

22 June 2017

Dear Complainant,

**Complaint against the Financial Conduct Authority
Reference Number: FCA00303**

Thank you for your letter dated 24 April 2017. I have now reviewed the information sent to me by you and the Financial Conduct Authority (FCA), and your response to my preliminary decision of 12 June 2017, and am able to write to you.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's 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.

What we have done since receiving your complaint

I have reviewed all the papers you and the regulator have sent to my office. Both you and the FCA have had the opportunity to comment in response to my preliminary decision. I have carefully considered the points made and, although they have not altered my decision on your complaint, I have made further reference to them below.

Your complaint

On 22 October 2016, you wrote to the FCA to complain about aspects of the regulatory process being applied to you. You said that the FCA's investigation into you and the Firm you worked for (the Firm) took too long at your expense, that a Private Warning should not have been issued and lacked fair process, and that you had received no apology from the FCA for this. You amplified your concerns in an email of 27 October. On 4 November 2016, the FCA wrote to you setting out its understanding of your complaint. You made further comments on 8 November. The FCA identified the following elements to your complaint:

Element One - the FCA took too long to investigate the FCA's case against you and to reach a decision not to give you a Private Warning or to offer you an apology once that decision was reached.

Element Two - the FCA's decision to give you a Private Warning was disproportionate and excessive. The fact it was withdrawn suggests the FCA's Enforcement team should have received clearer guidance on its use. The Private Warning procedure lacks due process because it did not give you the opportunity to challenge the FCA's findings before an independent panel. The case sponsorship arrangements include a 'need to punish'.

Element Three – There was a conflict of interest in the FCA’s investigation into both you and the Firm, particularly because of the Firm’s prevailing preference to pursue settlement of its own case with the FCA.

Element Four – The FCA’s Enforcement team communicated inappropriately with the Firm and this resulted in your dismissal. You say this because your dismissal coincided with the giving of the Private Warning and because of the wording of a letter from the Enforcement team.

Element Five- the wording of the Final Notice given to the Firm prejudiced you. You are unhappy that the Enforcement team disagree and have suggested the only way to challenge this is before the Upper Tribunal.

The FCA’s letter of 4 November excluded Element Five from consideration under the Complaints Scheme (the Scheme) because it considered this issue could have reasonably been dealt with in another way. Specifically, it said that section 393(11) of the Financial Services and Markets Act 2000 provides a route to refer to the Upper Tribunal the FCA’s decision not to grant you third party rights in respect of the Notices given to the Firm.

The FCA issued its decision about the remaining elements of your complaint on 13 April 2017. Element One of your complaint was partly upheld on the basis that it took too long for the FCA to conclude that the Private Warning against you would not be reinstated, and in its letter of 10 October 2016, the Enforcement Team had had the opportunity to acknowledge that fact but did not do so. The FCA Complaints Team offered you an apology for this.

Elements Two to Four were not upheld. Element Five remained excluded for the reasons stated. In addition, because you had asked about a recent Supreme Court decision {Financial Conduct Authority (Appellant) v Macris (Respondent) [2017] UKSC 19} the Complaints Team had asked Enforcement whether this decision changed their view that you do not have third party rights in respect of the Notices given to the Firm. Their view was unchanged.

You are dissatisfied with some elements of this response and have asked me to investigate. You have asked me to consider whether the FCA has been fair with you in “*in its issue, withdrawal and communications concerning the Private Warning (“PW”) given to you*”. This relates to Element Two in the FCA’s response letter. In support of your complaint, you have told me that the PW contained a condition that demanded disclosure to any future regulated employer and was therefore more akin to a prohibition order. As this threatened your future employment you believe you should have had access to an independent panel but this was not given. You consider that this breached your Article 6 rights to a fair hearing. Instead, your representations were only finally considered after the PW was issued. It was then placed under review and eventually withdrawn. You have also told me that you believe your reputation has been damaged by your identification in the Final Notice to the Firm. Although this is not part of your complaint to me, it is related to it.

I note that you have only referred Element Two of your complaint to me. In view of this I have not reviewed the FCA’s complaint response in respect of the other elements. However, I am aware that you have raised concerns about Elements Three and Four and aspects of the way your complaint was handled directly with the FCA. If you are dissatisfied with the FCA’s further response, you can consider referring the matter to me. In response to my preliminary decision you have indicated that you do not wish to do this. I also note that you

have made an application to the Upper Tribunal in respect of Element Five of your complaint and included your complaint to me within the evidence bundle.

My position

The FCA's decision to bring enforcement proceedings against the Firm and any sanctions imposed are not matters for the Scheme, since that is a statutory process and there are separate formal procedures for challenging enforcement decisions. However, I have reviewed confidential material about the proceedings supplied to me by the FCA, and this has helped me to form my view about the adequacy of the FCA's investigation into your complaint.

In respect of Element Two of your complaint, the FCA said that the decision to give a private warning followed the guidance set out in Chapter 7 of the Enforcement Guide (EG). The case handler had not considered "*whether the FCA ought not to give Private Warnings as a matter of policy, or whether the procedure, as drafted, gives 'due process' in the sense that it is fair. This is because the policy and procedure set out in EG is the product of one of the FCA's legislative functions, complaints about which the Scheme cannot consider. However, I have considered whether the decision to give you the Private Warning was a reasonable one, in light of that policy, whether the procedure in EG was followed, and whether there is any evidence of a 'need to punish', as you have alleged.*"

The case handler concluded that there was no evidence of an improper motive on the part of the Enforcement team. He said that "*the records reflect that the procedure set out in EG was followed, including decision making by an FCA Head of Department, and I believe the decision to give you a Private Warning was a reasonable one in the circumstances and in line with the published policy at the time*".

Having reviewed the Enforcement Team's file, I am satisfied that this was a reasonable conclusion for the FCA to reach. It is clear from the confidential papers I have seen that at each stage all options were carefully considered in deciding what action to take and that these followed the guidance and processes in place at the time and in view of the regulatory issues that the Enforcement Team had identified. In response to my preliminary decision, you have asked how the case handler could have reached this conclusion when there are no records retained by the FCA and referred to another decision I have made. I cannot comment on another decision in any detail but I believe this refers to a recent decision where I commented on the general undesirability of relying on handwritten records. I have not made any finding that the FCA retains no records of its enforcement investigations.

I understand that you would like to know more about the reasons for withdrawing the PW against you and the timing of this and I appreciate the stress and uncertainty that this has caused you. However, I am satisfied that this has been addressed by the FCA's response above and by its acknowledgement, in responding to Element One of your complaint, that the Enforcement Team took too long to conclude that the Private Warning against you would not be reinstated, and failed in its letter of 10 October 2016 to acknowledge that fact. I note that the FCA Complaints Team offered you an apology for this.

In response to my preliminary decision you have said that you are not satisfied with this and that you are disappointed at what you consider to be my failure to address the central issue for you: that you were not given the chance to make representations before the PW was issued and that the FCA's complaint response does not repair the damage to your reputation

caused by the issue of the PW in the first place. This was exacerbated by the long delay before receiving confirmation that it would not be reinstated. You would like to know why the PW was rescinded, whether it was because of your post PW representations or because of acceptance by the FCA that the section about PWs in the EG was wrong. You consider that the FCA has contradictorily given both reasons, that I have failed to answer the question and you would like to know why you cannot be given this information. You consider that you have not been given a sufficient reason as to why your PW was rescinded, that you have been punished by having your reputation damaged and that this has not been acknowledged by me or the FCA and that I appear not to want to assist you.

Regarding the steps leading to the issue and withdrawal of the PW, the FCA complaint response said: *“It would not be appropriate to draw any conclusion from the FCA’s more recent decision to consult on its use of Private Warnings, other than that the review coincided with your case, and led to the decision not to reissue a Private Warning to you.”* This is supported by my reading of the FCA’s file. I cannot see that the FCA has ever said to you that the EG section about PWs was wrong. I am satisfied that you were issued with a PW in accordance with FCA policy and guidance at the time and that at the point when your objections were being considered a strategic policy review had commenced which led to the withdrawal of the PW on 18 February 2016 and the eventual decision not to reinstate it.

The FCA complaints team accepted that it took too long (8 months) to reach this latter decision and apologised to you. Although you clearly disagree, I am satisfied that this was a reasonable response as it acknowledged there had been a level of detriment to you, not in the imposition of the PW itself but in the time taken to confirm that it would not be reinstated.

Under this element of your complaint you also referred to an issue of case sponsorship. You said that because an Enforcement Head of Department sponsored the case against you, you believed there was a prevailing ‘need to punish’ rather than to act with fairness. The FCA’s complaint response set out the policy approach and said that *“at the time that you and the Firm were referred for investigation, Project Sponsors of Enforcement investigations were always Heads of Department in the Enforcement Division. That position has changed slightly since but it remains the case that Project Sponsors are always Enforcement staff... Project sponsorship followed the FCA’s usual approach and I do not agree that it gave rise to a ‘need to punish’, nor have I seen any evidence in the Enforcement team’s records or in my discussions with them to suggest that was an objective.”* Having reviewed the FCA’s file I am satisfied that this was the case.

I therefore do not uphold your complaint about Element Two because, although I consider that there were delays in the withdrawal of the PW and confirmation that it was not to be reinstated, I am satisfied that these were addressed appropriately in the FCA’s complaint response to you.

Delay

In my preliminary decision, I made some observations about the time the FCA took to deal with your complaint, which exceeded its internal targets by some weeks. I noted that the FCA’s complaint response to you apologised for the length of time taken to complete its investigation into your complaint. In response to my preliminary decision you have said that you did not complain about this matter. I therefore make no recommendation about that.

Conclusion

In conclusion, for the reasons set out above, I have not upheld your complaint.

I realise that you will be disappointed by my decision but I hope you will understand how I have reached it.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend'.

Antony Townsend
Complaints Commissioner