

The complaint

Mr C is unhappy Amtrust Europe Limited turned down a claim he made on his legal expenses insurance policy.

What happened

Mr C has legal expenses insurance with Amtrust provided as part of his home insurance policy. In February 2021 he made claim on his policy. The dispute he was seeking assistance with related to whether he was entitled to holiday pay as a 'worker'. Mr C's solicitors said he was seeking a declaration from the Employment Tribunal (ET) to determine his employment status (following judgements in other cases which they felt were relevant to his situation).

Amtrust turned down the claim. It said seeking a declaration from the ET didn't fall within the definition of legal proceedings set out in the policy. It also said the policy didn't cover class or group actions or where the outcome would affect other claims. It thought that was the case here. And the policy excluded the defence or pursuit of new areas of law or test cases which it also thought applied in this case.

Our investigator agreed the claim wasn't covered and thought Amtrust had acted fairly in turning this down. Mr C's solicitors didn't agree. They said this wasn't a test case because they were attempting to enforce employment rights which had been established by the other cases they'd referenced. The claim wasn't being heard with others and wasn't a group or class action; Mr C was the only claimant. They accepted the outcome could benefit future claimants but said this would be a wide interpretation of the exclusion which would limit Mr C's legal right to access justice.

They outlined what had happened with the claim to date and said action in an ET did amount to legal proceedings and counsel involved in the case would regard it as such. They also argued the policy had been mis-sold and said we could consider complaints about this.

I issued a provisional decision on the complaint earlier this month. In summary I said:

The relevant rules and industry guidelines say Amtrust has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably

I've looked first at the terms and conditions of Mr C's policy. I think the only section of cover this claim could fall within is the 'Employment Disputes' section. And under the 'What is insured' section that says it covers:

"Standard advisers' costs to pursue a legal action against an employer, prospective employer, or ex-employer, arising from a dispute relating to your contract of employment or related statutory rights."

'Legal action' is defined in the policy as:

- *The pursuit or defence of civil legal cases for damages and/or injunctions (interdicts in*

Scotland) and/or specific performance (specific implement in Scotland) or

- The defence of criminal prosecutions to do with your employment, or the defence of motor prosecutions

The policy then limits the cover provided under 'General Exclusions'. That section says there is no cover for "Costs if your claim is part of a class action or will be affected by or will affect the outcome of other claims". It also excludes cover for any claim arising from or relating to "Defending or pursuing new areas of law or test cases"

I've thought about how that applies in this case. Mr C's solicitors have argued seeking a declaration does constitute legal proceedings and the counsel involved in the case would regard it as such. But legal action is specifically defined within the policy. So the question isn't whether Mr C's solicitors or counsel regard this as legal action but does it meet the definition in the policy.

Amtrust says it doesn't because seeking a declaration from the ET doesn't fall within it. But I don't agree that is what Mr C was doing. I've reviewed the 'Grounds of claim' submitted by his solicitors to the ET and that clearly includes a claim for unpaid leave. And the 'Grounds of resistance' from his employer set out its position on the issue of employment status and say "for the reasons above, the Respondent had no obligation to pay in respect of holiday leave..."

I appreciate the ET has concluded the issue of Mr C's employment status should be determined before other issues of liability or remedy are considered. But I think that's an issue relating to the management of the case by the ET. The overall legal claim that Mr C is pursuing is one for unpaid leave (albeit that as part of that a decision as to his employment status will initially need to be made by the ET).

I also note the policy defines an "insured incident" as "the incident or the first in a series of incidents which may lead to a claim under this insurance. Only one insured incident shall be deemed to have arisen from all causes of action, incidents or events that are related by cause or time". The maximum the policy will pay out for an insured incident is £100,000.

So it's likely that under the terms of the policy the entirety of the claim Mr C has made would be treated as one insured incident (which would receive a single rather than separate limit of indemnity). I think that supports a conclusion that this is one claim and separating it into different elements (the declaration and the unpaid holiday element) represents an artificial and unfair divide. As a result I don't think Amtrust can rely on the definition of 'legal action' to turn it down. I've therefore gone on to consider the other arguments it's made.

Amtrust say the claim is caught by the exclusion which says cover won't be provided "if your claim is part of a class action or will be affected by or will affect the outcome of other claims". However, I don't think it would be reasonable to say this was a class action; that term isn't defined in the policy and I don't think it would meet the technical definition established by case law (which relates to collective proceedings brought in the Competition Appeals Tribunal for loss or damage caused by an infringement of competition law).

I've thought about whether this is a claim which would affect the outcome of other claims. I appreciate Mr C's solicitors told Amtrust that everyone who had signed the same or similar contract as him would be affected by what happened. And given Mr C's role I think it is likely that there will be others in the same position who could well be impacted by any decision the ET reaches in relation to his claim.

Amtrust argues it didn't want to cover the risk of litigation where the case could affect the outcome of other similar cases. But the policy refers specifically to the "outcome of other

claims". I think for a claim to exist it must already have been made. And it's for Amtrust to show an exclusion applies. It hasn't provided evidence which shows the outcome of Mr C's case will impact other claims that have already been made. So I don't think it can rely on this to turn down his claim either.

Amtrust also said the claim was caught by an exclusion which applies to defending or pursuing new areas of law and test cases. However, I don't think that is the case. The law in this area has been set out in a number of high profile cases where judgement has already been reached. Mr C isn't seeking to challenge those judgements. His claim is that the law which has already been established covers his situation (and he is therefore entitled to unpaid holiday pay).

Nor do I think this could reasonably be said to be a test case. That term isn't defined in the policy and I'm not aware of any mechanism or scheme for a test case such as this to be brought in the ET (its rules refer instead to lead cases). And in any event there's no evidence, for example, to show that Mr C's solicitors have selected this case to progress from a number of similar ones they have. In fact, as I've already said, there's no evidence to show any other similar claims currently exist.

So I don't think Amtrust can rely on the reasons it's used to turn down this claim. It will therefore need to reconsider it against the remaining policy terms. I also think that having his claim turned down for the wrong reasons is likely to have caused Mr C some unnecessary distress and inconvenience. I think Amtrust should pay £200 to recognise the impact of that on him.

Mr C's solicitors also argued the policy had been mis-sold to him and that this was something we could consider. We can, in principle, consider a complaint about the mis-sale of an insurance policy. But that complaint would need to be taken forward against the business responsible for the sale. It appears Mr C took out legal expenses cover alongside his home insurance so he'll need to pursue any mis-sale concerns against the business responsible for that sale (which wasn't Amtrust).

Finally I'm also aware Mr C's solicitors asked for this complaint and others they made to be considered by the same ombudsman. They said this was because they involved similar issues relating to hourly rate and allegations of mis-selling. However, as I've explained, I'm not considering a complaint about mis-selling in this decision because Amtrust didn't sell the policy. And this complaint isn't about the hourly rate to be paid; it's about whether the claim Mr C made is covered by his policy. So I don't see this complaint does need to be considered alongside any others his solicitors have made.

Responses to my provisional decision

Amtrust accepted if there were no others claiming it couldn't rely on the exclusion it had used and agreed to consider the claim. However, it said it reserved the right to consider what funding should be provided if this did become a class action. It said if cover was agreed this would be in place from the date of issue. And it agreed to pay the £200 compensation. Mr C's representatives said he'd suffered financial loss because he'd paid legal costs that should have been covered by his policy. And he wanted reimbursement of those costs. They provided further details of these. They also said Mr C was caused considerable stress and worry over these fees (which he'd paid himself) and the compensation payment should be in the region of £1000.

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.

Amtrust has agreed to reconsider the claim and to pay the compensation I recommended. I appreciate Mr C's representatives believe it should also reimburse him for the costs he's incurred. However, Amtrust will first need to establish whether this is a claim that falls within the other terms and conditions of the policy. If it does it will then need to consider what costs should be paid. The policy terms as they relate to the payment of costs will be the starting point for that but Amtrust should also consider whether Mr C has suffered losses as a result of what it got wrong.

However, those issues haven't yet been considered by Amtrust and they therefore don't form part of this complaint. As a result, while I note the submissions that have been made by Mr C's representatives, that isn't something I'm considering at this stage. If cover is agreed for the claim Mr C has made and there is then a dispute over the costs to be paid under the terms of the policy (or when these should be paid from) that's something which could form part of a separate complaint if it isn't possible for the parties to resolve this themselves.

I've also considered the comments Mr C's representatives have made about the compensation I recommended. I appreciate Mr C has had to pay costs he believes should have been covered by his policy. But that isn't something I've concluded – as I've explained I'm directing Amtrust to reconsider the claim against the remaining policy terms. So the issue I'm considering here is the impact on Mr C of the claim being turned down for the wrong reasons. And I continue to feel that £200 is the right amount to recognise that.

My final decision

I've decided to uphold this complaint. Amtrust Europe Limited will need to reconsider this claim against the remaining policy terms and pay Mr C £200 to recognise the distress and inconvenience he was caused as a result of his claim being turned down for the wrong reasons.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 24 June 2022.

James Park
Ombudsman