

The complaint

Mr B complains that Vitality Life Limited has made his income protection claim payments late and hasn't made all the payments.

What happened

Mr B successfully claimed for income protection benefit on his flexible protection plan. He's been receiving payments since 2009. He says that he used to receive payments on the same date each month, but the payment dates have drifted and arrive late. This means that he goes overdrawn as his bills come out of the account at the end of the month. Mr B says that this had an impact on his mental health condition and means he's had to access money in ISA and pension funds to ensure he can pay the bills. Mr B wants Vitality to pay two months payment in one month to ensure he won't go overdrawn.

In their final response letter Vitality accepted that there had been several months where the claim payments were paid late. They said their aim was to process the payment by the end of each month and they had failed to do so. Vitality said they couldn't agree to make two months payment in one month but they were willing to pay an amount of £2000 in advance and subtract this amount from the final claim payment.

Mr B didn't accept this offer. In response Mr B said that his first payment was on 7 May 2009 and so the payment date should be the seventh day of each month. He also said he was due to receiving Retail Price Index (RPI) increments on the anniversary of his first payment, but these weren't being applied until the June payment. So, he thought he was owed over £2000 in RPI payments.

Our investigator looked into what happened and upheld the complaint. She thought that Vitality should pay the benefits on the first day of each month, give the £2000 advance payment and £100 compensation for the distress and inconvenience caused. Mr B and Vitality accepted her findings.

However, there were further issues in relation to the date of payment. Mr B said he'd received the £2100 but he'd not received a benefit payment for October or November 2023. Vitality confirmed the October payment was due by 1 November and November's payment would be made by 1 December 2023. Our investigator clarified to Mr B that the payments were made in arrears, not in advance, and when he should expect to receive the payments.

Mr B referred to his original submissions and said his first payment was made on 7 August 2009 representing the first three months of his claim until 31st July. He thought that Vitality had defrauded him of over £7000 as he'd lost a month's benefit and has to pay back £2000 off the final benefit payment. Mr B asked an ombudsman to review his complaint – he says the crux of the whole issue is that the payments he's been receiving are for the previous month. So, he'll only receive 11 payments instead of 12. As it wasn't possible to reach an agreement the complaint was passed to me to make a decision.

Since the case was referred to decision both parties have provided more information. I asked for Vitality's comments on the late and missing payments. They confirmed that they

accepted there had been delays because of the previous agreement to pay by the 15 of the month and there were several late payments in the last few years. They said that the payment is due by the first day of the month and were processed a few days early to ensure it reached Mr B before the due date. They confirmed payments were made at the end of the month, not at the start of the month, so the payments are not ever in advance.

Mr B instructed a forensic accountant who concluded that 119 of the last 121 payments were paid late and had committed fraud. He said he was caused significant psychological harm, had been defamed when Vitality had fraudulently said the payments were up to date and had suffered from breaches of the Equality Act 2010. Mr B highlighted his experience in financial services and knowledge of the product. Our investigator shared a spreadsheet of information with Mr B, provided by Vitality. Mr B didn't think this information would stand up in court and he was considering a private prosecution. Furthermore, he highlighted concerns that he would be subject to a miscarriage of justice and that the spreadsheet provided by Vitality should be provided from Vitality's actuarial department, with compliance sign off.

In March 2024 I issued a provisional decision which said:

The relevant rules and industry guidelines say that Vitality has a responsibility to handle claims promptly and fairly.

The starting point is the policy terms which say:

Once entitlement and value are determined We will pay benefits monthly. The first payment will be due on the first day of the month after the end of the Deferred Period. If benefits do not terminate for any other reason the final payment will be due on the first day of the month following the Date of Expiry of the Income Protection Cover.

Mr B's policy also offers an annual increase in with RPI. The terms say:

If selected the increase will take place on the first anniversary of the date that the first claim payment is made, and annually thereafter.

At the outset I acknowledge that I've summarised this complaint in far less detail than Mr B has, and in my own words. I won't respond to every single point made. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. The rules that govern our service allow me to do this as we are an informal dispute resolution service.

If there's something I've not mentioned, it isn't because I've overlooked it. I haven't. I'm satisfied I don't need to comment on every individual point to be able to fulfil my statutory function.

I'm upholding Mr B's complaint in part for the reasons I'll go on to explain.

The delayed payments, alleged missing payments and Retail Price Index (RPI) increase

I've been provided by a large amount of information from both parties in relation to the payments. Mr B's claim started in 2009 and so has been paid over many years. I've been provided with a schedule of payments from Vitality which dates to 2015. There's also evidence which Vitality has extracted manually from other records which cover payments made during the earlier part of the claim.

Mr B's accountant's report is based on payments made between October 2013 and October 2023 and is based on various information including Mr B's testimony, information provided from his bank statements and the date that RPI appears to have been applied to the payments. There are several assumptions upon which this report is based which are set out in the methodology and results section.

Vitality accepts that there were delays in making some payments but disputes that there's evidence of missing payments. They maintain that the RPI increased in line with the policy terms. They also question how the forensic accountant had concluded which month's benefit payment corresponded with the payment showing on the bank statement. Their interpretation of the data extracted manually, they argue, demonstrates that the methodology is incorrect. For example, the forensic accountant's report says that the payment for the end of October 2013 was received on 22 November 2013. Vitality's file notes from the time suggest that the payment was processed on 18 October 2013.

Vitality has accepted that there were some delays in making payments and also offered to make a partial advance payment. The extent of those delays, the application of the RPI adjustment and the missed payments remain disputed. I've thought carefully about how best to resolve the significant differences between the parties in a fair and reasonable way.

Putting things right

My provisional decision is that Vitality should instruct an independent forensic accountant to review all of the available material relating to the payments, including Mr B's accountant's report and the supporting evidence he considered. That report should include an analysis of the dates throughout the life of the claim that:

- payments were raised and/or made by Vitality (including which benefit month the payment was for) throughout the life of the claim
- The date payments were received into Mr B's account throughout the life of the claim
- The date RPI was due to be applied and when it was actually applied.

This information should be clearly presented in a table and include reference to any evidence relied on in support of the accountant's opinion.

The report should also provide the accountant's opinion on the evidence of missed payments, the application of the RPI increases and whether the payments were delayed.

They should also comment on the findings of Mr B's accountant. A copy of the report should be made available to Mr B's accountant if Mr B requires it to be.

I think this is the fairest way to resolve things based on the available evidence. I'm aware that Mr B instructed his own accountant. Although he's independent his report is not based on a full data set and there's other relevant evidence which I think, in fairness to both parties, needs to be further considered and scrutinised. I think this will fairly determine whether there are missed payments, the extent of any delays and whether the RPI increases were applied consistently and fairly.

I don't think the currently available evidence is sufficient for me to reach a conclusion

which is fair to either party about the current status of the missing payments, the application of RPI and delays. This further interpretation of the information wasn't available at the time Vitality issued their final response it's become available during the ongoing complaint. However, they gave the Financial Ombudsman Service permission to look into these further concerns and provided further supporting evidence. If Mr B remains unhappy with the accountant's findings, then he may be able to make a further complaint.

In Mr B's complaint form he said that Vitality was in clear breach of the foreseeable harm principles and the Equality Act as they aren't prepared to make reasonable adjustments for him by not paying him on time. In other words, has failed their duty to make reasonable adjustments under the Equality Act 2010. I've taken the Equality Act 2010 into account when deciding this complaint – given that I think it's relevant law – but I've ultimately decided this complaint based on what's fair and reasonable.

If Mr B wants a decision about whether Vitality has breached the Equality Act 2010, then he'd need to go to Court. That's because I don't have any power to determine whether Vitality has acted in breach of the Equality Act 2010. Only a court can do that.

Allegations of fraud

Mr B makes serious allegations that Vitality has committed criminal offences relating to fraud. As I outlined above the Financial Ombudsman Service is an informal alternative to the courts. It's not my role to determine whether a criminal or civil offence has been committed.

I have taken into account the relevant legislation but having done so I'm not persuaded I can fairly conclude that Vitality has acted fraudulently based on the available evidence. Even if I accepted that the payments were late or delayed I'm not persuaded that it's most likely, based on the available evidence, that Vitality's actions were dishonest.

Furthermore, Mr B's accountant did not reach a conclusion that Vitality had committed fraud and, in his conclusions, made clear his opinion was subject to the assumptions he'd made.

Future payments

I can't direct Vitality to change their overall processes or procedures. Furthermore, I can only consider what's happened already. I can't consider what may happen in the future.

However, I'd expect Vitality to take reasonable steps to ensure that the payments are made in a timely manner. And, if Mr B considers that further payments are delayed, he'll need to raise a further complaint to Vitality. If he remains unhappy with Vitality's response, he can make a further complaint to the Financial Ombudsman Service.

Distress and inconvenience

Mr B explained that the mood swings he suffers as a result of his bipolar disorder are not helped by the anxiety and stress caused by this constant irregularity and when he's left, in his words, scrabbling round for money at the end of the month. He explained it can cause him to become depressed and sometimes suicidal. He's also provided evidence from a private psychiatrist about the impact on him.

Vitality agreed to pay Mr B £100 compensation and give him an advance of £2000. I think this is reasonable in all the circumstances and fairly reflects that there were ongoing issues with the payments, which Vitality accepts. I think this fairly reflects the impact on Mr B, bearing in mind the conclusions I've reached about the status of the alleged missing payments.

Accountant and medical report fees

Mr B instructed his own accountant and provided information from his treating psychiatrist.

The Financial Ombudsman Service is an informal alternative to the courts and is free for consumers. Whilst I understand that this was information Mr B wanted to obtain and provide I don't think I can fairly conclude that Vitality should have to pay for this information. I think it's fairer that they cover the cost of a more comprehensive review of the available evidence by way of appointing an independent expert and providing the expert with all the available information.

Putting things right

My provisional decision is that Vitality should instruct an independent forensic accountant to review all of the available material relating to the payments, including Mr B's accountant's report and the supporting evidence he considered. Vitality should cover the cost of that report.

That report should include an analysis of the dates throughout the life of the claim that:

- Payments were raised and/or made by Vitality (including which benefit amount month the payment was for) throughout the life of the claim
- The date payments were received into Mr B's account throughout the life of the claim
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The report should also provide the accountant's opinion on the evidence of missed payments, the application of the RPI increases and whether the payments were delayed.

They should also comment on the findings of Mr B's accountant. A copy of the report should be made available to Mr B's accountant.

I can't pre-empt what conclusions the accountant will reach. However, if they identify any missing payments I'd expect Vitality to take into account those findings and consider awarding 8% simple interest per annum. If Mr B is unhappy with the conclusions reached by the accountant he may be able to make a further complaint to the Financial Ombudsman Service.

Vitality should also pay Mr B £100 compensation and the advance of £2000 if they haven't done so already.

Both parties responded to my provisional decision. Vitality said that they didn't accept they were behind on any payments to Mr B but didn't think that the time and expense in disputing the matter of instructing an accountant was worthwhile. They made an offer as a goodwill gesture to Mr B which was:

- They were willing to no longer reclaim the £2000 buffer payment they'd made, meaning it would no longer be offset against any benefit. This would mean Mr B could keep the full £2000.
- An additional payment of £3239.24 to represent the additional benefit Mr B felt he was missing.

Our investigator put this offer to Mr B who declined it. He made a counter offer of £5, 239.24, plus £2900 of loss of use and interest for late payments for the last 10 years, £2160 to cover the cost of his forensic accountant report and £2500 towards ongoing psychiatric care and to reflect the anxiety and stress caused.

Vitality responded to say that they did not agree to this. They highlighted that they felt sufficient evidence had been submitted to demonstrate on the balance of probabilities no payment had been missed. They said that they didn't think my provisional decision, to instruct a forensic accountant was a bad idea, but they didn't think the investigation would be favourable to Mr B. They said their offer to pay the equivalent of one months benefit stood.

Mr B made extensive comments in response to my provisional decision. In summary he said:

- No reasonable person could accept Vitality's position based on the content of the accountant's report.
- My decision was irrational and was procedurally unfair. I had failed to understand the complaint and the evidence presented.
- If Vitality's report agreed with his own report Vitality should cover the cost of that.
- He didn't think it was difficult to understand that RPI payments were due on the first of the month.
- He'd experienced a breakdown and had paid out hundreds of pounds for psychiatric support. His mental health condition was debilitating. Due to his protected characteristic under the Equality Act he engaged the services of a forensic accountant which was necessary due to his disability. I had found in his favour so it would be a breach of the Equality Act for me to not award costs because he wasn't well enough to represent himself.
- I had simply passed the problem the problem onto someone else and had failed to make a decision. He had requested a hearing so that the whole thing could be thrashed out.
- He ought to be able to keep the £2000 advance due to the stress and suffering he'd been subjected to.
- He asked for a timescale to be placed on the report so it was prepared in a timely fashion and other directions related to the preparation of the report.

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 further representations by Mr B and Vitality haven't changed my thoughts about the overall outcome of this complaint. I'll explain why.

As I outlined in my provisional decision I've focussed on what I think are the key issues here. The rules that govern our service allow me to do this as we are an informal dispute resolution service. I don't need to comment on every individual point to be able to fulfil my statutory function.

I'm satisfied the parties have now had a fair opportunity to make representations both prior to and following my provisional decision. That includes providing Mr B with the opportunity to consider Vitality's more recent offer and waiting until after Mr B received the payment he was expecting in May 2024 before re-reviewing the complaint which was in line with Mr B's request.

I am not persuaded by Mr B's further representations about Vitality having committed fraud to the criminal or civil standard of proof. Mr B feels that I had a sole task to determine whether a Vitality employee made a statement which was either true or made a false representation. However, it's for me to determine what evidence and arguments are central to the outcome of this complaint. And, in any event, Mr B's representations haven't persuaded me that Vitality have acted with any dishonest intention. As I explained in my provisional decision the Financial Ombudsman Service is an informal alternative to the courts. I've reached my decision on the basis of the available evidence.

I explained in my provisional decision why I didn't think it was fair and reasonable to rely on Mr B's accountant's report in isolation. There's significant evidence, in my view, which the accountant didn't have access to, and I think it's relevant to whether, as Mr B alleges, he has lost out financially over an extensive period. I'm not a forensic accountant and neither party has had full access to the full data set. That's why I think this is a fair and reasonable conclusion to this complaint.

The presentation of the information differs between the parties and so I'm not persuaded the current information, presented in its current format, would allow me to reach a fair and reasonable conclusion about whether there are missing payments, or not. That's not because I'm seeking to pass the problem onto someone else. Rather, in my view, this is a fair and reasonable way to move things forward for the parties on the basis of sound and complete evidence, assessed by an appropriately qualified professional. That includes the application of the RPI, which I have directed the instructed accountant should address.

If the investigation isn't favourable to Mr B, and he disputes the outcome, then as I've said in my provisional decision, he may be able to bring a further complaint to the Financial Ombudsman Service. I'm not going to direct that Vitality should cover Mr B's accountant's costs. Nor do I think they should make the payments set out in Mr B's counter offer. It was Mr B's decision to instruct a forensic accountant and I don't think the counter offer he proposed is fair or reasonable because it doesn't, in my view, fairly reflect the impact on Mr B based on the current available evidence.

Mr B wishes me to direct that the report is completed within a specified time. I don't think that's reasonable in the circumstances as that's something that will depend on the instructed accountant's capacity. However, I will direct that the accountant should be instructed, and provided with all the relevant information, within 28 days of Mr B confirming that he accepts

my final decision (if he chooses to accept it).

I've considered the offer that Vitality put to Mr B in response to my provisional decision in an attempt to resolve matters once and for all. However, I'm not endorsing that offer as fair and reasonable. For the reasons I've outlined above and in my provisional decision I think the redress I'm directing is fair and reasonable in the circumstances.

Putting things right

Vitality should instruct an independent forensic accountant to review all of the available material relating to the payments, including Mr B's accountant's report and the supporting evidence he considered. Vitality should cover the cost of that report.

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They should also comment on the findings of Mr B's accountant. A copy of the report should be made available to Mr B's accountant.

I can't pre-empt what conclusions the accountant will reach. However, if they identify any missing payments I'd expect Vitality to take into account those findings and consider awarding 8% simple interest per annum. If Mr B is unhappy with the conclusions reached by the accountant he may be able to make a further complaint to the Financial Ombudsman Service.

Vitality should also pay Mr B £100 compensation and the advance of £2000 if they haven't done so already.

My final decision

I'm upholding Mr B's complaint in part and direct Vitality Life 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 17 July 2024.

Anna Wilshaw
Ombudsman