

The complaint

M, a limited company, complains Irwell Insurance Company Limited has unfairly settled a claim under its commercial legal expenses (LEI) insurance policy.

What happened

The circumstances of this complaint are well known to both parties, so I've summarised events.

- M has a commercial LEI policy which is underwritten by Irwell. The policy provides cover for legal costs and expenses incurred in disputes with employees.
- A former employee of M brought a legal claim against M for unfair dismissal. Irwell accepted the claim and appointed a legal advisor – who I'll refer to as "C".
- The legal dispute was heard by an Employment Tribunal which found that whilst the employee's dismissal was justified, M hadn't followed procedural guidelines as it hadn't carried out a reasonable investigation prior to the disciplinary hearing, and it hadn't held an independent appeal hearing. So, the Judge directed M to pay an award to its former employee.
- Irwell agreed to cover M's legal costs for defending the case. And said because C hadn't provided clear advice to M in respect of the disciplinary investigation, it would cover part of the award. But it wouldn't cover the remainder as M hadn't followed C's advice about having an independent person hear the employee's appeal. It said M, therefore, hadn't complied with the terms of the policy.
- M complained to Irwell about its decision to reduce the amount it was willing to pay. M also raised concerns about the adequacy of C's legal representation.
- In its final response, Irwell said it was satisfied its decision was fair and it advised M to contact C directly if it had concerns about the service C had provided.
- Unhappy, M brought a complaint to this Service. An Investigator considered it but didn't uphold it.
- M disagreed and so, the complaint has been passed to me for an Ombudsman's 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.

Having done so, I'm not upholding this complaint. Before I explain why, it's important to clarify I'm only considering Irwell's handling of the claim. Any concerns M has about C's competency as its legal representative and how it litigated on its behalf during the Tribunal

do not fall within this Service's jurisdiction, and so I won't be commenting on this.

Irwell's 50% contribution to the total award

The crux of M's complaint is that it believes Irwell should cover the full award it has been directed to make – by the Tribunal - to its former employee. M says it sought advice from C and Irwell on the matter as to who should hear the disciplinary appeal hearing but was unable to obtain clear advice. It says telephone calls it had with C will demonstrate this. It adds that Irwell confirmed cover was in place prior to the Tribunal and so, it considers its decision to reduce the amount it would pay towards the employee's award – after the event - to be unfair.

I'm mindful that I'm making a decision without M having had access to the telephone calls it believes are fundamental to the complaint. This Service has attempted to obtain these calls from C on numerous occasions, but they haven't been provided. The calls were also sent directly to M, but it had issues listening to them – and I understand M now intends on submitting a subject access request to obtain these. However, our role is to resolve matters quickly and with minimal formality, and having considered things, I'm satisfied I can reach a decision on the information available. In the event M retrieves the calls and these unequivocally support its position, it may be able to ask this Service to consider this aspect of the complaint.

The exclusion Irwell seeks to rely on says it “*shall not be liable for any claim for indemnity in respect of, or arising from, or relating to:*

Any dispute, unless The Policyholder has notified and sought advice promptly from C as soon as The Insured Event becomes known and before any action is taken and The Policyholder has followed the advice given, and also unless The Policyholder has continued to seek advice from C in respect of any developments relating to The Insured Event and has followed the advice given. This is a continuing obligation for each dispute requiring The Policyholder to take and follow advice at each stage until the conclusion of each dispute.”

In other words, M had to seek advice from C and follow it for Irwell to be satisfied M had complied with the policy terms. M hasn't disputed it was required to do so, but argues it was given unclear advice from C which led to it taking a course of action which was later deemed unsuitable by the Tribunal.

From the information presented, I'm more persuaded advice was given to M to take certain steps in respect of the appeal hearing – namely, that it should be conducted by an independent person - but that M chose to not follow this advice. I say this because Irwell has presented information which says M was advised the employee could claim the appeal process wasn't unbiased if M conducted it, and that best practice would be for a third party to hear it. Irwell said information was also shared with M which related to the appeal being heard by an impartial person who would have no prior involvement with the case.

So, on balance, I'm satisfied M was aware of the requirement of holding an independent appeal hearing, and that as it had conducted the initial hearing it wouldn't be acting independently if it heard the appeal.

From what I've seen, M's decision to hear the appeal itself was largely based on the financial costs involved in appointing someone independent – which it said it couldn't afford. With that in mind, I'm not persuaded M would have acted differently even if it didn't consider C's advice to be unclear.

I understand M has complained that Irwell didn't give clear advice as to who should hear the appeal hearing, but Irwell as the insurer isn't a legal expert, and so, it's reasonable that it would refer M to C – who is a legal expert – to advise on this point. So, I don't consider Irwell to have treated M unfairly in doing so.

Having considered the above, I don't consider it unreasonable for Irwell to have relied on the exclusion - that M hadn't followed C's advice - to limit the amount it has paid under the claim.

Legal representation

The policy states *"If you need to make a claim you must notify C as soon as possible. Under no circumstances should you instruct your own solicitor, accountant or representative as the insurer will not pay any costs incurred without their prior agreement."* So, I'm satisfied the policy makes it clear that prior to Irwell's acceptance of the claim, Irwell wouldn't cover costs M may incur if it appointed its own legal representative at that stage.

M has complained it had no choice but to use C as its legal representative during the Tribunal. Irwell has explained that M was only required to take and follow C's advice prior to the legal claim having been brought by the employee, and that had M asked to use a different legal representative after this time, it would have worked with M to agree the terms. This is in line with this Service's approach which is that a policy holder has the freedom to choose legal representation when legal proceedings need to commence.

But, in any event, whilst M might have considered it had no choice but to use C, I haven't seen anything which shows it asked Irwell if it could change its legal representative, and so, I'm not persuaded Irwell has treated M unfairly in respect of this.

Compensation

M has said it's experienced stress because of Irwell's handling of the claim, but as it's a limited company, it can't experience "distress" and so, this Service can't award compensation to M for this.

Whilst I understand the employee dispute and legal action has been a difficult event for M, I haven't seen anything which persuades me Irwell's handling of the claim warrants it to pay compensation to M.

My final decision

My final decision is I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 22 September 2023.

Nicola Beakhust
Ombudsman