

The complaint

Ms S is unhappy with what DAS Legal Expenses Insurance Company Limited did after she made a claim on her legal expenses insurance policy.

What happened

In February 2023 Ms S sought assistance from DAS with a breach of contract claim against the school her children attended. DAS referred the matter to panel firms for an assessment of whether it had reasonable prospects of success (a requirement of the policy). There were issues with the firms it approached to carry out that assessment. In May DAS contacted Ms S's solicitors (B) to see whether they could provide the assessment.

That firm sought counsel's advice on a separate discrimination claim and confirmed at the end of June there were potential breach of contract claims on which further advice was required. DAS agreed counsel's advice should be sought on these but queried the time that B required to draft instructions to counsel. It agreed in September to pay for that at a rate of £282 an hour (which reflected the then court guideline rates for a Grade A fee earner in Ms S's area).

B didn't agree to that rate and wanted DAS to pay £335 an hour. DAS agreed an increase to £300 an hour but that still wasn't acceptable to B. Ms S couldn't find an alternative firm who would work for that amount. DAS thought it had acted fairly in offering an increase on the guideline rates but accepted there had been some communication issues in the early stages of Ms S's claim. It offered to pay £75 in recognition of the impact of that on Ms S.

Our investigator didn't think the hourly rate DAS had offered was unfair in the circumstances of this case. Agreeing a higher rate would use up the indemnity available to Ms S under her policy more quickly. He thought there had been some service issues in the handling of the claim but thought the £75 DAS had already offered was fair.

Ms S didn't agree. She accepted DAS could limit the hourly rate it would pay but that shouldn't render her freedom of choice meaningless. She thought that applied in this case. And she'd previously provided evidence to show she was unable to find a solicitor who would act for her under the hourly rate DAS had offered.

I issued a provisional decision on the complaint in August. In summary I said:

The relevant rules and industry guidelines say DAS 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 Ms S's policy. This does cover "costs and expenses for your legal rights...in a contractual dispute arising from an agreement or an alleged agreement which you have entered into in a personal capacity for: buying or hiring in goods or services". DAS hasn't disputed the claim she made could potentially fall within that section of cover.

However, cover is only provided as long as "reasonable prospects exist for the duration of the claim". And the policy defines that as "for civil cases, the prospects that you will recover losses or damages (or obtain any other legal remedy that we have agreed to, including an enforcement of judgment), make a successful defence or make a successful appeal or defence of an appeal, must be at least 51 %. We, or a preferred law firm on our behalf, will assess whether there are reasonable prospects".

So I think it was right DAS initially asked a panel solicitor to assess whether Ms S's claim did have reasonable prospects of success or not. I also think it acted reasonably once the panel firm was unable to act in seeking to agree terms with Ms S's solicitor so they could carry out that assessment. I understand both counsel's fee for carrying out that work and the number of hours required for B to draft instructions were agreed by DAS.

The outstanding issue is the hourly rate that DAS will pay B for doing that. The policy says "If you choose a law firm as your appointed representative who is not a preferred law firm, we will give your choice of law firm the opportunity to act on the same terms as a preferred law firm. However, if they refuse to act on this basis, the most we will pay is the amount we would have paid if they had agreed to our standard terms of appointment."

*Ms S says the hourly rate offered by DAS shouldn't render her freedom of choice meaningless. Here I think she's referencing the findings of *Brown-Quinn & Anor v Equity Syndicate Management Ltd & Anor* [2012] EWCA Civ 1633 which said a legal expenses insurer has the right to restrict what it would pay to a non-panel solicitor, provided the remuneration is not so low as to render the policyholder's freedom of choice meaningless.*

However, I'm not clear either that or the policy terms in relation to hourly rate are directly relevant here because they'd normally apply where legal proceedings are necessary and the claim has been assessed as having reasonable prospects of success. Ms S's claim hasn't yet reached that stage because that assessment hasn't been carried out. Nevertheless, I think it's fair to take into account the principles that would apply in that situation when deciding whether the hourly rate DAS has offered for the prospects assessment is fair.

The policy doesn't specify an hourly rate and DAS told B at the start of May 2023 the £100 rate (which I understand is set out in the terms of appointment) wouldn't apply. So I think it's reasonable and in line with our normal approach to use the court guideline rates as a reasonable starting point when considering whether an insurer has offered a fair hourly rate. And DAS appears to have accepted a Grade A fee earner would be required in this case.

But in deciding whether an insurer had offered a fair rate we'd also take into account whether it had been able to show it had claims with similar circumstances where a number of non-panel firms had acted for that rate without asking the policyholder to pay the difference. I don't think DAS has evidenced that in this case. I can see in January 2024 an internal query was raised as to whether there were "any solicitors outside of our panel that deal with education claims that have agreed to our terms and hourly rate". The relevant team said they weren't aware of any.

DAS did subsequently provide details to us of one case which it believed had similar circumstance where a non-panel solicitor agreed to act for £150 an hour. However, given that rate is lower than that for a Grade A fee earner in any part of the country I'm not persuaded that case is comparable to Ms S's. And in any case DAS hasn't been able to provide any other recent examples. It says that's because this isn't a common type of claim it sees. But I think that supports an argument that the court guideline rates may not be the most appropriate measure of what a fair hourly rate is in this case.

Ms S has provided details of other firms she approached who weren't prepared to act. In some case that appears to be because they didn't have anyone available to do so. That doesn't in itself support an argument that the hourly rate DAS had offered was too low. But a number of the solicitors did quote rates for an equivalent fee earner that were significantly in excess of both the rate DAS offered and that which B said it would accept. I appreciate those firms might have been prepared to negotiate but given their starting point was so far in excess of the £300 DAS offered I think it's unlikely they'd have agreed to that.

I also note DAS initially offered £282 an hour which was the court guideline rate at the time for a Grade A fee earner in Ms S's part of the country. It subsequently agreed to an hourly rate of £300 an hour. So it already appear to have accepted that Ms S's claim is one for which the guideline rates aren't appropriate and for which a higher amount should be provided.

I think relevant here is that that the guideline rates increased in January 2024. The equivalent hourly rate is now £301 an hour. DAS's actions suggest it accepts the nature of Ms S's claim means a higher rate than the guideline for that level should be offered. It previously offered to pay around 6% higher than that amount. Applying that uplift to the rate in place from January 2024 would in itself equate to an hourly rate of £320 an hour.

I've taken that and the evidence Ms S has provided about the rates charged by other firms for this type of case into account. I've also taken into account that DAS hasn't shown it has panel firms who could have progressed this claim and hasn't shown it has a choice of non-panel firms who would have acted for the amount it's offered. And the policy doesn't specify the hourly rate that would apply when a non-panel firm is used. Given all that I think it would be fair in this case for DAS to pay the £335 an hour that B requires to progress the matter.

Ms S also says B have charged her for its correspondence with DAS about the hourly rate and she wants DAS to reimburse her for those costs. However, I don't think that's something DAS should be responsible for. The policy says it covers "costs and expenses" of which the relevant section of the definition is "all reasonable and necessary costs chargeable by the appointed representative and agreed by us in accordance with our standard terms of appointment". The policy doesn't cover "any costs and expenses incurred before our written acceptance of a claim." In this case the claim hasn't been accepted (because prospects haven't been established) and the costs incurred aren't in any case ones DAS has agreed to. So under the policy terms I don't think these are costs DAS is responsible for.

Nor do I think they've come about because of anything DAS got wrong. While I do think DAS should now pay a higher hourly rate than it originally offered that's at least in part because of the changes to the court guideline rates which took place from 1 January 2024. I've not concluded its initial offer was unfair based on the evidence available at that time. So I don't think any costs Ms S has been charged by B to respond to correspondence are ones DAS should be responsible for. If Ms S has any concerns as to whether it's appropriate for B to charge her for what appears to be general administrative work that's something she'll need to raise with it.

I do agree that there were some failing by DAS in communicating with Ms S after she initially made her claim. I accept that will have caused her some unnecessary distress and inconvenience. But I think the £75 DAS has already offered does enough to recognise the impact of that on her.

Responses to my provisional decision

DAS accepted my findings in full. Ms S said she was pleased I'd agreed an hourly rate of £335 was fair. But she also provided further comments. In summary she said:

- Her complaint related to DAS not agreeing the hourly rate for B and the impact of that. It didn't relate to the overall level of service provided. She thought we should obtain clarification from DAS on what its offer of £75 related to before deciding whether this was reasonable or fair.
- She said as a result of poor communication from DAS, B had to engage in additional work to clarify the position and repeat explanations that had already been provided. And that had caused additional costs it then charged her for. She had also needed to contact DAS to try and progress matters which had led to increased costs to her. And she provided evidence in support of her position.
- She drew attention to the impact of not agreeing an hourly rate with B at a time when her relationship with the school was deteriorating and she wasn't receiving legal advice about her options. She thought DAS was responsible for the fact her children were out of education between May and July 2023 and asked for clarification on whether DAS's decision not to agree to the proposed hourly rate between May and December 2023 had been fair.
- She explained why she thought DAS should have accepted her choice of solicitor from the outset and drew attention to the stress not doing so had caused for which she thought compensation should be paid.
- She also said B might increase their hourly rate when they reviewed costs later this year and queried whether DAS would cover the new cost if that happened.

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.

First, I do appreciate this has been an extremely difficult time for Ms S. In her comments she's made reference to the impact the issues with her children's school had on her and them. I don't doubt all of that will have caused significant stress, distress and upset. However, I'm not considering in this decision her concerns about the school but what DAS did following the claim she made on her legal expenses policy.

That claim was made in February 2023. And as I've said I think it was right DAS initially asked a panel solicitor to assess whether Ms S's claim did have reasonable prospects of success or not. I also think it acted reasonably once the panel firm was unable to act in seeking to agree terms with B so they could carry out that assessment. And I don't think there was any delay in this period for which it was responsible.

Nor do I think it's right to say DAS was responsible for Ms S's children being out of school between May and June 2023. B advised DAS on 18 May they had been instructed to obtain counsel's advice and a conference was arranged for the end of the month. They said they would update DAS following that. At the end of June they told DAS counsel had found potential breaches of contract by the school and it was agreed advice needed to be obtained on whether these had reasonable prospects of success. So while I appreciate this appears to have been a particularly difficult time for Ms S I don't think that's come about because of anything DAS got wrong.

Ms S asked whether I thought DAS's initial decision not to agree the hourly rate B proposed had been unfair. I explained in my provisional decision that "*I've not concluded its initial offer was unfair based on the evidence available at that time*". And the comments Ms S has made haven't led me to reach a different view on that. It was the weight of evidence (including the changes to the court guideline hourly rates which was by then available) which led me to conclude DAS should now offer a higher rate.

I don't think it was at fault in not doing so from the outset. I think it was entitled to negotiate with B about this and question some of the costs it had quoted in relation to its involvement with the matter. Again, I don't doubt Ms S found this an extremely stressful period, but I don't believe that was caused by a failing on the part of DAS. So I don't agree compensation should be paid for this.

Turning to the contact between DAS and Ms S's solicitors I appreciate she feels there has been poor communication here. I've reviewed the emails she sent and the file more generally. Some of the information Ms S has provided relates to her dissatisfaction with (and complaint against) the panel solicitors who first considered the matter. Their actions aren't something DAS is responsible for.

I appreciate in later correspondence there are references from her solicitors to DAS asking for information that had already been provided. I also accept that Ms S sometimes had to take action to clarify matters. But looking at the claim in the round I don't see evidence of significant issues with the action DAS took. And while there may have been some instances where DAS could have been clearer in the information it asked for (or wrongly asked for information that had already been provided) I'm not persuaded it would be fair to ask DAS to cover any costs B charged Ms S in relation to this. These matters do seem to fall within general claim administration costs. I think if Ms S has any issues as to whether it's right for B to charge her for carrying out this work that's something that she would need to raise with it.

Ms S is also concerned about a possible future increase in the costs charged by B. But I understand that hasn't yet taken place. If there is a change I'd expect DAS to consider whether it should increase the agreed hourly rate to reflect that. If there's a disagreement over what it should then pay that could be considered as part of a fresh complaint.

In relation to the compensation DAS offered, as I said in my provisional decision, this was to reflect some failings by DAS in its communication with Ms S after she initially made her claim. That relates to issues with the appointment of the panel firm. It remains my view that £75 is the right amount to recognise the impact of that on her. If Ms S has other concerns about what DAS did, which fall outside of the subject matter I've considered as part of this complaint, then she can raise these with DAS separately.

Putting things right

DAS will need to pay B's hourly rate of £335 an hour to progress the prospects assessment of this claim (and, if required, for ongoing cover) in line with the other terms and conditions of the policy. It will also need to pay Ms S £75.

My final decision

I've decided to uphold this complaint. DAS Legal Expenses Insurance Company Limited will need to put things right by doing what I've said in this decision

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 25 September 2024.

James Park
Ombudsman