

## **Compensation for poor service**

In terms of our Rule 3.2.5 the office may, regardless of whether a complaint is upheld or not, “award compensation (to a complainant) for material inconvenience or distress or for financial loss suffered by a complainant as a result of error, omission or maladministration (including manifestly unacceptable or incompetent service) on the part of the subscribing member; provided that the amount of such compensation shall not exceed the sum of R50 000”.

Rule 3.2.5 came into operation during 2003 and, leaving aside the maximum amount of compensation of R15 000, its provisions have remained largely unchanged since then. By 2006 the maximum amount had been increased to R20 000; which was increased to R30 000 in 2009 and the last increase occurred during 2016 to the current amount of R50 000. The steady increase in the maximum amount of compensation which the office may award is attributable to inflation which, over the years, steadily eroded the value of the Rand. As a result of the increase in the maximum amount of compensation the awards of compensation made by the office also increased correspondingly with the passage of time. This fits in well with Rule 1.2.4 in terms of which the office must give weight to considerations of equity or fairness.

Sometimes there appears to be uncertainty about the manner in which the office applies Rule 3.2.5. Two examples show this. An unsuccessful complainant expects the amount of compensation to be in line with the amount of the insured benefit. An insurer perceives an award of compensation as a form of punishment for poor service. Both approaches are fundamentally wrong.

Hopefully this article will lead to a better understanding of how we deal with compensation for poor service.

As a starting point one must bear in mind what is said in **Life Insurance in South Africa** by Nienaber and Reinecke on pages 61 and 62:

“There must be evidence of some culpability on the part of the insurer and some harm, emotional or financial, on the part of the complainant. Such an award is not simply there for the asking nor is it, as it has been put, ‘an award for disappointed expectations’ ..... Like any ruling it is susceptible to an appeal but being discretionary in nature leave to appeal will not readily be granted.”

The authors refer to the following examples of “culpability” or “poor service”, but the list is obviously not complete:

“Such as imprecise or confusing draftsmanship of contractual documentation, misleading marketing of products, wrong information furnished, misplacing of or ignoring correspondence, poor responses to queries, fraud by agents, inordinate or persistent delays, recalcitrance, miscalculation of benefits and general incompetence.”

The office prepared the following guidelines which assist us in applying Rule 3.2.5:

“The following features will be taken into account by the Ombudsman when fixing an amount for compensation in terms of Rule 3.2.5, the weight to be accorded to each depending upon the particular circumstances of each case:

1. The nature of the insurer’s error, omission or maladministration;
2. The extent of it;
3. The extent to which it gave rise to the inconvenience or distress;
4. The extent of the inconvenience or distress suffered by the complainant;
5. The number of times the complainant engaged or sought to engage with the insurer;
6. The extent to which the insurer assisted, or failed to assist, when approached by the complainant;
7. The period over which the inconvenience or distress endured;
8. The resultant loss suffered by the complainant, if any, including the cost of transport, telephone calls, etc.;

9. The particular complainant's age and physical or mental condition that contributed to the degree of inconvenience or distress;
10. The monetary value of the policy contract or the claim;
11. The effect of inflation as time goes by;
12. Any other feature that may in a given case become relevant."

The issue of compensation may arise in any number of different ways in a complaint. It may be raised by the complainant or by the insurer. The complainant may claim a specific amount of compensation or the insurer may offer a specific amount. The office may be of the view that, on the facts of the particular matter, an award of compensation is indicated. In that event it will raise the issue with the insurer in an appropriate manner. In keeping with our impartiality the office does not, at that stage, suggest to any party what a suitable amount of compensation is. If the complainant and the insurer agree on the amount of compensation, the issue is thereby resolved. If no agreement is reached on the insurer's liability for compensation or on the amount thereof, the matter is referred either to an Adjudicators' meeting or to a Compensation Committee, which is made up of the Ombudsman or the Deputy Ombudsman; the Adjudicator or the Assessor to whom the complaint has been allocated and one other Adjudicator or Assessor. The determination of the insurer's liability for compensation and/or the amount thereof, as the case may be, by such a meeting or by the Compensation Committee is communicated to the parties. This is done in accordance with our usual procedure, namely in the form of a provisional ruling. If neither party challenges the provisional ruling, the matter is thereby resolved. If any party does not accept the provisional ruling, the matter is referred to a meeting of the Adjudicators in the office, at which the Ombudsman or the Deputy Ombudsman presides. Depending on the outcome of such a meeting the provisional ruling may be confirmed as a final determination or a new provisional ruling may be made.

For two illustrative examples of how we deal with compensation for poor service, the reader is referred to issue 29 of our Ombuzz newsletter, which appears on our website, [www.ombud.co.za](http://www.ombud.co.za).

The following views were expressed in determinations relating to awards of compensation for poor service:

- On 19 November 2014:

“In arriving at the conclusion set out in paragraph 4, above, the compensation committee also relied on its collective experience of awards of compensation made by this office. The importance of this experience should not be under-estimated – it ensures that all complainants are treated even-handedly, while making due allowance for the particular facts and circumstances of each complaint. In summary, we must be fair to both parties and we try to ‘personalise’ each award of compensation. By the very nature of things, there is no room for a so-called ‘mathematical approach’ or for the application of hard and fast rules in the determination of a fair amount of compensation.”

- On 11 December 2014:

“The office often emphasises the fact that no determination by it creates a precedent. Each case depends on its own facts and this is even more so when we make a subjective value judgment with regard to the award of compensation. Having said that, I must draw attention to a similar matter in which our office recently gave consideration to the amount of compensation.”

- On 21 August 2015:

“At the meeting which resulted in the provisional ruling, dated 11 August 2015, the persons present considered the reasonableness of the insurer’s offer of compensation. Clearly one cannot determine the extent of the compensation envisaged in our Rule 3.2.5 with mathematical precision.”

We regard the task of determining the liability for and the extent of an award of compensation under Rule 3.2.5 as being a serious one. In performing that task we do the best we can, but still adhere to Rule 1.2.2 by following “informal, fair, and cost-effective procedures”.

The foregoing demonstrates that we regard the issue of compensation in a serious light; that we strive to be even-handed and fair; that we try to avoid awards of compensation which are out of line with other awards in complaints which are more or less similar and that we use our collective experience and common sense in determining the amount of compensation for poor service.

In terms of Rule 1.2.3 we must keep “in balance the scale between complainants and subscribing members”. The following words of Holmes J in **Pitt v Economic Insurance Co. Ltd** 1957 (3) SA 284 (N) 287 E-F reflect our approach to Rule 3.2.5:

“I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant’s expense.”