

## **The complaint**

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

## **What happened**

In March 2022 Mr I made a claim on his legal expenses insurance policy as he wanted to pursue an employment claim. Fairmead is the insurer of his policy. The matter was referred to panel solicitors to see if it had reasonable prospects of success (a requirement for cover to be provided under the policy). The panel firm concluded it didn't.

Fairmead issued a final response to the complaint Mr I made in September 2022. It said if he wanted to challenge the prospects assessment he'd need to obtain a barrister's opinion of his own. Mr I did so. That opinion concluded an element of his claim (relating to disability discrimination) did have reasonable prospects of success but others didn't. A separate complaint about those issues (including payment for the barrister) was referred to us by Mr I and doesn't form part of this complaint.

Fairmead discussed next steps with Mr I. It said if he wanted to pursue the elements of the claim that didn't have reasonable prospects of success it wouldn't provide funding and he'd need to pay privately. Mr I said he would wait to see which claims would proceed in the Employment Tribunal (ET) following a strike out application.

Mr I's claims weren't struck out and he told Fairmead in January he wanted assistance and had a further hearing in early February. Fairmead said, given the strike out decision, it would ask another panel firm to reconsider prospects. It also agreed to fund that firm to assist Mr I with preparation for the February hearing and represent him at that.

After that hearing Mr I asked Fairmead for assistance with an appeal to the Employment Appeal Tribunal which the panel firm hadn't been instructed to assist with and for which there was an upcoming deadline. Fairmead asked the panel firm to help but it didn't have capacity to do so. Mr I lodged the appeal himself but still wanted representation with his other claims. At the start of March the panel firm completed its review. It found none of Mr I's claims had reasonable prospects of success. Fairmead said it would withdraw cover.

In response to the complaint Mr I made Fairmead said it made clear it would only provide funding for his claim if he removed those elements that were assessed as not having reasonable prospects of success. It nevertheless agreed to seek a further opinion on prospects in January and provided funding to protect Mr I's position while that was done.

As the further opinion on prospects was unsupportive cover was withdrawn following that. But it accepted there had been occasions where its communication with Mr I could have been better and offered to pay £150 in recognition of that.

Our investigator didn't think Fairmead had done anything wrong in withdrawing cover for Mr I's claim or declining to pay for costs he'd incurred. And she thought its offer of £150 was enough to recognise the inconvenience he'd been caused by its service failings. She also noted Mr I had subsequently provided a new opinion from counsel on prospects which Fairmead was reviewing.

Mr I didn't agree. He said his complaint was about what happened after the strike out hearing on his claims had taken place; it wouldn't have made sense to withdraw any of them prior to that. After that Fairmead agreed counsel could represent him at the February hearing but this was postponed until April without his consent.

Fairmead hadn't then paid for further representation at the April hearing or the new prospects assessment from the barrister involved. He thought Fairmead should reimburse him for those costs which amounted to £2,700. And he said no cover had been put in place for his victimisation claim which his barrister had given better than reasonable prospects of success.

I issued a provisional decision on the complaint last month. I said:

*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

*The relevant rules and industry guidelines say Fairmead has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.*

*In this case I'm considering what happened since the final decision on Mr I's previous complaint which was in September 2022. It's a requirement of his policy that a claim must have reasonable prospects for the duration of the claim. It defines that as "for civil cases the prospects that you will recover losses or damage (or obtain any other legal remedy that the administrator has agreed to including an enforcement of judgement), make a successful defence or make a successful appeal must be at least 51%".*

*Mr I obtained a barrister's opinion on his claim in at the end of September which identified some elements had reasonable prospects of success. But Fairmead said it would only provide funding if Mr I agreed not to pursue the other elements of his claim. In response to our inquiries it said that was because pursuing all elements meant the overall claim didn't meet the policy terms.*

*However, I'm not clear why Fairmead couldn't have offered to fund those elements of Mr I's claim that had been assessed as having reasonable prospects. Mr I could then have decided if he wanted to pursue the claims and pay for those himself. That would have been in line with the legal advice from the panel firm who said at the end of September his options were to withdraw all claims save that of disability discrimination or "choose to pursue all claims pleaded and currently before the Employment Tribunal. This would mean you need to pay privately for legal costs for your claims that do not have reasonable prospects of success".*

*However, while I have concerns about the advice Fairmead provided here I don't think Mr I has lost out because of anything it got wrong. He didn't want to make a decision on which claims to pursue because he was waiting the outcome of a forthcoming strike out hearing.*

*He told us it wouldn't have made sense to withdraw any claims prior to that taking place. So even if Fairmead had given Mr I clearer advice on his options I don't think that would have led him to act any differently prior to the strike out hearing.*

*At that hearing I understand Mr I's claims weren't struck out. I don't agree with him that means they had reasonable prospects of success; the test as to whether a claim meets the threshold for strike out is different to whether it's likely to be successful or not. But Fairmead says given the outcome of the strike out hearing it decided to seek a revised opinion from a panel firm on whether this did make a difference to the previous assessment on prospects. I think that was reasonable and was treating Mr I fairly.*

*I also think, as there was an upcoming hearing which would take place prior to that assessment being completed, it was appropriate of Fairmead to fund the panel firm and counsel to prepare for that hearing and represent Mr I at it. I appreciate he doesn't feel counsel acted in his best interests in seeking a postponement of the hearing. However, if he's unhappy with the action of counsel or the panel firm he'd need to raise that as a separate complaint against either or both of them. Fairmead isn't responsible for the actions of the panel firm (or counsel) when carrying out their legal role.*

*And I think Fairmead acted appropriately when Mr I told it about the appeal hearing he wanted it to fund; it asked the panel firm if it could assist and when it couldn't offered to fund a solicitor of Mr I's choice if he was able to find one. I appreciate Mr I wasn't able to find a firm and had to lodge the appeal himself but, given the short timeframes involved, I don't think there was more Fairmead could reasonably have done here.*

*The panel firm produced its prospects assessment in early March. That concluded none of Mr I's claims had reasonable prospects of success. I think the opinion is properly written and reasoned and from someone qualified to give it. So I don't think in principle it was unreasonable of Fairmead to rely on this.*

*Where I do have a concern is that Mr I had previously produced an opinion from counsel which did give positive prospects on some elements of his claim. And our general position is that where there's conflict between the opinion of a solicitor or counsel it should be counsel's opinion that's preferred. I appreciate the prospects requirement is an ongoing one but I haven't seen there was any significant new evidence in relation to this since counsel issued his previous opinion.*

*Given that I think prior to withdrawing cover for all of Mr I's claim Fairmead should have obtained a further counsel's opinion on those parts that had previously been assessed as having reasonable prospects of success. So I've thought about whether Mr I lost out because it didn't do that.*

*I understand he paid for counsel to represent him at an April 2023 hearing of his claim and paid for a further opinion from counsel on the claim's prospects of success. That opinion was negative about most elements. Counsel did however give reasonable prospects for a victimisation issue. In relation to disability discrimination he said he wasn't in a position to review or update the assessment undertaken by the previous counsel. And Mr I would have to rely on the prospects assessment he provided (which put this at 55%).*

*I appreciate Mr I thinks Fairmead should reimburse the £2,700 he spent on this advice and related representation. But it's only matters which were previously assessed as having reasonable prospects of success I think Fairmead should have sought its own counsel's opinion about. So it's only costs relating either to that or any other elements of the claim that have now been shown to have reasonable prospects of success it could reasonably be expected to pay here.*

*In more recent correspondence with Mr I it offered to pay £200 towards the cost of the advice he obtained. It's calculated that on the basis the proportion of claims which were*

*assessed as enjoying reasonable prospects was around 17%. I appreciate this isn't an exact science but I think that's a fair way of recognising the additional costs Mr I incurred in obtaining advice because of what Fairmead got wrong. But I think it should pay on a similar basis for the costs he incurred in funding representation at the April hearing because at least some of that amount will relate to costs which would otherwise have been covered by his policy.*

*I appreciate Mr I didn't seek authorisation for those costs from Fairmead but that's because he'd been told cover had been withdrawn for his claim in its entirety when, as I've already found, Fairmead should have sought advice from counsel on part of it. The cost of representation at the hearing was £1,500 so a 17% contribution would equate to £255. That means Mr I should be paid a total of £455.*

*I also agree there have been some customer service failings in Fairmead's contact with Mr I. In particular it does appear to have caused some confusion over what role the panel solicitors would be carrying out once they were appointed in January 2023. But I think the £150 Fairmead has already offered does enough to recognise the impact of what it got wrong on Mr I.*

*Mr I is also unhappy with more recent decisions Fairmead has taken in relation to the funding of his ongoing claim (having considered the most recent opinion from counsel). But those are matters that would need to be considered as part of a separate complaint (and Fairmead would need the opportunity to respond before we could consider them)*

## **Response to my provisional decision**

Fairmead said it didn't have any objection to my provisional decision.

Mr I did provide some further comments. He said Fairmead hadn't paid the value of his victimisation claim despite offering to do so in June 2023 and being provided with evidence in relation to this. He thought compensation should be provided for this and for it not covering his disability discrimination claim.

And he said he was unhappy with the actions of his insurer after the preliminary hearing in April 2023 as highlighted in previous correspondence. He was also concerned he had no representation for forthcoming ET hearings.

## **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 I is unhappy with what Fairmead did in relation to the April 2023 hearing. And I've taken into account the comments he previously made about this and in particular the correspondence he's referenced from July this year.

In relation to the April hearing Mr I focused on the £2,700 costs he'd incurred. However, I set out in my provisional decision why I didn't think Fairmead should be responsible for all those costs. And I explained why I thought it was reasonable it should pay a total of £455 in relation to this. I haven't seen anything that would lead me to reach a different view on that.

I appreciate Mr I is unhappy about what subsequently happened and that Fairmead hasn't paid the value of his victimisation claim or provided cover for his disability discrimination claim. But, as I explained in my provisional decision, those aren't matters I'm considering. I'm only looking at events that took place prior to the final response Fairmead issued on the complaint in April 2023.

I know Mr I is concerned about his upcoming hearings but if he's unhappy with what Fairmead did (or didn't do) on his claim after April 2023 that would need to form part of a fresh complaint. And we could consider that once Fairmead had had an opportunity to do so. As part of our investigation we'd then look into whether Fairmead had got anything wrong and, if so, whether Mr I should receive compensation. However, that doesn't form part of this complaint and for the reasons I've explained I don't think there are grounds to change the outcome I previously set out on this.

### **My final decision**

I've decided to uphold this complaint. Fairmead Insurance Limited will need to pay Mr I £455 towards the legal costs he incurred. It will also need to pay him £150 in recognition of the distress and inconvenience it caused him.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr I to accept or reject my decision before 7 November 2023.

James Park  
**Ombudsman**