

The complaint

Mrs M complains about the decision by Aviva Life & Pensions UK Limited to terminate her income protection claim and cancel her cover.

What happened

Mrs M is covered by her employer's income protection scheme, the aim of which is to pay an income in the event she can't work because of illness or injury.

In 2014, Mrs M stopped work after an accident. A claim was submitted to Aviva, which was accepted.

In 2020, Aviva terminated Mrs M's claim and cancelled her cover, as it thought she was carrying out another occupation and had withheld information from it. Unhappy with this, Mrs M brought a complaint to this service.

Our investigator didn't recommend the complaint be upheld. She thought, based on the available evidence, that Aviva's actions had been reasonable.

I issued a provisional decision on 20 June 2022. Here's what I said:

"The scheme terms say that cover may be terminated if an employee has failed in their duty of utmost good faith by supplying misleading, incorrect or incomplete information to Aviva.

When the claim was reviewed in 2015 and 2016, Mrs M told Aviva she wasn't receiving an income and that she hadn't undertaken paid or unpaid work/an alternative occupation. Aviva thinks that Mrs M was deliberately withholding information about her work activities by saying this. I disagree, and I'll explain why.

Mrs M visited car boot sales and local auctions, and sold items that she'd purchased. However, Mrs M says she saw this as a hobby rather than work and that she didn't seek to make an income from this. Mrs M didn't keep records of her sales, and has explained that she interpreted income that Aviva asked about as being income that was taxable.

Mrs M has since found out that only gross trading income up to £1,000 is exempt from tax. Whilst Aviva was looking into Mrs M's selling activities, she arranged for an accountant to look at her historical financial information. I understand that between 2015/16 and 2018/19, Mrs M's gross trading income did exceed £1,000, though her gross profit was much lower. The only time her gross profit exceeded £500 was in 2018/19.

Mrs M's accountant reviewed her bank statements and online payments account statement, and believed that the transactions were that of a hobby rather than a business. They confirmed a loss had been made for each of the years (taking into account Mrs M's allowable expenses).

Given that Mrs M viewed her selling activities as a hobby rather than work, and taking into account the low amount of profit she was making, I can understand why she didn't realise she ought to have declared her selling activities to Aviva at the 2015 and 2016 reviews. That doesn't mean that she deliberately tried to mislead Aviva.

Crucially, during Aviva's review in 2018, Mrs M did tell Aviva about her selling activities. First in the review form, and then she provided further details, via her employer, in December 2018. Her selling activities had increased by that point, and she had hired a glass cabinet in a local antique centre from which she sold items. Aviva then arranged for Mrs M to see a nurse, and she was open about her selling activities to the nurse.

Aviva has referred to some discrepancies in Mrs M's explanations. For example, in 2019 she told Aviva's representative she only sold clothes on a social media selling site, but Aviva found posts from 2017 and 2018 where she'd sold other items on that site. However, these were only a few items, and this was some time before Mrs M said she only sold clothes on that site. So I don't think this is enough to say that Mrs M deliberately gave Aviva misleading, incorrect or incomplete information - she'd already made Aviva aware that she was buying and selling items, including online.

I do understand why Aviva was concerned about Mrs M's buying and selling activities, and I think it was reasonable for Aviva to look into this in more detail. However, taking all the evidence into account, I don't agree with Aviva that Mrs M deliberately tried to mislead it about her activities, and so I don't think Aviva acted fairly by terminating Mrs M's cover. I therefore intend to require it to reinstate her cover under the scheme.

I've also considered Aviva's decision to terminate Mrs M's claim because it thinks she was carrying out another occupation.

The scheme terms and conditions define incapacity as:

"...a member is incapacitated, by reason of illness or injury, when the insurer is satisfied that the employee is incapable of performing the material and substantial duties of his or her own occupation and is not following any other occupation."

Aviva believes that Mrs M was working as a trader. Her Majesty's Revenue and Customs (HMRC) says that someone is likely a trader if they sell items on a regular basis, or sell a similar item on more than one occasion over a period of a year. I think Mrs M would fit this description. Whilst I accept that Mrs M would be considered a trader for HMRC purposes, that alone doesn't necessarily mean that this was her occupation. The policy doesn't define what's meant by occupation. Though another policy provided by Aviva defines occupation as 'work undertaken for profit, pay or reward'. I think that's a reasonable description.

Aviva thought Mrs M was selling items in order to make a profit. Whilst I appreciate that Mrs M wasn't trying to make a regular income from her selling activities, I think it's reasonable to say she was trying to make a profit (even if she wasn't always successful). If Mrs M had only sold items occasionally, I might've been inclined to agree with her that it was a hobby. But given how regularly she was selling items, I'm persuaded that she was carrying out another occupation.

However, the policy offers proportionate benefit. It says that if an incapacitated member returns to work but earns a lower wage, then the benefit will be reduced.

We've asked Aviva about this. It makes the point that since this is a group scheme,

proportionate benefit could only be paid in this way if the policyholder (Mrs M's employer) allowed her to have the alternative occupation and continued to keep her on their payroll.

As I understand it, Mrs M's employer is aware of her buying and selling activities and has continued to keep her on the payroll. It therefore seems to me that a reasonable way forward would be for Aviva to reinstate the claim and pay proportionate benefit due to Mrs M (taking into account any profit she's made from her buying and selling activities).

Going forward, Aviva/Mrs M may wish to establish with the policyholder that they remain happy for Mrs M to continue with her other occupation. If not, then it would be up to Mrs M to decide if she wishes to continue with her buying and selling activities.

Finally, Mrs M has raised concerns that Aviva hasn't considered her claim in accordance with the correct terms and conditions. However, the terms that apply to the claim are those that were in existence when Mrs M initially stopped work, so I'm satisfied that Aviva has used the correct terms when assessing the claim."

I asked both parties for any further comments they wished to make before I made a final decision.

Aviva responded and made the following points:

- It says it's clear that Mrs M did keep records of her previous sales, as she was able to provide her accountant with information from 2015.
- It says it took into account Mrs M's medical condition and made attempts to clarify the extent of her activities by asking her to complete daily activity logs. It says this was a further opportunity for her to provide details as to the extent of her activities, yet she failed to do this.
- It says Mrs M only told Aviva that she bought and sold items online when asked by its agent, and so does not think this is the same as providing the information upfront.
- It remains of the view that it was right to remove Mrs M from cover under the scheme.

Mrs M's representative responded to confirm that Mrs M accepted my provisional decision. He asked if Mrs M could see the scheme terms and conditions. He also suggested that when calculating proportionate benefit, Aviva should look at net taxable profit.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I remain of the view expressed in my provisional decision. I'll explain why.

Aviva says that Mrs M was able to provide her accountant with information of her sales going back to 2015. I accept this. But the majority of the information in 2015 and 2016 related to online sales, and so it would've been relatively easily for Mrs M to go back and find out that information. The point I was making in my provisional decision was that Mrs M says she didn't keep track of the sales in 2015 and 2016 (when the claim was reviewed and she told

Aviva she wasn't working) as she didn't consider herself to be running a business.

Mrs M did keep a record of sales she had made from fairs in 2017/2018, though as I said in my provisional decision, her selling activity had increased by that point and she told Aviva about this in 2018.

Aviva has referred to daily activity logs that it asked Mrs M to complete. It has previously told this service that no buying or selling details were recorded on those logs. Though as far as I'm aware, we don't know that Mrs M did do any buying or selling activities on those days. So I can't say that Mrs M gave Aviva incorrect information in those daily logs.

Aviva says that Mrs M only told it that she bought and sold items online when she was asked by its agent. I note that Mrs M had voluntarily told Aviva before this that she enjoyed visiting boot fairs and local auctions and purchased items to sell. She also told it she rented a small cabinet in a local antique shop where she sold items, and that she often attended the shop to change the items. At that time, she didn't know how interested Aviva was in her buying and selling activities. It seems to me that Mrs M was telling Aviva about the physical aspect of what she perceived to be her hobby – in other words, going out to the fairs and auctions, and visiting her glass cabinet. I don't think that means that she was deliberately trying to conceal that she bought and sold items online as well.

Overall, whilst it's clear that Aviva feels strongly about this, I'm not persuaded that there's sufficient information for me to conclude that Mrs M deliberately gave Aviva misleading or wrong information. I therefore remain satisfied it would be appropriate for Aviva to reinstate the claim.

Mrs M's representative said that Mrs M would like to see a copy of the policy terms and conditions. I note that our investigator previously provided this document to Mrs M. I'm satisfied she has been provided with the correct policy terms that apply to her claim, and I don't require Aviva to share any later scheme terms.

Mrs M's representative has also made a suggestion on how Aviva should calculate proportionate benefit. I would expect Aviva to work this out based on the policy terms and conditions. If there's any dispute about this, Mrs M would need to raise this with Aviva as a new complaint.

My final decision

My final decision is that I uphold this complaint. I require Aviva Life & Pensions UK Limited to reinstate the claim and pay backdated proportionate benefit in line with the scheme's terms and conditions.

Interest should be added at the rate of 8% simple per annum from the date each payment was due to the date of settlement.

If Aviva considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mrs M how much it's taken off. It should also give Mrs M a certificate showing this if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 27 July 2022.

Chantelle Hurn-Ryan

Ombudsman