

## The complaint

A limited company, which I will refer to as W, complains about the handling and settlement of its commercial legal expenses insurance claim by Irwell Insurance Company Limited.

## What happened

Both parties are aware of the circumstances leading to this complaint. So, the following is intended only as a brief summary of events. Additionally, whilst a number of individuals have been involved in the correspondence, I have just referred to W and Irwell in this regard. Due to the circumstances, it has been necessary to refer to third parties, but these references have been minimised intentionally.

W operates as a glazing business and entered a contract with a third-party company, which I'll refer to as C. Under this agreement, C would provide employment advice and also arrange commercial legal expenses insurance. This insurance was underwritten by Irwell.

Both parties are aware of the content of the policy, so I have not set this out in full here. Essentially, as far as is relevant to the current complaint, the policy provides cover in the event of an employment tribunal for "professional fees and expenses" and awards made by the court. Professional fees and expenses are those incurred by the "Policyholder's Representative". The policy says that Irwell will, where required, appoint the Policyholder's Representative, and this is defined as being:

"The solicitors, accountants, adjusters, advocates, consultants, investigators or other suitably qualified person appointed by [Irwell]..."

There are number of relevant exclusions within the policy. These include:

"1. Any dispute, incident or event unless The Policyholder has sought advice promptly from [C] as soon as The Insured Event becomes known and before any action is taken and The Policyholder has followed the advice given, and also unless The Policyholder has continued to seek advice from [C] in respect of any developments relating to The Insured Event and has followed the advice given. This is a continuing obligation for each dispute requiring The Policyholder to take and follow advice at each stage until the conclusion of each dispute.

2. If The Policyholder has not at any time given full and detailed information and facts or has failed to disclose any material information or fact to enable [C] to give relevant and pertinent advice as required by the Policy."

And:

"6. Any finding of dismissal or award of compensation or costs made by a Court or Tribunal in a claim or claims for direct discrimination pursuant to section 13 of the Equality Act 2010 or harassment pursuant to section 26 of the Equality Act 2010 or victimisation pursuant to section 27 of the Equality Act 2010."

In 2019, W was experiencing difficulties with one of its employees and C provided employment advice. The employee, who I'll refer to as E, was made redundant and they

raised an employment tribunal claim against W. Irwell were notified and claim was made under the policy.

Irwell arranged for C to provide legal assistance. C in turn had one of its employees, who I'll refer to as L, act on behalf of W. I have considered below which of these actions was the appointment of the Policyholder's Representative.

E's claim was considered by an employment tribunal, and the tribunal's judgment found against W. Again, the parties are aware of the findings, so I have not set them out in detail here. However, the tribunal found in favour of E in most respects.

W was unhappy with the legal assistance it had been provided, particularly by L. And it raised a complaint about this. Discussions also took place about appealing the judgment, albeit on different grounds. It was confirmed there were grounds for appeal in late April 2021. W queried what the insurance would cover in relation to the costs of this. I have discussed this issue in more detail below. The appeal process commenced.

In May 2021, W asked Irwell for a decision on the insurance claim. Irwell responded, saying that, as an appeal had been made, a final decision the claim would not be made until after that appeal. However, Irwell then made its decision on the claim in November 2022 - prior to the appeal. It seems this was as a result of C having only passed on a copy of the tribunal judgment around that time.

Irwell's initial decision on the claim was that it would not cover the award made against W, though it would meet the legal costs incurred. Irwell's stated reason at that time was that W had not made C aware of the advertisement of a role akin to E's whilst she was still employed. And so, C had approved W's actions without full knowledge of the facts. W complained about this decision.

Irwell responded to this complaint, saying that it was willing to meet 50% of the award the tribunal had made for "unfair dismissal" and said this would be based on E's annual salary – which would be the cap on this award. But that Irwell was not willing to meet the claim in relation to the rest of the award, as this related to harassment and victimisation claims which were excluded by the policy.

The reasons Irwell gave for not meeting the full unfair dismissal award were that W had not told C of the advertising of the role and that W had said E had not raised issues relating to sexual / inappropriate language in the office prior to a meeting in early 2019.

The issue of interest on the award also arose. W considered Irwell had previously agreed to pay all interest accruing. Irwell said that it would meet 50% of the interest on the award relating to the unfair dismissal, but nothing further.

Ultimately, the employment appeal tribunal did not overturn the original judgment.

W then brought its complaint to the Financial Ombudsman Service. The complaint was based on four main concerns:

1. Irwell had provided an unqualified and inexperienced person to defend the tribunal
2. The unfair and unsubstantiated withdrawal of 50% cover for the unfair dismissal element of the award. W did not consider it was fair to rely on the findings in the judgment, given the issues with legal representation during the tribunal
3. Not paying all interest, as had previously been agreed, and

#### 4. Using coercive and unfair processes.

Irwell then issued a second complaint response. It said it wasn't able to comment on C's actions or their representation, as they are a separate entity.

Irwell said that it was entitled to rely on the findings in the judgment, and these supported that there were two valid reasons (as referred to above) for not meeting the unfair dismissal award part of the claim in full. It said that, whilst the policy did not allow for a claim to be partially met, it was not prejudicial for Irwell to do this when the alternative was a full decline.

Irwell also said that the policy did not cover interest accruing on non-payment of a judgment award, and that it had not said it would cover any interest other than that which accrued whilst legal opinion on the appeal was being sought in early 2021.

Lastly, Irwell apologised for the delay in providing the insurance decision after the tribunal. But it did not consider any prejudice had been caused as a result of that delay. And it considered it was appropriate to start and progress the complaint process as it had.

W's complaint was then considered by our Investigator. He explained that the provision of legal services is not something that falls within the remit of the Financial Ombudsman Service, so he was unable to comment on the quality of any legal assistance W had been provided. He also said that he wasn't able to make a finding that the tribunal judgment was incorrect. And, ultimately, he considered that Irwell had acted fairly and reasonably on this point.

Our Investigator also said that, while there was some merit to W being confused by responses it had received from C and Irwell, he was not persuaded that W wouldn't have proceeded with the appeal. So, he thought this interest would've been incurred even if Irwell had been clear. He did think Irwell ought to pay the interest that had accrued on the sum of the award that was covered under the policy, for the period the appeal was ongoing though.

Lastly our Investigator agreed that there had been issues with the claim handling process, including delays. And recommended Irwell pay £750 compensation for this.

Irwell responded, saying it had already paid the interest relevant to the part of the award it was covering. But thought the £750 compensation amount was too high.

W responded to the Investigator's view, saying the £750 was not enough and that this should be £2,000. It also maintained that it was unfair to rely on the judgment when there was evidence available that disproves its accuracy. W considered it was entitled to the full amount of the unfair dismissal award, and interest on the whole award made by the judgment.

As our Investigator was unable to resolve the complaint, it was passed to me for a decision. Having reviewed the available evidence, I was minded to come to a slightly different outcome to our Investigator.

I explained to Irwell that there didn't seem any justifiable reason why it did not receive the judgment until November 2022, when this had been available from early 2021. So, I didn't think this justified why a decision on the claim was not made up until this point. And, whilst I was persuaded by the strength of W's disagreement with the outcome of the tribunal that it would always have appealed this, I thought W may have acted to minimise the impact this appeal had. I thought this was evidenced, in part, by the queries W raised at the time the appeal process was commencing. So, I explained that I was minded to direct Irwell to meet the interest on the full award up until the point it made W aware of its decision on the claim.

Irwell responded, agreeing to this and calculated the interest on the full judgment award from March 2021 to the end of December 2022.

I then contacted W, and explained that whilst I was not persuaded, by the content of the emails that had been exchanged in 2021, that Irwell had agreed to pay the interest on the award, I did think Irwell should pay the interest up until the point it informed W of its decision on the claim and that Irwell had agreed to this. I also explained that my initial conclusions were that Irwell had acted fairly and reasonably in not meeting the full award relating to the unfair dismissal element of the award and that £750 was an appropriate amount of compensation.

I asked whether W was willing to accept this as a resolution to its complaint. But W did not agree. I have therefore moved forward to reach my 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.

Having done so, I am upholding this complaint in part. I have explained what I mean and my reasons for this below.

Firstly though, I will just reiterate that the above was merely a summary of the events. The timeline of the complaint background is complex and both parties have made detailed submissions. I have considered all of this, but I am not going to comment on it all. Instead, I am going to focus on what I consider to be the key issues. This is not intended as a discourtesy, but rather reflects the informal nature of the Financial Ombudsman Service.

#### The appointment of a suitably qualified person

Much of the complaint stems from W's belief that it wasn't adequately legally represented during the tribunal. It is not my role to make any finding on this point specifically. My role is to consider Irwell's actions in the circumstances. So, I have thought about Irwell's responsibility here.

The policy essentially says that Irwell will appoint a "suitably qualified person". However, I do not consider this extends to choosing the specific individual, in this case L. I consider that the "person" referred to here is the entity – in this case C. The rest of the term in the policy uses the plural of the relevant descriptor, for example solicitors. And I consider this indicates the "firm", rather than the specific individual. I don't think it would be for Irwell, an insurance firm, to determine which individual is suitably qualified to represent a party in an employment dispute. So, Irwell's responsibility here only extended to appointing a suitably qualified "firm".

C itself is not registered with the Solicitors Regulation Authority. But it is a business with extensive experience in employment issues. And it has the support of and/or employs legally qualified professionals. So, I consider C was a suitably qualified person. This means Irwell met its responsibilities under this part of the policy, and if W is unhappy with the actions of C that will have to be taken up separately.

#### The decline of the claim

I appreciate that W does not consider the findings of the tribunal to have been accurate. And it says that other evidence ought to also be taken into account. As I say, I am unable to comment on the accuracy of the judgment of the tribunal. But I do agree that all of the circumstances of the complaint need to be considered.

The concerns here relate to whether W informed C of the two issues Irwell has relied upon to limit the claim. I have thought about the submissions W has made around these points. Whilst recognising W's concerns about the legal representation it received, these were largely considered by the tribunal though. So, I am limited in what I can say without challenging this judgment. For example, W has referred to whether or not E may have been able to fabricate evidence during the tribunal process to support their position. But the tribunal was willing to accept this evidence and I am unable to say that it ought not to have.

It should firstly be said that the policy excludes cover for awards made as a result of direct discrimination, harassment or victimisation pursuant to various section of the Equality Act 2010. And this appears to be the basis for the majority of the award made by the tribunal. So, I consider it is fair and reasonable for Irwell not to make any payment toward this part of the award.

In terms of the reasons Irwell had for not covering the full unfair dismissal award, the first is that the temporary role being advertised was not something W made C aware of until after this event. The fact of this does not appear to be overly disputed (although there is some dispute over the nature of the role advertised). Instead, W has argued that it would not be reasonable to expect it to tell C of every single daily decision it was making. I agree that such a requirement would be onerous and likely unreasonable. This is not the relevant question though. Instead, the question is, was this an activity material to the matter at hand that W ought reasonably to have known C should be made aware of prior to the action?

Given that W was seeking to employ someone (whether on a temporary basis or otherwise) in a role that was, at the least, closely related to the role that was the subject of the employment issue, I think it is reasonable that Irwell considered this to be something C ought to have been notified of at the time.

I note W's comments over C not mentioning at the time that it ought to have been told beforehand, and that C apparently gave the all clear to start the redundancy process after it was aware this had happened. But this does not mean that C would not have advised differently had it been made aware of W's plans in relation to this prior to the event.

The second reason is that W told C in March 2019 that issues with sexual language had not been raised prior to the investigation into E's issues beginning. I appreciate W may not have been fully aware until later that E would raise this matter as part of the grievance. But, given W was aware that there were issues around E and that a grievance seemed likely, I consider W ought to have considered itself what issues might be raised by E and ought to have briefed C on all relevant details. And I consider this would include the fact that issues with sexual language had previously been raised. W was aware that there were issues developing with E, and I consider this issue was significant and material information that W ought to have passed onto C.

Taking all of the circumstances into account, I am unable to agree that Irwell has not acted fairly or reasonably when considering this part of the claim. I agree that there was material information that W was, or ought reasonably to have been aware of, that it did not inform C about this at the relevant time. So, I consider it is fair and reasonable for Irwell to apply the exclusions set out above.

I will just add that I appreciate Irwell has acted in a way not set out in the policy - by limiting the amount of cover here. But given the alternative would have been to decline the claim in full, I cannot agree that Irwell has acted inappropriately or that its actions here have been detrimental to W.

Interest

Turning to the issue over interest on the award, Irwell has agreed to meet the interest up until late December 2022. So, it is only necessary for me to consider here whether Irwell ought to meet the rest of the interest for the months that followed until after the appeal.

W has said that Irwell agreed, in 2021, to meet all of the interest. And has repeatedly referred to several email exchanges it had with Irwell and C. There is some lack of clarity over whether all of C's correspondences here formed part of it acting to pass on communication from Irwell, or whether C was acting on its own behalf. I don't think it is necessary for me to make a finding on this point though, and have for the purposes of this decision assumed that all correspondence on this point ought to be considered as being from Irwell.

In late March 2021, C told W not to pay the award whilst a review of whether there were grounds to appeal was carried out. At the start of April 2021, C said that Irwell would cover the interest if accrued due to waiting for this review to be completed. C then confirmed that an appeal ought to be made.

Following this, W asked whether C/Irwell would cover "all costs" of the appeal. And C responded that it would. In May 2021, W sought clarification of what would and wouldn't be included by Irwell in the covering of costs and administration, and whether the policy would cover any "adverse costs" if the appeal was lost. Irwell said that it would cover the legal costs incurred, but not "adverse costs". W has said that this response did not detail anything else that would not be covered, i.e. the interest.

It is clear that Irwell agreed to cover the interest whilst legal opinion was sought on whether there were grounds for appeal. But I am not overly persuaded that Irwell led W to reasonably believe it would cover any interest beyond this point. It agreed to cover "all costs" of the appeal. But also referred on a number of occasions to these being, for example, the "legal costs for both the administration and representation". Thinking about this alongside the policy wording, I consider this was clearly a reference to the cover provided in relation to "professional fees and expenses", and I am not persuaded this would extend to covering interest due on an award. Such interest is not a "cost" of the appeal, it is effectively a penalty for not having paid the settlement in accordance with the original judgment.

It is possible that Irwell could have been clearer on this point though. However, regardless of whether it could have been clearer in 2021, in December 2022, Irwell confirmed that it would not pay for interest on any award. I think this was a clear statement that would have made W aware at this point – even if it can be argued that it was not previously aware – that interest on the award would not be covered.

I have found, and Irwell has agreed, that covering the interest up until December 2022 is fair and reasonable to recognise the consequences of not having made its decision on the claim at an earlier point. So, I consider whether or not it was reasonable for W to expect interest to have been paid as part of the claim settlement up to this date to be moot.

And from December 2022, it was made clear to W that interest would not be paid as a part of the claim settlement. At that time, W could have taken different action to avoid any further interest accruing. It is not fair or reasonable for me to direct Irwell to pay anything more here.

#### Claim handling

As well as the financial impact, the delay in making its claim decision would have caused W a significant level of uncertainty and it would have experienced issues with planning its business going forward. Additionally, it also took a number of months prior to this for Irwell to even confirm that any awards for direct discrimination, harassment or victimisation would not

be covered (although this ought to have been clear from the policy terms).

There were also a number of more general issues with communications throughout the claim process and a lack of clarity at times. So, I consider an award of compensation to reflect this is appropriate.

Irwell has said this should not be as high as £750. W has said it should be £2,000.

Firstly, I will just say that the complainant in this case is W and is a limited company. So, I am unable to make any award for any emotional impact – a limited company is an entity in its own right and cannot suffer distress or frustration.

That said, I do appreciate that dealing with the claim and complaint process would have been inconvenient to W. I do though need to balance that against the level of inconvenience inherent to making a claim of this nature – and that in relation to the tribunal process itself – which are not the avoidable result of Irwell's actions.

Taking things in the round, I am persuaded that our Investigator has set the level of compensation correctly. W did suffer a significant amount of inconvenience that ought reasonably to have been avoided – and could have been had Irwell acted appropriately and communicated in a clearer manner. But I am not persuaded that it would be fair or reasonable to direct Irwell to pay more than £750 to compensate W for this in the circumstances of this complaint.

### **Putting things right**

To put things right, if it has not already done so, Irwell Insurance Company Limited should pay W the amount of interest that accrued on the tribunal award from March 2021 to December 2022, as it has agreed to do. And £750 compensation for the inconvenience caused.

I understand Irwell Insurance Company Limited has also agreed to pay W £12,500 in relation to the unfair dismissal element of the tribunal award. And I consider this to be fair and reasonable in the circumstances of this complaint.

**My final decision**

My final decision is that I uphold this complaint. Irwell Insurance Company Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 15 May 2025.

Sam Thomas  
**Ombudsman**