

Before the Arbiter for Financial Services

Case ASF 100/2023

EL

(Holder of Portuguese Identity Card No.
XXXXXXX)

(‘the Complainant’)

vs

ONEY Insurance (PCC) Ltd (C53202)
(‘the Service Provider’)

Sitting of 30th April 2024

The Arbiter,

Having seen the **Complaint** made against ONEY Insurance (PCC) Limited (C53202) (‘ONEY Insurance’) and ONEY Life (PCC) Limited (C53199) (‘ONEY Life’) (‘the Service Provider’) relating to the denial of the insurance claim number 4260995 which was filed by the Complainant with the Service Providers and related to credit protection insurance.

The Complaint, in essence, relates to the Complainant’s claims of abusive behaviour because the Service Providers are relying on an exclusion clause in the contract of insurance that limits the insurance cover to unemployment arising out of extinction of the job in question or out of collective dismissal, whereas in the Complainant’s case the occupation was terminated by the employer during the probation period which coincided with the national lockdowns in reaction to the Covid-19 pandemic in 2020.

The Complainant claims that the exclusion clause cannot be relied on in such exceptional situations and that furthermore he was never informed of the

details of the exclusion clause and was not able to understand it. He also complains that ONEY Insurance failed to provide him with records on changes in subscription when the insurance underwriting company was changed.

The Complaint¹

In his complaint form, the Complainant explained that the claim 4260995 for CBP in the name of Company Oney Insurance (PCC) Ltd and Oney Life (PCC) Ltd refers to the denial of compensation for a credit protection insurance.

The Complainant explained that the above-mentioned company denied the payment of the compensation invoking the clause reproduced below which the Complainant translated from Portuguese into English:

“After submitting your claim to the insurance company, the latter carried out a new analysis of the claim, and communicates that he cannot accept his request for compensation, given that his unemployment situation of 04/25/2020 is excluded by the General, Special and Particular Conditions of the Insurance contracts linked to bank operations n° 100343867 and n° 100612168. We inform you that in article n° 1.24 of the operation contract n° 100343867, as well as in article n° 1.27 of the operation contract No. 100612168, defines the guarantee of “Unemployment due to Extinction of the Job or Collective Dismissal” as the situation arising from the total or involuntary lack of employment of the Insured Person due to collective dismissal or dismissal due to the extinction of jobs, one and/or the other, which have been in force for a period longer than twelve consecutive months (...).

Therefore, in article 45 of both contracts (Exclusions), it is specified that situations of termination of employment for any reason other than termination of employment or dismissal collective agreement, as well as situations of termination of an employment contract that has been in force for a period less than twelve months.

According to documentation sent by you, the reason for your unemployment dated 25/04/2020 is the termination of employment contract during the trial period, which had started on 10/28/2019. In As a result, the insurance

¹ Complaint Form on Page (P.) 1-8 with supporting documentation on P. 9-55.

company finds that it is not a question of the extinction of the job or collective dismissal, and which had a period of validity of less than twelve months.”

The Complainant submitted that the abusive behaviour relates to the fact that both the Mediator (indicated as Oney Bank) and the Insurance Company belong to the same economic group, and it seems to him that they may be abusing their dominant position for economic gains.

The Complainant added that, moreover, the insurance was active since 2008 and there was a change in the Insurance Company that he was not informed of by the Mediator (Oney Bank) neither the Insurer (Oney Insurance (PCC) Ltd and Oney Life (PCC)).

The Complainant informed the Arbiter that he never received any letter informing about the change of Insurance Company, and the Mediator (Oney) failed several times in the duty to provide information, when he was told several times that the insurance covered involuntary unemployment only, with no mention to any probation period. It was added that, when questioned regarding the coverage of the insurance via telephone, they never mentioned that involuntary unemployment in the probation period was a reason for exclusion.

The Complainant submitted that the Service Providers admitted that they do not have the record of the letter.

It was added that, furthermore, the contract the Complainant held was completely illegible and that the particular conditions, here the exclusion clauses invoked are written, of the contract were extremely difficult to read, as is apparent from the documentation attached to the Complaint.

The Complainant submitted that there was never informed consent regarding the exclusion clause.

It was added that the insurance company failed to provide records of changes in the subscription (it was submitted that they changed the insurance company) which occurred in 2010, according to their email.

The Complainant submitted that it is extremely repulsive how they rely on an exclusion clause to oppose a claim of involuntary unemployment that occurred

during the initial period of the Covid-19 pandemic and the first national and global lockdown in March 2020, on which this clause should not apply, since, it was submitted, the insurance company cannot assess, nor has the competence to assess, whether employment could be maintained if they were not in an exceptional period at a global level, during which employment could not be secured and fell to record lows.

The Complainant submitted that he would like the Arbiter to explain to the Service Providers how resorting to this clause cannot be applied in exceptional situations such as a global Covid-19 pandemic and national lockdowns, in which the right to employment becomes unfeasible in many professions, including the one the Complainant had at the time and for which breakdown in the volume of work was notorious. It was added that many people in similar situation in the Complainant's company at the time were fired while still in the probation period.

The Complainant submitted that he would appreciate if the Arbiter could assist in mediating this situation and appeal to the insurance company Oney Insurance (PCC) Ltd and Oney (PCC) to pay for the compensation.

The Complainant listed the following reasons why the Service Providers let him down:

1. It was submitted that they failed the duty of proactive information regarding the exclusion clause.
2. It was submitted that the insurance company failed to provide records of changes in the subscription (it was explained they changed the insurance company) which occurred in 2010, according to their email.
3. It was submitted that they rely on an exclusion clause to oppose a claim of involuntary unemployment that occurred during the initial period of the Covid-19 pandemic and the first national and global lockdown in March 2020, on which this clause should not apply, since the insurance company cannot assess, nor has the competence to assess, whether employment could be maintained if we were not in an exceptional period at a global level, during which employment could not be secured and fell to record lows.

4. It was submitted that this clause cannot be applied in exceptional situations such as a global Covid-19 pandemic and national lockdowns, in which the right to employment becomes unfeasible in many professions, including the one the Complainant had at the time and for which breakdown in the volume of work was notorious. It was added that many people in similar situations in the Complainant's company at the time were fired while still in the probation period.

Remedy requested

The Complainant submitted that he is seeking compensation for 10 months of payment of monthly instalments during the involuntary unemployment period, between 26th April 2020 and 30th July 2021, of 10% of total debt to be served per month.

The Complainant provided an estimate of €200 per month over 10 months and therefore requested €2000 in compensation.

Having considered, in its entirety, ONEY Life's reply,²

Where the Service Provider explained and submitted the following:

1. ONEY life submitted that Mr EL has referred to the Arbiter a mediation file concerning a claim they have refused to cover. It was explained that this claim is due to an unemployment period. Thus, as this claim does not concern the death risk, it was noted that Oney Life is not involved in the coverage of this contract. It was submitted that only Oney Insurance PCC is concerned.

Having considered, in its entirety, ONEY Insurance's reply of 07 August 2023, including attachments,³

Where the Service Provider explained and submitted the following:

1. ONEY Insurance noted that in 2008, the Complainant had subscribed a loan with Oney Bank with a loan insurance (it was noted that at this

² P. 68

³ P. 69-119

moment, the insurer was AXA). It was explained that the exclusion of guarantee clause stipulated that the unemployment due to a termination of probational period by the employer was not guaranteed.

2. It was explained that on the 27th of April 2020, the Complainant became unemployed due to the termination of the probational period by his employer because of the Covid-19 pandemic. It was noted that the Complainant is currently being sued by Oney Bank for payment of the loan outstanding and that the Complainant is asking Oney Insurance to guarantee its claim and cover the outstanding loan.
3. It was noted that in this regard, Oney Insurance is refusing to cover the claim basing its position on the exclusion of guarantee clause. It was submitted that they will inform the client and his legal representative by mid-next week.

Hearings

During the first hearing of the 6 November 2023, it has primarily been agreed⁴ that despite the complaint was originally lodged against both the general insurance company and the life company, the complaint is in fact against the former, and hence, any reference made to the Service Provider refers to the general insurance company.

The Complainant then declared that:

“Thank you for this opportunity, first of all.

I will make a summary of this the best way I can. The insurance I subscribed to back in 2008; I was informed during the period between 2008 and 2020, when this situation arose that the cover I had was for involuntary unemployment. That was my understanding even during the initial stages of the, let's say, accident that I claimed, the event that I claimed the compensation for.

Even during that period, I contacted Oney Insurance through their provider in Portugal, and their mediator, which is Oney Bank in Portugal. And, I was told that I had cover for involuntary unemployment. And there was never mentioned in any contact about any exclusion clause or particular conditions

⁴ P. 120

as they call it. Moreover, it was a very old insurance. I was never, never informed about the particular situation, so the duty in my perspective is the duty of proactive information which was never fulfilled by the mediator, who is the representative. However, when I contacted the insurance itself for the unemployment claim, I was never told either that I had particular conditions, and that's one of the aspects.

This is just one of the aspects of my contention with the insurance. So, this is the proactive duty of information that never was fulfilled by the insurance company.

Now the second part, which is also very important, is about the exclusion clause itself. So, one of the claims - because I have an ongoing case with the court here in Portugal, with the bank and one of the contentions that is under the embargo, because the Court case that was filed against me is on an ongoing embargo by the judge here, the Court, and one of the contentions that I presented against the Bank was the fact that the insurance coverage in the clause itself is abusive.

And this is one of the main reasons for my problem here is that exclusion clause does not have anything to do with the object of insurance. The object of insurance is involuntary employment; every other clause is inserted in the contract with the purpose of benefiting one of the parts. In this case, both the insurance and the bank are part of the same group, economic group. So, this is for economic profit, economic benefit of one of the parts. This is, in my perspective, not legal.

Then, we have a third aspect of this contention which is the context. The context for me is also very important. This happened. So, let's say that the accident that I have claimed for happened during the first global lockdown. So, they use a clause, the exclusion clause for probation period because I was in probation. I mean, this is completely nonsense because we are in a global lockdown, there were many people; I mean, my own team where I worked, which, by the way, was a bank. So, we had a lot of people who were sacked at the same time. In my team, a couple more, like me.

So, this has nothing to do with the probation period. This is an abusive interpretation of any possibly, I say, illegal clause, because I have to tell you

that I came to find out, at least from my research, that in Portugal for credit protection, I could not find any other insurer that had this exclusion clause. No other insurance company had this exclusion clause in credit protection, at least to my knowing. I researched like four or five. I don't know if I covered them all, but my impression was that this clause is not part of any other contract from any other insurance, at least for credit protection that I researched in Portugal.

So maybe there's something to it, I say, while no other insurance uses this exclusion clause for probation period. I mean the object is involuntary unemployment. This is the object. The object is not the probation period. This is for the economic benefit, for the profiteering of an economic group and the insurance company and the bank are part of the same economic group. I say that this is my contention. I believe I laid it all out.”⁵

The Arbiter pointed out that documents in Portuguese have been submitted, and only in one case, a Google translation was provided. It was made clear that the office cannot consider anything that is not in the local language or in the English language, and hence, the content of the document with page number 21 to 55 will not be considered as no translation facilities are provided by the same office. It was noted however that an English Google translation was provided for document on page 73 to 105.

During the same hearing, the Arbiter clarified whether the exclusion being referred to is that in clause 1.27, with the Complainant replying in the affirmative that the clause is that relating to the probation period. Referring to the same clause (P. 108 of the process) which says ‘... provided that, in any of these cases, the Insured Person is registered with the respective Employment Centre’, the Arbiter asked the Complainant whether such evidence can be provided. The Complainant replied that:

“Yes, but it's in Portuguese. The judge asked for the same documents last week. So, we have to send them those documents. I have them ready but, unfortunately, they are in Portuguese, but they are the Social Security here, Unemployment and Voluntary Unemployment. They are short documents, just 2 pages.”⁶

⁵ P. 121 - 122

⁶ P. 123

A copy⁷ of such document, that is, the proof of the involuntary unemployment status was submitted.

During the second hearing of the 15 January 2024, Quentin Castellano on behalf of the Service Provider, declared that he will not cross-examine the Complainant on the evidence he provided during and after the previous hearing.

He then submitted that:

“From our point of view, the case is not a big issue because the fact is that considering the contract signed by the client and all the communications that we have had together with the documents provided by Mr EL, we declare that we cannot cover the claim.

This is because in our contract it is mentioned that unemployment due to termination during the probational period is not covered. In the contract signed with us, it is mentioned that we cannot cover the claim because it is contractually excluded.

So, unless we are proven that this clause is abusive, and I have checked legal cases in many countries (not only in Portugal) to make sure that it was compliant, then we cannot cover the claim.”⁸

The Service Provider then declared that they have no more proofs to submit.

During the cross-examination, the Service Provider’s representative declared that:

“Asked on what legal basis we are claiming that the clause is not abusive, I say that it is not up to us to prove that it is not abusive. If the complainant proves to us by means of a legal decision that this clause is abusive but for us it is not abusive.

To be abusive and not to be effective, an exclusion in a clause must be imprecise or take off all the meaning of the guarantee which means that for unemployment if this clause had failed to uncover all the situations of unemployment, it would be abusive. Or if the clause was not precise enough it

⁷ P. 124 - 126

⁸ P. 129 - 130

could be considered from a legal point of view and from my analysis as abusive which, in this case, it is actually not.

Should the Arbiter find that this clause is abusive, we will revise our contracts and will cover for future cases. But for now, as it is not proven that it is abusive, and since I have not found a legal case stating it for now, or even a law saying that it is abusive, for this case we are relying on contractual freedom which means that we are free to make any rule in our contracts as long as our clients consent to it when they sign the contract.”⁹

Following such hearings, the Complainant presented his final submissions¹⁰ to the Arbiter.

Having seen the statements by the Complainant

Having seen the statements by the Service Provider

Considers

The Complaint mainly revolves around the fact of whether payments due to the Bank during the period the Complainant was unemployed, should in fact have been paid by the Service Provider under the *Credit Protection Insurance*.

The Arbiter shall determine and adjudge a complaint by reference to what, in his opinion is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.

The Complainant stated that, in the year 2020, also during the Covid-19 pandemic, he was, involuntarily, left unemployed. He lodged a claim, which however was denied with the Service Provider indicating that termination of an employment contract during the trial period is excluded.

The Service Provider’s representative declared that:

“... we cannot cover the claim. This is because in our contract it is mentioned that unemployment due to termination during the probational period is not

⁹ P. 130

¹⁰ P. 132 – 134

covered. In the contract signed with us, it is mentioned that we cannot cover the claim because it is contractually excluded.”¹¹

A copy of the applicable insurance policy was presented by the Complainant together with the original complaint form, which however, was in Portuguese¹². However, a translated version¹³ of the same document was presented to the Arbiter by the Service Provider in its reply.

When requested by the Arbiter to clarify whether the exclusion he is referring to is Clause 1.27, the Complainant replied in the affirmative.

Referring to the policy document in question, Clause 1.27 falls under the *Definitions*¹⁴ section, which in turn falls under the *Section 1. General Conditions Provisions Common to Protection of Life and Not Life*. By virtue of such clause, *Unemployment due to Termination of Job or Collective Dismissal or (“Unemployment”)* is defined as:

“Situation resulting from the total and involuntary lack of employment of the Insured Person/Insured Person due to collective dismissal or dismissal due to the job termination, one and/or the other, which have been in force for a period exceeding 12 consecutive months, justified by economic or market, technological or structural reasons, relating to the employer, or unilateral dismissal by the employer, provided that, in any of these cases, the Insured Person/Insured Person is registered with the respective Employment Centre.”¹⁵

The Complainant had in turn submitted evidence¹⁶ to the Arbiter indicating that the employment in question was in fact registered with the Employment Centre, whereby such document shows further details of the employment in question, including the reason for termination of the employment contract, that is, *“Termination of contract during the trial period”* and the termination date being the 24 April 2020.

The Arbiter understands the clause being quoted by the Service Provider in repudiating the claim, but however, analysing the policy document in its

¹¹ P. 129

¹² P. 25

¹³ P. 108 – P. 119

¹⁴ P. 108

¹⁵ *Ibid.*

¹⁶ P. 125 – P. 126

entirety, notices another Section, referred to as ***Special Conditions – Non Life Protection Common Provisions for Non-Life Protection***¹⁷. Considering that the claim in question is a non-life claim, this is another section of the policy which applies. Sub-section **37. Definitions** is included under such Section.

Definition 37.10 is ‘*Unemployment due to job termination or collective dismissal or (“Unemployment”)*. This is defined as:

*“Situation arising from the total and involuntary lack of employment of the Insured Person/Insured Person due to collective dismissal, dismissal due to job termination justified by economic or market, technological or structural reasons, relating to the employer, or dismissal unilaterally promoted by the employer, provided that, in any of these cases, the Insured Person/Insured Person is registered in the respective Employment Centre.”*¹⁸

Crucial to note that under this definition, there is no reference to the probation period, or more specifically, to the fact that the employment had to be in force for a period exceeding twelve months.

This means that the applicable policy contains two definitions of “Unemployment” which seem to contradict each other. One is conditional on the employment being in force for a period exceeding twelve months. The latter is contained under the Section 1 – *General Conditions Provisions Common to protection of Life and Not Life clause 1.27*, whilst the other definition is contained under the Section titled *Special Conditions – Non-Life Protection Common provisions for non-life protection clause 37.10*.

The Arbiter believes that, as previously noted, considering that the claim in question surely falls under the Non-Life element of the policy, and hence being determined that the Service Provider in question is the general insurance company, the definition most applicable in this case is the one under the *Special Conditions – Non-Life Protection Common provisions for non-life protection*.

Special Conditions supersede the *General Conditions* as despite the *General Conditions* apply to the whole policy, the *Special Conditions* apply solely and specifically to the *Non-Life Protection*.

¹⁷ P. 113

¹⁸ P. 114

Above all, it is only fair and reasonable that a policyholder will always be given the benefit of the doubt in case of contradictions in the same policy document, as in this case.

Furthermore, even in the absence of such contractions in the policy wording, the Arbiter would also have sympathy with the argument that even if the policy had unambiguously excluded cover due to termination during probation, the substantial rationale for such exclusion is to protect against abusive behaviour of regular loss of employment which can put in doubt the element of the dismissal being involuntary. In the circumstances of the Covid-19 pandemic there can be no doubt on the involuntary nature of the dismissal.

Decision

As it has been previously noted, the main reason provided by the Service Provider behind the claim repudiation was with reference to dismissal during the probational period.

As this reason for refusal has been overruled by the specific provision as above explained, the Arbiter decides that it is fair and reasonable for the Complainant to be reimbursed for the losses sustained and in terms of **Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, is ordering Oney Insurance (PCC) Limited to reimburse the Complainant with the sum of €2,000.**¹⁹

¹⁹ No arguments have been raised by the Service Provider about the quantum of the claim. Their only objection was related to exclusion condition and not the amount of the claim. Also, the Arbiter made some effort to understand, through automatic translation facilities, that this is the amount actually covered by the policy.

With interest at the rate of 4.5% p.a.²⁰ from the date of this decision till the date of payment.²¹

Costs of the proceedings are to be borne by the service provider.

Alfred Mifsud
Arbiter for Financial Services

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

²⁰ Equivalent to the current Main Refinancing Operations (MRO) interest rate set by the European Central Bank.

²¹ It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.

Costs of the proceedings to be borne by the Service Provider

The costs of the proceedings are not limited to the payment of any applicable cost of filing the Complaint with the Office of the Arbiter for Financial Services (presently Eur25) but may also include any reasonable lawful professional and legal fees paid by the Complainant limited to the acts filed during the proceedings of the case. Such professional fees should not include any extra-judicial fees and charges.

Whilst there exists no tariff about proceedings before the Arbiter nor such aspect is provided for under Chapter 555 of the Laws of Malta, it is being underscored the fact that the Office of the Arbiter for Financial Services is an Alternative Dispute Resolution Entity (ADR Entity). Therefore, the costs of the proceedings before the Arbiter cannot be higher than those prevailing for Court proceedings in Malta but are expected to be lower.

The Arbiter is inspired in this respect by the provisions of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes ('the ADR Directive') which clearly state that proceedings before an ADR Entity should *inter alia* be inexpensive so as to encourage consumers to seek a remedy for the solution of their disputes in a manner they can afford.

The ADR Directive insists on the low-cost nature of these proceedings. For instance, it provides that customers should have access to '*simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes*'²² and that '*Alternative Dispute Resolution (ADR) offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders.*'²³

The Arbiter accordingly directs the parties to take cognisance of the said principles listed in the ADR Directive. In reaching an agreement on the costs of

²² Preamble (4) of the ADR Directive (EU/2013/11)

²³ Preamble (5) of the ADR Directive (EU/2013/11)

the proceedings payable, the parties should accordingly be guided by the principle of a '*low-cost out-of-court solution to disputes between consumers and traders*'.²⁴ The benchmarks on fees as legally stipulated for civil procedures in Malta may also provide certain guidance.²⁵

²⁴ *Ibid.*

²⁵ Tariff E, Cap. 12, Code of Organization and Civil Procedure