

complaint

Mr C complains that Lloyd & Whyte Ltd sold him a professional indemnity insurance policy which wasn't suitable for his needs and as a result he had to stop trading for a short period, suffering a loss of income and other losses.

background

In late 2016 one of Mr C's customers made a complaint about him. After going through his complaint process, he referred them to the regulator ("G"). He was asked for a copy of his professional indemnity insurance, and Mr C then realised his insurance didn't provide the cover he thought he had.

Mr C contacted a professional association and was then referred to Lloyd & Whyte in April 2017 to obtain professional indemnity insurance. At the same time, Mr C stopped working and referred himself to G, as he was concerned about his professional indemnity insurance. Mr C explained to Lloyd & Whyte that his previous insurance wasn't covering the things it needed to, so he was looking for new quotes. He also explained that he'd had to shut his practice while he sorted this out. Lloyd & Whyte sold Mr C another insurance policy. He says G asked to see his new insurance policy to make sure he had the necessary cover.

In June 2017 Mr C received a letter from G advising that it was investigating his self-referral, which suggested that he'd been practising without indemnity cover for four years. He spoke to Lloyd & Whyte again, saying they knew what his occupation was so they should have known what insurance he needed. Lloyd & Whyte said his cover was adequate and the exclusions Mr C was concerned about were standard.

G held a hearing in June 2017. This confirmed that Mr C had closed his practice and ceased practising in April 2017. G added that there was no suggestion Mr C deliberately obtained inadequate insurance. But it still suspended him for six months.

Lloyd & Whyte told Mr C the exclusions in his policy – which resulted in him having inadequate cover – are common, but said the insurer had removed the exclusions for a month to help him arrange alternative insurance elsewhere. Lloyd & Whyte said they would never knowingly provide inadequate insurance cover and, as goodwill gesture, offered to refund the premium paid since the last renewal.

Mr C asked to cancel the insurance policy and be refunded from the original start date but Lloyd & Whyte said it could only offer a pro-rata refund. Mr C wasn't happy with this and so he complained.

Lloyd & Whyte issued a final response saying the policy was sold in good faith at the time, and it couldn't cover any loss of income. Lloyd & Whyte later said it would offer a refund of premium.

Mr C was able to find another insurance policy and got his licence back before the six months' suspension was up. But he was unable to work for around three months.

Our investigator said that as Lloyd & Whyte recommended the policy, it had a duty to make sure the cover was suitable for his needs, but this policy wasn't suitable and there are others that would have been. She thought Mr C did what he could to get back to work as quickly as possible and keep his losses to a minimum.

The investigator didn't think Lloyd & Whyte was entirely to blame for the suspension because there were problems with Mr C's previous insurance. So she recommended that it pay for 50% of Mr C's loss of earnings from the date he was suspended to the date this suspension was lifted, subject to Mr C providing evidence of that loss. And she thought he should get compensation of £1,000 for the other harm caused – including damage to his reputation, the distress caused to him, which led to some health problems, and all the trouble he was put to getting things sorted out.

Lloyd & Whyte accepted the investigator's view but Mr C didn't agree. He said:

- It's true there were problems with his previous insurance, but that had no bearing on his suspension.
- It was because of those earlier issues that he asked Lloyd & Whyte to recommend another policy. They knew what cover he needed but G found that the policy they sold him wasn't adequate and that's why he was suspended – not because of any failing with his previous insurance.
- His problems only started when he was suspended due to the potential risk at that point. His loss of earnings for the suspension period was caused by Lloyd & Whyte and he doesn't understand how the investigator could say Lloyd & Whyte was only partly to blame.
- The effect on his business is very difficult to quantify as it is conjecture, but he does know the referrals he used to get reduced a lot. He puts this down to the suspension being noted on his registration for all to see.
- His turnover reduced significantly – turnover for the three months before he was suspended was around £30,000; for the five months after the suspension was removed it was only £14,000.
- The stress of all this caused him health problems and he had to see his doctor about this.
- The compensation of £1,000 offered is totally inadequate; it has been a very stressful time for him and his family.
- He had to get legal advice, including the cost of a barrister's advice, and should be compensated for this;
- The investigator made no mention of the premium refund.

Mr C has provided evidence from his accountants and bank statements as evidence of his loss of earnings. He says his turnover reduced to around £2,000 per month and his savings reduced from around £30,000 to a few hundred. He says his financial position became desperate; it was really difficult for him to look after his family and his house.

I issued a provisional decision on this complaint in February 2019. In the provisional decision I said:

In order to carry out his work, Mr C has to have appropriate indemnity insurance cover; if he doesn't have this in place he's in breach of his professional requirements and at risk of being suspended. So it's important for him to have the right cover in place.

When Mr C renewed his insurance, Lloyd & Whyte's role was to assess his needs and find a policy that would cover his needs. So for example, when renewing his cover in 2014 it recommended a particular policy to match the demands and needs of a practice owner requiring medical malpractice cover. And when the insurance was renewed in April 2017 Lloyd & Whyte again recommended a policy following an assessment of his demands and needs.

Knowing what Mr C's profession was, Lloyd & Whyte should have recommended a policy that met his professional requirements. To do this, it should have got enough information from him to assess his needs; considered the policy to ensure it met those needs; and advised him about any significant exclusions. Lloyd & Whyte has accepted that it didn't provide all the cover Mr C needed.

Mr C referred himself to the G and was suspended. This must have been hugely disruptive – he wasn't able to carry on working, and had no income during this time. In addition, he suffered the distress of going through formal proceedings and being suspended, and was put to some trouble getting another policy. None of this would have happened if he'd been sold a suitable policy.

I'm satisfied that if Mr C had known this policy wasn't suitable for him he wouldn't have bought it. He would never have wanted to be in a position was he was in breach of his regulator's requirements. In these circumstances I'd generally direct a refund of premium and I think it's fair that should happen.

In addition to this, Mr C has suffered other losses. So I've considered how to address these.

Our investigator thought it was fair for Lloyd & Whyte to compensate him for 50% of his losses; she thought the problems weren't entirely down to the problems with this policy, as G referred to the earlier complaint and problems with his previous insurance.

I appreciate there had been other problems. But the issue was only referred to G after the problems with this policy came to light. G's decision says "The ongoing concern of [G] is that [Mr C's] current indemnity remains inadequate ...the risk in this case arises from the information that [Mr C] does not currently have adequate indemnity cover." And "the information before the Committee suggests that [Mr C's] current indemnity policy is inadequate." The committee's task was to assess the risk and it concluded there was a risk to the public.

Based on this, my judgment is that Mr C was suspended because he didn't have the right cover in place – the suspension was based on the risk to patients at that point. Regardless of any earlier problems, if Lloyd & Whyte had sold him a suitable policy in April 2017, he would have been able to practise as he wouldn't have had a problem with his cover when G considered the matter in June 2017. So the suspension wouldn't have happened. For that reason, I think Lloyd & White was responsible for the losses he suffered because he was suspended.

Mr C says it is very difficult to give a precise figure for all his losses. But he's provided information from his accountant and copies of bank statements for the relevant period. The accountant estimates his loss as £24,546.

This is the professional opinion of Mr C's accountant. It's based on a comparison of his profit and loss account with the previous year, together with analysis of his overheads. So this carries some weight and I have used it as a starting point for deciding the loss he should be compensated for.

However, the calculation is based on gross profit rather than net profit, which is a more accurate figure for the actual loss suffered. And it includes a figure for overheads. Those are

included in the profit and loss accounts. So I don't think it would be fair to count them twice. For these reasons, I take the reduction in net profit as the starting point, which is £7,214.

Mr C thinks this doesn't give the full picture. He says his business was growing and he would have expected his income to go up. The accountant agrees with this and estimates that he expected turnover to increase by 15%.

I've also considered the further information he has provided. He mentions two key points – the accountant's estimate doesn't take account of the reduction in his savings or the fact he had to borrow from his parents.

Mr C has provided bank statements to illustrate what happened to his finances. These show that in the months leading up to June 2017 his income was indeed increasing. This supports what he says about expecting turnover to increase.

At 1 June 2017 the balance in Mr C's account was around £16,000. By late August this had dropped to around £9,000 and it stayed at around that level for the rest of 2017. In March 2018 it was – as Mr C has said – just a few hundred pounds, but has since increased to around £10,000.

There seems little doubt this matter had a severe impact on Mr C's finances and his bank accounts show this. It's difficult to calculate the loss. Although Mr C says the evidence from his accountants doesn't give the full picture, I can't see that the other evidence he's provided shows additional loss; rather, it adds to the picture of a lengthy period of reduced income. As Mr C himself has said, trying to give an accurate figure for his overall financial position involves some conjecture.

For these reasons my judgment is that the loss should be based on the reduction in net profit with an allowance for the anticipated increase in turnover, which the accountant has estimated as £5,956. And so I would put the financial loss at £13,170. I know Mr C thinks his losses are more but I don't think the evidence confirms this.

Mr C has also explained the impact the situation had on him, and says this caused him a great deal of distress. He says he found himself in a seemingly impossible position; G wouldn't remove his suspension until he had insurance in place, but he couldn't find an insurer that would provide cover while he was suspended. After some discussions, G and an insurance broker sorted things out so he could get cover in place and start working again. This whole process must have been very frustrating.

Mr C relies on referrals from others for much of his work. Once it was noted that he had been suspended, these referrals dried up. And even once his suspension was lifted and he was able to work again, it was difficult to get referrals. In my judgment there was a significant impact on his reputation and it has taken time to restore this.

He's provided a note from his GP which says Mr C went to see the doctor in January 2018 with a stress-related problem. He has since suffered panic attacks and was diagnosed as suffering with anxiety and low mood, which may be due to the problems with his insurance. The note indicates there were other factors involved, so it wasn't solely due to the issues with his insurance. But I'm satisfied this played a part.

Our investigator asked Lloyd & Whyte to pay compensation of £1,000 for the harm caused – including damage to his reputation, distress, embarrassment and ill health, and the trouble

he was put to. I've considered whether this is enough in light of the further information Mr C has provided and in my view it doesn't adequately reflect the severe impact over a period of many months. Taking into account all the circumstances I think a payment of £2,500 would be fair.

I've also noted that Mr C (along with a number of others affected) contributed to the cost of getting legal advice. The compensation also takes into account the time and expense involved in that.

I said I intended to uphold the complaint and direct Lloyd & Whyte Ltd to refund Mr C's premium for the 2016-17 policy and to pay him compensation of:

- £13,170 for his financial loss; and
- £2,500 for the damage to Mr C's reputation, and the distress and inconvenience caused to him.

developments

Both parties have replied to the provisional decision with detailed comments. I have summarised some of the key points.

Mr C says:

- The figure for loss of earnings has been assessed as an actual loss which may or may not be fair depending on whether one is paying or receiving, but he does not feel it is adequate.
- The £2,500 offered for the effect on his health is derisory. This stress had an increased effect as it was on top of the stress he had already been subjected to by the first insurer who Lloyd and Whyte knew all about when they set up their policy for him. Whilst the earlier stress wasn't Lloyd & Whyte's fault they should still have provided the right insurance to make sure he wasn't going to suffer the same all over again.
- He should have been left in a position of being able to relax believing everything would at last be ok and he would not have his licence suspended.
- As it stands the figure suggested will not even cover monies borrowed from family members to keep himself over the suspension and aftermath period.
- There's no mention of reimbursement for the cost of the legal advice, doctor's letter and accountant's report.

Lloyd & Whyte says:

- When Mr C called to obtain insurance he did say his previous insurance wasn't adequate. But this was because previously he only had public liability cover; he didn't have professional indemnity insurance. As a professional, it would be reasonable to expect Mr C to understand the difference.
- Mr C only consulted it in April 2017, so any previous policies were sold by someone else.
- The proposal form he completed only gave brief details of what he did, and didn't fully explain the risk to be insured.
- It was aware of his occupation and provided professional indemnity insurance accordingly. The issue surrounding the exclusion in cover for claims arising out of failure to recognise certain specific conditions wasn't raised until the audit by G. So the policy sold by Lloyd & Whyte covered Mr C for other incidents that may have arisen as a result of the treatment and advice provided by him. And Mr C did not advise at any point that he specifically required cover for this element.

- Although G found the policy to be inadequate, Mr C had no professional indemnity insurance prior to 27 April 2017. Even if the policy didn't have the exclusion in question, there would have been no cover for any incident before that date, such as the claim made against him in 2016. If that patient hadn't made a complaint in 2016 it's possible Mr C would have continued practising without professional indemnity cover in place. And he was initially called in front of the regulator due to the lack of professional indemnity insurance.
- With regard to the loss of income and the expected increase of 15%, Mr C himself has said that trying to give an accurate figure for his overall financial position involves some conjecture. It's feasible the increase may have been less, or there could in fact have been a reduction, so this proposed percentage isn't accepted.

my findings

I've summarised some key points above but confirm I have considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I see no reason to change my provisional decision. I'll explain why.

Even if Mr C didn't make it clear exactly what he wanted, there was some onus on Lloyd & Whyte to find out and recommend a suitable policy, and ultimately this policy wasn't suitable. And while Lloyd & Whyte may not have been involved in selling Mr C's previous policy, it did sell this one.

I think it's relevant that Mr C didn't just fill in the proposal form and send it in; he called Lloyd & Whyte and went through the form on the phone, asking what to put in answer to various questions.

Lloyd & Whyte point out that Mr C didn't have cover in place before April 2017, and that's what led to his referral to G. Whilst that may be the context in which the referral happened, once he realised he didn't have the right cover, he wanted to put it in place; the whole point of approaching Lloyd & Whyte was to make sure he got the right cover. And he was referred to Lloyd & Whyte as a specialist in this area. Having become aware he didn't have the right cover in place, it was important for Mr C to resolve this so that he could continue working. Even if the exclusion in question was common, it was significant and affected whether the policy was suitable for Mr C, so I think it should have been brought to his attention.

I'm satisfied that if Mr C had known the new policy wasn't suitable he wouldn't have taken it.

Regardless of the lack of cover prior to April 2017, the hearing report makes it clear G was not finding facts but looking at risk – and the relevant consideration was the risk at that time. So the reason he was suspended was because of the risk presented by the level of cover he had at that point – it wasn't related to problems with his previous policy.

Mr C has questioned the amount of compensation and says it doesn't cover all his losses. Lloyd & Whyte on the other hand, says the increase in turnover wasn't definite and doesn't accept that figure.

As has already been noted, the losses are difficult to quantify with any certainty. I appreciate the difficulties Mr C found himself in. I based the figure on the evidence available and set out how I had come to that figure. Mr C has provided some further comments from his accountant. I've considered these but they don't persuade me to change my view. The figure

I calculated was based on the loss of profit shown in his accounts, with an uplift for the anticipated increase in turnover. On the information I've seen I still think it's a fair settlement, for the reasons given in the provisional decision.

Mr C also questions the sum of £2,500 proposed for the non-financial harm. Again, I appreciate how difficult things were for him. But as I explained in the provisional decision, there were other factors affecting his health and not everything was related to this policy. And I took into account the trouble and expense he was put to (along with others) in getting legal advice and his other expenses. Taking everything into account, I still consider the payment of £2,500 to be fair.

my final decision

My final decision is that I uphold the complaint and direct Lloyd & Whyte Ltd to refund Mr C's premium for the 2016-17 policy and to pay him compensation of:

- £13,170 for his financial loss; and
- £2,500 for the damage to Mr C's reputation, and the distress and inconvenience caused to him.

Lloyd & Whyte Ltd must make these payments within 28 days of the date on which we tell it Mr C accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple*.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 1 September 2019.

Peter Whiteley
ombudsman

* If Lloyd & Whyte Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr C how much it's taken off. It should also give Mr C a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate