



9 September 2009

Dear Complainant

**Complaint against the Financial Services Authority**  
**Reference Number: GE-L1037**

I write further to your letters in connection with your complaint against the Financial Services Authority (FSA). I have now completed my investigation into your complaint.

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the Financial Services Authority (FSA) has itself carried out its own investigation of a complaint. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. Full details of Complaint Scheme can be found on the internet at the following website; <http://fsahandbook.info/FSA/html/handbook/COAF>.

I should also at this point make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. My powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that FSA is exempt from "liability in damages". It states:

- "(1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.*
- (2) (Irrelevant to this issue under investigation)*
- (3) Neither subparagraph (1) nor subparagraph (2) applies*
  - (a) if the act of 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 of omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998."*

COAF nevertheless then goes on to provide that in paragraph 1.5.5 that:

*"Remedying a well founded complaint 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 the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."*

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 right that I consider may be relevant is contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998. That 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.

## **Your Complaint**

From your letter of 19<sup>th</sup> July 2009, I believe that your complaint relates to the following four issues:

1. You are unhappy that the FSA complaint handler changed during its investigation. You are particularly unhappy as you have not been given any explanation for the change and understood that the original complaint handler, Complaint Handler A, would investigate five elements of your complaint and that a senior investigator would investigate the remaining two issues.

You also claim that the new complaint handler, Complaint Handler B, did not appreciate that the original complaint handler, Complaint Handler A, had specifically categorized your complaint to be eligible for financial compensation. You are also unhappy that, although Complaint Handler B upheld three of the seven elements you had complained about were upheld you, you did not receive an offer of compensation.

You feel that the FSA’s investigation shows “*errors in process, poor communication and failures of existing systems and a lack of clarity*”. You add that your complaint has unearthed a number of longstanding weaknesses which should never have existed and you feel that effectively “*you have highlighted areas that will benefit the FSA and future users and (you) have got nothing for it*”.

2. You are unhappy with the relationship between the FSA and the Financial Ombudsman Service (FOS). Specifically, you are unhappy that following your complaint to the FOS, the FOS was unable to take the action that you felt it should against the firm. You were unhappy with the explanation you say the FOS gave you, i.e. *“that it is regulated by the FSA and cannot act outside those perimeters”*. You feel that the FSA should give the FOS the powers it needs and therefore *“a change in ethos and policy is long overdue”*.
3. You are unhappy that the FSA’s substantive response, dated 15<sup>th</sup> July 2009, makes no mention of the FSA’s failure to meet its deadlines for the completion of its investigation into your complaint on more than one occasion.
4. You are unhappy that in element 2 of your complaint that the FSA investigated, although admitting to a lack of clarity, it did not uphold your complaint.

## **Background**

As part of my investigation into your complaint I have obtained a copy of the FSA’s investigation file, which included recordings of the telephone calls you had with the FSA’s Consumer Contact Centre (CCC), which I believe gave rise to your original complaint. I note that pages two and three of its decision letter, dated 15<sup>th</sup> July 2009, contains a time line of the events which took place and as such I do not intend to repeat this in my letter.

## **My Position**

I have now had the opportunity to consider the contents of your complaint letter and also to review the FSA’s file relating to your complaint. I have also considered the detailed comments you have made when responding to my Preliminary Decision and appreciate that you are unhappy that I have rejected your complaint and that you dispute my reasons for reaching this decision. I am sorry that this is the case.

The FSA’s file indicates to me that it undertook a thorough investigation into the concerns you raised. When considering your complaint I have only investigated the issues you have referred to me in your letter to my office dated 19<sup>th</sup> July 2009 and have not revisited all of the issues you raised with the FSA and which it addressed in its letter to you of 15<sup>th</sup> July 2009.

Although you say you are unhappy that the complaint handler changed during the investigation, you have not provided any evidence to show how the FSA’s decision to do this has adversely affected you. I would also add that during the investigation, it is clear that in your letter of 17<sup>th</sup> May 2009 you expressed your dissatisfaction with Complaint Handler A and the letter she sent to you on 28<sup>th</sup> April 2009. As a result of this letter, the FSA felt it appropriate to transfer the complaint to a new complaint handler. Whilst you are unhappy with this, in light of the comments you made in your letter of 17<sup>th</sup> May 2009, particularly *“I would like the matter referring to an independent assessor”* and *“so it is very disappointing that you have let me down on this elementary matter”*, I believe that the FSA acted judiciously by transferring the complaint to a new complaint handler.

Similarly, although a senior investigator was appointed to investigate elements six and seven of your complaint, I feel that the FSA acted appropriately in transferring the complaint to a new complaint handler who would address all of your concerns (including those considered by the senior investigator) in a single letter. I believe that this decision was also appropriate as this avoided any confusion over any elements of your complaint not being fully addressed by either the complaint handler or the senior investigator, particularly in light of the comments you made about receiving an incomplete response from the CCC in your telephone conversation with Complaint Handler A of 2<sup>nd</sup> April 2009.

Although it may have been better if Complaint Handler B had provided you with an explanation of why she was taking over the investigation of your complaint from Complaint Handler A, in light of the contents of your letter of 2<sup>nd</sup> April 2009, I do not believe that the fact that Complaint Handler A relinquished responsibility for your complaint would have come as a surprise to you.

I have also noted that you allege the complaint handler who took over the investigation of your complaint in May 2007 did not appreciate that Complaint Handler A had specifically categorized your complaint to be eligible for financial compensation. Although you say that Complaint Handler A did this I have been unable to find sufficient, if any, evidence to support this claim. I would add here that, whilst I accept that you may well have discussed the issue of compensation with Complaint Handler A, I have seen no evidence to support your claims that Complaint Handler A was specifically categorizing your complaint to be eligible for compensation. Indeed, I note that Complaint Handler A addressed the issue of compensation on page two of her letter dated 31<sup>st</sup> March 2009. In this letter Complaint Handler A specifically confirmed that the scheme does not provide a right to compensation and this letter would have clearly, in my opinion, indicated that even if your complaint was upheld you may not receive a compensatory payment:

*“It would be sensible for me to clarify, at this point, that the FSA Complaints Scheme does not provide a right to compensation. Various consultations in relation to the Complaints Scheme were conducted by the FSA during, and after, the drafting of the Financial Services & Markets Act, and these form the policy basis for the operation of the Scheme. Following these consultations, and bearing in mind our statutory obligation to use our resources economically and efficiently, the FSA Board's view is that it should retain a wide discretion on whether it will make an ex gratia payment following a complaint investigation. In making such a decision, various factors will be taken into account, such as the gravity of the maladministration identified and its consequences for the complainant, and also the impact of the cost of such payments on the regulated community and, therefore, indirectly on consumers (these factors are set out in Consultation Paper 73, Para 3.23 <http://www.fsa.gov.uk/pubs/cp/cp73.pdf>).”*

With this in mind, although the FSA has upheld three of the seven elements of your complaint, this does not mean on its own that you should, as a matter of course, receive compensation. When the FSA upholds a complaint (or an element of a complaint) it must assess how it believes the complainant has been affected and then, in accordance with paragraphs 1.5.4 and 1.5.5 of COAF, decide on what remedy it believes is appropriate.

a. COAF 1.5.4 which states:

If the *FSA* concludes that a complaint is well founded, it will tell the complainant what it proposes to do to remedy the matters complained of.

b. COAF 1.5.5 which states:

Remedying a well founded complaint 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 the *FSA* decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the *Complaints Commissioner* to review the *FSA's* decision.

I note that, in accordance with paragraph 1.5.5 of COAF the *FSA* has taken the action it believed was appropriate in these circumstances and made an apology to you for the poor service you have received from it. However, whilst I believe that the *FSA* made you aware that an upheld complaint did not automatically give rise to a compensatory payment on an ex-gratia basis, in my opinion, it should have provided a further rationale to explain why it felt that a payment was not justified in its decision letter.

You also raised concerns over the relationship between the *FSA* and the *FOS*. The Act defines the role of the *FSA* and that of the *FOS*. The Act charges the *FSA* with the regulation and supervision of the financial services industry, including setting rules about how firms (including banks) should investigate complaints, and charges the *FOS* with resolving disputes between consumers and firms. Whilst you are unhappy with the perimeters within which the *FOS* operates and feels that this is too limited, this is not something which the *FSA* can alter. As the role of the *FOS* is set by Part XVI of the Act, Parliament would need to change legislation to increase the powers and role of the *FOS*. Likewise, I have also noted your comments about, what you believe, are limitations in the powers granted to me by the Act. Again, this is not something that either I or the *FSA* can alter. As I have explained above, my powers are set out in Paragraph 7 of Schedule 1 of the Act, and as such, if my powers or my role were to be expanded, Parliament would need to legislate to enable this.

I appreciate that you feel that the *FSA's* substantive response of 15<sup>th</sup> July 2009 makes no mention of its alleged failure to meet deadlines for the completion of its investigation into your complaint. Whilst I accept that the *FSA* took some time to conclude its investigation into your complaint, I have been unable to find any evidence to show that the *FSA* failed to complete its investigation by a set deadline. Having reviewed the *FSA's* complaint file, and its complaint leaflet it appears the *FSA* indicated that it aims (my emphasis) to complete complaint investigation within 16 weeks, although it stress that this is not always possible. Likewise, I have been unable to find anything to show that the *FSA* actually confirmed to you that it would (my emphasis) have completed its investigation by a set date.

Likewise, I would also add that although you first complained to the *FSA* on 27<sup>th</sup> February 2009, you appear to have added further elements to your complaint on 12<sup>th</sup> March 2009, 2<sup>nd</sup> April 2009 and 17<sup>th</sup> May 2009. The fact that further elements were added to your complaint over a period of almost three months clearly means that it would not be reasonable to expect the *FSA* to be able to complete its investigation by a date which was set at the beginning of its investigation.

I have also noted your comments regarding the FSA decision not to uphold element 2 of the complaint you made to it, despite offering an apology to you for the lack of clarity in information provided to you by its CCC operative and any inconvenience this may have caused you. Having read the FSA's file, I believe that the FSA was correct not to uphold your complaint as there is little, if any, evidence that to show that its CCC operative was purposely (my emphasis) being "economical with the truth" or being disingenuous with the information he supplied to you. Whilst the FSA's CCC operative may have misunderstood the point you were making to him, which resulted in you receiving information which lacked clarity, and could have caused you some inconvenience, this, on its own, does not support a claim that the FSA was being "economical with the truth" when providing you with information. As such, I concur with the FSA's decision not to uphold this element of your complaint.

## Conclusion

Having considered your complaint, I believe that the FSA may have addressed your concerns better and provided you with further justification for its decisions for changing complaint handlers and not providing you with a compensation award on an ex-gratia basis. However, although I hold this view, I do not believe that the FSA has incorrectly considered your complaint. Likewise, in my opinion, you have failed to show how you have been adversely affected by the FSA's actions you have complained about.

In your letter to me you have stated that you are "*far from happy with the FSA's findings*" and feel that its "*report is heavy on explanation and commentary on the role of the FSA but less informative and positive on its impact on the user and public perception*". Having had the opportunity to consider your claims and the FSA's file, in my opinion, you have not provided sufficient evidence to show why the decisions made by the FSA, in respect of your complaint, were incorrect or that the FSA was wrong to rectify the position by simply making an apology to you.

In this case you raised seven specific issues with it and the FSA has provided you with a detailed response to each of the elements of your complaint. Whilst you feel that the FSA's report was "*heavy on the explanation*", when answering a complaint, particularly where an element of a complaint is not being upheld, I would expect the FSA to provide a detailed explanation (or commentary) on why it has reached that conclusion.

Likewise, you also asked the FSA to provide very specific information about its role and remit, the rules it imposes on the FOS and its comments on the poor service you say you encountered. In my opinion, to address these points the FSA, by the nature of the query, had to provide you with information in an explanatory fashion.

Although you have asked me to award you with a compensatory payment, this is not something I can do. As I have explained above, my powers are limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. I would stress that any recommendations I make are not binding on the FSA and the FSA is at liberty not to accept them, although it is rare for it not to do so. However, having reviewed your complaint I do not feel that the FSA should make a compensatory payment on an *ex-gratia* basis to you and as such will not be recommending such an award.

When it received your complaint the FSA explained in its letters to you that an upheld complaint does not automatically give a right to compensatory payment. I would also add that, unless the FSA has ultimately made an incorrect decision which has impacted the complainant, the normal remedy under the complaints scheme is for the FSA to offer an apology to a complainant. In this case, the FSA accepts that it could have done things better and that there were errors in the letters it has sent to you, it also apologised for these mistakes prior to you referring the matter to me. In this instance I believe that an apology is the appropriate form of redress and I will not therefore be recommending that the FSA should consider making an award to you.

In view of the above, I am unable to alter the decision previously made by the FSA. I appreciate that you will be disappointed with my findings, but hope that you will understand why I have arrived at this decision.

### **Recommendations**

1. Where a complaint handler changes during the course of an investigation, the complainant should be made aware of this change and provided with a reason for this change.
2. When the FSA receives a complaint where the complainant specifically raises the issue of a compensation payment, when the complaint (or an element of the complaint) is being upheld and the FSA feels that a compensation payment is not warranted, the FSA should provide justification in its decision letter to confirm why an award is not being made.

Yours sincerely



Sir Anthony Holland  
Complaints Commissioner

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