

The complaint

Mr K complains about Advantage Insurance Company Limited's ("Advantage") decision to decline his claim under his car insurance policy.

What happened

Mr K says he was involved in an accident that wasn't his fault. He made a claim under his policy, but Advantage declined his claim on the basis Mr K was found to be above the legal alcohol limit following a roadside breath test. As Advantage had already incurred claim costs at the point they declined the claim, they requested reimbursement of these costs from Mr K. Mr K complained about the decision to decline his claim and maintained that he wasn't above the legal alcohol limit and that this was evidenced by the fact that the police didn't pursue any charges against him.

Advantage responded and explained Mr K's claim isn't covered because the police informed them a roadside breathalyser test carried out on Mr K was positive, and that Mr K was arrested as a result. They said due to the nature of the accident, the police took Mr K to hospital to make sure he didn't have any further injuries and didn't require medical assistance. Advantage said, at hospital they took bloods as the police weren't able to take Mr K to the police station to carry out an evidential breath test. Advantage said the results of the blood tests taken at hospital were below the legal limit, so the police didn't prosecute Mr K. Advantage said, although Mr K wasn't over the prescribed limit in a later test and no prosecution was pursued, at the time of the accident Mr K was under the influence of alcohol so they stand by their decision to not cover the claim. Advantage said, as they're not covering the claim, Mr K will need to reimburse them the costs they've paid out.

Our investigator looked into things for Mr K. He thought Advantage had unfairly declined Mr K's claim and recommended they reconsider the claim, remove any negative records about the claim and from Mr K's credit file, and pay £350 compensation. Advantage disagreed so the matter has come to me for 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.

Having done so, I've decided to uphold the complaint. And, I think the investigator's recommendation is a fair way to resolve matters.

My starting point is Mr K's car insurance policy booklet. This sets out the terms and conditions and, under a section headed 'General exceptions' it says, *"You're not covered if an accident happens while you or anyone entitled to drive under your current Certificate of Motor Insurance: is found to be over the prescribed limit for alcohol...in the country where the incident happens, is driving while unfit through alcohol..."* Advantage say Mr K provided a reading which was above the legal limit following a roadside breathalyser test – and they say this is enough for them to apply the term 'is found to be over the prescribed limit for alcohol in the country where the incident happens'.

The information shows the police contacted Advantage and confirmed they'd carried out a roadside breathalyser test on Mr K which he failed, and he was subsequently arrested. They also confirmed, as the collision led to the airbags being activated, they couldn't take Mr K to the police station to perform a further breathalyser test. They said Mr K was instead taken to the hospital where his bloods were taken and the reading for this was below the limit – so a decision was taken to not pursue any charges against Mr K. So, in this case, I need to be satisfied that it's fair for Advantage to decline the claim because they think Mr K was over the legal limit, even though the police decided not to prosecute him.

It's for Advantage to show why they think it's fair for them to apply this term. But, from the information I've seen, I don't believe they've demonstrated they've fairly applied this. I agree the police did inform Advantage that Mr K had failed a roadside breathalyser test. The legal limit for alcohol is 35mg of alcohol per 100 millilitres of breath. Given what the police told Advantage, I don't think it's unfair for Advantage to infer from this that Mr K provided a reading which was above the legal limit of 35mg. Advantage then relied on this information to decline the claim. But there's no evidence that Advantage were aware at that point what the precise reading was, how many readings were taken, or how long after the accident Mr K was breathalysed.

I think that's important here because Advantage were also made aware during the call with the police that Mr K's bloods had been taken and the blood alcohol reading for this was below the legal limit – so the police decided not to pursue any charges against Mr K. That being the case, I can't see Advantage obtained any information showing the precise breathalyser result – as that would show whether Mr K provided a reading which was marginally or significantly above the legal limit. They didn't obtain any information showing how long after the accident Mr K was breathalysed and then how long after that the blood sample was taken at the hospital – as that would allow Advantage to make their case as to why this evidence points to Mr K being over the legal limit at the time of the accident.

I think it will help if I explain here why I think the above is relevant. Claim notes provided by Advantage say that the police couldn't take Mr K to the police station for a second breathalyser “...*which they use for court so had to take to hospital – bloods was taken*”. Given that the police decided not to bring any charges against Mr K, it's clear they place more weight on the results of the blood tests. That being the case, if the bloods were taken from Mr K very shortly after the roadside breathalyser, I think it does bring into question whether it's reasonable for Advantage to rely on the roadside reading alone as evidence that Mr K was above the legal limit.

So that's why I think, in the circumstances of this case, it was unfair for Advantage to rely on just the police's confirmation of a failed roadside breathalyser, and without making any further relevant enquiries. So, it follows that I don't believe Advantage have done enough here to prove their case that, on balance, Mr K was above the legal limit at the time of the accident.

I acknowledge the standard of proof is higher in criminal proceedings compared to civil proceedings – the latter being the standard of proof Advantage and our service uses. And I also acknowledge Advantage's point that confirmation from the police that Mr K had failed a breathalyser test is enough for them to apply the term relating to Mr K being above the prescribed limit for alcohol. But based on my reasoning above, and applying our services standard of proof – on the balance of probabilities – I'm not satisfied Advantage have met this standard with the evidence they've provided.

I can see Advantage have provided further information – in this case a police report including a transcript of a recorded interview with Mr K - which they don't appear to have had, or referred to, when declining the claim. Given that Advantage have had an opportunity to comment on this, I've taken this evidence into account. Advantage say during the interview Mr K admitted to drinking prior to the accident, and also accepted that he'd committed an offence of driving whilst over the prescribed limit of alcohol.

I've reviewed the police report, and this confirms no proceedings have been brought against any person in respect of the road traffic accident. The police interview with Mr K took place 11 days after the date of the accident. The interviewing officer confirmed Mr K had been, "...arrested for the offence of driving...a mechanically propelled vehicle on a road...whilst unfit to drive through drink..." The interviewing officer asked questions and established Mr K had been asleep at home and then woke up to pick up his girlfriend from work when the accident happened. The interviewing officer asked Mr K what he'd been doing prior to sleeping and Mr K said he'd drank three beers.

The interviewing officer asked Mr K, "*Do you accept that you committed the offence of driving whilst over the prescribed limit of alcohol?*" and the transcription notes Mr K responded with "*Yes (inaudible)*". The interviewing officer asked the same question again and Mr K responded, "*Yes (inaudible), I was fit to drive.*" The interviewing officer then said, "...obviously you have had a few drinks, but you didn't realise you would be over the limit?" and Mr K responded "*Yeah*". The interviewing officer then explained, due to the nature of the collision, they took Mr K to the hospital, and they took bloods, and the police are waiting for those blood results to come back and they'll then inform Mr K whether those are over or under the limit. Later when the interviewing officer summarises what had been discussed, Mr K said, "...before I am driving, I was fit to drive."

I've carefully considered Advantage's points here about the police interview, but I'm not persuaded this demonstrates they've acted fairly in declining Mr K's claim based on the term they're relying on. I agree Mr K confirmed during the interview that he'd been drinking, but this doesn't prove he was above the legal limit. I also acknowledge that the interviewing officer did ask Mr K a direct question on whether he accepts he'd committed an offence. While the transcription notes Mr K responded with 'Yes' it also records Mr K followed this up with a comment which was inaudible. And when the interviewing officer repeated the question, Mr K again answered 'Yes' but also clarified that he was fit to drive – a comment which Mr K repeated towards the end of the interview. So, I'm not persuaded this is evidence of Mr K accepting he'd committed an offence of driving whilst over the prescribed limit of alcohol. And in any event, I'm still more persuaded, from the reasoning I've mentioned above, that Advantage haven't provided sufficient evidence or reasoning to prove their case that, on balance, Mr K was above the legal limit at the time of the accident.

In these circumstances, I think Advantage have unreasonably declined the claim. So I think the fair outcome is for Advantage to reconsider the claim. It's not clear whether there is any negative information which could be accessible by other insurers which shows the reason this claim was declined. But if there is, and if it's possible, Advantage should remove any negative record of this.

Advantage have pursued Mr K for claim costs which they've paid out while they were still investigating the claim. Mr K has referred to debt collection activity having taken place. Given that I've decided Advantage unfairly declined the claim, it follows that any debt collection action was unreasonable. So, if debt collection action has been started, Advantage shouldn't pursue any claim costs from Mr K based on the decline reasons they've relied on here. And, if applicable, they should remove any negative information recorded on Mr K's credit file about the recovery of claim costs.

It's clear from the information I've seen Mr K has been caused significant worry, upset and inconvenience as a result of Advantage's decision to decline his claim. During discussions with Advantage, Mr K has maintained that his blood results showed he was below the legal alcohol limit, but he feels this has been disregarded. I can see from information provided by Mr K he has been very worried about the requests for payment received from Advantage. Given that the decision to pursue Mr K for claim costs was as a direct result of the decision to decline the claim – which I've decided was unfair – I think it's right that Advantage pay Mr K compensation for the significant worry and upset caused to Mr K. Taking into account the impact caused to Mr K as a result of Advantage's unfair decision to decline his claim, and the duration of that impact, I think Advantage should pay Mr K £350 compensation.

Putting things right

I've taken the view that Advantage have unfairly declined Mr K's claim. So, Advantage should reconsider Mr K's claim further, in line with the remaining terms and conditions of the policy. It is of course open to them to make any other further enquiries they feel are necessary, but I don't think it's reasonable for them to use the reasons they have to justify their decision to decline the claim. Advantage should also, if applicable, remove any negative record, which could be accessible by other insurers, showing the reason for this claim being declined. If debt collection action has been started, Advantage shouldn't pursue any claim costs from Mr K based on the decline reasons they've relied on here. And Advantage should also, if applicable, remove any negative information recorded on Mr K's credit file about the recovery of claim costs. Advantage should also pay Mr K £350 compensation for the significant worry, upset and inconvenience caused.

My final decision

My final decision is that I uphold the complaint. Advantage Insurance Company Limited must take the steps in accordance with what I've said under "Putting things right" above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 30 June 2024.

Paviter Dhaddy
Ombudsman