

The complaint

Ms B and Mr T complain about their legal expenses insurer, Soteria Insurance Limited (Soteria). They say they've failed to agree appropriate hourly rates for Ms B's solicitors to pursue her employment claim or to authorise enough time for the necessary legal work to be done, bearing in mind their vulnerabilities and the impact of their medical conditions.

Ms B and Mr T are represented in bringing their complaint. But, for ease, I generally refer to Ms B and Mr T throughout my decision.

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

What happened

Ms B and Mr T took out legal expenses insurance (LEI) with Soteria as part of their home insurance. Ms B made a claim against her former employer for unfair dismissal and disability discrimination through her own solicitors. Soteria agreed to fund the claim subject to the solicitors agreeing their standard terms and conditions of appointment.

Under the terms and conditions of the LEI policy, Soteria agreed to pay solicitors' fees at the hourly rate of £120. Ms B and Mr T's solicitors charged a higher rate. They felt it was unfair they should have to pay the difference. And they complained too about the number of hours work Soteria would pay for.

Soteria didn't uphold their complaint. They said it was a requirement of the LEI policy that the non-panel solicitors Ms B and Mr T had appointed should agree their standard terms and conditions of appointment. The policy had set out the hourly rate they'd pay. They'd taken Ms B and Mr T's vulnerabilities and the complexities of Ms B's case into account in the time and costs they'd authorised. And they'd agreed more hours than they'd usually have paid for given the nature of the claim involved.

Since Ms B and Mr T didn't accept the outcome, they brought their complaint to the Financial Ombudsman Service. Our investigator thought Soteria had reasonably relied on their own solicitors' advice about costs and acted fairly. Since they were unhappy with that view, Ms B and Mr T's complaint was passed to me to decide. I recently issued a provisional decision, followed by a second provisional decision in light of developments. Extracts of both are set out below.

First provisional decision

"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.

Based on what I've seen so far, I've come to the same outcome as our investigator. Since my reasons are more detailed, I'm issuing a provisional decision to give the parties the chance to make further comments before I issue a final decision.

Ms B and Mr T say Soteria have indirectly discriminated against them in relation to disability. It's for the courts to decide whether the Equality Act 2010 has been breached. I've taken it into account when deciding this complaint, as it's relevant law. But ultimately I've decided this case based on what's fair and reasonable. I note Ms B and Mr T's circumstances and I'm sympathetic to the difficulties they face with memory loss and other health conditions. But, as I'll explain, I don't think Soteria have acted unreasonably or treated Ms B and Mr T unfairly in the circumstances of this complaint.

The policy covered "**Legal Costs**" which were defined as:

"Reasonable, necessary and proportionate legal fees, expenses and **Disbursements**:

(a) incurred by **Your Legal Representative** with **Our** prior agreement after **We** have accepted **your** claim and which **You** are unable to recover elsewhere:

and

(b) incurred by the other party which **We** agree to pay or which **You** are ordered to pay by a court order.

We will not pay more than £50,000 in total for any one **Insured Event**."

The policy conditions also said that if Soteria accepted Ms B and Mr T's choice of legal representative and agreed to cover their legal costs, the most they would pay would be no more than the amount they would have paid to their panel solicitors which, at the time, was £120 an hour.

Soteria contacted Ms B and Mr T in February 2022 when the LEI claim was referred to them. They noted the urgency of the situation, explained their involvement and confirmed LEI cover, subject to certain things being clarified. They set out the limits on the hourly rate they would pay, and that time and costs had to be authorised in advance.

Under the terms and conditions of Ms B and Mr T's LEI cover, there was no requirement on Soteria to agree to the appointment of Ms B's own solicitors until negotiations had failed and it was reasonable, necessary and proportionate to issue legal proceedings to move the claim forward. Ms B had the option of appointing Soteria's panel solicitors to act for her at no cost to her. And the solicitor Soteria say would have acted for Ms B if that had happened had the appropriate experience and qualifications to handle her claim at the hourly rates set out in the policy. So, she had a choice of solicitors at that stage.

At the beginning of March 2022, Soteria responded to Ms B and Mr T's concerns about the hourly rate they were prepared to pay the solicitors. They said their solicitors' failure to agree the hourly rate had limited Ms B's chances of using other solicitors given court deadlines were approaching, but they didn't rule it out completely. They pointed out the solicitors' time estimate seemed excessive, they wouldn't pay for more hours than they agreed with the solicitors and the costs of any disputed hours may fall to Ms B.

I think Soteria made their position clear to Ms B and Mr T. And what they said was in line with the terms and conditions of the policy. I appreciate Ms B and Mr T preferred to stay with their existing solicitors. And Soteria were agreeable to that. But I don't think it was unreasonable for Soteria to ask the solicitors to accept their standard terms and conditions, the hourly rate and the hours they proposed.

It's a common requirement of LEI policies that a policyholder's own solicitors should agree an insurer's standard terms and conditions and one we don't consider to be inherently unfair. It's reasonable for LEI insurers to be able to control the level of legal costs they may become liable for to ensure they are reasonable and proportionate, and don't exceed the policy limit. The requirement was set out in Ms B and Mr T's LEI policy. So, whilst I understand Ms B's solicitors were initially reluctant to agree to the terms and conditions, I don't think it was unreasonable for Soteria to insist they did.

Ms B and Mr T say they didn't realise solicitors would charge higher rates than the policy would cover and wouldn't have taken it out if they had. But I can't consider a complaint about Soteria in relation to the sale of the policy since they weren't involved in that. The policy set out that if Soteria agreed to the appointment of Ms B and Mr T's own solicitors, and they agreed to cover their legal costs, the most they would pay would be no more than they would have paid their panel solicitors. And Ms B and Mr T would be responsible for any legal costs that fell outside that rate or any other rate that had been agreed. The hourly rate was also set out in the policy. So, it was reasonable for Soteria to limit the hourly rate they would pay to £120.

Soteria's panel solicitors said Ms B's claim wasn't particularly complex and thought the time Ms B's solicitors estimated they'd spend on it was excessive. I appreciate Ms B's solicitors didn't agree with that. But I think it was reasonable for Soteria to rely on their solicitor's advice about what it was fair for them to cover – he was suitably qualified; he'd taken Ms B and Mr T's vulnerabilities and, later, their medical evidence into account in coming to his view; he recommended additional time be allowed for some of the work; and I'm satisfied there's nothing obviously wrong with the advice he gave. Soteria were responsible for *"Reasonable, necessary and proportionate legal fees..."* as I've noted. The time I've seen Soteria said they'd pay for was reasonable based on the advice they received. And I understand Soteria have recently agreed additional hours for negotiations and/or the final hearing to take account of Ms B and Mr T's circumstances.

I note Soteria were considering costs and commenting on the hours they were prepared to agree even though the solicitors didn't sign the agreement until around mid-May 2022. So, it's not fair to blame Soteria for any delays or inconvenience that might have arisen because the terms hadn't been agreed.

On balance, bearing everything in mind, I think Soteria have acted fairly and reasonably. Whilst I understand Ms B and Mr T will be disappointed, I don't intend to uphold their complaint.

My provisional decision

For the reasons I've explained, I don't intend to uphold this complaint."

I summarised the **"Developments"** after my first provisional decision as follows:

"Ms B and Mr T's solicitor and representative has responded to my provisional decision on their behalf. He's told us Ms B's legal claim has been settled. He says there were other steps that could have been taken to get a more favourable settlement, but Ms B felt pressured into settling because Soteria had consistently pushed back over funding the claim.

The representative made several points in relation to my provisional decision and has since responded to my request for further information and provided more documents, for which I'm grateful. I'll summarise the main points he's now made:

1. He acknowledged it was for the courts to decide if the Equality Act 2010 had been breached. But Ms B and Mr T were asking for a finding on whether Soteria had behaved reasonably given all the circumstances, whether they should have done more and whether they have provisions to assist disabled people.
2. Ms B didn't have a meaningful choice of solicitor since there was only one alternative solicitor Soteria said she could instruct.
3. Soteria had always authorised fewer hours than Ms B's solicitors anticipated would be necessary for the work they had to carry out for her.
4. Soteria's claims handlers had "micro-managed" the case, which was unnecessary since the reasonableness of the costs incurred could be reviewed at the end of the case. It had impeded the progress of the case and was contrary to the rules of natural justice.
5. The case was complex, and it was necessary for a senior lawyer to deal with it. The nature of Ms B's health condition meant it was difficult to take instructions from her, determine quantum and decide on how to present evidence. It was appropriate for the senior solicitor to take charge. The LEI insurer will have the opportunity of giving their view on whether particular pieces of work might have been delegated during the costing process.

Soteria has made the following key points:

1. The representative signed their standard terms and conditions so agreed to be paid at the hourly rate set out in the policy.
2. They can't comment on what the final costs/hours will be as they haven't seen the solicitors' final bill. They've authorised around 90 hours and the solicitors were asking for an additional 50 hours to be authorised.
3. At the agreed rates, they've funded around £11,000 plus VAT plus disbursements; at the rates the solicitors are asking for the costs would have been around £20,000 plus VAT plus disbursements.
4. The higher rate wasn't agreed, and the solicitors continued to act regardless. If higher rates had been considered, Soteria would have declined the LEI funding as the claim wouldn't have been proportional to the funding required.
5. They agreed a considerable number of hours because of Ms B's circumstances taking into account, for example, her communication needs.
6. Based on the information they have, none of the work was done by the solicitor whose rate they are being asked to pay.
7. They are concerned about the way in which the solicitors have acted as they have breached the LEI in a number of ways, but in Ms B's interests they haven't terminated the funding."

I considered these points and came to a second provisional decision.

Second provisional decision

"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've carefully reviewed the complaint in light of the points the parties have made and I've changed my mind about the outcome in some respects. I am therefore issuing a second provisional decision to allow further comments before I issue a final decision.

My role is to consider individual complaints, so I won't comment on Soteria's wider policies for supporting disabled people. If Ms B and Mr T wanted to raise concerns about Soteria's policies, they'd need to approach the Financial Conduct Authority.

I now understand Ms B's claim against her employer arose following her dismissal in July 2021 that took effect in early October 2021. She appointed her lawyers to represent her in around November 2021. The date by which proceedings had to be issued isn't clear. But once proceedings were necessary, it was reasonable - and the policy allowed her - to appoint her own solicitors.

In considering whether it was fair and reasonable for Soteria to restrict the solicitors' hourly rate to £120, I've kept in mind the court's position in *Brown-Quinn & Anor v Equity Syndicate Management Ltd & Another* [2012] EWCA Civ. 1633. In that case the court found that legal expenses insurers had the right to restrict what they would pay to a non-panel firm provided the remuneration wasn't so low as to render the policyholder's freedom of choice meaningless. In this case that means Soteria needed to have offered Ms B and Mr T a reasonable choice of suitably qualified solicitors who would act at the hourly rate they were willing to pay.

Soteria said that their panel firm was willing to act for Ms B and able to do so at the hourly rate in the policy. But Soteria could only offer one panel firm. More recently, when Ms B's solicitors said they might stop acting, Soteria said they couldn't offer an alternative at all. And Soteria haven't shown us evidence of other firms who could have acted for Ms B at the policy rate.

On reflection, I don't think Ms B had a meaningful choice of solicitors. In the circumstances, it's fair for Soteria to pay her own solicitors' reasonable, necessary and proportionate legal fees, expenses and disbursements, subject to the remaining terms and conditions of the policy.

I've noted Soteria's point that Ms B's solicitors continued to act after signing their standard terms and conditions. It's clear from the correspondence that Ms B's rights to challenge the hourly rate were reserved. Soteria continued to deal with Ms B's solicitors on that basis even though they didn't agree the reservation of rights. I don't think that affects things. Ms B had the right to complain. So, I've thought about the rate that would be reasonable here.

Given their location and their expertise in the field of employment law, it was reasonable for Ms B and Mr T to appoint the solicitors they did. They were local, and suitably qualified to help.

Although Ms B's solicitors say her claim was complex, Soteria dispute that. Counsel originally described the case as "a classic example of an employee being dismissed because of something arising in consequence of a disability". Although issues arose in determining its value, on balance, I don't think the subject matter of the claim was out of the ordinary.

Any complexity arose because of Ms B and Mr T's particular communication needs. I think it's reasonable Soteria should pay the costs of a more senior and experienced solicitor in communicating with Ms B and Mr T. From what I'm told, the solicitor in question was a Grade A fee earner. But it seems likely more junior lawyers could have provided support with day-to-day procedural issues and drafting. The solicitors have explained that unqualified staff dealt with administrative tasks, including dealing with the LEI insurers, and that time wasn't charged for that.

Looking at the court guideline hourly rates, I can see they were as follows at the relevant time:

- Grade A fee earner - £261
- Grade B fee earner - £218
- Grade C fee earner - £178
- Grade D fee earner – £126

Bearing everything in mind, and in the absence of full information about who carried out all the work, I think it would be reasonable for Soteria to pay a blended rate of all levels of fee earner. That gives an hourly rate of £195.75.

Soteria have authorised the work the solicitors carried out as the case has progressed. They have managed the costs closely through their costs lawyers in line with the policy conditions that they would only pay reasonable, necessary and proportionate legal fees, expenses and disbursements which they had authorised in advance. Ms B's solicitors expect Soteria to assess their costs at the end of the case. They say, because of that, the close control Soteria has had over costs during the case has been unfair and has impeded the progress of the case. Even if there was clear evidence of that, I'm not persuaded Soteria acted unfairly for the reasons I've set out before. They were entitled to make sure the costs remained proportionate, and they took Ms B's circumstances into account.

Soteria say that if they'd agreed a higher rate, the costs would have become disproportionate, and they would have withdrawn cover. I'm not persuaded they would. Counsel initially advised in February 2022 there were reasonable prospects of success, and the value of the claim was between approximately £27,000 and £32,000. In May 2023 Counsel said the claim was worth between £15,000 and £30,000 but advised there were risks and offers over £15,000 should be considered. Soon afterwards a settlement was reached. It seems likely the claim would have followed a similar route even if the hourly rate had been agreed at a higher level. Soteria would probably have required settlement to be explored since costs were becoming disproportionate then.

I don't think it's fair to blame Soteria for Ms B deciding to settle the case when she did. There's no guarantee her damages would have been any higher even if the discovery application the solicitors say they could have made had gone ahead. The application may not have succeeded and it's too speculative to say it would have resulted in a different outcome for Ms B even if it had. It's possible, given the advice on quantum, that Soteria would have been justified in declining any further funding on grounds of proportionality in any event.

Finally, I noted in my first provisional decision that the LEI insurer hadn't sold Ms B the policy. Following clarification about the LEI insurer at the relevant time, that statement is wrong. Soteria did sell the policy to Ms B and Mr T. I note Mr T said, broadly, he wouldn't have taken the policy out if he'd known the rate was less than solicitors would charge. But the rate was clear, and, in any event, the issue doesn't affect the outcome of this complaint.

Bearing everything in mind, I intend to uphold Ms B and Mr T's complaint in part and direct Soteria to pay Ms B's solicitors' costs at the rate of £195.75 subject to the remaining terms and conditions of the LEI policy. That will include condition "7. Costs" which requires Ms B and Mr T to send Soteria their legal bills and to have them assessed by the court if Soteria ask them to; and where there is a dispute between Soteria and Ms B's solicitors, that must be resolved in accordance with the procedure set out in the standard terms of appointment which the solicitors signed up to.

My provisional decision

I intend to uphold Ms B and Mr T's complaint in part and direct Soteria to pay Ms B's solicitors' costs at the rate of £195.75 subject to the remaining terms and conditions of the LEI policy."

Developments following my second provisional decision

Ms B and Mr T haven't commented on my second provisional decision.

Soteria have made several points and provided documents that I've already seen and considered. In summary, they've said:

1. It's unclear if Ms B has been billed.
2. There is no valid contract in place relating to the LEI funding since the terms and conditions weren't agreed. The reservation of rights in relation to the hourly rate isn't valid or ethical.
3. They made clear the level of contribution they would make to the costs and what Ms B and Mr T would be liable for. They set out their position to the representative in the emails they provided.
4. If the representative was unwilling to work for the rate Soteria would pay, it could have withdrawn from the case and Ms B and Mr T could have sought alternative legal representation.
5. They don't agree Ms B and Mr T didn't have a choice of legal representative. They could have appointed any other firm "*through their Freedom of Choice option (and hundreds of firms are willing and able to conduct such work for the pre-agreed rates)*". Soteria told Ms B and Mr T this.
6. It isn't Soteria's responsibility as insurer to find or recommend legal representatives for their policyholders if they don't want to use their panel solicitor.
7. The representative isn't a firm of solicitors so it's not appropriate to use the court guideline hourly rates to determine an appropriate hourly rate. The only solicitor in the company charges at a rate of £220. It's inappropriate to use the blended rate I've proposed.

I've carefully considered Soteria's points and will now go on to give my final 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.

Soteria's raised concerns about the solicitors' intentions relating to payment of their fees by Ms B. They have confirmed to us that they will charge Ms B their full rate of £220 an hour so that she would be liable to pay the difference between that rate and the rate Soteria pay.

I've noted Soteria's points about whether the LEI funding agreement is a valid contract given the reservation of rights. Soteria continued to fund the claim and the solicitors carried on dealing with it knowing no agreement had been reached on the hourly rate and that the issue was being referred to the Financial Ombudsman Service on behalf of Ms B and Mr T for consideration. Each party was clear about its respective position. In the circumstances, I think it's reasonable for me to come to a decision about the rate that is fair, leaving aside any technical legal arguments that might arise about the enforceability of the funding agreement. That reflects my role, which is to decide what's fair and reasonable, taking into account all the circumstances rather than applying the law strictly in the same way a court would.

I think Soteria may have misunderstood our approach about choice of solicitors. The effect of *Brown-Quinn & Anor v Equity Syndicate Management Ltd & Another* [2012] EWCA Civ. 1633 is that legal expenses insurers have the right to restrict what they would pay to a non-panel firm provided the remuneration isn't so low as to render the policyholder's freedom of choice meaningless.

We'd expect Soteria to show us there was a choice of more than one panel solicitor and/or non-panel solicitors who would be willing to act at the hourly rate set out in the policy. Soteria say there are hundreds of firms who would have represented Ms B at that rate. But they haven't provided any evidence of that. So, they haven't demonstrated that they gave her a meaningful choice of solicitors.

I was aware of Soteria's point that the representative firm isn't a firm of solicitors, but a claims handling company and have taken that into account. They say the only solicitor in the company charges at £220 an hour. And they say it isn't appropriate to use the solicitor guideline rates to determine the appropriate hourly rate to charge here. They haven't proposed an alternative.

I'm not aware of the qualifications of all the staff members involved in handling Ms B's case. But the company involved specialises in employment law and was carrying out legal work for Ms B. So, for that reason and the points I've set out previously, I think it's reasonable to use the court guideline hourly rates as a basis for deciding a fair rate.

Bearing the above in mind, I see no reason to change my mind about the outcome of this complaint. I still think it should be resolved on the basis set out in my second provisional decision.

Putting things right

Soteria should pay Ms B's solicitors' costs at the rate of £195.75 subject to the remaining terms and conditions of the LEI policy.

My final decision

I uphold Ms B and Mr T's complaint and direct Soteria Insurance Limited to pay Ms B's solicitors' costs at the rate of £195.75 subject to the remaining terms and conditions of the LEI policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B and Mr T to accept or reject my decision before 4 January 2024.

Julia Wilkinson
Ombudsman