

10 August 2020

**Final report by the Complaints Commissioner****Complaint number FCA00733***The complaint*

1. In May 2020 you, Kenny Johnston, asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and the FCA. My preliminary report is dated 6 July 2020 and both you and the FCA have commented. You have asked to be identified in this published version of my final report and I have agreed.

*What the complaint is about*

2. Your complaint is that the FCA is failing to comply with the anticipatory duty under the Equality Act 2010 and the Public Sector Equality Duty 2011 to make reasonable adjustments for consumers with mental ill-health disabilities and that as a result of this failure, numerous financial service providers are also failing in their anticipatory duty under the Equality Act 2010. This includes your own Bank.

*What the regulator decided*

3. The FCA's Decision Letter of 29 April 2020 said that it had considered the issues you had raised but that they were not covered by the Complaints Scheme (the Scheme). The letter provided you with some information about the FCA's work on equality. The FCA also told you that it had passed information about your Bank to the relevant supervision team but would be unable to tell you what action, if any, has been taken as a result due to the provisions of Section 348 of the Financial Services and Markets Act 2000 (FSMA).

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

4. You have told me that you think the FCA should have investigated your complaint under the Scheme, and that you were distressed by the FCA's Decision Letter because this outcome does not resolve your concerns.

FCA00733

5. You have also told me that, since the Decision Letter was issued, you have had several phone conversations with the Complaints Team Manager, who is considering whether there is a way to take forward some of the issues raised.

*My analysis*

*Substantive complaint*

6. On 10 February 2020 you contacted Andrew Bailey, then the FCA's Chief Executive, to raise your concerns about the failure of the FCA, and the financial services sector in general, to comply with the anticipatory duty under the Equality Act 2010 and the Public Sector Equality Duty 2011 to make reasonable adjustments for consumers with mental ill-health disabilities. This followed your very distressing experience in dealing with your own bank and your wider concerns as a result of your work in mental health.
7. Your letter to Andrew Bailey followed on from correspondence with him and emails and meetings with staff within the FCA over a number of years about your experiences with your Bank and other financial services firms. You said that your complaint was *a means to open the door and review, whether all parties regulated by the FCA adhere to their duty under the Equality Act 2010 and not placing people with disabilities at risk of distress or suicide due to discrimination, harassment and victimisation.*
8. The FCA's complaints response was that these issues could not be investigated under the Scheme because the Scheme is limited to the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions (paragraph 1.1).
9. The FCA's 'relevant functions' are its functions conferred by or under FSMA, other than their legislative functions, and 'such other functions as the Treasury may by order provide'. The FCA's legislative functions are defined in Section 85 (4) of the Financial Service Act 2012 and these also relate to its functions as conferred by or under FSMA.
10. It therefore follows that the FCA was correct to say that it could not investigate your complaint about its compliance with and enforcement of the Equality Act 2010 and the Public Sector Equality Duty 2011 under the Scheme. This is not

particularly satisfactory as the FCA pointed you to the Scheme as a means of resolving your concerns when it could not possibly do so.

#### *Complaints Team process*

11. In addition to your letter to Andrew Bailey, your complaint was taken over the phone on 10 February 2020 and forwarded to the Complaints Team, who sent you a standard acknowledgment on 14 February 2020. You replied on the same day informing the team that you had a disability and asking about reasonable adjustments to assist you in accessing the complaints process. Shortly after this you phoned the Complaints Team. The team member you spoke to said that he could not find anything on the FCA's website that *specifically prompts an individual to make us aware of any reasonable adjustments they require*, although *this was something the Complaints Team offers*. He asked you if you wanted to add this to your complaint and you said that you would need time to think about this.
12. On 17 February 2020 you sent another email to Andrew Bailey, saying that it had been very difficult for you to raise your complaint after the support he and colleagues had offered you over the past couple of years, but that you were *speechless, saddened and anxious* as a result of the Complaints Team's acknowledgement email, and the response to your phone call, which showed that the Complaints Team does not itself adhere to the anticipatory duty to make reasonable adjustments.
13. Although the FCA's Decision Letter of 29 April 2020 refers to your letter of 17 February as well as the one of 10 February, there is no acknowledgment that in this letter you made an additional complaint about the Complaints Team. Nor was that complaint responded to in the Decision Letter. Clearly, the FCA should have responded to this aspect of your concerns. It is very clear from the FCA's file that you were extremely distressed by receiving the Decision Letter without any warning or further discussion of the reasonable adjustments you needed.
14. I am surprised that the Complaints Team did not engage with you properly about these issues during its investigation of your complaint. The papers I have seen also suggest that there is some confusion within the FCA about the nature of the anticipatory duty. For example, although there is staff training on equality issues

and what to do if service users mention they have additional needs, I have not seen any evidence that either the Supervision Hub or the Complaints Team are proactive in anticipating or offering reasonable adjustments. I have also seen no statements about accessibility on the FCA's website page for complainants or in its published information, including its complaints form.

15. It seems that your expression of dissatisfaction about this aspect of the way your complaint was handled has led to your further conversations with the Complaints Team Manager, who is seeking to establish whether the FCA can work with you to resolve these issues and to ensure that the FCA is complying with its obligations under the Equality Act 2010 to make anticipatory adjustments for those accessing its services. Although it is not possible under this Scheme for me to make judgments about the FCA's compliance with the law or to recommend policy changes, I welcome the fact that these conversations are taking place. I have also drawn the FCA's attention to the case of [Blamires v the Local Government Ombudsman](#) as a useful example of how problems arise.

*My decision*

16. I have concluded that the FCA was correct to say that it could not investigate your complaints under the Scheme, although I note the further information it has given you about its work in the equality area. I also note the reasons why this leaves you dissatisfied and the further points that you make. Although under the Scheme I cannot make assessments of legal compliance or recommend policy changes, I welcome the fact that you continue to have conversations with the Complaints Team about how they can ensure that those accessing their services are fully enabled to do so.
17. You have made the following key points to me:
  - a. Your goal is to engage with the FCA further to help them to ensure that the anticipatory duty is embedded in the financial organisations it regulates;
  - b. You have been talking to the FCA since 2018 – the letter from Andrew Bailey was encouraging, but does not seem to have been matched by the FCA's operations;
  - c. If the FCA itself doesn't understand the anticipatory duty, it won't be able to ensure that regulated firms do;

- d. The anticipatory duty is consistent with the FCA's existing principles on communications with consumers;
  - e. You welcome recent initiatives from the Complaints Team to ensure that, at least internally, the FCA is putting its own house in order;
  - f. The Treasury Committee urged the FCA to make progress on this (particularly since the EHRC said that it didn't have the resources to do so).
18. You have also told me that your complaint is not solely seeking a resolution to your own concerns, but to seek anticipatory action by the FCA to ensure that people with mental ill-health disabilities are not placed at risk of mental ill-health distress, either by the FCA or by the firms that it regulates.
19. I have **recommended** that the FCA gives urgent attention to these matters, including but not limited to the wording on its website and other published information for complainants. In response to this, the FCA says that:
- a. In its consultation on revisions to the Scheme (issued on 20 July at <https://www.fca.org.uk/news/news-stories/fca-pra-and-bank-england-launch-complaints-scheme-consultation>) it has made explicit places in the Scheme process where complainants should let the Complaints Team know if they require reasonable adjustments to allow them access to the Scheme or to make a complaint, e.g. providing documents in larger print and communicating by telephone in addition to writing.
  - b. It is developing changes to its website to make this clearer and address other (unspecified) recent signposting issues.
  - c. Ahead of the implementation of the revised Scheme as noted above, it has considered the adjustments it can make for complainants who might experience barriers to using its service.
  - d. It has recently updated the wording in its acknowledgment email to comply with GDPR requirements around health data and to prompt complainants about whether they might require reasonable adjustments.
  - e. Once its discussions with you have concluded, it will write to me to update me with the outcome.

20. These initiatives are of course welcome. However, I should note that disability discrimination legislation for physical and mental health has been in place in the UK for twenty-five years. This was consolidated in the Equality Act 2010, and, as you have pointed out, includes an anticipatory duty to make reasonable adjustments when providing a service. As you have also pointed out, it is important that the FCA becomes an exemplar in this area if it is to be effective in ensuring that those it regulates meet their obligations too.
21. I also **recommended** that the FCA supply me and you with a response to the aspect of your complaint which was not addressed in the Decision Letter (see paragraphs 11 and 12). In response to this, the FCA says that the Complaints Team will apologise to you for any difficulties faced when making a complaint and also for the distress caused on receipt of both the acknowledgment email and the Decision Letter. They will also check with you to see if you are *still facing any difficulties accessing our service as we would be happy to make reasonable adjustments to overcome those*.
22. The FCA's offer of an apology is welcome; however, this does not explain or address the aspect of your complaint not addressed in the complaints response. I am not sure of the relevance of your current access to the service, as you have now completed the FCA's complaints process. Again, it is not a question of the FCA being 'happy' to make adjustments but of its compliance with the law. I therefore repeat my **recommendation**.
23. I look forward to receiving further responses to my recommendations at paragraphs 19 to 22, to demonstrate that the FCA appreciates the nature of its obligations in respect of the issues you have raised.

Antony Townsend  
Complaints Commissioner  
10 August 2020