



<u>Decision Ref:</u>	2020-0344
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Professional Indemnity
<u>Conduct(s) complained of:</u>	Rejection of claim - late notification
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant incepted a commercial insurance policy with the Provider in **November 2014** through his insurance broker (the **Broker**). On **14 March 2018**, one of the Complainant's employees sustained an injury while working. The Provider was notified of the incident on **30 January 2019**. The Provider communicated its decision to refuse to indemnify the Complainant on **17 June 2019**. The Complainant is dissatisfied with the Provider's decision to refuse to indemnify him under the policy.

The Complainant's Case

The Complainant explains that further to the Provider's letter of **1 July 2019** and its declinature letter of **18 June 2019**, his solicitors wrote to the Provider to appeal its decision to decline indemnity. The Complainant states that first notice of the claim was by letter dated **3 September 2018** from the Personal Injuries Assessment Board (**PIAB**). There was no prior notice of the circumstances giving rise to the claim nor was there any suggestion or suspicion of a claim.

It is stated that PIAB did not assess the claim due to the fact the employee's claim incorporated a claim for psychological injury. In **September 2018**, the Complainant was advised by PIAB that *'In the circumstances, we have today issued an Authorisation to [employee] which authorises her to bring legal proceedings in connection with this claim, should she so wish. There is, therefore, no need for you to respond to the attached Notice.'*

It is stated that the Complainant's manager "... understood this to mean wait and see do you hear from the plaintiff's solicitors."

The employee's solicitors first contacted the Provider on **13 November 2018** by serving a Summons. It is submitted that there did not appear to have been a letter of claim.

The Complainant's manager notified the matter to the Complainant's HR adviser, who in turn advised him on **17 January 2019** to notify the Complainant's solicitors. The Provider was advised through the Complainant's Broker of the claim in **January 2019**.

It is submitted that there is no prejudice or delay which warrants a denial of indemnity. The Christmas **2018** period caused some delay but not such that would prejudice any indemnity.

In resolution of this complaint, the Complainant wants the Provider to indemnify him in respect of the claim.

The Provider's Case

The Policy

The Provider explains the Complainant's policy is a surgery policy and is a commercial insurance product that provides cover for the Complainant's occupation. The policy was incepted through the Complainant's Broker on **6 November 2014**.

Timeline

On **14 March 2018**, during the course of her employment, an employee sustained a significant cut to her leg by a scalpel when emptying a bin. The Provider was advised the Complainant administered four sutures to her leg and another employee drove her home. The employee later attended hospital and received vaccines for Hepatitis B. The employee also completed an internal accident report in relation to the incident.

The Provider submits that such a serious incident in which an employee was injured so as to require sutures to be administered and resulting in subsequent attendance at hospital is precisely the type of event that requires early and immediate notification to the Provider. The Provider explains it is imperative that the Provider is afforded the opportunity to carry out an early investigation of such an event and, if appropriate, seek to resolve the matter in a timely manner. It is stated that this is why condition 5 of the policy mandates that an insured must notify the Provider immediately of any event that may result in a claim. Despite the seriousness of what had occurred, the Provider states the Complainant made no effort to advise it of the incident nor was guidance sought from the Broker.

On **3 September 2018**, PAIB wrote to the Complainant with a formal notification of a claim being made by the employee and that she was represented by a firm of solicitors. The Provider cites this letter as exactly what should have been sent to it in relation to condition 5. The Provider observes that it was very evident the employee was making a personal injuries claim against the Complainant and she had appointed solicitors on her behalf.

The Provider submits that it fails to understand how the Complainant did not appreciate the obvious significance of such a formal notification. The Provider also refers to the Authorisation issued by PIAB which states *'we have today issued an Authorisation to [employee], which authorises her to bring legal proceedings in connection with this claim, should she so wish.'*

The Provider states that had it been notified of the claim at this juncture, it would have given it an opportunity of investigating the claim and exploring an early settlement opportunity before legal proceedings were issued and inevitable disproportionate legal costs incurred.

On **13 November 2018**, the employee's solicitors wrote to the Complainant by registered post enclosing a Circuit Court Personal Injuries Summons and Affidavit of Verification. The Provider advises that the employee's claim had now progressed further as legal proceedings had issued against the Complainant which needed to be responded to immediately. The Provider submits that had it been notified when proceedings issued, it would have been afforded the opportunity to consider liability by reviewing the allegations of negligence against the Complainant, carried out an investigation and considered the quantum of the claim in relation to the injuries particularised in the Summons. The Provider maintains it would have had the chance of inviting settlement negotiations and appointing defence solicitors to represent the Complainant.

On **20 November 2018**, the employee's solicitors wrote to the Complainant outlining that they were waiting for an Appearance to be entered. This letter outlined the consequences of failing to enter an Appearance in that judgment in default of appearance would be sought with an order for legal costs. If the Provider was notified of the claim at this point, it would have immediately advised the employee's solicitors that it was investigating policy indemnity and liability, and requested additional time to complete the investigation.

As the employee's solicitors did not receive a response to its previous correspondence, on **20 December 2018**, a Motion for Judgment in Default of Appearance was served on the Complainant and returnable before the Circuit Court on **6 March 2019**.

The Provider explains that on **30 January 2019**, it was notified of the claim via email from the Complainant's Broker. The email also advised that the Complainant's contact person who would be assisting with the claim was away on holiday from **5 to 18 February 2019**. The Provider states it was afforded a very limited timeframe within which to investigate the claim prior to the return date of the Motion.

It is submitted that the Provider was *severely prejudiced* in that “[i]n addition to all of the previous failures to inform us of this incident, which was compounded further by the Motion not being sent to us in a timely manner, we were further constrained by the availability of the Complainant’s representative between the date of the notification and the scheduled hearing date for the Motion.”

The Provider outlined its investigation of the claim and its involvement in the legal proceedings.

The Provider wrote to the Broker on **17 June 2019** explaining that it was refusing to indemnify the Complainant and outlined the reasons for its decision.

Policy Conditions

The Provider has cited condition 5 of the policy conditions which require it to be immediately notified of any event or occurrence which may give rise to a claim.

The Provider advises that it might possibly have been prepared to overlook the Complainant’s initial default in not notifying it of the incident had a plausible explanation been offered. However, the correspondence from PIAB made it clear there was an actual formal claim being made for compensation. Due to the Complainant’s failure to forward the PIAB letter, “... *there has been substantial and irreparable prejudice to [the Provider] in dealing with this claim.*”

Letter of Claim

It is also stated that it is likely the Complainant received a letter of claim from the employee’s solicitors prior to the application form dated **20 August 2018** being submitted to PIAB. The Civil Liability and Courts Act 2004 requires that a person must serve notice in writing of a claim.

Declining Indemnity

The Provider explains that its decision to decline to indemnify the Complainant was not taken lightly. Policy indemnity and liability were investigated before a decision was taken. The Provider’s final decision on the matter was based on the serious, significant and repeated failings of the Complainant and the numerous breaches of his obligations under the policy.

The Complaint for Adjudication

The complaint is that the Provider wrongfully and/or unreasonably refused to indemnify the Complainant.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 16 September 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The Policy

The Complainant's policy states on page 4:

"The Contract of Insurance

...

Important

This policy is a legal contract. You must tell Us about any facts or changes which affect Your insurance and which have occurred either since the policy started or since the last renewal date.

If you are unsure whether certain facts are relevant please ask Your insurance adviser. If You do not tell Us about relevant changes, Your policy may not be valid or the policy may not cover You fully. ..."

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The claims procedure under the policy is set out in condition 5 on page 50 as follows:

“If in relation to any claim You have failed to fulfil any of the following conditions. You will lose Your right to indemnity or payment for that claim.

You must

- (a) tell Us immediately of any event or occurrence which may result in a claim*
- (b) ...*
- (c) ...*
- (d) provide Us with all information and help We require in respect of the claim*
- (e) pass to Us unanswered, immediately, all communications from third parties in relation to any event which may result in a claim under this policy*
- (f) ...*
- (g) allow Us to take over and conduct in Your name the defence or settlement of any claim. ...”*

Incident Report

An Accident Report dated **14 March 2018** was prepared in respect of the incident which occurred that day. However, due to the redactions of the names of the parties on the report, it is not clear who prepared and/or signed this document. The incident is described as follows:

“I cut myself when I took out the bin and it was something sharp and [...] my knee. [Individual] put for me 4 stitches.

...

I called my boss and I told him.”

PIAB

On **3 September 2018**, the Complainant received a letter from PIAB. This letter states:

“We have received formal notification of a claim from [employee] represented by [solicitors]. We are advised that she intends to seek compensation from you for personal injury.

...

In the circumstances, we have today issued an Authorisation to [employee], which authorises her to bring legal proceedings in connection with this claim, should she wish....”

/Cont'd...

The Authorisation enclosed with this letter states:

"[The employee] is hereby authorised, pursuant to section 17 of the Personal Injuries Assessment Board Acts 2003 and 2007, to bring proceedings in respect of the relevant claim against the Respondent(s) named above."

Legal Proceedings

By letter dated **13 November 2018**, the employee's solicitors served the Complainant with a Circuit Court Personal Injuries Summons and Verifying Affidavit in respect of the incident.

The Summons required the Complainant to enter an Appearance to the claim with 10 days of service of the Summons on him.

The employee's solicitors wrote a further letter to the Complainant on **20 November 2018**, noting that an Appearance had not been entered and consented to the late entry of an Appearance by 14 days. The letter also warned that if an Appearance was not entered, a motion for judgment in default of appearance would be issued and an order for costs sought against the Complainant.

No Appearance was entered and the Complainant was served with a Notice of Motion seeking judgment in default of appearance on **20 December 2018**. The return date for the hearing of the Motion was listed as **6 March 2019**.

Notification to the Provider

The Broker wrote to the Provider by email dated **30 January 2019** advising it of, and describing an incident, which occurred on **14 March 2018**.

The Provider wrote to the Broker on **1 February 2019** and enclosed a report to be completed and returned in respect of the incident. The Provider wrote to the Broker again on **5 February 2019**, reserving its rights in respect of the claim, requesting an explanation from the Complainant as to why the claim was not notified to it earlier, and why third party correspondence was not forwarded to it. This information was conveyed to the Complainant by the Broker on **6 February 2019**.

Declinature of Indemnity

The Provider wrote to the Broker on **17 June 2019** refusing to indemnify the Complainant "... due to the delay in notification and failure to pass on correspondence." The Provider referred to condition 5(a) and 5(e) of the policy's claims procedure and two previously unreported claims.

The Complainant's solicitors appealed the Provider's decision on **18 July 2019**:

"...

/Cont'd...

1. *The first notice of the claim by the insured was by letter dated the 3rd day of September 2018 from PIAB.*
2. *There was no prior notice to the insured which amounted to circumstances giving rise to a claim. ...*
3. *At time of injury, the insured was thanked and commended for the stitching of the wound and there was no suggestion or suspicion of a claim*
4. *The plaintiff left employment to get a better job in ... another [redacted] surgery and she told the insured she was going to a different industry. It had nothing to do with the accident.*
5. *PIAB did not investigate this claim and issued permission to issue proceedings right away because of the psychological nature of the injury,*
6. *The PIAB letter of September 2018 states 'In the circumstances, we have today issued an Authorisation to ... which authorises her to bring her legal proceedings in connection with this claim, should she wish. There is, therefore, no need for you to respond to the attached Notice' so the insured's manager ... understood this to mean wait and see do you hear from the plaintiff's solicitors.*
7. *The plaintiff solicitors first contacted the insured on 13th November 2018 with issued summons. There does not appear to have been a letter of claim.*
8. *The insured's manager ... notified the matter to the [Complainant's HR Advisor] for their advices who advised he contact solicitors who advised on 17th January 2019 the insured to contact insurer which insured did through [the Broker] in January 2019.*
9. *There is no prejudice or delay which warrants denial of indemnity. The 2018 Christmas holiday period did cause some minor delay in communications but not so much as would prejudice indemnity in any way. ..."*

The Provider responded to this letter on **29 July 2019** maintaining its decision to refuse to indemnify the Complainant referring to a number of events in the history of the claim and condition 5(a) and 5(e) of the policy.

In respect of condition 5(a), the Provider stated:

"The policyholder's employee ... sustained an injury in the course of her employment on the 14th March 2018 which required the administration of 4 sutures to her leg by the policyholder and also required hospital attention. An Accident Report was also completed, by the employee, on the 14th of March 2018, but [the Provider] were not notified of the event."

Referring

"The first communication from a Third Party appears to be a letter from the Injuries Board dated 3rd September 2018. The first sentence states 'We have received formal notification of a claim from [employee] ... We are advised that she intends to seek compensation from you for personal injury.'

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However, the policyholder did not comply with the Claims Procedure of the policy and pass this correspondence to us immediately.

Further correspondence was received from [the employee's solicitors] on 13th November 2018, enclosing the Personal Injuries Summons & Affidavit of Verification, and on 20th November 2018.

The Personal Injuries Summons clearly also states 'The Plaintiff's claim is for damages for personal injuries, loss and damage suffered and sustained by her ...'

Neither letter was passed to us immediately.

A further letter was sent by Registered Post to the policyholder on 20th December 2018 attaching a Notice of Motion & Ground Affidavit returnable for 6th March 2019 but the policyholder did not comply with the Claims Procedure of his Policy Conditions.

The first notification we received was via email from [the Broker] on 30th January 2019 at 17:40. As well as correspondence pertaining to this claim it contained a further 2 Accident Reports ... neither of which had been notified to [the Provider] previously.

As previously advised, the policyholder is in breach of the Policy Conditions, 5. Claims Procedure (a) and (e) and we are not in a position to provide an indemnity in respect of this claim. ..."

Analysis

The incident which occurred on **14 March 2018** and gave rise to the Complainant's claim for indemnity was not an insignificant or minor injury. It involved a laceration with a scalpel and required four sutures. The Complainant was aware of the incident on the day it occurred as he was the one who administered the sutures. Furthermore, as it was the Complainant's business and his employee who sustained the injury, I accept the Complainant was aware or ought reasonably to have been aware of the injured employee's attendance at hospital and the Accident Report.

There is no evidence of any legal letter being sent to the Complainant prior to the PIAB letter of **3 September 2018**. However, when one considers the correspondence received from PIAB as a whole, it is clear that a claim for compensation was being made by the employee against the Complainant arising from the incident.

Legal proceedings were served on the Complainant on **13 November 2018**. The Summons stated that an Appearance to the claim was required to be entered within 10 days. The Summons also stated that if an Appearance is not entered, the Complainant would be taken to have admitted the claim and judgment in default of appearance could be sought against him. An Appearance was not entered within the prescribed time.

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The Complainant received correspondence from the employee's solicitors on **20 November 2018** consenting to the late entry of an Appearance by 14 days and failing which a motion for judgment in default of appearance would issue. Despite this opportunity, no Appearance was entered, and the relevant motion was issued and served on the Complainant on **20 December 2018**.

The evidence indicates that the Complainant's manager was advised on **17 January 2019** to notify the Provider about the claim. The Provider was first notified of the claim by the Broker on **30 January 2019**. This was over 10 months after the incident occurred.

Following this, the Provider sought an explanation for the delay in notifying the claim from the Complainant in **February 2019**. This explanation does not appear to have been furnished to the Provider.

The obligations placed on the Complainant under condition 5 are clear and require the Complainant to act with immediacy and urgency in respect of essentially anything that *may* give rise to a claim. It is quite clear from the nature of the incident that the Provider should have been immediately informed of what had occurred but he did not.

Moreover, despite the advanced stage of matters, by **December 2019**, the Complainant had still not notified the Provider of the claim or passed on any third party correspondence, and had not entered an Appearance.

The Complainant has not offered any acceptable reasons or justification for the delays and inaction on the part of the Complainant who appears to have ignored matters and failed to engage with the claim. The Complainant had ample opportunity to notify the Provider of the claim, and several events occurred that should have prompted him to notify the claim to the Provider.

Taking the evidence of this complaint into consideration, I accept that the Provider was entitled to refuse to indemnify the Complainant and accordingly, I do not uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

8 October 2020

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.