in either the fit notes or their records that Mr W had depression or anxiety during that period. The GP instead listed the personal stressors Mr W was experiencing as the cause of his symptoms. Indeed, they referred to not wanting Mr W to develop symptoms which he'd experienced previously. And they specifically referred to Mr W's symptoms likely being stress-related. I'd add too that even when Mr W was diagnosed with fibromyalgia, on a background of depression and anxiety, the consultant rheumatologist didn't indicate that Mr W was unable to work as a result of his condition. Or explain why he'd be incapacitated from carrying out the material and substantial duties of his role as a result of his illness.

As such, taking into account the totality of the medical and other evidence available to Unum when it assessed this claim, I currently think it was reasonable for Unum to conclude that the evidence showed that during the deferred period, Mr W was suffering from an understandable reaction to the very difficult situation in which he found himself and a number of personal stressors. And that the main reason for Mr W's absence during the deferred period was likely a reaction to the stress he was experiencing as opposed to a mental or physical health condition. And, based on the available medical evidence, there aren't any reasonable grounds upon which I could fairly conclude that Mr W's absence during the deferred period was, with the benefit of hindsight, due to fibromyalgia.

I note that Mr W is unhappy that Unum didn't organise an occupational health assessment for him. But I wouldn't reasonably have expected it to. That's because occupational health referrals are usually arranged by an employer to assist with helping their employee back to work. Unum's role was assess Mr W's claim.

On this basis then, I don't think it was unfair for Unum to conclude that Mr W's absence wasn't due to an incapacity in line with the policy definition. Instead, I think it fairly concluded that Mr W's absence was more likely due to personal stressors and a reaction to his circumstances.

I'd like to reassure Mr W that I'm not suggesting that he was fit for work. I appreciate he was medically signed-off. And I understand he's been through a very difficult time. But I need to decide whether I think he's shown he met the policy definition of incapacity for the whole of the 26-week deferred period. As I've explained, I don't currently think he has.

It's open to Mr W to obtain new medical evidence in support of his claim, should he wish to do so. But I must make it clear that any such new evidence wouldn't form part of my consideration of Mr W's complaint. That's because, as I've explained, I'm not a medical

expert and neither would it be appropriate for me to effectively 'handle' Mr W's claim. Mr W would need to send any new medical evidence to Unum for it to consider and to decide whether or not it alters its understanding of Mr W's claim. If Mr W is unhappy with the reconsideration of any new evidence, he may be able to make a new complaint to us about that issue alone.

Overall, despite my natural sympathy with Mr W's position, I don't currently find it was unfair or unreasonable for Unum to turn down his claim.'

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

Unum had nothing further to add.

Mr W was very upset by my provisional findings and so he asked a solicitor to represent him. Mr W's solicitor has provided a detailed response to my provisional decision, which I have considered and read in its entirety. However, I've summarised what I consider to be Mr W's key representations:

- Unum's only objection to the investigator's original assessment had been that his conclusion was conjecture – it didn't dispute that Mr W had been diagnosed with anxiety and depression. The evidence of Mr W's mental health during the deferred period is unchallenged and on that basis, I should find in Mr W's favour;
- Mr W's mental and physical illnesses had been laid out in a table within the solicitor's response. All of these medical conditions could be found in Mr W's medical records. Mr W felt Unum had chosen to cherry-pick Mr W's medical records to support its conclusion that he had situational stress and the solicitor considered this to be unacceptable. Unum hadn't arranged an independent medical examination for Mr W at the time of claim, his earlier return to work, during his appeal or subsequently;
- Mr W's GP provided a letter in support of his claim. The solicitor said that Mr W had suffered from anxiety for the whole of his adult life and Unum's assertion that this condition had abated during this period of absence was absurd;
- It's clear that Mr W had the main symptoms of fibromyalgia, even prior to December 2021. The solicitor provided evidence of studies which show that stress is one of the main causes of this condition. Given the stresses Mr W suffered in 2021, it was unsurprising that fibromyalgia had flared. Fibromyalgia also takes a very long time to be diagnosed – therefore, Unum's expectation that it would be diagnosed at the start of Mr W's absence is not tenable, given his plethora of symptoms. The solicitor felt this could amount to disability discrimination. It was also important that Mr W's GP had considered his symptoms to be somatic, as such a lack of pathological causation is exactly the case with fibromyalgia;
- It wasn't tenable to claim it was just conjecture that Mr W had fibromyalgia at the time his absence began. But even if Unum maintains that position, then Mr W still had a diagnosis of anxiety and somatic symptom disorder – both of which are mental illnesses;
- Mr W had also been diagnosed with tachycardia in May 2021 and this was available to Unum in Mr W's medical records;
- I had stated that Unum's only role was to assess the claim. However, this was wrong. Mr W's employer had outsourced the monitoring and management of Mr W's return

to work to Unum. It was quite clear that it should have sought a medical opinion from the point of fairly assessing the claim and Mr W's welfare. And it should have rung alarm bells when Mr W wasn't able to complete the phased return to work. Mr W had been crying on the calls with the rehabilitation specialist and was very depressed. His total average working time during the phased return was only 25% of his WTE. Unum hadn't dug further medically because it wanted to rely on the stress 'golden ticket';

- Unum had delayed in communicating with Mr W throughout the claim and neither Unum nor his employer had let Mr W know that the group contract was being terminated in November 2022;
- The solicitor provided NHS and other information about fibromyalgia, the symptoms and diagnosis times, amongst other things.

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, whilst I'm very sorry to disappoint Mr W and I know my decision will be upsetting for him, I still don't think it was unfair for Unum to turn down his claim.

In my provisional decision, I explained the reasons why I didn't think it had been unfair or reasonable for Unum to turn down Mr W's claim. I've carefully considered the solicitor's detailed response to my provisional findings. But overall, my final decision is the same as my provisional decision and for the same reasons. However, I will address what I consider to be the key further points Mr W's solicitor has made.

Mr W's GP has provided a letter dated 23 October 2023 in support of Mr W's claim. However, it wouldn't be appropriate for me to take the GP's comments into account and so I won't be commenting on the content of that letter within this decision. That's because Unum hasn't seen a copy of the letter or had a chance to decide whether it alters its view of the claim. So as I made clear in my provisional decision, Mr W will need to send a copy of this letter to Unum for its consideration.

Nor would it be appropriate for me to draw any conclusions from the detailed list of symptoms Mr W has told me he suffers from or from the articles and NHS information the solicitor has provided. I must reiterate that I'm not a medical professional and it wouldn't be appropriate for me to make any clinical finding about the likely overall cause of the symptoms Mr W reported. Again, it's open to Mr W to send this information to Unum for it to consider should he wish to do so. If Mr W is unhappy with the outcome of Unum's assessment of any new medical evidence, he may be able to make a new complaint about that issue alone.

It remains the case that it's for Mr W to show that he was incapacitated in line with the policy terms. I understand the solicitor considers Unum had accepted that Mr W suffered from anxiety and depression. I don't agree. Unum's initial claim decline, dated June 2022, clearly stated : *'overall, the medical information indicates a primarily situational psychological presentation, rather than the presence of a pervasive and persistent mental health condition that would have prevented Mr W from performing the full insured occupation throughout the deferred period.'* This position was reiterated in Unum's response to Mr W's first appeal. And in June 2023, Unum stated the following in its final response to Mr W's complaint:

'The medical records and Mr W's claim form explain how he was experiencing several difficult personal and family stressors prior to and during his absence. His absence is

therefore understandable. However, for a claim to be paid, we need evidence that he was incapacitated, as the result of an illness, during the deferred period and the evidence does not confirm this. During the period between December 2022 and June 2022, the GP has documented his absence to be the result of a 'stress related problem'. While an understandable reaction to difficult circumstances stress on its own is not medically considered an illness, so we are unable to accept a claim based on this alone.'

It's clear from Mr W's medical records that he had previously suffered from anxiety and depression and that his GP was concerned that he'd develop these conditions once more. However, it's still the case that during the deferred period, Mr W's GP's records specifically stated that Mr W was signed-off work with a 'stress-related problem'. Neither the GP's records nor the relevant fit notes stated that Mr W was suffering from anxiety and depressive disorder during this period and nor did they suggest that Mr W was suffering from somatic symptom disorder. There's no suggestion that Mr W's diagnosis of tachycardia prevented him from working either. So I'm still satisfied that it was fair and reasonable for Unum to rely on the contemporaneous medical evidence provided by Mr W's treating GP when it assessed his claim. And in my view, it wasn't unfair or unreasonable for Unum to conclude that Mr W hadn't shown he was incapacitated by an illness from carrying out the duties of his insured role.

Mr W's solicitor has questioned why Unum didn't appoint a medical examiner to assess Mr W's condition. However, it isn't obliged to do so. Unum was satisfied it had enough medical information to decide whether or not Mr W's claim met the definition of incapacity. I don't think this was an unfair position for Unum to take – especially given it had sought the opinion of clinical members of its staff when deciding the outcome of this claim.

I don't dispute that Mr W received support from Unum's vocational specialist team when he returned to work. I referenced this in the background sections of both my provisional decision and this final decision. But a vocational specialist is generally not an occupational health adviser, nor a physician. And I'm still satisfied that it was for Mr W's employer to organise an OH referral to understand any adjustments it could make and to seek an opinion on Mr W's fitness to work from an occupational perspective.

Mr W considers there were unreasonable delays in Unum's handling of this claim. He says that his employer didn't communicate Unum's claims decision or tell him about his right to appeal. Unum isn't responsible for any actions on the part of Mr W's employer. And as the employer is Unum's policyholder, I think it was appropriate and reasonable for Unum to communicate directly with the employer. I appreciate Mr W feels that Unum deliberately delayed the claim so that new evidence would be provided after the insurance contract had ended, meaning his periods of absence couldn't be linked. But it isn't clear that Mr W has previously complained to Unum about his belief that it made specific representations to his employer that he shouldn't try and make a new claim until he had a definite diagnosis of fibromyalgia. So I can't fairly comment on this point any further.

Mr W's solicitor considers that Unum's actions may amount to disability discrimination, given the problems he's experienced. I can understand why Mr W may feel this way, but having looked at everything, I haven't seen any evidence that Unum discriminated against Mr W because of his illness. It may be that Mr W's illness is covered by the disability provisions of the Equality Act 2010, but it's not our role to make a finding on that point – because that's a finding for the Courts to make. Nor is it our role to say whether a business has acted unlawfully or not – again, that's a matter for the Courts. Our role is to decide what's fair and reasonable in all the circumstances. In order to decide that, however, we have to take a number of things into account, including relevant law and what we consider to have been good industry practice at the time. So although it's for the Courts to say whether or not Unum has breached the Equality Act 2010, we're required to take the Equality Act 2010 into

account, if it's relevant, amongst other things when deciding what is fair and reasonable in the circumstances of the complaint. And having done so, based on all I've seen, I don't think Unum has treated Mr W unfairly or unreasonably.

Overall, despite my natural sympathy with Mr W's position, I find that Unum didn't act unfairly when it turned down his claim.

My final decision

For the reasons I've given above, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 9 January 2024.

Lisa Barham
Ombudsman