

The complaint

R, a limited company, has complained about the settlement offered by AXA Insurance UK Plc in settlement of its business interruption insurance claim.

Mr G, a director of R, has brought the complaint on R's behalf.

What happened

R runs a guest house which employs several staff.

It made a claim to AXA on 25 March 2020 after the business was affected by Covid-19 lockdown restrictions. It furloughed some staff (granted them temporary leave of absence).

In April 2020 the Financial Conduct Authority announced its intention to obtain a court declaration aimed at resolving the uncertainty around the validity of many business interruption insurance claims (*"the test case"*).

In May 2020 AXA declined the claim. It said R hadn't shown its business interruption losses had been caused by an outbreak of Covid-19 within 25 miles of the insured premises.

In January 2021 the Supreme Court issued its judgment in the test case. Later that month AXA told R it would review its claim in the light of the judgment in the test case. On 17 February 2021 it paid R an interim settlement of £12,500. It made a further payment of £12,500 on 12 January 2022 and the balance of £19,533.26 on 28 March 2022.

AXA deducted from the claim settlement £16,417.87 being the amount of furlough payments that R had received from the Government. Mr G didn't think that was fair. AXA said it was entitled to make such a deduction under the terms of the policy.

Mr G complained about the delay in dealing with R's claim. He said he'd suffered unnecessary stress and inconvenience as a result. He also said R had had to take a bounce back loan (BBL) of £20,000 in October 2020 due to the delay in paying the claim.

AXA said it hadn't been in a position to settle the claim until the conclusion of the test case in January 2021.

R brought its complaint to this service. I issued a provisional decision explaining why I was minded to uphold the complaint in part. An extract from my provisional findings is set out below:

"I'm sorry to hear that the pandemic and the Government's related actions had an impact on R's business. Since AXA has now accepted R's claim, the issue for me to decide is whether AXA should compensate it for the delay in paying the claim and whether it's fair and reasonable to deduct from the claim settlement the amount R received from the Government in respect of furlough payments.

Delays

I've noted AXA's point that it felt it needed to wait until the outcome of the test case but I am not persuaded by it. This delay in dealing with business interruption insurance claims was permitted under the guidance issued by the Financial Conduct Authority to insurers at the time but not required by law. Additionally, the guidance did not suggest that, for customers whose claims were found to have been incorrectly declined, interest should not be awarded. I recognise that there was uncertainty about the interpretation of the wording in certain policies, including ones like R's. which required the loss to have been caused by an outbreak of Covid-19 within a specified distance of the premises. However, I think it was always open for AXA to have accepted the claim sooner and ultimately the Supreme Court found that AXA's initial decision not to provide cover was incorrect.

I've also taken account of the fact that AXA has had the benefit of the money it should have paid R. I believe it is fair and reasonable to add interest on to the settlement amount to compensate R for its loss.

The rules governing this service allow me to make, amongst other things, a money and interest award for what I consider to be fair compensation if a complaint is determined in favour of the complainant. In this case, my decision is based on what I think is fair compensation to put R back in the position it would have been in if AXA hadn't turned down its claim at first. I acknowledge that my decision might be different from one which a court might make. But in this case I think it is fair and reasonable to do so.

In relation to an ongoing claim of this nature, it is reasonable that an insurer should wait for losses to accrue before making settlement. However, it is not necessarily reasonable for an insurer to wait for the end of an indemnity period before making any settlement. Generally speaking, I would expect regular monthly payments to be made.

It is also reasonable that an insurer will need some time to assess a claim and make a settlement. I consider a reasonable time to do this for a claim of this nature would be around two months from when R first made its claim on 25 March 2020 in order to wait for losses to accrue and to give AXA a reasonable amount of time to assess the claim. I don't consider the bringing of the test case alters this in the circumstances of this complaint.

I currently think it is fair and reasonable that AXA should add interest to the first month's loss from two months after the claim was made, the second month's loss from three months after the claim was made and so on until 1 October 2020.

On 2 October 2020 R took out a BBL of £20,000. No interest is charged on the BBL for the first year and thereafter it is charged at 2.5%. As this loan formed part of the money R should have received from AXA, I don't think R was without the settlement funds from 2 October 2020 until the amount of the settlement based on monthly interim payments as set out above exceeded the £20,000 received via the BBL or until 2 October 2021 when interest was payable on the BBL whichever is the sooner. So, no interest is payable for this period.

Thereafter AXA should continue to pay interest on subsequent months' losses on the date that they should have been paid to the date of settlement.

This interest should be paid at a rate of 8% simple a year.

However, AXA is entitled to deduct from this interest calculation any interest that would be payable on the sum of R's BBL from 2 October 2021 until the date of final settlement of the claim. Instead AXA should pay R the cost of its borrowing under the BBL up to the date of final settlement of its claim. AXA is also entitled to deduct the two interim payments of

£12,500 each from the amount interest is payable on, in each case from the date that such interim settlements were made.

Compensation

I recognise Mr G's frustration at the time taken by AXA to pay R's claim. However, R is the eligible complainant in this case as opposed to Mr G. So, I can only consider the impact of AXA's actions on R as a limited company and not on Mr G as a director. AXA says it has already paid R £75 compensation for the delay. I currently think a further £125 for the inconvenience of R having to apply for the BBL and chase the progress of the claim would be reasonable in the circumstances.

Furlough payments

*The terms and conditions of R's policy say that for business interruption claims AXA will pay for loss of trading profit due to a reduction in turnover and an increase in the cost of working "less any sums saved during the **Indemnity Period** in respect of the charges and expenses of the **Business** payable out of **Trading Profit**".*

I think the above wording makes it clear that any charges and expenses saved during the indemnity period would be deducted from the claim settlement.

The wages R paid its staff during lockdown were a charge and expense of the business.

Under the Coronavirus Job Retention Scheme (commonly referred to as the furlough scheme) employers such as R who chose to pay the full amount of their employees' normal wages when they couldn't work during lockdown could apply for a grant from the Government to cover a percentage of their wages bill. I understand that R received £16,417.87 in respect of a grant under this scheme which it does not have to repay. That represents a saving on its wages bill and that in turn is a saving in the charges and expenses of the business. It doesn't seem fair to me to require an insurer to pay for an expense of a business for which the business has already been compensated from elsewhere.

*In reaching a decision, amongst other things I have to consider relevant law and I think the following judgment is helpful when considering this complaint: *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others* [2022] EWHC 2548 (Comm). That's because, one of the issues considered by the Court was whether payments received by a policyholder under the CJRS were to be taken into account when calculating the sums recoverable under the policy. The Court found that payments received by businesses for furlough should be taken into account when calculating any indemnity as they did "diminish the insured loss".*

So, I think AXA was entitled under the terms of the policy to deduct the amount R received in respect of furlough payments from its settlement of R's business interruption claim."

In response AXA said it didn't wish to make any further comments on the compensation for inconvenience but it did object to the requirement to pay interest on the settlement. This was because:

1. It thought I didn't have the power to make a "freestanding" interest award under the statute and regulation governing this service and indeed that I was precluded from making such award under that statute and regulation.
2. In the circumstances of this case it thought an interest award was neither fair nor reasonable. It also didn't think it was compliant with this service's own stated approach to interest awards.

Mr G said the compensation of £75 previously paid by AXA didn't relate to the time and effort he'd spent on the claim.

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.

Largely speaking this complaint now comes down to whether it is appropriate for AXA to compensate R for not having money it would otherwise have had if its claim had been settled at the time it was made in 2020.

The FCA Handbook section 3.7 outlines the type of awards an Ombudsman can make. This includes amongst other money awards and interest awards. With regard to an interest award the rules state:

"...an interest award may provide for the amount payable under the money award to bear interest at a rate and as from a date specified in the award."

That means an interest award can only be awarded if there's a money award on which the interest will be payable. That doesn't apply here as the claim was settled before the complaint was referred to this service.

However regarding money awards the rules state that an Ombudsman can award such amount as the Ombudsman considers to be fair compensation for various things including financial loss whether or not a court would award compensation. In this case I think R has suffered a financial loss because of the delay in settling its claim. I'm not adding interest to an award but rather in this case interest is the money award.

The COVID-19 pandemic and surrounding circumstances presented a novel situation for insurers. And I recognise that there was some uncertainty about whether the wording of certain types of clause would cover claims. This was part of the reason for the FCA test case. But whilst the court judgments provided clarity, this does not mean AXA was unable to have reached a different conclusion to the one it did prior to the judgments. Ultimately, the decision it reached on R's claim in 2020 was shown to have been incorrect. And as a result of this incorrect decision R was left without the settlement of its claim when it would otherwise have received this.

I note AXA's comments over the guidance for firms about the FCA test case issued by the FCA. Whilst I note that this indicates insurers might be able to wait until the conclusion of the court case, no mention was made in relation to compensating customers who then had to wait for a decision on their claim.

The role of the Ombudsman Service where consideration of a complaint identifies, for example, that an insurer has reached the incorrect decision on a claim, is to put the complainant back in the position it would have been in had the correct decision been made. So, my aim is to try to put the parties back in the position they would have been in had AXA met R's claim in 2020. In attempting to put the parties back in the position they would have been in, this service considers that if a party has been left without funds they ought to have had, interest should be paid on this sum. The level of this interest takes into account the fact that the complainant will have been denied opportunities to use the money they've been without. And the level of interest we tend to award is 8% simple per annum, which is in line with the rate awarded on judgment debts.

I recognise that Mr G spent a lot of time and effort on pursuing R's claim. As explained in my provisional findings R is the eligible complainant in this case as opposed to Mr G. I remain of the opinion that payment of a further £125 is fair to compensate R for the inconvenience of having to apply for the BBL and chase the progress of the claim.

Overall, having carefully considered the responses to my provisional findings, for the reasons set out above I see no reason to change them.

Putting things right

To put things right I think AXA should add interest to R's first month's loss from two months after the claim was made, the second month's loss from three months after the claim was made and so on until 1 October 2020.

On 2 October 2020 R took out a BBL of £20,000. No interest is charged on the BBL for the first year and thereafter it is charged at 2.5%. As this loan formed part of the money R should have received from AXA, I don't think R was without the settlement funds from 2 October 2020 until the amount of the settlement based on monthly interim payments as set out above exceeded the £20,000 received via the BBL or until 2 October 2021 when interest was payable on the BBL whichever is the sooner. So, no interest is payable for this period.

Thereafter AXA should continue to pay interest on subsequent months' losses on the date that they should have been paid to the date of settlement.

This interest should be paid at a rate of 8% simple a year.

However, AXA is entitled to deduct from this interest calculation any interest that would be payable on the sum of R's BBL from 2 October 2021 until the date of final settlement of the claim. Instead AXA should pay R the cost of its borrowing under the BBL up to the date of final settlement of its claim. AXA is also entitled to deduct the two interim payments of £12,500 each from the amount interest is payable on, in each case from the date that such interim settlements were made.

It should also pay R compensation of £125 for inconvenience caused to it.

My final decision

For the reasons set out above, I uphold this complaint and require AXA Insurance UK Plc to pay R the following amounts:

1. interest calculated as set out above; and
2. £125 compensation for inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask R to accept or reject my decision before 27 March 2023.

Elizabeth Grant
Ombudsman