

The complaint

Miss M complains about the way DAS Legal Expenses Insurance Company Limited has handled claims made under her legal expenses insurance policy.

What happened

In October 2019, Miss M made a claim under her policy to pursue legal action against her employer for disability discrimination, failure to make reasonable adjustments and breach of contract. DAS passed the claim to their panel solicitors, who I'll refer to as 'D'.

D conducted a legal assessment on the merits of the claim and concluded that it didn't enjoy reasonable prospects of success - which is a requirement for cover under the policy. Based on this advice, DAS declined the claim.

Shortly after, Miss M contacted DAS to let it know that her claim had been passed to a senior colleague at D who believed the breach of contract claim did have reasonable prospects. Miss M raised a complaint to D as she felt the first solicitor hadn't considered her claim correctly. This was considered by a Partner at D, who agreed with the senior colleague that reasonable prospects existed. As such, the claim was accepted.

In February 2020, Miss M contacted DAS again. She said her claim had been passed back to the first solicitor again, who subsequently confirmed that there were no reasonable prospects. DAS informed Miss M she'd need to raise a complaint to D, but Miss M reminded DAS that she'd already done this.

Around this time, D sent a letter before claim to Miss M's employer.

In April 2020, Miss M informed DAS that she had a new element to her claim for unlawful pension deductions. DAS passed this on to D and asked for their comments, but there was no response. DAS emailed D several times throughout August and September asking them to contact Miss M, with no reply.

Miss M raised a further complaint about D, which DAS passed on to them in October 2020. Shortly after, D responded to say they'd been weighing up whether to pursue the claim in the Employment Tribunal or the County Court, and that they'd contact Miss M later that day. Miss M did receive a call and was subsequently given a new solicitor at the firm.

In January 2021, Miss M was put at risk of redundancy. D emailed DAS to ask if a new claim could be set up as it appeared to be a separate matter to the one being pursued, which DAS agreed to.

In May 2021, DAS logged a complaint about Miss M's dissatisfaction with how her claims were being handled. As part of its investigation, it asked D for an update on the claims and despite chasing, it didn't receive a response for over a month. When D responded it said that due to the complexity of the case it required counsel to draft the particulars of claim and assess the prospects – which DAS agreed to.

In July 2021, DAS issued its complaint response advising that it was satisfied it had handled the claim correctly and it couldn't take responsibility for D's conduct – which should be raised to them directly and to their regulators.

Counsel's opinion was provided to DAS in September 2021 and concluded that there was no breach of contract – and therefore no reasonable prospects existed. It valued the claim at around £3000, but that an appropriate settlement would be in the region of £1,000 to £1,500, given the position on prospects.

Miss M didn't accept counsel's opinion. She said there were factual inaccuracies and that they hadn't been provided with all the relevant evidence. DAS made enquiries with D, who disagreed.

They said the evidence Miss M referred to was in relation to her work hours in 2020 / 2021 and would have no bearing on counsel's opinion on the breach of contract occurring in 2019. D said this information had purposely been kept separate as they were waiting for counsel's advice in order to determine how they should approach the 2020 / 2021 hours which form part of the redundancy claim. They later asked for this issue to be dealt with as a separate claim for breach of contract.

Based on counsel's advice and D's explanation, DAS withdrew funding from the 2019 breach of contract claim. Miss M was unhappy and raised a complaint, which DAS responded to in October 2021 and didn't uphold.

In November 2021, D sought a further counsel's opinion on both the 2019 and 2020 / 2021 breach of contract claims. The second barrister was also of the opinion that the 2019 claim – as well as the 2020 / 2021 claim – didn't enjoy reasonable prospects of success.

Miss M didn't accept this advice either. She said it was incorrect and didn't include relevant information. She also raised concerns over the conduct on her redundancy claim saying that D had issued the ET1 without her having sight of it and they'd made several errors. DAS made enquiries with D who said Miss M had approved the ET1 prior to it being submitted.

In December 2021, Miss M raised a further complaint to DAS for maladministration. She said DAS were aware of D's poor handling of her claims and failed to intervene. Furthermore, it had denied her request to use a solicitor of her own choice.

In January 2022, Miss M was advised that her discrimination claim no longer enjoyed reasonable prospects of success. On speaking to DAS, she was told that cover had now been withdrawn on all aspects of her claims. This was particularly distressing to Miss M as she was under the impression her redundancy claim was being covered and she was due to attend a preliminary hearing.

A week later, DAS identified its error and confirmed that cover was still in place for the redundancy claim. But around that time, D confirmed it was no longer prepared to act for Miss M due to a breakdown of trust and confidence. DAS offered Miss M the option to choose her own solicitor and said if they believed the discrimination element of her claim to enjoy reasonable prospects it would reconsider cover.

DAS issued a complaint response in February 2022. It acknowledged its error in withdrawing cover for all elements of the claim and said its correspondence about instructing a solicitor of Miss M's choice could've been clearer. It offered £100 compensation for what went wrong.

Miss M didn't accept this, so she brought her complaint to our service. Our investigator asked DAS to increase the compensation to £250 which she considered to be more

reflective of the stress caused to Miss M. DAS agreed, but Miss M didn't. So the complaint was passed to me and I issued the following provisional decision.

My provisional decision

I recognise Miss M's strength of feeling regarding her complaint and I appreciate the circumstances of her legal dispute have been stressful. She's provided a great deal of information regarding the background of her complaint and whilst I may not have mentioned everything, I want to reassure her that I've read and considered everything she's told us.

But I don't intend to respond to every point individually, or possibly in the level of detail she would like. This isn't meant as a discourtesy, but it simply reflects the informal nature of our service.

Solicitor's conduct

Firstly, I should be clear that I can't look into the conduct of a firm of solicitors. Nor do I consider DAS to be responsible for a firm of solicitor's actions.

As such, if Miss M is concerned about D's actions, advice, or conduct on her claims, she should follow D's complaints procedure and escalate it to the relevant regulator / ombudsman service.

Prospects of success

It's a requirement for cover under the policy that a claim must have reasonable prospects of success which are defined as having "at least 51%" chance of winning.

This is a requirement of virtually all legal expenses policies, and we don't think it's unfair. Court action can be expensive. A privately paying customer wouldn't generally want to bear the cost if advised it's unlikely to succeed. And we wouldn't expect a legal expenses insurer to either.

Where an insurer has declined or withdrawn funding in such a case, it isn't for us to evaluate the merits of the underlying claim. Instead, we look at whether the insurer has acted fairly. As long as they've obtained advice from suitably qualified lawyers, we won't generally question their reliance on that advice, unless we think it was obviously wrong or based on factual mistakes.

In this case, two separate counsel's opinions have been sought on Miss M's breach of contract claims. And both barristers were of the opinion that prospects are less than 51%.

I appreciate Miss M believes there are errors in the advice, but I haven't seen any evidence of this. Having considered the legal assessments, I'm satisfied they're properly written and well-reasoned. And they've been obtained from suitably qualified lawyers. So I haven't seen anything to persuade me that DAS shouldn't have relied on either opinion.

DAS' claims handling

Having reviewed DAS' conduct on these claims, I can understand why Miss M feels it has failed to intervene over D's poor conduct on the case.

From the outset of these claims in 2019, Miss M informed DAS of the problems she was having with D. I can see that DAS has consistently passed on these concerns to D directly – which is in line with what I'd expect it to do. But after a certain point, when it was clear the situation wasn't getting better, I would've expected DAS to do more. In particular there have been several occasions, as evidenced in the timeline provided above, where D wasn't responding to Miss M or DAS – which should've prompted DAS to take matters more seriously rather than just continuing to send chaser emails.

It was clear from D's eventual responses that matters were moving very slowly. For example, they sent the letter before claim in February 2020 and the next update was in October 2020 where D said it was weighing up whether to pursue the claim in the ET or CC. DAS made no enquiries as to what D had been doing on the claim for eight months and according to Miss M, D weren't doing anything. Whilst this is a complaint to be directed to D itself, I think DAS had enough information to be concerned over the claim's progression and to take further action.

I can see that Miss M asked DAS in July 2021 whether she could use a solicitor of her own choice. And DAS advised that it needed to establish the current position on the claims from D first. It obtained this information, but the discussion on changing solicitor wasn't revisited until January 2022. Given D's conduct, or lack thereof, I think DAS should've done more here. I appreciate Miss M would only have freedom to choose her own solicitor under the policy when court proceedings became necessary, but if she wasn't at this stage with her claims at that time, DAS could've considered instructing another panel solicitor.

Furthermore, whilst I'm satisfied DAS is entitled to rely on counsel's advice, as explained above, I can't see from the file that Miss M was properly informed of her right to challenge this advice with her own counsel's opinion at her own cost. Given that Miss M had strong concerns over the accuracy of the opinions, I think it would've been the best way forward and it's DAS' obligation to ensure Miss M is aware of her options following the rejection of her claim. I can see that it has subsequently been mentioned in more recent correspondence, but I can't find any record of Miss M being informed of this at the time cover was withdrawn.

And finally, DAS incorrectly informed Miss M that cover had been withdrawn on all her claims in January 2022. I agree with our investigator that this would no doubt have caused Miss M a great deal of distress. And whilst I acknowledge DAS clarified its mistake within a week, I'm mindful that this was around the time Miss M was undergoing the tribunal's timetable and attending a preliminary hearing. So the impact this would've had on her would no doubt be significant in the circumstances.

Overall, I don't think £250 truly reflects what's gone wrong here for the reasons I've set out above and I'm inclined to award compensation of £500.

Responses to my provisional decision

Miss M has provided a detailed response to my provisional decision.

In particular, she disagrees with much of the content set out in the "what's happened" section above. I must be clear that this section sets out the factual background of what's happened – not my opinion on it – which I've based on a full review of correspondence between Miss M, DAS and D. So whilst she may consider that some things are incorrect, I've set out the facts as I see them.

For example, Miss M says it's incorrect that D were weighing up whether or not to pursue the claim in the Employment Tribunal or the County Court. She says D were always clear the

claim would go to the County Court. However, a call note within DAS' file dated 13 October 2020 says:

"O is the case handler and is aware of this case. D are due to respond to the insured very shortly (by this afternoon). O advises that they have been weighing up whether this claim should be brought in the ET or the CC".

Another example, Miss M says she did not approve the ET1 prior to it being submitted. She says she didn't see it until after. To be clear, I've not said she did – rather, I've said D told DAS she did.

It's for this reason that, with all due respect, I don't intend to respond to Miss M's points made on the "what happened" section of my decision. I'm satisfied I've captured the chronology for both sides' perspective using the copies of correspondence I've been provided with – not all of which Miss M would've had access to.

Regarding my actual decision, Miss M has raised the following points:

- Her claim was 100% sure to win, but D didn't understand the law regarding workplace agreements and unions, nor did they carry out the necessary research. They failed to include the most important elements of the claim and refused to do anything about it. And failed to send all information to counsel.
- Neither counsel's opinions can be relied upon as both barristers made exactly the same errors and used case studies that bore no relevance to the claim, which DAS and D failed to investigate.

DAS accepted my provisional decision.

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.

As I've already explained in my provisional decision, I can't look into the conduct of D – as they're a firm of solicitors which we don't have jurisdiction over. I appreciate Miss M feels they didn't have the expertise to deal with her claim and made errors, but this is a complaint she needs to direct to them.

I've considered her arguments that counsel's opinions shouldn't be relied upon. But as I've already explained, it's not my role to evaluate the merits of the underlying claim. I'm satisfied that DAS can rely on a legal opinion provided that it isn't obviously wrong or based on factual mistakes.

Miss M says it's obviously wrong as it relies on irrelevant case law. But this doesn't make it obviously wrong as it's not something a layperson would know – rather, it's a legal matter that I'm not able to make a finding on. So whilst I appreciate her concerns, I remain satisfied DAS were entitled to rely on the legal advice it obtained.

I appreciate Miss M will be disappointed but having considered her further submissions my decision on the complaint remains unchanged and I see no reason to deviate from my recommended award.

My final decision

For the reasons I've explained, I'm upholding this complaint and directing DAS Legal Expenses Insurance Company Limited to pay Miss M compensation of £500.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 25 October 2022.

Sheryl Sibley
Ombudsman