

The complaint

Mr and Mrs P's complaint is about the handling of a claim under the legal expenses insurance section of her home insurance with Aviva Insurance Limited. The complaint relates to a claim made by Mrs P, so I will refer to her throughout.

Aviva is the underwriter of this policy, *i.e.* the insurer. Part of this complaint concerns the actions of the agents it uses to deal with claims and complaints on its behalf. As Aviva has accepted it is accountable for the actions of the agent, in my decision, any reference to Aviva includes the actions of the agents.

What happened

In April 2023, Mrs P made a claim under her policy with Aviva. Mrs P wanted cover for the legal costs of taking legal action against her employer for breach of contract, disability discrimination, personal injury and a number of other matters. She says the claim is complex and is particularly high value, as it is for the loss of her career.

Aviva accepted the claim and arranged for it to be assessed by one of its panel or pre-approved solicitors. The claim was assessed in April 2023 and June 2023 but it was advised that it was too early and there were no identifiable claims that she could bring against her employer. Mrs P subsequently left her employment, so Aviva agreed to have it assessed again. I also understand Mrs P issued proceedings in the Employment Tribunal in October 2023. In late 2023 a barrister advised that Mrs P had a reasonable chance of succeeding in a breach of contract claim but other heads of claim did not have prospects of success.

Mrs P raised a complaint about Aviva's handling of the claim to that point. One of my colleagues issued a decision on a previous complaint in July 2024 which addressed the time taken to get assessments of case and events up to January 2024. Since then, the matter has progressed and the merits of the claims Mrs P wants to bring against her former employer have been assessed several times.

In February 2024, it was assessed that there were reasonable prospects for some of the other heads of claim Mrs P wanted to bring. Aviva said it would agree to instruct a non-panel solicitor of Mrs P's choice but would only pay £100ph plus VAT. Mrs P was unhappy with this. I also understand that subsequent to this, further barristers' opinions were obtained. There was a preliminary tribunal hearing in May 2024 but there was no cover in place at that time.

In July 2024, Mrs P amended her claim. Aviva therefore said it would need to be reassessed. Mrs P is very unhappy with the barrister instructed and says his instruction was victimisation of her by Aviva in repeatedly getting unnecessary merits assessments. Mrs P also says this means she did not have representation under the policy for another preliminary hearing of her case in September 2024. She wants the costs she incurred in relation to the hearings in May and September 2024, and other costs, reimbursed. Mrs P also wants cover for her own chosen solicitors, at their usual charging rates going forward.

Aviva does not accept it has done anything wrong. It has recently confirmed its position is

that it will cover claims for the failure by Mrs P's employer to make reasonable adjustments, harassment related to her disability and victimisation as they were confirmed to have reasonable prospects of success. Aviva says it won't cover the claim for disability discrimination, as the barrister did not consider it has reasonable prospects. Aviva said it would consider any contrary opinion Mrs P provides. Aviva confirmed it would instruct a panel solicitor to take on the claims it will cover, or consider her own solicitor in accordance with the policy terms and conditions.

Mrs P remains unhappy with Aviva's handling of her claim, so referred the matter to us. She is unhappy with the panel solicitors and wants to instruct her own solicitors. However, she says that the hourly rate offered by Aviva is too low for her to instruct a suitably qualified and experienced solicitors, which has rendered her statutory right to freedom of choice meaningless. Mrs P is also unhappy with the barrister that was appointed to assess her claim and that Aviva hasn't agreed to fund an alternative barrister without a positive prospects assessment.

Mrs P also says that Aviva has failed to make reasonable adjustments and breached the Equality Act 2010, by failing to provide her with representation, as she has hearing loss. Mrs P wants her costs reimbursed. Mrs P also says that there have been unreasonable delays and maladministration of her claim generally.

One of our Investigators looked into the matter. She did not recommend the complaint be upheld. She was satisfied that Mrs P had a reasonable choice of solicitors to act for the amount offered under the policy by Aviva. The Investigator also concluded that Aviva was not responsible for the costs Mrs P incurred, and while there were some delays these were not on the part of Aviva.

Mrs P does not accept the Investigator's assessment. She has made a number of points in her initial complaint and in response to the Investigator. I have considered everything she has said but have summarised her main points below:

- The Investigator was biased and failed to review all the evidence properly.
- She has used the policy a number of times in the past and has never been offered such a low hourly rate for non-panel solicitors.
- Insurers must disclose material facts and policy changes in a clear manner. The £100ph limit for non-panel solicitors was not clearly disclosed to her at any time.
- In any case, the panel solicitors were paid £150ph and £130ph for dealing with the merits assessment – not the £100ph quoted in the policy.
- She has contacted more than 60 solicitors, none of whom will take the case on for £100ph. Most with the required expertise charge £550 plus VAT per hour.
- Her claim needs a partner level fee earner given the complexity of overlapping Tribunal and High Court claims.
- The barristers she approached would not deal with her case on a direct access basis and told her that a solicitor is needed for effective case management.
- Aviva has only asked the solicitors it has approached if they would deal with an employment claims for £100ph. There has been no effort to discuss the complexity and nature of the case.
- Aviva has not provided evidence of solicitors willing to act at the £100ph while meeting the essential criteria of expertise in both employment tribunal and High Court litigation; the successful handling of cases exceeding £1,000,000 in damages; or experience with claims involving complex corporate structures and disability discrimination.
- Her case is complex and our guidance is that in such cases there should be unfettered freedom of choice of solicitor from the outset of an insurance claim.

- The County Court guideline rates for a grade A fee earner vary, depending on region, from £282 to £566 for inner London.
- The opinion on the case in December 2024 failed to consider new grounds for defence, revised particulars of claim and witness statements. It is therefore fundamentally flawed. It should be disregarded and the barrister's opinion in February 2024 should stand. The same barrister should be asked to review on the updated information.
- Aviva unilaterally appointed the barrister to reassess her claim, instead of asking the Bar Council to appoint someone, as her policy states.
- Aviva's handling of her claim has caused severe prejudice to her legal position and caused unnecessary delays and increased costs.
- She has also been caused emotional distress and suffered discrimination due to the failure to accommodate her disabilities, in violation of the Equality Act 2010. She has hearing difficulties and 15 disabilities. She intends to take legal action against Aviva and its claims-handler in relation to this.
- Aviva has said the indemnity limit must be split between the claims she wants to bring against her former employer in the employment tribunal and the ones in the High Court but there is no basis in the policy for this.
- Aviva didn't provide funding for a hearing in January 2025, as it said it was procedural only. She paid just under £1,600 for representation, which she wants reimbursed
- The Investigator said she can't be reimbursed costs of her legal representatives providing a positive assessment of her claim because she said her claim still did not meet the policy requirements, but she has had consistently positive merits assessments.
- The application to strike out her claims is a direct result of Aviva's failure to provide legal cover at the time when her claims were consistently demonstrated to have merits.

Mrs P says she has found a barrister who can provide a legal opinion on her claims at an estimated cost of £5-6,000 and to represent her at the upcoming hearing and that Aviva should pay for this, fund the hearing to strike out her action and review the revised particulars of claim and provide a new assessment of this. The matter is urgent, as the respondent in the legal case applied to strike out her employment claim. This is a direct result of Aviva not providing the cover it should have. The hearing is set for two days in June 2025.

Mrs P also says she wants £65,000 compensation for the harm and stress caused to her; all the legal expenses she has incurred reimbursed and all increased legal costs paid; freedom to appoint her own solicitors under the policy at £575ph; removal of the shared £100,000 indemnity limit; immediate review of the merits; a direction that Aviva should not take the cost of any of the legal opinions (save from one barrister) from her indemnity limit due to the negligence and maladministration of the claim; and a compliance review of Aviva's conduct of disability related claims. Mrs P also wants a public acknowledgment of the systemic failures in Aviva's handling of the claim and commitment to prevent similar issues on the future.

As the Investigator has not been able to resolve the complaint, it has been passed to me.

For the sake of clarity, I am considering:

1. The dispute about the hourly rate offered and whether Aviva has established that any reasonable non-panel firms will act for the rate offered; and
2. if it has, whether any discretion should be given on that rate given the particular

- circumstances of Mrs P's case.
3. The failure to notify her of the change in policy terms that impose a £100ph limit on fees paid to non-panel solicitors.
 4. The reassessment of the merits of the claim by the barrister in late 2024 and Aviva's refusal to fund a further barrister's assessment.
 5. The general handling of the claim since mid-July 2024 to the final response letter in October 2024, failure to provide reasonable adjustments, breach of the Equality Act 2010 and delays which meant she had no cover for the hearings in May and September 2024.

Issues regarding funding after the final response letters to these points cannot be considered in this complaint.

In addition, Mrs P has also said she has two claims: one for breach of contract to be brought in the High Court and the other for heads of claim to be brought in the employment tribunal. Mrs P therefore says she should have separate limits of indemnity. Aviva says that the employment claim and breach of contract claim are connected, so only one claim indemnity limit applies to them. However, Aviva says there is a separate indemnity limit for the personal injury claim. Mrs P asked Aviva to give her three indemnity limits as part of the resolution she wanted to her complaint but it was not raised as part of the complaint itself. I cannot therefore address in this decision whether this is fair or not, as it did not form part of the initial complaint that we have been asked to consider.

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.

Notice of the change in policy terms regarding hourly rates

Mrs P says that she has used her legal expenses insurance cover several times over the years and previous policies did not restrict the hourly rate paid for her own chosen non-panel solicitors. She was not aware the policy wording had changed until she made this claim.

The investigator said it was not a significant restriction of cover, as Mrs P has still got freedom to choose her own representative, therefore Aviva was not required to specifically draw the change to her attention.

Nevertheless, Aviva says that the policy wording about this is clear and the change was detailed to Mrs P at renewal of her policy in a "*Notice to Policyholder*" document and all the policy documents are accessible to Mrs P online.

However, even if Mrs P was not provided with sufficient notice of this change to the policy wording (which I do not think I need to make any finding about), I do not think there is reasonably any award I can make for this. I say this because I do not think it is likely that Mrs P would be in any different position now, even if she had known of this change. This is because such a limitation on the fees paid to non-panel solicitors is not uncommon. While Mrs P has used this cover in the past, so I accept this probably would have been a concern to her, it is unlikely she would have obtained a policy without any restriction on the amount paid to non-panel solicitors.

The policy wording is clear and unambiguous and is not inherently unfair. (I will address this further below.) We do of course expect insurers to apply any policy terms fairly and reasonably in the circumstances of the claim but it is not unreasonable for an insurer to want to control and limit the hourly rate paid to solicitors.

Hourly rate and freedom of choice

Mrs P's policy says:

"Claims

a. Freedom to choose your Lawyer

(i) 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 in their name and address.

(ii) We will appoint that lawyer subject to their acceptance of our standard terms of appointment which are available upon request.

(iii) We will only pay costs and expenses up to the amount we would have paid our appointed lawyer. This amount is currently £100 per hour and can vary from time to time at our discretion. These terms could mean you may be liable for additional funding which your own lawyer should explain to you along with the relevant information contained in the terms of appointment.

(iv) Subject to the terms and conditions of this policy we will pay their costs and expenses up to the maximum shown on your schedule."

The policy clearly states that indemnity for non-panel solicitors costs will be at £100ph, plus VAT.

Mrs P has also said that our approach is that in a complex legal claim, the policyholder should be granted unfettered freedom of choice from the outset of the insurance claim. Aviva has not objected to Mrs P using non-panel solicitors, as the proceedings are underway, but I do not agree that any freedom of choice would be unfettered. Aviva has the right to limit the costs incurred in line with the policy terms set out.

Mrs P says this limit on the hourly rate paid is inherently unfair and unreasonable, as it essentially renders her freedom to choose his own solicitor meaningless. However, I am not persuaded that it fetters Mrs P's choice of solicitors to the extent that her freedom to choose is meaningless.

I say this because Aviva has provided evidence of panel and non-panel solicitors that would be able to take on the case for £100ph plus VAT.

Aviva said that in addition to the panel solicitor already appointed, it has three other panel solicitors willing to act. I agree with the Investigator that two of these did not seem to deal with employment claims but the other did. So, there are two panel firms suitably qualified and experienced that would deal with it at this rate. Aviva also provided details of three non-panel firms who would deal with the case for £100ph plus VAT.

Mrs P says Aviva did not ask the right questions of these solicitors to ensure they were suitably experienced to deal with her case. However, I can see they do deal with high value and complex employment claims.

I can see that Mrs P's claim involves a number of heads of claim and there is a lot of information, a high number of allegations and she has said it is high value. However, I have not seen any convincing independent evidence that her claims concern unusual or novel points of law, or are of such complexity, that only a specialised solicitor (other than an

experienced employment lawyer) is required. In addition, solicitors would be obliged by their professional standards to only continue a case they have the expertise to deal with and a barrister would be conducting the advocacy in any event.

I can also see from the papers that Mrs P previously instructed a solicitor who confirmed in a letter of September 2023 that, while they would usually charge £175ph, they'd agree to £100ph.

I accept the case was of great significance to Mrs P and I can see why she would want what she considers to be the very best representation but I am not persuaded that Mrs P has established a compelling reason for requiring Aviva to deviate from its policy terms.

I have not seen any convincing evidence that the firms approached by Aviva are not suitably qualified and experienced to deal with Mrs P's case. Therefore, given that two panel solicitors and three non-panels solicitors, suitably qualified and experienced, agree to work (and I note one did work) on similar cases for the standard rate of £100ph plus VAT, I am not persuaded that Mrs P has been denied a reasonable choice of solicitors. I do not therefore consider that I can reasonably require Aviva to pay the rates Mrs P has asked for.

Mrs P has also said that it is not true that the panel rate is £100ph, as the panel solicitors have confirmed they were paid more than this for assessment of the claim. I do not think this changes the policy terms and that Aviva has provided sufficient evidence that panel and non-panel firms that will act for £100ph plus VAT.

Appointment of barrister and claim assessment

As the Investigator explained the policy requires there to be reasonable prospects for the entire life of the legal claim, so Aviva was entitled to reassess prospects when the claim Mrs P wanted to make against her former employer was amended.

It was therefore agreed in July / August 2024, that the merits of Mrs P's claim would be reassessed before the hearing in September 2024. Aviva proposed to instruct a barrister that had previously advised but Mrs P was not happy with him as she did not think he had understood her claim.

However, Aviva said it was entitled to reassess the claim and was entitled to choose the barrister that did so. Aviva asked Mrs P to provide all the recent documentation for the claim (the ET1, ET3, the employer's response to her statement). Mrs P did not provide this as she was not happy with the barrister proposed or that the claim should be reassessed.

Mrs P instructed her own direct access barrister to represent her at the hearing in September 2024 but it was postponed as he withdrew.

Mrs P then did provide the documentation on 17 September 2024. Having considered the documents, Aviva advised that there was a claim for breach of contract which would need to be made separately from the employment tribunal claim. Aviva therefore said Mrs P should submit a separate claim for that, which she did.

Mrs P still objected to the barrister Aviva was proposing to instruct but it said he was over 25 years call and suitably qualified and experienced for the instruction. Aviva asked him to assess the claim as a matter of urgency.

I think that as matters had moved on, Aviva was entitled to have the merits of the claim reassessed. I also do not think it was unreasonable that this was done by the barrister that

had previously been involved. There is no convincing evidence that he was not appropriately qualified and experience to deal with the case.

Mrs P then asked that her own chosen solicitors be appointed and Aviva sent them terms of appointment, which included that they would only be paid £100ph plus VAT. However, in October 2024, Mrs P said the solicitors could no longer deal with her case and she wanted to use a direct access barrister.

The barrister Aviva instructed to reassess the claim did take some time to complete his assessment but Aviva is not responsible for the conduct of legal representatives and we have no jurisdiction over them. There was clearly a long history to this matter and I can see Mrs P's strength of feeling but I have no reason to require the opinion provided by the barrister in December 2024 to be disregarded, or that Aviva needs to pay for another barrister to conduct the same review. I note that Aviva asked the barrister to consider Mrs P's comments and I think that was reasonable.

Mrs P also says that the policy provides that where there is a dispute about representation, the Bar Council should have been asked to appoint a suitable barrister. The policy does state that if there is a dispute about the merits of a claim, between two equivalent legal opinions, then Aviva will arrange for the claim to be reviewed by another lawyer agreed between the parties; and if they cannot agree on the appropriate lawyer to review the claim, then the relevant law society will be asked to appoint a lawyer. However, I don't think this is the situation that the parties were in at this point. The claim had moved on since any previous assessment. In July 2024, Mrs P had amended the claim she wanted to make and as such, Aviva was entitled in my opinion, to have it reassessed based on the up-to-date position.

Mrs P was then able to obtain her own opinion on the merits, based on the new information if she wished.

Mrs P says Aviva has repeatedly had the merits reviewed unnecessarily, often just before key hearings. Mrs P says this is victimisation and an attempt to deny or delay access to funding. However, it is entitled to assess merits at key points in the process and I do not agree that it has acted unreasonably here.

Delays

I can see that there was a delay in the revised claim being sent to counsel, but I can also see that Aviva was waiting for information from Mrs P to allow that to happen. I don't think that Aviva acted unfairly by requesting further information and waiting for it to be provided, before proceeding with the reassessment.

While I can appreciate the delay in the assessment by the barrister was frustrating, Aviva is not responsible for the time taken by the lawyers involved. I don't think this was due to Aviva.

Reimbursement of costs

Mrs P has incurred costs of around £8,000 up to October 2024. She has also incurred more since but as stated, I can only consider matters up to the final response letters about this complaint.

Mrs P paid her solicitors to prepare and submit the ET1 to the Employment Tribunal. Aviva says it has reimbursed the cost of this (£1,200). I also note that around £2,500 of the costs Mrs P incurred seems to be in relation to advice about an appeal to the Tribunal about the way they conduct hearings. This does not form part of this complaint.

The costs that I am therefore able to address in this complaint, are the costs Mrs P incurred in getting her own barrister's opinion in early 2024 and the costs incurred in relation to hearings in May and September 2024.

Mrs P's barrister did advise that some parts of her claim had prospects of success. However, Aviva paid for its own barrister's opinion around the same time, which also confirmed there were prospects for some of the heads of claim. I do not therefore think Aviva can reasonably be required to reimburse the cost of Mrs P's barrister.

I have thought carefully about whether Aviva should have offered cover or reimbursed some costs, for the parts of the claim that have been established as being covered in principle under the policy. However, while some heads of claim have been established as having reasonable prospects in the various barrister's opinions, there have been differences of opinion about these. Aviva confirmed cover for some heads of claim after the hearing in May 2024. I do not think it is therefore liable for any costs incurred before then. And as I have said above, Aviva was entitled to have the claim reassessed after new information was provided and this meant there was no supportive assessment of the merits of the claim at the time of the September 2024 hearing.

Having considered everything carefully, I do not consider that I can reasonably require Aviva to reimburse any further legal costs incurred by Mrs P.

Discrimination and breach of Equality Act 2010

Mrs P says that Aviva has failed to take account of her disabilities and make reasonable adjustments for her; it has discriminated against her and victimised her throughout its handling of the claim.

It's for the Courts to say whether or not Aviva has breached the Equality Act 2010. However, I have taken the Equality Act 2010 into account when deciding this complaint – given that it's relevant law – but I've ultimately decided this complaint based on what's fair and reasonable.

Mrs P says that Aviva discriminated against her in breach of the Equality Act 2010 by not providing her with legal representation at the hearings. She also asks that a complete review be undertaken into the handling by Aviva of disability related claims. We do not regulate the insurance industry, so have no power to carry out or order such a review.

We expect insurers to treat its customers fairly and to provide reasonable adjustments if required to allow a policyholder to access the cover they are entitled to. Aviva was aware of Mrs P's personal circumstances and had a duty to act fairly and reasonably in handling her claim.

However, I do not think that Aviva can be reasonably expected to provide legal representation before it has been established that there is a valid claim under the policy. I note Mrs P's strength of feeling about her claim but it had not been established that she had a valid claim under the policy, so I do not think Aviva has acted unfairly in not providing legal representation at the hearings of Mrs P's case so far. I can see that Mrs P is very disappointed but Aviva is only obliged to provide cover in accordance with the terms of the policy.

As I am satisfied Aviva was entitled to take the position it has on her claim, I do not think it has done anything wrong and I do not consider there is anything to suggest Aviva discriminated against Mrs P.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P and Mr P to accept or reject my decision before 23 May 2025.

Harriet McCarthy
Ombudsman