

The complaint

Mr M is unhappy with what Aviva Insurance Limited did after he made a claim on his legal expenses insurance policy.

What happened

In July 2021 Mr M claimed on his policy for assistance with an unfair dismissal claim against his former employer. After receiving additional information from Mr M, Aviva said it would obtain counsel's opinion on whether the claim had reasonable prospects of success (a requirement of the policy). At the start of August counsel advised he wasn't able to assess the claim without some evidence to support the claims Mr M was making. Aviva passed those and subsequent comments on to Mr M's solicitors who provided additional information in response.

At the start of October counsel said he still didn't have enough information to reach an assessment and raised concerns about the state of the pleadings made by Mr M. And he highlighted missing primary material that hadn't been provided including evidence to support the claims of discrimination Mr M had made. Aviva discussed matters with Mr M who said he would provide further information.

Mr M didn't contact Aviva again until June 2022 following which it confirmed the information counsel had referenced was required for an assessment on prospects to be reached. In January 2023 Mr M queried what was required and Aviva sent copies of its previous emails. In March he asked for an upload link for documents to be resent; it appears Aviva sent its previous emails but not the link.

In June 2023 Mr M said his claim had concluded and he wanted Aviva to reimburse the legal fees he'd incurred. Aviva initially asked for details of those costs but confirmed at the start of July it wouldn't be paying these because cover had never been confirmed for Mr M's claim. And the policy didn't cover costs it hadn't authorised. It reiterated that position in response to the complaint Mr M subsequently made.

Our investigator said as prospects of success for Mr M's claim hadn't been confirmed then the policy requirements in relation to this hadn't been met. And Aviva had told Mr M what further information was required in relation to this. She didn't think any issue with the upload link would have prevented him from supplying relevant material. So she didn't think Aviva had done anything wrong in declining to reimburse the costs he'd incurred. And she didn't think there were avoidable or unnecessary delays that Aviva was responsible for.

Mr M didn't agree. He said he'd be providing further information in support of his position but requested more time to do so because of ill health. Our investigator allowed additional time but a further response wasn't provided by the revised deadline she set. At the start of May she said the complaint would be moved for review by an Ombudsman. So I need to reach a 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.

I appreciate Mr M has found this a very difficult experience. He's told us about the impact on his mental health and how his family have also been affected. I was very sorry to learn about that. And I appreciate in response to our investigator's view Mr M requested more time to respond because of his health issues. So I've thought about whether it's fair for me to reach a decision on his complaint at this point.

In doing so I've taken into account that our investigator issued her view on 26 January. As Mr M requested an Ombudsman's decision she asked him to provide further comments by 1 March. In response to the health issues Mr M highlighted she subsequently agreed an extension to 18 April. At the start of May, Mr M asked for a further two weeks to respond. Our investigator said she couldn't agree to that and would move the complaint to our decision stage. A further six weeks have now passed without any response being received from Mr M.

I appreciate Mr M has been impacted by health issues but I do feel he's been given a fair opportunity to provide any further comments to us. I also note Mr M told our investigator he didn't have any new information to provide but wanted to explain his thinking on the evidence already submitted. However, I've reviewed the file in its entirety and I'm clear about Mr M's position from the submissions he's already made. And I think I have the information I need to reach a decision on his complaint and it's appropriate for me to do so.

But, while I have read the detailed submissions Mr M made, I don't think it's practical or in line with the informal nature of our service to respond to every point he's raised. Instead, I've sought to focus on what seem to me to be the key issues; those which would impact the outcome of the complaint.

Turning to the actions of Aviva, the relevant rules and industry guidelines say it has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I've looked first at the terms and conditions of Mr M's policy. This does cover 'Employment Disputes' which includes "*a dispute with your employer regarding your contract of employment including unfair dismissal*". So the policy could, in principle, assist with the claim Mr M wanted to bring.

However, in common with similar legal expenses policies for cover to be provided a claim needs to have reasonable prospects of success. And the policy defines that as "*it is more likely than not that you will...recover damages or obtain any other legal remedy which we have agreed to*". As an insurer isn't a legal expert we think that should be assessed by a qualified lawyer with suitable experience. And that's in line with the policy terms which say the assessment will be carried out by 'Our lawyer' which it defines as "*a suitably experienced legal professional*".

Mr M says his freedom to choose his own legal advisor was denied by Aviva. Our normal approach (which takes into account the relevant law) is that a policyholder is entitled to do that from the point at which proceedings become necessary (so from when negotiations have failed and formal legal action is required). As Mr M had issued Employment Tribunal (ET) proceedings that might be the case here.

But I don't think that's something which would fairly apply in any case unless cover was available under Mr M's policy in the first place. And that wouldn't be the case unless it had been shown to have reasonable prospects of success. So I think it was reasonable in this case that Aviva asked a barrister to carry out that assessment. And an insurer is generally entitled to rely on a properly written and reasoned assessment from a suitably qualified lawyer when deciding if a claim has reasonable prospects of success or not.

In this case it's clear the barrister didn't feel he had enough information to conclude the claim did have reasonable prospects of success. Aviva passed on his concerns to the solicitors acting for Mr M but the responses they provided weren't sufficient to address the issues the barrister had. And the barrister explained in October 2021 what further evidence he'd require (for example primary evidence to support the discrimination claims).

I recognise in his submissions Mr M has questioned the rationale behind those conclusions. But the question I need to consider is whether it was reasonable for Aviva to rely on what the barrister said. I think he's clearly set out his reasoning. And I can see he has extensive experience of ET work. So I think he was in a position to do so. Mr M has argued his own solicitor's opinion wasn't taken into account. However, I've reviewed the information provided to Aviva and I can't see his solicitors did provide an opinion confirming the claim had reasonable prospects of success.

Given Mr M was legally represented at the time of his claim to Aviva I think it's reasonable to assume that if such an opinion had been available from either his representatives or his own barrister they would have provided it to Aviva. But that didn't happen. And in the absence of a properly written and reasoned positive opinion on prospects I don't think it was unreasonable of Aviva to conclude the relevant policy term hadn't been met.

Aviva requested Mr M provide the information the barrister had asked for in October 2021. However, he didn't contact it again until June 2022 when it reiterated its position. It did so again in response to further contact from Mr M in January 2023. I appreciate there were then some difficulties in Mr M accessing email attachments and using the link he'd been sent. But if he did have the requested information I don't think that would have prevented him sending it in a different way (for example by email).

In fact Mr M didn't then contact Aviva again until June 2023 when he said his claim had concluded and he wanted his costs reimbursed. I don't think it was unreasonable Aviva said it wouldn't be doing that given the prospects of success of Mr M's claim had never been evidenced to it. In any event his policy doesn't cover "*costs and expenses which are incurred prior to our written agreement and authorisation*". I think it's clear that applies to the costs Mr M was seeking reimbursement for. And even if he could now show his claim had prospects of success at the point Aviva was considering it, I don't think it would be reasonable to expect it to pay these costs. They relate to a claim which it hadn't had any control or oversight of and where a settlement appears to have been agreed that it didn't know about and didn't have the opportunity to consider.

Mr M also thinks Aviva should also pay him the difference between what he settled his claim for and what he believes it would have settled for if cover from his policy had been in place. However, I haven't seen clear evidence to show that Mr M would have been advised to pursue his claim if he had cover in place.

But the more important point here is that I don't think it was because of anything Aviva got wrong that funding wasn't in place. For the reasons I've explained Aviva was entitled to decline funding for the claim because it didn't have evidence to show it had reasonable prospects of success. So even if Mr M is right to say he could have pursued his claim (and been awarded a higher sum if he'd done so) that isn't a loss which has come about because of anything Aviva got wrong.

I do accept that Aviva did ask Mr M for further details of his costs and proof of payment prior to saying these weren't in fact amounts it was going to pay. I think it should have told Mr M that following his renewed contact with it in June 2023. But given this issue was resolved relatively quickly I don't think there's an impact on Mr M which warrants compensation. And while Mr M believes there was delay by Aviva in progressing the claim I haven't identified significant avoidable delays for which I think it was responsible.

Finally, I appreciate in his submissions to us Mr M has referenced other decisions from our service that he believes support his position. However, each complaint is decided on its own merits. And for the reasons I've explained in this decision I don't think there's any further action Aviva needs to take in relation to this complaint.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 15 July 2024.

James Park
Ombudsman