

complaint

Miss B is unhappy with Ageas Insurance Limited's handling of her claim under a legal expenses insurance policy.

All references to Ageas Insurance Limited include references to its claims handling agents.

background

I issued a provisional decision on this complaint in December 2015. An extract of the provisional decision follows:

In May 2012, Miss B made a claim on her legal expenses insurance policy in relation to a dispute with her employer. She wanted to bring a number of claims in the employment tribunal. Ageas appointed one of its panel solicitors but Miss B wanted her own solicitors to act for her.

The panel solicitors advised in September 2012 that the only legal claim Ageas should consider funding would be an unfair dismissal claim, but this would depend on the outcome of her internal grievance appeal, which was still ongoing. They said they would need more information to assess it properly.

Miss B contacted Ageas again in late November 2012, but there was no further contact until April 2013 when Miss B provided an update on her case. Her solicitors were now preparing for the tribunal hearing. They told Ageas they thought elements of her claim were likely to be successful, though they needed further information to confirm this. They asked Ageas to provide cover for their costs.

Ageas wanted a view from its panel solicitors. It referred the case to another firm of panel solicitors, and requested the papers from the first panel solicitors.

The second panel solicitors advised that Miss B was likely to be successful on some aspects of her case and so Ageas agreed to provide cover. By this time, the tribunal hearing was about to start. Ageas told Miss B's own solicitors it would cover their costs from 16 May 2013 onwards.

Miss B was unhappy with the way her claim had been handled. She complained to Ageas and then to this service. Amongst other things, she said Ageas had delayed dealing with her claim, it should have backdated cover to an earlier date, and the amount it was prepared to pay for her lawyers' costs was too low.

In total, Miss B raised eight issues but as the matter has progressed, most of these have been resolved. Ageas agreed to backdate the costs to April 2013. It agreed with Miss B's solicitors that they would jointly ask a costs lawyer to decide the hourly rate it should pay for the solicitors' fees, and how much it should pay for her barrister. Ageas also offered some compensation for delays and inconvenience, which Miss B accepted.

Miss B wasn't successful in her claim against her employer. The employment tribunal ordered her to pay some of the employer's costs. Miss B asked Ageas to pay these costs, but Ageas refused, saying she had breached her policy terms. This issue is still outstanding, so I need to make a decision on this.

Miss B's solicitors argue that Ageas should pay the costs Miss B was ordered to pay by the tribunal. They make a number of points, including:

- Ageas initially said it hadn't received details of these costs, but that wasn't correct – they had provided details.*
- Ageas said Miss B had given false information on her claim form, but refused to provide a copy of this form or explain what the false details were. Ageas also alleged that Miss B had breached the policy terms, but hasn't said which terms, or explained how she breached them.*
- As Ageas hasn't provided any details to support its decision, Miss B's complaint should be upheld.*
- Miss B brought three claims against her former employer. She wasn't successful on any of them, but was only ordered to pay costs relating to two of the claims.*
- A tribunal only makes costs orders where it considers someone has been vexatious or unreasonable, or where their claim never had any real chance of success. If an insurer chooses to cover adverse costs orders, they are inevitably insuring against a liability that arises from behaviour the tribunal thought was wrong. To offer cover and then refuse a claim because the insured behaved wrongly is illogical. If the insurer can refuse a claim in these circumstances, it's difficult to imagine any case where any insurer would have to make a payment.*
- Because there was such a long delay dealing with her claim, Miss B had to deal with her case herself, and was only able to get legal advice just before the tribunal hearing. If she'd had legal advice earlier, she would have been able to present her case in a better way, and probably wouldn't have been ordered to pay any costs.*

Ageas says the policy will cover orders to pay the other side's costs where the policy terms are met. The terms say a policyholder must take reasonable steps to keep the amount that has to be paid as low as possible, and try to prevent anything happening that may cause a claim. It says Miss B didn't meet these terms, because it was her conduct that led to the costs order against her.

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.

I'm pleased to see that Miss B and Ageas have been able to resolve most of the issues she raised. Her solicitors agreed with Ageas that they would get an independent assessment of the hourly rate that should be paid for the solicitors' fees, and the amount that should be paid for her barrister's fees. The assessment set out the hourly rate it thought was reasonable for the solicitors' fees and an amount for the barrister's fees.

As the parties agreed to an independent costs assessment, it should follow that Ageas would pay the solicitors' and barrister's fees in line with that assessment, but it's not clear to me whether it has now done so. For the avoidance of doubt, if Ageas hasn't agreed to pay those costs in accordance with the independent assessment, it should do so.

The issue that still needs to be determined is whether Ageas should cover the contribution to the other side's costs that the tribunal ordered Miss B to pay.

Her policy does include cover for costs orders like this, but Ageas has refused to pay them. It says Miss B breached the policy terms, so she's no longer entitled to cover for these costs.

Ageas says that under the policy terms, a policyholder must take reasonable steps to keep the amount that has to be paid as low as possible, and try to prevent anything happening that may cause a claim. It says Miss B didn't meet these terms, because it was her conduct that led to the costs order against her.

I think it's reasonable for Ageas to rely on these terms. This wasn't simply a case where the tribunal preferred one side's case to the other. It found that Miss B had lied, and these two claims were based on concocted evidence. Miss B can't be said to have taken reasonable steps to keep the costs low, or prevent a claim being made, if it's her actions that led to the claim for adverse costs.

Miss B's solicitors say a tribunal only ever makes costs orders if it thinks the party acted unreasonably or vexatiously, or it thinks the claim never had any prospects. On that basis, a costs order in a tribunal will always be the result of the claimant's behaviour. So in effect, the policy will never pay out for adverse costs in tribunal cases, meaning this element of the cover is worthless.

I've considered this point carefully. The policy covers costs for various types of proceedings and all claims are subject to the policyholder complying with the policy terms. And there might still be some circumstances where we think they should cover adverse costs in employment cases - for example if the tribunal awards costs on the basis a claim never had reasonable prospects, but the policyholder was advised by panel solicitors that it did, and pursued the claim on the basis of that advice. I don't think it would be fair to penalise the policyholder in those circumstances.

In Miss B's case, cover was only provided at the last minute. She'd had some limited legal advice previously, but had run the case herself up to that point. Her solicitors say Ageas delayed her claim; if it had been accepted earlier, she would have had the benefit of legal advice and wouldn't have ended up with an adverse costs order. I don't agree that Ageas was responsible for this.

Panel solicitors had previously advised that parts of her claim might have prospects, but further information was needed. It was reasonable for Ageas to wait for that further information before deciding whether to provide cover. The delay wasn't down to Ageas failing to take action. Miss B instructed her own solicitors at a late stage and then requested cover. Once it heard from her again, Ageas agreed to cover her legal costs – and has since agreed to backdate cover to the date her solicitors requested it.

Miss B's solicitors also say Ageas didn't initially give reasons for the decision, kept changing its reasons, and accused her of putting false statements on her claim form, but refused to provide a copy of that form or explain what the false reasons are.

Ageas didn't handle this particular issue particularly well. But in the end it did give reasons for the decision. I don't think she should benefit from cover for costs that arose from claims that the tribunal found were dishonest. It wouldn't be fair or reasonable to make Ageas cover the adverse costs in those circumstances.

my provisional decision

For the reasons given above I don't intend to uphold the complaint other than to the limited extent of confirming that Ageas Insurance Limited should pay the hourly rate for the solicitor's fees, and the barrister's fees, in accordance with the independent assessment.

developments

Ageas hasn't replied to the provisional decision. Miss B's solicitors have provided some further comments on her behalf, including:

- Miss B made her claim in May 2012, but cover wasn't confirmed until June 2013, so the delay was 13 months;
- it's not correct to say the delay was because Ageas was waiting for information from Miss B – she provided all the information requested from her and it was the panel solicitors who caused all the delay;
- unless Ageas can identify a request for information that Miss B failed to answer, there's no basis for finding that she was responsible for the delay;
- it's wrong to say Miss B wanted her own solicitors from the outset – she was initially happy for panel solicitors to act, and it was only their lack of action that led her to request her own solicitors.

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 agree that Ageas decided to provide cover in June 2013. What I said in my provisional decision was that it agreed to provide cover for costs *from* 16 May 2013 – in other words, any costs incurred from that date. But the time between making the claim and the decision to provide cover was 13 months.

The relevant point is why it took that long. Miss B's solicitors say the delay was entirely due to the panel solicitors, who failed to take any action. I disagree. I accept that Miss B initially agreed to use panel solicitors, but she then decided she no longer wanted to use them. That's why Ageas asked them not to pursue the claim further, and simply provide an opinion on the prospects of the claim.

The panel solicitors gave their view in September 2012, and Ageas then wrote to Miss B. Ageas told her it wouldn't cover her costs, because the solicitors' advice was that she was unlikely to win most of her claims. The only claim that she might succeed with was a claim for unfair dismissal. But that was subject to the outcome of her grievance and appeal, and she would need to provide further documents. Ageas said

"Please can you forward any further documentation you have in relation to these, so that we may reassess the potential cover under your policy."

Miss B didn't provide further documents. She spoke to Ageas in November 2012, when Ageas noted that panel solicitors were no longer acting, and it would wait for her to come back again. There was no further contact from her until April 2013.

I'm satisfied the delay wasn't due to the panel solicitors. It was agreed in September 2012 that they would no longer act for Miss B. Ageas made it clear there was no cover at that point, and it was for her to provide further documents if she wanted to pursue her claim. I don't think Ageas was responsible for the delay dealing with the claim, or the adverse costs order made against Miss B.

In any event, for the reasons set out in my provisional decision, it was reasonable for Ageas to refuse cover for the other side's costs, where those costs were ordered as a result of Miss B's own actions.

my final decision

My final decision is that I uphold the complaint only to the limited extent of confirming that Ageas Insurance Limited should pay the hourly rate for the solicitor's fees, and the barrister's fees, in accordance with the independent costs assessment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 18 February 2016.

Peter Whiteley
ombudsman