Complaints Commissioner

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19 June 2024

Final report by the Complaints Commissioner

Complaint number 202300773

The complaint

1. On 2nd February 2024, you submitted a complaint about the FCA to my office.

Your complaint to my office

2. This can be summarised as follows:

Part One

You *"fundamentally disagree"* with the FCA's comments in respect of QROPS and it is your *"view that a QROPS was a blatantly unsuitable product, and contractually there was no requirement to assess any product other than the proposed Sipp as agreed with the client. The purpose of the suitability letter is to explain why a product is suitable for a client, not a letter to explain the why a QROPS (and a myriad of other products) may be unsuitable. This is confirmed in COBS in 9.4.7R. ..We therefore feel it is an incorrect assertion to claim that my business had breached Principle 6."*

Part Two

You disagree with the FCA's assertion that the CETV value should have been used for the purposes of calculating the transfer analysis. You state that you were *"following a rule under COBS 19.1.3.AR. The FCA are stating that I should have followed the guidance (FG21/3). There is a distinction here between Guidance and Rule. This is addressed in the "FCA's Handbook Readers Guide". The definitions are: "R (Rules) - General rules, specialised rules and listing rules made under FSMA. Most rules create binding obligations on firms. If a firm contravenes such rules, it may be subject to enforcement action and action for damages". "G (Guidance) - Guidance is not binding and need not be followed to*

achieve compliance with the relevant rule or requirement. However, if a person acts in accordance with general guidance in circumstances contemplated by that guidance, we will treat that person as having complied with the rule or requirement to which that guidance relates."" Therefore, you assert that *"there is a legal requirement to follow rules, but guidance is not binding."* You further state that the FCA's review of your work shows signs of confusion within the same document.

Part Three

You believe the FCA have overstepped their regulatory powers by requiring you to confirm by 5pm Friday 17 November that the FCA letter dated 14 November 2023 had been shared with your Professional Indemnity Provider. It is your *"belief that this was done in order to disrupt the renewal process"* and *"that the timing supports this."*

Part Four

It is your *"view that the FCA took far too long to complete their assessment. They had the files to check on the 17th August 2023. A response was sent on the 14th November. There were only two files to check, yet it took three months."* It is also your *"view that this was a deliberate attempt to disrupt the PII renewal process (as it renews on December 1st)."* You "*argue that such a timescale is unreasonable"* and you *"cannot understand why an organisation tasked with protecting consumers took three months to review these files."*

Part Five

You believe that your May 2023 *"request for a meeting was ignored"*, you were *"passed onto the "Supervision Hub" ..and ended up with a succession of emails that provided no clarity, and no acknowledgment for a meeting."*

What the regulator decided

3. The FCA did not uphold your complaint. For ease of reference, the FCA's Decision Letter is included in the Appendix.

Why you are unhappy with the regulator's decision

4. You are unhappy with the FCA's decision in respect of your complaint because it: *"demonstrates the FCA's:*

a. mistakes

b. lack of care

c. unreasonable delay

d. unprofessional behaviour

e. lack of integrity".

Preliminary points

5. Your complaint to my office followed the structure of the FCA complaint. I will adopt the same approach in my response.

My analysis

6. By way of background information, on 24 May 2023, you wrote a letter to Nikhil Rathi – Chief Executive at the FCA – to request a meeting to discuss a lack of guidance in the COBS on the exchange rate risk and how to factor this risk to ensure compliance with legal requirements.

7. In parallel, the FCA commenced a supervisory review in respect of your firm and requested it to submit two files to assess the suitability of pension transfer advice. On 14 November 2023, you received a letter from the FCA notifying you of the outcome of their review (the "Review Response"). On 1 December 2023, you submitted a complaint to the FCA, on which you received a decision on 1 February 2024.

8. It is my understanding that the purpose of supervisory reviews is to provide feedback to businesses regulated by the FCA in order to help them stay compliant with rules and regulations so that consumers are treated fairly and are given all the pertinent information to enable them to make informed decisions.

Part One

9. I note your comments in your complaint on the Review Response. Having reviewed it, I can see that their decision contained a caveat at Paragraph 1 that it was *"a high level review"* based solely on the information you provided prior to 14 November 2023.

10. The FCA decision in respect of Part One reiterates this point: *"When carrying out file reviews, the FCA can only base an assessment on the information provided by the firm. Where there was a gap in relation to a QROPS in this case, the FCA cannot assume it was considered for the client."*

11. It is my understanding that your client file contained detailed information, however only part of that was provided to the FCA for review. Once you furnished the FCA with a detailed response and additional information as to why QROPS was not appropriate in that instance, in other words showed that your client's interests had been properly considered, the FCA accepted your assessment. Whilst I appreciate that receiving criticism from the regulator can be disconcerting, in the FCA's Decision Letter, they confirm that this point was no longer an issue. On that basis, I do not uphold this Part of your complaint.

Part Two

12. Part Two of your complaint is concerned with whether or not, in addition to COBS 19.1(R), the non-Handbook guidance has to be adhered to when preparing a transfer value comparator. It also suggests that the FCA review was contradictory.

13. As you rightly point out, this Part of your complaint is quite complex and, in order to better understand this point, I sought further clarification from the FCA. Their response is set out below.

14. "The requirement for a TVC is set out in the COBS 19.1 section of the FCA Handbook. These COBS rules apply to advice on the transfer of pension benefits that are guaranteed or safeguarded. COBS 19.1.3A specifically states the TVC should show the estimated value needed today to purchase the future ***income*** *benefits available under the ceding arrangement. The definition of ceding arrangement in the Handbook is a pension arrangement with safeguarded benefits.*

15. *The Guidance published in FG21/3 states the TVC should show the estimated cost of buying the DB scheme benefits.*

16. *Both the COBS rules and the Guidance refer to the cash equivalent transfer value and the transfer value in the context of advice being given in respect of guaranteed or safeguarded pension benefits. The COBS rules and guidance do not explicitly state that the non-guaranteed amount of a transfer value should not be used, as the COBS rules and Guidance only apply to guaranteed or safeguarded pension benefits.*

17. *The COBS rules and Guidance are consistent and in the Guidance in paragraph 2.11 it states, 'Advice on pension switches that do not involve any safeguarded benefits are not subject to the pension transfer rules in COBS 19.1 but are still subject to COBS 9."*

18. With regard to the contradictory response:

19. *"The ceding arrangement is contracted to pay the GMP irrespective of the fund accrued, the review feedback was trying to highlight that the client would receive effectively a higher guaranteed pension than the 'value' provided, and that the non-guaranteed part would be available as well. This is compared with the whole (guaranteed part and some of the non-guaranteed part) transfer value being used on the open market to provide the same benefits.*

20. *In his complaint letter the complainant states 'For clarity the transfer value offered in relation to the guaranteed benefits was £51,684. It is worth pointing out the rule reference[s] 'transfer value' and not 'CETV'."*

21. *The statement from the ceding scheme clearly stated that the guaranteed element of the transfer value related only to the Pre 97 GMP and was £35,198.96.*"

22. In my view, the above interpretation is reasonable, and the explanation sufficiently clarifies this point, therefore I do not uphold this Part of your complaint.

Part Three

23. I understand that you were surprised by the FCA's request to share their review findings with your insurance provider. It is also your belief that the FCA made

this request in order to disrupt your insurance renewal process and, in doing so, it overstepped their regulatory powers.

24. I have considered the FCA's 'Next Steps' wording in their Review Response. The stipulation of a deadline by which their request had to be complied with does carry an undertone of a demand, especially when one takes into account the source of the request.

25. However, the FCA requires that firms comply with the Capital Requirements. This includes the maintenance of appropriate PII insurance coverage. Mindful of your PII policy's terms and conditions, the FCA wanted to ensure that you complied with its PII requirement, hence the request to confirm by the deadline.

26. In view of the above, I do not uphold this Part of your complaint.

Part Four

27. I appreciate that, given the impending insurance renewal deadline, you would have liked to have received a speedier response from the FCA. Having reviewed the information on the file, there is nothing there to suggest that the provision of a response on 14 November 2023 was a deliberate attempt on the part of the FCA to disrupt the renewal process.

28. Whilst taking three months to review two files may seem long, however there was no service level and you did receive a response before your insurance renewal deadline.

29. On that basis, I do not uphold this Part of your complaint.

Part Five

30. From the information on the file, I do not get the impression that your request for a meeting with the CEO was ignored. I understand that after posting your letter on 24 May 2023, you received an acknowledgment from the FCA on 9 June 2023 and, on 5 July 2023, the FCA provided you with a detailed response by email. The contents of their response suggest that your letter to Mr Rathi of 24 May 2023 and the issues raised in it were carefully considered by the FCA and, most likely, it was decided that a meeting in the circumstances was not necessary.

31. Further, as you sought additional clarification on 31 August 2023 (almost two months after receiving a response), your query was referred to the Supervision Hub on 14 September 2023, to which you received a response.

32. It is unrealistic to expect the CEO to attend every requested meeting. Given the level of technical expertise your query demanded, the Supervision Hub was the appropriate route.

33. In view of the above, I think the FCA's approach to dealing with your request was reasonable, therefore I do not uphold this Part of your complaint.

My decision

34. I note you do not agree with my decision, however, in view of the above, I do not uphold your complaint.

Rachel Kent
Complaints Commissioner
19 June 2024

APPENDIX

"Dear complainant

Further to my email of 3 January 2024, I am writing to let you know I have now completed my investigation into your complaint.

Your complaint was received on 7 December 2023. On 2 January 2024, I wrote to you with a summary of my understanding of your complaint.

You provided comments on my summary in your email of 3 January 2024, which I have taken into account in my investigation.

Decision

My letter explains, below, that I have not upheld your complaint.
I appreciate this will not be the outcome you were seeking. I hope that the explanations given below will help you to understand why I reached these conclusions.

Your complaint

To summarise my understanding of your complaint, I can see you are unhappy with two recent file reviews on the suitability of pension transfer advice.

Part one

You are unhappy that the FCA review stated that your firm should have considered a QROPS for a client, which you say is unfounded as the use of a QROPS in that client's circumstances could have resulted in a tax liability of 55%. You say the use of QROPS would be a dangerous development if implemented by the wider IFA industry.

Part two

You are unhappy as the review suggests that for a client, your firm should have used a lower value for the comparison of a transfer value versus guaranteed benefits. However, the larger fund value can be used to provide the guaranteed income. You say this contradicts the relevant COBS rules and is therefore a lack of care and a mistake.

Part three

You believe the FCA is acting beyond its powers, as the FCA has no regulatory power to force your firm to disclose the findings to your PII provider. You say this amounts to unprofessional behaviour as there is nothing in the FCA handbook that allows the FCA to do this.

Part four

You are unhappy with the delays throughout this review, and believe it was strategic in disrupting your PII cover renewal. You say the FCA had three months to assess the files, but only responded with 9 working days until the PII renewal, accompanied with a demand to supply your PII provider with the FCA's review within 3 working days.

Part five

You wrote to the FCA on 31 May 2023 requesting individual guidance under SUP 9.2.1, however this request has not been responded to.

Findings

To investigate your complaint, I have reviewed the assessments to see if the reviews have been handled fairly.

Part one – not upheld

On page 9 of the letter of 14 November 2023, it says:
'The Firm has not reviewed the objectives with the client. They have also not considered why a transfer to an Australian QROPS is not being investigated now, when the client has a limited lifespan and an objective of transferring to an Australian based QROPS when closer to retirement.'

This paragraph was to point out that the use of a QROPS was not considered in line with the client's objectives, as they had stated they wished to discuss that option. This is not to say, that a QROPS is suitable for every client, however there was no evidence to show all of the clients objectives had been met.

When carrying out file reviews, the FCA can only base an assessment on the information provided by the firm. Where there was a gap in relation to a QROPS in this case, the FCA cannot assume it was considered for the client. In addition, the FCA did not make the conclusion that a QROPS was suitable for the client, nor should it be widely implemented by the industry.

I can see you have provided a detailed response as to why a QROPS was not suitable for this client's needs, which we accept – although at no point did the FCA insist that it was.

Part two – not upheld

On page 7 of the letter of 14 November 2023, it says:

'We believe the adviser has not conducted the appropriate transfer analysis through the TVC as they have used the full value of the Pre 97 element in the analysis. However, only the GMP benefit is secured using the CETV figures

and so the actual comparison should have been assessed using the guaranteed figure of £35,198.96.

Due to this we have assessed this case as being non-compliant with COBS 19.1.3AR'

I understand your point in being able to use the full value of the pre 97 benefits and appreciate the reference to 'transfer value' within COBS 19.1.3AR; however, when considering the non-handbook guidance contained within FG 21/3 (paragraph 5.6) believe that we have been sufficiently clear that this refers to the Cash Equivalent Transfer Value (CETV).

I am therefore unable to conclude that a TVC has been provided in line with COBS 19.1.3AR underpinned by the guidance in FG21/3 and also conclude that the file reviewer acted correctly in their feedback to the firm.

Part three – not upheld

I have reviewed the policy wording for your PII insurance, and I can see on page 5, under paragraph 4.2iii, it says there is a requirement for the firm to inform the insurer of "…*any investigation, enquiry or disciplinary proceedings during the period of insurance arising from circumstances first notified to the insurer during the period of insurance.*"

Whilst there is no 'regulatory power' for the FCA to force your firm to inform your PII provider with these findings, I cannot see where the FCA has forced you to. However, there is an exclusion on page 4 under paragraph 3.18 of your policy, which applies if you do not inform them of these findings – so it would have been in both yours and your client's best interests for you to do so. Therefore, I do not find it unreasonable for the FCA to remind you of these obligations under your insurance policy.

Part four – not upheld

I have reviewed the timeline from when we received the client files on 17 August 2023 up until November 2023. When the file was received, they were assigned to multiple areas for different reviews, and are often not straight forward to review. This unfortunately, takes time and resources to ensure fair and consistent outcomes for all firms.

Part five – not upheld

I can see you wrote a letter to Nikhil Rathi on 31 May 2023, requesting both a meeting and guidance in relation to your business model.

The letter was referred to our Executive Casework Unit (ECU), who are responsible for responding to correspondence addressed to Nikhil. They acknowledged your letter on 9 June 2023 and they sent their response on 9 July 2023. As you requested further clarification on the ECU's response, you

were referred to the Supervision Hub, as they were best placed to respond to more detailed firm queries.

Conclusions

I have not upheld part one of your complaint. The information initially provided showed no evidence of a QROPS being considered, even though it was an option that the client had asked for. The FCA did not imply that one should have been put in place, nor did the FCA imply that a QROPS should be used more widely by the industry.

I appreciate you have since provided evidence as to why a QROPS would not have been suitable which we accept - however, at no point did the FCA insist that a QROPS should have been used, it was just highlighted that there was no evidence to show that one had been considered.

If this information would have been provided to us when requested, no challenge would have been raised.

I have not upheld part two of your complaint. Based on the lack of information provided, it was not made clear that the adviser fully understood the hybrid product – and it can't be concluded that the TVC was provided in line with both COBS and FG21/3.

I have not upheld part three of your complaint. The FCA did not force your firm in inform your PII provider of its findings, but it would have been in your best interests for you to do so. Not doing so may have resulted in a claim not being accepted – so I don't think the FCA has acted unfairly in requesting you to inform your insurer.

I have not upheld part four of your complaint. I appreciate the timing of the letter may have been unfortunate for you in relation to your PII renewal, however I cannot see that this was purposely done. In addition, file reviews often take time, resource and governance to ensure accuracy, fairness and consistency in our response, so these delays were not avoidable.

I have not upheld part five of your complaint. Your letter was responded to appropriately by the ECU and your additional queries were answered by the Supervision Hub. A request for guidance doesn't always necessitate a face to face meeting, and I am satisfied your queries were responded to appropriately by email. As such, I do not believe SUP 9.2.1 has been breached, nor can I see that your letter was not responded to."