

The complaint

Mr and Mrs S' complaint is about a claim Mr S made on their Fairmead Insurance Limited, trading as L&G ('L&G') legal expenses insurance policy.

Mr and Mrs S say that L&G has treated them unfairly.

What happened

Mr S made a claim on his L&G legal expenses insurance policy for cover for legal expenses in defending an appeal against a judgment he'd obtained against his former employer in the Employment Tribunal.

The history of the claim is well known to both parties, so I don't intend to repeat it here. The issue this Service is considering is whether L&G were entitled to withdraw funding on this matter when they did and whether they should pay the Barrister's fees currently being sought by the Chambers instructed by his own Solicitors in the litigation L&G had previously agreed to fund.

Our investigator considered Mr and Mrs S' complaint and concluded it shouldn't be upheld. He said that L&G were entitled to withdraw funding when they discovered that this was a claim they should never have covered, based on their policy terms. But he didn't think that L&G needed to do anything further. This was because he thought that Mr S had the choice to stand down the Barristers instructed by his Solicitors when L&G withdrew funding, which would have considerably reduced the Solicitors' liability to pay the costs being charged by the Barristers. He also said that as L&G has offered to pay part of these costs, Mr S has received the benefit of cover he wouldn't have otherwise been entitled to.

Mr and Mrs S don't agree so the matter was passed to me to determine.

In June 2023 I issued a provisional decision in which I said:

"It doesn't appear to be in dispute that L&G made a mistake when they agreed to cover Mr S' claim. For the sake of completeness, I agree that the type of action Mr S wanted cover for- to defend an appeal against his former employer in the Court of Appeal- wasn't covered by the policy. That's because the policy only covers pursuing legal action arising directly from a policyholder's contract of employment- rather than defending litigation, as was the case here. And I'm satisfied there are no other policy terms that assist him in respect of this.

The issue that I need to decide is whether L&G were entitled to withdraw cover when they did and whether they need to do anything further, like pay the Barristers' fees Mr S says he will ultimately be liable for. When L&G discovered its mistake, it withdrew funding. It also offered to pay a proportion of those fees, but not all of them.

After reviewing things, in particular the terms of Mr S' Solicitors' retainer with the Barristers in question, I asked the Chambers whether the fees charged would have been the same if Mr S had stood down the Barristers on the date that L&G withdrew funding. The Chambers responded confirming that the retainers in place with the Barristers were charged on a fixed

fee basis. So, the sums now payable would have been the same had Mr S stood them down when funding was withdrawn by L&G or at conclusion.

The Chambers have also provided me with further detailed information about the Barrister's fees. As I understand it, the fixed fees charged were considerably less than if those Barristers had acted on an hourly rate. This meant that the overall liability to L&G (had they funded the entire matter) would have been less than if those Barristers had charged on a usual hourly rate basis. I've been told that by the time funding was withdrawn by L&G, considerable work had already been conducted, which had necessitated one of the Barristers having to break off their summer vacation to complete. And given the nature of the charging arrangement, the full fee would still have been payable at that point, the same as it would have been if the Barristers had conducted all the work to conclusion in a similar way to if the matter had settled early.

Having considered this and the fact that Mr S would ultimately be liable for these fees- because his Solicitors would inevitably claim against him for the liability they have to the Chambers in question- I think that L&G do need to discharge these fees in the circumstances. Whilst L&G were entitled to withdraw cover when they did, they also needed to ensure that Mr and Mrs S weren't worse off as a result of their actions. At present, it seems to me that they are worse off because they are liable for fees that L&G agreed to pay and they had no way of mitigating this loss because of the nature of the charging arrangement, which was intended to benefit L&G from the outset. And those fees wouldn't have necessarily been incurred if L&G hadn't expressly agreed to fund them.

For clarity, I would have reached the same conclusion as the investigator, if Mr S' liability to the Barristers would have been equivalent to what L&G had offered to pay in respect of Barristers' fees, if he'd stood them down when cover was withdrawn. But since his liability to pay the fees currently being sought are the same as if he'd stood them down when cover was withdrawn, I think it's reasonable for L&G to discharge that liability to ensure that Mr S' position is protected. This accords broadly with the principle the investigator set out in his view when he said that if there were any penalties from cancellation, then he would've expected L&G to cover those costs together with the fees they'd already offered to cover whilst cover was in place.

I've also considered whether L&G needs to pay Mr and Mrs S anything further to compensate them for the stress and loss of expectation caused by providing and then withdrawing cover. Having done so, I don't think L&G need to do so. That's because I think that Mr S has had the benefit of cover for considerable legal fees that he otherwise wouldn't have been entitled to, had L&G not provided cover in error. As such I can't compensate him for the loss of something he wasn't ordinarily entitled to."

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 asked both parties whether they had any further comments or evidence they wanted me to consider in response to my provisional decision. L&G have responded confirming they agree with my provisional findings. Mr and Mrs S have also responded. They say they have no further comments to make. In light of that, and given that no further submissions have been made by either party, I remain of the view that this complaint should be upheld. As such I direct L&G to put things right in the way I've set out below.

Putting things right

Fairmead Insurance Limited, trading as L&G, need to pay all of the outstanding Barrister's fees that Mr S will ultimately be liable for to his own Solicitors as a result of L&G withdrawing funding on his claim when they did.

My final decision

I uphold Mr and Mrs S' complaint against Fairmead Insurance Limited, trading as L&G and direct them to comply with my award of Fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs S to accept or reject my decision before 1 August 2023.

Lale Hussein-Venn
Ombudsman