

30 October 2023

Final report by the Complaints Commissioner**Complaint number 202300214***The complaint*

1. On 23 May 2023 you asked me to review a complaint about the FCA's oversight of the Financial Ombudsman Services' application of DISP rules.

What the complaint is about

2. You have written extensively to me about your complaint. By way of background, you explained to the FCA that in or around 2012 you received a final Financial Ombudsman Service (FOS) decision on a complaint against an Independent Financial Adviser (IFA). You allege that you spent two years involved in that FOS complaint process, during which the FOS upheld your complaint. However, you say that 'having lost on the substantive issue, after two years, the respondent decides to challenge the decision on jurisdictional grounds'. It appears this relates to a claim by the IFA that your complaint was out of time. You say the FOS accepted this challenge, and upheld it, the result being that your complaint ended up excluded on jurisdictional grounds.
3. You felt that issues of jurisdiction should have been looked at first and that :
 - a. 'The complainant has been treated grossly unfairly, having been strung along for months or even years believing the substantive issue is being considered, and that the complaint is supported.
 - b. All parties have undertaken a large amount of work, all of which is now wasted.
 - c. The complainant has been subject to great stress, having been operating in a financial environment with which he is unfamiliar, and having been led to believe that he will be compensated for behaviour by the respondent that the FOS has found to be unacceptable'.

4. Some years later you became aware of changes in legislation which prompted you to review matters surrounding your case and you came to believe that the FOS had incorrectly applied the Dispute Resolution rules (DISP) when dealing with your complaint. You do not feel you were treated fairly and reasonably and that Rule DISP1.8.1 'is sufficient to constitute an obligation to settle jurisdiction issues at the outset of the complaint process'. You sought clarification from the FCA about whether the FOS had incorrectly applied the DISP rules on your specific case. I can see that following some correspondence with the FCA on the matter, you complained to the FCA. I will only review below the complaint which you brought to me and not other matters which you raised with the FCA but not with me.

Why you are unhappy with the regulator's decision

5. You referred your complaint to me. In addition to reiterating your belief that the FOS had not applied the DISP rules correctly to the FOS, you also raised some general queries and points which I summarise below:
 - a. You do not feel you have had an explicit answer from the FCA whether the FOS are able to '*ignore DISP rules regardless of the original meaning and purpose of those rules when created by the FCA*' and you say if this were true, it doesn't seem right to you. (Element One)
 - b. You do not feel the FCA has answered your query whether your '*interpretation of DISP Rules 1.8.1 and 1.6.2 as set out in my letter dated 5th September 2022, is correct or set out where it is in error*' (Element Two).

Preliminary points (if any)

6. As you are aware, I am unable to review complaints against the FOS under paragraph 3.4 of the Complaints Scheme.

My analysis

7. The complaint you have referred to me is slightly different from the one the FCA reviewed. Usually, under the Complaints Scheme, it is desirable for the regulator to investigate a complaint first, before it is referred to me, as that is usually the best way to resolve matters. However, in this case, I have liaised

with the FCA to gain clarity on the background of the complaint and I am exercising my discretion to review the matters you raise without referring you back to the FCA.

Element One

8. S.228 (2) FSMA provides that “A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case”.
9. For the avoidance of doubt, this means the FOS has a wide discretion in how to interpret and apply DISP rules according to the circumstances of each case.
10. I do not agree that the FCA did not make it clear to you that this was the case. The FCA wrote to you on 8 December 2022 to this effect. It also told you it could not get involved in commenting on the FOS interpretation of the DISP rules on your case. Therefore I do not uphold your complaint.
11. I appreciate you continue to have concerns and have said to me that in your opinion, the FOS may apply fair and reasonable judgement in deciding the merit of the case, but that DISP rules are mandatory. I appreciate your point, however, it is not the case that either the FCA or I have argued that rules are not mandatory. The question which arises is how they have been applied. You feel that the rules have been disregarded. However, if a complainant disagrees with how the FOS has applied or interpreted the DISP rules on complaint, their only recourse is to take the matter to court. It is the court, not the FCA that is the final arbiter in such matters. The FCA is correct to tell you it cannot get involved in individual disputes.
12. You have said to me that ‘*The FOS system was set up to avoid the necessity for complainants to go to Court to resolve complaints. People like me have neither the expertise nor financial resources to take legal action*’. I appreciate what you say, which would involve the creation of an additional layer of an appeal mechanism of the merits of a FOS decision which would be also free to the public, however, this is how Parliament set up the roles of the FOS and the FCA and we have to work with the systems that exist now.

Element Two

13. I now turn to your point that your letter of 5 September 2022 has not been responded to properly.
14. Several letters of correspondence were exchanged between the FCA and you on this and related matters. On 17 October 2022 the FCA wrote to you to say that at the time you made your complaint to the FOS, the DISP rules were different to the current rules.
15. Some more correspondence ensued and in relation to a question from you about the purpose of DISP 1.6.2R and 1.8.1R. the FCA wrote to you on 13 March 2023 providing general information on the matter.
16. I can see that there was extensive correspondence on this matter, but it was not resolved satisfactorily, which ultimately led to your complaint.
17. It seems to me that what you are ultimately seeking to determine is whether the FOS interpreted the relevant rules at the time (you say 2012) fairly and reasonably in determining the firm or IFA did not have a time limit to raise a jurisdiction objection.
18. I have already explained that it is not my role to review FOS decision, nor is it the FCA. If you disagreed with the FOS interpretation of rules, only a court would be in a position to make a finding on the interpretation of a rule. I can only review the actions of the FCA. You have said it was not your intention for me to review the FOS decision and that you mentioned it only by way of background.
19. The FCA did write to you to say that the DISP rules, including those relating to jurisdiction, were different at the time your complaint was made. But it is right to say it cannot become involved in commenting how the FOS applied the DISP rules on your case. You have said to me that you are not asking the FCA to become involved in your case, only to provide an opinion as to whether your interpretation of the rules (at the time) are correct.
20. I have said that the complaint you have submitted to me (both elements one and two) are slightly different from the one the FCA reviewed. My understanding is that you would like the FCA to explain to you whether your interpretation of DISP rules in force in 2012 (but not so currently as they have been amended and are now different), is correct.

21. You have also said to me 'My original complaint about my IFA in 2009 was upheld by the FOS in two provisional decisions. After two years they allowed a time bar challenge. In doing so, they failed to observe DISP Rule 1.8.1.'
22. You feel that the FOS incorrectly applied DISP rules in 2009 and you feel further additions to the DISP rules have strengthened your position about what happened in 2009.
23. I appreciate this is important to you, however, I am exercising my discretion not to review this matter. I regret to disappoint you, however, I see no good reason for asking the FCA to take your request any further. Nor is this a matter which strictly falls within the remit of the Complaint Scheme. I will explain why. First, in order to be eligible to make a complaint, a complainant has to be affected by the actions or inactions of the FCA. Paragraph 3.2 of the complaint Scheme provides that :

Complaints can be made by anyone who is directly affected by the way in which the regulators have carried out their functions, or anyone acting directly on such a person's behalf, provided that the complaint meets the requirements of the Scheme. To be eligible to make a complaint under the Scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.

24. It cannot be said that the FCA's current interpretation of historic DISP rules in 2012 affect you in any way.

In addition paragraph 1.1 provides that Part 6 of the Financial Services Act 2012 (the Act) requires the regulators to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions, and paragraph 1.2 stipulates that the relevant functions of the Financial Conduct Authority (the FCA) and the Prudential Regulation Authority (the PRA) are their functions other than their legislative functions. Therefore, strictly speaking, the FCA is not obligated to interpret rules for you under the Complaints Scheme. In fact, as I have mentioned above, only a court of law can provide a definitive interpretation.

25. I have asked the FCA to provide further information at times to complainants in cases where I have either excluded the substantive element of the complaint, or decided not to investigate, and I have seen it give further information to complainants, including in cases where complaints are excluded, which has been particularly helpful and welcome, particularly as it provides an element of transparency to the regulator's work. However, in the particular circumstances of this case, given that the DISP rules you seek to interpret are no longer valid and have not been for a very long time there is no good reason for me to review this any further.
26. For this reason, I am utilising my discretion not to review this matter.

My decision

27. I appreciate you are unhappy with my decision and you do not accept it. You feel that the FCA should provide the interpretations of the rules you request. I have explained to you that only a court of law can definitively provide these interpretations. I have also explained that the matters you raise are now historic. The FCA has tried to provide you with some information, but what you are ultimately seeking is not within the remit of complaint scheme, which is why I am exercising my discretion not to investigate.

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Complaints Commissioner

30 October 2023