

The complaint

Mrs E, Mr E1 and Mr E2 complain about Aviva Insurance Limited declining Mr E2's claim for cover under their legal expenses insurance policy and about their handling of Mr E2's data.

Since this complaint concerns Mr E2, I'll mostly refer to him in my decision to make things simpler.

Where I refer to Aviva, I include their agents and claims handlers.

What happened

Mr E2 benefited from legal expenses insurance (LEI) cover under a policy taken out by Mrs E and Mr E1 in September 2018.

In mid-2021 he made a claim on the policy for cover to pursue legal action against an educational body (the EB) for, amongst other things, alleged bullying and breaches of contract. Aviva declined his claim on grounds that the series of events giving rise to his claim had started before the policy began, so it fell within an exclusion. Mr E2 disagreed. And when Aviva didn't uphold his complaint, he brought it to the Financial Ombudsman Service. The ombudsman who considered that complaint decided in April 2022 that Aviva hadn't unfairly declined his claim.

In early May 2022 Mr E2 asked Aviva to erase his personal data. Shortly afterwards he made a further claim (the current claim) on the LEI policy for cover to take legal action against the EB.

Aviva declined the current claim. They said, in summary, it was a continuation of the previous claim; it related to EB's alleged breach of contract in failing to deliver his course appropriately; since his dispute with EB predated the inception of the policy, his claim was excluded under the policy; and the Financial Ombudsman Service had decided that previously.

Mr E2 didn't agree. He said, in summary, the 20 or so alleged breaches of contract he wanted to pursue against the EB had happened during the period the LEI covered since they began in December 2018. They were new and distinct from the bullying claims he'd raised before and which the previous ombudsman had considered.

Aviva refused to erase Mr E2's data. They said, in summary, the "right to be forgotten" under the General Data Protection Regulation (GDPR) wasn't absolute; they had legitimate reasons for keeping his data; their policy allowed them to keep it for seven years following the expiry of his insurance contract; their decision to decline his request to erase his data was in line with their privacy policy, which was available on their website; the claim Mr E2 was making was a continuation of the previous one; and Mr E2 had given his consent to use of his data by signing the declarations on claim forms he'd previously submitted.

Mr E2 disputed the bases on which Aviva said they could retain his personal data. He said, in summary, they'd used it in a way he hadn't anticipated or authorised. He hadn't consented to Aviva using information relating to his previous claim to decide the outcome of the current claim.

When Aviva didn't uphold Mr E2's complaints, he brought them to the Financial Ombudsman Service.

Our investigator thought Aviva had declined Mr E2's claim for cover to pursue the EB fairly. She said it was essentially the same claim he'd made before; the issues he'd raised were part of an ongoing series of related issues and concerns about the EB's treatment of Mr E2 and their alleged breaches of contract since February 2018 onwards; and Aviva were right to say the exclusion applied.

Our investigator said there was no evidence Aviva had misused any of Mr E2's data; they'd explained why they'd kept it for longer than the life of his previous claim, which was in line with the terms and conditions he and Aviva had agreed to.

Mr E2 didn't agree with our investigator's views. So, his complaint was passed to me to review afresh. I recently issued a provisional decision, an extract of which follows:

“What I've provisionally 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 note Mr E2's strength of feeling about his complaint. And I'm sorry to hear the experience he had at the EB didn't meet his expectations. I won't mention here everything he and Aviva have told us about his LEI claim or address things in the level of detail Mr E2's provided. I'll focus on the things I consider key. That's because we provide an informal service. No discourtesy is intended. I'd like to reassure Mr E2 and Aviva that I've considered everything they've said in coming to my conclusions.

I've come to the same outcome as our investigator for broadly the same reasons. But since Mr E2's raised some additional points which I've addressed here, I'm issuing a provisional decision to give the parties time to respond before I issue my final decision.

Mr E2's complaint is essentially in two parts. The first relates to Aviva declining his claim for LEI cover in 2022, (the LEI claim). The second relates to Aviva's alleged misuse of Mr E2's personal data and their refusal to delete it, (the data complaint). I'll consider each part in turn.

- The LEI claim

We expect insurers to consider claims fairly and promptly and not to decline claims unreasonably. The starting point is the terms and conditions of the policy.

Mr E2 had LEI cover as part of the home insurance policy taken out by Mrs E and Mr E1. Subject to the terms and conditions of the policy, cover was provided for, amongst other things, “Consumer Disputes” defined as:

“A dispute regarding an agreement for the sale, purchase or hire of goods or services that are not for your business use”.

Cover was excluded for, amongst other things,

“d. Claims where the initial dispute or series of incidents leading to a claim on this policy happen before this cover starts or after it comes to an end as shown on your schedule. You can only make one claim for all disputes arising from the same incident.”

Aviva said that the many breaches of contract Mr E2 alleged the EB were responsible for were a continuation of his previous complaint and formed part of a series of events linked by one cause, namely the EB's alleged failure to deliver the contract relating to his course appropriately. They were all viewed as one claim under the policy. And the claim was excluded since the series of incidents began before the policy started.

Mr E2's raised a number of points as his complaint's progressed, which I'll summarise:

- The contract breaches he now wishes to pursue against the EB are independent of the issues he raised in the previous claim.
- Just because a member of staff at the EB bullied him a few months before the policy began, doesn't mean he ought to have known the EB would later breach its contract with him in relation to teaching issues.
- The LEI policy doesn't list bullying as something that can be claimed for. Since he can't claim for it, Aviva shouldn't be able to take it into account when considering the exclusion for pre-existing disputes.
- The policy terms and conditions aren't balanced as they should be to comply with consumer rights law. The exclusion means almost any claim could be declined if the policyholder had had a dispute with Aviva, even if unrelated. And in his case, it prevents him from claiming several thousand pounds in damages and fee refunds because of the bullying incident that happened several months before the contract breaches began. That isn't proportional.

I can't decide whether Aviva has breached consumer protection law. Only a court can decide that. But I can consider whether Aviva have treated Mr E2 fairly and I bear the law in mind in reaching my conclusions.

LEI is designed to cover fortuitous events, not things that are likely to happen or which a policyholder knows about before a policy begins. It's common for LEI policies to exclude claims where there is a related pre-existing dispute, as here. We don't generally consider that to be unfair - or disproportionate, as Mr E2 suggests. Aviva's decision not to cover Mr E2's claim doesn't stop him from taking legal action against the EB, although he'd need to find alternative funding.

As Mr E2 notes, the policy doesn't specifically refer to bullying as something that can be claimed for. I wouldn't expect it to. The policy is more widely drafted to provide cover to pursue claims for breach of a contract for services. Even if it were right to say the incidents that happened before the policy began were solely about bullying, the absence of a direct reference to claims for bullying in the policy doesn't mean Aviva can't take them into account in considering cover. But I can consider whether Aviva applied the exclusion fairly.

I note the distinctions Mr E2 draws between his previous claim and the current claim. He says his previous claim, whilst involving alleged breaches of contract, was based on bullying by certain individuals at certain locations. And he says that since, for example, the current claim relates to incidents that began in December 2018, the EB personnel and locations are different, and the allegations relate, broadly, to how teaching was delivered, not historic bullying, the claims are unrelated.

Mr E2's acknowledged he complained about delivery of a lesson and about group work in 2018 before the policy began. He's said that was background information to his bullying complaint since they'd led to the alleged poor staff behaviour towards him. But I think it was reasonable for Aviva to think those issues and his concerns about treatment of him by staff members were evidence of an ongoing dispute between Mr E2 and the EB.

Despite the differences Mr E2 has referred to, I think it was reasonable for Aviva to consider the current claim was related to the previous claim – or, in their words, a continuation of the previous claim. In the end, all Mr E2's concerns are about the way in which the EB has delivered his course.

Even if the current claim was considered on its own, the result is the same. The current claim relates to incidents which began in December 2018. Aviva could reasonably take into account Mr E2's issues with the EB leading up to that date, including the allegations he made before the policy started, in deciding if the exclusion applied. It was reasonable for Aviva to think there was a pre-existing dispute relating to the EB's delivery of his course and a subsequent series of events that ultimately led to the claim.

Bearing everything in mind, I think Aviva acted in line with the terms and conditions of the policy and came to a fair and reasonable decision to decline the current claim on grounds the exclusion applied.

- The data complaint

Aviva said the "right to be forgotten" wasn't absolute and they had the right to retain data for handling future claims and dealing with complaints. Mr E2 disputed the grounds Aviva gave for refusing to delete his data were valid. He felt they'd breached Information Commissioner's Office (ICO) rules; the terms and conditions about handling data hadn't been made clear; there should be stricter provision for his sensitive personal information; and Aviva's reasons for processing data had changed, which suggested they'd required his consent – which he hadn't given – or they'd misused his data.

If Mr E2 wants a ruling on how Aviva have handled his personal data he'd need to take that up with the ICO. I can't determine whether Aviva breached GDPR or data protection legislation. But I can consider whether they acted fairly and reasonably in handling his information - since that was part of their consideration of his claim.

From what I understand, Mr E2's main complaint is that he didn't consent to, and there was no legal basis for, Aviva using information in relation to the earlier claim to consider the current complaint. He's concerned too that the information he provided was sensitive and would be accessed widely within Aviva.

Mr E2 hasn't provided any evidence to support his concerns that his sensitive personal information has been shared too widely or that he's suffered harm. So, I won't comment further on that.

Mr E2 signed declarations relating to his claims for cover to pursue the EB. They set out clearly that Mr E2's data would be used in accordance with their privacy statement and provided a link to access it. The privacy statement was easy to locate using the link. Given Mr E2's concerns about how his data would be used, I'd expect him to have taken a look. If he had, he would have seen that Aviva would use the information they held about him for the purpose of, amongst other things, handling claims and any other related purposes. It was reasonable for Aviva to think Mr E2 consented to them using his information in line with their privacy policy, given he'd signed the declarations. I don't think consent was limited to using the information for the claim to which the individual declarations related, as Mr E2 believes, given its broad wording.

Arguably, Mr E2's request to delete his data was a withdrawal of his consent. But, bearing in mind GDPR allows insurers to use information for legitimate business reasons, I don't think it was unreasonable for Aviva to use information about Mr E2's previous claims in considering the current claim. The information was directly relevant to whether the policy responded.

Even if I'm wrong about that, or if Aviva had deleted Mr E2's data when they asked him to, I don't think it would have made a difference to the outcome of the current claim. That's because Mr E2 would have had to provide the historical information about his dispute with the EB when making it. Aviva would have needed the information to decide if the claim was related to the earlier claim. If he hadn't provided it, Mr E2 would have risked being in breach of the terms and conditions of the LEI policy relating to fraudulent claims. So, Aviva would have been aware of the background and likely declined the claim on the basis of the exclusion in any event.

Bearing everything in mind, whilst I understand it will be disappointing, I don't intend to uphold Mrs E, Mr E1 and Mr E2's complaints.

Developments

Aviva had no comments to make on my provisional decision.

Mr E2 made several points in response to my conclusions about the LEI claim, which I'll summarise:

- He says the complaints he raised with the EB before the policy started were about staff behaviour towards him rather than delivery of the course. Although he mentioned poor service in relation to one of the complaints, that was to show that the reaction of a staff member he reported it to was unreasonable. His concern was about the staff member and no breach of contract occurred.
- Mr E2 isn't claiming for that incident now. There was no "ongoing dispute" as defined in a dictionary. It didn't "lead" to the current claim as the policy wording requires and it's not reasonable to say it did. For example, his complaint was never made formal, it would be out of time under the EB's complaints process, it formed a minor part of Mr E2's overall experience at the EB and it happened several years ago.
- According to Mr E2's research, he wouldn't be able to make a legal claim for poor customer service/rude behaviour alone. Since the earlier incidence of poor service was minor and unlikely to have resulted in a claim for compensation, it's not reasonable to consider it to be part of an ongoing dispute.
- Neither Aviva nor the Financial Ombudsman Service has been specific in addressing the insurance contract and timelines. We haven't explained how the pre-insurance

contract incidents mean the exclusion applies or how they and the incidents he now wishes to pursue against the EB are linked in time.

Mr E2 hasn't commented on my conclusions regarding the data complaint.

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 don't think Mr E2's made any substantively new points about the LEI claim that I haven't already considered. I note he feels the detailed points he's made should be addressed in full. I'd like to reassure him I've thought carefully about everything he's said in coming to my decision. But, as I've said, we're an informal service. For that reason, I don't set out everything he and Aviva have told us in the level of detail they've provided.

Mr E2 says he included information about the pre-policy events as background to his LEI claim. He considers them to be minor and feels he wouldn't be able to pursue a successful claim in relation to them separately. I won't comment on the grounds on which any legal claims against the EB could be made since that's not my role. But I don't think the nature of the complaints Mr E2 made against the EB or the basis of any legal claims he might have against them matters. The policy provided broad cover for disputes regarding an agreement for services. I think it was reasonable for Aviva to look at Mr E2's overall relationship with the EB in relation to his course in considering if the exclusion applied.

Even if I'm wrong about that, the emails Mr E2 exchanged with the EB in around February 2018 show he complained then about teaching issues and delivery of his course. And emails exchanged in around April 2018 record his concerns about the EB's failure to act twice on issues he'd raised about group work. The concerns he had about poor treatment from EB staff members may have followed on from the complaints he made about delivery of the course itself. And whilst Mr E2 may not have formally complained about both these issues, they were covered in the EB complaints process.

As I've explained, LEI is designed to cover fortuitous events, not things that are likely to happen or which a policyholder knows about before a policy begins. Since Mr E2 had issues with the delivery of his course before the insurance policy started, the events are relevant to deciding if the exclusion applies.

I note Mr E2's point that the events in early 2018 didn't "lead" to the claim. It's the claim on the policy that's relevant here, not the claim against the EB. His dispute with the EB began before the policy started as I've noted. And it continued in the months that followed. Mr E2's previous claim covered bullying and breach of contract/service failings. And the previous ombudsman decided the exclusion applied to that claim.

Mr E2 says his current claim is restricted to cover to pursue the EB in relation to later contractual issues. But the issues in the previous claim and the current claim overlap in some regards. And I'm satisfied the issues Mr E2 now wishes to pursue are sufficiently linked to the pre-policy events for Aviva to have reasonably excluded the claim - the parties involved are the same, there are similar issues, and the timescale is short enough.

I appreciate the difficult time Mr E2 had whilst attending the EB and I'm sorry to hear of the impact it had on his health. But, for the reasons I've explained, I'm not persuaded to change my view. Bearing everything in mind, whilst I understand Mr E2 will be disappointed, I think it was fair and reasonable for Aviva to decline the LEI claim based on the exclusion.

Since neither party has made any further comments on the data complaint, I see no reason to change my mind about the conclusions I reached in my provisional decision.

In all the circumstances, I don't uphold this complaint.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E, Mr E1 and Mr E2 to accept or reject my decision before 28 July 2023.

Julia Wilkinson
Ombudsman