

The complaint

Mrs N and Mr N complain Marshmallow Insurance Limited (Marshmallow) gave a poor level of service when it cancelled Mr N's motor insurance policy it and the date of, and reason for cancellation were incorrectly recorded..

References to Mr N or Mrs N, will include the other.

What happened

Mr N took out a motor insurance policy with Marshmallow through a price comparison website. When he received his policy documents he contacted Marshmallow to tell them his date of birth was recorded incorrectly.

Marshmallow said because he'd answered the question it asked about his age incorrectly, it considered this to be a deliberate qualifying misrepresentation, which entitled it to cancel his policy.

When Marshmallow looked into his complaint it said it would change the cancellation to a cancellation by him because he contacted it by live chat to explain about the incorrect date of birth. It said this meant he does not need to declare this cancellation to future insurers.

Mrs N brought Mr N's complaint to us, and our investigator thought it should be upheld. They agreed there had been a qualifying misrepresentation. But the evidence had persuaded them the misrepresentation was not deliberate. They believed it was careless. They said Marshmallow's decision to cancel his policy was fair but as Mr N cancelled the policy before it did this, it should cancel the policy from 20 November 2023 and should only charge a £30 cancellation fee.

Both Marshmallow and Mr N accepted the investigator's view, but because Marshmallow has failed to make the refund it accepted it would do, nor did it respond to any contact attempts made by our service, the case has come to myself for a final decision to be made.

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 relevant law in this case is the Consumer Insurance (Disclosure and Representations) 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.

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.

Marshmallow thinks Mr N failed to take reasonable care not to make a misrepresentation when he entered an incorrect date of birth in his application via an online price comparison website.

I saw evidence that Mr N had entered the day and month of his date of birth correctly, but the year of birth was incorrect by three years. This mistake made him 21 years old at the time rather than his correct age of 18 years old.

Marshmallow has provided evidence that shows Mr N obtained a number of quotes just prior to the start of the policy in which his date of birth was entered correctly and which were all declined due to his age. I saw he ran a single quote with the incorrect date of birth, and this was accepted with Mr N as the policy holder and Mrs N as a named driver.

I do not think Mr N took reasonable care to enter his correct date of birth. A reasonable consumer would check all their details in full before purchasing cover. And it's clear this didn't happen in this case.

Marshmallow has provided evidence by way of its underwriting criteria that if Mr N had not made this misrepresentation it would not have offered cover.

This means I'm satisfied Mr N's misrepresentation was a qualifying one.

Marshmallow said Mr N's misrepresentation was deliberate. Because he ran a number of quotes with his correct date of birth and one quote with an incorrect date of birth why Marshmallow would say it was deliberate.

However, Mr N brought the mistake to Marshmallow's attention prior to it highlighting the mistake to him. I consider that if he intended to obtain a policy by providing false information, he wouldn't have then contacted Marshmallow a few days later to make it aware of the incorrect information. Mr N had also provided a copy of his driving licence which includes his correct date of birth when the policy started, and I don't think he would have voluntarily provided this if he had deliberately given an incorrect date of birth.

I recognise Marshmallow said its own internal validation process had noticed the mistake with the date of birth, however it did not bring this to Mr N's attention until after he had been in touch with it to inform it of the mistake. I am persuaded that Mr N notified Marshmallow of the mistake, and not the other way round.

Therefore I don't agree that Mr N's misrepresentation deliberate. I am persuaded that this was careless rather than deliberate.

Because I think Mr N's misrepresentation should be treated as careless I've looked at the actions Marshmallow can take in accordance with CIDRA. In this case it would not have offered cover which means it could avoid the policy for misrepresentation, and return his policy premiums, which in this case would mean the start of the policy.

In this case although Marshmallow said Mr N made a deliberate misrepresentation, it did not choose to follow the remedies available to it under CIDRA. Instead it cancelled his policy. It also charged him £130 cancellation fee.

I looked at the terms of the policy and found it 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 minus a void fee of £130, unless there is any claim in which case the full premium may be retained;*
- 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 up to £130 & refund any remaining premium owed on a pro rata basis”.*

Therefore the cancellation of his policy was made within the terms of his policy.

The evidence shows Mr N contacted Marshmallow by online chat on 17 November 2023 to inform it of the mistake with his date of birth. Marshmallow said it would get *back in touch tomorrow* but didn't. I saw Mr N attempted contact again on 18 November 2023 and was told by the online chat advisor she would need to check with colleagues. On 20 November 2023 Marshmallow emailed him and gave him notice of its intention to cancel his policy from 27 November 2023. And on receipt of this email Mr N immediately contacted Marshmallow, by online chat, and told it to cancel his policy with immediate effect.

Marshmallow said it cancelled the policy at Mr N's request because he did not wish to pay an extra week of insurance, but it didn't deal with the request until 22 November 2023. It said this was due to a backlog of online chats.

I saw in the terms of the policy it says;

“This insurance provides you with a cooling off period to decide whether you wish to continue with the full policy. The cooling off period is for 14 days from the date your policy commences.

If you cancel within the cooling off period, and you have not made a claim, you will receive a pro rata refund and be charged a £30 administration fee”.

Because of the delays with Marshmallow making a response to Mr N after he contacted it on 17 November 2023, and because there is no evidence to show it was aware of the mistake with his date of birth before this date, I think the fair and reasonable outcome to the complaint is that the policy cancellation date be recorded as 20 November 2023. This is the date Marshmallow accepted Mr N's request for cancellation. Marshmallow are entitled to retain Mr N's premiums on a pro-rata basis for his time on cover. In this case from 13 November 2023 to 20 November 2023. The fee charged for cancellation should be £30 as per the policy terms for customer cancellation, because Mr N requested cancellation within the 14-day cooling off period.

In January 2024 Marshmallow told Mr N it would record the cancellation as cancelled by him, so he wouldn't have to report it to future insurers. Whilst our service has been looking into this complaint it has said it has recorded its as cancelled by itself. However for the reasons I have given I don't think it is fair for it to now change its stance and it should be recorded as cancellation by Mr N as it agreed to do.

In light of all this, I uphold Mr N's complaint.

My final decision

For the reasons set out above, I've decided to uphold Mr N's complaint.

I require Marshmallow Insurance Limited to

- Record the cancellation of the policy as 20 November 2023. Any policy premiums charged for 21 and 22 November 2023 should be returned to Mr N
- Record the cancellation as cancelled by customer.
- Refund £100. Which is the difference of the £130 cancellation fee already charged and the £30 fee due for a customer cancellation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N and Mrs N to accept or reject my decision before 17 December 2024.

Sally-Ann Harding
Ombudsman