



3rd March 2011

Dear Complainant

**Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01166**

I write with reference to your correspondence with my office in relation to your further complaint against the Financial Services Authority (FSA).

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint that comes within the complaints scheme. 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>.

Your Complaint

1. You are unhappy with the actions of the FSA during the settlement process following an Enforcement investigation into your conduct whilst holding a controlled function. Specifically, you feel that a member of the FSA's Enforcement Team effectively threatened you by stating that unless you settled the matter, it would withdraw its offer of a temporary prohibition and recommend to the Regulatory Decisions Committee (RDC) that your prohibition would be permanent.
2. You are also unhappy with the FSA's actions in relation to the manner in which it set the financial penalty. Specifically, you are unsure why the FSA set your post discount fine at over 99% of your total assets. Although you have asked the FSA to clarify how it arrived at this figure, it will not provide further explanation.
3. You feel that the FSA's actions in relation to the two issues I have set out above gave you no choice but to settle as if the FSA had carried out the threat you say it had made you would have been unable to work in the UK in the financial services industry in the future and would therefore not be able to provide for your family.

Background

When considering your complaint 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 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 [1998 c.42] Human Rights Act 1998.”*

COAF nevertheless then goes on to provide 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 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.

My Position

I have now had the opportunity to consider the issues you have raised and review the FSA's investigation file. In considering your complaint I know that you feel that the financial penalty the FSA applied had the result of, using your words, bankrupting you. Whilst I accept that the penalty may seem unduly high, as part of my investigation I have now had the opportunity to review the papers the FSA prepared before it set your financial penalty. From these papers it appears that the FSA followed the correct procedures in setting the financial penalty in that it considered the nature of the offence, financial penalties set for similar offences and your individual financial circumstances.

Although I sympathise with your position, unfortunately I am not able to consider the level of the financial penalty. This is not because I wish to be unhelpful, but simply the matter is not something I have the legal power to consider under the complaints scheme. Challenging the level of a financial penalty following an Enforcement investigation is a matter which can only be considered by the RDC and/or the Tribunal and is not something which can be considered by me. Unfortunately, in this case, whilst it is clear that you felt under considerable pressure to settle the matter, ultimately it was your own decision to do this.

I would add that as part of the settlement process, when you decided to settle the matter, and accepted the temporary prohibition and the financial penalty the FSA set, you gave up the right to challenge these penalties. As such, no matter how sympathetic I may be to the issues you have raised, as you have given up the right to challenge them, I simply cannot investigate or comment further upon the appropriateness of the penalties. I appreciate that this may appear unfair given the issues you have raised, but the settlement document you signed imposed an undertaking upon both you and the FSA that in settling the matter neither party would look to review the settlements terms or challenge them at a later date. It would, in my opinion, be unjust to both parties if either side was later able to challenge or to attempt to set aside set aside an agreement which was voluntarily entered into.

I am however able to consider your comments that you were, in effect, pressurised into accepting the settlement by a member of the FSA's Enforcement Team. As part of my investigation into this issue I have obtained and reviewed the FSA's investigation file and have asked both you and the FSA to provide further information relating to the settlement discussions which took place.

Upon my request the FSA has provided me with considerable additional information in relation to the circumstances surrounding the penalties and the settlement discussions which took place. The FSA was able to provide me with a copy of its attendance note arising out of a telephone conversation which took place between members of the FSA's Enforcement team and you on the morning of 11th August 2008. At this point I would say that it was disappointing that the FSA was unable to provide an actual recording of this call which would detail in its entirety the discussions which at that time took place.

It is clear from your correspondence with my office that having had the opportunity to view the FSA's attendance note, you dispute the details that the FSA has recorded within it. Although I have asked you to provide your own contemporaneous notes of the call, I appreciate that you are currently overseas and have therefore been unable to produce or access your own notes of this unhappy episode as any documents you may have are archived here in the UK.

I would add that in the absence of a conflicting contemporaneous attendance note of the discussions that took place with the FSA on 11th August 2008, I have to base my decision on the evidence that I have to hand. However, whilst I make this point, I feel that I should emphasise that even if you had been able to provide your own attendance note (which contradicted that produced by the FSA), I would be faced with a position where there would be no clear way in which I would be able to decide whose notes were indeed correct. This is clearly an unsatisfactory position and is something I will return to later in my recommendations.

I can and do appreciate that being the subject of an Enforcement investigation is not a pleasant experience and that as a result of this you felt that you were being placed under considerable pressure. Whilst this is unfortunate, it is not something which the FSA can avoid if it is to fulfil its statutory function of consumer protection. However, it is also disappointing that the FSA has placed itself in a position where a person who was subject to the Enforcement process feels that he was 'threatened' or 'pressurised' into accepting a settlement offered by the FSA in order that he could "*continue to support their family [and work in the financial services industry] in the UK*" rather than referring the matter to the RDC. This is clearly an allegation the FSA should always be on guard against being made. It should, in my view, continuously take steps to ensure that it is not possible for such allegations to be made with any degree of substance or likelihood of success.

Conclusion

Having considered the matters you have raised with my office, I do not dispute the fact that, following your telephone call with the FSA on the morning of the 11th August 2008, you believed you had no option but to settle the Enforcement action on the terms set by the FSA and that if you referred the matter to the RDC the FSA would look to change its recommendation to the RDC from a temporary prohibition to a lifetime prohibition. Although it is clear that this was your belief, without an actual recording of the call or an attendance note agreed by both you and the FSA it is extremely difficult for me to comment, with any degree of certainty, exactly what was said and in what context any comments were made. This is an unfortunate position. However, in the absence of such items, I therefore have to adopt the same procedures as the Courts and base my decision upon the most appropriate evidence presented to me. In this case, although disputed by you, the only contemporaneous note of the settlement discussion which has been presented to me is the contemporaneous attendance note produced by the FSA. Based on this I must conclude that the FSA did not place undue pressure upon you to settle the matter.

I am therefore 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 Final Decision.

Recommendation

My recommendation is a general one and it relates to safeguarding from misunderstandings in the future of what are called by the FSA "settlement discussions". In essence such discussions represent a form of plea bargaining although that term would be inappropriate to use in this context where what is under consideration are issues surrounding alleged breaches of regulatory requirements and what should be the appropriate penalty for breaches that have been uncovered after an investigation by the FSA. Nevertheless a person's long-term livelihood is involved.

It is always open when sanctions are to be imposed for any alleged offender to take the issue to the RDC. However, to avoid the time and cost as well as the uncertainty of outcome inherent in taking that step, the FSA quite rightly has a procedure whereby discussions can take place as to what sanction can be agreed upon without involving the RDC process. Simply put a discussion is initiated to see whether it is likely in all circumstances to agree a mitigation of the likely sanction given the saving of time and cost as well as uncertainty to the alleged offender.

That is what occurred in this particular case as my preceding paragraphs explain and which in this case has caused a complaint to be made on the grounds that the complainant has alleged that he felt under considerable pressure to accede to the settlement because of alleged hints or threats made as to the eventual outcome if the matter of the appropriate sanction was to be placed in the hands of the RDC.

While such a complaint is uncommon, it is not the first time that a complaint of this nature has occurred and been referred to my office. While it is unfortunate that any settlement process, particularly one involving financial consequences and restrictions on being able to work in the financial services industry within the UK, can give rise to misunderstandings it is the view of the Commissioner that at this end of the final process an agreed note would be useful. At this moment this is not a formal recommendation as it is understood that additional safeguards have now been put in place to avoid future problems. The Commissioner is content to leave the matter on that basis at the current time.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner