

01 September 2022

Final report by the Complaints Commissioner**Complaint number FCA001704***The complaint*

1. On 20 April 2022 you asked me to investigate a complaint about the FCA.

What the complaint is about

2. On 6 May 2021 you wrote to the Chief Executive of the FCA to say that ‘the Solicitors Regulation Authority (SRA) has introduced certain restrictions on freelance solicitors. One of those is that a freelance solicitor may not conduct any regulated claims management activities. The reason given by the SRA for the restriction is said to have been following discussion with the Claims Management Regulator and on the basis of concerns that solicitors may set up “unauthorised firms” to offer claims management activities (including Employment Tribunal claims).’

3. You then said:

‘The purpose of this letter is to seek clarification from the FCA on the following points:

(i) what “discussions” were had between the SRA and the FCA on this subject

(ii) whether the FCA sees it as necessary (either as a matter of law or to ensure adequate consumer protection) for a freelance Solicitor to register with the FCA before acting for a claimant in Employment Tribunal proceedings. Particularly taking into account that the legislation appears to exempt “a solicitor” from the obligation to register with the FCA in such circumstances. Or would the FCA be content that such a solicitor was

already under SRA regulation and thus would not need to further register with the FCA.

(iii) whether the FCA has any record or notes of any discussions with the SRA on this subject’.

4. The letter was referred to the FCA Supervision Hub which forwarded it for answering to the relevant department within the FCA: the Executive Casework Unit (ECU).
5. Due to what has now transpired to be a technical error, the Supervision Hub forwarded your letter, but the ECU did not receive it. As a result, although you chased the Supervision Hub for a substantive reply for over four months, none was forthcoming. The Supervision Hub sent you holding responses to assure you someone would get back to you, but no one ever answered your query.
6. You finally complained in September 2021 and the FCA Complaints Team issued its decision letter on your complaint on 20 January 2022. I refer to it below.

What the regulator decided

7. The FCA Complaints Team apologised for the delay in answering your letter dated 6 May 2021 and said the following:

‘Due to an apparent technical error which occurred, this prevented the ECU from receiving your lines of correspondence.

Therefore, on the evidence, staff took reasonable actions to share your concerns and the reason they were not actioned sooner resolved solely to a system issue alone. Please accept my sincerest apologies on behalf of the FCA for the technical issues occurring and for any inconvenience caused. However, as with any organisation, IT related issues can occur and as the error wasn’t specifically relating to the actions of the FCA, I have decided to partially uphold your complaint.’

8. The FCA offered you £50 ex gratia payment for this delay.

9. The FCA decision letter continued: 'Questions (i) and (iii) have been referred to the FCA Information Disclosure Team to be processed in line with the requirements of the Freedom of Information Act 2000 (FOIA). They will respond to you separately'.
10. With respect to (ii), the FCA said 'is indeed necessary for a freelance solicitor to be authorised by the FCA before undertaking regulated claims management activity'. The decision letter then provided information about why this is the case by outlining the legal framework in place.
11. Finally, the decision letter gave you referral rights to the Complaints Commissioner.
12. You wrote back to the FCA on 25 January 2022 to say that
 - a. You couldn't accept the £50 as your questions have not been answered in full (the FCA Information Disclosure Team had not written to you on (i) and (iii)).
 - b. You did not accept that the delay in answering your complaint should only be partially upheld and asked that the FCA Complaints Team review this aspect of your decision and make a finding that the FCA was clearly (fully not partially) at fault in taking over 8 months (despite a number of reminders) to answer a simple enquiry and uphold your complaint in full.
 - c. You said that the decision letter dated 20 January 2022 explained the legal framework but did not answer the question about whether the FCA thought it necessary to have such restrictions in place.
13. On 4 February 2022, the FCA Complaints Team wrote back as follows:
 - a. With respect to this point, the FCA Complaints Team suggested you contact the FCA Information Disclosure Team directly to chase for a response.
 - b. With respect to this point, the FCA Complaints Team said 'As with any other organisation, system issues can arise, which as a consequence is reasonable to conclude that the error was not foreseeable and nor was it down to the actions, or inactions, of FCA staff. On the evidence, staff did what they were expected to do but the system let them down.'

I hope that this additional information helps you understand why I made the decision to partially uphold your complaint and not to fully uphold your complaint.'

- c. With respect to this point, the FCA Complaints Team said: 'The Complaints Scheme is in place to deal with complaints that arise from the exercise of or failure to exercise, any of the FCA's relevant functions. This is set out in paragraph 1.1 of the Scheme and Part 6 of the Financial Services Act 2012. As your complaint relates to a policy question rather than a complaint, it is not something that we are able to investigate or answer under the Scheme, as it would not be considered one of the FCA's relevant functions.'

I would suggest raising the above question with the Supervision Hub on 0800 111 6768 or by email at firm.queries@fca.org.uk. Alternatively, you may wish to seek independent compliance advice on this matter'.

Why you are unhappy with the regulator's decision

14. You have said to me that:

- a. Your complaint about delay should be fully upheld. The FCA is responsible for its IT equipment and has to take responsibility. It is not the case Supervision Hub staff took reasonable actions to share your concerns as they did not actually chase the ECU during the four months you were asking for a response. (Element One)
- b. You feel that even if answering whether the FCA felt it was necessary to have such restrictions in place is not strictly to be dealt with through the complaints process, nevertheless you 'did not put this point as a complaint when I sent my letter dated 6 May 2021. It was then just a simple request for information. With respect it seems to me to be ridiculous to now suggest that I re-submit my original request to the Supervision Hub' (Element Two)
- c. You responded to the FCA Complaints Team on 9 February 2022 as follows: 'In your letter you have, in part, responded to my request for contact detail for the Information Disclosure Team. Thank you for that. But I did also ask for an estimate of when I will receive a response and I also asked if my requests could be given some priority. Given that you are the

person within the FCA who, probably, has the best understanding of the history of this matter I would have thought (given the very poor previous inaction on the part of the FCA in responding to my 9 month old enquiry) that you would have taken it upon yourself to speak with the Information Disclosure Team to obtain the information on response time that I asked for and pass it to me direct. If I now contact the Information Disclosure Team, I expect they will respond by saying they received this information request only a matter of a week or so ago and they will not understand why I am seeking an expedited request. Can I ask you please, given the background circumstances, to liaise with the Information Disclosure Team to achieve an expedited response to my disclosure request?' The FCA answer to this was a response on 9 February 2022 to say 'As my letter of 4 February 2022 prescribed, the Complaints Team have now concluded matters on your complaint. I would suggest that, if you remain unhappy and would like my decision reviewed, please contact the Complaints Commissioner.' You do not think this is acceptable and would like me to recommend that the FCA complies with your request. (Element Three)

d. You have asked for the ex gratia payment to be reviewed. (Element Four)

My analysis

Element One

15. There is no dispute that the FCA received your letter dated 6 May 2021 and did not respond to it for over four months despite your frequent requests to chase a response until you submitted a formal complaint in September 2021. The FCA has explained this was due to an internal IT error which meant your letter was 'lost in translation' between two departments. The FCA has apologised for this and offered you an ex gratia payment, which I welcome.
16. Had the FCA let matters rest at this point, you may not have become (understandably in my view) frustrated with the subsequent FCA response and referred this complaint to me.
17. I agree with you that the FCA's partial uphold of this element of complaint and its reasons for doing so are nonsensical. In my view you are correct that the FCA should take responsibility and accountability when things go wrong with its

IT systems. The simple facts of this case are that you sent the FCA a letter to which you did not receive a reply from the FCA. This is the essence of your complaint. As you did not receive a response, I consider your complaint is upheld. The fact that there may have been internal issues with the FCA's IT is regrettable, and warrants an apology and an ex gratia payment, both of which you were offered, but it does not 'absolve' the FCA from accountability and responsibility for its errors.

18. I also agree with you that it is difficult to see how the FCA reached the conclusion that the Supervision Hub staff had taken appropriate and reasonable actions with respect to sharing your information. In the first instance, it seems to me that there ought to be an acknowledgement mechanism in place to assure Supervision Hub that correspondence it has referred to other departments has been delivered/received and read. Second, you chased the Supervision Hub repeatedly for an answer, but no one there seems to have, in turn, chased the ECU for an explanation or update, even though at least two months had passed since you wrote your letter. I consider this poor customer service on the part of the Supervision Hub and agree with you that staff there should have contacted the ECU with the passage of time for an update given your repeated chasers for a response. The FCA informs me 'the Hub have accepted that the Sup Hub colleague (who has since left), could have been more pro-active when they realised that Mr. McMahon had sent 3 chasers that ECU had not responded to, nor acknowledged'.
19. I am also concerned that the FCA decision letter makes no mention of any internal review or action taken to ensure that such a technical error does not occur again.
20. For the reasons above, I uphold your complaint and I **recommended** the FCA fully, and not partially uphold your complaint.
21. I also **recommended and invited** the FCA to confirm that it is responsible, as an organisation, for its internal operations and that it must take accountability and responsibility for these. It is simply not good enough for the FCA to say that it cannot uphold a valid complaint because it has no control over its IT system. The FCA accepted your recommendation that the FCA is, as an organisation,

accountable and responsible for its internal operations and has told me it has changed the complaint outcome from partial uphold, to a full uphold. It apologises that it did not do so in its Decision Letter of January 2022.

22. I **recommended** that the FCA confirm what actions it has taken with respect to ensuring the technical error is not repeated
23. I **recommended** the Supervision Hub review its internal procedures to ensure that there is a clear audit trail showing that correspondence conveyed to other departments within the FCA has been delivered and read.
24. As I mentioned above, the FCA acknowledges the Supervision Hub should have been more proactive in when it realised you had sent three chasers the ECU had not responded to. With respect to the technical error, the FCA informs me that 'the Hub and ECU are undertaking reviews into what happened. Further, the Hub is also engaging with ECU on the technical issue around the email address to find a solution to prevent the situation occurring in the future. Following the conclusion of these reviews, we will confirm what actions have been taken to ensure the technical error is not repeated'.

Element Two

25. You wrote to the FCA on 6 May 2021. You say it was then just a simple request for information and it was passed to the Supervision Hub (which in turn tried to send it to ECU). When the FCA did not respond, it escalated into a complaint. This was passed to the Complaints Team which as you say, suggested you resubmit your original request for information to the Supervision Hub Team.
26. I agree with you that you are being passed from pillar to post between the FCA departments, with no clear resolution to your specific query in sight. As you are aware, the FCA has told you that freelance solicitors do need to be authorised by the FCA before undertaking regulated claims management activity. Your specific query of why the FCA feels this is necessary would involve the FCA offering opinions on policy, rules and guidance. There may be many reasons why the FCA may or may not want to provide such opinions as an organisation, but the answer conveyed to you does not deal with this matter as such. Instead, the FCA Complaints Team says that it cannot look into this matter for you as it's

not a relevant function of the FCA and therefore outside its remit and suggests that you approach the Supervision Hub for more information. This is an unsatisfactory response for the following reasons:

27. Either the FCA is prepared, as an organisation, to offer you an opinion as per your request, or it is not. You were not given a clear answer on this point, but I think you should have been.
28. If it is, then it is very poor customer service to send you back for this information to the Supervision Hub after you had been waiting for nine months for a reply to your question, most of that time from the Supervision hub. Which in turn had forwarded your complaint to the ECU, but which in turn had also failed to answer your question. Which begs the question why the Complaints Team was referring you back to the Supervision Hub and not the ECU, Or indeed some other department? The Complaints Team should have obtained this information for you, in the same way it obtained the answers to your question (ii).
29. If it is not, then it should say so and not waste your time by sending you to the Supervision Hub for an answer after you had been waiting for one from the Supervision hub for over four months and never actually received one.
30. I do not think the FCA handled this element of your complaint well. For the reasons above I uphold your complaint.
31. I **recommended** the FCA provides a clear answer on your query as per my comments in 26 above.
32. The FCA has responded as follows:

‘We think that some further clarity on the situation may assist here. [the complainant] has made requests of the FCA and I outline our response as follows:

- What “discussions” were had between the SRA and FCA regarding the introduction of restrictions on freelance solicitors?
- Whether the FCA has any records of notes of any discussions with the SRA on this subject.

What information and documents we can disclose about discussions between two regulators is determined by the Freedom of Information Act 2000. Following

IDT's assessment of [the complainant]'s request, we understand the FCA wrote to [the complainant] in April 2022 and June 2022, to say that the FCA was unable to confirm or deny whether discussions with the SRA had taken place.

- Whether the FCA sees it as necessary (either as a matter of law or to ensure adequate consumer protection) for a freelance Solicitor to register with the FCA before acting for a claimant in Employment Tribunal proceedings. Particularly taking into account that the legislation appears to exempt “a solicitor” from the obligation to register with the FCA in such circumstances.

In short, the answer to this question is yes. SRA-regulated freelance permissions from the SRA do not confer the rights to take advantage of the exemption under 89N of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 to conduct regulated CMC activity. Information from the SRA website may also assist and may provide [the complainant] with an alternative option. While it is not for us to comment on SRA regulatory regime, it appears should [the complainant] not wish to seek FCA authorisation, he could explore with the SRA obtaining the relevant permissions to enable him to take advantage of the exemption under s.89N. As I say, it is not for us to comment on the SRA regime, so he would need to explore with the SRA whether this is, indeed an alternative option, but I hope the information below is of use:

<https://www.sra.org.uk/solicitors/guidance/preparing-sole-practitioner-regulated-independent-solicitor/>

Either way, he must hold the appropriate level of authorisation with either the FCA or SRA should he wish to conduct regulated CMC activity. The requirements for regulated CMC activity are similar to those for reserved legal services which can only be provided through an entity that is authorised to do so.

I appreciate [the complainant] may feel this is burdensome. Nevertheless, there have been significant levels of misconduct in the CMC space. Indeed, regulation of the sector was passed from the Ministry of Justice to the FCA on 1 April 2019 for this very reason. For more information, please see The Brady Review

commissioned by the Government. In furthering our consumer protection objective, we must take action to address and prevent harm to consumers’.

Element Three

33. The background to this element of complaint is that the FCA complaints Team forwarded your queries to the Information Disclosure Team and closed the complaint. When you asked the Complaints Team if they would make a request of the Information Disclosure Team to expedite the response to you given you had been waiting nine months for a response, the Complaints Team replied it had closed your complaint and you should refer it to me if you remain dissatisfied. You subsequently did so.
34. I do not think this element of your complaint was addressed well, and I uphold your complaint for the reasons below.
35. It does not seem unreasonable to me that you should request that your correspondence is prioritised by the Information Disclosure Team, given the circumstances of your complaint. The Complaints Team appears to think you should be the one to directly contact the Information Disclosure Team with any further requests/queries/ as stated in their decision letter. You rightfully pointed out to the Complaints Team that it should be them passing the request on to the Disclosure Team and highlighting the background circumstances. As I mentioned above, the FCA’s response to you was to refer you to my office.
36. I agree with you that the sensible thing is for the FCA Complaints Team, who passed your request to the Information Disclosure Team, to also explain the circumstances of the delay to that team and ask if a prioritisation of your case is possible. The Complaints Team should not even have to be prompted by you to do so. But it did not, and even when you asked it to, this did not prompt any review of the circumstances. If anything, matters became worse: the Complaints Team refused to consider your point at all and referred you to me.
37. In my view, in cases such as these where there has been excessive delay in dealing with complainants, the Complaints Team should have in place protocols/service level agreements with other departments so that there is a prioritisation of their input in resolving a complaint. I recommend that this happens.

38. The FCA has responded that
- a. The Information Disclosure Team (IDT) is responsible for ensuring the FCA complies with its obligations under the Data Protection Act 2018 and Freedom of Information Act 2000, both of which are overseen by the Information Commissioner's Office (ICO). Due to the importance of the legislative functions performed by IDT, the level to which any form of prioritisation of specific cases is possible is extremely limited. This is to ensure equal prominence is given to every request submitted to the FCA for information and to ensure we remain agnostic as to the reasons surrounding an information request being submitted to the FCA, something set out within the ICO's guidance.
 - b. The FCA does not consider it is prudent to change its processes in general but has explained that 'the Complaints Department already have substantive arrangements in place with other Departments. The appropriate solution is for investigators to consider whether a conversation needs to happen around the possibility of prioritisation with the relevant business area. While that did not happen in this case, for which we apologise, it is something which the Complaints Department do consider, depending on the circumstances of the case'.
39. I do not think the FCA Complaints Team should close a complaint before it has ascertained that all the issues raised in the complaint have been resolved. The function of the Complaints Team is not to merely act as a post box, as has happened in your case, by simply passing on information/queries to other departments (such as the Information Disclosure Team). The Complaints Team should at the least consider where there have been shortcomings whether to offer a remedy: in your case, it is to 'put things right' which means ensuring, over and above apologising to you for the delay and offering an ex gratia payment, that you actually receive the answer to the queries which is at the centre of your complaint. I **recommend** the Complaints Team keep complaints open until the underlying issue of the complaint is resolved, and proactively monitor progress.

40. The FCA has responded that it already tracks actions through its Recommendations process. However, this misses the point that in this case, there was no recommendation to track. However, the FCA has told me it is open to discuss this point further, and I turn to it below.

Element Four

41. You were offered an apology for the FCA's delay in answering your queries, and a £50 ex gratia payment for distress and inconvenience.
42. What you were not offered is the full answer to your queries, or even an indication if some of your queries can or will be answered by the FCA, or who will answer them within the FCA, and how quickly your queries will be answered (say by the Information Disclosure Team).
43. You tried to speak to the Complaints Team about the points above, but you have not had an answer to these points, you have instead been referred to me.
44. Unfortunately, I cannot answer these questions. In turn, I had to refer you back to the FCA, which I appreciate you will find frustrating. However, I made numerous recommendations in this preliminary report that the FCA now robustly addresses all the outstanding issues. I also **recommended** that the FCA increases the ex gratia payment offer to you for this case, which has been handled poorly from start to finish for the reasons I give above. Given the seriousness of the failings in your customer experience when interacting with the FCA over a period of nine months, I recommend that the FCA offers you £500 in ex gratia payment.
45. The FCA has accepted you have not received the level of service that it expects to provide. It proposes to offer you an apology and considers an 'ex-gratia payment of £450 is merited given the poor level of service and inconvenience [you] have suffered which has been compounded by a number of errors. In particular in relation to the issues in Supervision Hub, ECU and the Complaints Department in dealing with [your] questions and chasing responses and the service [you] received from the Complaints Department, which could have sought to resolve the complaint at an earlier stage rather than passing [you] back to Sup Hub colleagues. For clarity, this offer is in addition to the £50 which was already offered and accepted by [you].

My decision

46. Your experience with the FCA over a period of over nine months has been one of delays, poor customer service, departments working in silos and ultimately a failure to resolve your complaint. What started as a request for answers to three questions which you posed to the FCA ended up, needlessly, as a complaint .
47. I uphold your complaints for the reasons given above.
48. The FCA has accepted my recommendations apart from two:
- a. The FCA does not consider it is prudent to change its processes in general with respect to interdepartmental prioritisation but has explained that ‘the Complaints Department already have substantive arrangements in place with other Departments. The appropriate solution is for investigators to consider whether a conversation needs to happen around the possibility of prioritisation with the relevant business area. While that did not happen in this case, for which we apologise, it is something which the Complaints Department do consider, depending on the circumstances of the case’. I find this response from the FCA adequate under the circumstances and following this explanation, I rescind my recommendation.
 - b. The FCA has not accepted my recommendation that the Complaints Team keep complaints open until the underlying issue of the complaint is resolved if this involves matters being passed to other departments, on the basis it monitors progress of recommendations. I said in this case the FCA made no recommendation to monitor. The FCA has said it is open to further discussion and I propose to discuss this matter further with the FCA as I am not satisfied with the outcome of this recommendation. I propose to revisit the outcome of my discussions with the FCA in my next annual report.
49. I find the FCA’s responses to my preliminary report reasonable and make the following final two recommendations:
- a. I recommend the FCA update me in six months’ time on whether the IT issues identified have been rectified.

- b. I recommend the FCA engages in discussion with me in reaching a more appropriate outcome on my recommendation in 48 b above.

Amerdeep Somal

Complaints Commissioner

01 September 2022