

The complaint

Mrs P is unhappy with what Aviva Insurance Limited did after she made a claim on her legal expenses insurance policy.

What happened

In April 2023 Mrs P sought assistance from her policy in relation to an employment dispute. Counsel initially advised the claim hadn't progressed to a stage where reasonable prospects of success could be assessed. Mrs P accepted that and provided further information a few months later. Aviva referred that for further assessment and counsel again concluded the policy requirements in relation to prospects of success weren't met.

At the end of July Ms P provided Aviva with the ET1 form she'd drafted and asked if the information that contained could be reviewed. Aviva asked counsel to do so but a response wasn't received until October which was again negative on prospects. Ms P said there were errors in that opinion. Aviva accepted it hadn't been provided by a barrister who specialised in employment law. It said it would obtain fresh advice from counsel with relevant expertise.

That advice was received in November. It found one of the claims Ms P was seeking to bring (in relation to a breach of contract) did have prospects of success but other grounds did not. Aviva sent its terms of business (including an hourly rate of £100 an hour) to solicitors it thought Ms P wanted to use. It also said it would reimburse the costs Ms P incurred in relation to the ET1 form.

Ms P said she wanted to use more specialist employment solicitors and also disputed counsel's negative assessment on prospects. In January 2024 Aviva agreed to seek a further review of prospects taking into account the information Ms P had provided. She said Aviva should exercise its discretion to allow a higher hourly rate for her solicitors and complained to us about the handling of her claim in mid-January.

Our investigator thought it was reasonable of Aviva to rely on the legal opinions it had been provided with when deciding whether Ms P's claim had reasonable prospects of success. And it had acted fairly in asking for further reviews when Ms P provided additional information. She thought the policy terms were clear about the £100 hourly rate Aviva would pay for a non-panel solicitor. But she thought there had been some delay by Aviva in obtaining the counsel's opinion it agreed to get at the end of July. She thought it should pay Ms P £100 in recognition of the impact of that on her.

In its most recent response Aviva agreed to do that. Ms P didn't agree. She said:

- It had taken a number of assessments from Aviva before the barristers the claim was referred to actually understood the case. And a number of the barristers failed to carry out the correct assessment and ignored information provided to them.
- She didn't think the hourly rate Aviva was offering for a non-panel solicitor enabled her to find someone who was able to manage her complex and high value claim. And she said that restriction hadn't been brought to her attention when it was introduced.

- She didn't think the panel solicitors Aviva had suggested had the expertise to progress the matter and drew attention to the impact that was having on the progress of her claim and the costs she was incurring herself in doing so.

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.

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 don't think it's in dispute Ms P's claim would fall within the 'Employment disputes' section her policy contains. But the policy says if "*prospects of success are no longer in your favour*" Aviva will not pay costs and expenses towards it. And the policy definition of prospects of success includes that "*it is 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 a noise)*".

The policy says that assessment will be carried out by "*our lawyer*" which the policy defines as "*a suitably qualified legal professional*". That's in line with our long standing approach which is that, as an insurer isn't a legal expert, we don't think it's in a position to carry out the prospects 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.

In this case Aviva asked one of its panel firms to obtain counsel's advice on whether the claim Ms P had made did have prospects of success. I don't think there was any reason why it shouldn't have relied on the initial opinion counsel provided (and Ms P accepted that at the time). But, where a policyholder then provides additional information, we would expect an insurer to review that and refer it for further assessment if appropriate. I think Aviva was right to do so in this case in response to the comments Ms P made.

However, it's not clear to me the opinion that was then provided is one Aviva could rely on because the counsel who produced it isn't listed as having experience of employment law. And Aviva identified itself the opinion which was then provided in October 2023 wasn't one it could rely on because the counsel involved also didn't appear to have relevant experience.

It's clearly extremely unfortunate two barristers appear to have been chosen who didn't have relevant experience. But I understand Aviva instructed a panel firm to obtain counsel's opinion. So it's that firm which should have ensured the opinions it was obtaining were from someone suitably experienced. Aviva isn't responsible for the actions of the panel firm.

In any event Aviva did ask the panel firm to arrange for Ms P's claim to be reassessed at the end of July after she provided the ET1 form. So it hasn't relied on the July assessment. But I do think if Aviva had identified (as it should) that the July opinion wasn't from a suitably experienced lawyer it would likely have given clear instructions that the reassessment should be carried out by someone who did have relevant experience (as it did in October).

I've thought about whether that caused a delay to the progress of Ms P's claim. I appreciate it did take from the end of July until October for the revised assessment to be received. But

that delay appears to be largely due to a separate error by the panel firm in progressing the referral. And I can see Aviva made reasonable efforts to chase the panel firm for a response. So even if Aviva had given clearer instructions to the panel firm, I don't think that would have led to an earlier assessment of the claim being provided.

But it would have meant the October assessment was provided by a suitably qualified lawyer. So that would have been obtained around a month earlier than it actually was. I've thought about whether there's anything Aviva needs to do to put things right here. It's already agreed to pay £100 as our investigator thought it could have done more to manage Ms P's expectations around timeframes. I don't think the impact on Ms P of the relatively short period of additional delay I've identified warrants a higher figure than that.

I appreciate Ms P continued to disagree with the outcome counsel reached in his November assessment. But I think that assessment is properly written and reasoned and from someone suitably qualified and experienced. So it is one Aviva was entitled to rely on. And it did refer further comments from Ms P for review. I understand that led to additional elements of Ms P's claim being identified as having prospects of success. I accept that process has taken some time but, aside from the delay I've already identified (and for which I think an appropriate remedy is in place), I don't think that's something Aviva is responsible for.

Turning to the issue of the hourly rate I recognise Ms P doesn't feel the £100 set out in the policy enables her to find a solicitor of her own to progress the claim. However, she hadn't identified a solicitor who she wanted to do that at the point she complained to Aviva or in her January 2024 complaint to us. Aviva did send terms of business to solicitors who it thought Ms P wanted to use but she said she was seeking a more specialist employment lawyer. So, even if I was to conclude Aviva should have offered a higher rate during the period I'm considering as part of this complaint, I don't think there'd be a loss to Ms P because she hadn't found a solicitor who she wanted to act for her during this time.

I can see in more recent correspondence with Aviva Ms P did identify a solicitor she wanted to act for her (at a rate of £550 an hour). She set out reasons why she thought Aviva should exercise discretion to go beyond the figure set out in the policy given her circumstances and those of this case. In considering whether it was fair for Aviva to offer the £100 hourly rate the policy specifies we'd need to be satisfied that non-panel solicitors had been prepared to act on that rate in relation to similar claims. I'm not clear whether that's the case here or not.

But Ms P is also concerned the policy previously provided for a higher hourly rate and this change wasn't brought to her attention by Aviva. I understand this has been considered and responded to as part of a separate complaint by Aviva. That issue seems intrinsically linked to the question of whether a higher rate should be offered for the solicitors Ms P has now found. So I think it's appropriate those matters are considered together as part of a fresh complaint. As our investigator has advised we can consider that separately if Ms P is unhappy with the response Aviva has provided to it. I can see she's already logged a new complaint with us so she should contact our investigator if she wants to progress this.

My final decision

I've decided to uphold this complaint. Aviva Insurance Limited will need to put things right by paying Ms P £100.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 21 August 2024.

James Park

Ombudsman