

The complaint

Mr S complains that esure Insurance Limited has registered a fault claim against him for an accident which was not his fault.

What happened

Mr S's car was severely scratched in a supermarket automated car wash. The supermarket refused to pay for the damage so Mr S contacted his motor insurer, esure.

esure said Mr S's car was beyond economical repair and paid him the 'total loss' value less the policy excess. esure said it would try to recover its outlay from the supermarket.

Mr S insured his new car with a different insurer, on the basis that the esure claim was a 'non fault' claim which did not affect his no claims discount (NCD). He said esure had led him to believe this was the way his claim had been registered.

But the new insurer later contacted Mr S to say that the esure claim was showing as open and was a 'fault' claim that had reduced Mr S's NCD. Mr S's premium increased significantly. This was particularly unwelcome as he's living with a disability and is on a low, fixed income.

Mr S complained that esure had misled him. He also asked esure to send him his personal information under a 'data subject access request' (DSAR).

esure responded to say that it had not misled Mr S. It said it had not guaranteed that it would be able to recover its claim expenses from the supermarket. esure said the supermarket had not responded to its requests for reimbursement of its claim expenses and it had now closed the claim as it did not think any further legal action would be likely to succeed.

esure said the claim would remain as a 'fault' claim because it had not been able to recover its costs. It also said Mr S's NCD had correctly been reduced from four years to two years, in line with its policy terms. But esure accepted that it could have dealt with Mr S's complaint and DSAR request more quickly and paid him £200 compensation for his distress and inconvenience.

Unhappy with esure's response, Mr S came to us. He said if he'd known the claim would have affected his NCD as a fault claim he wouldn't have proceeded. He had told esure that when he first notified it of his claim.

Our Investigator thought esure had fairly recorded the claim as a 'fault' claim, which reduced Mr S's NCD. He said this didn't mean Mr S was at fault for the accident and explained that this was the way claims were recorded when the insurer could not recover the claim costs from a third party.

Our Investigator listened to Mr S's call with esure and noted that its claims handler said he would put the claim through as a 'non fault' claim and 'allow' the NCD. But the claims handler went on to explain that there were no guarantees that esure would be able to recover their costs from the supermarket and did not promise the NCD would not be

affected. Our Investigator thought esure's payment of £200 compensation was reasonable.

Mr S responded to say he understood the liability point, even though he thought this was extremely unfair. But he still thought esure had wrongly implied the accident was a non fault claim, which had led him to answer the new insurer's questions incorrectly. The new insurer implied he had lied about this and this impacted his insurance costs enormously, which is unfair given the accident was not his fault. The claim process had taken over a year and he wanted esure to restore his full NCD as it assured him the claim would not affect his NCD.

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.

I've been sorry to hear about Mr S's personal circumstances. I've no doubt he's been distressed both by the accident and the impact on his insurance premium at a time when he can least afford an increase in his expenses. I will first consider whether the claim was properly recorded as a fault claim before looking at Mr S's complaint that he was misled.

Was the claim properly recorded as a 'fault' claim?

Mr S says he understands what the Investigator has said about liability for the claim. But for completeness I think that esure was fairly entitled to record the accident as a 'fault' claim because it could not recover its costs from the supermarket. As our Investigator has explained, 'fault' does not mean that Mr S was to blame for the accident. But rather it refers to the way an accident is recorded where costs can't be recovered from the other party.

Unfortunately, the supermarket did not respond to esure's request for reimbursement. This meant that esure needed to decide whether to pursue legal action against the supermarket. Under the policy terms, esure had full discretion to defend or settle the claim in Mr S's name. But I have also considered whether esure fairly exercised its discretion not to pursue legal proceedings against the insurer.

Mr S had dashcam footage of the accident and said the supermarket had closed the car wash after his complaint about the damage. esure said it had not seen evidence the supermarket had left the car wash open despite knowing it was faulty. esure said the fact the supermarket had closed the car wash after Mr S's complaint did not support his case, because it showed the supermarket had taken action when notified of the problem.

The supermarket had robustly defended its position in its response to Mr S's complaint about its car wash. Given the circumstances and the amount of the claim, I think esure reasonably exercised its discretion not to pursue legal proceedings against the supermarket and to record the claim as a 'fault' claim. esure had a duty to mitigate the costs of a claim and this includes ensuring any legal action has a reasonable prospect of success. Because of the claim, esure was also entitled to reduce Mr S's NCD from four years to two years in line with the policy's terms.

Did esure mislead Mr S about the 'fault' status and NCD?

Mr S says that esure misled him to believe the claim would be recorded as a 'non fault' claim which would not affect his NCD. He says this meant he unwittingly gave his new insurer incorrect information about the claim. He says he would not have proceeded with the claim had esure given him correct information.

I've listened to Mr S's call to esure when he notified it of the accident. Mr S told esure that he

did not want to go ahead if the claim would affect his NCD. esure's claim handler told Mr S that he was putting the claim through as "*non fault*" and so he was going to "*allow the NCD*". But the claims handler went on to say the problem was that the supermarket was "*kicking off*" and so he "*can't promise anything, will boil down to what the system recommends*".

Mr S asked what would happen if the supermarket refused to pay. esure's claim handler said that they would try to settle the claim but esure would keep it open until it was resolved and the claim process could take some considerable time, particularly if the third party had solicitors.

The claims handler told Mr S he couldn't waive the policy excess because the circumstances were "*a bit weird*" and that he "*can't guarantee full recovery*". The claims handler said his priority was to get Mr S back on the road and that he couldn't make too many promises.

I think esure could have explained more clearly to Mr S about the likely impact on his NCD and the fault status of his claim. It seems the claims handler was sympathetic to Mr S's position given the accident had not been his fault.

Mr S told the claims handler he might not proceed if his NCD was impacted. But I don't think the evidence suggests it is likely he would have abandoned his claim had esure made its position clearer.

I say this because Mr S needed a car for his work and the money from the claim to buy another one and he was aware the supermarket had refused to pay his costs to repair the car. It's not clear to me that he was in a position to abandon his claim for the damage. I note that esure had offered him the option of paying his claim less the salvage value and excess, so that he could have kept his car and have it repaired himself (the estimate to repair the damage was around £4,500). Mr S didn't want to keep the car and checked with esure that he wouldn't have to wait for a settlement from the supermarket before esure paid his claim.

Mr S's premium with his current insurer unfortunately increased when the insurer found out he had an open claim, which it said it would treat as a 'fault' claim unless it was settled by the third party. I can see this was an unwelcome shock to Mr S due to his low fixed income.

But I don't think I can fairly hold esure responsible for Mr S giving his new insurer incorrect information about the status of the claim. Mr S knew he had made a claim, which had been settled as a total loss. I can't see that Mr S had been given any information to suggest the supermarket had accepted liability or settled the claim.

Mr S says the claim took too long. I think there was a delay in esure chasing the supermarket for a response to its email message asking for settlement of esure's outlay. Given the supermarket did not respond to esure's messages it's not clear to me that there would have been any change to the outcome even if esure had chased earlier. And esure had told Mr S the claim process could take a long time. I don't think it was unreasonable for esure to make attempts to recover its outlay before ultimately deciding not to proceed with legal action.

I have thought about Mr S's point that it would not impact esure if it restored his NCD to four years. But I don't think I can fairly require it to do so given Mr S has made a claim. esure had an obligation to accurately record the status of any claim, and how it's been settled, so other insurers are able to accurately assess the level of risk they are taking on when offering insurance.

Finally, I agree with our Investigator that the £200 esure paid Mr S for its poor service in responding to his DSAR was reasonable.

I have a lot of sympathy for Mr S's position. He had spent a lot of money on a reliable car which was damaged in an accident that was not his fault. This all happened just before he had to stop work due to a disability. But I don't think I can fairly say that esure is responsible for Mr S's financial losses. So this means that I do not uphold his complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 12 April 2024.

Amanda Maycock
Ombudsman