

The complaint

Mr G complains that Vitality Health Limited declined his claim against his personal healthcare plan and subsequently cancelled his plan from the outset.

What happened

The details of this complaint are well known to both parties, so I won't repeat them again here in full. In summary, in July 2022, Mr G took out a personal healthcare plan underwritten by Vitality. The plan was on full medical underwriting terms which meant that Mr G answered questions about his health.

On 20 February 2023, Mr G fell and injured his back. On 8 March 2023, Mr G made a claim against his plan. Vitality declined the claim. It said that the referral letter Mr G had provided referred to lower back pain in November 2022 and a long history of recurrent episodes. It said that Mr G hadn't disclosed that when he took out the plan. Mr G didn't accept that.

Vitality asked for Mr G's medical records. Initially, it received a medical report from Mr G's physiotherapist at his GP surgery which said that Mr G's records were only available from 30 November 2022. Mr G's physiotherapist referred to back and right groin ache in November 2022. On 21 March 2023, Vitality asked Mr G to provide further medical records from his GP.

On 23 March 2023, an x-ray revealed that Mr G had a lumbar wedge fracture. On 24 March 2023, he told Vitality that he wouldn't be pursuing a claim on this occasion, and he would pay for physiotherapy himself. But Mr G wanted Vitality to confirm that this injury wasn't a result of a pre-existing condition.

Vitality reviewed the medical information and maintained its position about Mr G's claim. In April 2023, Vitality wrote to Mr G and said that his condition was pre-existing, he had degenerative issues in his spine and had suffered from ongoing lower back pain for a number of years.

In July 2023, Mr G renewed his plan. In August 2023, Vitality told Mr G that his plan would be cancelled from inception in July 2022. Vitality said that Mr G had deliberately misrepresented his medical history when he didn't disclose his long history of lower back pain when he took out the plan. It said that whilst the claim in March 2023 related to a fall, it doesn't change the fact that Mr G misrepresented the true extent of his back problems. Mr G didn't think that was fair.

Mr G wants Vitality to acknowledge that his fall in February 2023 and subsequent injury wasn't caused by a pre-existing condition. He also says that Vitality's handling of his claim caused delay in his treatment. Mr G initially wanted Vitality to confirm that it wouldn't exclude claims in relation to his back in future. Events moved on and Vitality cancelled his plan from the outset. Mr G denies that he misrepresented information about his back when he took out the plan and wants Vitality to change its decision.

In responding to this service, Vitality agreed that Mr G's injury in February 2023 wasn't related to his underlying degenerative spine condition but it maintained its position about cancelling the plan from the outset.

One of our investigators looked at what had happened. He said that Vitality hadn't acted fairly in this case. He thought that whilst Mr G had made a misrepresentation when he took out the plan, it was careless rather than deliberate. The investigator thought that Vitality should reassess the claim on the basis that Mr G made a careless misrepresentation, rather than a deliberate one.

Mr G accepted the investigator's recommendation and said that he'd found alternative cover. Vitality didn't agree with the investigator. It reiterated its position in relation to the misrepresentation. There was correspondence between Vitality and the investigator which I won't set out here. Vitality accepted that it declined Mr G's claim incorrectly and offered compensation of £150 in relation to that but maintained its position that Mr G had deliberately misrepresented issues about his back.

Mr G didn't accept Vitality's offer. He said that he suffered for over a month after he made his claim. Vitality asked that an ombudsman consider the complaint, so it was passed to me to decide.

My provisional decision

On 16 January 2024, I sent both parties my provisional decision in this case in which I indicated that I'd reached a different conclusion than our investigator. I said:

'It's now common ground that Mr G's injury in February 2023 wasn't related to an underlying spine condition. But I think that Vitality didn't act unfairly or unreasonably in concluding that Mr G had made a deliberate misrepresentation and in subsequently cancelling his plan from the outset. I'll explain why.

- *Vitality has now confirmed that it declined Mr G's claim incorrectly. It says that the fracture caused by Mr G's fall in February 2023 isn't related to a pre-existing condition. It's offered compensation of £150 in relation to Mr G's distress and inconvenience in relation to its action in declining the claim incorrectly. Mr G says that he was in pain for a month after he made his claim, while he waited for Vitality's decision. But Vitality was entitled to gather medical information in order to validate the claim and I don't think that it delayed unduly in doing so.*
- *The remaining issue in this case is whether Vitality acted unfairly or unreasonably in cancelling Mr G's plan from the outset. 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.*
- *If a consumer fails to take reasonable care, 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.

- *I've listened to the phone call which led to Mr G taking out the plan in July 2022. Vitality asked Mr G several questions but the one that's relevant to this complaint was as follows:*

'Have you or any applicant had any musculoskeletal disorders for example any form of arthritis, any back issues or fractured bone joint or muscular (sic).'

I think that it was clear that Vitality wanted to know about any back issues.

- *Mr G said that he had a back issue seven or eight years ago. He said he wasn't sure what it was, there was nothing ongoing and he had physio, saw a consultant and had scans. Mr G said that there was nothing diagnosed and that he'd made a full recovery since then.*
- *Based on what I've seen, I don't think that Mr G took reasonable care in answering Vitality's question about his back. That's because the medical information shows that Mr G's difficulties with his back had led to various engagements with medical services over a number of years, most recently in 2019. More specifically:*
 - *The referral letter dated 9 March 2023 by the physiotherapist at Mr G's GP practice refers to "...a long history of recurrent episodes [of nonspecific lower back pain]".*
 - *In 2016, Mr G saw a consultant spinal surgeon who, in a letter of 3 August 2016, referred to "...many years of low back pain which is getting progressively worse" and a diagnosis two to three years earlier of "... moderate to severe degeneration in the spine".*
 - *In a letter of 21 September 2016, the consultant spinal surgeon referred to mild disc degeneration and moderate facet joint degeneration.*
 - *In 2019, Mr G was referred to an integrated pain and spinal service in relation to "...ongoing lower back pain for approximately 5 years". In a letter of 7 February 2019, that clinic referred to an MRI Mr G had two years before and "...known degenerative change".*
- *I don't think that Vitality was at fault in concluding that Mr G hadn't taken reasonable care in answering the question it put to him about back issues. That's because the medical information available to Vitality shows that Mr G had a history of back issues, a diagnosis of moderate to severe degeneration of his spine and several presentations to services for back issues.*
- *Vitality has provided information about its underwriting process. It says – and I accept – that if it had known the true position, it would have excluded cover for any disorders of the spine and related conditions. So, I'm satisfied that the misrepresentation was a qualifying one under CIDRA.*
- *Vitality thinks that Mr G deliberately misrepresented his medical history when he didn't disclose his long history of lower back pain. That means that it thinks that Mr G knew the information he provided was untrue or misleading and knew that the matter to which the misrepresentation related was relevant to the insurer.*
- *Our investigator asked Mr G why he didn't disclose his back issues to Vitality. Mr G said that he's physically active and has a physical element to his job. He said that he*

saw a physiotherapist and he didn't mention that because he forgot about it. Mr G said that he had no ongoing treatment, consultations and referrals. He said that he'd had a scan many years ago and no further treatment was advised. Mr G says that he doesn't understand why falling over and breaking his back led to the cancellation of his cover.

- On balance, I don't think it was unreasonable for Vitality to conclude that the misrepresentation was deliberate. The medical records show that Mr G had back issues over several years, a diagnosis and various contacts with medical services about his back. I think the nature and number of the issues Mr G had with his back and his reference to medical services indicate that it's unlikely he would simply forget what had happened. And I think that what he told Vitality minimised the problems he'd had with his back and his engagement with services about it.*
- I appreciate Mr G's point that his claim in March 2023 had nothing to do with the history in relation to his back. But the remedies available to an insurer under CIDRA aren't dependent on there being a link between the misrepresentation and the condition claimed for, so the fact that Vitality has now acknowledged that it declined Mr G's claim incorrectly doesn't alter the outcome here.*
- I'm satisfied that Vitality was entitled to cancel Mr G's plan from the outset in accordance with CIDRA. And as that means that the plan never existed, Vitality wouldn't have had to deal with Mr G's claim and isn't obliged to deal with any future claims. As CIDRA reflects our long established approach to misrepresentation cases, I think that allowing Vitality to rely on it to cancel Mr G's plan from the outset gives a fair and reasonable outcome in this complaint.*
- As I've indicated above, in the particular circumstances here, Vitality has now offered compensation of £150 in relation to Mr G's distress and inconvenience arising out of its handling of his claim. I don't propose to direct it to do more.'*

Responses to my provisional decision

Neither Mr G nor Vitality responded to my provisional 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.

As neither Mr G nor Vitality has provided any fresh information or evidence in response to my provisional decision, I find no basis on which to depart from my earlier conclusions. For the reasons I've explained, whilst Vitality declined Mr G's claim incorrectly, I don't think that it acted unfairly or unreasonably in cancelling Mr G's plan from the outset.

Putting things right

Vitality should pay the compensation of £150 it has now offered to pay in relation to Mr G's distress and inconvenience arising out of its handling of his claim.

My final decision

My final decision is that I uphold this complaint to the extent indicated above. I now direct Vitality to take the step I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 28 February 2024.

Louise Povey

Ombudsman