

## **The complaint**

Mr R is unhappy with what Aviva Insurance Limited did after he made a claim on his legal expenses insurance policy.

## **What happened**

In February 2018 Mr R contacted Aviva as he'd been unsuccessful in obtaining a job and wanted to pursue an Employment Tribunal (ET) claim for age and race discrimination. Aviva asked a panel firm to assess whether the claim would have reasonable prospects of success (a policy requirement). Having obtained counsel's opinion the firm advised it didn't.

Mr R pursued his claim and contacted the panel firm again in July 2019. He said he'd obtained new information following the disclosure process. Aviva agreed the panel firm could carry out a further assessment. It concluded in August the claims were unlikely to succeed.

The following month Mr R provided a barrister's opinion of his own which said, while there was a significant degree of litigation risk, he was likely to succeed in his claims. Aviva agreed to provide funding and appoint Mr R's existing representatives C (a charity) to progress it. In October, following an ET hearing at which judgment was reserved, Mr R contacted Aviva as he was unhappy with how C had dealt with his claim. Aviva said it couldn't become involved with this.

In December 2019 judgment was issued. Mr R was unsuccessful in his claim. Counsel advised he had a case to appeal and confirmed the following month prospects were in the region of 51-53%. Mr R said he wanted to use an alternative firm, P to pursue the claim. Aviva agreed to their appointment.

Matters progressed and in March an application for reconsideration was refused. In June an appeal to the Employment Appeal Tribunal (EAT) was rejected. Aviva agreed funding for counsel to advise on the prospects of challenging the EAT decision. In July 2020 counsel said an appeal would not have reasonable prospects of success. I understand Aviva didn't provide any further funding.

Following complaints to the Legal Ombudsman Mr R contacted Aviva again in 2022 and complained about poor service from the legal service providers in his case. He thought they had benefited from his policy when his claim didn't have good enough prospects of success. And Aviva shouldn't have funded them. Aviva said it had acted in line with the legal advice provided in relation to Mr R's claims and it was entitled to do so.

In her most recent view our investigator agreed Aviva were entitled to rely on legal advice when making claims decisions. It had agreed to appoint the organisations Mr R asked to represent him in pursuing his claim and paid those costs which, following assessment, it had been advised were reasonable and necessary. If it hadn't done so Mr R's representatives might have pursued him for those costs. She didn't think there had been unnecessary delays by Aviva in its handling of the claim.

Mr R didn't agree and provided detailed comments. I've read through those carefully and I've summarised them as follows.

- Aviva should have given more consideration as to whether it was right to pursue the case as it had more expertise in this area than he did. He wasn't aware when making his claim of the challenges of pursuing a discrimination claim at ET. If the claim hadn't been pursued it would have avoided the stress and other impact caused to him.
- Aviva should have challenged the positive legal assessments provided included that of the barrister who said the claim did have prospects in 2019 (given that had previously been thought not to be the case when the claim had been assessed by panel solicitors). He said that barrister was only newly qualified and had little experience of employment or discrimination cases.
- Aviva should have done more to assess the ability of the firms he suggested to satisfactorily deal with this claim, in particular C. He said Aviva should have checked they were a suitable organisation to be appointed. And he didn't think Aviva should have appointed them because they weren't a recognised legal services provider meaning he wasn't able to complain about them to the Legal Ombudsman.
- He didn't agree it was solely for him to decide whether his choice of legal representative was appropriate; if that was the case a policyholder would be able to obtain funding for a legal representative who had no expertise in the area of law the claim related to simply by requesting this.
- He questioned whether it was right for Aviva to have continued to provide funding for his claim after it had failed at the ET hearing. He thought Aviva should have done more to check whether the claim did continue to have good prospects of success following that.
- He said payments made to the appointed firms hadn't been properly scrutinised by Aviva and it appeared that, following assessment, C was found to have claimed costs which were outside of the scope of its agreement with Aviva. He queried why Aviva had agreed to provide any funding to C at all given that.
- Given its conduct he didn't agree C would have been able to pursue him for any unpaid costs. He thought that would in any case have been contrary to his agreement with it and the terms of appointment. He accepted this hadn't caused him a financial loss but highlighted the wider impact on him which could have been avoided if Aviva had acted with more care and consideration.

So I need to reach a final decision.

### **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 appreciate Mr R is unhappy with the actions of the firms that acted for him and the barristers that were involved with his case. And he's outlined what he feels were their motivations for taking on the case in his detailed response. But those aren't matters I can consider because those organisations aren't ones our rules allow us to look at. Mr R has pursued some of these matters with the Legal Ombudsman. I appreciate he isn't able to do that in relation to his concerns about C because they don't fall within its remit. But they don't fall within ours either. So I can't look at the points he's made about their conduct.

What I can consider is whether Aviva did anything wrong when dealing with the claim Mr R made on his legal expenses policy. So I've looked at that, taking into account those points Mr R has made which are relevant to that issue. However, while Mr R has sought to draw a distinction in his response between Aviva and its claims handlers that isn't something I'll be doing. Even where claims handling has been delegated, the insurer remains responsible for the actions (or inactions) of the handler. And we would consider any failing on the part of the claims handler to be a failing by the insurer. So any references to Aviva in this decision include the actions of its claims handlers.

Turning to Mr R's claim, the relevant rules and industry guidelines say Aviva has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I've looked first at the terms and conditions of Mr R's policy. I don't think it's in dispute that his claim is covered by the Employment Disputes section of the policy. But, in common with similar legal expenses policies, it's a condition of cover that a claim must have reasonable prospects of success. Mr R's policy says Aviva will only fund a claim if it's "*more likely than not that you will recover damages or obtain any other legal remedy which we have agreed to (e.g. being paid compensation or stopping a neighbour from making noise)*". And if the prospects are success are no longer in the policyholder's favour then it won't pay any further costs and expenses.

Our long standing approach is that, as an insurer isn't a legal expert, we don't think it's in a position to carry out that assessment and it should be carried out by a suitably qualified lawyer who has relevant experience. Where that has been done we think it's reasonable for an insurer to rely on a properly written and reasoned legal opinion when deciding whether a claim has prospects of success or not. I can see Mr R's policy reflects that approach as it says "*our lawyer will assess the evidence*". So, once it accepted Mr R had a valid claim, I think Aviva correctly referred the matter to one of its panel solicitors for them to assess whether it had reasonable prospects of success.

I've reviewed the negative panel opinions provided through the panel firm (including counsel's opinion) and I think they are properly written and reasoned and from someone suitably qualified to provide them. So I don't think Aviva did anything wrong in deciding that Mr R's claim didn't meet the policy requirements and so wasn't one it should fund. I also think Aviva was right to agree a further assessment when Mr R provided more information in July 2019 and was entitled to rely on the opinion the panel firm provided at that time.

Mr R says after he made his claim Aviva should have given more consideration as to whether it was reasonable for him to pursue it as it had more expertise in this area than he did. But, as I've said Aviva, isn't a legal expert and I don't think it would have been appropriate or reasonable for it to have advised Mr R as to whether his claim was likely to succeed. That's something it would be for legally qualified professionals to do. In this case the panel solicitors did explain why they thought his claim was unlikely to win. And, as I've already said, they did so in a properly written and reasoned opinion.

That concluded they couldn't identify "*any evidence or effective grounds to argue that the reason for your treatment was attributable to your race and/or age. That aspect of your claim appears to be purely speculative. I cannot conclude that your proposed legal claim is likely to succeed in circumstances where there is a lack of evidence to support the assertions you make*". I think it was then for Mr R to decide whether this was a claim he then wanted to pursue. I don't think there was more advice Aviva could reasonably have been expected to give him about this.

Mr R did subsequently provide a barrister's opinion who concluded that he was "*likely to succeed in his claim for discrimination on the grounds of his race, ethnicity, age, and inferred religion*". In his most recent comments Mr R has said that Aviva should have done more to challenge this assessment and shouldn't have relied on it. He's drawn particular attention to what he regards as the barrister's lack of experience.

I appreciate the barrister's year of call was relatively recent at the point he provided his advice. But he's listed as having experience of employment law matters including claims for discrimination. And I think his opinion is properly written and reasoned; it sets out the relevant law and explains why, with reference to that, Mr R's claim would likely be successful. I also note Mr R's concerns about this legal assessment formed part of his complaint to the Legal Ombudsman who didn't uphold it.

This assessment did differ from that provided by a barrister who previously considered the claim in an opinion dated April 2018. But I can also see that barrister said in their negative assessment "*it may be that, if the Claimant does commence proceedings under his own steam, more evidence comes to light - in which case the merits of his claim could be reviewed*". At the point Mr R contacted Aviva again I understand he had pursued the claim and obtained further information as part of the disclosure process. So I don't think it was unreasonable of Aviva to place more weight on the more recent positive opinion from counsel Mr R provided.

That opinion also differed from the opinion of the panel solicitors who I appreciate had seen the further evidence Mr R provided. But, as a barrister has higher legal standing, I think it was right (and in in with our general approach) for Aviva to place more weight on his opinion. I also think it's clear from his opinion that that this was a relatively finely balanced case. The barrister acknowledged that "*there is a significant degree of litigation risk inherent in this claim*". And "*the allegations of discrimination are highly evidence-dependent and will likely come down to how [Mr R] fares in cross-examination*". So I think it was reasonable of Aviva to conclude he had carefully weighed up the arguments prior to concluding the claim nevertheless enjoyed reasonable prospects of success. I don't think there was anything obviously wrong about his opinion which should reasonably have led Aviva to question it further. I think it was right it therefore agreed to fund Mr R's claim.

Mr R is unhappy Aviva then appointed C to progress matters. He says Aviva should have done more to check on whether they were a suitable organisation to progress his claim. As proceedings were already underway then under the terms of the policy (and the relevant law) Mr R had the right to choose his own representative. The policy says "*If court proceedings are issued, there is a conflict of interest or if we consider the claim to be complex and requiring a specialist lawyer, you are free to choose your own lawyer by sending us their name and address*". And the policy definition of lawyer is "*a suitably experienced legal professional*". In this case Mr R had told Aviva he wanted C to be appointed and said they were "*an organisation with qualified solicitors acting on behalf of clients facing issues of discrimination*".

Mr R says Aviva shouldn't simply accept any representative a policyholder puts forward. And I appreciate that, depending on the proposed representative, it could be reasonable to expect an insurer to carry out checks to ensure they were in a position to properly progress the proposed claim. Having said that, given Mr R had the right under the policy and the law to appoint his own representative, then I think an insurer would need good grounds to deny that request particularly as the relevant legislation refers to "*a lawyer (or other person having such qualifications as may be necessary)*".

In any event it's clear Aviva didn't simply accept Mr R's choice but raised concerns with C about its appointment. In part that was because it recognised it wasn't a solicitor's firm. In

response C confirmed it was registered with the Charity Commission and with the Office of the Immigration Services Commissioner. And it had professional indemnity insurance to cover the work it did. It also said it *“employed caseworkers who are qualified and competent to do the work”*. And *“we have secured the barrister to represent in this case because of our links in with key chambers who are sympathetic to our work; we regularly instruct counsel and they are perfectly happy to take them from us, despite not being a solicitors firm”*.

Aviva also established the individual at C who it was in contact with (and who Mr R confirmed had been dealing with his claim) was legally qualified and used to be a practicing barrister. So I think it's fair to say Aviva did carry out checks on C prior to agreeing their appointment. And that established they employed (and had arrangements in place) with suitably experienced legal professionals. I appreciate issues with their conduct weren't ones that could be referred to the Legal Ombudsman but there's nothing in Mr R's policy which says that's a requirement for cover to be provided.

And even if Aviva had made that clear to Mr R at the time (and I'm not sure that was something it needed to do) I think it's unlikely he'd have acted differently. It was after all he who had requested C act for him based on their familiarity with his claim. And he wouldn't have known at that point he would have concerns about their conduct at his ET hearing because that hadn't taken place.

However, Mr R did bring issues about how C was handling his claim to Aviva's attention in October 2019. In response Aviva said it couldn't become involved with a dispute between him and C. And where a firm has been appointed to progress a claim an insurer's role is normally limited to the funding of fees and disbursements and it doesn't control the day to day conduct of litigation. But where a policyholder raises concerns about their representative (whether appointed by the insurer or not) we do expect an insurer to take action even if that's limited to ensuring the representative is aware of the concerns and responds to them.

So I think Aviva should have done more in response to the contact Mr R had with it. But I don't think Mr R has lost out because it didn't do that. C were clearly aware of his concerns as Mr R said he'd made a complaint to them. And as his ET hearing had already taken place (with judgement reserved) no action Aviva could have taken would have impacted the outcome of that. Aviva also made clear in response to Mr R's further concerns that it would have C's costs assessed prior to making any payment to them. And after Mr R received an unsuccessful outcome Aviva agreed he could appoint an alternative firm (P) to progress an appeal against that. As P are a regulated solicitors firm specialising in employment law I don't see there were any further checks Aviva should have carried out prior to doing so.

Mr R has questioned whether Aviva should have continued to fund his claim after it had been unsuccessful at ET. I've read the counsel's opinion provided on his prospects of appeal and again I think it is properly written and reasoned. And it's from a barrister who practices principally in employment and discrimination law. I also note Aviva did provide some challenge to his initial opinion as it didn't express the prospects of success in percentage terms.

In response counsel confirmed in an addendum opinion that prospects were in the region of 51-53%. But in line with the previous opinions he said *“this case is by no means clear cut”*. However, as that opinion nevertheless met the *“more likely than not”* test set out in the policy I think Aviva was right to agree further funding for Mr R's claim. It was only when a negative opinion from a different counsel was subsequently provided in July 2020 (about the prospects of challenging the EAT decision) that Aviva decided to withdraw funding. Again I think it was reasonable of it to be guided by that legal advice and it's acted in line with the policy terms in doing so.

Mr R doesn't think any payment should have been made to C as the assessment of its costs found this included items outside of the scope of its agreement with Aviva. I appreciate the costs assessment did reduce the amount claimed by C. But the policy says where prospects of success exist it will pay "*costs and expenses up to the amount shown on your schedule*". The terms of appointment with C says those need to be "*reasonably and proportionally incurred in the conduct of the claim*" So if, as appears to be the case, the remaining costs were assessed as falling within that definition Aviva was required to pay them in line with the terms of appointment and the requirements of the policy.

And I don't think the question of whether C would have been entitled to pursue Mr R for these amounts is something I need to reach a view on in this decision. The amount to be paid to C (and P) for the work they carried out is a matter between them and Aviva. But even if Mr R is correct to say Aviva shouldn't have made payment (and for the reasons I've explained I don't think he is) there's no financial loss to him as a result of that.

Mr R has highlighted the impact on him of what's happened which he says could have been avoided if Aviva had acted with more care and consideration. But he's referencing here the overall stress and upset he was caused by the claim being progressed. That isn't something which directly relates to the payments made by Aviva to the firms involved in his case.

Having said that I don't doubt Mr R has found all of this an extremely difficult experience and I was very sorry to learn about the impact on him of that. However, for the reasons I've already explained I don't think there was more Aviva could reasonably have been expected to do to challenge the legal advice it received. And I think it acted correctly in following that advice. I don't think the stress and upset Mr R has referenced came about because of anything it got wrong.

### **My final decision**

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 7 June 2024.

James Park  
**Ombudsman**