

The complaint

S complains DAS Legal Expenses Insurance Company Limited isn't providing full cover for its legal costs of £22,138 and has handled its claim poorly.

What happened

S contacted DAS LEI in March 2017 to seek assistance with claims brought against it by a former employee.

S wished to use the firm which had advised it on the initial stages of the case. I will call this firm 'P'. DAS LEI wanted to use a panel firm. DAS LEI tried to appoint a panel firm I'll call 'F', but eventually it was realised F was unable to act. So, DAS LEI agreed to use P.

DAS LEI sent P its standard terms of appointment and requested further information on 22 March 2017. The next day P raised concerns about the hourly rate applied in the terms and stated that their usual rate was £350 per hour. DAS LEI agreed to make concessions on this matter but despite this being followed up by P, DAS LEI failed to deal with the dispute over the hourly rate and failed to obtain the solicitor's signed agreement to its terms.

Unfortunately, the claim for unfair dismissal was lost, and the third party was awarded £33,429.37, for which DAS LEI was now responsible. Again unfortunately, the file was noted as awaiting final invoices from P rather than dealing with the award that was now due. Subsequently interest was added to the award due to the delay, but DAS LEI was able to forward this payment to S to enable it to pass it on to the former employee.

The former employee then made a claim for wrongful dismissal. DAS LEI confirmed that this would not be treated as a new claim but requested an updated claims management report and confirmed that there would be no cover for any award (as this was a contractual rather than a statutory award). The wrongful dismissal claim was settled.

In February 2018, S sent DAS LEI a summary of the outstanding invoices on the case. This summary showed three invoices (one for £13,500, one for £7,215 and one for £666). These three invoices added up to £21,381. A further invoice was also provided for £757 (which seems to relate solely to the wrongful dismissal claim), and this took the total to £22,138.

In July 2019, S logged a complaint that its legal fees of £22,138 hadn't been paid and about DAS LEI's general handling of the matter.

DAS LEI apologised for its failings in handling the claim. It agreed to consider the reasonable and necessary costs S incurred.

DAS LEI agreed that it wouldn't be fair to apply its standard rate of £100 per hour. The details of the costs were passed to their costing unit for assessment of the reasonable and necessary costs.

An initial offer of £9,571.05 was made to S based on an hourly rate of £180. When this amount was challenged DAS LEI agreed to pay for more hours including the wrongful

dismissal claim and it increased its offer to £10,057.05 (which was still based on an hourly rate of £180). DAS LEI then increased its offer to £12,650. This latter figure – offered in May 2020 - was said to be based on an assessment of approximately 56 hours of work at £230 per hour although £230 x 55 comes to £12,650 and £230 x 56 comes to £12,880. DAS LEI made an interim payment to S of £12,650.

S stated that as DAS LEI failed to send P its standard terms of appointment to sign, but continued to correspond with them, it assumed that DAS LEI were happy to pay for P's standard hourly rates. For this reason, the costs should be paid in full. To put things right, S wanted DAS LEI to pay the full costs of £22,138.

Following mediation with the investigator DAS LEI agreed to pay the legal fees at a rate of £350 per hour. The costs would still need to be reviewed by a costs draftsman to confirm that they were reasonable and necessary.

DAS LEI then reviewed the rates stated on the invoice and noticed in many cases they were below the £350 per hour that had been previously mentioned. It therefore offered £16,241.80 which was calculated by looking at the time that had been approved by its costing unit and multiplying it by the hourly rate stated on the invoices. Although the figure that was offered wasn't rounded to the nearest pound there was rounding throughout the process.

S took advice from P. P said *I have checked the periods in question, and the differences in the rates are simply down to discretionary discounts I offered on the WIP [work-in-progress] on the clock, rather than anything else.* It also said that its hourly rate for a partner was £370.

The investigator responded to say that it wouldn't be fair on DAS LEI for P to attempt to recoup the discount they were happy to give S initially. She thought it was only fair for DAS LEI to cover what was actually charged. She also didn't think it would be fair for DAS LEI to be expected to pay £370 per hour when this wasn't mentioned in the initial complaint.

S responded to say it was only claiming what it paid to P. S thinks all the work carried out by P was reasonable and necessary. S said that whilst P initially charged at a discounted rate this wasn't realistic after a while as regards the fee earner's role and workload. The fee earner also was promoted to a partner.

The investigator recommended that DAS LEI should calculate the reasonable and necessary costs and apply the rates that were actually charged up to the maximum of £350 per hour. S responded to say that it was only seeking *all reasonable and necessary cost* in accordance with the terms, and the spirit, of the policy. It has paid P's costs and it thinks these were fair. It felt DAS LEI was acting arbitrarily and unilaterally. It thought DAS LEI had behaved totally unreasonably. It was prepared to accept a ceiling of £350 per hour but it did not accept the arbitrary discounting of "reasonable and necessary costs" which it did not feel had been explained. It pointed out it did quite a lot of work itself preparing bundles to keep costs down. It further pointed out that it hadn't been compensated for the additional time it had taken to deal with DAS LEI's poor handling of its claim nor had it received interest on the amount it has paid to P but not recovered from DAS LEI.

S also provided invoices relating to early stage advice on the claim which it had previously said it wasn't seeking reimbursement for.

My provisional decision

I made a provisional decision on 14 January 2022. In it I said:

I can understand the frustration of S's director. I don't think DAS LEI has handled the claim well. But just because I don't think DAS LEI has handled things well doesn't mean I believe that S should be able to recover all it has claimed from DAS LEI.

S's policy states that DAS LEI is willing to pay: "All reasonable and necessary costs chargeable by the representative on a standard basis". This is a common term in legal expenses insurance and not one I'd consider inherently unfair.

It also states:

Any representative will be appointed by us and represent an insured person according to our standard terms of appointment (which may include a 'no win, no fee' agreement). The representative must co-operate fully with us at all times.

As P was a non-panel firm of solicitors it wasn't bound by any terms of the insurance policy, it needed therefore to agree to the standard terms of appointment. The terms of appointment will set out how much the solicitors are to be paid and what they need to do to keep the insurer informed about the legal case.

DAS LEI's standard terms of appointment offer an hourly rate of £100. P queried the rates applicable several times.

Like the investigator I'd expect the rate offered by DAS LEI to be reasonable and in line with what the policy purports to cover, which are reasonable and necessary costs.

It is not clear whether S is now claiming for the costs incurred pre-March 2017. When it initially claimed on its policy it was clear that it understood these costs weren't covered but it is not clear that S's directors still have this understanding. To be clear therefore these invoices are not covered by the policy as they relate to work which pre-dates the claim. DAS LEI has agreed to pay the rate that P charged for the work it carried out at the rate set out in the invoices DAS LEI has seen, up to a maximum of £350 per hour. I think this is fair particularly given that DAS LEI only found out about the £370 rate after the costs had been incurred. I appreciate that S received a discount based on a prior working relationship with P, but I don't think it would be fair to expect DAS LEI to pay a higher rate than S could agree.

DAS LEI hasn't agreed to pay for all the work set out in those invoices. Some of the work it doesn't believe are covered in the Working Together agreement and some it doesn't believe were reasonable or necessary. This is where S and DAS LEI now seem to be in most disagreement. S thinks DAS LEI hasn't explained why it won't pay all the costs. I don't agree. On 13 August 2019 DAS LEI sent an email to S from a senior costs draftsman. Attached to the email was a marked up copy of P's invoices which showed what would and wouldn't be paid. The email explained why certain things wouldn't be paid including for example that the work communicating with DAS LEI wasn't covered. The email was superseded by the agreement that the wrongful dismissal claim would be covered and the agreement to pay higher rates, but I think anyone reading this email would have a good sense of the draftsman's approach. The approach is also consistent with the Working Together document which sets out examples of some types of work that wouldn't be covered and had been shared with S.

The burden of proof with regard to costs is on S not on DAS LEI – it is for S or its solicitor P to show the costs were reasonably or necessarily incurred. In the absence of a conflicting draftsman's view, I have no basis upon which to conclude it is unfair for DAS LEI to rely on the advice of its own draftsman. The route to challenge this is to provide a report from a qualified draftsman which contradicts DAS LEI's draftsman's own view. S has indicated that it doesn't wish to obtain such a report.

So, based on what I have seen so far, I intend to order that DAS LEI pay to S £16,241.80 (less the interim payment). This is different from what the investigator recommended as she seems to have anticipated that DAS LEI would carry out a further review to determine the costs. I think the review DAS LEI's costs draftsman has already carried out is sufficiently clear for this to be unnecessary.

I think that DAS LEI should also pay compensation for the time that has been taken up by S due to DAS LEI's poor handling of the claim. From what I have seen I think it would be reasonable for DAS LEI to pay S £300 for the additional time spent by its officers.

I also think DAS LEI should pay interest to S to compensate it for the time that it has been without funds due to waiting for DAS LEI to make payment. I asked S and its solicitors to provide evidence to show when the invoices were settled. Unfortunately, that hasn't yet been provided. If this is provided then I think interest should be paid at the rate of at 8% a year simple for the period from the date of settlement of the invoice until the date S receives the sum due from DAS LEI in respect of that invoice. As DAS LEI has already made an interim payment to S of £12,650 then for the invoice dated 31 August 2017 the period for interest on the £9,165 due in respect of this invoice would be from the date of settlement of the invoice until the date of receipt of the interim payment. For the invoice dated 28 September 2017 the period for the interest on £3,485 (£3,485 plus £9,165 equals £12,650 which is the amount of the interim payment) due on that invoice would be from the date of settlement of the invoice until the date of receipt of the interim payment and for the remaining £2,465 (£5,950.00 (the amount DAS LEI has agreed to pay for the 28 September 2017 invoice) less £3,485 is £2,465) due in respect of that invoice the period for the interest would be from the date of settlement of the invoice until the date of payment following the final decision. In respect of the invoice dated 31 December 2017 (where £443.80 is due) and the invoice dated 9 February 2018 (where £683.00 is due) then interest would be payable for the period from the date of settlement of the invoice until the date of payment following the final decision.

Responses to my provisional decision

DAS LEI has accepted my provisional decision.

S's initial response to my provisional decision was to remind me of how much short of the actual expenditure its claim was. It said all its records were in storage but that it was confused by my observation that the invoices had been paid but not tendered. Later S indicated that it would accept my provisional decision but said it wasn't able to access it due to an office move. It asked that if I hadn't considered an award for interest that I make such an award given that it settled the invoices four years ago.

I gave S more time to respond and arranged for another copy of the provisional decision to be sent to it but it did not respond by the deadline.

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 did not say in my provisional decision that invoices had been paid but not tendered. I think S is confused because, whilst I have now seen evidence the invoices were settled, I don't know when they were settled and without this information neither I nor DAS LEI can

calculate the exact amount of interest to be paid for the period that S was deprived of its funds.

I appreciate that S has had difficulty locating papers due to them being in storage following an office move but I have been asking for this information for some time and so I don't think it would be fair to delay this decision any further. I have given S 28 days to provide DAS LEI evidence of when the invoices were paid. I think this is fair and reasonable.

Notwithstanding its comments about interest, S has indicated it would accept my provisional decision and DAS LEI has said it accepts my provisional decision. I therefore see no reason to depart from it and confirm it here now.

Putting things right

To put things right DAS LEI should:

- Pay a further £3,591.80 to S, taking the total paid towards S's legal fees to £16,241.80;
- Pay to S £300 for the time S's officers have had to spend dealing with the poor handling of the claim; and
- Provided S produces evidence within 28 days of this final decision to DAS LEI showing the date the invoices were paid, then DAS LEI should pay S interest at 8% fee simple to compensate S for being deprived of its funds whilst it has waited for the interim payment and final payment. As DAS LEI has already made an interim payment to S of £12,650 then for the invoice dated 31 August 2017 the period for interest on the £9,165 due in respect of that invoice would be from the date of settlement of the invoice until the date of receipt of the interim payment. For the invoice dated 28 September 2017 the period for the interest on £3,485 (£3,485 plus £9,165 equals £12,650 which is the amount of the interim payment) due on that invoice would be from the date of settlement of the invoice until the date of receipt of the interim payment and for the remaining £2,465 (£5,950.00 (the amount DAS LEI has agreed to pay for the 28 September 2017 invoice) less £3,485 is £2,465) due in respect of that invoice the period for the interest would be from the date of settlement of the invoice until the date of payment following the final decision. In respect of the invoice dated 31 December 2017 (where £443.80 is due) and the invoice dated 9 February 2018 (where £683.00 is due) then interest would be payable for the period from the date of settlement of the invoice until the date of payment following the final decision.

My final decision

I uphold this complaint and order that DAS Legal Expenses Insurance Company Limited:

- Pay a further £3,591.80 to S, taking the total paid towards S's legal fees to £16,241.80;
- Pay to S £300 for the time S's officers have had to spend dealing with the poor handling of the claim; and
- Provided S produces evidence within 28 days of the final decision to DAS LEI showing the date the invoices were paid, then DAS LEI should pay S interest at 8% fee simple to compensate S for being deprived of its funds whilst it has waited for the

interim payment and final payment. As DAS LEI has already made an interim payment to S of £12,650 then for the invoice dated 31 August 2017 the period for interest on the £9,165 due in respect of that invoice would be from the date of settlement of the invoice until the date of receipt of the interim payment. For the invoice dated 28 September 2017 the period for the interest on £3,485 (£3,485 plus £9,165 equals £12,650 which is the amount of the interim payment) due on that invoice would be from the date of settlement of the invoice until the date of receipt of the interim payment and for the remaining £2,465 (£5,950.00 (the amount DAS LEI has agreed to pay for the 28 September 2017 invoice) less £3,485 is £2,465) due in respect of that invoice the period for the interest would be from the date of settlement of the invoice until the date of payment following the final decision. In respect of the invoice dated 31 December 2017 (where £443.80 is due) and the invoice dated 9 February 2018 (where £683.00 is due) then interest would be payable for the period from the date of settlement of the invoice until the date of payment following the final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 28 March 2022.

Nicola Wood
Ombudsman