DRN-3257940

The complaint

Mr B's complaint is about DAS Legal Expenses Insurance Company Limited's handling of a claim under the legal expenses section of his home insurance policy.

What happened

Mr B made a claim under his policy in October 2019 for cover in relation to proceedings against his former employer. Mr B had already appointed solicitors to act for him at a cost of £300ph plus VAT. DAS said this was above what it would usually pay but asked for more details of the case. Another firm was then appointed by Mr B who said their rate was £175 per hour plus VAT. DAS agreed to that firm acting for Mr B under the terms of the policy.

However, in early April 2020, with not long to go before a hearing of his legal case, Mr B told DAS that his solicitors would not able to deal with the case any longer. Mr B asked for a panel firm of solicitors or for a new solicitor ("Firm A") to be appointed.

DAS agreed in principle to Firm A acting under the cover of the policy and offered to pay their costs at a rate of £217ph plus VAT, which it says is the appropriate the court guideline rate. The solicitors didn't agree and said the fee earner with conduct of Mr B's case charges £350ph plus VAT. DAS suggested Mr B agree to instructing one of its panel solicitors, or another firm who would agree the hourly rate offered. DAS said it could not provide any cover if he wanted to stay with Firm A.

In early May 2020, in its response to Mr B's complaint, DAS agreed to cover all reasonable costs incurred with Firm A up to 24 April 2020 (the day after the hearing) at an hourly rate of £217ph plus VAT, subject to a costs assessment. It maintained its position that it would not provide any further cover, as it had not agreed terms with Firm A.

In mid-July 2020, Firm A told DAS that Mr B's case had been settled through mediation.

Mr B is unhappy with the refusal of cover and the handling of the claim. Firm A has made a number of submissions on behalf of Mr B, which I've summarised below:

- the £217ph offered is not reasonable and is not the correct rate to apply in any event. It is based in central London and the guideline rates for its area are significantly higher.
- The court guidelines are also out of date and are, in any case, only starting guideline rates and not fixed rates.
- It was reasonable for a partner of the firm to represent Mr B, given the age of the case and amount of documentation to consider prior to the imminent hearing.
- DAS's suggestion to Mr B that he instruct a panel solicitor or another solicitor who would charge less, was a breach of his right to choose his own solicitor.
- In any case, Mr B was unable to find an experienced discrimination solicitor to act for him at the rate offered.
- The costs outstanding since 2020, have still not been paid.
- The policy was mis-sold. It does not state policyholders can only instruct solicitors in the area they live; it does not fix the hourly rate of £217 plus VAT; and it does not say

that indemnity would be refused if the hourly rate is not agreed; and does not make clear that a policyholder might be liable for a shortfall in costs.
- Mr B did not therefore know what cover he was getting in exchange for his premiums.
- The previous solicitors (who acted for £175ph plus VAT) had a paralegal dealing the with case but it needed a more senior fee earner due to its complexity and so requires a higher hourly rate.
- DAS has breached the relevant regulations relating to legal expense insurance by only paying an hourly rate based on where the complainant lives, which restricted Mr B's freedom of choice. The relevant EU regulations mean that his freedom of choice should not be fettered and the option of panel solicitors only is a fetter to that freedom.
- And in any case, the evidence provided by DAS from two panel firms by way of letters dated December 2021, that they would have taken the case in April 2020, do not specify the level of fee earner that would have had conduct of the case and are "*contrived and made in bad faith".*
- DAS also breached the regulations by refusing to pay any costs on the basis they had not signed terms of agreement because they couldn't agree the hourly rate.
- Firm A refers to the Court of Appeal decision in the case of *Brown-Quinn*[1] as being relevant to this case and says it supports its position that the court guideline rates are not fair.
- Mr B should have received a written explanation of all his options and the possible risks associated with them, before the previous solicitors came off record as acting, including the possibility that DAS would not pay all his legal costs. All Firm A had was some confused verbal information from Mr B, as told whilst he was going through a stressful disability discrimination claim. The explanation it was provided with "*does not tick any box relating to professional duty of solicitor or professional duty of an insurer."*
- DAS failed in its duty to make reasonable adjustments in the way it communicated with Mr B in relation to this matter, in breach of The Equality Act 2010. This relates in particular to its final response letter of 11 May 2020 (re-sent in March 2021, as he said he had not received it) telling him costs would not be covered if Firm A would not agree its terms.
- No remedy has been offered for the breaches of contract and relevant regulations and no assessment made of Mr B's financial loss or the distress and inconvenience he has suffered.
- DAS should also pay £5,000 for Firm A's costs of pursuing this complaint, which Mr B could not have done himself.

Since the complaint was brought to us DAS has accepted that it cannot refuse all indemnity on the basis that no terms had been agreed with the solicitors Mr B appointed. I am disappointed that it maintained that it was entitled to do so, as late as 2021, as it has been well aware of our position on this – as confirmed by the courts- for some time before then. (I will comment on this further below.) However, I am pleased that issue is now agreed. I also understand it has made an interim payment for the costs up to 24 April 2021 of £3,281.04 and also now offered a further £12,412.40 for costs incurred with Firm A after that date (all based on the hourly rate of £217ph plus VAT). Firm A says this still leaves a significant shortfall for Mr B to pay and DAS has not written to Mr B to explain this to him.

One of our Investigators looked into the matter. She did not recommend the complaint be upheld, as she considered that DAS was entitled to limit the costs to £217ph plus VAT. The

[1] (1) Brown-Quinn (2) Webster Dixon LLP and Others v (1) Equity Syndicate Management Ltd (2) Motorplus Ltd [2012] EWCA Civ 1633

Investigator also stated that DAS should not have refused cover for ongoing costs entirely just because the terms of appointment had not been agreed with Firm A.

Mr B does not accept the Investigator's assessment and has also raised a further complaint relating to a subject access request he made to DAS in November 2021. This is being dealt with separately. I am only addressing the complaint about the handling of the claim in this decision.

As the Investigator has been unable to resolve the complaint, it has been passed to me.

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.

Freedom of choice

The Insurance Companies (Legal Expenses Insurance) Regulations 1990 are derived from European Council Directive 87/344/EEC of 22 June 1987, recast by the Directive 2009/138/EC into the Insolvency II Directive.

The Directive 87/344 made it clear that where insurers have given undertakings to separate legal expenses from its other classes of business (which is the option taken by all UK legal expenses insurers) a policyholder will have the freedom to choose their own legal representative once legal proceedings are imminent.

Mr B therefore had the freedom to choose his own legal representatives, from early on in his claim and long before Firm A were appointed, and was not obliged after then to use one of DAS's panel of pre-approved solicitors.

Was Mr B's freedom of choice unfairly restricted due to the hourly rate offered by DAS?

Mr B's policy covers his legal costs and expenses in relation to actions such as the one he was claiming for. The policy defines 'costs and expenses' as being:

"All reasonable and necessary costs chargeable by the appointed representative… in accordance with the DAS Standard Terms of Appointment".

The policy also says *"If you choose a law firm as your appointed representative who is not a preferred firm, we will give your choice of law firm the opportunity to act on the same terms as the preferred law firm. However, if they refuse to act on this basis, the most we will pay is the amount we would have paid if they had agreed to the DAS standard Terms of Appointment".*

The policy document in place at the time of this claim doesn't provide any further guidance as to how DAS would assess what is "*reasonable and necessary*", or any specific hourly rate.

DAS has not limited the indemnity to the amount it would pay its panel solicitors under its Standard Terms of Agreement (which would usually be around £100ph plus VAT). As the terms of that agreement are not set out clearly in the policy, I think this is reasonable and it would not have been entitled to limit costs to this figure.

I do not agree that the policy terms mean DAS is required to pay whatever a policyholder's chosen solicitor wants to charge. The policy provides that it will pay *"reasonable and*

necessary" costs. In the absence of any more specific detail about the indemnity provided, I have to determine if what DAS has offered can be considered to be 'reasonable' taking account the case involved and all other circumstances.

Firm A says the Court of Appeal decision in the case of *Brown-Quinn*[2] is relevant to this case and supports its position that the court guideline rates are not fair.

I have had regard to the case, as it is relevant law. However, I do not agree that it means the court guidelines rates are not an appropriate benchmark. The Court of Appeal decision provides that insurers can seek to limit costs, provided the insured's freedom of choice (as provided for in the regulations) is not *"rendered meaningless".*

In determining what a 'reasonable' rate should be, it seems to me that the court guideline hourly rates (used by the courts mainly in summary assessment of costs) provide a good starting point for assessing a reasonable hourly rate. The court guideline rates are set for the purpose of guiding assessment for summary assessment of costs and they provide a starting point "*on reasonable hourly rates for solicitors and legal executives of varying levels of experience*" and in various locations. It therefore seems to me that the court guideline hourly rates provide evidence of a range of reasonable hourly rates which could have been reasonably incurred by Mr B. There will be some solicitors within each area that charge more than the guideline rate and some that charge less.

Firm A has also argued that it is not fair to limit the indemnity to these guideline rates, as they are outdated and are only starting guidelines. I am not persuaded that the court guideline rates are not a reasonable tool to use in determining a reasonable hourly rate. I accept they are guidelines and that the rates increased in October 2021 for the first time since 2012. However, there's no evidence presented to me that the pre-October 2021 rates were not being applied by the courts in 2020. I also note that the court service provided some further guidance, including that "*an hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners in substantial and complex litigation where other factors, including the value of the litigation, the level of complexity, the urgency or importance of the matter as well as any international element would justify a significantly higher rate to reflect higher average costs".* It also says that other factors can be taken into consideration in determining the actual hourly rate. However, I have not seen any convincing evidence that any features of Mr B's legal case would mean the relevant guideline rate generally isn't reasonable in his case.

Under the guidelines, a Grade A fee earner is defined as being "*Solicitors with over eight years post qualification experience including at least eight years litigation experience".* There is no higher grade, for the purposes of the court guideline rates.

Mr B's solicitor was a grade A fee earner under this definition. Firm A says it is a London Area 1 firm (which command the highest possible rates) according to the guidelines but I consider they would be London 3 according to the guidelines relevant at the time, which is based on their postcode. The updated guidelines (which do not restrict London 1 firms to any particular London postcode) define London Area 1 firms as being those involved in "*very heavy commercial and corporate work by centrally based London firms… not restricted to a particular postcode*."

I am not persuaded there is any convincing evidence that this case would count as *"heavy commercial or corporate"* case. It was a disability discrimination claim. Firm A says that Mr B's attributes, the importance of the case to him, the value of the claim, the fact there

---

[2] (1) Brown-Quinn (2) Webster Dixon LLP and Others v (1) Equity Syndicate Management Ltd (2) Motorplus Ltd [2012] EWCA Civ 1633

were 100 allegations of discrimination to be determined and his employer intended to call at least five witnesses all mean it was particularly complex and that it was reasonable to charge the rate it did.

DAS has not, as far as I'm aware, disputed that it was reasonable for a grade A fee earner to handle the case. However, I have not seen any evidence that it was of particularly high value, involved any novel or complex point of law, or other issues. Firm A says it was of high value and the initial schedule of loss was relatively high but it settled for much less. I accept the case was of importance to Mr B and there were a number of allegations and would have involved some complexity, but that in itself does not establish that it was of the *highest* level of complexity and would qualify as "*very heavy commercial work".* Firm A may deal with such cases but that does not mean that it would be reasonable to apply the rates that would apply to such cases to a case that does not fall within that category.

Given the above, I am satisfied that London 3 is a reasonable categorisation for Firm A, based on its postcode (which is a relevant factor for London Areas 2 and 3 under the guidelines in force at the relevant time *and* in the updated guidelines).

Mr B lives in National area 1 and his tribunal was also heard in National Area 1. I also understand the courts would usually take account of the location of the hearing and apply the rates for that area, when assessing costs.

The court guideline hourly rates for the areas mentioned above (until October 2021 when they were increased) were:

London 3 - Grade A fee earner £229-267ph plus VAT.

National 1 – Grade A fee earner £217ph plus VAT.

I can see why Mr B would want London solicitors. However, there's no evidence that there were not suitable expert solicitors in the National 1 area. And there is nothing to link the case to the London area the solicitors were based in. Firm A has said it has previously been paid its normal rate by DAS on another case and so it should do so here. I am only able to determine if Mr B's claim has bene dealt with fairly and reasonably and whatever decision it might have made on another case, is not directly relevant to my consideration to this complaint.

Firm A has also said that Mr B was not aware of the indemnity he was to be provided with under the policy, in exchange for his premium. However, I am tasked with determining what 'reasonable and necessary costs' should be in the absence of any hourly rate being specified in the policy. In my opinion, Mr B was entitled to expect his 'reasonable' costs to be paid but this cannot be interpreted as meaning he was entitled to expect the costs of the most senior solicitor available, in one of the most expensive areas, to be met. I am therefore satisfied that it is reasonable to apply the National 1 rates.

I am also not persuaded that Mr B has established that there is any compelling justification for exceeding the guideline rate. It is not enough to simply say it was complex, when the Grade A rate already assumes a need for seniority and expertise. There has to be a compelling reason to justify exceeding the guideline rate and I have not been presented with any. For these reasons, it would seem to me that the evidence currently available supports a finding that the court guideline rate for National 1, is not unreasonable in relation to Mr B's case.

Firm A says that the offer to pay only £217ph plus VAT effectively renders Mr B's statutory right to choose his own solicitors meaningless, as it limits him to a choice of panel solicitors

only, because no other non-panel firm would be able to handle the case for this amount. Firm A says that Mr B approached three other firms and they all told him they would not take the case for the £217ph offered. However, I have not seen any evidence to support this and have not seen any convincing evidence that no other suitable non-panel firms would be able to act for the amount offered.

The solicitors that acted for Mr B before Firm A asked for £175ph plus VAT and while they apparently said that the matter would have to be dealt with by someone with more experience, there is no record of them asking for a higher rate from DAS at that stage. I also note that a significant amount of the preparatory work for the case had been carried out by those solicitors (at that rate) and an offer of settlement had been received by the time they said they could no longer act.

DAS has also provided evidence from two of its panel firms that confirm they would have taken the case for the panel rate of £100ph plus VAT. Firm A questions the veracity of this evidence, as it says the panel firms have an ongoing relationship with DAS. The firms are on DAS's panel of pre-approved solicitors and there is therefore a relationship there but I do not think this means that I cannot rely on their evidence that they would have taken the case on those terms. Firm A also says the letters do not confirm the grade of fee earner that would deal with the case. It would be up to the firms to allocate the case appropriately but they have confirmed they would have taken the case for the panel rate.

Given all of the above, I do not consider Mr B has established that there was no other non-panel firm willing to take instructions for £217ph plus VAT. In addition, there was a choice of panel firms. I don't therefore think the hourly rate offered is so low that it rendered Mr B's freedom to choose meaningless. And for the reasons I've explained I think the rate is reasonable taking into the account the circumstances of this particular claim.

First solicitors terminating agreement

Mr B's solicitor has said that DAS should have provided a written explanation of his options including that DAS might not pay his legal fees before the solicitors came off the record as acting for him. DAS did not appoint the solicitors and is only responsible for indemnifying Mr B's legal costs (for a valid claim in accordance with the policy terms). It therefore had no control over why or when the solicitors came off the record as acting for him. They did not ask for a higher rate for themselves or counsel, as far as I can see from the files presented to me.

Firm A also says that no clear written explanation of his options was provided and all they had was a confused verbal account from Mr B. Firm A was not involved at that point with DAS, and the information or documents Mr B provided them is not relevant to DAS. From the correspondence I have seen, DAS and Mr B emailed about various options available to him and I am not persuaded that DAS acted unreasonably at that point, or failed to provide him with sufficiently clear information.

Indemnity beyond 24 April 2020 and refusal to appoint Firm A

We have long-held (in line with the case of *Brown-Quinn*) that if the claim is covered and the policyholder is entitled to choose their own solicitor, the insurer cannot refuse all cover simply because the terms of appointment aren't agreed with the solicitor. This is because the terms of appointment are a separate contract between the insurer and the lawyers. The policyholder will not normally have much influence over this and so it would be unfair to let

the lack of agreement over this mean the policyholder doesn't get the cover they're entitled to. It would also inhibit the policyholder's freedom of choice.

I do therefore agree with Mr B's solicitor that DAS should not have refused all cover under the policy pending resolution of the dispute about the hourly rate. DAS should have agreed the solicitor's appointment and agreed the £217ph on an interim basis and I am disappointed that it maintained its position on this for so long.

DAS has since agreed to review the costs incurred after the hearing on 24 April 2020 subject to a costs assessment and based on the hourly rate it offered. I think this is reasonable for the reasons I've explained.

Reasonable Adjustments

Firm A has also said that DAS has failed to take account of Mr B's health condition and failed to make reasonable adjustments in the way it dealt with the claim and communicated with Mr B. As such Firm A says DAS has discriminated against him and victimised him.

In particular, Mr B has complained about sending its final response letter on 11 May 2020, without explaining the outcome of his complaint verbally and then not making any other contact for several months. The complaint about the subject access request has been dealt with separately and so I cannot make any final determination on that matter. With regard to the May 2020 letter, Firm A says this discriminatory conduct, in breach of the Equality Act, exacerbated his anxiety. Firm A says the question we have to answer is whether it had a duty to make reasonable adjustments under the Act and whether it failed to make them.

The Investigator has already explained that it's not for this service to decide if the Equality Act has been breached as that's for the courts to decide. I have however, considered whether DAS acted fairly and reasonably when dealing with Mr B while having regard to the law, including in writing that letter.

Mr B had written to DAS expressing his dissatisfaction with its response to his claim. It correctly in my opinion, treated this as a complaint and as such was required to provide a final response to that complaint in writing. That in itself would not amount to discrimination. In my opinion, the letter was written in professional terms and while the contents might have caused disappointment and stress (as DAS was saying it would not indemnify his legal expenses) it was required to set out its position in writing (even if that position is later deemed to be incorrect) and it did so. I also note that Mr B had communicated with DAS in writing prior to this and had not indicated any issue with that.

Firm A also suggests DAS should have spoken to Mr B to ensure he understood the contents of the letter and knew his options. Mr B has also said that he did not receive the letter at the time it was sent. DAS therefore resent it in March 2021 and extended the time within which Mr B was required to refer to this service. I think it acted fairly and reasonably in doing this and I do not think it had any further obligation to follow this up.

I do not think any award specifically for the fact of having written that letter is warranted. DAS had to respond to Mr B in writing to set out its position and it did so. Mr B was unhappy with the content of the response and so he brought his complaint to us. I appreciate Mr B has said he didn't receive the response to his complaint dated 11 May 2020. However, I can see that it was sent to the address we have for Mr B. I do not think DAS treated Mr B badly or discriminated against him.

DAS's handling of the claim, including delay in payment of costs, financial loss and compensation

Firm A has confirmed that Mr B has not paid any of its costs directly, so he has not suffered any financial loss as a result of this matter. So while I agree that it was not reasonable of DAS to refuse to proceed with the hourly rate offered, and it could have made an interim payment sooner, I have no power to compensate Mr B's solicitors for having to wait for payment, as they are not eligible complainants in their own right. And because I think DAS was also entitled to limit the indemnity to £217ph plus VAT, it follows that I do not think any compensation is warranted for any stress Mr B suffered as a result of thinking he might have to pay any shortfall.

However, Mr B was also told that none of the costs he incurred with Firm A would be covered, beyond the April 2020 hearing. It seems to me this would have caused him stress and worry, which could have bene avoided. I therefore consider that some compensation is warranted for this. When determining the appropriate amount of compensation, I have taken into account the fact that Firm A and counsel apparently agreed to defer payment, so Mr B has not had to meet those costs himself and he was aware there would have been a shortfall in any event. Having taken everything into account, I consider the sum of £200 to be appropriate for this.

Interim payment

DAS has now made a payment of costs based on £217ph plus VAT to Firm A. It is unhappy that this leaves a shortfall for Mr A to pay. As I have determined that the rate of £217ph plus VAT is not unreasonable, I do not think DAS has to make any further payment. Firm A also says it has not explained this to Mr B and has not told him what his options are. Mr B is already aware that DAS would only pay a rate of £217ph, so he is aware of its position on this. It will be up to Firm A whether it seeks further payment from Mr B.

Mis-selling

Mr B's solicitor has also said the policy was mis-sold to him, as it did not set out clearly enough the restrictions of cover that were applied in his claim. DAS did not sell the policy, which was sold as part of his household insurance policy. Any allegation of mis-sale should therefore be directed to the seller and I cannot take this part of the complaint any further in the context of this decision against DAS.

Firm A's costs of dealing with this complaint

Firm A says Mr B could not have pursued this complaint without its professional representation because to the complex issue relating to the egal expenses regulations and the *Brown-Quinn* judgement.

We don't normally award the costs of professional representation in establishing an insurance claim, or pursuing a complaint, as consumers have the right to come to us free of charge and unrepresented if they have a dispute about insurance policy. We are an informal, impartial dispute resolution service, with an inquisitorial remit and do not require complainants to plead their case in the way they would need to in court.

I have not seen any convincing evidence that Mr B was unable to bring this complaint without professional representation. I am not therefore going to award any costs for this.

My final decision

I uphold this complaint against DAS Legal Expenses Insurance Company Limited in that I consider it should not have refused all indemnity beyond April 2020, on the basis terms were not agreed with Mr B's solicitors and require it to do the following:

- indemnify all Mr B's reasonable legal costs with Firm A at £217ph plus VAT (subject to the remaining terms of the policy, including the indemnity limit). I understand that two payments towards these costs have already been made, so if those are accepted (aside from in regard to the hourly rate) no further payment is required; and
- pay Mr B £200 compensation for the distress and inconvenience caused by its refusal to provide any cover for his ongoing fees with Firm A.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 8 July 2022.

Harriet McCarthy
Ombudsman