

## **The complaint**

Mr G and Miss W complain DAS Legal Expenses Insurance Company Limited (DAS) has unfairly handled their claim for LEI cover.

Because the legal claim relates to Mr G, for ease, I have referred to him throughout.

## **What happened**

The circumstances of this complaint are well-known to both parties, so I've summarised what's happened.

- In November 2019, Mr G made a claim on his LEI policy for cover in respect of an employment legal claim he wanted to pursue against his employer at the time (claim A).
- In February 2020, DAS informed Mr G that a panel firm solicitor (Company A) had been appointed to help with his legal claim.
- In April 2020, a Barrister – appointed by Company A – reviewed Mr G's legal claim and said it didn't enjoy reasonable prospects of success. On this basis DAS said it wouldn't cover the claim.
- Mr G continued to fund the legal claim himself and Company A remained his solicitor. A few months later, his claim was lodged with the Employment Tribunal.
- In December 2020, Mr G resigned from his job. He subsequently sought to bring a claim for constructive unfair dismissal against his former employer – which DAS set up in January 2021 (claim B).
- Around the same time, Mr G instructed his own Barrister to consider the merits of his legal claim. The Barrister said the legal claim enjoyed prospects of success.
- Mr G was, however, unable to pursue his legal claim, as the Employment Tribunal deemed it to have been made too late.
- Mr G then raised another claim with DAS to pursue a legal claim against Company A for allegedly failing to handle his legal claim properly.
- Unhappy that DAS hadn't provided legal cover in respect of claim A, Mr G made a complaint.
- In its final response DAS said as Claim A didn't enjoy reasonable prospects of success – which is a condition of the policy – it was entitled to decline cover based on the legal advice it'd received.
- It added Company A hadn't considered whether Mr G had prospects of success

in respect of constructive unfair dismissal because he hadn't resigned at the point the prospect of success assessment was completed.

- It advised Mr G that he could challenge the legal opinion by providing a Barrister's opinion at a cost to himself. It also offered £50 compensation for the delay in providing its final response.
- Mr G is unhappy that he wasn't told – at the time cover was withdrawn – that he could challenge the legal opinion. He considers that as his own Barrister said the legal claim had prospects, the legal costs he's since paid should be covered.
- Our Investigator considered Mr G's complaint and said that because DAS had failed to tell Mr G he could challenge the legal opinion, it should cover the legal costs he's incurred.
- DAS disagreed. It said Mr G's Barrister's opinion – which said his case had prospects of success - was too far removed and so couldn't reasonably be relied on to challenge the Barrister's opinion it had sought.
- So, the complaint has come to me for a decision.

Because I disagreed with the Investigator's outcome, I issued a provisional decision which said:

*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

*The crux of Mr G's complaint is that DAS didn't tell him he could challenge the Barrister's prospect of success assessment by providing his own Barrister's opinion – and so, he thinks his claim has been unfairly declined. I haven't been provided with a copy of the letter in which DAS told Mr G his claim wasn't covered, but DAS doesn't dispute that it omitted to tell Mr G how he could challenge the claim outcome – which is something I would have expected it to do.*

*I've thought about whether Mr G would have acted differently had he known he could challenge the prospects of success assessment. Given Mr G went on to personally fund his legal claim, I'm satisfied he would have instructed his own Barrister and sought legal advice as to the likely success of his legal claim at that stage. But even if Mr G had done this, it doesn't mean his legal claim would have had prospects of success. And so, it doesn't automatically follow that DAS should cover the claim for failing to tell Mr G how he could challenge the outcome of his claim – which is the position our Investigator had taken.*

*I'm aware Mr G resigned from his role in late 2020, and subsequently instructed his own Barrister for advice in respect of a constructive unfair dismissal claim – which his Barrister said enjoyed prospects of success. Mr G considers this to support his position that DAS should have covered his legal claim from the start. But based on the information I have, I'm not persuaded by this argument, and I'll explain why.*

*I had asked to be provided with a copy of Mr G's Barrister's opinion to see whether the positive prospect of success was only in respect of the constructive unfair dismissal legal*

*claim, or whether it included matters of the legal claim raised in 2019. But I haven't been provided with this and so am unable to determine this. Because it remains unclear as to whether Claim A enjoyed prospects of success, I'm not persuaded DAS should cover the legal costs Mr G incurred. However, if Mr G were to obtain a retrospective Barrister's prospects of success assessment (which should be based on the information available at the time Company A's Barrister provided a negative prospect of success assessment), DAS should consider this. And if the claim would have had prospects of success, I'd consider it reasonable for DAS to cover the legal costs Mr G incurred because of pursuing legal action.*

### **Compensation**

*Although DAS has offered £50 to recognise there was a delay in providing its final response, I don't think it's considered the impact this claim and its handling of it has had on Mr G. For approximately three years Mr G's been dealing with the ongoing stress of the claim – and I consider that had DAS told Mr G he could challenge the initial prospects of success assessment, the additional stress and inconvenience he's later experienced could have been avoided. This, coupled with the difficulties Mr G experiences because of his health conditions, persuades me that compensation is warranted, and I consider £400 to be reasonable.*

### **Barrister's fees**

*It's not clear if Mr G is also unhappy about DAS only partly covering the cost of his Barrister's legal fees. I assume this is in relation to his Barrister's fees for pursuing the constructive unfair dismissal legal claim – for which it appears DAS agreed cover. I can't see these concerns have been addressed by DAS and so, I won't be commenting on them as part of this decision. Mr G will need to raise a complaint about this issue with DAS in the first instance.*

Both parties replied to my provisional decision. DAS said that whilst it mostly agreed with my decision, it considered that if a retrospective Counsel opinion was found to favour Mr G, it thought Company A should be responsible for the legal costs and that this ought to be pursued as part of Mr G's legal claim against them. It said this was because Company A had seemingly given an incorrect prospects of success assessment.

Mr G replied asking that if the retrospective opinion said there were prospects of success, whether the cost of obtaining it would be reimbursed by DAS, and whether he'd have to go through this Service to request it. He later asked for an extension to the deadline so that he could request information from his Barrister. I agreed to extend the deadline for submissions to 11 January 2023.

### **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 haven't been provided with any further evidence, and so, based on the information I do have, my final decision follows that set out in my provisional decision.

With regards to DAS' argument that Company A should be responsible for the legal costs (should the retrospective Barrister's opinion confirm Mr G's claim had prospects of success), I'm not persuaded it is relinquished of its obligation to cover costs on the basis that Mr G is seeking to pursue a negligence claim against Company A.

I say this because ultimately DAS, as the underwriter of the policy, has a duty to cover reasonable and proportionate legal costs. And had Mr G been able to provide a Barrister's opinion which confirmed his legal claim had reasonable prospects of success at the time his claim was declined, DAS would have been responsible for the legal costs. So, it follows that DAS remains responsible for covering the legal costs should Mr G's retrospective Barrister's opinion confirm there were prospects of success.

Turning to Mr G's query - if the Barrister's retrospective opinion confirms his legal claim had prospects of success, then in line with DAS' terms and conditions which says "*[...] We will pay the cost of getting the opinion if the expert's opinion indicates that it is more likely than not that you will recover damages [...]*", I would expect DAS law to cover the reasonable cost of obtaining that opinion (subject to proof), as it forms part of Mr G's legal costs.

### **My final decision**

My final decision is that I uphold this complaint and direct DAS Legal Expenses Insurance Company Limited to:

- Consider a retrospective prospects of success assessment (obtained by Mr G and Miss W at their own expense) which should be based on the information which was available at the time Company A's Barrister said the claim didn't enjoy reasonable prospects of success.
- If the claim would have had prospects of success, it must reimburse Mr G and Miss W the legal costs incurred because of pursuing legal action (subject to proof).
- Pay Mr G and Miss W £400 compensation in total. It must pay the compensation within 28 days of the date on which we tell it Mr G and Miss W accepts my final decision. If it pays later than this, it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G and Miss W to accept or reject my decision before 9 February 2023.

Nicola Beakhust  
**Ombudsman**