

## **The complaint**

Mrs B and Mr E complain about the decision by DAS Legal Expenses Insurance Company Limited to withdraw cover following a claim on their legal expenses insurance policy.

## **What happened**

The policy is in the joint names of Mrs B and Mr E but the complaint only concerns a claim Mr E made for legal expenses cover concerning an employment tribunal case and a personal injury claim arising out of the same issues.

Cover was provided on the basis of legal advice he had obtained but was withdrawn in 2019 following advice that his case no longer had reasonable prospects of success. Mr E complained about that decision. When that complaint was referred to this service an ombudsman issued a decision that DAS' decision to withdraw cover was fair on basis of the legal advice it had received.

Mr E made a further complaint in November 2021 and DAS issued a response in March 2022. Mr E says after this, DAS admitted it never investigated his complaint that the panel solicitor who had advised on the case had a conflict of interest and that it had failed to follow its usual policy; it should have offered to appoint his own solicitor because of the conflict and offered to have another assessment from a more qualified solicitor.

Further correspondence about this led to DAS issuing a supplementary complaint response in February 2023 addressing a number of additional points.

Mr E referred to a statement on DAS' website which said if a policyholder disagreed with a prospects assessment, a senior solicitor could be asked to provide an opinion. He said this hadn't been offered. DAS said the legal advice was from a senior associate and supervising solicitor, but it accepted that it hadn't asked the panel solicitors to review his comments challenging its assessment.

DAS offered to reimburse the legal fees Mr E had incurred to instruct another firm of solicitors to act on his personal injury claim. It said he wouldn't have had to incur legal fees if it had obtained his authority to instruct another panel solicitor at that time. DAS said on receipt of copy invoices, it would reimburse costs he'd paid.

Mr E didn't accept the offer and referred the complaint to this service but our investigator didn't think the complaint should be upheld. She said

- This service had considered the decision to withdraw cover in a previous complaint so that could not be looked at again.
- DAS' admission that it didn't investigate the issue about the solicitor having a conflict of interest wasn't material new evidence that would be likely to affect the outcome of the previous complaint.
- Mr E referred to a statement on DAS' website that if a policyholder disagreed with a panel solicitor's assessment, a more senior lawyer would review their comments. But a statement on its website wouldn't be relevant when the policy terms and conditions didn't make any reference to it.

- The panel solicitors' conflict was also considered in the previous complaint.
- The offer to reimburse his legal fees was fair.

Mr E disagrees and has requested an ombudsman's decision. He's made detailed comments. I won't set them out in full but they include:

- The previous ombudsman failed to deal with the issue about there being a conflict of interest.
- The investigator is refusing to consider new evidence that in 2022 DAS admitted it had failed to follow the policy and investigate the conflict of interest.
- The view is irrational in not considering DAS' admissions about not complying with the policy terms. DAS should have allowed him to choose his own solicitor.
- The view should have taken into account the admitted error by DAS and assessed his losses according to negligence and contract law.
- The view doesn't take into account the stress and ill health he has suffered as a result of having to get his own legal advice.
- The ombudsman should direct DAS to pay all his legal costs to pursue a claim against it for breach of contract and negligence. This will allow a judge to calculate his losses under the relevant law.

### **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.

Mr E has made a number of complaints to this service. Some of these have been, or are being, considered separately. This complaint only concerns the withdrawal of cover for his personal injury claim. He's provided detailed comments but although I have considered them all I won't refer to everything in detail. That's due to the limits on what I can consider in this complaint and in line with our approach, which is to resolve complaints quickly and with minimal formality.

We have already considered a complaint from Mr E about the decision to withdraw cover for his personal injury claim and an ombudsman issued a final decision about that. This means I can't review the decision to withdraw cover as that has already been determined.

Mr E says a new issue has arisen since the ombudsman's decision – DAS has since admitted that it failed to follow the policy terms in 2019 because it didn't consider that if the panel solicitor was conflicted, he had the right to appoint his own solicitor. Mr E considers this is new evidence which means we should look again at the decision to withdraw cover.

Even if DAS has admitted it didn't investigate the conflict of interest, this is ultimately a professional issue for a solicitor when they receive instructions to act on a matter. If a solicitor thinks they're conflicted, they would refuse to act. And the ombudsman addressed this and said it was a professional matter and not a matter for DAS. So the point about whether there was a conflict of interest was considered at the time. In the circumstances I don't think it was necessary for DAS to revisit this. Whether DAS did or didn't investigate that, ultimately it was a matter for the solicitor.

This isn't new evidence that would make a difference to the outcome so there's no reason to review the decision made in 2019. I have considered whether, in light of the further issues Mr E raised, DAS should have reconsidered the claim or taken any other action. But on this point, the outcome of any further action would have been the same – it was in the end a matter for the solicitor.

The other issue Mr E has raised is about a statement on DAS' website that if a policyholder

disagreed with a panel solicitor's assessment, a more senior lawyer would review their comments. He says DAS didn't ask the panel solicitors to review his challenge to their prospects assessment.

The definition of 'reasonable prospects' in Mr E's policy terms said: "*....we or a preferred law firm on our behalf will assess whether there are reasonable prospects.*" There was no reference to a more senior lawyer reviewing a policyholder's comments disagreeing with the prospects assessment. A statement on DAS' website wouldn't in itself overrule the policy terms. DAS underwrites different policies with different terms and conditions and a statement like this wouldn't necessarily apply to every policy.

Having said that, if a policyholder challenges an assessment and provides new information it would be reasonable to expect an insurer to refer that to the solicitors to see if it changes their advice.

However, Mr E had already provided his own barrister's advice to the panel solicitors. The solicitors reviewed the advice and said things had changed since that advice was given; there had been developments since, which had led to the negative prospects assessment.

The ombudsman's decision on the previous case said it was reasonable for DAS to rely on the panel solicitor's assessment. Mr E later asked DAS to reconsider on the basis of the statement on its website. I appreciate DAS accepted it hadn't asked the panel solicitors to review Mr E's challenge to the assessment. But a statement on the website wouldn't in itself overrule the policy terms. And the panel firm's assessment on prospects had been provided by a Senior Associate and supervising solicitor. So it had already been considered by someone senior.

Taking all of these things into account I don't consider the fact DAS has accepted that it didn't ask the panel solicitors to review the assessment again means DAS should have done anything different after Mr E raised this.

DAS accepted there had been some instances of poor service and that Mr E had instructed his own solicitors, which might not have been necessary otherwise. It made an offer to reimburse legal costs Mr E incurred to instruct solicitors and I understand these have been dealt with separately, so there's nothing further for me to add in relation to this.

I appreciate these matters have been ongoing for some years and have been very difficult for Mr E. He's explained the impact on his health. But taking all of the above into account, I don't think the additional points he has raised are grounds to reconsider the original decision to withdraw cover or to find DAS at fault in the way it responded to the additional points. Mr E is not entitled to cover under his policy for the legal costs of taking legal action against DAS and there is no reason to direct DAS to cover such costs.

### **My final decision**

My final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr E to accept or reject my decision before 14 September 2023.

Peter Whiteley  
**Ombudsman**