

The complaint

Mr S (a solicitor) represents Ms A and Mr C in this complaint against RAC Insurance Limited. They complain that RAC will only pay an hourly rate of £120 + VAT for Mr S to act in Mr C's employment claim. Cover is provided under a Family Legal Protection policy.

RAC has an agent that administers its claims, but I'll just refer to RAC throughout.

What happened

The dispute is relatively straightforward, and Mr S submits:

- A fair hourly rate is that of a Grade A fee earner at £217 + VAT (relevant at the time) due to complexity.
- The case is complex:
 - A four-day trial with three witnesses is listed for September 2022.
 - The claim is for unfair dismissal, direct discrimination, discrimination relating to disability.

RAC submits:

- The hourly rate offered is a blended rate which could be charged for all work and included scope for a Grade B solicitor to carry out the complex elements.

I issued a provisional decision setting out why I was minded to uphold the complaint and require RAC to do the following:

It appears that litigation has concluded as I've seen an email from RAC to Mr S offering to settle his invoiced fees and that of Counsel. Logically the next step is for RAC to review Mr S' invoice to assess and calculate what fees were necessarily incurred against the Grade B fee earner rate of £192 +VAT per hour by the leading solicitor and settle Ms A and Mr C's claim on that basis.

I'm mindful that invoiced costs may include work done by fee earners below Grade B, and it's my view that these costs should be paid at the relevant court guideline rates.

I explained my reasons as follows:

The crux of this complaint centres on whether RAC has offered a fair hourly rate – there are no issues about whether the claim is covered.

RAC is required to communicate in a way that is clear, fair and not misleading. While the policy has a total indemnity limit it doesn't specify the hourly rate it's willing to pay where Ms A or Mr C doesn't use the panel solicitor. And indeed, the only reference to the panel rate comes within a letter from RAC's representative to Mr C's solicitor once a claim had been made. If no claim had been made Ms A and Mr C are unlikely to have ever known what hourly rate RAC would offer to pay.

The policy explains what it will cover in terms of 'costs and expenses' reasonably, properly and necessarily incurred. In deciding whether RAC has offered a fair hourly rate I'm satisfied the standard court guideline rates are an appropriate consideration. The guideline rates set out reasonable rates dependent on a fee earner's grade and for different areas within England and Wales. I find these a persuasive set of guidelines.

So, the next step then is for me to determine whether RAC's hourly rate offer at £120 (agnostic of fee earner grade) is fair. Mr S believes a Grade A rate for the type of case is fair whereas RAC say Grade B is appropriate. While it isn't for me to determine whether the claim is complex or not, I've considered the fact that the claim essentially centred on one main issue albeit with different allegations. From what's been provided Mr S' information doesn't persuade me that the case necessitated a Grade A fee earner, and as he asserts for a higher rate I think it's for him to demonstrate, on balance, that the higher rate is a fair reflection of what's necessary. He has not done so. Having carefully considered everything I'm satisfied RAC's offer of a rate for Grade B fee earner is fair - in the guidelines for the relevant time and place that rate is £192 + VAT.

From RAC's response it's apparent that it has construed the investigator's opinion to mean a flat rate, so the Grade B rate for all work done. For the avoidance of doubt, I'm not persuaded that would lead to a fair and reasonable outcome. In litigation not all work is carried out by the leading solicitor (e.g. administration) and so I don't determine that a Grade B fee earner rate is fair to be charged for all work. It is the rate that should be charged for fees necessarily incurred by that Grade B fee earner.

Replies to my provisional decision

Mr C's solicitor replied, in summary he made the following points:

- Grade A was justified due to the complexity of the case, the value being more than £44,000 and the defendant saw it appropriate to instruct a solicitor who was a partner in a firm.
- Where work is chargeable at a lower grade fee earner but was nonetheless done by the higher rate fee earner, the number of hours should reflect the fact that the higher rate earner would do it quicker than the lower rate earner. And so that should be factored in by RAC.

RAC replied too, in summary it said:

- The claim wasn't complex – the value in the schedule of loss was easy to workout as loss of earnings and injury to feelings. Both grade B and C fee earners would be deemed competent to deal with such matters.
- The hours spent on work and relevant grades will be considered in the assessment of the solicitor's bill. It's not necessarily always the case that a higher fee earner does things quicker and point to completing bundles of documents as an example.

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 thought carefully about the reasons given in my provisional decision I'm not persuaded to change my outcome.

RAC's assessment of whether it was complex is as compelling as what Mr C's solicitor says. They're at odds over whether it was complex but RAC's opinion is formed based on advice from its solicitors. It's not our role to determine what the costs should be – based on what's been provided by the parties I'm not persuaded by Mr C's solicitor that the tribunal claim was complex so deserving the higher Grade A fee earner rate. So, because of that I'm not satisfied Mr C's solicitor has shown it more likely than not the claim was complex. I remain satisfied the hourly rate for a Grade B fee earner in the guidelines for the relevant time and place (that rate is £192 + VAT) is fair.

I'm mindful that invoiced costs may include work done by fee earners below Grade B, or by Mr S but should be charged at a lower grade. It remains my view that these costs should be assessed at the relevant court guideline rates.

Putting things right

In assessing costs RAC will need to be clear which fee earner rate it is applying, to what activity and the duration. This will enable Mr C and his solicitor to understand how RAC has reached its offer for 'costs and expenses' reasonably, properly and necessarily incurred. It would be prudent (albeit not a direction) for RAC to use a costs draftsman to assess the costs submitted.

My final decision

I uphold this complaint and require RAC Insurance Limited to review Mr S' invoice to assess and calculate what fees were necessarily incurred and settle Ms A and Mr C's claim on that basis.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms A and Mr C to accept or reject my decision before 18 July 2022.

Sean Hamilton
Ombudsman