

16 August 2019

**Final report by the Complaints Commissioner****Complaint number FCA00605***The complaint*

1. On 17 June 2019 you asked me to investigate a complaint about the FCA. I accepted your reasons for your complaint being sent to me beyond the usual timescales. My preliminary report was issued on 19 July 2019 and both you and the FCA have commented.

*What the complaint is about*

2. On 29 March 2018 you submitted a formal complaint to the FCA about its oversight of the Financial Ombudsman Service (FOS). You made allegations about the way FOS had treated you after you made a complaint to them. You said that this, along with a Channel 4 Dispatches programme, pointed to a systemic failure at FOS for which the FCA was responsible in its oversight role under the Financial Services and Markets Act 2000 (FSMA).

*What the regulator decided*

3. The FCA issued its complaint response to you on 12 February 2019. Your complaint was not upheld on the basis that the Complaints Team did not share your view that there are systemic failings at FOS or that the FCA is failing in its oversight of FOS. The Complaints Team noted that you disagreed with the way in which your complaint had been scoped but said that it considered many of your complaints were excluded under paragraph 3.4.e) of the Complaints Scheme. The FCA offered you the sum of £100 for complaints handling delays.

*Why you are unhappy with the regulator's decision*

4. You are dissatisfied with the FCA's complaint response because you consider it failed to address your substantive complaint against FOS and instead referred you to Richard Lloyd's report on the FOS which is unrelated to your complaint.

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You have told me that in your view the FCA failures consist of but are not limited to:

- a. Failure to follow the Complaints Scheme;
- b. Failure to categorise your complaint under section 3.1 a), c), d) and e) of the Complaints Scheme, although the initial FCA summary states clearly that you were not complaining under section 3.4 e);
- c. Failure to understand that ‘two views were created by Ombudsman to be adjudicated by the same or another Ombudsman at later stage’;
- d. Failure to allocate a suitably senior manager to investigate your complaint independently as set out within section 6.2 of the Complaints Scheme;
- e. Failure to understand the legal implication of FOS breaching ‘the DATA law’ which impacted your complaint to the Independent Assessor and her subsequent findings;
- f. Failure to understand that FOS breaching data law is an oversight matter for the FCA.

*Relevant extracts from the Complaints Scheme (the Scheme)*

5. Paragraph 3.1 of the Scheme states that:

*3.1 The Scheme covers complaints about the way in which the regulators have acted or omitted to act, including complaints alleging:*

*a) mistakes and lack of care;*

*...*

*c) unprofessional behaviour;*

*d) bias; and*

*e) lack of integrity.*

6. Paragraph 3.4 states that:

*3.4 Excluded from the Scheme are... e) complaints about the actions, or inactions, of the Financial Ombudsman Service...*

7. Paragraph 6.2 states:

*6.2 The relevant regulator(s) will conduct an initial investigation into any complaint which falls within the scope of the Scheme and which does not come within the provisions of paragraphs 3.4 to 3.7. That investigation will be carried*

*out by a suitably senior member of staff who has not previously been involved in the matter complained of, aiming to resolving the matter to the complainant's satisfaction.*

*My analysis*

8. Your letter of complaint to the FCA dated 25 March 2018 is addressed to the Chief Executive, Andrew Bailey, and is headed **Complaints against the FOS under the Complaints Scheme**. It refers to the FCA's oversight role and the [Memorandum of Understanding](#) between the FCA and FOS. You said that you were 'persecuted and discriminated against after drawing [FOS's] attention to many failures of the Service'. You gave details of what you considered to be procedural irregularities, malpractice and service failings at the FOS, for which you held the FCA ultimately responsible.
9. As you have pointed out, I have previously criticised the FCA for excluding complaints about its FOS oversight under 3.4.e). However, this is not what happened in your case. The Complaints Team's letter of 26 April 2018 accepted your complaint for investigation under the Scheme.
10. You disagreed with the way your complaint had been scoped by the FCA, and correspondence about this continued. The FCA's complaint response of 12 February 2019 acknowledged this and described your complaint as: *You are unhappy with the adjudicators' views from the Financial Ombudsman Service relating to a complaint you have raised. You have subsequently referred your concerns to the Independent Assessor as you believe that non-compliance by the Financial Ombudsman Service had a negative impact on your complaints. You have been clear that your complaint, as now raised against the FCA about the Financial Ombudsman Service under the Scheme, is not about the merits of your complaints with the Financial Ombudsman Service. Rather it is in relation to discrimination, persecutions and improprieties perpetrated against you by the Financial Ombudsman Service, meaning that the FCA is failing in its oversight role of the Financial Ombudsman Service. You suspect that owing to the failings in your specific case, it would suggest that there are systemic failings across the Financial Ombudsman Service which would require FCA intervention in its oversight capacity.*

11. The complaint response said that, although much of your complaint appeared to be about the actions or inactions of the FOS and was therefore excluded from the Scheme under paragraph 3.4. e), your complaint had been considered on the basis that: *Your overarching complaint is, essentially, that the FCA, through your experience with the Financial Ombudsman Service, is failing in its oversight function.* The letter went on to say that: *Under the Scheme, the FCA's Complaints Team can only consider a complaint against the Financial Ombudsman Service if the complainant is alleging that the FCA is failing in its oversight function of the Financial Ombudsman Service.* The response then set out the FCA's understanding of the different roles of the FCA and the FOS and the nature of the FCA's oversight responsibility for the FCA under FSMA.
12. In response to my preliminary report you have said that the FCA should have made it clearer which elements of your complaints it had excluded, and which it had investigated. You have also said that: "[the FCA] failed to understand that my complaint never officially went to the Adjudicator [and that] the FCA needs to inform me if they have investigated discrimination and persecution against me. If not, I need to know why such unlawful allegations were not investigated."
13. However, I am satisfied that the FCA's approach was reasonable and that, although not explicitly stated, the FCA has investigated your complaint under paragraph 3.1 of the Scheme. It was appropriate for the FCA Complaints Team to refer you to paragraph 3.4 e), to make clear the extent of its remit. Your detailed complaints about the investigation of your complaint by the FOS – First and Second Case Investigator stage, Ombudsman Manager involvement, Senior Ombudsman Leader stage - are clearly about the actions or inactions of the FOS and its operation of the FOS complaints scheme, which are excluded under paragraph 3.4. e) of this Scheme. For example, I consider that your complaint that the FCA failed to understand that '*two views were created by Ombudsman to be adjudicated by the same or another Ombudsman at later stage*' is a complaint about the operation of the FOS complaints scheme that is excluded. Complaints alleging discrimination are a matter for the courts, although the FCA did not state this explicitly, which would have been helpful.
14. As part of your complaint, you wanted the FCA to take note of conclusions reached by the Independent Assessor (IA) and the Information Commissioner

(ICO). The IA looked at your service complaint about the FOS and upheld some elements but not others. That was the appropriate route for your complaint about the FOS's service. It appears from your response to my preliminary report that you believe "The FCA investigation is the next stage after the IA review is completed". However, that is not correct: the IA's decision is final as their letter to you of 10 November 2017 made clear. Similarly, the ICO considered your complaint about data breaches, upheld one allegation of a breach, and made recommendations for steps the FOS should take 'to improve its information rights practices'.

15. In response to my preliminary report, you have correctly pointed out that the FCA's complaint response refers only to your 'liaising' with the ICO and does not acknowledge that you had already had a response that upheld one of your allegations. The FCA was correct to tell you that the IA and ICO operate separate jurisdictions, and I am satisfied that it has reached reasonable conclusions about these matters in the context of its oversight role. Nevertheless, I **suggest that** the FCA's Regulatory Affairs Team and Oversight Committee should take note of the findings of the IA and the ICO in your case as part of its general oversight function (see also paragraph 24).
16. The FCA's case file shows that the Complaints Team took your complaints seriously. Its investigation included making detailed enquiries of the Regulatory Affairs Team about the FCA's oversight of the FOS in the light of the issues that you had raised.
17. Paragraph 3 A of Schedule 17 of FSMA states:
  - 3A(1) The [FOS] and the FCA must each take such steps as it considers appropriate to co-operate with the other in the exercise of their functions under this Part of this Act.*
  - (2) The [FOS] and the FCA must prepare and maintain a memorandum describing how they intend to comply with sub-paragraph (1).*
  - (3) The [FOS] must ensure that the memorandum as currently in force is published in the way appearing to the [FOS] to be best calculated to bring it to the attention of the public*

18. The current Memorandum of Understanding (MOU) between the FCA and the FOS is dated 18 December 2015 and is published on the websites of both organisations. It describes the respective roles of the FCA and the FOS and sets out their understanding of the FCA's statutory responsibilities for the FOS (paragraphs 7 to 10). Paragraph 11 states:

*11 Mindful of its obligation to take such steps as are necessary to ensure that the scheme operator, the Financial Ombudsman Service Limited, is at all times, capable of exercising its statutory functions, the FCA will: (a) consider the appropriateness and suitability of the persons whom the FCA may consider for appointment as a director of the Financial Ombudsman Service Limited (and in the case of the appointment of the chairman, seek the approval of the Treasury); (b) review the reports submitted to it by the Financial Ombudsman Service Limited on the discharge of its functions and review the report by the Chief Ombudsman on the discharge of his or her functions; (c) periodically review and consult the Financial Ombudsman Service Limited on the desirability (or not) of developing any rules regarding the requirements for reports on the discharge of its or the Chief Ombudsman's functions; (d) review the annual accounts and the report by the Comptroller and Auditor General; (e) consider and, where appropriate, approve, the annual budget proposed by the Financial Ombudsman Service Limited in a timely manner; and (f) take any other steps that may be necessary to ensure that the Financial Ombudsman Service Limited is, at all times, capable of exercising its statutory functions.*

19. The FCA's file shows that the Oversight Committee meets three times a year, approving the FOS's plan/budget and appointing senior staff. The Committee reviews past performance against the budget and receives reports from the FOS, including numbers of complaints, and an annual report from the IA from a service point of view. From these reports the FCA decides whether the FOS is still able to function.

20. Following the Dispatches programme on Channel 4, which was highly critical of the FOS, the evidence shows that the FCA's Oversight Committee took additional steps. As part of its complaint response, the FCA referred you to a review carried out by Richard Lloyd that, although commissioned by the FOS, had been requested by both the FCA and the Treasury Select Committee. I

consider that the findings of this report were a relevant matter for the FCA to refer you to, since it demonstrated the FCA's exercise of its oversight role, although I would also expect the FCA to continue to reach its own conclusions about the FOS's performance over time.

21. It is up to the FCA how it interprets its statutory obligations. However, my view is that the FCA's Oversight Committee should have an interest in receiving, and collating, information about complaints involving the FCA's oversight of the FOS.
22. Your complaint was addressed to the FCA's Chief Executive, but was passed to the Complaints Team and investigated there. This was the correct procedure under the FCA's corporate structure. The Complaints Team is overseen by the Director of Corporate Services who reports to the Chair of the FCA Board. In the Complaints Team, your complaint was considered by an Investigator, and reviewed by a Senior Investigator who signed your response letter. The Complaints Team Manager and the Director of Corporate Services also provided input and advice was sought from the FCA's General Counsel's Division. I am satisfied that these arrangements meet the requirements of paragraph 6.2 of the Scheme and that your complaint was appropriately considered.

*My decision*

23. The Complaints Team concluded that there was no evidence of systemic failure at the FOS and that it was therefore unable to uphold your complaint that the FCA was failing in its oversight. This was a conclusion that the FCA was entitled to reach, although I acknowledge that you profoundly disagree with it. For this reason, I am unable to uphold your complaint.
24. I do, however, **suggest**, that the FCA reviews its approach to monitoring and collating the information it receives about the performance of the FOS independently of the FOS's own reports. As part of this review, I have **suggested that** the FCA's Regulatory Affairs Team and Oversight Committee should take note of the findings of the IA and the ICO in your case as part of its general oversight function. I also **suggest** that the FCA develops a system whereby both the Regulatory Affairs Team and Oversight Committee receive and review a regular summary of any complaints received about the FCA's oversight of the FOS, to inform their work. Whatever the outcome of this review, the FCA

should provide further clarification on its website about its approach to its oversight of the FOS. I am pleased to note that the FCA has accepted these suggestions in response to my preliminary report.

Antony Townsend  
Complaints Commissioner  
16 August 2019