

The complaint

Mr H's complaint is about Alwyn Insurance Company Limited's ('Alwyn') decision to turn down a claim on his legal expenses insurance policy.

Mr H feels that Alwyn were wrong to do so and should fund his claim.

All references to Alwyn include their claims handlers.

What happened

This complaint follows an earlier complaint to the Financial Ombudsman Service by Mr H, which I won't be commenting on in this decision save to say the circumstances of Mr H's claim are well known to both parties.

The claim that is the subject of this particular complaint was turned down by Alwyn on the basis that they didn't feel it fell within the policy terms. Essentially Mr H wanted to bring a claim against a firm of Solicitors he previously worked for as well as two former Directors, for fraud and or misrepresentation on the basis that had he been in receipt of certain information before he entered into a settlement agreement with the firm, he would never have entered into it.

Alwyn turned the claim down for several reasons. They said the claim was essentially for breach of contract and the policy didn't offer cover for this situation. They also said the employment section of the policy didn't engage in respect of Mr H's claim because that section only covered a dispute with a policyholder's former employer regarding the insured person's contract of employment and or a breach of their rights under employment law- and none of those circumstances applied here. In addition, Alwyn thought the events that gave rise to the claim that Mr H wanted to bring occurred before Mr H's policy started.

Mr H didn't agree so referred his complaint to the Financial Ombudsman Service. Our investigator considered the complaint and said that she thought it should be upheld. She said that the claim could potentially fall within the employment section of cover, but that Alwyn should instruct a Barrister to determine this issue. She also said she wasn't persuaded that the events giving rise to the claim predated Mr H's policy but even if they did and he had continuous legal expenses insurance cover elsewhere, Alwyn should accept the claim, subject to the claim falling within the employment section of cover.

Mr H confirmed he did have continuous legal expenses insurance cover with Alwyn. He also accepted the investigator's view and provided an opinion from his own Barrister setting out that he thought Mr H's claim could be construed as a breach of his legal rights under employment law. Alwyn did not however agree with the investigator's view. As such the matter was referred to me to determine.

In February 2024 I issued a provisional decision in which I said:

"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 won't be upholding Mr H's complaint. I'll explain why. The starting point is the policy terms. The only section Mr H's claim is capable of being covered under is the employment section of the policy. These cover:

"Adviser's costs and expenses in a dispute with an insured person's current, former, or prospective employer:

- a) Regarding the insured person's contract of employment; and/or*
- b) In a breach of the insured person's legal rights under employment law."*

It's our longstanding approach that the question of whether a claim falls within policy cover is a matter for an insurer to decide in most cases. There are exceptions where the question is complicated by the issue being a matter of law. In those cases, we don't think it's unreasonable for an insurer to obtain an opinion from a suitably qualified legal professional. But ultimately the decision is one we think an insurer can determine. Alwyn did that here. They set out why they didn't think the claim was one that fell within the policy section I've set out above. In particular they said the claim wasn't for a dispute with Mr H's former employer in respect of a breach of his legal rights under employment law, it was a claim in fraud and/or misrepresentation on the basis that had he been in receipt of certain information before he entered into a settlement agreement with his former employer, he would never have entered into it. I agree with that interpretation.

The construction of the policy wording doesn't lend itself to a claim for fraud and or misrepresentation in respect of a settlement agreement, even if the settlement agreement was intended to bring an employment dispute to an end. In addition the claim Mr H wants to bring is not only against his former employer but also two of their former Directors. The latter is supportive of the fact that this isn't in reality an employment claim at all.

I appreciate that Mr H's Barrister has provided a legal opinion setting out that what's considered to be employment law is broad, but in my view, this particular claim wouldn't extend to falling into a breach of Mr H's legal rights under employment law. Mr H's claim is in relation to fraud and/or misrepresentation that he feels falsely caused him to sign a settlement agreement. That in itself doesn't amount to a breach of his rights under employment law. More particularly it amounts to a breach of his rights under a contract he signed. And whilst the Financial Ombudsman Service can take account of legal advice in respect of the construction of policy terms, it's a matter for us to interpret them, in the same way we would expect an insurer to.

Alwyn have made representations about the forum in which such a claim might be brought and the fact that it wouldn't be advanced in the Employment Tribunal. I don't think that particularly matters for the purposes of my findings. And I don't think it's a matter of law that the claim itself doesn't fall within cover. For the reasons I've set out, it's clear to me that the employment section of the policy doesn't apply here and is not capable of covering Mr H's claim. As a result, I think Alwyn were entitled to decline it for this reason and don't need to do anything further.

Given my findings, it's not necessary for me to comment on whether the events that gave rise to Mr H's claim occurred before the policy was in place because this isn't a claim that is covered by the policy."

I asked both parties to provide me with any comments or evidence they wanted to me to consider in response to my provisional decision. Mr H has responded but Alwyn has not. Mr H doesn't agree with my provisional findings. In summary, he says:

- It's not up to insurers to determine the scope of cover but rather to the Financial

Ombudsman Service.

- I haven't considered that the settlement he reached related to an ACAS agreement with his former employer ultimately preventing him from pursuing the matter at the Employment Tribunal and fraud and dishonesty occurred in relation to settling the dispute. Because of this it's clear that the claim is covered because his employer breached his rights under employment law and that is what a Court would be considering as well as the actions of his employer and its agents.
- The employment policy term is wide and covers all disputes related to employment law in breach of Mr H's legal rights.
- I've ignored the fact why two Directors would be brought. This is because Mr H's former employer is in administration and the two Directors were significantly punished by the Solicitor's Regulation Authority and therefore legal action would only be possible against them personally in their capacity as former business Directors.
- My decision means that his former employer is entitled to commit fraud against their employees and his legal expenses insurance policy would not protect him.
- My decision is fundamentally flawed and shows any complaints he brings to the Financial Ombudsman Service will be declined with no grounds at all.
- He expected much more from a former Solicitor acting as an Ombudsman.

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 remain of the view that Mr H's complaint shouldn't be upheld.

I appreciate that Mr H is disappointed with the outcome of my provisional decision and that he feels this is unfair, but I can assure him I considered his complaint in line with our approach to similar complaints. And whilst he's referenced my professional background (which is current rather than former), this has no bearing on my role as an independent decision maker.

It remains the case that we consider it's a matter for insurers to determine policy coverage and that these aren't in the main matters of law. Where there is a dispute as to whether the insurer made their decision correctly, we will of course address any complaints about that when referred to us, as I have done here in Mr H's case.

In Mr H's complaint I've explained in more detail within my provisional decision why I don't think his claim falls within the employment section of cover. I thank him for confirming why he intended to claim against the former Directors of his former employer, but I don't think that makes a difference to my view that his claim is essentially for breach of contract as well as claims of fraud and misrepresentation. They are not claims for breach of his legal rights under employment law. I would be more inclined to agree with Mr H that his former employer's actions breached his legal rights under employment law if the matter of those rights hadn't been settled by way of an agreement. It's the issue of the basis on which that agreement was entered into that Mr H wants to challenge here- and not his specific legal rights under employment law.

For the avoidance of doubt, I don't agree that the employment policy term is so wide that it covers any dispute that might vaguely be related to a breach of any legal rights in relation to employment law. And in this case, I'm only determining whether Mr H's claim is covered by the policy. For the reasons I've mentioned, I'm not satisfied that it is.

Mr H feels that my decision means his former employer is entitled to commit fraud against employees and his legal expenses insurance policy would not protect him. I don't think that

my decision means that anyone is entitled to breach Mr H's legal rights but it's true that in this case his legal expenses insurance policy wouldn't engage to enable him to bring the claim he wants to with the benefit of legal expenses insurance cover. That doesn't of course prevent Mr H from bringing the claim against his former employer himself and that's something he's quite entitled to do.

My final decision

Overall and for the reasons set out above, I don't uphold Mr H's complaint against Alwyn Insurance Company Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 12 April 2024.

Lale Hussein-Venn
Ombudsman