

complaint

Miss B's complaint is about the handling of her legal expenses insurance claim by Aviva Insurance Limited.

All references to Aviva include its claims handlers.

background

I issued a provisional decision on this matter in December 2015, part of which is copied below:

"In November 2013 Miss B made a claim on her legal expenses insurance policy for cover to bring a claim against her employer. Aviva appointed a panel firm to consider the various claims Miss B wished to bring. The panel firm instructed a barrister who advised that only one of Miss B's claims had reasonable prospects of success as required by the policy. The barrister also said that his assessment was subject to a review of Miss B's employer's reply to her claim once it had been received.

Miss B wanted her own solicitors to be instructed on the claim. Aviva agreed to this but only after it obtained the barrister's opinion on the merits of her claim. In November 2013 Aviva sent Miss B's solicitors' terms of appointment. The solicitors agreed to the terms put by Aviva and returned them a few days later. It looks like Aviva didn't receive the signed terms so a further set were sent by Miss B's solicitors a few weeks later. Miss B's own solicitors' appointment was formalised in December 2013. They appear to have acted for her for a short time.

In March 2014 Aviva referred Miss B's employer's response to the claim against it to a barrister for review. The barrister concluded that he was now of the view that Miss B's claim didn't have reasonable prospects of success as required by the policy. As a result Aviva withdrew funding of the claim. Miss B has continued to pursue the claim against her employer in person. A further barrister was instructed by Aviva in July 2014 to provide advice about whether the prospects of Miss B's claims would change if she combined two of them in the tribunal proceedings. The barrister concluded that he didn't think this would make a difference to the assessment of the first barrister.

Miss B was unhappy about Aviva's decision to withdraw funding and wanted it to fund her own solicitors' costs in continuing to pursue the claim. Our adjudicator assessed Miss B's complaint and concluded that it shouldn't be upheld. Miss B hasn't confirmed whether she accepts the assessment but asked for further time to provide her response to it. This service agreed to allow Miss B further time but as two months has elapsed since the adjudicator provided his assessment and Miss B hasn't provided a substantive reply, the matter has been passed to me to determine.

my provisional findings

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'm currently not minded to uphold Miss B's complaint.

It's a requirement of virtually all legal expenses policies – including Miss B's – that any intended claim has a reasonable prospect of succeeding.

We don't think this is unfair. Litigation can be expensive. A privately paying customer wouldn't want to bear the cost if advised it's unlikely to succeed. A legal expenses insurer can hardly be expected to either.

Where an insurer has turned down a claim in a case like this, it isn't for us to look at the merits of the underlying claim. Instead, we look at whether the insurer has acted fairly. So long as it has got advice from suitably qualified lawyers, we won't generally think it's unfair to rely on that advice, unless we think it was obviously wrong or based on factual mistakes. Aviva did this. The advice of the barristers it instructed was that Miss B's claims, both on their own and when combined together, didn't have reasonable prospects of success. I understand that the barristers were suitably qualified in dealing with employment cases and I haven't seen anything to suggest that their advice was obviously wrong or based on factual mistakes. And Miss B hasn't provided any further information to suggest anything to the contrary. So I think that Aviva has acted reasonably in the circumstances because it could only rely on the advice it had been given.

I realise that Miss B isn't happy that her own solicitors weren't instructed by Aviva to assess the merits of her claim. But I don't think that Aviva had to instruct them for this purpose. The policy terms do allow for Miss B to appoint her own solicitors but this is only when proceedings become necessary and subject to terms of appointment being agreed between her solicitors and Aviva. I understand that Miss B submitted her claim for legal expenses insurance cover three days before it was thought the limitation for her claims would expire. In those circumstances Aviva said it wasn't appropriate for it to instruct Miss B's own solicitors directly without first having the opportunity to review whether the claim had reasonable prospects of success. Because of this it appointed a panel firm who in turn instructed a barrister to consider the claims. I don't think this is unreasonable. Aviva was entitled to instruct a panel firm to assess the merits of Miss B's claim before agreeing to cover her costs in the litigation. So whilst it's unfortunate that this coincided with the time that Miss B needed to bring her claim, I don't think this means that Aviva was required to fund her costs without being given a reasonable opportunity to review the merits of it first.

When the first barrister advised that one of Miss B's claims had reasonable prospects of success, Aviva agreed to instruct Miss B's own solicitors. I know that Miss B isn't happy with the rate Aviva paid those solicitors but I don't think this was a matter of great concern to that firm. I say so because those solicitors agreed to the terms of appointment offered by Aviva. If they were unhappy with the rate offered by it they could've sought to negotiate a higher sum or declined to act for Miss B under the terms of her legal expenses insurance policy altogether. So I don't think there was an issue that caused problems for Miss B as far as representation was concerned when Aviva agreed to appoint her solicitors.

Miss B feels she has been disadvantaged by acting in person during parts of this litigation and that Aviva ought to have provided her with representation. For the reasons set out above, I think that Aviva did what it reasonably could within the confines of the policy terms. It did provide her with some cover to pursue her claim. I appreciate that her claim had already started in the employment tribunal, but as I have said, I don't think this is something that Aviva could've helped as this was due to the timing of Miss B's insurance claim.

Miss B has also said that she thinks her own solicitor would've reached a different view on the merits of her claims had Aviva instructed them to carry out the assessment. That might well have been the case but I don't think Aviva were wrong to rely on the assessments obtained by their panel firm. Those opinions were provided by two different barristers who

were independent professionals with their own regulators and complaints procedures. And given the opinions were from barristers experienced in dealing with employment cases, we would generally give greater weight to these than an opinion from a solicitor. We don't consider it unreasonable for a legal expenses insurer to do the same. If Miss B remains unhappy with the barristers' actions she can complain separately to them or through the Legal Ombudsman.

I understand that Miss B feels that the way in which Aviva dealt with her claim put her under a lot of pressure because funding wasn't agreed and she was forced to litigate the claim herself without any experience of how to deal with it. She also says she lost the opportunity to apply to strike out her employer's response because she didn't have the benefit of representation at this time. Having reviewed the evidence in this case I'm not persuaded that this was something Aviva was responsible for or that there were unreasonable delays in their handling of Miss B's claim. Aviva was notified of the claim very close to the limitation applicable to those claims. I can see that it took just over two weeks for a barrister's opinion to be taken about the merits of Miss B's claim. I accept that there was a short delay before Miss B's own firm of solicitors was instructed but this appears to be because Aviva hadn't received signed terms of appointment from them. When those terms were received, Aviva agreed to the instruction of Miss B's own solicitors within four days. So I don't think Aviva did anything to prejudice Miss B's claim in the way she says. I appreciate that Aviva has now withdrawn funding but that's because Miss B hasn't provided anything to show that her claims have reasonable prospects of success. If she is able to provide an alternative barrister's opinion that supports the merits of her claims then I would expect Aviva to reconsider funding. Until then, I don't think Aviva needs to do anything more.

Finally, I understand that Miss B is unhappy that the second barrister conducted a review of her claim based on a suggestion that she might combine two of them. In particular Miss B says she didn't want to disclose this to Aviva and that this information was communicated by our adjudicator without her asking him to. I have considered this. Having done so can't see there was any prejudice to Miss B in the second barrister considering whether a combined claim might have better prospects of success. I appreciate that Miss B might not have wanted further advice in respect of this point but overall I don't think that this caused her any detriment."

developments

I asked both parties to provide any other comments or information they wanted considered in response to my provisional decision. Aviva has confirmed it has nothing further to add.

Miss B has also responded. She says she doesn't agree with my provisional decision and that her employer's act was deemed by the court as a "continuous act of discrimination". So the barrister instructed by the panel firm should've known her claims would automatically be combined. She also says that the barrister's opinion has been proven wrong.

Miss B feels that other customers have complained about the same issues she has experienced with Aviva so this service should be taking these reports seriously and check the validity of the complaints before reaching a decision. She also says that I have relied on the adjudicator's account of her claim when making my provisional decision and that this account was biased. Miss B feels there is nothing further she can add to her complaint that is going to change my decision and that this and the adjudicator's assessment has prejudiced her case and affected her health.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I can assure Miss B that I have carefully considered everything provided to me by her and Aviva in respect of her complaint in reaching my provisional decision. This means I have reviewed all the evidence afresh both after the adjudicator conducted his assessment and when I received Miss B's responses to my provisional decision. I didn't base my findings on the adjudicator's assessment as she suggests. I appreciate that Miss B doesn't agree with the outcome I have reached but I haven't seen any evidence to make me think Aviva did anything wrong or that this complaint should be upheld.

Miss B feels the approach I have adopted is limited. I don't agree. My findings are based on what's fair and reasonable in the circumstances of this complaint, which takes account of any relevant regulatory rules as well as the law and good industry practice.

I understand Miss B is unhappy with the review conducted by the second barrister based on the suggestion that she might combine two of her claims. But I haven't seen anything to suggest that the barrister's advice in respect of the merits of those claims was obviously wrong or based on factual inaccuracies. From what Miss B has said, it's possible she might've been successful at tribunal, although this might've only been on the issue of combining her claims. But this doesn't mean that Aviva did anything wrong by declining to cover her claims. Aviva acted on the advice it was given. It's possible that the advice might not have been borne at trial but that doesn't mean it was wrong. It would be unfair to apply the benefit of hindsight to the advice given. And the advice given was that Miss B's claims didn't have reasonable prospects of success- not that they would fail entirely. So it was also possible she could succeed but that on balance, the threshold set down by the policy wasn't met.

Finally, Miss B says that other customers have complained about the same issues she has experienced with Aviva so this service should be taking these reports seriously and check the validity of the complaints before reaching a decision. I can assure Miss B that each complaint I consider turns on its own facts and that I take this very seriously. I can't comment on Aviva's conduct on other complaints. I can only determine whether it has done anything wrong in this case. For the reasons I have set out above, I don't think it has.

my final decision

It follows that I don't uphold Miss B's complaint against Aviva Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 15 February 2016.

Lâle Hussein-Doru
ombudsman