

## **The complaint**

Mrs S is unhappy DAS Legal Expenses Insurance Company Limited turned down a claim she made on her legal expenses insurance policy.

## **What happened**

In March 2024 Mrs S contacted DAS seeking assistance with a legal expenses claim. She'd been involved in an incident at the school she worked at as a supply teacher. She wanted to bring an employment claim against the agency she worked for who she didn't feel had acted properly in the investigation following the incident.

DAS turned down the claim. It said the policy provided cover for employment disputes where these related to a policyholder's contract of employment. But Mrs S was working under a contract for services and this wasn't something the policy covered. And a claim against the school wouldn't be covered because Mrs S didn't have a contract with it (and even if she did any contract wouldn't be for the buying or hiring in of goods or services or the selling of goods which is what the policy covered)

Our investigator thought DAS had applied the policy terms correctly. But he didn't think it was fair to do so in this case as the contract between Mrs S and the agency worked in the same way as an employment contract and her claim was effectively an employment dispute. So he said DAS should reconsider the claim and, if it was one her policy would cover, should reimburse costs Mrs S had incurred to date, appoint a solicitor to act for her and make a distress and inconvenience payment of £200.

DAS didn't agree. It said the policy only covered disputes that arose directly from a contract of employment which was clearly set out in the policy terms. And it drew attention to a previous decision from our service (and associated legal advice) which it thought supported its position.

Mrs S reiterated that she regarded the agency as her employer and her claim had been accepted by the Employment Tribunal (a process which she was currently having to navigate on her own). She'd previously confirmed to us her claim was against the agency and not the school.

I issued a provisional decision on the complaint last month. 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 appreciate this has been an extremely difficult situation for Mrs S. She's set out in detail the impact it's had on her and I recognise the ongoing challenges she faces in relation to her future employment. I was very sorry to learn of what an exceptionally distressing time this has been for her. However, the question I need to consider is whether DAS did anything wrong in turning down the claim she made on her policy.*

*DAS has highlighted a previous final decision from our service which it believes is relevant to the outcome here. I'm familiar with that decision but I think the circumstances are very different to the position here. In that case the complainant was employed through her own company and was seeking to bring a claim against the business that company had contracted with. The policy terms were also worded differently to those in this case. So I don't think there's any direct read across from that case to this (and in any case each complaint we deal with is considered on its individual merits).*

*In considering that I've looked first at the terms and conditions of Mrs S's policy. For cover to be available for her claim at all it needs to fall within one of the insured incidents set out in her policy. And the onus is on a policyholder to show their claim falls within one of those sections. In this case the policy includes as one of the insured incidents 'Employment Disputes'. And it says the policy will cover "a dispute relating to your contract of employment".*

*I understand Mrs S regarded the agency as her employer. I also appreciate that as an agency worker she will have limited employment rights from the start of her contract (though as her contract at the school was for six weeks the enhanced rights available to an agency worker after 12 weeks wouldn't apply). But the evidence doesn't suggest she was working under a contract of employment. The 'Key Information Document' her agency provided to her says "Type of contract you will be engaged under: Contract for services". And a 'Statement of Conditions for Agency Workers' produced by her agency and which sets out its terms of engagement with Mrs S says "Your employment is: Under a Contract for services".*

*Those terms go on to say that "For the avoidance of doubt, the Agency Worker is not an employee of the Employment Business [the agency] although the Employment Business is required to make the Deductions from the Agency Workers pay. These Terms shall not give rise to a contract of employment between the Employment Business and the Agency Worker, or the Agency Worker and the Hirer. The Agency Worker is supplied as a worker, and is entitled to certain statutory rights as such, but nothing in these Terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated".*

*I appreciate her contract for services does also contain some of the features that might apply to a contract of employment. And I recognise Mrs S has been able to pursue a whistleblowing claim as part of ET proceedings. However, I understand she's able to do so as a result of her status as a 'worker' and not because she's an employee of the agency. And case law has established that 'mutuality of obligation' which is the requirement on an employee to provide work and pay a wage or salary and the obligation on an individual to accept and perform that work is a necessary feature of the relationship between an employer and an employee.*

*The Employment Appeal Tribunal in the case of 'James v Greenwich Council' which related specifically to an agency worker said "whilst of course every case turns on its own particular facts, it will be an exceptional case where a contract of employment can be spelt out in the relationship between the agency and worker...typically, the agency does not have the day to day control which would establish such a contract. Nor, indeed, is the worker carrying out the work directly for the benefit of the agency, and there is usually no obligation on the agency to find work or on the worker to accept it, let alone personally to do it".*

*I think there's a read across from that to this case. In particular Mrs S's contract for services and accompanying documentation says there's no obligation on the part of the agency to offer or provide work. Nor is Mrs S obliged to accept any work which is offered.*

*I appreciate, while that represents the contractual position, case law has also established that in an employment context the true agreement between the parties needs to be established from all of the circumstances of the case of which written agreements only form one part. So, for example, if in reality Mrs S hadn't been able to refuse offers of work that were made by her agency that could be relevant. But I haven't seen evidence of that. And Mrs S hasn't provided any legal advice demonstrating an employer / employee relationship (governed by a contract of employment) existed between her and the agency. Given that I think it was reasonable of DAS to conclude Mrs S didn't have a contract of employment (and so her dispute couldn't relate to that).*

*However, I also need to consider what's fair and reasonable in all of the circumstances of the case. It might not be fair of DAS to turn down the claim if Mrs S was to all intents and purposes working in the same way as someone employed under a contract of employment. I don't think that is the case. For the reasons I've already explained I don't think there was mutuality of obligation between her and the agency which seem to me to be a key distinction between her circumstances and someone who had a contract of employment.*

*In addition, while I appreciate Mrs S may have extremely good reasons for working on an agency basis, there's no statutory or other reason that prevents a teacher from working under a contract of employment. So the position is different to that of, for example, a police officer who simply isn't able to work under a contract of employment because of their particular status. And it's ultimately for an insurer to decide what risks it wants to take on (and what to charge for doing so). In this case DAS had decided that while it will take on the risk of providing cover for employment disputes it's limited that exposure by restricting cover to policyholders who have a contract of employment. That's a decision it's entitled to take.*

*Taking everything into account I don't think there is a basis on which I could fairly direct DAS to cover the claim Mrs S made. I don't think she's shown she has a claim that falls within the 'Employment Disputes' section of the policy and I don't think it was unfair of DAS to say it wouldn't be providing cover for this based on the available evidence. It therefore follows that I won't be upholding her complaint. I'm sorry to bring her what I do appreciate will be extremely disappointing news.*

*Mrs S has also raised concerns about the information provided when this policy was sold to her. However, if she wants to pursue that she'd need to raise that as a separate complaint against the business responsible for the sale (which from the information I've seen doesn't appear to have been DAS).*

## **Responses to my provisional decision**

DAS didn't respond. Mrs S did respond and said she was extremely disappointed with my provisional decision. And she made further detailed comments. In summary she said:

- She asked what consideration had been given to a document she previously supplied which referenced The Employment Rights Act, the Public Disclosure Act and the Agency Worker Regulations 2010. And she queried how other relevant regulations and guidance had been taken into account which protected people in their place of work. She also highlighted her agency's 'Key Information Document' which she said supported her view that agency staff had a right to be protected with regard to whistleblowing.

- And she thought it was discriminatory of DAS to exclude her from the protection set out in Employment Law and other regulations which she reasonably believed her policy would provide. If it didn't that should have been made clear to her when she took out cover. And she said the policy said it would help to both pursue legal action before an employment tribunal or with any disputes relating to your employment contract. So it covered two separate matters.
- She accepted there was no 'Mutuality of obligation' between her and her agency when she was not on assignment. However, when she was she was obliged to do work and her employer was required to pay her for work done. And she referenced government guidance and case law in support of her position that meant mutuality of obligation did exist at the point the incident in this case arose.
- She said the local authority was the major shareholder in her agency and she was working at a local authority school when on her placement. And the local authority's Code of Conduct set out agreed terms and professional responsibilities which she needed to follow. She thought that meant she was obliged to work in the same way as someone employed under a contract of employment.
- She didn't agree that the case of '*James v Greenwich Council*' was relevant here because that was brought against the local authority and not the agency. In any event she thought both the agency and local authority could be regarded as her employer. However, it was the agency which she needed to report to in the event of sickness and was responsible for her pay.

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.

First, I'd like to assure Mrs S I did carefully consider all of the information she'd previously provided in reaching my provisional decision including the document she specifically referenced. And I recognise there is of course legislation and other regulations in place that protect people in their place of work including providing protection for whistleblowers.

However, the question I need to consider is whether DAS acted fairly in saying the claim Mrs S was seeking funding for wasn't one her policy covered. I appreciate she regards its decision as discriminatory but like any other insurer DAS is entitled to decide the risks it wants to cover and charge a premium that reflects those risks. And in this case DAS has decided to limit cover for employment disputes to "*a dispute relating to your contract of employment*". That's a decision it's entitled to make.

Mrs S has referenced documentation which references wider coverage than that. However, that doesn't appear to be information DAS produced and it's the policy terms which represent the contract of insurance she has with it and which govern the cover the policy provides. If Mrs S is unhappy with the information provided about the policy by her home insurer (who may also have been responsible for the sale of the policy) that's an issue she'll need to raise as a separate complaint with that business.

Turning to the question of whether Mrs S does have a contract of employment with her agency I don't agree the case of *James v Greenwich Council* wouldn't be relevant here. I appreciate that case was against a local authority but the Employment Appeal Tribunal did make specific comment on the reasons why it was unlikely a contract of employment would exist between an agency and worker which I do think have a read across here.

And I don't think it's clear the case Mrs S has cited (and associated guidance) impacts the position on that. I've reviewed that judgement which related to a case where there was a direct relationship between the worker and the local authority involved with no separate agency involvement. That's different to the position here where Mrs S is arguing she has a contract of employment with her agency.

Nevertheless, I do appreciate the question of whether an agency worker has a contract of employment can be very fact and case specific. And I note the points Mrs S has made about the relationship between her agency and the local authority and particular responsibilities she needed to follow when carrying out her role. However, as I've already said the onus is on policyholder to show their claim falls within one of the insured events a policy contains. And as I've highlighted Mrs S's 'Statement of Conditions for Agency Workers' explicitly says "*These Terms shall not give rise to a contract of employment between the Employment Business and the Agency Worker, or the Agency Worker and the Hirer*".

Mrs S has referenced case law and general guidance but she hasn't provided any specific legal advice to show she did have a contract of employment with her agency. Given that and the position as set out in *James v Greenwich Council* I don't think it was unreasonable of DAS to conclude Mrs S hadn't shown she had a claim that fell within the terms of her policy. If she is able to provide legal advice specific to her circumstances which shows she does have a contract of employment with her agency I'd expect DAS to reconsider whether this is a claim it should cover.

### **My final decision**

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 14 February 2025.

James Park  
**Ombudsman**