

The complaint

Mr I complains that Royal & Sun Alliance Insurance Limited (“RSA”) unfairly declined a claim under his legal expenses insurance policy.

Where I refer to RSA, this includes the actions of its agents and claims handlers for which it takes responsibility.

What happened

Mr I made a claim on his legal expenses insurance policy to pursue an employment dispute. RSA instructed its panel solicitors to assess the merits of the case.

The panel solicitors were of the opinion that the claims for unfair dismissal and discrimination didn’t enjoy reasonable prospects of success. And that whilst a claim for wrongful dismissal did enjoy prospects of above 51%, it wouldn’t be proportionate as the likely value of that claim was estimated to be around £1,437 and the legal costs to pursue it would be £6,000.

RSA declined the claim on the basis the policy will only cover claims that have reasonable prospects of success and are proportionate to pursue. It said that if Mr I had any further evidence, the panel solicitors would reconsider the claim. Alternatively, it would reconsider cover if Mr I provided a legal challenge in the form of a supportive legal opinion. But in the absence of either, RSA maintained its position that there was no cover available.

Mr I didn’t agree with the advice on prospects or the estimated value of his claim. He brought a complaint to our service. Our Investigator was satisfied that RSA had acted in line with the policy terms when declining the unfair dismissal and discrimination claims. But he didn’t think the policy terms allowed the wrongful dismissal claim to be declined solely on proportionality, as it said RSA would pay legal costs up to the value of the claim. So he suggested it pay Mr I £1,437.

RSA disagreed with our Investigator. It said it would only make a payment to Mr I at its discretion. And as it had already spent £1,500 in legal costs to obtain a merits assessment, it was satisfied Mr I had exhausted proportionate funding under the policy. In addition, it said the Employment tribunal was specifically designed to be easily accessible for people without legal expenses funding or access to a solicitor, so Mr I could represent himself in his claim.

As RSA didn’t agree, the complaint has been passed to me to decide.

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.

The Financial Conduct Authority’s (FCA) Insurance Conduct of Business Sourcebook (ICOBS) requires Advantage to handle claims promptly and fairly, provide information on the claims progress, and to not unreasonably reject a claim. I’ve kept this in mind when considering Mr I’s complaint.

Prospects of success

The terms and conditions of Mr I's legal expenses insurance policy say cover is available "as long as...*reasonable prospects exist for the duration of the claim*". It defines reasonable prospects as "*at least 51%*".

This is a requirement of virtually all legal expenses policies, and we don't think it's unfair. Court action can be expensive. A privately paying customer wouldn't want to bear the cost if advised it's unlikely to succeed. And we wouldn't expect a legal expenses insurer to either.

Where an insurer has declined or withdrawn funding in such a case, it isn't for us to evaluate the merits of the underlying claim. Instead, we look at whether the insurer has acted fairly. As long as they've obtained advice from suitably qualified lawyers, we won't generally question their reliance on that advice, unless it was obviously wrong or based on factual mistakes.

In this case, RSA obtained the advice of a panel firm. And they were of the opinion that, based on the information available, part of the claim didn't enjoy prospects of at least 51%. It said the unfair dismissal claim had 35-40% chance of winning and the discrimination claim had 10-20%. So the policy terms and conditions had not been met.

Having considered the legal assessment, I'm satisfied it's properly written and well-reasoned. And it's been obtained from a suitably qualified lawyer. So I haven't seen anything to persuade me that RSA shouldn't have relied on it.

Rather it was up to Mr I to obtain a contrary legal opinion on the merits of his claim, at his own cost if he wanted to challenge this further. If such an opinion was supportive then RSA should've reconsidered the claim. I'm not aware that Mr I did this. In the absence of a supportive legal opinion, I'm satisfied it was fair for RSA to decline these parts of the claim due to insufficient prospects of success.

Proportionality

The panel solicitors assessed Mr I's wrongful dismissal claim as having 51-60% prospects of being successful. So this part of the claim met the policy requirements in this respect. But the solicitors were of the opinion the legal costs to pursue the claim would outweigh the likely award.

RSA declined the claim on the basis that the policy excludes claims that aren't proportionate to pursue. Whilst this is a common requirement under a legal expenses policy, I can't find any condition or exclusion within Mr I's policy terms that enable RSA to decline the claim outright on this basis. Rather, the policy says:

"Where an award of damages is the only legal remedy to a dispute and the cost of pursuing legal action is likely to be more than any award of damages, the most we will pay in Costs and Expenses is the value of the likely award."

This means Mr I is entitled to legal expenses funding up to £1,437.

RSA say it's already spent £1,500 obtaining a merits assessment from its panel solicitors, so any further legal costs would be disproportionate. But I don't agree. A proportionality clause is based on what the legal costs are to pursue the claim, compared to the likely award. But this legal assessment was obtained for RSA's benefit as part of its claims assessment to determine whether the claim is covered by the policy terms – not to pursue the claim.

Furthermore, due to RSA's arrangements with its panel solicitors, I'm aware that the £1,500 paid for the legal assessment was a fixed fee for the case as a whole regardless of the amount of work completed. So I don't think it's fair to conclude that the £1,500 was for a legal assessment.

RSA seeks to rely on a previous decision from this service where we've said the costs of a prospects assessment should be deducted from the limit of indemnity. I don't intend to comment on this in detail. The circumstances of that case were different, in that the cost of the prospects assessment was a disbursement from external counsel. And the question in Mr I's case is not whether these costs should come out of his limit of indemnity, but whether they should be factored into proportionality.

RSA has recently acknowledged that the policy terms aren't clear on proportionality, but now seeks to rely on the CPR regulations that require legal action to be proportionate. But it's unlikely £1,437 worth of funding would take this case to court. In fact, the legal assessment says that amount would only allow the panel solicitors to *"draft a Letter Before Action and would likely not stretch to issuing the claim and assisting beyond this stage"*. So I'm not persuaded there's any risk of wasting court time here by providing proportionate funding.

Because of this, I remain satisfied that Mr I is entitled to funding up to the value of his claim. But given that Mr I is unlikely to get far with £1,437 worth of legal costs, and it will most likely put him in a position whereby he's started legal action but doesn't have the funding to finish it, our Investigator recommended RSA pay that amount to Mr I instead. And I agree that this is the fairest way to settle the claim.

RSA say its discretionary how it chooses to settle a claim, and it relies on the policy term which says:

"We may decide to pay you the reasonable value of your claim, instead of starting or continuing legal action."

Whilst I've considered the policy terms, I'm not bound by them. It's my role to determine what's fair and reasonable in the individual circumstances of Mr I's complaint. And as he has the benefit of cover up to the value of his claim, provided that it enjoys reasonable prospects of success – which it does – I'd expect RSA to provide that cover in good faith.

And finally, RSA says the employment tribunal is designed to allow people to easily represent themselves. I'm not sure of the relevance of this statement. RSA has sold a policy which covers legal expenses for employment matters. If legal representation isn't required in these circumstances, I would question the relevance of the policy and its value for money.

I'm aware Mr I doesn't agree the value of his wrongful dismissal claim is only £1,437. But in the absence of any contradictory legal opinion on quantum, I'm satisfied RSA can rely on this valuation when making the bagatelle payment I'm awarding.

My final decision

For the reasons I've explained, I'm upholding this complaint and directing Royal & Sun Alliance Insurance Limited to pay Mr I the sum of £1,437 in full and final settlement of his claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr I to accept or reject my decision before 28 March 2024.

Sheryl Sibley
Ombudsman