

**RECENT FOS & SCT DECISIONS**

# Section 54 of the Act prevents a FSP from relying on a technical breach of the policy

[Link to determination](#)**Facts**

On 18 January 2000, the Applicant entered into an income protection policy with the Financial Services Provider (FSP). The Applicant worked as a commercial pilot. On 24 February 2016, the Applicant made a claim for total disability benefits as a result of suffering from chronic fatigue syndrome, symptoms of which he claimed commenced two years prior.

The Applicant submitted that he had been unable to work since January 2014 and sought the payment of benefits from 24 February 2014 to 23 September 2016.

The FSP accepted the Applicant's claim from 23 September 2016 however, refused to pay benefits from 24 September 2014 on the basis that the waiting period (as defined in the policy) did not commence until 23 September 2016 and that in any event, the applicant did not satisfy the three part definition of 'totally disabled' under the policy namely:

1. Unable to perform at least one income producing duty of his... occupation;
2. Not working, and
3. Under the regular care and attendance of a medical practitioner.

**Issues**

1. Did the Applicant meet the three parts of the total disability definition from 24 September 2014?
2. Could the FSP rely on a technical breach of the policy in order to refuse to pay benefits prior to 23 September 2016?
3. Did section 54 of the *Insurance Contracts Act* limit the FSP's right to not pay benefits?

**Determination**

In dealing with the dispute, the Financial Ombudsman Service Australia (FOS) first considered whether the three parts of the policy definition had been met by the Applicant prior to 23 September 2016. It then turned its mind to whether the FSP could rely upon a technical breach of the policy in relation to the commencement of the waiting period in the context of section 54 of the *Insurance Contracts Act 1984* (the Act).

With reference to the first part of the definition, the FSP submitted that there was conflicting information regarding when the Applicant ceased all work. The Applicant submitted that he was unable to work since January 2014. In support of his submission, the Applicant provided medical evidence that his class one medical certificate had lapsed (this medical certificate is a requirement for a commercial pilot) and that according to a Designated Aviation Medical Examiner, anyone presenting with symptoms of fatigue and depression (such as the Applicant) would be automatically disqualified from holding a class one medical certificate and would be precluded from working as a commercial pilot. The FOS accepted that the medical evidence demonstrated that the Applicant had a history of symptoms supporting a diagnosis of chronic fatigue syndrome and that from 24 January 2014, the Applicant was unable to perform at least one income producing duty of his occupation.

In relation to the second part of the total disability definition, the Applicant claimed that he had not worked or been paid money for working since January 2014 and relied upon copies of his log book which detailed that he was only flying on a private basis from January 2013 and his tax return from 1 July 2014 showing that his income stream was only from his investment income as a beneficiary of NAF Trust. The FOS accepted that the Applicant was not working as a commercial pilot from 24 January 2014.

With reference to the third part of the definition, the FSP argued that clinical notes confirmed that the Applicant had not been under the regular care and attendance of a medical practitioner because any attendance had been intermittent. The Applicant submitted a number of reasons for why his attendance on a medical practitioner had been irregular including that he believed that his symptoms would abate, that due to his rural location in Western Australia, it was difficult to see the same medical practitioner and, he became disillusioned by the lack of improvement in his symptoms. The FOS accepted the reasons advanced by the Applicant in consideration of the evidence and the Applicant's circumstances. The FOS therefore accepted that the Applicant met the third part of the definition.

Having determined that the Applicant met all three parts of the definition for total disability from 24 January 2014, the FOS considered whether section 54 of the Act limited the rights of the FSP to refuse to pay benefits on the basis of a technical breach of the policy. In this case, the technical breach relied upon related to a clause setting out the commencement of the waiting period:

The waiting period begins on the date a *medical practitioner* first examines the person insured and certifies that he or she is totally disabled.

As the Applicant was not certified by a medical practitioner as being totally disabled until 23 September 2016, the FSP asserted the Applicant was prevented from seeking benefits at any date prior to 23 September 2016.

The FOS determined that in consideration of the whole of the evidence, it was fair and reasonable to accept that the Applicant was totally disabled from 2014. Further, the FOS asserted that section 54 of the Act did not permit the FSP to refuse to pay benefits from 2014 by relying on a technical breach of the policy.

The FOS determined that the FSP was required to pay the Applicant the income protection benefits from 2014 to 2016 and interest calculated in accordance to section 57 of the Act.

### **Implications**

This decision demonstrates that the FOS will consider all of the evidence before it in determining whether section 54 of the Act prevents a FSP from relying on a technical breach of the policy in refusing to pay benefits.

In this case, the FOS considered the whole of the evidence and the circumstances of the Applicant, including rural location, in determining when the waiting period under the policy commenced, notwithstanding the relevant clause in the policy and whether the breach asserted by the FSP could reasonably be said to have caused or contributed to the loss. Further, the Tribunal detailed that Chronic Fatigue Syndrome can be difficult to diagnose because it involves a series of tests to exclude common causes of tiredness.