DRN-4041674

The complaint

Mr D complains Royal & Sun Alliance Insurance Limited (RSA) caused avoidable delays in how it handled his legal expenses insurance (LEI) claim. He says this led to him incurring additional legal fees. Mr D also considers the hourly solicitor rate payable to his solicitor to be too low.

Any reference to RSA includes the actions of its representative.

What happened

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

- In late March 2021, Mr D submitted an LEI claim to RSA in respect of an employment dispute. He expressed he wanted to use his own solicitor, who I'll refer to as "W".

- In early April 2021, RSA told Mr D that prior to the issuing of court proceedings, it would only cover the costs of its panel solicitors. It also asked him to provide additional information – including "any other information relevant to your claim."

- On 14 April 2021, Mr D told RSA he had additional information that was with W saying "[I] could send over a myriad of additional documents but don't think they are relevant to the choice of solicitor or the validity of cover." So, he didn't provide anything further at this time.

- A few days later, RSA advised the information it had been given was being reviewed. Mr D asked that if any more information was required RSA ring him rather than email.

- On 21 April 2021, RSA asked Mr D for clarification as to the exact date the grievance was raised with his former employer. Mr D said it was in late-January 2020. Mr D wanted to know why the information was needed.

- A week later - having been asked for an update by Mr D - RSA said the policy started on 6 January 2020, so it needed to establish if the insured event fell within the period of cover. Mr D explained he'd had continuous cover for several years. RSA said it would review the claim and revert to Mr D by the end of the month.

- On 6 May 2021, RSA told Mr D that an exclusion applied because the claim had been raised within 90 days of the start of the policy.

- Mr D provided evidence of his previous insurer which confirmed continuous LEI cover and asked that his claim be expedited owing to the deadline to submit his employment tribunal claim.

- In Mid-May 2021, RSA confirmed it was obtaining a legal assessment from its legal adviser. On 27 May 2021, RSA shared with Mr D that its legal adviser had said the claim didn't enjoy reasonable prospects of success.

- RSA explained Mr D could challenge the assessment by either submitting further new information for its solicitor to consider or he could submit a formal legal assessment from a suitably qualified solicitor which showed prospects of success.

- Mr D said that whilst RSA's legal adviser had asked for more information it hadn't specified what it needed. Mr D asked whether W could provide a legal challenge - RSA said it could.

- RSA subsequently provided a list of suggested evidence that would be required by its legal adviser to reassess the claim which included *"if an alternative advice on prospects has been provided, the basis of the same."*

- Mr D replied saying, *"The problem with the list below is that it provides yet more data / background but without the colour of how the various bits link in with one another, we may have another similar highly inefficient and time consuming process which doesn't directly address the 50% criterion contemplated by the policy."*

- Unhappy with the time taken to progress his claim, Mr D complained to RSA.

- On 31 August 2021, W provided a legal assessment to challenge RSA's solicitor's opinion. Having considered this and further evidence provided by W, RSA's solicitor agreed Mr D's legal claim had prospects of success and so, RSA sent W its terms of business.

- Mr D raised further complaint concerns relating to costs: he was unhappy RSA had only agreed to legal costs from the time it had said there were prospects of success; the time it had taken to negotiate his solicitor's hourly rate and pay his solicitor's fees; he considered the hourly rate to be too low.

- RSA concluded that overall, it had handled Mr D's claim in line with the terms of the policy but offered £50 compensation to recognise there had been one occasion where it replied to Mr D outside of its five-business day service level agreement.

- Unhappy, Mr D brought a complaint to this Service. An Investigator considered it and upheld it. He said RSA should cover the costs Mr D incurred in obtaining his legal opinion to challenge the prospects of success assessment and pay an additional £100 compensation for the delays it had caused.

- Both parties disagreed with the Investigator's outcome and so the complaint has been passed to me for a decision.

Having considered the evidence, I issued a provisional decision which said I intended to reach a different outcome to the Investigator.

> *"What I've provisionally decided – and why*
>
> *Validating the claim*
>
> *Mr D has complained about the time it took RSA to validate his claim. Insurers are required to handle claims promptly and fairly but it's also reasonable for them to seek further information to satisfy itself a claim is covered.*

Here, however, it seems RSA got unnecessarily tangled up in considering whether the insured event was covered by the policy even though Mr D had continuous cover in place. Whilst this might not have been apparent to RSA at the outset, I do think this could have been identified and addressed earlier on – taking approximately seven weeks to do so seems unreasonable. And because RSA hadn't identified Mr D had continuous LEI cover, it incorrectly advised him his claim wasn't covered which caused unnecessary stress. So, I agree with our Investigator that RSA could have done more to progress the claim and agree £100 additional compensation is reasonable.

Once RSA validated Mr D's claim it referred his legal claim to its legal adviser for a prospects of success assessment - a standard process legal expenses insurers follow. The outcome – that the legal claim didn't enjoy prospects of success - was given to Mr D just over two weeks later. It seems this was outside the timeframe RSA had advised Mr D of and so, I can appreciate his frustration at having to wait a bit longer when he was already under time pressures owing to submitting his employment tribunal claim.

I note that at the time of sharing the prospects of success outcome, RSA informed Mr D of his right to challenge the outcome and how he could do this. But it seems that it wasn't until the end of August 2021 – three months later – that RSA received W's legal challenge. So, I'm not persuaded the delays during this time are attributable to RSA's handling of the claim.

Once RSA received W's legal challenge, it shared this with its legal adviser who considered the new information. The legal adviser confirmed the claim had prospects of success approximately three weeks later, at which time RSA sent its terms of business to W. In deciding whether this was a reasonable amount of time, I must keep in mind that RSA's legal adviser was provided with new information to consider which would take time to review. So, whilst I understand Mr D feels things took too long, and I may agree this was slightly longer than I'd usually expect to see, the impact was limited here and isn't to the extent that I would look to make a further award for.

Prospects of success

In his view, our Investigator said RSA should cover the legal costs Mr D incurred in obtaining a legal opinion from W to challenge RSA's legal adviser's assessment that his employment dispute didn't enjoy prospects of success. He based this on the policy document stating:

> *"Where you have chosen your own representative any legal expenses incurred in providing assessment shall only be covered where there are reasonable prospects of successfully pursuing or defending the legal proceedings and the claim is covered under all other terms and conditions of the policy.*
>
> *The decision to grant consent will take into account the advice of your representative as well as that of our own advisers. We may require, at your expense, an opinion of Counsel on the merits of the legal proceedings. If the claim is subsequently admitted your costs in obtaining such an opinion and providing such advice will be covered under this insurance."*

But having looked at the evidence, I'm not persuaded that achieves a fair outcome in this particular case, and I'll explain why.

A condition of the policy is that the insured must tell RSA "fully and truthfully in writing all the details about [their] claim and give [RSA] all the information that [it] may need." This was reiterated in early correspondence to Mr D where RSA asked him to provide any other information relevant to his claim.

I've looked at W's legal challenge to the initial prospects of success assessment and note the grounds of complaint were submitted with it, but this grounds of complaint document hadn't been shared with RSA's legal adviser prior, as W says:

> *"I attach my client's Grounds of Complaint (GOC) as filed with the Employment Tribunal which set out the full particulars of claim. I understand that your solicitors did not have sight of the GOC prior to providing their opinion […]"*

On its face, this was relevant information that should've been shared with RSA, in line with the above described obligations.

So, I've gone on to consider whether had RSA's legal adviser had sight of the grounds of complaint, it would have made a difference and whether it was reasonable for Mr D to have known he ought to have shared this. In doing so, I note that in W's legal challenge, it says:

> *"I understand that your solicitors did not have sight of the GOC prior to providing their opinion and can infer from your letter of 27 May 2021 that their basis for advising that Mr D's claims had less than a 50% chance of success was the absence of relevant information, evidence and / or comment from Mr D. As you will appreciate the GOC is a substantial pleading which I drafted on the basis of material amount of documentary and oral evidence which Mr D and […] has provided to me over the last 12 months."*

And I note RSA's legal adviser said in their revised prospects of success assessment:

> *"We have now been provided additional documentation in the form of the insured's particulars of complaint, the respondent's grounds of resistance and an assessment of the claim from the Insured's solicitor."*

It goes on to say:

> *"We had previously been provided very little information regarding the Insured's claim. The particulars of complaint have substantively elaborated upon the same…"*

Considering the above, it's clear to me relevant information wasn't shared with RSA's legal adviser – including the grounds of complaint which W themselves said was key. And I consider that this ought to have been shared with RSA before its legal adviser completed its legal assessment.

Had this, and the other information been shared, the initial prospects assessment wouldn't have been made on partial evidence. Or, if the grounds of complaint post-dated the initial prospects of success assessment, Mr D could have submitted it as new evidence for RSA's legal adviser to consider. Either way, I'm satisfied Mr D had the opportunity to provide relevant information – which was likely to make a difference to the legal adviser's assessment - but chose not to for reasons of their own.

I say "chose not to" because I've seen an email from Mr D where he says there is a myriad of information with W but that he doesn't see how it's relevant to validating cover. But I'm not persuaded that's good enough reason for not sharing relevant information. Ultimately, RSA must determine whether the claim is one it can cover considering the legal dispute's prospects of success and whether it is proportionate to pursue, amongst other things. RSA's panel solicitors put together an initial assessment based on the information available, and I'm satisfied it was reasonable for RSA to rely on those prospects of success to decline the claim.

Given the pertinence of the grounds of complaint, I'm more persuaded that had this been shared earlier on, Mr D wouldn't have had to incur subsequent legal costs in instructing W to produce a legal challenge to the panel solicitor's prospects of success assessment. And so, I'm not persuaded the costs he incurred in doing so should fall to RSA.

Communication

Mr D has said he's unhappy RSA communicated with him by email when he'd asked to be telephoned. RSA has explained that it told Mr D that it could accommodate his request to speak on the phone in error and that ordinarily, communication is by email, so it has a paper trail. Whilst I understand Mr D's frustration and acknowledge his point that phone calls would expedite the process, RSA has explained it's position and apologised for its mistake which I'm satisfied is reasonable. Mr D is also unhappy that he didn't get to speak with RSA's legal adviser before it issued its prospects of success assessment. RSA has explained the legal adviser is for its benefit – not Mr D's, and that's correct. Ultimately, RSA isn't a legal expert and so, it's entitled to rely on the advice of a legal professional to determine whether a claim is covered under the policy. RSA hasn't treated Mr D unfairly by preventing him from speaking with its legal adviser. And as I've explained above, I'm satisfied he was given the opportunity to provide information he wanted the legal adviser and RSA to consider prior to the prospects of success assessment being completed.

Solicitor's hourly rate and time taken to pay costs

Mr D complains RSA has acted unfairly by capping the hourly rate it'll pay W at £200. He considers it should be £250 per hour – the rate W is charging him.

In determining whether RSA has acted fairly, I've looked at the policy document which says:

> *"At the point where Court papers need to be issued (or have been received), […] you are free to choose a suitably qualified representative. […]*
>
> *Where we agree to the appointment of a representative of your choice, you must confirm that your representative will not charge more than a representative chosen or suggested by us or that you will pay any difference between your chosen representative's fees and those of a representative chosen by or suggested by us. We will not pay your choice of representative more than we would pay our own choice of representative."*

So, whilst the policy makes it clear RSA won't pay more than what it would pay its choice of representative, it doesn't specify the maximum hourly rate. In such circumstances, I would expect the rate offered to be reasonable and in line with what the policy purports to cover which here is "the cost of you taking legal proceedings against your employer over your contract of employment." The policy also states:

"you must take all reasonable measures to prevent or avoid being involved in legal proceedings and keep the cost as low as possible". In other words, legal costs should be necessary and reasonable.

Because the parties disagree about what a reasonable hourly rate is, I've looked at the available evidence and considered the nature of Mr D's legal case, the court's guidelines on fee earner hourly rates, and the court's approach to the level of remuneration to be applied. Mr D's chosen solicitor, W, has 21 years' experience and specialises in employment law. I've looked at W's location and note the court guidelines state £282 per hour for a fee earner of W's grade (A) – which is far higher than what RSA initially offered (£150 per hour + VAT). Though I note it has since agreed to pay £200 per hour + VAT.

So, I've considered whether it's reasonable to ask RSA to pay W's hourly rate of £250 which I understand is already discounted. It doesn't appear to be in dispute that both parties agree the claim is high value and complex. I say this because in an email to W, RSA said: "[…] we have employment specialist panel and non-panel solicitors based in Central London dealing with high value complex employment claims at our hourly rate of £150 + VAT)."

I haven't seen however, that RSA has offered Mr D a reasonable choice of suitably qualified solicitors who are willing and able to act at the hourly rate it's offering to pay beyond simply saying it has panel and non-panel solicitors available. This coupled with the fact the court guidelines show a fee earner of W's standing could charge an hourly rate far higher than what RSA pays its panel solicitors persuades me that Mr D is unlikely to be able to find a suitably qualified solicitor to take on his case for £200 per hour and even less so for £150 per hour. So, I think his freedom of choice was rendered meaningless, and I'm currently inclined to say RSA should increase its hourly rate to £250 + VAT.

With regards to the issue of how long it took RSA to authorise initial legal costs in December 2021, it seems this took approximately two weeks. It's not unusual for approval of costs to go through an internal process – so whilst I appreciate Mr D's frustration at the time it took, I'm not persuaded it was unreasonable.

Costs which pre-date positive prospects assessment

The policy's terms and conditions state RSA will cover "your representative's fees, cost and disbursements which we have agreed […]". So, I'm satisfied the policy makes it clear that unauthorised costs won't be covered.

RSA has said it'll consider costs which were incurred after the positive prospects of success assessment was reached (subject to it being necessary to issue court proceedings) but that it'll require a breakdown of W's fees to do so. I appreciate Mr D feels all his legal costs should be covered under the policy, but that's simply not the level of cover offered. I'm satisfied RSA's offer to consider costs from the date of its positive prospects of success assessment to be reasonable in the circumstances.

My provisional decision

My provisional decision is that I uphold this complaint and direct Royal & Sun Alliance Insurance Limited to:

- *pay an additional £100 compensation*

- *increase the hourly rate payable to W to £250 + VAT. This will include any existing costs that have already been incurred."*

Both parties responded to my provisional decision. RSA accepted it and reiterated it would only consider legal fees incurred by Mr D after the positive prospects of success assessment.

Mr D agreed with my findings but thought the compensation should be increased. He said that whilst RSA responded to correspondence within the time frame afforded to it under its service level agreement, it always took the full amount, which meant his claim didn't progress as quickly as it should have done. Mr D alleges RSA intentionally did this to reduce the amount it'd have to pay under his claim – as until cover was agreed and the legal claim deemed to have prospects of success and be proportionate to pursue, Mr D was funding the legal costs. Mr D also clarified that RSA was his previous insurer.

Mr D accepted he'd contributed to delays and explained this was due to his solicitor's difficult personal circumstances at the time. But he says despite this, RSA still took six months to agree cover – which he considers to be unreasonable considering the nature of his legal claim and the implications for not meeting deadlines.

Last, Mr D also considers that had RSA asked his solicitor to provide their analysis at the outset rather than use its panel solicitors, months of delay could have been avoided.

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 done so, I'm not intending to depart from the findings set out in my provisional decision. But for completeness, I'll address Mr D's further comments.

I appreciate Mr D's strength of feeling in respect of how long it took RSA to respond to him and ultimately agree cover, but I've not been provided with evidence which persuades me it deliberately prolonged the process to avoid paying legal fees.

I explained in my provisional decision that I thought RSA had got unnecessarily tangled up in whether there was continuous cover when it should have been apparent that Mr D did have it. Because this prevented the claim from progressing – and caused Mr D avoidable stress for the short period of time he was led to believe he didn't have cover - I've said RSA must pay additional compensation to reflect this.

Mr D has said had RSA asked for W's analysis at the start, months of delay could have been avoided. Whilst I agree that ultimately, W's assessment of the legal claim – along with the grounds of complaint – was evidence which led to RSA's legal adviser reaching a positive prospects of success assessment, I'm not persuaded Mr D's suggestion is fair. I say this because RSA *did* ask for information which was relevant to the claim at the start of the process, but Mr D chose not to provide it. So, whilst it's likely that had RSA been in receipt of W's analysis earlier on the claim would have progressed more promptly, I'm not persuaded RSA is at fault for not having acquired it earlier on.

My final decision

My final decision is that I uphold this complaint and direct Royal & Sun Alliance Insurance Limited to:

- Increase the hourly rate payable to W to £250 + VAT. This will include any existing costs that have already been incurred since 22 September 2021 – the date of Royal & Sun Alliance Insurance Limited's positive prospects of success assessment. For the period after 22 September 2021, Royal & Sun Alliance Insurance Limited will need to pay 8% interest on any legal costs already paid by Mr D from the date he paid them, up until the date of settlement – subject to proof of payment.

- Pay an additional £100 compensation. Royal & Sun Alliance must pay the compensation within 28 days of the date on which we tell it Mr D accepts my final decision. If it pays later than this, it must also pay interest on the compensation from the deadline date for settlement to the date of payment at 8% a year simple

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

Nicola Beakhust
Ombudsman