

## **The complaint**

Mrs W complains that BUPA Insurance Limited has turned down claims she made on a personal private medical insurance policy and that it's applied a special exclusion to her contract.

## **What happened**

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

Mrs W was insured under her employer's group medical insurance policy on full medical underwriting terms. However, the group policy was due to lapse on 31 October 2021 and so Mrs W applied for a personal, continuation policy through a broker. Mrs W answered medical screening questions during the application process and based on her answers, BUPA agreed to offer continuation cover. The new policy began on 1 November 2021.

A few months later, Mrs W made claims on the policy for treatment related to her ears.

BUPA investigated Mrs W's claims and obtained medical evidence from her treating doctors. It noted that in mid-October 2021, she'd been diagnosed with an ear infection by a consultant and had been prescribed a one-month course of ear-drops. As the infection hadn't cleared, in mid-November 2021, Mrs W had returned to the consultant, who'd prescribed antibiotics.

So at the time Mrs W had been going through the policy application, BUPA concluded that she'd been receiving treatment for an ear infection. Therefore, it felt she should answered 'yes' to one of its medical screening questions, which had asked whether she had any treatment planned or pending. It said that had Mrs W correctly answered this question, it would've applied an exclusion for all claims related to ear infections to her policy. So it applied a backdated special condition to the policy and turned down Mrs W's claims.

Mrs W was very unhappy with BUPA's decision and she asked us to look into her complaint. She said she'd believed that the October 2021 ear infection would be covered under the terms of her old policy. And she said she thought her infection had resolved by the time she applied for the policy, so she hadn't thought she needed to tell BUPA about her condition.

Our investigator didn't think Mrs W's complaint should be upheld. She thought Mrs W had been asked a clear question about her health, which she had failed to take reasonable care to answer. So she concluded that Mrs W had made a qualifying misrepresentation under the Consumer Insurance (Disclosures and Representations) Act 2012 (CIDRA). She was satisfied that BUPA had shown that if Mrs W had correctly answered its question, it would've applied a special condition excluding ear infections from the outset. So she concluded that BUPA wouldn't have agreed to have covered any claim related to ear infection and that therefore, it was entitled to turn the claims down.

I issued a provisional decision on 1 November 2023. In my provisional decision, I explained the reasons why I thought it had been fair for BUPA to turn down any claims related to Mrs

W's October/November 2021 ear infections, but why I didn't think it had been fair for BUPA to apply the special condition to the policy. I said:

*'First, I'd like to reassure Mrs W that while I've summarised the background to this complaint and her submissions to us, I've carefully considered all that's been said and sent to us. Within this decision though, I haven't commented on each point that's been raised and nor do our rules require me to. Instead, I've focused on what I think are the key issues.*

*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 terms of the policy, the available evidence and the relevant law, to decide what I think is fair and reasonable in the circumstances of this complaint.*

*Should Mrs W's claims be covered under the group scheme?*

*It's common ground that Mrs W was covered under the terms of the group scheme until 31 October 2021 – around two weeks after she'd been prescribed ear-drops for the ear infection by the consultant. However, it seems that Mrs W went on to claim for further treatment she'd received in November 2021 – under the new, personal policy. The terms of the group scheme say:*

*'We only pay benefits for treatment you receive while you are covered under the agreement and we only pay benefits in accordance with the cover that applies to you on the date the treatment takes place. We do not pay for any treatment, including any treatment we have pre-authorised, that takes place on or after the date your cover ends.'*

*In my view, the policy terms make it clear that BUPA will only pay for treatment which takes place while the group contract remains 'on-risk'. In this case, while Mrs W developed symptoms of ear infection while she was still covered under the group scheme, it doesn't appear that she claimed for treatment for the infection until after the group scheme had ended. I say that because the last claim paid on the old policy was for hearing loss on 17 October 2021. So I don't think it was unfair for BUPA to conclude that Mrs W's claim for ear infection wasn't covered under the lapsed group scheme.*

*Has BUPA acted in line with CIDRA?*

*The relevant law in this case is 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 Mrs W took out the continuation cover, the broker asked her medical screening questions which had been set by BUPA. BUPA used this information to decide whether or not to insure Mrs W and if so, on what terms. BUPA says that Mrs W didn't correctly answer one of the questions she was asked during application process. 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 Mrs W's claim.*

*BUPA thinks Mrs W failed to take reasonable care not to make a misrepresentation when she went through the application process. So I've considered whether I think this was a fair conclusion for BUPA to reach.*

*First, when considering whether a consumer has taken reasonable care, I need to consider how clear and specific the questions asked by the insurer were. BUPA believes that Mrs W answered the following question incorrectly:*

*'Do any of the applicants have any planned or pending investigations, treatment or surgery for any condition or symptom that's not already excluded on their existing scheme?'*

*It's clear, from the medical evidence, that on 16 October 2021, Mrs W had seen her consultant with 'an urgent problem'. She was diagnosed with an infection in both ears. The doctor felt it 'looked staphylococcal' and the letter states that the consultant 'asked (Mrs W) to use (a steroid spray) after cleaning it all out and carry on using it nightly, five drops on each side, using separate bottles, for a month.' And further medical evidence, which was sent directly to BUPA, states that Mrs W's subsequent appointment on 16 November 2021 was 'mainly to check the infection in her right ear had resolved.' Based on the medical evidence then, it's clear that Mrs W was experiencing symptoms of an ear infection – and was being treated for it – at the point she applied for the policy.*

*However, BUPA's question doesn't ask whether an applicant is already experiencing symptoms or undergoing treatment. Instead, it asks whether an applicant has planned or pending investigations, treatment or surgery for any condition or symptom. In my view, a general interpretation of pending means 'until' or 'awaiting' and I think is likely to be a common understanding of the word. As such, I think planned or pending suggest future investigations, surgery or treatment. At the time of application, Mrs W wasn't waiting for any investigations, treatment or surgery and it doesn't appear that any were pending either. The evidence suggests that - as it appears Mrs W told the broker - she was waiting to see her consultant to be signed-off following a check that the infection had cleared.*

*As such then, while I can understand why BUPA would likely have wanted to know about Mrs W's infection and treatment, I don't think its question was clear or specific enough to prompt her to disclose it. In my view, the evidence suggests that Mrs W answered the actual question she was asked honestly and to the best of her knowledge and belief. And on that basis, I don't think I could fairly find that Mrs W made any misrepresentation under CIDRA.*

*Accordingly, I don't think it was fair or reasonable for BUPA to rewrite the policy or impose the special condition which would have applied had Mrs W told it about her ear infection at the time. So I intend to direct BUPA to remove the retrospective special condition which excludes all claims relating to ear infections from Mrs W's policy.*

*Was it fair for BUPA to turn down any claims for Mrs W's ear infection?*

*While I don't think Mrs W made a misrepresentation under CIDRA, I do need to bear in mind what the policy terms and conditions say. It's accepted that Mrs W's policy was taken out on an underwritten basis. Page five of Mrs W's personal policy terms set out 'Important Information' about the contract. Point four says:*

*'If your underwriting method shown on your Membership Certificate is:*

*- Underwritten: we do not pay for treatment for any special conditions detailed on your Membership Certificate or any Pre-Existing Conditions.'*

*A pre-existing condition is defined as:*

*'any disease, illness or injury for which in the seven years before your Effective Underwriting Date:*

- you have received medication, advice or Treatment, or*
- you have experienced symptoms,*

*whether the condition was diagnosed or not.'*

*This definition is also set out on Mrs W's membership certificate.*

*As I've explained above, I think the medical evidence clearly shows that Mrs W had experienced symptoms of, advice for and treatment of a specific ear infection, prior to the start date of her policy. So on that basis, I currently think it was fair for BUPA to conclude that Mrs W's October 2021 ear infection was a pre-existing condition in line with the policy terms and to therefore, turn down any claims for the treatment of that particular infection.'*

I asked both parties to send me any further information or evidence they wanted me to consider.

Mrs W maintained that she felt she'd correctly answered the medical questions she was asked when she went through medical screening.

BUPA accepted my provisional findings.

### **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 it was unfair for BUPA to turn down any claims for Mrs W's October/November 2021 ear infection, but I don't think it was fair for BUPA to apply the special condition to the policy.

As I explained in my provisional decision, I don't think Mrs W made a misrepresentation when she went through medical screening with the broker. BUPA accepted my provisional decision and so I see no reason to change my findings.

Based on the available medical evidence though, I'm still satisfied that Mrs W had experienced symptoms of, advice for and treatment of a specific ear infection before her policy began. So I still find it was fair for BUPA to conclude that Mrs W's October/November 2021 ear infection was a pre-existing medical condition and to turn down any claims for the treatment of that particular infection.

### **My final decision**

For the reasons I've given above and in my provisional decision, my final decision is that I direct BUPA Insurance Limited to remove the special condition from Mrs W's policy.

But I think BUPA was reasonably entitled to turn down any claims for treatment of the ear infection Mrs W was experiencing when she applied for the policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 18 December 2023.

Lisa Barham

**Ombudsman**