



## **Guidance Notes for Ombudsman determination, review and hearing**

1. These notes are for guidance of individuals ('complainants') who have an unresolved complaint against a financial services supplier ('supplier'), staff of the Office of Fair Trading ('OFT') Financial Services Ombudsman Scheme ('FSOS') and Ombudsman Adjudicators ('Ombudsman/men').
2. These guidelines apply at all stages after a case has been referred to an Ombudsman because the complainant is dissatisfied with the outcome of local resolution by the supplier or where the case cannot be resolved by mediation via the OFT caseworkers under the FSOS.
3. The FSOS is established under the Financial Services Act 2008 ('the Act') and conducts its investigations and hearings in accordance with the Act and in particular Schedules 4 and 5, as amended by the Financial Services Disputes (Definition) Order 2019 and the Financial Services Disputes (Bodies Corporate) Order 2014. Schedule 4, paragraph 5 allows the Treasury to make rules on procedure, time limits and fees. None have been made so far.
4. The legislative and regulatory regime has been in force for over a decade. Since the introduction of the FSOS case law and practice has developed. There are no detailed rules as to practice and procedure in relation to a provisional investigation by an Ombudsman, review by the Ombudsman, or review by a Senior Ombudsman.
5. The Ombudsmen felt it would be of assistance to them, OFT staff who clerk for the FSOS, complainants and suppliers who have to prepare for FSOS investigations or, in rare circumstances, hearings, to provide guidance as to best practice to attempt to ensure that FSOS Ombudsman proceedings are conducted in accordance with the fair procedures and the overriding objective as follows.
6. All investigations and hearings will be conducted in accordance with the principles of natural justice to receive a fair hearing and determination.
7. **The Overriding Objective**
  - (1) The overriding objective is to assist the FSOS to deal with cases justly.
  - (2) Dealing with a case justly includes, so far as is practicable –
    - (a) ensuring that the parties are on an equal footing;
    - (b) saving expense;
    - (c) dealing with the case in ways which are proportionate to-
      - (i) the importance of the case;
      - (ii) the complexity of the issues; and
      - (iii) the needs and requirements of each party; and

- (d) ensuring that it is dealt with expeditiously and fairly; and
  - (e) allotting to it an appropriate share of the FSOS resources, while taking into account the need to allot resources to other cases.
- (3) The Ombudsmen will attempt to give effect to the overriding objective when they exercise any power given to them by the Act.
  - (4) The parties are required to help the Ombudsmen to further the overriding objective.
8. The OFT and FSOS in general and the Ombudsmen in particular, are committed to value for money, transparency, accountability and to the delivery of the highest quality decision making and administration to FSOS users.
9. These guidelines are not set in stone. They are intended to set out best practice. If there is a conflict between the guidelines and the Act and its schedules or case law then the Act and case law will prevail. It is intended that the guidelines will be reviewed often.

### **GENERAL PRINCIPLES**

10. Determinations by an Ombudsman will be made on paper using the documents submitted by the parties during the OFT mediation process together with any additional documents and evidence and submissions requested by the Ombudsman. Only if the Ombudsman decides that the case is complicated, and that evidence is required in person, will an oral hearing be directed. Either party can request an oral hearing, but the decision is one for the Ombudsman after taking all matters into account.
11. The Ombudsman will work from a bundle. It will be paginated in date order from earliest to most recent.
12. If the case has not been resolved by local resolution or if it has not been resolved by OFT case officer mediation, the complainant may apply to have the case referred to an Ombudsman.
13. The Senior Ombudsman will allocate the case to an Ombudsman.
14. The complainant and supplier will be advised by OFT of the allocation. At this stage it is important that each of the parties nominate one person as a point of contact for correspondence and that all papers and files are got out of archive and kept where they are available. The biggest source of delay is the non-availability of someone to deal with questions raised by the Ombudsman and delays in disclosing documents.
15. On receipt of the case file the Ombudsman will read it and consider the issues. This normally takes between three and six weeks. The Ombudsman will then contact the parties via the FSOS clerk. The Ombudsman will set out their initial views and, where possible, a provisional timescale. The Ombudsman will indicate if the determination is to be made on paper or by oral hearing. If additional evidence or documents, or submissions are required, they may make a directions order. A directions order is a binding instruction to provide evidence, documents, and submissions and will set out dates for compliance.

16. All correspondence between the Ombudsman and the parties is to be via the FSOS clerk. Everything the clerk sends to one party will be copied to the other. Everything one party sends to the clerk must be sent to the other party. All communications must show clearly on their face that this has been done. If this is not clear the clerk will respond and copy the response and the original communication in its entirety to the other party.
17. Natural justice and fairness would not be served if one party was communicating in secret behind the back of the other with the clerk or Ombudsman.
18. If directions are given, what is required from each party will be set out clearly as will the date and time by which it is to be provided.
19. Time limits are generally:-
  - Simple correspondence to be answered within 14 days
  - Complicated correspondence and disclosure of documents to be answered within 21 days
  - Submissions or response to submissions by the other party to be answered within 21 days
20. If either party needs extra time they must say so, in writing, as soon as possible. They must explain why they need extra time and how long they need. It is not granted automatically.
21. If a party does not respond or supply evidence, documents, submissions or explanations in the time allowed the Ombudsman may proceed to determine the case without that input.
22. Once the directions are complied with, or if the Ombudsman decides to proceed in the absence of information because it is not provided on time, the Ombudsman will start to prepare their determination This will normally take between four and six weeks. If the case is complicated the Ombudsman will let the parties know if it is to take longer.
23. The Ombudsman may decide that they require more information and may request that by letter or new directions.

### **PROVISIONAL DETERMINATION**

24. The Ombudsman will circulate their determination in a provisional format. It will contains words like:-

***This is a provisional determination***

*Complaint Ref xxxxxx*

*A copy will be sent to each party by the Clerk to the Financial Services Ombudsman Scheme (FSOS). Each party will be able to respond, by writing to the Clerk to the FSOS at the Office of Fair Trading ('OFT'), within 21 days of the date at the bottom of this provisional determination (or by a specified date). If no responses are*

*received the complaint will be deemed determined and final determination will be issued confirming the reasons for the decision and the award.*

*If responses are received within the 21 day period (or by the date and time specified) then I shall consider them to see if any new information provided causes me to change this provisional determination. I shall then arrange to issue a further provisional determination, subject to the same review procedure and eventually a final determination, including the matters reviewed by me.*

*Under the terms of Schedule 4 of the Financial Services Act 2008 either party may request a review of my final decision by a senior adjudicator. Such request should be made in writing within 21 days of the date of my final determination.*

*If a review of a provisional determination is not requested the final determination by me will become final and binding on both parties although it may be subject to an appeal on a point of law (not fact) to the High Court.*

*If a review is requested the senior adjudicator may either confirm the determination as final or make a new determination in its place. Any determination made by the senior adjudicator will be final and binding on both parties although it may be subject to an appeal on a point of law (not fact) to the High Court.*

If a determination becomes final, and there is a monetary award, the following words will be used:-

***This is a final determination***

*This determination, is now final, and subject to the time limits above and the confirmation in respect of the sum of £xxxx is enforceable as if it were an execution issued by the High Court and that it carries interest from the date it becomes final at the High Court rate (currently 4%).*

25. The maximum award an Ombudsman can make is £150,000. If the complainants are a couple they are each entitled to an award up to that sum if they lodge separate complaints/applications. The maximum award includes any loss of interest or income or costs or out of pocket expenses. The maximum award is set by Tynwald.
26. In addition the Ombudsman may make an award on top of the maximum for distress and inconvenience. Awards for distress and inconvenience are categorised below:
- An apology or small award of **up to £100** would be considered to be a fair outcome following a one off incident or a short delay where there is a minimal impact and the error is put right quickly.
  - An award between **£100 and £300** may be appropriate where there are repeated small errors or one large error which takes additional effort to resolve.
  - Awards of between **£300 and £750** will cover cases involving significant sums of money and major repeated administrative errors leading to significant loss which incurs a lot of extra effort to sort out. Alternatively an award in this category could be made where a mistake has a serious short term impact.
  - An award of over **£750 and up to £1,500** is recommended where the impact of a mistake has caused substantial distress and worry leading to serious disruption to daily life with the impact being felt over a sustained period.
  - Awards between **£1,500 and £5,000** would include where the effects of a mistake are irreversible causing sustained distress which typically lasts more than a year or has a lasting effect on someone's health.

- Where the impact of a mistake is more extreme an award of **£5,000 or over** could be made.

Specialist help from professionals such as lawyers or accountants is not normally required when bringing a complaint to the FSOS therefore awards do not generally include the refund of professional costs. These are the responsibility of the party engaging the representative.

27. Were the actions of the supplier have caused anxiety, depression or post-traumatic stress disorder and the complainant wishes to claim an award they must produce a report from a qualified medical practitioner with diagnosis and prognosis.
28. When claiming out of pocket expenses or loss of interest or income there must be a documentary report, including receipts.
29. The Ombudsman may, but is not obliged to, make more than one provisional determination if the parties request reviews of the provisional and reviewed provisional determination. However it is more likely that they will not consider repeated requests and will make the second or third determination final. At that stage either party can request a review by the Senior Ombudsman.
30. The Senior Ombudsman will follow these procedures. They are entitled to review the decision of the Ombudsman in the light of the evidence the Ombudsman had received and any review requests or to start again and come to their own decision after receiving new evidence and documents.

## **ORAL HEARING**

31. If the Ombudsman or Senior Ombudsman decides that an oral hearing is appropriate then the following guidelines will apply.

### **Oral Hearing Guidance Notes**

32. The Ombudsman will give written directions and a copy of the paginated bundle will be made available to both parties. One of those directions may include the provision of written witness statements and/or submissions which is explained below.
33. During the hearing both parties are to be present at all times, except in exceptional circumstances.
34. The proceedings will be recorded.
35. Witnesses (if any) may be present during the whole Hearing; even before they have given evidence, at the discretion of the Ombudsman and with consent of the parties.
36. The parties may be accompanied/represented by a friend or legal representative who may assist with or present their case.
37. The award, if any, will not include the cost of legal representation which will be the responsibility of the party engaging the representative.

## **Procedure**

38. Normally evidence will be unsworn, although the Ombudsman retains the discretion to administer oaths or declarations.
39. The complainants and their witness(es) shall give oral evidence to confirm their written evidence\*(if any) and produce and explain their documents. They may, at the discretion of the Ombudsman, give additional evidence of new matters or evidence coming to their attention since preparing their written evidence and in reply to any evidence served on behalf of the other party.
40. The supplier may question the complainant(s) and their witness(es) on their written, oral and documentary evidence produced by the complainants.
41. The Ombudsman may question the complainants(s) and their witness(es) on their written and oral evidence, the documentary evidence and any other matters that the Ombudsman considers appropriate in the circumstances of the case. The supplier may ask further questions of the complainant(s) arising out of such questions and answers.
42. The supplier and their witness(es) shall give oral evidence to support their written evidence\*(if any) and produce and explain their documents. They may, at the discretion of the Ombudsman, give additional evidence of new matters or evidence coming to their attention since preparing their written evidence and in reply to any evidence served on behalf of the of the other party.
43. The complainant(s) may question the supplier and the supplier's witness(es) on the written, oral and documentary evidence produced by the supplier.
44. The Ombudsman may question the supplier and their witness(es) on their written and oral evidence, the documentary evidence and any other matters that the Ombudsman considers appropriate in the circumstances of the case. The complainant may ask further questions of the supplier arising out of such questions and answers.
45. The complainant(s) will be given the opportunity to summarise their claim and comment upon the claim and evidence of the supplier.
46. The supplier will be given the opportunity to summarise their defence and comment upon the claim and evidence of the complainant(s).
47. The Ombudsman will retire to consider.
48. If at all possible the Ombudsman shall try and give a decision and brief reasons orally, shortly after the end of the hearing. If that is not possible the Ombudsman shall attempt to indicate when their written adjudication should be available.
49. \*Written evidence is a document from a complainant, supplier or a witness, in their own words containing the facts that they say gave rise to the dispute and how it has affected them financially, and otherwise, or disputing those facts and effects by the supplier or a witness. Written evidence should attempt to be in chronological order as if telling a story in order without flash backs. You may, if you wish, agree to the letters and documents you have sent to the caseworker being included. Any written statement should include

the following words **“(name of complainant /supplier/ witness) believes the facts stated in this document are true”** Written evidence should be signed and dated.

50. The written determination delivered after an oral hearing shall be final rather than provisional. However, the Ombudsman may raise any question that needs to be answered, to assist them in coming to a decision in writing, with both parties and the answers from either will be provided to the other.

## **OTHER MATTERS**

### **51. Interest**

Whilst there is no power to award interest, if an Ombudsman thinks, using discretion, that interest should form part of the compensation then a sum for interest can be included. In the case of a provisional award followed by a final award it may be necessary to increase the sum to take account of any delay between the two dates. A suitable wording might be **“I shall of course recalculate the interest to the date of the final award in the final award. But £X.00 per day is my indication of the amount that will be added.”**

### **52. Enforcement**

There is no power to award interest after a final determination, but under Schedule 4 of the Act at paragraph 7, (5) it is provided that “An award under sub-paragraph (3) shall be enforceable as if it were an execution issued by the High Court” This means it carries interest at the ‘Judgement Rate’ (currently 4%) under the provisions of section 41 of the High Court Act 1991 and the Enforcement Rules.

53. The following wording will be included in any final determination

**“I have calculated the amount above. I ORDER that the Supplier pays to X the sum of £Y calculated to £Z. The determination, when final, is enforceable as if it were an execution issued by the High Court and will carry interest from the date it becomes final at the High Court Judgement Rate (currently 4%).”**