

The complaint

Mr and Mrs K complain that Amtrust Europe Limited rejected a claim on their legal expenses insurance.

Mrs K is the policyholder but Mr K is able to claim on the policy and the complaint concerns a claim he made, so I'll refer to him throughout. Where I refer to Amtrust Europe Limited, this includes its agents and claims handlers acting on its behalf.

What happened

Mr K's employer announced that it was going to consult about possible changes to its pension scheme.

A consultation started in November 2021 and finished in February 2022. At the start of the consultation process, the employer said if the decision was to withdraw from the existing scheme, one option it may have to consider would be to give notice to terminate the contracts of any employees who did not agree to the changes.

Following the consultation process, the employer then made a decision to leave the existing pension scheme. Some staff agreed to the changes but not all. Notice was given in accordance with the employer's legal obligations that dismissals were possible.

Mr K was one of those who did not accept the changes. He was dismissed and re-employed under new conditions. He did not believe the consultation process was followed correctly and took action against the employer in the employment tribunal. A hearing at the tribunal was set for August 2023.

Mr K made a claim on the legal expenses insurance to cover the legal costs of pursuing the case but the claim was rejected. Amtrust said the dispute with his employer had started before he took out his policy, or at the latest within the first 120 days of cover, and he was not covered for pre-existing disputes or disputes that arose in the first 120 days.

Mr K complained about the decision. In its final response to his complaint, Amtrust said it now took the view the exclusion for events in the first 120 days of cover didn't apply so was not relying on that, but still considered the dispute was pre-existing.

Mr K disagreed and referred the complaint to this Service. Our investigator said Amtrust had applied the policy term strictly, without taking account of what Mr K knew at the time, and didn't think it wasn't fair to treat the dispute as pre-existing.

The investigator said it wasn't possible to know what would have happened if the claim had been covered but Amtrust should pay £500 to compensate Mr K for the distress caused.

Amtrust disagreed and provided further comments. The investigator considered these but didn't change her view.

Mr K felt the compensation was too low. He said he had been forced to settle his case as he couldn't take the risk of going to trial without cover for his costs. He settled for £5,000 and believed he would have been entitled to £11,000 if he had won the case, but would accept 50% of the difference (around £3,000).

Amtrust still thought the dispute had started before the policy was taken out.

As no agreement was reached, the complaint was passed to me to determine. I issued a provisionally decision saying I intended to uphold the complaint and direct Amtrust to arrange a legal assessment of the case and pay compensation of £500 to Mr K for the distress and inconvenience caused to him. I set out my reasons as follows:

The relevant industry rules and guidance say insurers must deal with claims promptly and fairly, and not unreasonably reject a claim.

The policy provides cover for employment disputes but, as with all insurance, there are conditions and exclusions that apply.

There's an exclusion in the employment section of cover for events that happen within the first 120 days of the policy. Amtrust initially relied on that exclusion as well, but later said it accepted that did not apply and was not relying on it. So I don't need to make a finding on it.

What Amtrust is relying on is an exclusion that says it will not pay for "Any claim for an insured event which happens before the insurance under the Family Legal Protection cover started."

"Insured event" is defined as follows:

"An event, or the first event in a series of events, for which we provide cover under the Family Legal Protection cover. We will treat all causes of action, incidents or events related by cause or time as one insured event."

Amtrust says:

- *It's clear that in June 2021 Mr K was concerned new pension arrangements could be implemented and there was a possibility his contract of employment would be terminated and he'd be offered new terms of employment. He raised concerns at that time.*
- *Mr K was concerned then – or at the very latest by November 2021 – that new pension arrangements would be made.*
- *The policy started on 12 November 2021 and the events leading to the claim had started before then.*

I appreciate the employer first raised the possibility of changes before the policy was taken out. And to some extent there is a connection between that and the later events. But to apply the policy term strictly in circumstances where there was no dispute wouldn't be fair.

In June 2021, the employer had said it wasn't in a position to make a decision, including whether to proceed to a formal consultation. There was a meeting in September about whether to consider leaving the scheme, which recommended proceeding to consultation and this was confirmed in October.

So at that point, all the employer had done was decide it would start a consultation process about whether to make changes.

The employer wrote to staff on 1 November 2021 to introduce the proposal and seek nominations for employee representatives ahead of a formal collective consultation process. The collective consultation process started on 16 November and ran until February 2022.

So at the point when the policy started, all Mr K knew was that there was to be a consultation process. He didn't know what the outcome of that would be. While he was naturally concerned it might lead to changes, at that point there was more than one possible outcome. Mr K didn't know what changes (if any) would be made to the scheme, when they might happen, or how they might affect him.

It was only once the consultation process had been completed that Mr K had information about what was proposed and how it might affect him. He then sought advice from solicitors. When he took out the policy, there wasn't a dispute already in existence which Mr K knew was likely to lead to a claim on the policy.

This is made clear by the nature of his claim in the employment tribunal. He said the way his employer had dealt with the consultation process did not comply with its legal obligations. He couldn't have known that before the consultation started; it was only after the process had completed and a decision made that Mr K took legal advice and started a claim on the basis the consultation had not been done correctly.

For these reasons, it would not be fair in the circumstances of this case to decline the claim in reliance on the exclusion for pre-existing disputes.

I've thought carefully about how to put things right for Mr K. He says he accepted a lower settlement because he couldn't risk the costs of proceeding to trial without cover.

My aim is, as far as possible, to put him in the position he would have been, if the claim had not been rejected. I don't think he should be out of pocket because his claim was wrongly declined. But I can't say what would have happened in his legal case or if he has lost out.

The policy terms say cover will only be provided where a claim has reasonable prospects, the costs are proportionate and the other party will be able to pay any damages. If the claim had been accepted, the next step would have been for Amtrust to arrange a legal assessment of this.

So Amtrust should arrange for solicitors to assess the prospects of his case, based on the evidence that was available at the time.

That puts Mr K in the position he would have been in if the claim had been dealt with.

The legal advice might not be favourable, in which case Mr K hasn't lost out. But if the advice is positive, that means Mr K should have been covered. He says if he'd had the benefit of cover he would have been able to pursue the claim further and seek a better settlement. To address this, the solicitors should then advise on what would have been a reasonable settlement of his case. If that is more than the amount Mr K received, Amtrust should pay the balance.

Whatever the outcome of that assessment, I agree Mr K has been caused distress and was put to a lot of trouble as a result of the claim not being accepted. It's fair he should be compensated for that.

Replies to the provisional decision

Mr K said he accepted the findings but raised some further points, including:

- If Amtrust appoints solicitors to assess the case, he's concerned about how independent they would be.
- He had to consult solicitors and pay their fees, and this was only necessary because cover wasn't provided; he has asked if those fees could be refunded.
- He would like the compensation of £500 to be paid separately, without having to wait for the outcome of the solicitors' assessment.

Amtrust has replied saying:

- The provisional decision refers to when Mr K was in dispute with his employer, but the policy wording doesn't specifically refer to disputes – it refers to “*causes of action, incidents or events related by cause or time as one insured event*” – and the incident or event that caused the “dispute” occurred before the policy started.
- Even if the issue is when there was a “dispute”, that was within 120 days of the policy starting.
- It had previously said it wouldn't apply the waiting period but if the dispute happened in February 2022, that was within this period so it would invoke that term. And that means Mr K would need to provide evidence of previous legal expenses cover.

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.

The exclusion for pre-existing disputes says there is no cover if the insured event happens before the policy starts. It's correct that the definition of an insured event says the policy treats “*all causes of action, incidents or events related by cause or time as one insured event*”. So on a strict interpretation of that definition, if there was an event before the policy, that was related to a dispute which started later on, it would be caught by this.

But when deciding the complaint I have to consider whether the way Amtrust applied the policy terms was fair and reasonable, taking into account all the circumstances. The policy definition is very wide and could apply to any situation where something happens that is in some way connected to a later dispute. It wouldn't be fair to apply the term strictly to a situation where Mr K had no reason to know, when the policy started, there was going to be a dispute some months later.

The aim of an exclusion like this is to stop someone taking out a policy where they are already aware of a dispute that's likely to lead to a claim. I don't think that's the case here.

Amtrust says that even if this isn't considered a pre-existing dispute, the actual dispute started within the first 120 days of the policy, so it's excluded in any event.

Again, this type of exclusion is to prevent someone taking out a policy where they know about something that's likely to lead to a claim.

We generally think it's reasonable to exclude claims where the incident happens in the first 90 days of a policy, but a longer period than that is unlikely to be fair. In this case, the point where Mr K became aware of the dispute was more than 90 days after the policy started. So I don't think it would be fair to apply this term in these circumstances.

In any event, Mr K has shown that the policy in question had been in force for a number of years. The legal expenses cover is an 'add-on' to their home insurance. He didn't

specifically take out legal expenses cover because he knew there was going to be a dispute that would lead him to make a claim; it was part of the existing home insurance which was simply renewed each year.

For these reasons it remains my view that the claim should not have been excluded.

As set out in the provisional decision, that doesn't mean Mr K's claim would definitely have been covered. There would need to be a legal opinion confirming that his case was likely to be successful. So that assessment should now be done.

Mr K has asked about the independence of solicitors appointed by Amtrust. Normal practice is for an insurer to instruct solicitors to advise on this. The solicitors are independent professionals, subject to their own regulatory regime, who would be obliged to give their own professional opinion. The fact that Amtrust appoints them does not mean they cannot give independent advice.

Mr K has asked about costs he incurred obtaining legal advice. Even if the claim had not been rejected, there's no guarantee cover would have been provided or, if it was, how soon that would have happened. Given the issues at stake for Mr K, he may have needed to seek some advice while he waited for a decision on the claim in any event.

He has also asked for clarity that the decision means, if the legal advice is positive, the solicitors will also be asked to advise on what he would have won if the case had proceeded to trial. I don't know if that would have happened – and most cases are settled without the need for a trial. What I am directing is that the solicitors give their view on what Mr K would have been advised to accept as a reasonable settlement. And if the advice is that a reasonable settlement would have been higher than the actual settlement he achieved, he should be paid the difference.

The £500 compensation is not related to the legal advice and should be paid whatever the outcome of that advice. I've included a direction about this, with interest to be added if there is any delay in payment.

Putting things right

To put things right, Amtrust should

- Arrange for a legal assessment of the prospects of success, based on the evidence that was available at the time the claim was declined. If the legal advice is positive, the solicitors should then advise on what would have been a reasonable settlement of his case and if that is more than the amount Mr K received, Amtrust should pay the balance.
- Pay compensation of £500 to Mr K for distress and inconvenience.

Amtrust must pay the compensation of £500 within 28 days of the date on which we tell it Mr K accepts my final decision. If it pays later than this it must also pay interest on the compensation from the deadline date for settlement to the date of payment at 8% a year simple.

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

My final decision

I uphold the complaint and direct Amtrust Europe Limited to take the steps and pay the compensation set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr K to accept or reject my decision before 17 September 2024.

Peter Whiteley
Ombudsman