

The complaint

Mr P complains that The Shepherds Friendly Society Limited has turned down a claim he made on an income protection insurance policy and cancelled the policy from the start.

What happened

The background to this complaint is well-known to both parties and so I haven't set it out in detail here. Instead, I've focused on what I consider to be the main events.

In September 2018, Mr P took out a personal income protection insurance policy through a broker. During the sale, Mr P answered questions about himself and his medical history. He declared that he'd previously suffered from cancer; a skin condition; he'd had a polyp removed and that he had mild asthma. Based on the answers Mr P gave, Shepherds Friendly offered Mr P a policy on standard terms.

Unfortunately, in December 2021, Mr P had to make a claim on the policy because he was unable to work in his occupation due to severe asthma.

Shepherds Friendly investigated Mr P's claim. It requested medical evidence from Mr P's GP. While it waited for the GP to provide evidence, Shepherds Friendly paid Mr P a claim amount of £800.

However, based on the medical evidence Shepherds Friendly received, it ultimately decided to turn down Mr P's claim and cancel the policy. That's because it noted that Mr P suffered from long-term hip osteoarthritis; he'd suffered from joint pain; he'd been diagnosed with carpal tunnel syndrome (and the consultant's notes indicated he'd experienced pins and needles as a symptom). Shepherds Friendly said that Mr P hadn't declared these conditions when he applied for the policy and that had he done so, exclusions would've been applied to his cover. And based on the available medical evidence, Shepherds Friendly concluded that Mr P's asthma was moderate to severe. This would also have attracted an exclusion on cover. Shepherds Friendly said that in cases where more than two exclusions would've been applied to a policy, it wouldn't offer an income protection insurance policy. So it said it would never have offered Mr P cover had he fully disclosed his medical history.

Mr P was unhappy with Shepherds Friendly's decision and he asked us to look into his complaint. He provided evidence from his treating doctors which showed that his asthma would've been considered to be mild at the point he applied for the policy.

Our investigator didn't think Shepherds Friendly had treated Mr P unfairly. In summary, she considered that Mr P had made a qualifying misrepresentation under Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). She felt that Mr P had deliberately or recklessly failed to take reasonable care to answer Shepherds Friendly's questions accurately at the point he applied for the policy. She thought he ought reasonably to have told Shepherds Friendly about osteoarthritis; shoulder pain; the carpal tunnel symptom and the symptoms of pins and needles a consultant's letter stated he'd experienced. Shepherds Friendly had provided underwriting evidence to show that if Mr P had disclosed these conditions, it would not have offered him a policy. So the investigator concluded it had been

fair for Shepherds Friendly to decline Mr P's claim, cancel his policy from the outset and to retain the premiums he'd paid. Given that Shepherds Friendly would've declined cover based on osteoarthritis; shoulder pain and carpal tunnel syndrome, the investigator didn't think she needed to further consider whether Mr P had accurately disclosed his symptoms of and treatment for asthma.

Mr P disagreed and he provided detailed representations. I've summarised his response below:

- Both Shepherds Friendly and the investigator had seen him as a liar and a fraud. He had run a business truthfully and diligently for many years;
- Shepherds Friendly had had months to trawl through his medical records, but he'd gone through the telephone application after a long day at work and without the benefit of medical notes;
- He felt CIDRA made it clear that insurers shouldn't rely on 'catch-all' questions. Instead, it stated that questions should be clear and specific. He referred to case law which he felt supported his position and he referred to the principle of interpreting ambiguous questions in favour of the non-drafting party;
- Mr P felt that the screening questions he was asked were unclear and ambiguous. He questioned how he was supposed to know what information Shepherds Friendly wanted to know;
- He stated that he had never suffered from pins and needles – only pain. His GP records relating to carpal tunnel syndrome don't refer to pins and needles or numbness. He felt the consultant's letter which did refer to him experiencing pins and needles should be disregarded, as he said he hadn't discussed these symptoms with him during a short private medical appointment;
- In relation to osteoarthritis, Mr P said he'd experienced slight problems with his right hip which he'd seen the doctor about. He'd taken up swimming, which had helped him greatly and so when he was asked about arthritis, he'd correctly answered that he didn't have any current problems;
- He considered that Shepherds Friendly's question relating to joint pain was also ambiguous and unclear. He provided medical notes which showed that his shoulder pain was insignificant and wasn't a joint problem;
- He maintained that he had correctly answered Shepherds Friendly's questions relating to asthma;
- If he'd intended to deliberately or recklessly answer Shepherds Friendly's questions, it was odd that he'd contacted it to declare his skin condition after the initial application;
- Mr P didn't accept that he'd answered Shepherds Friendly's questions deliberately or recklessly. He maintained that he'd answered its questions to the best of his knowledge and belief, He said he was an honest person in need and he wished us to be impartial and to find that his claim was genuine. He felt Shepherds Friendly had distorted facts in order to avoid his claim.

The complaint was passed to me to decide.

Our investigator asked Shepherds Friendly whether, given Mr P had declared other conditions and had contacted it post the initial application to declare his skin condition, it would be prepared to treat the misrepresentation as careless. She acknowledged that Shepherds Friendly would still not have offered Mr P an income protection insurance policy. But she asked whether it would be prepared to offer Mr P a refund of the premiums he'd paid, less the claim amount it had already paid him.

Shepherds Friendly agreed to offer Mr P a premium refund, less the amount it had already paid out for the claim. So the investigator put this offer to Mr P.

However, Mr P turned down Shepherds Friendly's offer. He maintained that any incorrect answers he'd given to it had been done innocently. CIDRA said that if there was no qualifying misrepresentation, then an insurer had no remedy and a claim should be paid. So Mr P felt his policy should be reinstated and his claim paid. He also questioned whether I would be prepared to make a proportionate award under CIDRA and whether we would be able to negotiate a further settlement with Shepherds Friendly.

What I've decided – and why

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

Having done so, whilst I'm very sorry to disappoint Mr P, I think Shepherds Friendly's offer to refund Mr P's premiums, less the £800 it's already paid him, is fair and reasonable and I'll explain why.

First, I'd like to reassure Mr P that whilst I've summarised the background to his complaint and the detailed representations he's made to us and specifically to me, I've carefully considered all he's said and sent us. As our investigator explained though, I haven't commented on each point he's raised and nor do our rules require me to. Instead, I've focused on what I consider to be the key issues.

I'd also like to explain the role of this service. We are independent and impartial of both consumers and financial businesses. We assess the available evidence to decide whether a financial business has treated a consumer fairly and reasonably. While financial businesses may decide to make offers as a result of our involvement, we are not a formal mediation or conciliation scheme. Neither is it our role to enter into negotiations with a financial business on a consumer's behalf. So while I appreciate Mr P would've liked us to do more to try and negotiate a settlement with Shepherds Friendly, this wouldn't have been appropriate.

The relevant regulator's rules say that insurers must handle claims promptly and fairly. And that they mustn't turn down claims unreasonably. So I've considered, amongst other things, the law; the terms of the insurance contract; and the available medical evidence, to decide whether I think Shepherds Friendly handled Mr P's claim fairly.

The relevant law in this case is CIDRA. CIDRA requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract. The standard of care is that of a reasonable consumer.

And if a consumer fails to do this, the insurer has certain remedies provided the misrepresentation is - what CIDRA describes as - a qualifying misrepresentation. For it to be a qualifying misrepresentation, the insurer has to show it would have offered the policy on different terms - or not at all - if the consumer hadn't made the misrepresentation.

CIDRA sets out a number of considerations for deciding whether the consumer failed to take

reasonable care. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless. There is no provision for any other form of misrepresentation under CIDRA.

When Mr P took out the policy, he was asked information about himself and his medical history. Shepherds Friendly used this information to decide whether or not to insure Mr P and if so, on what terms. Shepherds Friendly says that Mr P didn't correctly answer the questions he was asked during the telephone screening he went through with the broker. This means the principles set out in CIDRA are relevant. So I think it's fair and reasonable to apply these principles to the circumstances of Mr P's claim.

Shepherds Friendly thinks Mr P failed to take reasonable care not to make a misrepresentation when he took out the policy. So I've considered whether I think this was a fair conclusion for Shepherds Friendly to reach. Like the investigator though, I don't consider I need to make a finding on whether Mr P took reasonable care to answer Shepherds Friendly's questions about asthma accurately. I'll explain why in more detail later in this decision.

First, when considering whether a consumer has taken reasonable care, I need to consider, amongst other things, how clear and specific the questions asked by the insurer were. I've listened to the screening call between Mr P and the broker. Mr P was given a clear warning at the start of the call that questions needed to be answered accurately, or there was a risk that claims may not be paid or that the policy might be cancelled.

In my view, the relevant questions were as follows:

'During the last five years, have you seen a health professional for:

- *Any lupus, fibromyalgia, gout or any type of arthritis, neck, back, spine or joint trouble, for example rheumatoid arthritis, sciatica?*
- *Chest pain, palpitations or irregular heartbeat, paralysis, numbness, persistent tingling or pins and needles, tremor or facial pain other than dental pain, memory loss, dizziness or balance problems?*

Apart from anything else you've told us about, in the last 12 months have you:

- *Been referred to or had any investigations in hospital, for example biopsy, scan or ECG?'*

I appreciate Mr P considers these questions to be unclear and ambiguous. However, I disagree. I don't think that these are 'catch-all' questions, or so wide as to be unclear as to what Shepherds Friendly wanted to know. The questions include the relevant time period; the type of conditions and the symptoms Shepherds Friendly needed to know about. I think these questions were worded sufficiently clearly to prompt a reasonable consumer to understand what Shepherds Friendly was asking and what it wanted to know.

Mr P answered 'no' to all three of these questions. Shepherds Friendly considers that Mr P ought to have answered 'yes'. So I've looked closely at Mr P's medical records from 2013 onwards (the five year period before he took out the policy) to see whether I think he took reasonable care to answer Shepherds Friendly's questions.

In August 2017, about a year before Mr P applied for the policy, the GP recorded that Mr P had had bilateral shoulder and arm pain for several months, along with loss of function, such as ability to tuck in his shirt; bend his arms around his back and reaching back. The notes

also say: *'right hip OA (osteoarthritis) can flare at times.'* The GP concluded that Mr P's pain was likely due to his work and it seems Mr P was advised to self-refer for physiotherapy.

Subsequently, in October 2017, 11 months before Mr P applied for the policy, the GP noted that Mr P had left and right shoulder pain for the previous two months. The record states: *'worse on internal rotation & abduction.'* Mr P was given physio exercises, but if these didn't work, he was advised to self-refer to physio.

Additionally, in October 2017, Mr P was referred to hospital for nerve conduction studies, due to suspected carpal tunnel syndrome. This would suggest he was referred for hospital testing in the 12 months before he took out the policy.

In December 2017, Mr P was referred to an orthopaedic consultant regarding carpal tunnel syndrome. Mr P saw the consultant in January 2018 and I've seen a copy of the consultant's letter. This noted that Mr P's complaint was: *'pins and needles in the median nerve distribution of both hands, left worse than the right, for some time. The symptoms wake him up at night. He says the tips of left index and middle fingers and thumbs are numb.'* Mr P was diagnosed with severe left carpal tunnel syndrome and right carpal tunnel syndrome.

I think that given the conditions I've mentioned – and in particular, that were referred to specifically during the 13 month period prior to Mr P's application for the policy, it was fair for Shepherds Friendly to conclude that his medical conditions fell within the scope of its questions.

And I think too that Mr P ought reasonably have been prompted to answer 'yes' to those questions. I've thought about the reasons he's given for answering no to those particular questions. But it's clear Mr P did have arthritis, which flared up, and which appears to have flared up in the 13 months before the policy was taken out. While Mr P may have been advised to self-refer for physio to treat his shoulder pain, it seems to me that shoulder and arm pain do fall squarely within the scope of joint pain. I appreciate that Mr P disputes that he told the consultant that he had experienced pins and needles and numbness in his hands. But I think it was fair and reasonable for Shepherds Friendly to rely on the independent medical evidence it was provided with to conclude that Mr P had suffered pins and needles and numbness in the five years before the policy was taken out. So I think it was fair for Shepherds Friendly to conclude that Mr P ought reasonably to have answered yes to this question too. If Mr P feels that the content of his medical records is inaccurate, he'll need to raise that directly with his treating doctors.

Mr P says he answered the screening questions at the end of a long day and without reference to his medical records. I accept this was the case. But if Mr P was unsure about what he was being asked or what his specific diagnoses were, it was open to him to look into this further with his GP and to contact Shepherds Friendly to update it about his conditions.

Shepherds Friendly has provided evidence that had Mr P answered its questions correctly, it wouldn't have offered him this insurance policy. That's because it says that it would have applied three exclusions to Mr P's policy – for bilateral shoulder conditions; carpal tunnel syndrome and osteoarthritis (if it hadn't declined the application outright due to carpal tunnel syndrome and shoulder pain, given the nature of Mr P's employment). It says that in cases where more than two exclusions would be applied, no cover would be offered at all. For that reason, I find it's immaterial whether Mr P answered the questions relating to asthma accurately, because even if he did, Shepherds Friendly still wouldn't have offered him income protection insurance.

In my view then, the available evidence suggests that Mr P did make a qualifying misrepresentation under CIDRA. So I think Shepherds Friendly is reasonably entitled to

apply the relevant remedy available to it under the Act. Initially, Shepherds Friendly classified Mr P's misrepresentation as deliberate or reckless, but given it's agreed to refund his premium less the value of his claim payment, it seems to me that it's now prepared to treat the misrepresentation as careless. And on the evidence before me, I think this is a fair conclusion for Shepherds Friendly to draw. I say that because I don't think Mr P intended to mislead Shepherds Friendly – but it seems he didn't take enough care to ensure he answered its questions correctly.

CIDRA says, in cases of careless misrepresentation, that an insurer is entitled to rewrite the policy as if it had all of the information it wanted to know at the outset. If it wouldn't have offered the policy, it may cancel the policy from the outset and refund the premium. In this case, as I've explained, Shepherds Friendly has provided underwriting evidence which shows that had Mr P answered its questions correctly, he wouldn't have been able to take out this policy and it wouldn't have offered cover. I'm satisfied, based on the evidence it's provided, that this was the case. I appreciate Mr P has queried why I haven't made a proportionate award. Such an award would only apply where an insurer would still have offered cover, but on different terms, such as charging a policyholder a higher premium. That isn't the case here.

Overall, whilst I sympathise with Mr P's position, I think it was fair and reasonable for Shepherds Friendly to decline his claim, cancel the policy and to now agree to refund the premiums he's paid, less the claim payment. I think it's fair for Shepherds Friendly to make such a deduction, as by cancelling the policy and refunding the premium, both parties are treating the policy as effectively never having existed. I don't find it would be fair to find that Mr P should benefit from a claim payment from a policy he wouldn't have been offered. So I find Shepherds Friendly's offer is in line with CIDRA. It follows that I don't direct Shepherds Friendly to reinstate Mr P's policy and pay his claim.

My final decision

For the reasons I've given above, my final decision is that Shepherds Friendly has now made a fair and reasonable offer of settlement.

I direct The Shepherds Friendly Society Limited to refund the premiums Mr P has paid from the policy start date to the date of policy cancellation, less the claim payment it made.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 17 July 2023.

Lisa Barham
Ombudsman