

20th February 2014

Dear Complainant,

**Your complaint against the Financial Services Authority
Reference Number: FCA00004**

I write with reference to your email of 8th February 2014 addressed to the Office of the Complaints Commissioner.

I need to explain my role and powers. Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints' scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner charged with the task of investigating those complaints made about the way the regulators have themselves carried out their own investigation of a complaint that comes within that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role.

Your complaint

From your recent email, I understand that you are unhappy with the FCA's actions as you say that:

- *“[during] the month of July 2013 I called the office of the Financial Conduct Authority's Customer Contact Centre for certain information about terms and conditions for the issue of licence to a broker or Insurance company providing with (sic) Pensions Annuity to the trustees of the Occupational Pension Scheme.*

The CCC staff I spoke seemed to be very confuse or hesitant to explain the rules about the issue of licence for the Pensions annuity to any one by the FCA. The person transferred my call to several desks but none of them guided me to the right person who could have replied to my simple enquiry about the rules of the FCA for the issue of a license to sell Pension Annuity to the trustees of the Occupational Pension Scheme. And until today I am still wandering who should I approach for this information (sic)”.

- you add that although “*the FCA complaints investigator while turning down my complaints explained that the underwriting of an annuity is a regulated activity and the FCA requires the annuity provider to have the relevant authorisation. My enquiry was clearly related to the authorisation means (sic) the issue of licence to the underwriter of the annuity*”.
- continuing that the “*investigator of my complaints still insisting that my enquiry was not within the parameter or the remit of the FCA and therefore I was rightly advise (sic) to contact to TPAS or TPR. So far my knowledge is concerned the TPAS and TPR are both handling the beneficiaries of Pension Annuity complaints against the administrator or trustees or vendor of the Pension annuity or any other financial products related with pensions. They are not authorising or licensing authorities of the financial products (sic)*”.

Coverage and scope of the transitional complaints scheme

The Complaints Scheme provides as follows:

3 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.
- 3.3 Complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. Complaints made later than this will be investigated under the Scheme only if the complainant can show reasonable grounds for the delay.

I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. I would specifically draw your attention to Section 25 of Part 4 of Schedule 3 of the 2012 Act where it states:

“*Exemption from liability in damages*

- (1) *None of the following is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the FCA’s functions—*

- (a) *the FCA;*
 - (b) *any person ("P") who is, or is acting as, a member, officer or member of staff of the FCA;*
 - (c) *any person who could be held vicariously liable for things done or omitted by P, but only in so far as the liability relates to P's conduct.*
- (2) *Anything done or omitted by a person mentioned in subparagraph (1)(a) or (b) while acting, or purporting to act, as a result of an appointment under any of sections 166 to 169 is to be taken for the purposes of sub-paragraph (1) to have been done or omitted in the discharge, or as the case may be purported discharge, of the FCA's functions.*
- (3) *Sub-paragraph (1) does not apply—*
- (a) *if the act or omission is shown to have been in bad faith, or*
 - (b) *so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998".*

You have not adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The Complaints Scheme nevertheless then goes on to provide in paragraph 6.6 that:

Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis.

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a "*compensatory payment on an ex-gratia basis*".

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the FCA which is incompatible with the Human Rights Act 1998. My rationale for arriving at this decision is set out below.

My Position

As part of my investigation into your complaint I requested a full copy of the FCA's complaint investigation file. I should add that the FCA's investigation file also contained recordings of the four calls you made to it during July, August and September 2013 together with the emails which it exchanged with you.

From the Regulator's investigation file it appears that when you called the Regulator on 23rd July 2013 you explained that you were calling as you wanted some information about pension annuities issued or underwritten by insurance companies. You then went on to set out that you were specifically looking for details of the terms and conditions under which they can arrange these for firms. You then asked whether both the firm providing the pension annuity and the pension annuity itself needed approval before the arrangement could be completed. This question was then expanded to enquire as to how approval could be granted.

The FCA's Consumer Contact Centre (CCC) operative to whom you spoke initially explained that the provider of a pension annuity has to be authorised by one or more of the UK's financial services regulators. He added that where an insurance company is the pension annuity provider providing it held the correct permissions it can issue annuities. However, when it became clear that you were talking about the 'regulation' of occupational pension scheme the operative explained that the 'regulation' of occupational pension schemes is not something which falls within the jurisdiction of the FCA. The operative also correctly set out that the regulation of occupational pension schemes is something which falls under the jurisdiction of The Pensions Regulator.

I appreciate that you are unhappy with the information you were provided by the operative you spoke to on 13th July 2013 and the subsequent email exchanges. However, there is nothing to indicate that this information was incorrect. The FCA has confirmed in its decision letter of 4th February 2014 that:

"Based on the nature of your questions, the CCC decided that you should be directed to TPR or failing that, to TPAS. We have reviewed your correspondence and it is apparent that your questions relate to an occupational pension scheme. From what we can gather from your emails, it appears that your annuity itself would have been purchased by the trustees of the Occupational Pension Scheme. Your pension scheme appears to be a trust based scheme. The FCA does not have regulatory remit in respect of the trustees' actions.

Your emails enquired about what regulations and conditions apply to the sale of annuities 'sold to a group of occupational pension scheme members'. The underwriting of an annuity itself is considered to be a regulated activity and therefore the FCA requires the annuity provider to have the relevant authorisations in place. The sale of annuities is itself a regulated activity, as it is considered an insurance contract and this is governed by the FCA's COBS rules. However, the activities surrounding the administration of an Occupational Pension Scheme do not fall within the remit of the FCA, as this falls under the remit of TPR".

From this it is clear that the general information regarding the regulation of occupational pension schemes you were given by telephone on 13th July 2014 and in the email was correct. However, I note that the FCA has accepted that part of the information you were subsequently given in response to your email was incorrect. Whilst The Pension Regulator was correctly identified as the Regulator responsible for the regulation of occupational pension schemes, you should not have been directed to it as it only takes enquiries from the trustees and advisers of occupational pension schemes. It is unable to take enquiries from members of the public. Although it is disappointing that the Regulator provided you with incorrect information, this is something which was addressed in the decision letter where the Regulator has stated that:

“We have looked at Part One of the Pensions Act 2004, which states that one of the main objectives of the TPR [The Pension Regulator] is to ‘protect the benefits under occupational pension schemes of, or in respect of, members of such schemes.’

We note that TPR does not deal with queries from the public, and their website specifically directs individuals to the TPAS [The Pension Advisory Service] website. We can see that the CCC apologized (sic) to you for incorrectly directing you to TPR. If you had issues with the trustees’ actions, then you could further decide to refer your matter to the Pensions Ombudsman”.

The FCA’s Complaints Team further explained that:

“We have liaised with the CCC regarding what they do on receipt of queries such as yours, and they have told us that they assess how much information that they can give.

The CCC was only able to provide you with minimal information because the FCA does not have regulatory remit in respect of the issues you have raised. Pensions can be a complicated topic with various different regulators covering certain activities. It is for this reason that the CCC, as well as the TPR, would refer individuals to TPAS, which is staffed by industry experts.

The CCC is limited by the level of service they can offer which is general guidance and for the most part they advise consumers on whom they can contact and what their next steps might be in order to resolve an issue. In this instance we believe that the CCC took the correct approach in directing you to TPAS as they would have been best placed to give you the advice you required. TPAS does not only deal with complaints, as its website specifically states that it ‘provides free information, advice and guidance on the whole spectrum of company, personal and stakeholder schemes’”.

I appreciate that you were disappointed that the Regulator could not provide you with a clear and simple answer but the legislation surrounding pensions is itself a complex matter (particularly where the question appears to have related to retirement options in connection with a wound-up scheme) given the different legislative regimes and Inland Revenue rules surrounding the payment of benefits. As such, in my opinion, it is not practicable to expect to be provided with a detailed answer to a question which surrounded a very complex area and where very little specific information has been provided. However, what I would say is that the FCA did provide you with correct information as you were informed that the pension annuity provider needed to be authorised by the FCA and hold the appropriate permissions (authorisation).

The Regulator also explained, correctly, that the regulation of occupational pension schemes was something which fell within the jurisdiction of The Pension Regulator *rather* (my emphasis) than within the jurisdiction of the FCA. Although it is accepted that the FCA incorrectly referred you to The Pension Regulator rather than The Pension Advisory Service, given that it is The Pension Regulator which is responsible for the regulation of occupational pension schemes it is understandable why this error occurred.

I appreciate that you appear to remain disappointed that you were not provided with specific and detailed answers to the questions you have raised but, as I have indicated above, the regulation of occupational pension schemes is an extremely complex area. There are a number of pieces of governing legislation which is made even more complex by rules imposed by both the Inland Revenue and the specific occupational pension scheme (and possibly the 'arrangement' in which the 'wound-up' funds have been placed).

Whilst the provision of a pension annuity may be an activity which requires the provider of the pension annuity to be authorised by the FCA and the arrangement of which is governed by the FCA's rules, it must be remembered that the legislation and governing rules specify how benefits can be provided. As the FCA has stated, given that the questions you posed surrounded the benefits available from an occupational pension scheme (through a pension annuity) the question would ultimately be best answered by the regulator responsible for the regulation of the underlying occupational pension schemes or a body designated with handling enquiries in respect of such schemes.

Conclusion

When arriving at my Decision I have to consider the FCA's procedures and position together with the rules of the Complaints Scheme. In this situation, the FCA has explained that, as your enquiry relates to the provision of a group pension annuity with funds originating from an occupational pension scheme it is unable to be of assistance to you. As the FCA is *not* (my emphasis) responsible for the regulation of occupational pension schemes (and the provision of benefits stemming from such schemes) I concur with the FCA's view that The Pension Regulator or The Pension Advisory Service would be better placed to answer your enquiry and provide the answers you seek.

I would also specifically draw your attention to paragraphs 6.14 and 6.8 of the Complaints Scheme which states:

- 6.14 The Complaints Commissioner will not investigate any complaint which is outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with the Complaints Commissioner.

In my view, your complaint relates to your displeasure that the FCA has adopted the view that, given the complex nature of your enquiry (and the role of The Pension Regulator) it is unable to provide the answers you seek. As I have explained the fact that you are unhappy with a position adopted by the FCA *does not* (my emphasis) bring the issue into the Complaints Scheme.

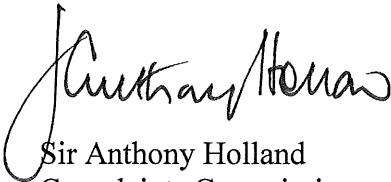
I should also point out that whether a complaint is within the Complaints Scheme is at my sole discretion. For the reasons explained above, I do not believe that this case justifies an investigation by me.

- 6.8 Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the relevant regulator(s)' progress in investigating a complaint, may refer the matter to the Complaints Commissioner, who will consider whether to carry out his own investigation.

This is a relevant provision as, although I can appreciate your position, it gives me an unfettered discretion as to whether or not I carry out an investigation. In this case, the FCA has explained that, if the provider of a pension annuity is an insurance company, that company must hold the appropriate permissions to provide that annuity. This is the answer to the question which you posed in your telephone call to the CCC on 13th July 2013. Whilst you would like to know under what terms and conditions a pension annuity can be provided to an occupational pension scheme and how benefits can be paid from under an annuity funded from the proceeds of a wound-up occupational scheme such details would fall within the jurisdiction of The Pension Regulator as the scheme providing the funding for the annuity is an occupational pension scheme. Likewise, given that your detailed questions surround the benefits available from an occupational pension scheme, such an enquiry, in my opinion, *should* (my emphasis), as set out on The Pension Regulator's website, be directed to The Pension Advisory Service as it is able to provide answers to questions posed to it about all types of pension arrangements.

It is my Decision that I am unable to reach a conclusion that the Regulator has acted inappropriately or, as a result, that it has failed to handle both your enquiries and complaint appropriately.

Yours sincerely



Sir Anthony Holland
Complaints Commissioner