

The complaint

Mr and Mrs B have complained about DAS Legal Expenses Insurance Company Limited's refusal to provide cover under the legal expenses section of their household insurance policy.

What happened

In 2015 Mrs B made an application to the employment tribunal against her former employer for discrimination and equal pay. She did not have cover with DAS at the time and I understand she paid for her own representation. Mrs B says she was advised that her chances of her claim succeeding were low based on the evidence she had at that time and she was advised to withdraw her claim.

Mrs B reissued her claim for equal pay in 2018 and in October 2021 made a claim under her policy with DAS for cover. In December 2018, her tribunal claim was struck out in part and a deposit order made as the Judge didn't think the remaining part of her claim had reasonable prospects of success. DAS obtained a legal assessment from one of its panel solicitors on Mrs B's chances of succeeding in appealing the tribunal's decision and the chances of succeeding in the remaining part of her equal pay claim. DAS's panel solicitors provided an opinion in February 2019 that there was no chance of appealing the striking out of the claim and the deposit order and that the remaining part of her equal pay claim was unlikely to succeed. DAS therefore rejected the claim, as it said it is a pre-requisite of cover that a claim have reasonable prospects of success (*i.e.* a more than 51% chance of succeeding).

I understand Mrs B continued her tribunal claim and arranged legal representation herself. The remaining part of the claim was struck out by the Employment Tribunal in November 2020 and permission to appeal to the Court of Appeal was refused in April 2021.

In 2021, Mrs B asked DAS to look into this claim again to help with an appeal. She says she specifically wanted cover for her chosen solicitors to review her claim and provide a written opinion on her options. DAS re-opened the claim file and asked for more information, so it could review the matter. Having done so, DAS concluded again that any further action was not likely to succeed, and it refused to provide any cover under the policy for this claim. It however told Mrs B that if she could get the tribunal to reverse its decision it would reconsider the matter.

Mrs B is very unhappy with this and the time taken by DAS to consider the matter. DAS apologised for the delay in telling Mrs B its decision on her claim and offered £75, and later a further £150, compensation for this.

Mrs B made another claim to DAS in 2021, for cover for employment tribunal proceedings against the same former employer for unfair dismissal, harassment and discrimination, which was related to the previous employment tribunal claims. Mrs B said the court was allowing this as a new claim.

DAS said it would not cover the unfair dismissal aspects (as she was dismissed with effect from February 2021 and there was no policy in place at that time) but would consider the

other matters. DAS obtained counsel's opinion. While it had said it would not cover the unfair dismissal part of the claim, counsel did in fact assess this as well as Mrs B's possible claims for wrongful dismissal, discrimination, harassment and victimisation in November 2021. Counsel concluded that none of the claims had more than 51% chance of success, which is what is required for cover under the policy. DAS therefore refused cover for any part of this claim.

Mrs B was very unhappy with this. She says DAS's assessment of the claim was wrong, as she was able to proceed and this claim was settled by way of judicial mediation. As she had no assistance from DAS, she had to employ her own barrister to help her and is out of pocket as a result.

DAS did not agree that the fact she might have been able to continue the claim and settle it means Mrs B had sufficient prospects of success for there to be cover under the policy. However, it accepted it did not give Mrs B an answer to this claim as quickly as it should. It accepted it should have been able to assess this claim by 4 August 2021 and offered £150 compensation for this. The total compensation offered by DAS in relation to both claims was therefore £375.

Mrs B remains unhappy with the service provided by DAS and refusal of her claims and so brought her complaint to this service.

One of our Investigators looked into the matter. She didn't think that DAS had acted unfairly in refusing the two claims but agreed it could have dealt with them both more quickly than it had. The Investigator thought the £375 compensation already offered for this was reasonable in all the circumstances.

Mrs B does not accept the Investigator's assessment. I have considered everything she has said but have summarised her main points below:

- She wanted cover for her chosen solicitors to provide written assessments of her claims, not for DAS to assess them.
- DAS chose the panel solicitors that assessed the matter and they always say there are no prospects of success. The Investigator said DAS was entitled to rely on the opinion because it was "*properly written and reasoned*". This simply allows and insurer to refuse cover without the legal opinion being challenged and cannot be fair.
- As the client, she should be entitled to rely on an opinion from lawyers of her own choosing and she asked for this
- She did have her own solicitors that thought her claim for unfair dismissal and harassment was very strong and offered to provide an opinion on prospects but it was ignored by DAS. She did therefore provide an alternative opinion in support of her claim four months before DAS obtained the negative opinion.
- With regard to the equal pay claim, the original opinion relied on was inadequate. The solicitor appointed had no experience of litigation at Court of Appeal level.
- Her chosen solicitor offered to review and advise on possible ways to continue her claim and would not have done so if this were impossible.
- The compensation offered is insulting, given the prolonged distress caused to her and her family. In addition, she incurred expenses paying her own legal representation when this should have been provided under the policy.
- DAS's failure to provide her with a proper and fair service has jeopardized her legal position and her human right to legal equality.
- Dr B wants compensation to the value of her lost legal claims (which she puts at £355,000). She says there is a pattern of refusing cover and never really providing any support. She says it delayed consideration until her claims were no longer viable.

As the Investigator was 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.

Mrs B's policy provides cover for various legal disputes, including employment issues. It is a pre-requisite of any cover under the policy however that there be reasonable prospects of any legal dispute succeeding. The policy states:

"We will cover the insured incidents in this section as long as...for civil claims it is always more likely that not that you or your family will recover damages (or obtain any other legal remedy which we have agreed to) or make a successful defence".

Virtually all legal expenses policies have similar requirements. We don't think this is unfair: a legal expenses insurer can't really be expected to fund expensive litigation whose prospects of success are not good.

It is a principle of insurance law that it is for the claimant to establish, on the balance of probabilities, that they have a valid claim under a policy. So this would in this case include establishing that it has reasonable prospects of success. (We would consider this to be a more than 51% chance.) However, it is usual in legal expenses policies for the insurer to appoint panel solicitors to assess the prospects of a legal claim (in cases where its in-house staff are unable to do so) at its own cost, rather than insist on policyholders doing so at the outset of a case.

Mrs B says she wanted cover for her own solicitors to assess her claims but DAS did not have to pay her solicitors to do that assessment. The policy states that the insured can choose their own representative only if it is agreed that court proceedings can start and it is necessary to be represented in such proceedings. But that is also only after it has been established that there is a valid claim. In this instance it has not been established that there is a valid claim under the policy.

Mrs B has also said that as long as the panel firms provide a written assessment it cannot be challenged and this is unfair. I do not agree. Mrs B can challenge any legal assessment provided by the panel firms but to be persuasive any such challenge would need to be from another suitably qualified solicitor or barrister and would need to set out why they think the claim has prospects of success.

It isn't for me to evaluate the merits of the underlying claim. Instead, we look at whether the insurer has acted fairly. So long as it is acting on legal advice from suitably qualified lawyers, we won't generally question its reliance on that advice, unless we think the advice was obviously wrong or based on factual mistakes, or there is other persuasive evidence that it is incorrect. For the avoidance of doubt, I've seen nothing in this case to justify such a conclusion. I will address each claim separately.

Overturning refusal of leave to appeal

Mrs B says the legal opinion obtained by DAS regarding the appeal was from a lawyer not experienced in litigation at that level. I do not agree that there was anything obviously

unreasonable in the appointment of the panel solicitors or counsel. I am satisfied they were each suitably qualified to assess the merits of this matter.

The solicitors that advised in 2019 said any application to have leave to appeal was “hopeless” and the remaining equal pay claim had little prospects of success. I note the advice said *“it would take a remarkable set of circumstances for a merits assessment to conclude that the threshold for legal expenses insurance cover has been passed when an experienced Employment Tribunal judge had determined after full argument with both sides being represented by counsel that the claim had little reasonable prospects of success”*.

DAS reconsidered the matter in 2021 and said again that there were no prospects to pursue the equal pay claim, given it had been struck out.

Mrs B has said her solicitors were prepared to assess her options regarding the equal pay claim and would not have done so, if there was no action she could take. I do not agree that the fact solicitors were prepared to assess her legal options amounts to an assessment that she has reasonable prospects of succeeding in the claim.

Mrs B’s equal pay claim had been struck out and leave to appeal refused. I note that the Court of Appeal order made on 15 April 2021, in which Ms B’s application for permission to appeal the employment tribunal order which dismissed her appeal says *“I have concluded that the appeal has no real prospect of success and there is no compelling reason for it to be heard...”*

Given this, and the absence of any other expert legal opinion that states she has reasonable prospects of succeeding in any further action in this matter, I am not persuaded that it was unreasonable of DAS to rely on the assessments it received in 2019 and 2021 on the merits of this matter. And it isn’t required to fund further opinions just because Mrs B disagrees.

Other employment matters

DAS obtained an opinion from counsel in November 2021. This was 31 pages long and well-reasoned. It concluded that Mrs B did not have reasonable prospects in any of the other possible claims she wanted to make (including unfair dismissal, victimisation and harassment).

Mrs B says she was advised she had a strong case but I have not seen anything from any other solicitors or counsel to state that her claims had reasonable prospects of success as required by the policy.

Mrs B also says that the claim was settled which also means that DAS’s legal advice was wrong. I am not persuaded by this. I have not seen any information about the terms of the settlement but even if she received a payment from her former employer, parties to litigation may agree to settle for many reasons. The fact a case is settled, does not automatically mean it would have had a more than 51% chance of succeeding if it the case had gone to trial. This is the threshold required by the policy. And it doesn’t mean there would be no chance of succeeding at all but for there to be cover under the policy it has to be more likely than not that the case would succeed.

And in the absence of any other expert legal opinion, I am satisfied that DAS was entitled to refuse cover for this claim as well claim.

Delays

Given the legal opinions on Mrs B's chances of succeeding in any of her employment claims, I am not persuaded that she lost any opportunity to pursue any of her legal claims as a result of anything done wrong by DAS. DAS's panel solicitors and counsel assessed the matters and provided reasoned opinions as to why they did not think the claims had reasonable prospects. Mrs B has objected to the assessments but I have not seen any convincing reason why they should in effect be disregarded.

However, DAS did take too long to assess these two claims. I do not think there is any evidence that the delays meant Mrs B's legal position was affected but I can understand that it would have caused her some frustration and inconvenience. The first claim took from October 2018 to February 2019. The second claim was initially raised in early 2021 but this was at first made to another insurer who referred it to DAS. I can see that it would have taken some time to assess the claim, given the extended history of the matter. It also would have taken time for counsel to consider the matter. Overall, I agree that it would have been reasonable for DAS to have completed its assessment by August 2021 but it took until November 2021. Having considered everything, I consider the total compensation already offered of £375 to be reasonable to reflect the distress and inconvenience caused to Mrs B by these delays. If any part of that compensation has not already been paid, I'd ask DAS to now pay that to Mrs B.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Ms B to accept or reject my decision before 16 June 2023.

Harriet McCarthy
Ombudsman