THE HIGH COURT

[2024] IEHC 422

[2020 No. 49 MCA]

IN THE MATTER OF SECTION 64 OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN ACT 2017

-AND-

IN THE MATTER OF A DETERMINATION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN MADE ON 14 JANUARY 2020 BEARING REFERENCE NO 17/93719

BETWEEN:

UTMOST PANEUROPE DAC

APPELLANT

-AND-

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

-AND-

T.G.

NOTICE PARTY

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 10th day of July, 2024.

INTRODUCTION

1. This is the judgment of the court on a statutory appeal brought in respect of a decision made by the respondent on 14 January 2020. In that decision, the respondent made findings pursuant to section 60(2)(b) and (g) of the Financial Services and Pensions Ombudsman Act 2017 ("*the 2017 Act*") against the appellant, on foot of a complaint made by the notice party. For the reasons set out in this judgment I have concluded that the decision was flawed by serious and significant errors and that it should be set aside and remitted to the Ombudsman for fresh consideration.

2. As the way that the parties are described differs throughout the papers, I will describe the appellant throughout as "*Utmost*", the respondent as "*the Ombudsman*", and the notice party as "*Mr G*". It should be noted that Mr G was a party to the statutory appeal and was present in court during the hearing, but he did not participate by filing any documents or making any submissions. I have redacted Mr G's name as the matters under discussion involve a consideration of his medical conditions, and also section 62(2)(a)(i) of the 2017 Act requires the Ombudsman when publishing a decision not to identify the complainant by name, address or otherwise, strongly suggesting an intention on the part of the Oireachtas that complainants under the 2017 Act should not be identified.

BACKGROUND

3. The complaint made to the Ombudsman by Mr G concerned a decision by Utmost to cease paying benefits to Mr G under the terms of a group income protection policy. This decision was communicated on 28 February 2018. The policy initially was written by Generali PanEurope, the predecessor to Utmost, but for convenience I will refer to the policy provider as Utmost throughout this judgment. The Ombudsman found that the decision of Utmost contravened section 60(2)(b) and (g) of the 2017 Act. The Ombudsman directed Utmost to

reinstate benefit payments to Mr G, and also to make a further payment to redress any loss that may have been caused to Mr G by him not receiving the benefit payments at the time that they ought to have been paid.

4. This appeal was commenced by a notice of motion dated 17 February 2020. Utmost asserts that the decision is flawed and vitiated by a series of serious and significant errors and inconsistencies. As will be seen, the appeal was addressed both to the basis for the disposal of the complaint and the remedy directed by the Ombudsman.

5. At the heart of the decision is Utmost's treatment of a claim under a group income protection scheme for locomotive drivers ("*the policy*") that it provided to Iarnród Éireann. The policy constituted an agreement between Iarnród Éireann and Utmost for the benefit of drivers. Mr G was a locomotive driver, and he made a claim under the scheme on 6 November 2014 after he encountered mental health difficulties following a back injury. That claim was accepted and went into payment with effect from 8 December 2014.

6. The issue that triggered the complaint arose from the definition of "*disability*" in the income protection policy conditions. In the conditions "*disability*" is defined as a:-

> "*Illness or injury upon occurrence of which the benefit under the policy becomes payable, after the deferred period. For the first 24 months after the deferred period disability is the member's inability to perform the material and substantial duties of their normal occupation as a result of their illness or injury.*
>
> *After 24 monthly benefit payments have been paid in respect of the member under the policy, the definition changes. Thereafter we will only continue to pay the benefit if the*

illness or injury also prevents the member from performing the duties of any rail operative occupation within Iarnród Éireann."

7. Utmost initiated a claim review shortly before the conclusion of the initial 24 months of benefit payments. On 25 November 2016, Utmost wrote to the Chief Medical Officer (CMO) of Iarnród Éireann, noting that Mr G was approaching the end of the initial 24 month period of receiving benefits. The letter stated that under the definition of "*disability*" in the policy, the benefit will only continue to be paid if the illness or injury also prevented the member from performing the duties of any rail operative occupation within Iarnród Éireann following the initial 24 month period. The letter requested the CMO to answer a series of questions, all of which were directed to a consideration of whether Mr G was able to perform the duties of any rail operative occupation within Iarnród Éireann. The CMO, Dr. Declan Whelan, provided a report dated 23 December 2016, setting out answers to the questions asked by Utmost. The CMO concluded that Mr G was considered unfit for locomotive driving duties and that that was likely to be a permanent situation. Dr. Whelan also noted: -

"[Mr G] is unfit to carry out any role within a railway setting, due to the nature and severity of his symptoms and the psychotropic medicine required to treat same."

8. Utmost then arranged for an independent psychiatric examination of Mr G. In a letter dated 19 January 2017, Dr. Patrick Devitt, was requested to carry out the examination and assessment. That letter noted the policy criteria and requested Dr. Devitt to establish whether Mr G continued to meet the definition of disability as outlined in the policy. The letter went on to request Dr. Devitt to answer a series of specific questions. The framing of the questions was slightly different to that in the letter to the CMO, but essentially sought to explore the same subject matter. The final two questions in the request to Dr. Devitt were:-

"*9. In your opinion, is [Mr G] currently fit to carry out any rail operative occupation within Iarnród Éireann? Please note that as per scheme set up, will only continue to pay the benefit if the illness or injury also prevents the member from performing the duties of any rail operative occupation within Iarnród Éireann. List of job descriptions applicable is enclosed.*

10. If not,

(a) What specific symptoms render him unfit?

(b) What specific work tasks is he unable to perform?

(c) Can you recommend any treatment to facilitate a return to work.

(d) When in your opinion will [Mr G] be fit to return to any Iarnród Éireann occupation?"

9. While the letter purported to attach a list of job descriptions it was common case that the list was only provided later when it was requested by Dr. Devitt and that the list of job descriptions was not included in the papers sent to the Ombudsman by Utmost. Dr. Devitt produced a report dated 1 February 2017. The report noted the sources of information upon which the report was based, which included a one-to-one interview with Mr G and the administration of a series of tests.

10. The letters from Utmost to both the CMO and Dr. Devitt noted that Utmost had consent from Mr G that contact could be made with his treating clinicians; however, it was common case that neither Utmost nor the doctors communicated with those clinicians at any point in the process.

11. Dr. Devitt's' report noted that Mr G stated that he had diagnoses of anxiety disorder, depression, and psychotic depression. Dr. Devitt noted that Mr G had attended a psychotherapist, had been admitted to hospital for psychiatric treatment, and was attending an outpatient clinic. Mr G was due to reattend for outpatient treatment approximately one week after the date of the assessment. The report noted that Mr G was prescribed anti-psychotic medication and anti-depressant medication. Having recited the outcome of the various tests that were applied, and his interview with Mr G, Dr. Devitt set out his conclusions at page 9 of his report. Dr. Devitt opined that Mr G's diagnosis was that of personality disorder with paranoid narcissistic traits. Because of the medication that he was prescribed, Dr. Devitt considered it unlikely that Mr G would be suitable to return to work as a locomotive driver at that time. However, Dr. Devitt expressed the view that "*[t]here is no reason from a work mental health perspective that he would not be able to engage in other work as a Railway Operative*". The report notes that because of Mr G's propensity to anger there was a reasonable likelihood that he would have difficulties with management, but that this "*behaviour should be managed similar to every other employee and it is appropriate that he have to adhere to the same standards.*"

12. Following receipt of Dr. Devitt's report, Utmost concluded that Mr G did not meet the definition of "*disability*" under the policy – given the different criteria that applied to the period after the first 24 monthly benefits had been paid. Utmost informed Mr G of that conclusion by letter dated 13 February 2017, and informed him that payments would cease after 28 February 2017.

13. Mr G then engaged in protracted correspondence with Eolas Finance, who were the brokers appointed by Iarnród Éireann to liaise with employees in respect of the scheme. As part

of that process, Mr G was informed that there was an internal appeal process available under the policy, but, ultimately, he did not submit an appeal and instead submitted a complaint to the Ombudsman. It is not necessary to rehearse the full details of the correspondence, but the following points can be noted:

a. First there was an effort on the part of Eolas to encourage Mr G to engage with the appeal process. In summary, Mr G expressed the view that he had lost confidence in the process and did not wish to participate in an appeal.

b. Second, because there was an internal appeal process – and efforts to encourage Mr G to engage with that process – Utmost initially considered that it was not able to issue a final response letter, which is a necessary step before a complaint before the Ombudsman could proceed.

c. Third, Mr G had complained in his correspondence that if he was paid a lump sum of what he saw as the outstanding benefits, it would increase his tax liability because, as it is put in an email, a lump sum would push him into a higher tax band rather than if it had been paid monthly.

14. In May 2018, the Ombudsman wrote to Mr G indicating that he had contacted the office over two months previously with a view to submitting his complaint and they wished to know whether he wanted to continue with the complaint. In that regard, they noted the need for a final response letter. The final response letter was sent by Utmost on 8 June 2018 setting out, for the reasons provided in the letter, their belief that the decision to reject the claim was correct, and that the time for an internal appeal had passed by that point. In those premises, Utmost stated that their letter could be treated as a final response letter.

THE PRELIMINARY DECISION

15. Following an exchange of documents and information, the Ombudsman issued a preliminary decision on 21 October 2019.

16. The preliminary decision noted that Mr G's complaint was that, in February 2017, Utmost wrongfully discontinued payment of benefits under the policy. The preliminary decision notes that having considered the full exchange of documentation and evidence relating to the complaint together with the submissions that had been made, it was satisfied that there was no conflict of fact that would require the holding of an oral hearing.

17. With regard to the initial 24 month benefits period, the preliminary decision records that Mr G originally made a claim for benefits on 31 October 2014. In the claim form, his difficulties were described as "*[p]aranoid, avoidant, anxious personality traits. Features of anxiety disorder.*" The CMO had described Mr G's disability as "*severe psychotic depression with strong paranoid ideation, thoughts, self-harm and frequent outbursts of anger. This occurred in the immediate period post operatively for a lumbar disc decompression.*" The CMO's report confirmed that Mr G had been an inpatient for mental health treatment for a period of seven weeks in September/October 2014, and was under medical supervision. The preliminary decision then goes on to consider how Utmost dealt with the review after 24 months.

18. The analysis in the preliminary decision framed the role of the Ombudsman as not concerned with forming an opinion as to the nature or severity of Mr G's illness or condition, but rather to establish whether, on the basis of an objective assessment of the medical evidence submitted, Utmost adequately assessed his ongoing claim in early 2017, and whether it was

reasonably entitled to arrive at the decision it did to cease benefits following its assessment of the medical evidence available at that time.

19. The Ombudsman first addressed an element of the complaint made by Mr G to the effect that Utmost did not factor in the effect of his back injury. The Ombudsman expressed the view that, because Mr G had never made a claim under the policy in respect of his back injury, Utmost was not obliged to assess or determine in early 2017 whether that back injury came within the definition of disability as defined in the policy document. That issue did not give rise to any controversy.

20. The preliminary decision noted that once 24 monthly benefit payments were made under the scheme, the definition of disability changed. The Ombudsman therefore considered the approach of Utmost to the medical evidence. In that regard, the Ombudsman expressed concern that it was difficult to form an understanding as to how Utmost was in a position to reach any meaningful conclusion when it was not in possession of any report or information from Mr G's treating clinicians. The Ombudsman noted that it could have been open to Mr G to provide the reports but the Ombudsman stated, *"[i]t appears relatively clear that, owing to the nature of the Complainant's illness, he may not have been in a position to function as ordinarily required"*. The Ombudsman also noted what appeared to be, to the Ombudsman, some errors in Dr. Devitt's report, particularly, Dr. Devitt's description of the notice party's normal insured occupation as a *"railway operative"* when in fact he was a locomotive driver.

21. The primary focus of the Ombudsman in the preliminary decision was on the reasonableness of the decision that even if Mr G was unable to return to his previous occupation

as a locomotive driver, he nevertheless should be in a position to engage in other work as a general railway operative. Significantly, the Ombudsman observed the following:-

> *"No information has been furnished regarding the roles or responsibilities of other general railway operatives such that it is clear how the Provider was in a position to determine that the Complainant's condition of personality disorder with paranoid and narcissistic traits, or that the medications he was using, would not prevent him from engaging in such duties.*
>
> *In my opinion, if the terms of the scheme required that, after a period of 24 months of benefits payments, the definition of disability was changed to apply to "the duties of any rail operative occupation" then it was incumbent on the Provider to consider the duties in question of any such rail operative occupations, and to make a decision as to which of the occupations in question, if any, the Complainant was capable of undertaking, in order to form an appropriate opinion as to whether or not the definition of "disability" within the policy continued to be met and therefore, whether or not benefit payments should cease."*

22. In those premises, the Ombudsman was not satisfied that Utmost was entitled to form the opinion that benefits payments should cease. The Ombudsman took into account that the Iarnród Éireann CMO offered the opinion that Mr G was unfit to carry out any role within a railway setting due to the nature and severity of his symptoms, along with the psychotropic medication that was prescribed.

23. The preliminary decision found that Utmost's decision to cease benefit payments to the complainant with effect from 28 February 2017 was wrongful. This was because of the absence

of a more comprehensive assessment of Mr G's ongoing symptoms, and a detailed consideration of the duties of any alternative rail operative occupations which the complainant might be in a position to perform.

24. The remedy proposed in the preliminary decision was, first, that Utmost should "*[r]einstate benefit payments to [Mr G] with effect from end February 2017, pending a further review and assessment of [his] condition and whether or not he continues to meet the definition of disability within the policy.*"

25. Second, Utmost was to be directed to make "*such further payment as necessary to [Mr G], if any, in order to redress any loss that may have been caused to [him] by the Provider not having paid those benefits at the time when they should have been paid to [Mr G] from the end of February 2017 onwards, to date, to take account of any changes in the taxation regime, which may now disadvantage [Mr G] in his receipt of those outstanding policy benefits.*"

26. The preliminary decision specifically noted that once the directions in the decision were implemented, Utmost was entitled to conduct a fresh review of Mr G's medical condition in order to confirm whether or not he continued to satisfy the definition of disability within the policy.

27. The formal preliminary conclusion was that the complaint would be upheld pursuant to s. 60(1) of the Financial Services and Pensions Ombudsman Act 2017, on the grounds prescribed in section 60(2)(b) and (g). It follows that these were findings that the conduct that was the subject of the complaint was "*unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant*" (s. 60(2)(b)) and that the conduct was "*otherwise improper*" (s. 60(2)(g)).

THE RESPONSE TO THE PRELIMINARY DECISION

28. The Ombudsman offered the parties an opportunity to make submissions or observations on the preliminary decision, and, on 8 November 2019, Utmost submitted detailed written observations in relation to the preliminary decision.

29. Utmost made a number of observations. First, it identified what it considered to be certain errors of fact, but which to the court appear to be questions of contractual interpretation or at least mixed questions of law and fact.

30. Utmost asserted that the definition of "*disability*" had been incorrectly interpreted by the Ombudsman. Effectively, so the argument went, it was not a question of benefit payments ceasing or continuing after the 24 monthly benefit payments were made. Instead, Utmost argued that following the completion of 24 monthly benefit payments the definition of disability changes, and thus there had to be a fresh consideration of Mr G's circumstances. On that argument, Mr G only could be deemed to meet the revised definition of "*disability*" if he showed that he was prevented from performing the duties of *"any rail operative occupation… within Iarnród Éireann"*. As such, it was not a question of Utmost identifying any specific other rail operative occupation that he must be unable to perform, but rather that there must be a situation where he was unable to perform the duties of *any* (which the complainant suggested was an analogue for *all*) rail operative occupations within the corporate structure of Iarnród Éireann, the policyholder. Utmost asserted that it was for Mr G to adduce medical evidence that that was indeed the case, and for Iarnród Éireann to satisfy itself that it had no alternative

rail operative occupation duties within its structure that Mr G could perform. Accordingly, it was not for Utmost to consider the various possible roles that could be performed. Hence, as asserted by Utmost, the approach adopted by the Ombudsman was in effect to reverse the burden of proof provided for in the policy. Arising from the foregoing Utmost asserted that it was entitled to reach the decision it reached on the basis of the evidence and report from Dr. Devitt.

31. That approach was said to be consistent with a commonly held industry proposition that if a provider was to provide indefinite cover for safety critical roles only within an organisation such as Iarnród Éireann, the cost of coverage would be so high as to be financially prohibitive for any organisation. Hence, the definition of disability as a matter of industry standard practice changes after 24 months moving from safety critical roles only to including the non-safety critical roles.

32. Second, Utmost also raised an issue with the remedy provided for in the preliminary decision. As noted above, Utmost was ordered to redress any loss that may have been caused to Mr G as a result of Utmost not having paid the benefit payments at the time when they should have been paid to the complainant from the end of February 2017 onwards, having regard to any changes in the taxation regime which may now disadvantage Mr G in his receipt of those outstanding policy benefits. Put another way, it seems that the formulation of the redress in the preliminary decision was informed by a concern that if Mr G was repaid the benefits in a single payment, account should be taken of any disadvantage he might suffer from a tax perspective compared to his position if had the payments been made on a monthly basis from the end of February 2017.

33. In that regard, Utmost noted that they could not accede to such a direction as policy benefits are paid net of any taxable deductions which they were directed to make by the Revenue Commissioners. Utmost could not calculate Mr G's taxable liabilities. The argument was that any sums due to the Revenue Commissioners or otherwise under the policy's benefits are a matter for the beneficiary and the Revenue Commissioners. In addition, it was pointed out that Utmost was required to deduct or apply taxes in respect of benefit payments in the manner directed by the Revenue Commissioners, which was for a given fiscal year.

THE BINDING DECISION

34. On 14 January 2020, the Ombudsman issued a legally binding decision pursuant to section 60(1) of the 2017 Act. In the final decision, the Ombudsman upheld the complaint on the grounds prescribed in section 60(2)(b) and (g). The final decision follows the scheme of, and largely replicates, the preliminary decision. The final decision notes that both parties made additional submissions and observations following the delivery of the preliminary decision and that those matters were considered by the Ombudsman.

35. In a similar way to the preliminary decision, the final decision highlighted the Ombudsman's concern that no information had been furnished regarding the roles or responsibilities of other general railway operatives and therefore it was not clear how the provider was in a position to determine that the complainant's condition or his medications would not prevent him from engaging in such duties. The critical observation made by the Ombudsman was:-

> *"In the absence of such an assessment, it is difficult to understand the Provider's opinion that the Complainant was capable of undertaking the duties of any rail operative occupation, i.e. that there was a role within such rail operative occupations*

that the Complainant could undertake notwithstanding his severe and disabling outbursts of anger."

36. The Ombudsman went on to express the opinion that if the terms of the scheme were such that after a period of 24 months of benefit payments, the definition of disability was changed to apply to the *"duties of any real operative occupation"*, then it was incumbent on Utmost to consider the duties in question of any such rail operative occupations, and to make a decision as to which of the occupations in question, if any, that Mr G was capable of undertaking.

37. On foot of the observations made by Utmost after the delivery of the preliminary decision, the Ombudsman noted the observation that Iarnród Éireann had accepted and signed off on the inclusion of the language used in the definition of disability. The Ombudsman agreed that it was clear that the insurer and employer, as policyholder, agreed to the clause in question. The Ombudsman noted that its role was to examine whether the decision of Utmost to cease benefits payments to the complainant in late 2017 was a reasonable decision, taking into account the agreed wording of the policy.

38. The Ombudsman noted: -

"It is the Provider which seeks to rely upon the changed definition of disability, after the elapse of 24 months, and I believe accordingly that it is for the Provider to make a reasonable decision based upon whether the Complainant's medical difficulties were such that he was, or was not, prevented from undertaking the duties of any rail operative occupation. It is the absence of any such assessment by the Provider, relative to such alternative rail operative occupations, which in my opinion calls the Provider's decision into question."

39. As discussed later, and this was a significant feature of the matters raised in the statutory appeal, the Ombudsman does not appear to have engaged with the submission made by Utmost that the Ombudsman erred in the preliminary decision in its interpretation of the disability clause and in its understanding of how the burden of proof (as it was put) operates once 24 monthly payments had been made under the scheme, or with the associated submission that, without the change in the analysis for disability, moving from a focus on the ability to perform safety critical roles to the performance of non-safety critical roles, the provision of insurance of this type would become unfeasible for most employers.

40. Similarly, in observing that it was incumbent on Utmost to consider the specific duties involved in performing the duties of any rail operatives, it was not made clear whether the Ombudsman was finding that the duty that emerged as a result of its interpretation of the contract or was a duty arising from a need to be reasonable, just and not oppressive. Given that there was no finding made pursuant to s. 60(2)(a) – that the conduct complained of was contrary to law - it seems probable that this was part of a reasonableness analysis.

41. In terms of remedies, the final decision repeats the two directions given in the preliminary decision (a) to reinstate benefits from the end of February 2017, and (b) to make such further payments as may be required to redress any loss caused to Mr G by Utmost not having paid those benefit payments at the correct time, taking into account any changes in the taxation regime which may now disadvantage Mr G in his receipt of those outstanding benefits.

42. To that remedy, the Ombudsman added the following rider, on foot of the submissions made by Utmost:-

"It should be noted by the Provider in that regard that it is not required in any manner to breach its obligations under the Taxes Consolidation legislation. Rather, it is required to assess whether the Complainant will now be out of pocket because of changes in the taxation regime which would not have arisen if the benefit payments had been made by the Provider to the Complainant from late 2016 onwards. In that event, if the Complainant is now out of pocket for that reason, it is a matter for the Provider to make good that additional loss."

THE GROUNDS OF APPEAL

43. The grounds of appeal relied upon by Utmost were set out initially in an affidavit sworn by its legal counsel, Mr. Paul Kelly, on 17 February 2020. Those grounds of appeal were summarised in the written legal submissions made on behalf of Utmost as follows:

44. First, it is asserted that the decision does not identify precisely the basis upon which the complaint has been decided. In this case, the findings were made that there was a breach of section 60(2)(b) and (g). However, Utmost complains that it is not clear how that conclusion connects to the substance of the decision made by the Ombudsman.

45. Secondly, there is a complaint that the decision is made without any reference to industry standards or Consumer Protection Code provisions and that the finding of the Ombudsman that the behaviour of Utmost was unreasonable, was flawed for that reason.

46. Third, in terms of remedies, while accepting the type of redress which can be directed by the Ombudsman is very broad and goes beyond that which can be ordered by a court, the remedies should be proportionate to whatever findings the Ombudsman has made and the specific basis upon which a complaint has been upheld. In order to be proportionate, it is also

necessary for the Ombudsman to have due regard to the impact of any order upon the financial services provider. In addition, where the Ombudsman may be entitled to override strict contractual arrangements, any order in that regard must require the most careful of consideration.

47. In terms of the substance of the decision itself, the complainant identified a number of errors:-

(a) The Ombudsman erred in the interpretation of the policy and failed to consider whether Mr G continued to meet the definition of disability within the policy;

(b) The Ombudsman erred in finding that it was incumbent on Utmost to consider the duties of rail operative occupations and to make a decision as to which, if any, Mr G was capable of undertaking;

(c) The Ombudsman erred by placing the onus on Utmost to establish that Mr G did not meet the definition of disability on the expiry of the 24-month period;

(d) The Ombudsman erred in its treatment of the medical evidence which was supportive of Utmost's decision;

(e) Insofar as there is any conflict of fact on the medical evidence, the Ombudsman could not arrive at conclusions on that matter without an oral hearing;

(f) The Ombudsman erred by placing weight on the fact that Utmost did not contact the doctors treating Mr G, but failed to attach any weight to the fact that Mr G did not invoke the internal appeals process where he could have provided any additional information including medical reports;

(g) The Ombudsman failed to tie any of its findings regarding the conduct of Utmost to the statutory grounds;

(h) The remedies imposed were erroneous in law as they were wholly disproportionate to the alleged wrong;

(i) The Ombudsman failed to engage with the submissions made in response to its preliminary decision.

48. The Ombudsman opposed the relief being sought, and its statement of opposition was dated 15 April 2020. In addition to denying that the matter complained of by Utmost could be characterised as serious or significant errors, the Ombudsman stated that they correctly considered the reasonableness of the determination by Utmost. There is a denial that there was any error of contractual interpretation, and, in any event, it was asserted that the Ombudsman was exercising its jurisdiction pursuant to section 60(2)(b) and (g) of the 2017 Act. The Ombudsman was entitled to determine the complaint based on its conclusions regarding the reasonableness of the assessment conducted by Utmost. With regard to remedies, in addition to denying that there was any error, the Ombudsman asserted that there was no evident bar to Utmost requesting details from the notice party of his tax affairs.

49. The statement of opposition was grounded on an affidavit of Ms. Mary Rose McGovern, Director of Investigation, Adjudication and Legal Services in the Ombudsman. That affidavit set out the essential functions of the Ombudsman and the complaints procedure, and then provided a chronology associated with an exhibit setting out the material that was before the Ombudsman when the preliminary decision and final decision were made.

Affidavit of Mr. Graham Hulsman

50. Utmost filed a replying affidavit dated 26 November 2020, sworn by Mr. Graham Hulsman, a technical claims manager. In addition to taking issue with certain averments made

by Ms. McGovern, Mr. Hulsman also exhibits an email dated 17 January 2017 which was sent to Dr. Devitt following an inquiry from his office and the email contains a list of occupations within Iarnród Éireann. According to Mr. Hulsman, a copy of that email was not in the file provided to the Ombudsman.

51. Mr. Hulsman also takes issue with the contention that Utmost could request details from Mr G in relation to his tax circumstances in order to complete the second element of the redress ordered by the Ombudsman. In that regard, he notes a taxpayer's entitlement to confidentiality in his tax affairs and asserts that it would be disproportionately burdensome for an insurer to undertake a review of an individual's tax affairs to ascertain how benefits paid might impact on tax liabilities. Mr. Hulsman noted that the scheme operated by Utmost is a Revenue-approved policy, which means that Utmost is authorised to and required to deduct tax liabilities as directed by the Revenue Commissioners. He noted that there was also an interaction between the benefits paid under the scheme and social welfare payments obtained by Mr G, which had an impact on Mr G's tax affairs, and that this was not a matter that could be addressed by Utmost.

52. Mr. Hulsman also took issue with the implication that there was a requirement on Utmost to contact Mr G's treating psychiatrist directly. In that regard, the following was cited from the policy:-

> *"As part of the process we will request updated medical evidence from the claiming member's treating physician. We may also request a medical examination by a specialist chosen by us, or other types of medical evidence as necessary."*

53. Furthermore, Mr. Hulsman takes issue with the fact that Mr G did not participate in the claims appeal process. Had he done so, it was argued, Mr G would have been entitled to submit

evidence from his own treating clinicians. Moreover, by pressing Utmost to issue a final response letter, notwithstanding the fact that the internal appeals process had not been completed, it was asserted that the Ombudsman erred in finding that Utmost should have sought information from Mr G's own psychiatrist.

54. Finally, Mr. Hulsman argues that the effect of the remedy was to direct Utmost to recognise a contractual claim which was not upheld in the decision. It was stated that the cost of complying with the direction could run to approximately €730,000 in circumstances where the income protection scheme contemplates that cover will be paid until the complainant's retirement date in 2041. As such, the remedy was said to be disproportionate where the Ombudsman had not found that the complainant met the definition of "*disability*" under the policy findings.

Affidavit of Ms. Mary Rose McGovern

55. Ms. McGovern swore a second affidavit on behalf of the Ombudsman on 17 December 2020. In the first instance, the affidavit takes issue with the entitlement of Mr. Hulsman, as the Ombudsman framed it, to introduce new points of appeal or objections to the decision which were not set out in the initial grounding affidavit of Mr. Kelly sworn on 17 February 2020.

56. Without prejudice to the above, Ms. McGovern continues her denial that the Ombudsman reversed any wording within the policy and states that the appellant is put on proof that the Ombudsman *"imposed a duty on Utmost to prove that the member could in fact carry out the duties of a specified rail operative"*.

57. The Ombudsman contends that Utmost is not entitled to place any reliance on documents which could and should have been provided to the Ombudsman, but which were not, this was directed towards the email of 17 January 2017 which set out the list of occupations that were provided upon request to Dr. Devitt.

58. Regarding the contention by Mr. Hulsman that the Ombudsman effectively erred by conducting an investigation following a request for a final response letter even if the internal appeals process had not been concluded, Ms. McGovern points to the letter sent by Utmost to Mr G which was said to constitute a final response letter and which included a statement to the effect that, because the time within which an internal appeal could be brought has passed, that option was no longer available to Mr G.

59. The court is satisfied (a) that the Ombudsman was correct in its contention that Utmost should not be able to rely on documents that were not placed before it, particularly where those type of documents had been requested by the Ombudsman and were available to Utmost, and (b) that Utmost cannot complain legitimately about the internal appeal issue where it chose to issue a final response letter and in that letter set out its view that the time for filing an internal appeal had passed.

APPLICABLE LEGAL PRINCIPLES

60. The general approach to be adopted in a statutory appeal of this type has been set out clearly and determinatively in a number of authorities. It is clear that there is no material difference between the proposition that a decision can be challenged successfully if the court is satisfied that the decision is vitiated by a serious and significant error, or a series of such

errors, and the more general standards for statutory appeals set out by the Supreme Court in cases such as *Fitzgibbon v. Law Society* [2015] 1 IR 516.

61. In *Millar v. FSPO and Danske Bank* [2015] IECA 126, the Court of Appeal identified that the approach adopted in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323, is correct. In *Ulster Bank*, Finnegan P. described the standard of review to be applied by the High Court on statutory appeals as follows:

> "*To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant., The deferential standard is that applied by Keane C.J. in Orange v The Director of Telecommunications Regulation & Anor (No. 2) and not that in The State (Keegan) v Stardust Compensation Tribunal."*

62. In *Millar*, the Court of Appeal approved of the way that the *Ulster Bank* test was explained by MacMenamin J. in *Hayes v. Financial Services Ombudsman* (Unreported, HC, 3 November 2008) as follows:

> "*...It must now be seen, therefore, as a well established accepted test.*
>
> *27. The principle ultimately could be seen as having the following elements:*
>
> *I. The burden of proof is on the appellant;*
>
> *II. The onus of proof is the civil standard;*
>
> *III. The court should not consider complaints about process or merits in isolation but rather, should consider the adjudicative process as a whole;*

IV. *In light of the above principles, the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or series of such errors;*

V. *In applying this test, the court may adopt what is known as a deferential stance and may have regard to the degree of expertise and specialist knowledge of the respondent*."

63. MacMenamin J. noted that a statutory appeal of this type is not a *de novo* appeal. The court further noted that there may be a permissible error if it is within jurisdiction, albeit only insofar as that error falls short of being one which is serious and significant. MacMenamin J. also observed in relation to the general structure for the Ombudsman that:

"*33. What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue*."

64. The Court of Appeal in *Millar* also approved of the following further observations made by MacMenamin J. in *Hayes*:

"*34. The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as where the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with the law, it is unreasonable, or is otherwise improper. ... He can also make orders of a type the court would normally be able to*

make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in a court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."

65. *Utmost v. Financial Services and Pensions Ombudsman* [2020] IEHC 538 is a more recent case that was dealt with in the High Court (Simons J.) and on appeal to the Court of Appeal (where the judgment was delivered by Binchy J.), and which was the subject of argument in this appeal by both sides. I am satisfied that the *Utmost v. FSPO* case is very helpful for the resolution of this appeal and on a number of issues amounts to a strong precedent for resolving this appeal. It is necessary to consider what was decided at first instance because not all those findings were appealed.

66. The complaint dealt with by the Ombudsman concerned claims made pursuant to a group income protection scheme. The insured party suffered from fibromyalgia, which was excluded from cover under the terms in the policy, and from rheumatoid arthritis, which was not excluded. Utmost referred the insured party to a consultant for the purpose of an independent medical examination. The independent consultant concluded that there was evidence of fibromyalgia, which was the main contributing factor to her current symptoms. She tested positive for rheumatoid arthritis which appeared to be at the very early stages. The consultant considered that she was not permanently disabled from work. In a follow up answer to a query from the insurance company, the consultant stated that the extent of the employee's rheumatoid arthritis was not enough to render her disabled from work.

67. Put briefly, the Ombudsman appeared to have concluded that there was an overemphasis on quantifying the impact that the two medical conditions had on the insured's ability to work, and that the insurance company unreasonably and unfairly found that the excluded condition predominated. In the premises the complaint was upheld on the grounds prescribed in section 60(2)(b) and (g).

68. The High Court considered it significant that the final decision was not grounded on a finding that the complaint complained of was contrary to law in terms of legal principles; the High Court noted the "*hybrid jurisdiction*" of the Ombudsman: the Ombudsman may adjudicate not only on contractual disputes but may also make determinations and direct remedies in respect of conduct which, while not contrary to law, is found to be unreasonable or unjust.

69. The court noted that in *Governey v. Financial Services Ombudsman* [2015] 2 IR 616 the Supreme Court had made clear that a range of issues and a range of remedies can be dealt with by the Ombudsman and these go far beyond the type of case that can be brought to court as a result of an alleged breach of legal rights or failure to meet legal obligations. However, the remit of the Ombudsman does include cases which may involve the establishment and determination of legal rights and obligations in the payment of compensation for loss in respect thereof. In respect of those matters the Supreme Court noted at para. 42:

> *"The legislation, therefore, permits, but does not require, the F.S.O. to deal with such complaints, being cases which are, in reality, matters which might otherwise be pursued by an appropriate form of court proceedings before whatever court might have jurisdiction to deal with the issues concerned."*

70. The court in *Utmost v. FSPO* considered it significant that the essence of the decision under appeal was that the insurance provider had not properly or reasonably analysed the claim because of the emphasis it placed on the exclusion condition. There was no express finding in the decision to the effect that, in declining the claim, the insurance provider had acted in breach of the contract or otherwise contrary to law. In that regard, that case is very similar to the present case under appeal. It concerned *the approach* adopted by a financial services provider to the formulation of an opinion which grounded a decision not to provide cover.

71. It was noted from the relevant case law addressing the approach that may be adopted by the High Court regarding decisions of the Ombudsman that the court is not required to, and should not, adopt a deferential stance to a decision or determination by the Ombudsman on a pure question of law. The High Court noted the authorities, including the line of authority from *Millar,* and the distinction that must be drawn in terms of deference between matters within the specialist area of expertise of the Ombudsman and the matters that remain within the province of the courts.

72. A further point noted by the High Court in *Utmost v. FSPO* is that the Ombudsman is not a medical expert whose function it is to adjudicate on medical opinion; as such there is no need to defer to decisions or determinations made in respect of matters which fall outside decision makers expertise particularly with regard to medical evidence.

73. Simons J. considered that the rationale of the Ombudsman decision was confined to a finding that the conduct of the insurance provider was unreasonable and improper insofar as it emphasised the excluded illness, fibromyalgia. The decision was thus directed to the conduct

of the insurance provider in assessing the claim. The decision could not be read as entailing a finding that the insurer had acted in breach of contract by declining the claim.

74. In considering the decision, the court noted that Utmost had submitted that both as a matter of contract law and under the Central Bank's Consumer Protection Guide an insurance provider must endeavour to verify the validity of a claim received. An insurance provider when it receives a claim, is entitled to look at the policy terms and conditions and to interrogate whether the claim is covered. Significantly, the High Court accepted that the starting point for any proper assessment of the reasonableness of the processing of a claim should have been the terms of the relevant code of conduct applicable to the insurance provider. As noted by Simons J. at paragraph 66:

> *"This is the objective standard against which the "reasonableness" of the conduct falls to be considered in the first instance."*

75. In that case the Ombudsman had in fact recited a clause from the Code of Conduct but had not discussed its implications. In that regard, the Court of Appeal agreed that the Ombudsman must have regard to codes of conduct, good practice or industry standards in formulating a decision on reasonableness. However, the Court of Appeal was satisfied that the effect of the particular provision of the Code did not advance the case in any meaningful way, because the provider had in fact endeavoured to verify the claim – which is what the provision in the Code required.

76. Simons J. went on to consider the relationship between reasonableness and the treatment of the contractual relationship, and observed that:

"*68. In assessing whether the conduct of the insurance provider was "reasonable", it is also appropriate to have some regard to the underlying contract of insurance itself. Whereas the mere fact that conduct is in accordance with the terms of the contract does not necessarily mean that the conduct is "reasonable"—conduct may be unreasonable even if it is lawful — the terms of the contract are nevertheless relevant. ..."*

77. The court went on:

"*69. The entitlement to claim under the scheme was also confined to circumstances where the contractual definition of "disability" had been met. That definition requires that an insured party's inability to perform the material and substantial duties of their normal insured occupation is as a result of their illness or injury. Accordingly, in order for the insured party in the present case to succeed in her claim, it would be necessary for her to establish, first, that she was unable to work, and, secondly, that that inability is as a result of a non-excluded illness."*

78. The court found that the insurance provider's entitlement to verify the validity of the claim prior to making a decision that it should be admitted had not been properly acknowledged by the decision of the Ombudsman and that this constituted a serious and significant error of law. It does not seem that this element of the High Court decision was challenged. The court also found that the queries raised by the insurance provider with the nominated independent medical consultant were legitimate.

79. Finally, Simons J. summarised his view which is that the Ombudsman's approach evinced serious and significant errors of law in that it purported to make a finding that the

conduct of the insurance provider was unreasonable without any attempt to measure that conduct against the relevant code of conduct, and then drew unsubstantiated inferences from certain correspondence.

80. In relation to the question of remedies, the court noted that the Ombudsman does not have *carte blanche* as to what remedy is imposed. In *Utmost v. FSPO*, the court found that the effect of the remedy imposed is to direct the insurance provider to recognise a contractual claim which had not been upheld by the Ombudsman in its decision. Utmost had argued that the rider to the direction, which was to the effect that the insurance provider remained entitled in accordance with the policy provisions to further review the claim at any time in the future, was inoperable. Utmost had asked what change in circumstances or other factor was the insurance provider allowed to take into account when reviewing the claim in circumstances where the insurance provider considered that cover was appropriately declined in the first instance.

81. In addressing the issues, the High Court distinguished between the threshold question of whether the Ombudsman had on the basis of its findings on the substance of the complaint jurisdiction to impose a particular form of remedy; and the subsequent question as to whether the precise form of remedy was reasonable or proportionate in all the circumstances. In that regard the court noted that curial reference was afforded to the Ombudsman in terms of the precise form of remedy, the second aspect of the question. The court noted at paragraph 90:

> *"The question of principle for determination in this appeal is whether, on the assumption that his findings on the substance of the complaint were to have been upheld, the Ombudsman would have had jurisdiction to direct the insurance provider to admit the claim for income protection. For the reasons which follow, the answer to that question is "no".*

91. The decision of the Ombudsman was to the effect that the conduct of the insurance provider in assessing the claim was unreasonable or otherwise improper. The Ombudsman did not find, as a matter of contract law, that the insured party was entitled to recover under the group income protection scheme. The Ombudsman made no finding to the effect that the insured party's inability to work is attributable entirely to rheumatoid arthritis. Yet, the remedy directed was precisely that the insurance provider admit the claim. The practical effect of this was that the Ombudsman treated the claim as if it had been well-founded and that the insured party was suffering a disability (as defined) caused by an illness which came within the terms of the insured risk. With respect, there is no lawful connection between the finding of unreasonable or improper conduct and the remedy actually imposed: it is a non sequitur.

92. The decision is not saved by the rider to the effect that the insurance provider remains entitled, in accordance with the policy provisions, to further review the claim at any time in the future. This rider is unworkable for the reasons advanced by counsel on behalf of the insurance provider in her submissions (summarised earlier). In particular, the notion of a further review of the claim by the insurance provider is nonsensical in circumstances where the provider has already determined, on the basis of the medical evidence, that the claim is inadmissible."

82. That decision of Simons J. was appealed to the Court of Appeal (Binchy J.), whose judgment has the neutral citation [2022] IECA 77.

83. First, it can be observed that at para. 92, the Court of Appeal made clear that the approach to statutory appeals described by the Supreme Court in *Fitzgibbon v. Law Society* "*is clearly applicable to statutory appeals under s.64 of the Act of 2017*". Logically, the effect of that decision seems to be that if the court is satisfied that the decision maker has reached a decision in a way that triggers a successful appeal under the *Fitzgibbon* standards it is almost invariable that those errors will be treated as serious and significant errors for the purposes of the *Millar* type analysis. This not only makes sense but also avoids a situation in which different standards are applied to different forms of statutory appeals, save where the Oireachtas has so directed.

84. The breadth of the Ombudsman's jurisdiction, as described in the previous cases, was noted by the Court of Appeal in *Utmost v. FSPO*. The Court referred to the decision of the High Court in *Danske Bank v. FSPO* [2021] IEHC 116, where Hyland J. observed at paragraph 27:

> "*The breadth of the Ombudsman's jurisdiction under s.60(2) cannot be underestimated: he or she is effectively given a decision to override the law in certain situations, in the sense that although the complainant may have no remedy in law, including under the law of contract, nonetheless they can have their complaint upheld. In other words, a financial services provider can act perfectly lawfully but nonetheless find that a complaint is upheld against it carrying with it an obligation to make specified redress."*

85. At paragraph 105, the Court of Appeal noted that:

> "*105. It is clear from the express terms of s.60(4) that the jurisdiction of the FSPO is not limited to cases in which the FSPO has found a financial services provider to be in breach of contract. The powers conferred upon the FSPO are*

indeed very broad and are clearly intended to reflect the intention of the Oireachtas to provide a swift, informal and effective mechanism for the resolution of disputes between consumers and financial services providers. Of its very nature, an investigation conducted by the FSPO is of an altogether different character to legal proceedings, and the powers conferred upon the FSPO are not circumscribed by the requirement that the FSPO should make a determination as to legal rights, before directing a remedy."

86. However, the court was also clear, that the Ombudsman is required to act in accordance with law and does not have *carte blanche* in exercising its jurisdiction. In *Utmost v. FSPO*, the Court of Appeal specifically addressed an argument which had been successful in the High Court, to the effect that where the Ombudsman made a finding that conduct complained of was unreasonable there was a necessity that the Ombudsman makes that finding by reference to the Consumer Protection Code. In that appeal, the Ombudsman argued that the High Court was incorrect to suggest that in all cases where it is considering a complaint under s.60(2)(b) and (g), it must have regard to the Code when considering the conduct of a provider. The Court of Appeal did not agree, and explained as follows:

"*74. In my view the position adopted by the FSPO on this issue was both illogical and untenable. Codes adopted by the Central Bank are adopted following a process of consultation with stakeholders. As the name implies, the Consumer Protection Code is intended to afford consumers a measure of protection in their dealings with financial services providers which, for the most part, will enjoy a position of commercial dominance over the consumer. The imposition of a Code of Conduct on the provision of financial services by service providers, necessarily influences the manner in which such services are*

provided, as well as the interactions between consumers and financial services providers as regards the provision of such services. The Code also serves an additional and useful purpose in providing an objective benchmark against which complaints of consumers and standards of service financial services providers may be assessed, thereby affording both consumers and providers protection against potentially arbitrary or subjective decisions on the part of the FSPO.

75. In the very vast majority of cases (unlike in this case) it is consumers, and not financial services providers who will seek to rely upon the Code when advancing a complaint. Whether the Code is relied upon by a complainant, or by a financial services provider in responding to a complaint, it can hardly be doubted that once reliance is placed on it, the FSPO must have regard to it when determining the reasonableness of the conduct of the financial services provider. But even where it is not relied upon by either party, the Code may nonetheless have a relevance to the determination of the complaint, and it is reasonable to expect the FSPO, having regard to the expertise imputed to that office, to have due regard to the Code when assessing the reasonableness of the conduct of the financial services provider. By "due regard" I mean to consider whether or not the conduct complained of was conduct (a) necessitated, directly or indirectly, by any provision of the Code or (b) was in breach of any provision of the code."
[emphasis added]

87. A further issue that arose in the Court of Appeal was the question of whether, in the absence of any finding that there had been a breach of contract, the Ombudsman had

jurisdiction to direct a financial services provider to admit a claim under a policy of insurance and pay a benefit to the insured. In that regard, having noted that the Ombudsman enjoys an extensive jurisdiction regarding the range of remedies which can be imposed, including a jurisdiction to override the law of contract, the Court found:

> "*106. All of that said, and as the FSPO very properly acknowledged, he does not enjoy a carte blanche when directing remedies. The remedies directed should be proportionate to whatever findings the FSPO has made as a result of his investigation, and the specific basis upon which a complaint has been upheld. In order to establish whether or not a particular remedy is proportionate, it is necessary for the FSPO to have due regard to the impact of any order that he is contemplating making, upon the financial services provider, and in particular the likely cost of such an order. If necessary, in appropriate cases, the FSPO should invite submissions from the parties on this issue.*
>
> *107. Furthermore, the remedy directed by the FSPO should bear some logical relationship to the conduct which the FSPO has found wanting. It is not open to the FSPO to impose remedies which bear no relationship to the conduct giving rise to the complaint, or to rewrite or completely ignore the contractual arrangements between the parties. While there may be circumstances where the FSPO will be justified and overriding strict contractual arrangements - for example where there has been an egregious delay or wholly unreasonable conduct on the part of the service provider such as to render it unconscionable for the service provider to be permitted to rely upon it strict legal entitlements - the making of an order to direct a financial services provider to admit a claim under a policy of insurance and pay benefit to the insured, in the absence of any*

finding of a breach of contract on the part of the provider, is one that requires the most careful of consideration taking account of all of the matters referred to above, and any other relevant considerations."

88. In that case, the Court of Appeal found that the remedy directed by the FSPO was on any analysis disproportionate and unconnected to the mischief. That was particularly so where it was never in dispute that the appellant suffered from an excluded illness. Binchy J. was clear that the FSPO should be careful, when considering making orders of that kind, to apprise itself of the likely financial consequences of any such order before reaching its decision in the matter, as that will undoubtedly have a bearing on the assessment of proportionality of any remedy it is considering.

DISCUSSION

89. In common with a number of decisions of the Superior Courts, in *Utmost* a complaint was upheld on the basis that the conduct complained of contravened section 60(2)(b) and (g) of the Act of 2017. But the Ombudsman did not specifically tie any of the findings to either of those statutory grounds. As noted by the Court of Appeal, "*the FSPO should, when explaining his decision, expressly refer to the statutory ground or grounds upon which each element of a complaint is upheld, and on what basis. Similarly, any directions made pursuant to s. 60 (4) of the Act of 2017 should refer to the subsection pursuant to which they are made."*

90. In this case, as has occurred in a number of previous cases, the Ombudsman has not specifically tied the conduct that it found problematic to the express provisions relied on in its conclusions. Accordingly, while it is possible in this case to infer that the Ombudsman found the conduct of Utmost to be unreasonable, this should have been stated expressly and made

clear. The fact that previous decisions have noted (a) that this exercise should be undertaken, but (b) that a failure to do so did not amount to a serious or significant error, should not be taken as meaning that a consistent pattern of this conduct will never amount to a serious or significant error. The need for clarity in connecting findings to a formal decision has been emphasised too often to be overlooked or ignored.

91. This appeal is not concerned with a decision of the Ombudsman that the conduct complained of was contrary to law. It can be noted that to some extent in its statement of opposition and written submissions the Ombudsman suggests that the contractual analysis conducted by Utmost was not correct. However, it would be fair to state that at all stages the Ombudsman has adopted the position that it did not find that Mr G was entitled to continued benefits. Instead, its stance was that Utmost's determination to cease benefits was inappropriate because the opinion on which it was based was not reasonable, and, in turn, the opinion was not reasonable because Utmost should have specifically considered all the rail operative duties that Mr G could have performed. Up to a point, I agree that Utmost's argument that the Ombudsman erred in its interpretation of the contract was somewhat misdirected. The Ombudsman did not purport to make any concluded finding on the interpretation of the contract.

92. That does not mean, however, that the underlying contractual relationships are immaterial. As noted by Simons J. in the High Court in *Utmost v. FSPO* (and a matter that did not seem to be the subject of challenge on appeal) the terms of the contract remain relevant. In my view, the underlying contractual relationship is material both to the questions of whether Utmost behaved reasonably and also the question of remedies. In my view, the fact that a financial services provider is acting in a manner that was agreed to by the parties to the contract can be critically relevant to the question of whether they behaved reasonably. Prima facie, it is

not necessarily unreasonable to insist that a party abides by its contractual obligations. Abiding by the terms of a contract is one important objective measure of reasonableness.

93. Put another way, the Ombudsman is entitled to find that an approach to compliance with contractual obligations is not reasonable, but that finding must be clearly explained and the service provider must be able to understand *why* and by reference to what objective metric or measure its contractually compliant conduct has been found to be unreasonable. This is important because if the Ombudsman finds that conduct is unreasonable it may well have implications for the financial services provider outside of the parameters of the specific complaint under consideration. It is also more broadly important because, under the statutory regime, the Ombudsman has a power to find that conduct is contrary to law, as well as the power to find that conduct is improper or unreasonable. As noted in the authorities, a decision on a point of law will not attract any deference in a statutory appeal, while a decision on reasonableness is likely to attract some level of deference. At a level of principle, what should not happen (and I am not suggesting that this happened in this case) is that a decision maker avoids addressing the underlying legal relationship and instead reframes or refocuses the issues to the question of reasonableness in order to avoid the heightened scrutiny that follows findings on questions of law.

94. It can be recalled that in this case the approach adopted by the Ombudsman to the underlying contractual position was contingent: *if* the terms of the policy were that after 24 monthly benefit payments the definition of disability changed such that benefits only were payable if the claimant was unable to fulfil the duties of any rail operative, then it was incumbent on Utmost to consider all of those occupations and to consider whether or not Mr G

was able to perform any of those duties. There was a clear interrelationship between the contractual analysis and the question of whether Utmost's approach was reasonable.

95. Following the preliminary decision Utmost drew the Ombudsman's attention to the reasons why it considered it was entitled to act in the way that it did. While it is not necessary for this court to make a conclusive finding on the construction of the policy, it can be observed that the arguments made by Utmost were conventional and not based on any strained interpretation of the terms. The main arguments were that the definition of "*disability*" was not a continuing definition. There were two distinct phases to be considered, the period of 24 months after the deferred period, and then the period after that initial 24 month period. At the conclusion of the initial period, the criteria for receiving benefit changes in a significant manner.

96. Next, it was argued that under the proper construction of the contract, the policy terms meant that it was for the claimant to establish eligibility. Here the term "*burden of proof*" is not entirely apt, but I accept that there is a strong argument that, under the contract, it is a matter for the claimant to show eligibility, rather than it being for Utmost to demonstrate ineligibility. There is no suggestion in the contractual terms that the benefit will continue to be paid beyond 24 months unless or until the provider shows that the claimant is ineligible. This makes practical sense in that the claimant is the person who is saying they are unable to return to work and the claimant likely will have the immediate medical evidence to support such a contention.

97. Next, there was a broader argument that from an industry perspective it is not feasible to provide indefinite cover for safety critical roles. Like any insurance policy, there is a balance to be struck between the extent of cover and the costs of cover. Utmost contended that this was an active consideration in the bargain struck between it and Iarnród Éireann.

98. Finally, the argument was made that having regard to the necessity for the claimant to establish eligibility it was not contractually necessary for the provider in effect to prepare a schedule of all rail operative occupations and associated duties and then consider whether the claimant's injury or illness prevented him from carrying out any of those duties.

99. To a very large extent, in the final decision, the Ombudsman did not engage with those arguments in any clear way and, in reality, avoided engaging with the question of identifying how the relevant decision was structured under the contract. In those premises it seems to the Court that there was a particular need for the Ombudsman to explain clearly and by reference to some objective criteria why the conduct complained of was unreasonable or otherwise improper if there was to be no clear finding on the contractual relationship, or if arguably there was going to be a finding that the conduct was unreasonable notwithstanding the contractual terms.

100. The Ombudsman seems to have found that Utmost was obliged to identify the alternative rail operative occupations and to establish whether Mr G could carry out those duties. It was not explained why this was required. Moreover, there was no real engagement with the fact that Utmost had been advised by an independent consultant psychiatrist that Mr G in fact could engage in other rail operative occupations, or why it was unreasonable for Utmost to place reliance on that advice.

101. There was no reference to or reliance on any code of conduct, best practice or other reliable objective measure for the finding that the conduct was unreasonable, particularly where the Ombudsman did not appear to make a finding on the contractual obligations. As noted above, the Court of Appeal has identified the need for reasonableness findings to be rooted in

objective criteria, such as codes of conduct. This has been identified as a necessary element in formulating a finding on the grounds of reasonableness, but it is strikingly absent from the final decision.

102. I accept as a general proposition that the Ombudsman has extensive expertise in reviewing the reasonableness of the conduct of financial services providers, and a degree of deference certainly is warranted. However, where a finding of unreasonableness is made without reference to any objective criteria, it potentially transforms the analysis from an objective assessment into a "*because I say so*" assessment. I do not accept that this is what the jurisprudence to date on the Ombudsman authorises.

103. It is also important to record that I am satisfied that the remedies directed were disproportionate and illogical. The Court of Appeal in *Utmost v. FSPO* has made clear that the discretion regarding remedies is broad but, like any discretion, it must be exercised in a logical and proportionate manner.

104. Here the finding was that Utmost did not conduct its assessment of the claim reasonably and that the decision to cease paying benefits was unreasonable. That is not the same as a finding either that as a matter of law that Mr G was in fact entitled to claim the benefits for the post 24 month period or that for some other reason he should have been paid the benefits.

105. I do not accept the Ombudsman's argument that this decision is sufficiently different to the decision in *Utmost* decided by the Court of Appeal to make it properly distinguishable. The introduction of the "*rider*" to the direction to the effect that the claim could be revisited by Utmost does not address the fact that Utmost will have to pay an amount equal to the benefits

that would have been paid to Mr G between the end of February 2017 to the date of payment. The reality is that the remedy amounts to a direction that Mr G should receive a sum reflecting the benefits that could have been paid between February 2017 to date without a proper decision ever being made on the threshold question of whether he was entitled to the payment in the first place. Even if it is presented slightly differently to the remedy in *Utmost v FSPO*, the effect is the same.

106. Framing the remedy as "*reinstating*" the benefits does not make sense if there was no finding that Mr G was entitled to them in the first place. Whatever else can be said about the effect of the policy, it is clear that there was no automatic entitlement to ongoing payments after the initial 24 month period had expired. At the expiration of the initial 24 month period, it was necessary for the situation to be revisited and reconsidered by reference to the definition of "*disability*" that then became applicable. Logically, if the findings of the Ombudsman were correct, the proper course was to require a two-step process: (a) the decision should be reconsidered by Utmost in what the Ombudsman considered to be a proper way, and (b) at that stage if there was a finding that on the expiration of the 24 month period Mr G indeed met the new criteria, he should be paid what ought to have been paid from that date.

107. The remedy is disproportionate because on a proper analysis it may transpire that Mr G was not eligible. The remedy directed that Mr G should receive the payment without it being established if he was medically unfit to perform the duties of any rail operative occupation.

108. The further direction regarding payments to reflect any tax disadvantage to Mr G was seriously flawed in my view. In the first instance the direction is defective as it flows from the primary remedy, which is flawed on its own terms. The following additional matters are also apparent:

(a) Utmost had made clear that it was operating a Revenue approved scheme and that it was obliged to operate the scheme by making deductions in the manner directed by the Revenue Commissioners. This was not engaged with properly by the Ombudsman.

(b) There was no proper acknowledgement of the self-evident practical difficulties of giving effect to the direction where Utmost had no knowledge of Mr G's tax affairs and where the correspondence demonstrated that there was a very poor relationship of trust between Mr G and Utmost such that serious problems could be anticipated in complying with the direction.

(c) Perhaps more significantly, there was no evidence adverted to in the body of the final decision and no discussion of the potentially different effects on Mr G from a tax perspective of payments being made by way of a lump sum as opposed to by the regular periodic payments that were provided for in the policy. As such there is no apparent evidential foundation in the findings for the remedy directed.

109. A final argument from Utmost was that the Ombudsman did not specify the time within which the directions were to be complied with. Section 60(8) of the Act of 2017 obliges the Ombudsman to specify a period within which a direction is to be complied with by a financial services provider. That period is important, both from the perspective of the need to ensure that there is certainty about the parties' respective obligations, but also from the point of view of the consequences of a failure to comply with a direction. First, a failure to pay an amount specified in a direction may also give rise to a liability for Courts Act 1981 interest from the date that should be specified in the direction. Second, the Act of 2017 includes enforcement provisions in section 65, which can include applications for enforcement in the Circuit Court. Hence there is a need for certainty in any directions that are given, including certainty around the periods within which directions to pay monetary amounts must be discharged.

110. The Ombudsman argued that this was not a serious or significant error and that this court, under section s.60(4) of the 2017 Act had a power to insert a time period. It is not necessary for this appeal to determine whether this failure was a serious or significant flaw, as the appeal is being decided on more substantive grounds. However, it is not very convincing to expect that a party should have to appeal to the High Court in order to rectify an error in a decision of this nature, while at the same time suggesting that the error is not serious or significant.

111. Ultimately, for the reasons set out above, I am satisfied that Utmost has proved that the decision of the Ombudsman was flawed and vitiated by serious and significant errors.

a. There was no proper consideration given to the contract underpinning the relationship between the parties.
b. There was no explanation by reference to any objective measure or metric of why the Ombudsman found that the conduct complained of fell foul of section 60(2)(b) and (g) of the 2017 Act. Added to that issue, the Ombudsman did not connect the findings that were made to the specific terms of the statutory provisions, which adds to the confusion about precisely what informed the decision.
c. The remedies were not proportionate or reasonable.
    i. The direction to reinstate benefits in effect amounts to a direction that the claim should go into payment, backdated to the end of February 2017, when Utmost already had decided that contractually it was not an eligible claim. That finding effectively imposes a contractual obligation on Utmost when there was no logically prior finding that declining the

claim was contrary to law, or any finding that Mr G met the eligibility criteria in February 2017.

ii. The direction that the reinstatement of benefits should be effected in a way that compensated Mr G for any tax disadvantage that may follow from receiving a lump sum rather than monthly payments was unreasonable.

iii. There was no engagement with or consideration of how such an outcome could be achieved in light of the observations that had been made by Utmost following the preliminary decision about its ability to comply with that form of direction.

iv. There was no evidence before the Ombudsman from Mr G (or certainly no reference to such evidence being obtained) to explain precisely how he would be impacted by the payment of a lump sum.

v. The direction carried real legal consequences for Utmost in terms of an obligation to comply, but no provision was made for resolving the potential difficulties that they had flagged if they transpired.

d. The Ombudsman did not specify the time within which the directions were to be complied with, which potentially leads to very serious scope for confusion and further disputes.

THE COURT'S ROLE

112. Section 64 of the 2017 Act provides as follows:

"*64. (3) The orders that may be made by the High Court on the hearing of an appeal under this section include (but are not limited to) one or more of the following:*

(a) an order affirming the decision or direction of the Ombudsman, subject to such modifications as it considers appropriate;

(b) an order setting aside that decision or any direction included in it;

(c) an order remitting that decision or any such direction to the Ombudsman for review with its opinion on the matter;

(d) such other order in relation to the matter as it considers just in all the circumstances;

(e) such order as to costs as it thinks fit;

(f) an order amending the decision or direction of the Ombudsman, as the case may be."

113. In the circumstances the court will make an order setting aside the decision of the Ombudsman dated 14 January 2020 and remitting the decision to the Ombudsman.

114. As this judgment is being delivered electronically, I will list the matter before me at 10.30am on 11 September 2024 to address any arguments on the final form of orders and costs. My provisional view is that the appellant, Utmost is entitled to its costs, but the parties may wish to make arguments in that regard. The parties are invited to seek to come to agreement on the appropriate form of final orders in advance of that listing.