

The complaint

Mrs and Mr D's complaint is about a claim Mrs D made on her Aviva Insurance Limited legal expenses insurance policy.

Mrs D says Aviva didn't pay all of her legal costs and that this was unfair.

All references to Aviva in this decision include their claims handlers.

What happened

Mrs D had a dispute with her employer. In 2019 she took advice from her own Solicitors about it. At the time she contacted Aviva's Legal helpline to discuss a possible claim with them. The Legal helpline said that Mrs D's claim would need to have reasonable prospects of success in order for Aviva to cover the claim.

Mrs D's Solicitors then instructed a Barrister to advise on the merits of her claim against her employer. The advice received was that the claim didn't have reasonable prospects of success. As a result, Mrs D didn't pursue a claim on her Aviva policy. Instead, she decided to pursue the claim herself without their assistance through her own Solicitors.

As the claim progressed, the Barrister Mrs D's Solicitor instructed changed her view of the merits of the claim in light of the evidence presented by the parties. Following this, Mrs D's Solicitors made a claim on her behalf to Aviva for cover for her legal costs from that point onwards. Aviva considered the claim and agreed to fund Mrs D's costs.

In 2021 Mrs D won her claim at Tribunal and was awarded damages. At that point Mrs D's Solicitors asked if Aviva would consider backdating Mrs D's costs to 2019 when Mrs D first approached Aviva's Legal helpline. Aviva declined. They said they would only fund Mrs D's costs from the time the claim was actually submitted, and they had agreed to fund them. Aviva also said that Mrs D didn't submit a claim in 2019, but even if she had, the claim wouldn't have been covered because the advice she received from her Barrister at that time was that it didn't have reasonable prospects of success.

Unhappy, Mrs D referred her complaint to the Financial Ombudsman Service. Our investigator considered it and concluded that Aviva were entitled to decline the costs she incurred before they agreed to fund them as these accorded with their policy terms and it wasn't fair in this case to require them to fund costs they didn't authorise. Mrs D doesn't agree, so the matter has been passed to me to determine.

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 won't be upholding Mrs D's complaint. This is why.

The starting point is the policy terms. They say Aviva won't pay for "*costs and expenses*

which are incurred prior to our written agreement and authorisation”.

In this case, Mrs D didn't make a claim on the policy in 2019 and Aviva didn't provide their agreement to pay for her costs, so the terms don't require them to do so now. But even if that wasn't the case and Mrs D had made a claim, Aviva still wouldn't have covered her costs at that stage.

It's a requirement of virtually all legal expenses insurance policies that any intended claim has a reasonable prospect of succeeding. Mrs D's policy is no exception. That means her claim needed to have over 51% prospects of succeeding in order for Aviva to cover them.

We don't think this is unfair. Litigation can be expensive. A privately paying customer wouldn't want to bear the cost if advised it is unlikely to succeed. We wouldn't expect a legal expenses insurer to fund claims in these circumstances either. At that time the advice Mrs D obtained was that her claim didn't have reasonable prospects of success. If a claim had been made on the policy, Aviva would have declined it in reliance on their policy terms.

It was only when Mrs D received a positive legal opinion from her Barrister that her Solicitors made a claim on the policy on her behalf and obtained Aviva's written agreement to fund their costs. That's when Aviva became responsible for those costs. It wouldn't be reasonable in my view to require them to pay Mrs D's costs before this time.

I know that Mrs D doesn't feel the position Aviva have taken is fair in this case. She feels that she's been deprived of the cover she was entitled to and given the subsequent positive legal assessment by her Barrister and the outcome of her claim, it's reasonable to assume that had all the evidence been available from the outset, Aviva would have covered her claim. That might be right but that doesn't mean it's fair for Aviva to fund the claim, for the reasons I've mentioned. That fact that Mrs D chose to pursue the claim further after she was given a negative assessment by her Barrister was a matter for her, but that's not the same risk we'd expect an insurer to take. And whilst this risk ultimately paid off for her, we wouldn't apply the benefit of hindsight when considering whether a claim was one that ought to have been funded- and we wouldn't usually expect an insurer to pick up costs that it hadn't agreed to from the outset.

Mrs D has said this is an exceptional case because she had already notified the claim to Aviva in 2019, so the claim isn't for retrospective cover in the usual sense. She's referred to other cases the Financial Ombudsman Service has decided where insurers have been directed to pay costs incurred before they agreed to fund them. I understand the points that Mrs D is making but I don't agree that the circumstances in this particular case are ones where I think it would be reasonable for Aviva to fund her costs before they agreed to pay them. And I can't comment on cases we've decided in the past. I can only comment on the specific circumstances of Mrs D's complaint. The approach I've applied to it is consistent for what we've decided in similar circumstances.

I know my decision will be disappointing for Mrs D, but I hope I've provided her and Mr D a thorough explanation of why I won't be upholding their complaint.

My final decision

For the reasons set out above, I don't uphold Mrs and Mr D's complaint against Aviva Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D and Mr D to accept or reject my decision before 24 December 2023.

Lale Hussein-Venn
Ombudsman