

6th April 2017

Dear Complainant

Complaint against the Financial Conduct Authority (FCA)**Our reference: FCA00283; FCA reference 204562768**

Thank you for your letter of 16th February 2017, and for your various supplementary emails up to and including 5th April 2017, all of which I have carefully and personally considered.

How the complaints scheme works

Under the Complaints Scheme, I can review the decisions of the FCA Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

In the light of the extensive comments you have made in response to the preliminary decision which I issued to you and the regulator on 10th March, I make the following general preliminary points.

The Scheme is established under statute, and must be fair and thorough, but it is not an alternative form of litigation, nor is it a mechanism for the review of statutory systems or for the testing of legal points. Section 84(3) of the Financial Services Act 2012 states that “The complaints scheme must be designed so that, as far as reasonably practicable, complaints are investigated quickly”.

Some of your comments suggest to me that you expect the Scheme to follow quasi-judicial approaches, or that I should consider detailed points of law in relation to process. This Scheme is not the forum for that.

I have considered all the points you have made in response to my preliminary decision (although I have not responded to each point individually), and have amended my decision where I consider it appropriate.

What we have done since receiving your complaint

I have reviewed all the papers you and the regulator have sent us (including papers in the two dropbox.com folders). I have not appointed another investigator to undertake this review (although two colleagues have provided some administrative support).

In response to paragraph 26 of your original letter, and your supplementary comments in response to my preliminary decision, I should clarify that:

- a. In accordance with the standard practice under this Complaints Scheme, I have been sent the full FCA file on your complaint, including internal correspondence up to the issuing of its decision letter;
- b. The only other contact which I had with the FCA in relation to your complaint before sending my preliminary decision was a brief discussion with a member of staff about the *general* arrangements for oversight of the FOS, followed by confirmation that the factual statements in the section below headed “Statutory responsibilities” were correct. For the avoidance of doubt, I have had no discussion with the FCA about the merits of your complaint or my conclusions about it, other than sending them the preliminary decision at the same time as it was sent to you. You have seen their response.

Your complaint

On 19th January 2017 you complained to the FCA. Your complaint was detailed, but you summarised the origins of your complaint as follows:

In summary, these complaints have their origins in how a complaint of mine was treated by the Financial Ombudsman Service ('FOS') and then by the Independent Assessor of the FOS ('IA').

In my opinion, the FOS/Ombudsman in handling my complaint/reaching her decision did not comply with (i) a considerable number of procedural rules, some mandatory, set out in the FCA Handbook, (ii) various legal cases supplementing those rules in terms of how Ombudsmen should act and (iii) principles of natural justice/human rights. I therefore rejected the Ombudsman's decision meaning it is without legal effect. I did, however, refer matters to the IA but her staff advised that under her terms of reference she would not be able to consider the bulk of that which I had referred to her as to do so would entail expressing comment on the Ombudsman's judgment. The imperative following on from that remark that someone should consider those complaints, impacting as they may (or in my view, should) do on the Ombudsman's decision, is therefore obvious. In dealing with my approach to her, the IA also showed herself to be unable or unwilling to comply with a principle of natural justice/human right to a fair hearing.

In its decision letter of 9th February 2017, the FCA summarised your complaint against it as follows:

I understand that you are unhappy with the way in which a complaint of yours was treated by the Financial Ombudsman Service. You feel that it was not handled correctly because the Financial Conduct Authority (FCA) has not met its statutory responsibilities in encouraging the Financial Ombudsman Service to comply with its statutory functions.

Having referred to the memorandum of understanding between the FOS and FCA, and summarised the FCA's statutory responsibilities, the FCA rejected your complaint on the following grounds:

having reviewed all your comments I am not persuaded that the FCA is failing to deliver on its statutory responsibilities in this matter.

You are dissatisfied with the FCA's decision, and have referred the matter to me. You have helpfully summarised your complaint as posing two basic questions:

- A. *Has the FCA complied with its statutory responsibilities as regards the Financial Ombudsman Service ('FOS')?*
- B. *Could any failures in that regard have accounted for how my complaints to the FOS and then the Independent Assessor of the FOS ('IA') were treated?*

In addition to the principal two issues contained in your summary, above, your complaint to me contains a large number of questions addressed to the FCA, which are largely to do with the interpretation of the statutory provisions. You have invited me to pose those questions to the FCA and/or to conclude that the FCA's original investigation of your complaint was so inadequate that they should start considering your complaint again from scratch.

My consideration of your complaint

I shall start by rehearsing the coverage and scope of the Scheme:

Coverage and scope of Scheme

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;*
- b) unreasonable delay;*
- c) unprofessional behaviour;*
- d) bias; and*
- e) lack of integrity.*

3.2 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.

My role, therefore, is not to answer the general question “has the FCA complied with its statutory responsibilities?”, but rather to establish whether any failure to comply with its statutory responsibilities *has* (not *could have*) caused you inconvenience, distress or loss. My task is complicated by the fact that it is first necessary to answer a prior question which is, is there evidence of failure in the FOS and/or its Independent Assessor which should have caused the FCA to act?

Statutory responsibilities

You have asked what provisions of the Act the FCA relies upon to say that the FOS must be operationally independent. What follows is my interpretation of the provisions of schedule 17.

Schedule 17 to the 2000 Act states that the terms of the FOS Board members' appointments (which are made by the FCA) “must be such as to secure their independence from the FCA in the operation of the scheme.” Having looked at this, my view is that this operational independence is clearly wider than the independence of the individual ombudsmen, since it explicitly refers to the independence of the Board members. That is reinforced by the fact that, while the appointments to, and removals from, the Board are made by the FCA, in the case of the chairman this must be done with the approval of the Treasury.

The FCA's duties, again under the statute, are to “take such steps as are necessary to ensure that the body corporate established by the Financial Services Authority under this Schedule as originally enacted is, at all times, capable of exercising the functions conferred on the scheme operator by or under this Act”. The addition of the words “capable of” appears to me to be clearly designed to distance the FCA from operational responsibilities.

I understand that the FCA discharges these duties by the making of the Board appointments, annual approval of the Financial Ombudsman Service's budget, and through a sub-committee of its Board (the Oversight Committee) which meets the FOS three to four times a year and reports to the FCA Board on its discussions, which include consideration of the overall performance of the Financial Ombudsman Service.

As you are aware, there is also a memorandum of understanding between the FOS and the FCA which is designed to give practical application to those arrangements. This is referred to in the FCA's decision letter. However, I do not consider it to be necessary to consider that memorandum in the context of this complaint.

You have also drawn my attention to other provisions of the 2000 Act, and in particular sections 1B, 1C, 1L and 204A(6). These relate to the general duties of the FCA. You are asking me to rule upon the applicability, effect and the FCA's compliance with those broad regulatory duties. This would require an extensive review of the FCA's approach, and the exercise of its discretion. This Scheme is not designed to do that kind of review, nor do I think it is necessary for the consideration of your complaint. In my view, such an exercise would require a Judicial Review or a different type of inquiry. I could, however, consider a complaint which demonstrated a clear breach of a statutory duty.

The connection between the FCA's statutory responsibilities and the two questions posed by your complaint

For your complaint to succeed, it would be necessary for you to demonstrate both that the FCA had failed in its statutory responsibilities, and that that failure had disadvantaged you in the matters about which you complained to the FOS.

In relation to your first question, you infer that the alleged deficiencies in the handling of your complaint (and possibly others) by the FOS must be down to a failure of the FCA's oversight. The Complaints Scheme specifically excludes complaints against the FOS from its scope, so all I can consider is the FCA's actions, or inactions. I have some sympathy with you, since the FCA's decision letter is so brief that it gives no indication as to how the FCA reached its conclusion that it is not persuaded that the FCA is "failing to deliver on its statutory responsibilities".

However, I have to say that, in my view, you have supplied no convincing evidence that the FCA has failed in its responsibilities – particularly bearing in mind the FCA's legitimate discretion in the exercise of its functions, and its duty to respect the FOS's operational independence. You have raised some significant questions (to which I shall refer later), but that is a different matter.

In your comments on my preliminary decision, you have alleged that the FOS has breached the rules on procedural fairness, and that the FCA is therefore required to (and has failed to) act. Shortcomings in the FOS's performance in a particular case or cases, even if established, do not equate to the kind of evidence of systemic failure which might require the FCA's intervention, or support a conclusion that the FCA had failed in its duties. By "systemic failure", I mean failure of a kind which might suggest not merely that there are occasional errors in the system, but a failure which might call into question the FOS's ability to fulfil its functions, and therefore justify FCA intervention. You have alleged that the FOS has breached the requirements of procedural fairness, but – even if that were established – it does not follow that that is the fault of the FCA.

In your comments on my preliminary decision, you "contend that if the rules are not being followed, as is the case with my complaints, the FOS is not operating the scheme but something of its own devising...It follows that in the circumstances of my case...where the FOS is acting outside of the Scheme or unlawfully, there is no independence...and the FCA can and in my view should intervene".

I agree with you to the extent that, if the FCA had clear evidence that the FOS was persistently failing to operate the scheme and/or operating unlawfully, there would be an onus on the FCA to intervene. However, it seems to me that your complaint about the FOS's handling of your complaint includes arguments about the fairness or otherwise of the FOS's

procedures which are contentious, and could be settled ultimately only through a court. This Scheme is not the place to rule on such matters, nor does the existence of an argument about the fairness of the FOS's procedures establish a failure by the FCA.

It follows from that conclusion that your second question falls away.

The FCA's decision letter

Although I have decided that the FCA was right to reject your complaint, in my view the FCA's decision letter was unhelpful in its lack of explanation. Given that the FCA does have responsibilities for the FOS, it would have been sensible to give some further explanation. For example, a description of how the FCA Board exercises its role, and on the basis of what broad categories of data, how it responds to information alleging failure by the FOS, and what steps the FCA takes to identify whether the FOS is "capable" of exercising its functions, might have provided you with some degree of reassurance.

Furthermore, I think that it would be helpful if the FCA were to confirm that it will satisfy itself (if it has not already done so) that the *general* allegations of procedural unfairness which you have raised have been adequately addressed. In other words, one would expect the FOS to be satisfied that its procedures were compliant with the rules of fairness. The fact that the FOS is operationally independent from the FCA does not mean that the FCA cannot, or should not, seek assurances if significant allegations about the FOS's practices are made.

Conclusion

For the reasons given above, I have not upheld your complaint. However, I recommend that the FCA:

- a. Reviews the information it publishes about both its relationship with the FOS and the way in which it monitors the performance of the FOS;
- b. Satisfies itself (if it has not already done so), that the questions of procedural fairness which you have raised have been adequately addressed by the FOS.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner