An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0517
Sector:	Insurance
Product / Service:	Term Insurance
Conduct(s) complained of:	Delayed or inadequate communication Dissatisfaction with customer service Failure to process instructions in a timely manner
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint concerns a Life Assurance Policy.

The Complainants took out a whole of life insurance policy with a third party provider in **1996**. The Provider, which is the subject of this complaint, subsequently took over the policy. In **1996** the First Complainant had declared that she was a smoker, and this was reflected in the premium being paid. Having given up smoking, the Complainants wanted the Provider to re-evaluate the premiums being paid.

The Complainants' Case

The First Complainant submits that the policy in question states that she is classified as a smoker and that this information is incorrect. The First Complainant states that when she took out the policy in **1996** she was a smoker and that she has not been a smoker since **2005**.

The First Complainant contends that she was led to believe that if she remained a non-smoker after one year she could be classified as a non-smoker on the policy. The First Complainant submits that the broker representative that the Complainants had appointed in relation to the policy had contacted the Provider on numerous occasions over the years, to inform it that she is no longer a smoker and that despite these attempts to

communicate the matter to the Provider, it has continued to classify her as a smoker under the policy.

The First Complainant submits that on **11 October 2016** the broker representative contacted the Provider again via email to inform it that although the First Complainant had been a smoker when the policy was first issued in **1996**, she has been a non-smoker for over ten years. The First Complainant submits that within this correspondence to the Provider, the broker representative requested that the First Complainant receive a revised quote under the policy to reflect this change of smoker status.

The First Complainant submits that the Provider responded to the Complainants' broker representative on **11 October 2016** and stated that the smoker status could not be amended on the policy. The Provider's letter further stated that should the Complainants wish to change their status, they would need to apply for a new plan, as the quotes showing the First Complainant as a smoker were based on then current status of the plan.

The First Complainant states that the Provider has continued to apply loading to the premium due to her classification as a smoker since **2006,** when she was twelve months free from smoking. The First Complainant submits that to date she has paid approximately €28,000 in premiums for the policy over the years. The First Complainant submits that the current monthly premium, at €141.14, is very excessive for the level of cover under the policy, especially when taking into account that she is a non-smoker.

The First Complainant has stated that she has discussed this matter with a solicitor who informed her that the premium on the policy should reflect that she is a non-smoker.

The Provider wrote to the Complainants on **24 January 2020** and stated that, had it been advised in **2006** that the First Complainant had stopped smoking, it could have looked at altering the smoker status at that stage. The Provider further states in the letter, that as it was only now being notified of the change in status and as the First Complainant is over 50 years of age, it is unable to offer non-smoker rates on the policy. The Provider further submits in its letter that should the First Complainant wish to take out a new plan with non-smoker rates, she should talk to her financial adviser.

The Provider wrote to the Complainants again on **21 May 2020** and stated that the policy was incepted on **1 November 1996** and upon inception of the policy at that time, it was not possible to amend the smoker status of the policy. The Provider stated that as the First Complainant was a smoker at the time of setting up the plan, the policy application was accepted on the basis that she was a smoker and smoker rates were applied to her under the plan. The Provider stated that if the First Complainant became a non-smoker during the term of the plan, then she would need to apply for a new plan and cancel the original plan. The Provider stated that the smoker status of the plan could not have changed at any time, after the plan had started. The Provider submits that during a telephone conversation on **13 May 2020**, the First Complainant informed it that she had received a letter from the Provider in **2016** which confirmed that she was noted as being a non-smoker on the plan. The Provider submits that following a search of the paperwork from **2016** it is unable to locate this letter regarding the First Complainant's smoker status.

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The First Complainant contends that if the policy was amended to classify her as a non-smoker, the monthly premiums would reduce on the policy.

The Complainants want the Provider to amend the policy in order to classify the First Complainant as a non-smoker and for the policy premiums to reflect this change on the policy. The Complainants are also seeking a refund of any overcharged amounts in the monthly premiums, due to the change pertaining to the First Complainant's smoker status on the policy.

The Provider's Case

The Provider states that the Terms and Conditions of the plan in question do not reference whether the smoking status of a customer can or cannot be changed after the plan has started. Rather, this was a business decision made by the original third party provider, and applied to all of its life cover plans.

The Provider says that when the First Complainant applied for the plan, she confirmed she was a smoker, therefore, she was subsequently underwritten and accepted, as a smoker. The Provider states that this was the basis of her contract with the third party provider.

The Provider submits that it is important to note that when applying for a life cover plan, the information provided by the Applicants (either medical or smoking status), is only required to be correct when they are signing the Application Form. The Provider says that as a result, it is standard procedure for Life Insurers to only seek up-to-date medical information at the following stages;

- Application Stage;
- If a top-up of life cover is being applied; or
- If a claim is being made.

The Provider states that there is no obligation or need, for a life cover provider, to continually collect new medical information over the life of a plan.

The Provider submits that it is not obliged to change the terms of the original acceptance, due to the First Complainant giving up smoking, any more than it would be acceptable for it to increase the payment being made, if it came to light that the Second Life Assured has started smoking, after the Plan Started.

The Provider says that while it notes that the First Complainant states that she informed her Broker on many occasions from 2005, that she was no longer a smoker and that it was her understanding that her Broker relayed this information to the Provider, the Provider has stated that this was not the case.

Rather, it asserts that it was 11 October 2016, when the Provider was first informed, that the First Complainant no longer smoked. This information was provided in an e-mail from

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the Broker, in which he sought life cover quotes relating to the plan. The email in question noted;

> *"As the second life insured was a smoker on issue of this policy and is now a non-smoker for over 10 years can she get non-smoker rates on the revised quotes?"*

On the same day, the following was sent to the Broker;

> *"In relation to the smoker status, please note that this cannot be amended on this contract. If the clients are looking to change their status, they will need to apply for a new plan. The quotes below will be based on their current status".*

In his reply to the Provider on 12 October 2016, the Broker noted;

> *"Many thanks for your reply regarding my below query".*

It is the Provider's position that at no stage did the Broker question this information or note that he had informed either the third party provider or the current provider, of this information in the past, which would be the Provider's expectation, if this was the case.

The Provider notes that the First Complainant has also advised that she received written confirmation form the Provider in 2016, that she was now noted as a non-smoker. The Provider says however, that no such correspondence issued, in relation to the plan in question.

That being said, the Provider notes that the Complainants applied for a new plan with the Provider in 2016, of which the First Complainant was the Plan Owner and the Second Complainant was the Life Assured. The Provider submits that is it possible that the when carrying out a Personal Financial Review with their Broker at the time, they received confirmation in the resulting documentation, that the First Complainant was a non-smoker.

The Provider states that the Complainants were advised in a letter dated **24 January 2020** that had it been alerted to the change in smoking habits in 2006, when the First Complainant was under age 50, the Provider would have looked at altering the smoking status on the plan.

The Provider however says that on **21 May 2020**, the Provider wrote to the Complainants and clarified that this information was incorrect and that it was never possible to amend the smoking status on the plan in question. Rather, if the First Complainant wished to be rated as a non-smoker, he would have to apply for a new plan.

As regards the background to the advice that was given in January 2020 the Provider states that, it is important for the Provider to first explain that the plan in question, while taken

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out with the third party provider in 1996, has been administered by the current Provider, from May 2015.

The Provider explains that while the third party provider did not allow the smoking status on existing plans to be amended during the term, the current Provider does allow such a change on its plans. Subject to the following conditions;

- The Life Assured is under age 50;
- The level of cover is under a certain amount (the amount can vary between €500,000 and €1,000,000 life cover)
- There was no loading on the original payment;
- The Customer was smoking less than 20 cigarettes a day when they applied for the plan;
- They have not smoked within the last 12 months; and
- They are able to sign a non-smoking declaration

The Provider states that, based on its operating procedures, the Complainants were incorrectly advised (in the letter dated **24 January 2020**), that had it been alerted to the change in smoking status in 2006, this could have been amended on the plan and for this, the Provider apologises.

The Provider says that based on the commercial decision taken by the original third party provider it was never possible to change the smoking status on this plan, regardless of when the First Complainant stopped smoking or brought this to the attention of either the original or current Provider.

The Provider submits that it is also important to note that even if the administration procedures for the plan in question, had been amended to match that of the current Provider when it took over the administration of the plan in 2015, the plan could not have been amended in 2016 (when it was first alerted to the First Complainant's change in circumstances), as she did not meet the criteria of the current Provider.

The Provider says it was never possible to amend the smoking status on the Complainants' plan, regardless of when the change in smoking habits occurred or when it was relayed to the Provider.

The Provider accepts that the information in the letters from January 2020 and May 2020, did have conflicting information.

The Provider states that it is important to note that the correct information was relayed to the Complainants' Broker in October 2016, therefore, the Provider states that it is reasonable for the Provider to assume that this was in turn, relayed to the Complainants at that time.

The Provider states that this, was confirmed by the First Complaint, in her letter of **20 January 2020**, in which she noted;

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"I have explained this on numerous occasion, to my Broker, …, but he stated that once classed as a smoker, you are always a smoker".

The Provider therefore says, it was clear that the First Complainant was aware, before the Provider wrote to her in January 2020, that her smoking status on the plan, could not be amended.

The Provider apologises for the incorrect information contained in its letter dated January 2020, which was the result of the agent not noticing that the plan in question did not originate with the current Provider, rather, it was a plan that originated with the third party provider and as such, was governed by procedures put in place by it at the time.

The Provider states that it was never possible to change the smoking status of a customer on an existing plan. Rather, if they wished to be rated as a non-smoker (after the plan had started), they had to apply for a new plan. This was the process in 2006, for the Complainant's plan, and remains the process.

The Provider says that when the First Complainant applied for the plan, she was a smoker, therefore, she was underwritten as a smoker and this formed the basis of her contract, for the term of the plan.

The Provider states it has been correct, in continuing to charge at the rate under which the First Complainant was accepted into the policy.

The Provider says that should the First Complainant wish to be rated as a non-smoker, a new life cover plan would have to be put in place.

Evidence

Policy Provisions

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"6. CHARGES
A. Benefits Charge
The cost of providing the benefits will be recovered monthly in advance by cancellation of Units from the Benefit Fund. The amount of the monthly charge will be based on the amount of the Benefits held at the start of the month multiplied by a factor determined by the Actuary.

In determining the factor, the Actuary will refer to
(i) the age, smoker status and sex of the Life Assured at the Policy Anniversary which precedes or coincides with the calculation date.
(ii) such other factors relevant to the benefit in question as were agreed between the Policyholder and the Company at the Commencement Date or subsequently".

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"The Policy is governed by the laws of the Republic of Ireland and Premiums receivable or Benefits payable shall be in Irish pounds. The Policy is issued on the basis of the application form, any declaration as to smoking habits. any health or other questionnaire, and any medical or other statement which has been made by the person effecting the Policy and/or by the Life Assured and/or by any other person concerned with the Policy.

The Policy contains all the terms of the contract between the Life Assured and the Company".

The Complaint for Adjudication

The Complaint is that the Provider has wrongfully refused to classify the First Complainant as a non-smoker on the insurance policy.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **22 November 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Analysis

The Provider states that the Terms and Conditions of the plan in question do not reference whether the smoking status of a customer can or cannot be changed after the plan has started. The Provider says, this was a business decision made by the original third party provider, and applied to all of that provider's life cover plans.

The policy provisions specifically state that:

> *"In determining the factor* [the charge for the benefits], *the Actuary will refer to (i) the age, smoker status and sex of the Life Assured at the Policy Anniversary which precedes or coincides with the calculation date. (ii) such other factors relevant to the benefit in question as were agreed between the Policyholder and the Company at the Commencement Date or subsequently".*

In the above regard the Provider states that when applying the charges each month, it considers the smoking status associated with the contract in question. In this instance (and in accordance with the original application completed and signed by the lives covered), Life 2 is rated as a smoker and the charge associated with such, is applied.

While there is no evidence of a communication by the Complainants to either provider of the change in the First Complainant's smoker status before 2016, I accept that as with the Provider, who took over the policy from the third party provider in 2015, there may have been operating procedures or specific criteria for accepting any change to a policy. Such operating procedures or specific criteria are discretionary and are not set out in the policy provisions. Each provider may have different procedures or criteria. This is in part due to the fact that Insurers will have different underwriting requirements when considering the risks associated with providing cover for an insured who had previously smoked.

In its final submission of **8 October 2021** the Provider set out its position as follows:

> *"The discretion to facilitate a change in smoking status lies totally with the provider, as the entitlement to amend from smoker to non-smoker is not facilitated in the Terms and Conditions".*

The Provider states that while a change is allowed by the current Provider, it only applies to some products and only if certain criteria are met. The Provider says it has not been retrospectively applied to all plans or in particular; plans whose administration has been taken over from the previous provider.

The evidence submitted shows that the Provider was first advised in 2016 of the First Complainant's changed smoker status. The operating procedures or specific criteria, that

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would apply in 2016 were those of the Provider and not any that the third party provider may have had in place. I note the Provider states that the third party provider's position was to not allow a change to the policy at all, when a change of smoker status was communicated.

The Provider only took over the role of administrator and underwriter of the policy in 2015. I accept that the Provider's procedures or criteria, that it applied to policies, were discretionary in nature and are underwriting matters, not applicable as of right. I accept that the Provider's position of considering a change of smoker status on its policies, subject to its criteria, was a much fairer approach to take, than having a blanket refusal to make any alteration where there was a change in a policyholder's smoker status.

I accept that even if the Provider did apply its underwriting criteria to this policy, the First Complainant would not have met the Provider's criteria to effect a change in smoker status in 2016, in particular in relation to the Provider's age criterion of a policyholder having to be aged under age 50 (the First Complainant would have been over aged 50 in 2016). This office cannot interfere with the Provider's general underwriting discretion.

Having regard to all of the above, I do uphold this complaint.

Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

15 December 2021

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—
(i) a complainant shall not be identified by name, address or otherwise,
(ii) a provider shall not be identified by name or address,
and
(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.