

## **The complaint**

Mrs M and Mr M complain Amtrust Europe Limited declined their claim under their legal expenses insurance policy.

## **What happened**

Mrs M and Mr M had legal expenses insurance (LEI) with Amtrust Europe Limited. Mr M made a claim for cover to take legal action against a third party for failing properly to deal with his data.

Amtrust initially declined the claim on grounds there was no cover under the LEI policy for claims of that sort. They said Mr M could take advice through their legal helpline. Mr M didn't agree. He said he was entitled to cover to pursue legal action against the third party arising from a dispute about statutory rights related to his contract of employment.

Amtrust took legal advice. The solicitors said Mr M was an office holder, not an employee. It was unlikely he was covered under the employment section of the policy. They hadn't seen any evidence the relevant privacy policy formed part of any breach of contract he might be able to establish. They hadn't identified any quantifiable loss and couldn't say a claim for breach of contract had reasonable prospects of success. They couldn't advise whether a claim for breach of data protection legislation would be regarded as a statutory right related to Mr M's contract of employment. But they said that any such claim was unlikely to have reasonable prospects of success.

Amtrust declined the claim on the basis of the solicitors' advice and sent a copy to Mr M. They said he could send further information and documentation and they'd arrange for the solicitors to review it and consider whether it changed their legal assessment of his claim. They said too he could submit a legal assessment from a solicitor of his own choice at his own cost. If it was supportive of his claim, they would then fund a barrister's opinion. And if that supported Mr M's case, they would then accept the claim.

Mr M made several points in response to the solicitors' advice and submitted an opinion from a barrister who had advised him on another matter. He said, in summary:

- The barrister's opinion supported his position that as an office holder he had the same protection as an employee.
- Although the solicitors were right to say he couldn't pursue the claim in the employment tribunal, the policy didn't require that, and he could bring a claim in the county court.
- The duty to comply with data protection legislation is a statutory right. The solicitors were wrong to say he'd need to show it was a term of a contract with the third party that they should comply with the legislation in order to bring a claim.
- The third party had also breached human rights law.
- There is an implied term in every contract of employment that an employer should comply with appropriate legislation.
- The solicitors were wrong to say Mr M wouldn't be able to obtain an award of compensation.

- Amtrust were unfair in seeking advice from lawyers who had little knowledge of the relevant law.
- He proposed Amtrust fund an opinion from a barrister he identified.

Amtrust referred the new information to their underwriters. They continued to decline the claim. Mr M then referred Amtrust to previous claims where they had treated individuals in his role as employees despite initially declining the claims on the same grounds as they were declining his current claim. But Amtrust didn't change their mind and dealt with Mr M's concerns as a formal complaint.

Amtrust didn't uphold the complaint for the reasons they'd already discussed with Mr M. So, he brought the complaint to the Financial Ombudsman Service. Our investigator said it had been fair for Amtrust to rely on the advice of their solicitors. She noted they'd said the claim didn't fall within the terms of the policy and, even if it had, the claim didn't have reasonable prospects of success. And she thought Amtrust had reasonably declined the claim.

Mr M didn't agree. And he was unhappy our investigator hadn't addressed the points he'd raised in correspondence with Amtrust including, in summary:

- The Supreme Court case that established that an office holder – like him – had substantially all of the rights of an employee.
- Previous litigation where Amtrust had provided cover under a similar policy.
- Even if he didn't have employee rights, the terms of cover include pursuing a "related statutory right".
- The solicitors' advice didn't make sense and was wrong – although he accepted an appropriate fee earner had dealt with the matter – and it wasn't right for Amtrust to rely on it.
- He'd made a reasonable proposal that Amtrust should take advice from a barrister he'd identified.

Since the complaint hasn't been resolved, it's been passed to me to decide.

### **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 M's strength of feeling about this complaint. I'm grateful for the detailed information and comments he and Amtrust have provided. I may not mention everything they've said. No discourtesy is intended by that. It simply reflects the informal nature of the service we provide. I note Mr M's comments that Amtrust have accepted other claims in similar circumstances. But I can only look at the individual circumstances of this complaint. And, whilst I understand Mr M will be disappointed, I've come to the same outcome as our investigator for broadly the same reasons, as I'll explain.

In line with relevant Financial Conduct Authority rules, we expect insurers to handle claims promptly and fairly and not to decline claims unreasonably. I've considered this complaint against that background. The starting point is the LEI policy.

Subject to the terms, conditions and exclusions in the policy Mrs M and Mr M had LEI cover for legal costs incurred up to a certain limit in relation to disputes arising out of several events. Of those events, the only potentially relevant one here is "**Employment Disputes**".

The policy provided cover under that section for:

***“Standard advisers’ costs to pursue a legal action against an employer, prospective employer, or ex-employer, arising from a dispute relating to your contract of employment or related statutory rights.***

*A dispute is deemed to have occurred once all internal dismissal, disciplinary and grievance procedures have been brought or ought to have been concluded.”*

In order for there to be cover, the claim had to be against an employer, and any dispute had to be either about an employment contract or about a statutory right related to an employment contract.

Mr M acknowledges that his role makes him an office holder, not an employee. The barrister’s opinion he’s provided confirms that. On that basis alone his claim under the policy fails. He has no claim against an employer and no contract of employment so any claim in relation to his statutory rights isn’t connected to either. I think Amtrust were right to say the policy didn’t provide cover.

Amtrust sought legal advice about Mr M’s claim. I’ve noted all the concerns Mr M’s made about the conclusions the solicitors reached. I can’t comment on legal issues, only whether Amtrust could reasonably rely on the solicitors’ advice.

I’m satisfied the advice was obtained from a solicitor with the appropriate qualifications and experience to advise on the issues that arose here – and Mr M doesn’t challenge that. They’d considered the documentation Mr M had submitted to support his claim. As a lay person, I don’t think there are any obvious mistakes or factual inaccuracies that would mean I could ask Amtrust to disregard the advice. In all the circumstances, I think it was reasonable for Amtrust to rely on what the solicitors said.

The solicitors advised, amongst other things, that Mr M wasn’t an employee and therefore not likely to be entitled to cover under the Employment Disputes section of the policy. I note the point Mr M made that the solicitors didn’t reach a conclusion about whether the policy covered his claim. But they did conclude he wasn’t an employee. And Amtrust were entitled then to come to a decision about cover bearing that in mind.

I note Amtrust said they’d ask the solicitors to consider further information Mr M submitted. I’m not aware they sent the barrister’s opinion he provided or the further points he made to them. On balance, I don’t think that was unreasonable. The barrister’s opinion confirmed the role Mr M performed didn’t make him an employee, but an office holder. It supported the solicitors’ view Mr M didn’t have a contractual relationship with the body he wished to sue. And the remaining issues covered by the opinion were about statutory rights Mr M had even though he wasn’t an employee.

I think it was fair for Amtrust to conclude that since there was no contractual relationship between him and the third party, any data protection claim he might have wasn’t related to an employment contract. Any claim that might arise would be based on breach of statute and the policy didn’t provide cover for that. I’ve noted Mr M’s point that there is no exclusion under the policy for claims about data protection issues. But there is no section of the policy that provides cover for that separately, so the absence of an exclusion is irrelevant.

Even if the policy had provided cover, for a claim to succeed it had to meet the terms and conditions of the policy. It was a condition of the policy that any claim must have reasonable prospects of success. That’s a common term in LEI insurance and one we consider reasonable. We wouldn’t expect a private individual to incur costs in pursuing a claim which is unlikely to be successful. And we don’t think it’s fair to require an insurer to do so either.

Prospects of success were defined in Mr M's policy as follows:

*"There must be a 51% or greater chance of winning the case or achieving a positive outcome. A positive outcome includes, but is not limited to, recovering the amount of money at stake, enforcing a judgment or achieving an outcome which best serves **your** interests. The assessment of **your** claim and the prospects of its success will be carried out by an independent **adviser**. If the **adviser** determines that there is not a 51% or greater chance of success, then **we** may decline or discontinue support for **your** case."*

And the policy conditions said:

*"**You** only have cover under this policy where there is a 51% or greater chance of winning the case or achieving a positive outcome.*

*At any time **we** may, but only when supported by independent legal advice, form the view that **you** do not have a 51% or greater chance of winning the case and achieving a positive outcome. If so, **we** may decline support or any further support. Examples of positive outcome are:*

- a) Being able to recover the amount of money at stake;*
- b) Being able to enforce a judgement;*
- c) Being able to achieve an outcome which best serves **your** interests."*

The solicitors assessed the prospects of success at ten per cent or less. It was fair for Amtrust to decline the claim on that basis.

Amtrust said they would consider any advice from Mr M's own solicitors, provided it met certain requirements, obtained at his own cost. And if the advice was supportive they would obtain Counsel's advice and act in accordance with that advice. I appreciate Mr M would prefer Amtrust to agree to appoint a barrister he's identified to advise. But their proposal is a reasonable way of taking things forward if Mr M doesn't accept Amtrust's position.

Bearing everything in mind, 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 M and Mr M to accept or reject my decision before 24 November 2023.

Julia Wilkinson

**Ombudsman**