

## The complaint

Miss G complains Vitality Life Limited unfairly declined her claim, following the death of her husband, Mr V.

Miss G's complaint is brought on her behalf by a representative, but for ease I will refer to all representations as having been made by Miss G herself.

## What happened

Miss G and the late Mr V took out a joint life assurance policy underwritten by Vitality, in December 2019.

In 2021, Mr V very sadly passed away, and a claim was made against the policy. Vitality said when it assessed the claim, it found Mr V had made a misrepresentation when taking out the policy. And it said because of this, the claim would not be paid.

Vitality said Mr V had answered an application question about alcohol incorrectly, as a medical report contained evidence that he had in the past been an alcoholic. And, it said had Mr V disclosed this information when taking out the policy, the application for cover would have been declined. Vitality classed the misrepresentation as deliberate / reckless, declined the claim, avoided the policy and retained the premiums paid.

The evidence Vitality received included a witness statement completed by Miss G shortly after Mr V's death. She made two separate references to him having been an "*alcoholic*" in the past, and as a "*recovering alcoholic*".

Also, Mr V's GP records include a reference to him having "*been drinking a lot*" and a possible seizure after "*3 bottles of red wine*" in October 2010. And a couple of months later "*stopped drinking since last appt*". In 2011 the records reflected Mr V being a "*non drinker*" and in February 2018 "*recovering alcoholic*". Also in May 2018 it's stated a blood sample was taken on the request of Mr V's employer "*due to drinking history*".

And in 2021, a report from Dr B states the following. Based on the ages Dr B referenced, this relates to some point in 2017 or 2018.

*"...a history of being an alcoholic. Between the ages of [...], he was heavily dependent on alcohol but managed to stop that and has now been dry for three years with a very strong attachment to Alcoholics Anonymous (AA) which he finds very helpful."*

Miss G complained to Vitality and appealed its decision. However, Vitality didn't uphold the complaint and maintained its position that the claim was declined.

Unhappy with Vitality's response, Miss G brought her complaint to this service and provided the following additional comments.

- Mr V was aware of his alcohol intake when he was younger and made a personal decision to abstain. He had never been advised to reduce his alcohol intake, but chose to do so of his own volition;
- Miss G's witness statement, taken a few days after Mr V's death, is unreliable due to her state of mind, and her words were not intended to mean that Mr V was an alcoholic;
- the entries related to drinking in Mr V's medical history and use of the term "recovering alcoholic", do not prove that he was advised to reduce his alcohol intake;
- the medical records reflect advice given about smoking and diet, so if advice had been given about alcohol, this would also have been recorded;
- Mr V never failed any of his occupational drink or drugs testing; and
- Vitality has provided insufficient evidence that there was a misrepresentation, or that this was reckless.

The case was passed to me to decide and I thought Vitality had declined the claim unfairly, so I issued a provisional decision to both parties.

### **My provisional decision**

"In reviewing this case, I've concentrated on the issue I think is at the heart of this complaint, which is whether or not Mr V made a misrepresentation when answering Vitality's application questions. Having done so, I don't currently think Vitality has acted fairly. And I'll explain why.

The relevant law in this case is The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 (CIDRA). This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract (a policy). 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.

Vitality has said Mr V failed to take reasonable care when answering "no" to the below question, when he took out the policy.

*"Have you ever been advised to reduce your alcohol intake because you were drinking too heavily?"*

The medical records and other evidence provided has persuaded me that Mr V most likely had a drinking problem prior to taking out the policy in 2019. I say this because there are several references to heavy alcohol drinking in Mr V's medical records as well as "alcoholics anonymous". In particular, in October 2010 it's noted that Mr V may have had a seizure after drinking three bottles of wine. And at the next appointment around two months later, the GP noted Mr V said he had stopped drinking since the last visit.

Miss G made references to Mr V being an alcoholic in the statement she gave to police. I accept and appreciate this statement was given in the days shortly after her husband's death and that this would of course have been a very traumatic and distressing time. However, this doesn't persuade me that her statements relating to Mr V as having been an alcoholic were therefore untrue or unreliable.

However, the test here is not whether Mr V had a drinking problem in the past. What I need to decide, is if Mr V made a misrepresentation when he took out his policy. The question Vitality asked was if Mr V had been advised to reduce his alcohol intake because of drinking too heavily. And I've not seen evidence that Mr V received that advice. The medical evidence supports that there were periods where he drank heavily, and that he stopped drinking. Miss G has said Mr V stopped drinking of his own volition, and I've not seen any persuasive evidence which contradicts that.

Dr B's report in 2021 reflects Mr V as having had a heavy dependency on alcohol around 2017 or 2018. However, there is no mention of Mr V having received advice to drink less. And Mr V's GP records also do not contain evidence that he was given advice to drink less.

I've found Mr V's own reporting of his drinking within his medical records to be conflicting at times, and therefore unreliable. There is record of him having said he had a heavy dependence on alcohol in 2017 / 2018, also between 2006 and 2017. However, he also reported being "teetotal" during a GP visit in 2011. I think it also follows that Mr V wouldn't have been given advice to reduce drinking, at times when he had stated he wasn't drinking alcohol.

Miss G has said she thinks Mr V's medical records would show a record of advice to reduce alcohol, if it had been given. As advice given on other matters such as diet and smoking is recorded. I've thought carefully about this. I've noted that Mr V's records reflect advice being given around diet, exercise and smoking, but not alcohol. I think in a medical setting where heavy alcohol drinking is discussed; advice to drink less is likely to be given. However, I also have to look at the evidence available. And there is no evidence that advice to drink less was given to Mr V. And so I don't think it was fair for Vitality to have concluded that he received that advice.

Turning back to the question Vitality asked about alcohol: it seems possible to me that Vitality wanted to know if Mr V had any history of a drinking problem. However, that's not the question it asked, and it's the insurer's responsibility to ask clear questions. The question was very specific in nature – it asked whether or not Mr V had ever been advised to reduce his alcohol intake, due to drinking too heavily. And I've not been not satisfied by the evidence I've seen, that Mr V made a misrepresentation by answering 'no' to that question.

I've considered what good industry practice was at the time of claim as set out in the Association of British Insurers (ABI) Code of Practice; in particular the guidance regarding lifestyle. But, as there is no clearly evidenced misrepresentation, I haven't found it to be helpful in the facts of this case.

I don't think Vitality has adequately evidenced Mr V made a qualifying misrepresentation when he took out his policy. As such, I don't think Vitality was entitled to avoid the policy and decline the claim. As I've not been sufficiently persuaded a misrepresentation was made, it's my intention to direct Vitality to re-instate the policy and assess the claim in line with the remaining terms and conditions."

## **The response to my provisional decision**

Miss G's representative advised that she accepted my provisional decision. However, they questioned if interest should be added to the settlement due to the delay and emotional and financial detriment Miss G has suffered since the claim was rejected.

Vitality disagreed with my provisional decision. And I've summarised its representations below.

- Vitality referenced the ABI code and an example related to smoking;
- it said it is not only medical evidence which should be considered as relevant;
- it provided opinions from medical professionals, including a statement that it is inconceivable that Mr V was not given advice to drink less in the circumstances; and
- a previous decision issued by this service conflicts with my outcome.

## **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.

I've also considered again my provisional findings in light of the responses.

Firstly, Vitality has referenced a previous final decision issued by this service. Each complaint brought to us is determined on its own merits. No two cases will be exactly the same and we don't have a system of precedent; although we do endeavour to be consistent. My role as an ombudsman is to consider the individual complaint in front of me, and to decide whether something has gone wrong. I'm required to reach a decision that is fair and reasonable on that complaint, notwithstanding what the service may have recommended or decided, in other cases with their own individual circumstances.

As I said in my provisional decision, I considered the ABI code when reviewing this case. I note Vitality has raised the example within the code related to smoking. But the question asked in this case is not as straightforward as being a smoker or non-smoker. Vitality's question was much more specific than asking if Mr V drank alcohol or not; or asking how many units were consumed. It specifically focussed on whether Mr V had received advice to drink less.

I agree with Vitality that its question does not specify the advice to drink less must be medical advice. And I agree that any reasonable person ought to have interpreted the question to relate to any advice to drink less, not just medical advice. I would consider evidence of any advice to drink less to be relevant, but I've not been provided with evidence from any source which proves Mr V was given this advice. I agree there are varying references to heavy drinking, alcoholism and support groups within the statements and reports provided. However, the matter in question is not whether Mr V had struggled with heavy drinking, it's specifically whether or not he was given advice to drink less.

As I said in my provisional decision, I think on balance, it is more likely than not that a GP would give advice to reduce alcohol consumption in the circumstances noted during the appointment in October 2010. However, I've been presented with no tangible evidence of this, or any other occasion or situation when such advice was given.

The test I need to apply is whether Mr V mis-declared when answering Vitality's question about alcohol. The burden of proof sits with Vitality to show a mis-representation was made.

And I'm still not satisfied that it was, because I've not seen evidence which categorically shows any advice to drink less was ever given.

I've noted Vitality said it thinks it's inconceivable that Mr V would not have been given advice to drink less in his circumstances. And its provided statements from medical professionals explaining approaches to drinking issues, and why advice around drinking may not be documented.

Knowing this information, I think Vitality could have taken this into account when designing its questions. And could have asked its question about alcohol in a different way, to ensure it obtained the information it needed.

Whilst I do understand Vitality's overall position, I think it asked a very specific question and I've not seen evidence to support the allegation that Mr V failed to answer that question truthfully.

Miss G's representative raised the question of interest. I'm unable to direct Vitality to pay interest on the claim settlement, as my findings in this case are that the policy should be reinstated, and the claim re-assessed. However, should Miss G be unhappy with the outcome of Vitality's re-assessment of the claim, she can raise a new complaint at that time.

### **My final decision**

For the reasons I've given, I uphold this complaint and direct Vitality Life Limited to re-instate the policy and re-assess the claim in line with the remaining terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss G and the estate of Mr V to accept or reject my decision before 19 December 2023.

Gemma Warner  
**Ombudsman**