Financial Ombudsman Service Review Secretariat
Retail Themes Division
25 The North Colonnade
Canary Wharf
London E14 5HS

Dear Sir or Madam

I am concerned that the small firm is not being properly heard in responses to CP 04_12.

From some of the submissions I have seen to date from the representative bodies I can say without hesitation that they do not represent my personal views or that of the many small firms both authorised and departed that I am in contact with on a daily basis. I am particularly concerned about a firm's right to appeal against FOS determinations that are patently unjust and faulty

The consultation paper acknowledges that there is concern about the lack of appeal but then refutes the need with contrived comments. In my response I would like to discuss these elements and show why an appeal process is essential in the interests of 'natural justice'.

In what follows, extracts from the report are shown in bold italics with my comments immediately below in plain text.

"For some firms, particularly small firms, a single adverse decision from FOS might have an impact on livelihood or on the availability and cost of indemnity insurance."
(CP04_12 PARA 2.26)

I agree. The FOS is not infallible and some of its decisions have been wrong. Firms have been driven out of business through no fault of their own. This alone should be sufficient cause for a method of challenging an FOS decision be available to a firm. I have ample evidence to demonstrate that the existing system is neither fair nor workable.

"The absence of an external appeal created an imbalance, particularly as the complainant had the choice of accepting the ombudsman's final decision or retaining the right to go to court".
(CP04_12 PARA 5.5, Bullet 2 page 30)

I agree with this although I understand how a naïve and possibly unbalanced mind would think such a system could possibly be fair and workable in the first place.

"The lack of an appeals process may offend the 'fair trial' provisions in Article 6 of the European Convention on Human Rights (ECHR) incorporated in UK law by the Human Rights Act 1998"
(CP04_12 PARA 5.5, Bullet 3, page30)

Absolutely, the fact that the FOS is both mandatory and binding means it is not compatible with the Human rights act 1998 and the ECHR would have a field day when a case is eventually brought before them, Sir Anthony Holland of the PIAOB admitted his scheme was just waiting for someone to take it to Strasbourg and the FOS is even more incompatible with Article 6**.**

"Judicial review does not amount to an appeal. The court will only overturn an ombudsman's decision on judicial review if it contains errors that deprive it of logic, making it irrational. So, the argument against appeals put forward at the time of FSMA is no longer valid"
(CP04_12 PARA 5.5, Bullet 4, page 30)

Agreed. The FSMA 2000 was built on the assumption that a Judicial Review is prohibitively expensive and will not impact on the day-to-day workings of a faulty system. This does not mean that applications for Judicial Review are not being planned.

"An external appeal could overturn a 'wrong' decision where a party considers that the ombudsman had misunderstood the issues, misunderstood the facts misunderstood the law or applied hindsight– or where a party turns up new evidence"
(CP04_12 PARA 5.5, bullet 1, page 31).

Agreed. I have evidence of determinations being made on cases that are not within the jurisdiction of the Ombudsman and the claimant has lied in the complaint form, in many instance the final decision of the Ombudsman was based on a tissue of lies from the claimant despite the evidence on file, this system is faulty.

"An external appeal could maintain the general quality of decision-making by FOS ombudsmen by introducing an external check on how they apply the criteria of fairness and reasonableness in individual cases"
(CP04_12 PARA 5.5, bullet 2, page 31).

Agreed.

"FSMA requires FOS to resolve disputes with minimum formality. Introduction of an appeal body would introduce complexity and cost –even more so if appeals were available in all cases. One reason behind the requirement for informality is so that consumers are not dissuaded from complaining because of an intimidating process. Introducing appeals could discourage justified consumer complaints."
(CP04_12 PARA 5.6, bullet 1, page 31)

Appeals should not be available in all cases, there should be irrefutable evidence to support the claim that the FOS made an error and the FOS should be warned that such errors were not to be repeated, an award for time wasted and costs incurred should be made to the firm. A firm would not take the process of appeal lightly if there was a possibility the firm could be sanctioned for making spurious claims, in the same way that a genuine complainant would benefit from sanctions against spurious, vexatious or fraudulent claims made against firms.

"FSMA says decisions are to be based on the ombudsman's opinion of what is fair and reasonable, and gives consumers the right to reject the ombudsman's final decision. This follows the principles of predecessor ombudsman schemes, including those established voluntarily by insurers and banks. In practice, consumers are unlikely to take a case onwards from FOS to the courts, because of the attendant costs".
(CP04_12 PARA 5.6, bullet 3, page 31)

Fair and reasonable is entirely subjective as is attitude to risk, using 'decision trees' and employing people who do not possess the required expertise is a recipe for disaster. The same information on a different day or before a different adjudicator could result in an entirely different opinion; I have evidence to support the accusation that certain individuals at the FOS have their own agenda. The complainant has recourse; the firm does not. This policy may follow earlier established principles but that, of itself, does not make the policy right. As the above paragraph rightly points out the consumers are unlikely to take a case onward because of the attendant costs this applies equally to the firm in the case of a Judicial Review.

"Who could appeal? Consumers who do not accept an ombudsman's final decision remain free to take their case to court, but the courts do not have jurisdiction to deal with maladministration or 'fair and reasonable' issues. So, arguably, it would be fairer to make any appeal mechanism available to consumers as well as firms."
(CP04_12 PARA 5.7, bullet 1, page 32)

The answer would be for the consumer to pay a fee for an appeal. If the courts do not have jurisdiction to deal with a regulatory whim then why do the FOS have these amazing powers?

"Should there be an appeal to court? As described above, an ombudsman's decision can already be subject to judicial review on a number of grounds. But considering afresh what was 'fair and reasonable' would take a court into unfamiliar territory."
(CP04_12 PARA 5.7, bullet 2, page 32)

We take "unfamiliar territory" to mean as opposed to "natural justice".

"If there were a review limited to the principles of the decision, how would that work where FOS received a number of similar cases and concentrated first on deciding a 'lead case'? Could it mean that the results of the 'follow-on cases' then differ from the result of the 'lead case'?"
(CP04_12 PARA 5.7, bullet 4, page 32)

Each complainant, firm and Ombudsman is different, I doubt whether a 'lead case' would set a precedent given the ready use of hindsight seen to date.

"How should the costs of the appeal process be met? Would that depend on whether the appeal was brought by the firm or the consumer? Firms would be unlikely to launch frivolous appeals if they had to meet the costs of both parties. But what would dissuade consumers from launching frivolous appeals?"
(CP04_12 PARA 5.7, bullet 5, page 32)

“Consumers” should be charged a fee and pay all costs when the claim is not upheld, firms should be sanctioned by any means made available if it is proven that the firm brought an unfounded claim to appeal. This seems fair and reasonable.

The Consultation raises a number of questions to answer.

Do firms want appeals?
Absolutely. Of the possible options in Appendix F the preferred choice is External Appeal to Court

Do consumers want appeals?
That is a question for consumers. They have an external process already with recourse to the courts

If so – for what types of cases, why and to whom?
I am sure that their reasons would be the same as for the firm. Instances where they believe that the FOS has got it wrong. The consumer has recourse to the court

How would it be decided how many cases, and which ones, should go to appeal?
Let the firm and/or the consumer decide**.** Neither will take this action lightly

How often might an appeals body reach a different conclusion from the ombudsman, and why?
An appeals body would reach a different conclusion as many times as the FOS makes and error, and why? Quite simply, because the Ombudsman made an error in the first instance.

Should the appeal decision apply to other consumers?
Yes, if a decision is proven to be defective then all those who suffered as a result should receive redress and that includes firms.

The weight of evidence shows that the remuneration policy of the FOS encourages the employment of unsuitable candidates and the reckless determination of cases to meet targets and therefore bonuses.

If a final decision of an Ombudsman can wreck the lives of advisers with impunity it cannot be right, it cannot be ‘fair and reasonable’ to be shut down or hounded in retirement through regulatory or legal sanctions imposed using faulty determinations of the FOS. This is actually happening here and now, the situation is so unbelievable that a sane man could be forgiven for believing that it is merely a game being played out by people who have absolutely no comprehension of the consequences brought about by their arrogant incompetence.

Another solution would be to allow a fully funded Defence Union to represent firms and keep the FOS in check?

Yours faithfully

Evan Owen

The IFA Defence Union

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