DRN-5185473

The complaint

Ms O and Mr S complain that Zurich Assurance Ltd has turned down a critical illness claim Ms O made on a Zurich Personal Protection policy.

As Ms O brought the complaint, I've referred mainly to her for ease of reading.

What happened

The background to this complaint is well-known to both parties. So I've simply set out a summary of what I think are the key events.

In November 2022, Ms O and Mr S took out a Zurich Personal Protection policy through a broker, which included critical illness cover. When Ms O applied for the policy, she was asked questions about her smoking status and smoking history. The application completed by the broker stated that Ms O was a 'non-smoker'.

Zurich agreed to offer Ms O cover, on non-smoker rates. It charged a monthly premium of £148.05.

Unfortunately, in May 2023, Ms O suffered a stroke. So she made a critical illness claim on the policy.

Zurich obtained medical evidence to allow it to assess Ms O's claim. It noted from Ms O's medical records that her GP had stated that in 2016, 2017 and 2018, Ms O had been a current smoker and that she'd been given smoking cessation advice. It said that during the application process, Ms O had incorrectly answered a question about her smoking history. It considered she ought to have told it that she'd used tobacco or nicotine products between one and five years ago.

And Zurich said that if Ms O had properly disclosed her smoking status, it would have classified her as an ex-smoker and it would have charged her a higher premium from the start. So it concluded that Ms O had made a deliberate, qualifying misrepresentation under the relevant law. And therefore, it turned down her claim, cancelled the policy from the start and refunded the premiums Ms O had paid for the contract.

Ms O was very unhappy with Zurich's decision and she asked us to look into her complaint. She told us that her GP had amended her records to show that in December 2017, she'd been an ex-smoker.

Our investigator didn't think Ms O's complaint should be upheld. Based on the medical evidence, he thought it had been fair for Zurich to conclude that Ms O had made a deliberate misrepresentation under the law. And therefore, he felt Zurich had been entitled to rely on the remedy available to it under the legislation.

Ms O disagreed and so the complaint was passed to me to decide.

We asked Zurich for evidence of the monthly premium Ms O would have been charged had she declared her smoking history. That's because a relevant industry code of practice states

that an insurer shouldn't treat a misrepresentation as deliberate or reckless where the *'degree of relevance associated with the misrepresentation is relatively low and, in cases where a premium rating would have applied, the underlying risk premium rating resulting from that misrepresentation would not have been more than +50% (or £1/mil) for the applicable life assured'.*

Zurich told us that if Ms O had declared that she was an ex-smoker, her monthly premium would have been £171.13 and if she'd declared herself to be a smoker, the monthly premium would have been £180.99. This meant that by my calculation, based on the applicable premium Zurich says Ms O should have paid, her underlying risk premiums wouldn't have been more than +50% (or £1/mil). So I asked Zurich why it hadn't treated Ms O's misrepresentation as careless, rather than deliberate or reckless.

In reply, Zurich told us that it had reviewed Ms O's entire file again and, based on the medical evidence, it felt it had made an error when it originally concluded Ms O had been an ex-smoker when she took out the policy. Instead, it now considered that the evidence showed she'd been a smoker at the time of sale. And it maintained that Ms O's misrepresentation was deliberate or reckless. It referred to a section called 'Lifestyle information' in the industry code, which stated: 'since lifestyle information (such as smoking) is usually more familiar and easier for a customer 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 issued a provisional decision on 15 November 2024 which explained the reasons why I didn't think Zurich had treated Ms O fairly. I said:

'The relevant regulator's rules say that insurers must handle claims promptly and fairly. And that they mustn't turn down claims unreasonably. So I've considered, amongst other things, the relevant law, the available medical evidence, industry codes, regulatory principles and the policy documentation, to decide whether I think Zurich handled this claim fairly.

The relevant law in this case is The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). CIDRA requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract. 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.

When Ms O took out the policy through a broker, she was asked a number of questions about her health and her circumstances. Zurich used this information to decide whether or not to insure Ms O and if so, on what terms. Zurich says that Ms O didn't correctly answer the questions she was asked during the application process for the policy. This means the principles set out in CIDRA are relevant. So I think it's fair and reasonable to apply these principles to the circumstances of this claim.

Zurich thinks Ms O failed to take reasonable care not to make a misrepresentation when she applied for the policy. So I've considered the available evidence to decide whether I think this was a fair conclusion for Zurich to reach.

I've first considered how clear and specific the questions Ms O was asked were. As Ms O took out the policy through a broker, Zurich doesn't have a copy of the actual application form the broker completed. But it has been able to provide me with a copy of the form the broker input on Ms O's behalf.

It seems during the application process, the broker was asked for information about Ms O's tobacco usage. The form says: 'Please provide accurate information about your client's use of cigarettes, including roll ups, vapes and e-cigarettes containing nicotine, cigars, pipes or any other tobacco or nicotine products including patches or gum.

This is an important factor in our assessment and payment of claims. ..

If the life assured is a previous smoker, the final premium could be higher than any initial quote previously provided through a comparison website.'..

The broker was asked to select an option from a drop-down list. The following options were listed:

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

Ms O's status was listed as a 'non-smoker'. Zurich says the broker input that Ms O had 'never used' tobacco or nicotine. And this was also set out on the personal details confirmation which Ms O was asked to carefully check and sign before the policy was set-up.

In my view, Zurich's question was clear and specific enough to have prompted Ms O to provide it (via the broker) with the information it wanted to know. So next, I need to consider whether I think Zurich has shown that Ms O didn't take reasonable care to answer this question. I've turned then to consider the available medical evidence to assess whether or not I think Zurich has provided sufficient evidence to demonstrate, on balance, that Ms O did misrepresent her smoking history at application.

Ms O's GP completed a claim report. The report asked about Ms O's past and current habits in relation to cigarettes, vapes, roll-ups and cigars and asked the GP to include dates if known. The GP answered: 'history of smoking – last nurse entry was in 2018, duration of smoking was not recorded.'

The medical records which were sent to Zurich include information about Ms O's smoking history. They say that in September 2018, during a check, Ms O was listed as a current smoker and that smoking cessation advice was given.

I appreciate that after the claim was declined, Ms O provided further notes from her GP which stated that in December 2017, Ms O was a non-smoker. But even if Ms O wasn't smoking in December 2017, the medical records do indicate that during a consultation in September 2018, Ms O was a smoker and had been given smoking cessation advice.

Zurich says that it now believes it miscategorised Ms O as an ex-smoker and that it she was, in fact, a smoker when she took out the policy. It referred to a clinic report dated June 2023 from a stroke specialist nurse, which states that Ms O was a smoker, smoking 10 cigarettes per day.

I've considered this point carefully. It's entirely possible that Ms O had been smoking between 2018 and 2023 and that, therefore, she was a smoker when she took out the policy. However, I don't think Ms O's medical records go far enough to persuade me, on balance, that that was the case. That's because, as I've said, the GP's claim report states that Ms O's last nurse entry regarding smoking was in 2018. There's no further reference in the GP records to Ms O being a smoker or any mention of smoking cessation being given. The next mention of Ms O being a smoker was in the stroke nurse's report – which was dated some months after Ms O had taken out the policy and around four and half years since the last entry in the GP records.

On the balance of probabilities then, I don't think there's enough persuasive medical evidence to show that Ms O was a smoker at the time of sale. I think it was more reasonable for Zurich to class Ms O as an ex-smoker. But I do think that even if Ms O had stopped smoking again by the time she took out the policy in 2022, she ought to have declared that she'd stopped smoking between one and five years ago. Therefore, I think Ms O did make a misrepresentation when she applied for the policy.

Next, I've gone on to consider whether I think Zurich has demonstrated that Ms O made a qualifying misrepresentation under CIDRA. It's provided us with underwriting evidence which shows that if Ms O had told it that she was an ex-smoker who'd given up between one and five years ago, it would have applied ex-smoker's rates. It's shown us that ex-smoker premiums would have cost £171.13 per month, rather than the £148.05 per month Ms O actually paid. This means it would have offered the policy on different terms. And as such, the available evidence suggests that Ms O did make a qualifying misrepresentation under CIDRA.

Zurich considers that Ms O made a deliberate misrepresentation under CIDRA. The act says that in cases of deliberate misrepresentation, an insurer may decline a claim, cancel the policy from the start and retain the premiums. In this case, while Zurich categorised Ms O's misrepresentation as deliberate, it refunded the premiums she and Mr S had paid.

CIDRA says that a qualifying misrepresentation will be deliberate or reckless if the consumer:

• knew the information they provided was untrue or misleading or did not care whether it was untrue or misleading; and
• knew that the matter to which the misrepresentation related was relevant to the insurer or did not care whether or not it was relevant to the insurer.

I've considered whether I think it was fair and reasonable for Zurich to classify Ms O's misrepresentation as deliberate. In doing so, I've taken into account a relevant industry code of practice, which I think represents good industry practice. This is the Association of British Insurers' Code of Practice called 'Managing Claims Involving Misrepresentation For Individual and Group Life, Critical Illness and Income Protection Insurance Products.'

The Code includes a section called 'Notes on misrepresentation that is deliberate or reckless.' I've set out below what I consider to be the relevant sections of the Code:

'The overall principle is that the remedy of avoiding a policy from the outset should be confined to the most serious cases of misrepresentation…

This category does not apply where:

The degree of relevance associated with the misrepresentation is relatively low and, in cases where a premium rating would have applied, the underlying risk premium rating resulting

from that misrepresentation would not have been more than +50% (or £1/mil) for the applicable life assured.'

I asked Zurich to provide me with evidence of the premium it would have charged Ms O had it been aware of her smoking history. As I set out above, Zurich says that Ms O and Mr S would've been charged a monthly premium of £171.13 rather than the £148.05 they actually paid. By my calculation, the additional premium Ms O and Mr S would have been charged is less than £1/mil and less than +50%.

Zurich considers that given the Code's reference to the classification of misrepresentation when the non-disclosure relates to lifestyle information (such as smoking), it's fair and reasonable to classify Ms O's non-disclosure as deliberate or reckless. I've considered this point carefully.

But, as I've said, the Code specifically states that the overall principle is that cancelling the policy from the start should be confined to the most serious cases of misrepresentation. And as I've set out above, it also clearly states that the deliberate or reckless category doesn't apply where the underlying risk premium would not have been more than +50% or less than £1/mil. And that seems to be the case here.

So taking the Code into account, I don't currently think it's fair or reasonable for Zurich to classify Ms O's misrepresentation as deliberate or reckless and I don't think it acted in line with the industry practice set out in the ABI Code.

As such then, I currently think that the fair and reasonable outcome to this complaint is for Zurich to treat Ms O's misrepresentation as careless rather than deliberate. CIDRA says that in cases of careless misrepresentation, an insurer may rewrite the policy as if it had all of the information it wanted to know at the outset.

Putting things right

Zurich hasn't confirmed whether or not it considers Ms O's critical illness claim would have met the stroke definition set out in the policy terms. So I don't think it would be fair or reasonable for me to direct Zurich to settle Ms O's claim proportionately. Instead, I currently think the fair and reasonable award in these circumstances is for me to direct Zurich to reinstate Ms O and Mr S' policy, subject to the payment of any refunded premiums, and to reconsider Ms O's claim in line with the remaining terms and conditions of the policy and in line with the remedy for careless misrepresentation set out under CIDRA.'

I asked both parties to provide me with any further evidence or comments they wanted me to consider.

Ms O let me know that she and Mr S accepted my provisional decision.

Zurich didn't accept my provisional findings and it provided a detailed response, which I've summarised below:

- At the point of application in November 2022, Ms O had only disclosed that she suffered from one medical condition;
- As Ms O's claim was made only a few months after the policy application, Zurich requested information both from Ms O's GP and consultant. These reports showed further information Zurich felt should have been disclosed;
- Ms O's specialist stroke nurse report of June 2023 showed that she'd had a loss of sensation in her arm '*approx a year ago'* and had been referred to neurology. Zurich therefore said this loss of sensation pre-dated the policy application;

- The GP's report also reflected that Ms O had a history of right-sided numbness;
- In April 2022, Ms O had had MRI scans of her back and neck, which found minor degenerative changes;
- Zurich said therefore that Ms O hadn't accurately answered other medical questions she was asked during the application process. It said that if it hadn't made the decision to cancel the policy due to the smoking point, it would have sought further information to decide whether, if it had known all of the correct information at the application stage, it would have offered any cover at all;
- It maintained that the smoking misrepresentation should be classed as deliberate/reckless under the ABI Code, since Ms O hasn't provided a credible and convincing explanation for it – and it felt that the further misrepresentation should also be taken into account;
- However, it said that if I maintained that the smoking misrepresentation was careless, then it would wish to make contact with the relevant medical professionals surrounding the April 2022 MRI scans. It considered there was an element of non-disclosed neurological history which pre-dated the application, so it said it would need to establish a timeline of events and symptoms in order to retrospectively rewrite the policy and to communicate the outcome;
- Zurich said it would also wish to ask Ms O for an explanation as to why those questions weren't accurately answered. And it added that given Ms O's occupation, it felt she'd have known the importance of accurate disclosure.

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 still don't think Zurich has treated Ms O fairly for the same reasons I gave in my provisional decision.

I appreciate Zurich still considers that Ms O's misrepresentation in relation to her smoking history was deliberate/reckless and should be classed as such under the provisions of the ABI Code. I've borne in mind its comments. But it's still the case that the Code clearly states that the deliberate or reckless category doesn't apply where the underlying risk premium would not have been more than +50% or less than £1/mil. That still seems to be the case here, based on the smoker and ex-smoker rates Zurich quoted. And I don't think Zurich has provided me with sufficiently compelling evidence to persuade me that it's unfair to disregard this part of the Code in all the circumstances of this complaint.

Accordingly, I still don't think it's fair or reasonable for Zurich to classify Ms O's misrepresentation in relation to smoking as deliberate or reckless and I don't think it acted in line with the industry practice set out in the ABI Code.

Zurich has now provided a further assessment of Ms O's claim and raised further medical issues it considers were likely misrepresented at the time of policy application. It accepts that it didn't investigate those issues at the outset because it felt it had enough evidence to cancel Ms O's policy based on the inaccurate information it concluded she provided in respect of smoking.

However, as Zurich hasn't previously raised these points as part of the claim and nor has it previously communicated these concerns to either Ms O or to this service, it would be unfair for me to consider them as part of this decision. And it wouldn't be reasonable for me to make findings on evidence and concerns Ms O hasn't had a chance to respond to or to comment on.

With that said, as I set out in my provisional decision, I planned to direct Zurich to reinstate Ms O and Mr S' policy, subject to the payment of any refunded premiums, and to reconsider Ms O's claim in line with the remaining terms and conditions of the policy and in line with the remedy for careless misrepresentation set out under CIDRA. To be clear, I didn't direct Zurich to *pay* this claim. And given the information Zurich had provided at the point of my provisional decision, my proposed direction to treat the misrepresentation as careless *only* related to Ms O's non-disclosure of her smoking history. That's still the case.

This means that it's open to Zurich, following the reinstatement of the policy (if the refunded premiums are paid), to reassess this claim in line with the policy terms and conditions and to ask for any additional information or evidence it considers it requires. It will be for Zurich to consider that evidence and to reach a claims decision, in line with its regulatory obligations, the contract terms and the law. If Ms O and Mr S are unhappy with the outcome of any further assessment of their claim, they may be able to complain about that issue alone.

Putting things right

Based on the complaint Ms O brought to us (the cancellation of the policy due to the misrepresentation of smoking) and based on the information which was available to me and to Ms O when I made my provisional decision, I still think the fair and reasonable award in these circumstances is for me to direct Zurich to reinstate Ms O and Mr S' policy, subject to the payment of any refunded premiums, and to reconsider Ms O's claim in line with the remaining terms and conditions of the policy and in line with the remedy for careless misrepresentation set out under CIDRA.

My final decision

For the reasons I've given above and in my provisional decision, my final decision is that I partly uphold this complaint.

I direct Zurich Assurance Ltd to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms O and Mr S to accept or reject my decision before 2 January 2025.

Lisa Barham
Ombudsman