

The complaint

Mr B is unhappy that Zurich Assurance Ltd declined a claim he made on his life insurance policy and cancelled the policy.

What happened

Mr B was diagnosed with cancer in 2022 and claimed on his life insurance policy.

The claim was declined because Zurich said he'd answered the question it asked about smoking incorrectly. And it considered this to be a deliberate or reckless qualifying misrepresentation, which entitled it to decline the claim and cancel the policy. Zurich refunded the premiums to Mr B.

Mr B said he had been a smoker but had given up. He said that the seller of the policy, which is a separate business to Zurich, had some responsibility. And, when he received the policy documentation it referred to 'non-smoker' which was accurate at the relevant time. Mr B complained to Zurich, but they maintained their decision. So, Mr B complained to the Financial Ombudsman Service.

Our investigator looked into what happened and upheld Mr B's complaint. He thought that even if the answers to the application questions had captured that Mr B had never smoked the policy documentation wouldn't have made this clear to Mr B as it referred to 'non-smoker'. He recommended that Zurich reinstated the policy and reassessed the claim. He said that if the claim was accepted then Zurich should settle the claim proportionately to reflect the additional premiums Mr B should have paid and that they could deduct the premiums they'd refunded from the settlement. He also recommended £150 compensation for distress and inconvenience.

Zurich didn't agree and asked an ombudsman to review the complaint. In summary, they said the questions asked weren't ambiguous and the answer taken was in good faith. They said this was replayed to Mr B in the Personal Details Confirmation (PDC). They referred to the relevant Code of insurers and said that they thought the investigator's opinion conflicted with it.

So, I need to make a decision.

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.

The relevant law in this case is The Consumer Insurance (Disclosure and Representations) 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.

Zurich thinks Mr B failed to take reasonable care not to make a misrepresentation was asked about his tobacco and nicotine usage. He was asked to select one of the following options:

- Regular, occasional or social use
- Completely stopped within 12 months
- Completely stopped between 1 and 3 years ago
- Completely stopped between 2 and 5 years ago
- Completely stopped more than 5 years ago
- Never used.

The answer 'never used' was recorded. There's no dispute that this information was incorrect. Mr B had previously smoked but had given up in 2018. That's confirmed by the medical information provided by Mr B's GP. So, I think Mr B failed to take reasonable care when answering the question.

Zurich has provided evidence that if they'd been aware Mr B had given up smoking, they'd have charged him a higher premium. That means I'm satisfied Mr B's misrepresentation was a qualifying one.

The key issue in dispute is whether Zurich has fairly concluded that the misrepresentation was deliberate or reckless. I'm not persuaded that it was for the reasons I'll go on to explain. I think, on balance, it's fair and reasonable to conclude that the misrepresentation was careless.

Mr B was sent a policy schedule and a PDC. The policy schedule referred to Mr B as a 'non smoker'. The PDC had a table which said, 'Tobacco and Nicotine usage' and next to this it says, 'never used'. Mr B has made the point that at the time of the application that information was correct – he wasn't smoking, and he never used nicotine or tobacco products. So, I don't think this would have highlighted to him that he'd given the wrong answer during the application process and needed to change it.

I've also considered that Mr B had a previous policy with Zurich and had fully disclosed his smoking history. I wouldn't expect Zurich to check that application form against the more recent one. But it seems unlikely to me that he'd have chosen not to disclose it on this occasion on purpose or that he realised that the answers he'd given were incorrect. I find it more likely that there was a careless error when completing the original application, which was completed using a dropdown menu, as opposed to a deliberate or reckless one. And, I don't think the schedule or PDC would have highlighted to Mr B that there was an error with the answer he provided during the application process.

In reaching this conclusion I've considered the Association of British Insurer's code of

practice that Zurich has referred to. That includes section 7.4.4 which says:

Lifestyle information – since lifestyle information is usually more familiar and easier for customers to understand, it follows that customers should give a particularly credible and convincing explanation for clearly evidenced misrepresentation not to be classified as deliberate or reckless.

I think Mr B has given a credible and convincing explanation for the reasons I've explained above. That includes, but isn't limited to, the consistency of his testimony, the way in which the application process was completed and the available documentation. On balance, I think it most likely that this was a misrepresentation because of insufficient care or an inadvertent mistake.

Zurich have also referred to a previous case considered by the Financial Ombudsman Service. But every case is different and turns on its own facts. I think there are important differences between the factual and overall circumstances of the case Zurich has referred to. So, this point hasn't changed my thoughts about the overall outcome of this complaint.

As I'm satisfied that Mr B's misrepresentation should be treated as 'careless' I've looked at the actions Zurich can take in accordance with CIDRA. If Mr B had disclosed his history of smoking accurately Zurich would have charged him an additional premium. Mr B has paid 71.6% of the premium he should have done. I think Zurich should therefore reinstate the policy, reassess the claim in line with the remaining policy terms and settle the claim proportionately if it's accepted.

Mr B has been caused a lot of worry and upset because his claim was declined, and the policy was cancelled. This all took place at a time when he was dealing with a cancer diagnosis and was concerned about his health including his ability to work and to provide for his family. So, I think £150 fairly reflects the distress and inconvenience caused.

Putting things right

Zurich needs to put things right by:

- Reinstating Mr B's Decreasing Life Cover and Critical Illness policy and reconsidering his critical illness claim in line with the remaining terms and conditions of the policy.
- If the claim is accepted, Zurich settling the claim proportionally by paying 71.6% of the sum payable based upon the premium Mr B paid against what should have been paid. As the premiums have been refunded Zurich would be entitled to deduct the already refunded premiums from the proportionate settlement.
- Paying £150 to recognise the worry and upset caused in having the policy avoided at a time where he was experiencing a significant change in health and was concerned about his finances.

My final decision

I'm upholding Mr B's complaint and direct Zurich Assurance Limited to put things right in the way I've outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 27 December 2023.

Anna Wilshaw
Ombudsman