

The complaint

Mr T complains that Marshmallow Insurance Limited unfairly cancelled his car insurance policy, refused to pay his claim and is looking to recover the costs it pays for a third party claim from him. Mr T also complains that Marshmallow says he owes the balance of his policy premiums even though it isn't meeting his claim.

Mr T's parents are helping him with his complaint.

What happened

In July 2022 Mr T took out a car insurance policy with the insurer, Marshmallow Insurance through a price comparison site online. In January 2023 he was involved in an incident with a third party and he reported it to Marshmallow. I understand Mr T's car was declared a total loss.

Later in January 2023 Marshmallow noticed that the date of birth Mr T gave in a phone call wasn't the same as the date of birth listed on his policy.

Marshmallow Insurance said he'd answered the question it asked about his date of birth incorrectly. It gave Mr T notice under the terms of his insurance policy to cancel his policy and subsequently did this in February 2023. Marshmallow declined his claim and said Mr T owed the balance premium under the policy. It said it would deal with the third party claim and look to recover the costs from Mr T.

Mr T brought his complaint to us and our Investigator thought it should be upheld in part. She thought Mr T had made a qualifying misrepresentation. But she didn't think Mr T had deliberately misrepresented his date of birth, as he had provided his correct date of birth when he'd called Marshmallow. She thought the misrepresentation had been careless. So she thought Marshmallow should provide a refund of the premium.

Marshmallow doesn't agree. It says the premium is separate to the costs it will have to pay to the third party under their claim. So it says it is entitled to seek the balance due of the premium for the year as well as the third party claim costs from Mr T.

Mr T's parents want Marshmallow to remove any record of a cancellation of the policy by it. They say having to declare the cancellation means insurance is unaffordable for Mr T and he needs to be able to drive in order to work – so the impact of the cancellation is severe and affecting Mr T's mental health as he is no longer able to secure work.

I issued a provisional decision on 5 January 2024. As Marshmallow had cancelled the policy and not avoided it, I thought it should deal with the claim as the policy was in use when the claim was made. I thought Marshmallow should have acted sooner on the cancellation and had charged Mr T too much when he added a new car to the policy before cancellation. I thought Marshmallow's handling of the claim and cancellation caused Mr T unnecessary distress and inconvenience. So I intended to ask Marshmallow to do the following:

- Deal with Mr T's claim in line with the remaining terms and conditions of the policy. This means both Mr T's and the third party costs are covered under the claim.
- Charge Mr T no more than the original premium due under the policy – as a claim is being met by Marshmallow the full year's premium is due.
- Marshmallow can decide to offset the balance of the (original) premium Mr T owes from the total loss settlement it pays Mr T, minus the applicable excess.
- Pay interest on (or the balance of) the total loss settlement at a rate of 8% simple interest from a month from the date of the claim, so 11 February 2023, to the date Marshmallow pays Mr T.
- Pay Mr T £500 compensation for the distress and inconvenience caused.

Mr T's mum on Mr T's behalf accepted my provisional decision. Marshmallow said it charged Mr T an additional £47.43 for 11 days cover for a replacement car before it cancelled the policy. It said it would offer this as part of the compensation award to Mr T, but doesn't agree with the sum of £500. Marshmallow said it would like to offer a total of £150 compensation for the distress and inconvenience caused.

So as both parties have replied, the case has been passed back to me to decide.

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.

My provisional findings were:

"I understand Mr T wants to be able to not have to declare a cancellation by an insurer. I cannot ask Marshmallow to change things here as it carried out the cancellation in line with the policy. Marshmallow's policy says under the title *"Cancellation by us"*;

"We can cancel this policy where there is a valid reason for doing so.

If cover has already commenced we will give you 7 days' notice in writing to your last email address notified to us. If cover has not yet been incepted we will notify in writing that cover will not be incepted. Valid reasons may include but are not limited to:

Marshmallow applied the following reason from the policy as to why it cancelled the policy:

"Misrepresentation or any attempt to gain an advantage under this insurance to which you're not entitled."

The policy also says:

"If you have given us inaccurate information this can affect your policy in one or more of the following ways:

1.

If we would not have provided you with any cover we will have the option to:

a. void the policy, which means we will treat it as if it had never existed and repay the premium paid unless there is any claim; and

b. Decline your claim, and/or seek to recover any money from you for any claims we have already paid, including the amount of any costs or expenses we have incurred.

c. In the alternative, we may cancel the policy in accordance with Section 3:

Cancellations, charge a cancellation fee of £75 & refund any remaining premium owed on a pro rata basis."

However, because Marshmallow cancelled the policy instead of avoiding it, I think it needs to take different action in relation to the claim.

I have looked at the information provided by Marshmallow including its investigation notes, its cancellation notice and final response letter to Mr T. None of these refer to Marshmallow's consideration of The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA) when reaching its decision to cancel his policy.

Marshmallow says that if it had known the correct information, it wouldn't have offered a policy to Mr T. In certain circumstances a misrepresentation would allow an insurer to avoid a policy (treat it as though it never existed). However, Marshmallow didn't exercise its rights under The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). Instead, it relied on the terms of the policy to give Mr T notice to cancel after the date of the misrepresentation.

When a policy is avoided it is to treat it as though it has never existed. But when an insurer takes action which relies on the terms of the policy in place, it is using the policy to do something. Here Marshmallow used the policy's terms to cancel it. Having done so, it should deal with the claim under the remaining terms and conditions by applying the excess and settling both Mr T and the third party's claim.

As I'm asking Marshmallow to deal with the claim, this means the policy has been used, and so the full year's premium is due in line with the policy terms when a claim is made.

But I've looked at the way Marshmallow dealt with the premiums paid under the policy before it cancelled it. Even if I thought Marshmallow's decision to cancel the policy rather than avoid it was fair, I think it unfairly calculated the balance premium Mr T owed and should have cancelled the policy sooner than it did.

Mr T called on 13 January 2023 and gave Marshmallow his correct date of birth. But Marshmallow by its own admission didn't act on this until 30 January 2023 when it happened again in a call. Mr T had called Marshmallow to add a replacement car to his policy which he'd purchased that day, and which Marshmallow agreed to do.

However, this time Marshmallow referred the difference in the date of birth to its underwriters. And on 2 February 2023 Marshmallow issued a seven day cancellation notice – after agreeing to insure a replacement car for Mr T on 30 January 2023 and increased his premium to reflect the change of vehicle. I don't think this was fair. If Marshmallow had acted on the information given on 13 January 2023, Mr T would have been put on notice of cancellation by around 15 January 2023. And so he would not have been charged a higher premium for insuring a replacement car on 30 January 2023.

So I don't agree with the actions taken by Marshmallow here. I think Marshmallow has unfairly charged Mr T an additional premium for insuring his replacement car – when it was aware of the incorrect date of birth which caused its decision to cancel the policy - on 13 January 2023. This was over two weeks before Mr T asked for cover for the replacement car.

I think Marshmallow has treated Mr T unfairly and it's clear this has caused him considerable distress and inconvenience. For this I think it should pay Mr T £500 compensation."

In response to my provisional decision, Marshmallow has made an offer to pay a reduced compensation award of £150. But I don't think this reflects the worry and upset caused by its decision not to meet Mr T's claim when his car was a write off, and the possibility of having to pay for third party claim costs. So I haven't changed my decision here.

I appreciate that the outcome Mr T was looking for was for the cancellation to be removed. But in this case, as Marshmallow cancelled the policy in line with the policy terms, the cancellation stands.

My final decision

My final decision is that uphold Mr T's complaint in part. I require Marshmallow Insurance Limited to do the following:

- Deal with Mr T's claim in line with the remaining terms and conditions of the policy. This means both Mr T's and the third party costs are covered under the claim.
- Charge Mr T no more than the original premium due under the policy – as a claim is being met by Marshmallow the full year's premium is due.
- Marshmallow can decide to offset the balance of the (original) premium Mr T owes from the total loss settlement it pays Mr T, minus the applicable excess.

- Pay interest on (or the balance of) the total loss settlement at a rate of 8% simple interest from a month from the date of the claim, so 11 February 2023, to the date Marshmallow pays Mr T.
- Pay Mr T £500 compensation for the distress and inconvenience caused.

Marshmallow Insurance Limited must pay the compensation within 28 days of the date on which we tell it Mr T accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at a simple rate of 8% a year.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 22 February 2024.

Geraldine Newbold
Ombudsman