Complaints Commissioner

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15th July 2011

Dear Complainant,

Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01247

I write with reference to your letter of 14th February 2011 in relation to your 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

In your letter of 14th February 2011 you set out, in detail, your complaint about the FSA. From this letter I understand that your complaint can be summarised as follows:

1. You are unhappy with the *conduct* (my emphasis) of two of the FSA's Treating Customers Fairly (TCF) assessors during a TCF visit to one of the firms for which you are a Compliance Consultant. You also feel that TCF visit was carried out inappropriately with the assessors not undertaking a full review of the procedures adopted by the firm, but simply looking at certain areas and insisting that the firm should adopt the procedures they recommended. Collectively you consider, in effect, that the TCF assessors were unprofessional in the manner in which they carried out their duties.

2. As a result of this complaint you are looking for the TCF assessors to undergo some additional training so that they can adapt their judgements to reflect the needs and risks of small firms. Additionally, in respect of the visit which took place to Firm A you are looking for:

    a. an acceptance that a valid assessment did not take place on 1st September 2010

b. the report of the TCF visit to be amended to reflect that although Firm A would benefit from guidance to improve its suitability reports, there is no evidence that Firm A has provided unsuitable advice.

I should also set out as a complement to the above that in an email of 10th September 2010 addressed to a member of the FSA's stage 1 investigation team you said this:

> *"The complaint is to be registered in my name as it is I who am bringing it, on two grounds, where there may be wider implications:*
>
> *(1) The behaviour of the assessors towards myself was unprofessional and, in my view, showed a disrespect towards myself and the work I had carried out with and for this firm. This is a personal grievance, but I would wish to see the TCF assessors concerned made aware of the fact that, if they had paid attention to what I or any other compliance consultant in a similar position was saying, they would have conducted a valid assessment instead of an invalid one.*
>
> *(2) I witnessed first hand bullying behaviour and incorrect statements coming from these assessors that caused me concern that they could behave like this in other firms. My concern is that firms may be unaware that things these assessors said are wrong, so the firm may be browbeaten into adopting practises that are unnecessary and unsuitable for the size and business profile of the firm. I have witnessed TCF Assessor X display the same tendencies [which you subsequently described as a "blinkered" approach] in an interview with a different firm [and subsequently have added that you had no reason to complaint about Assessor X's behaviour on that occasion].*
>
> *The redress I've asked for is not for myself but to stop any further damage to this particular firm and to prevent the same thing happening for other firms."*

I include this further elaboration of your complaint as plainly, coming so soon after the event which was on 1st September 2010, you clearly felt that it was an important issue that the FSA needed to be aware of.

My Position

I have now had the opportunity to review the papers both you and the FSA have presented to me. I have also considered the responses both you and the FSA have provided to my Preliminary Decision. From these papers, it is clear that you were and remain unhappy with the way and manner in which the FSA Assessors carried out Firm A's TCF visit.

Before commenting upon the issues you have raised, I would say this. It is disappointing that an individual who undertakes work (on a contractual basis) on behalf of an authorised firm should be unhappy with (and feel the need to complain about) the manner with which two FSA employees conducted themselves during a TCF visit. This is clearly an unfortunate position.

Although it is clear that you are unhappy with a number of issues arising out of the visit to Firm A on 1st September 2010, under the rules of the complaints scheme I am only able to consider that part of your complaint that relates to the behaviour or manner of the FSA personnel involved that is to say your comments about the way in which the FSA Assessors conducted themselves during the visit. I can consider this aspect of your complaint by virtue of 1.4.2(A) of COAF which states:

1.4.2A The *FSA* will not investigate a complaint under the *complaints scheme* which it reasonably considers amounts to no more than dissatisfaction with the FSA's general policies or with the exercise of, or failure to exercise, a discretion *where no unreasonable, unprofessional or other misconduct is alleged.* (my emphasis)

In this case that part of 1.42(A) I have italicised allows me to consider that first part of your complaint that I have identified. However, in relation to the remaining part of your complaint I am unable to assist you. The reason for this is that that part of your concerns relates to the investigatory outcome and detail in which the FSA conducted a supervisory visit. The outcome and substance of a supervisory visit is excluded from the complaints scheme. Specifically I would draw your attention to paragraph 1.4.2(3) of COAF which states:

1.4.2 Exclusions from the scheme

Each of the following is excluded from the *complaints scheme*

(3) complaints in relation to the performance of the *FSA's* legislative functions under the *Act* (including making rules and issuing codes and general *guidance*)

If you and/or the firm feel that the FSA's TCF visit findings (resulting in guidance) are inappropriate or simply incorrect then the firm can challenge these with the FSA in due course. I would add here that, from the information provided by both you and Firm A itself I believe that it is currently engaging with the FSA in relation to its further enquiries in respect of this matter.

As I have indicated above, when conducting my investigation, I considered the information obtained by the FSA during its own investigation into your complaint, the information provided by you (to both to the FSA and to my office), together with the considerable amount of information Firm A provided to me.

From the FSA's file it is clear that following receipt of your complaint it asked the two Assessors involved in the visit to the firm to respond to the comments you made about their conduct during the TCF visit. The FSA Assessors have provided different recollections about what was said to those put forward by you. Unfortunately, I was not present at the TCF assessment, so on the face of it it is difficult for me to comment directly upon what was said by whom and more importantly the manner in which the comments were made by both you and the FSA Assessors. This is because my investigations are paper based and do not involve hearings based on sworn testimony including adversarial cross examination. Having said this, it is clear that a situation was allowed to develop whereby the 'relationship' between you, the FSA Assessors and the firm being assessed deteriorated to an unacceptable level. Clearly this is not a desirable outcome for any of the parties involved.

I appreciate that Supervision visits (including TCF assessments) are rarely a pleasant experience for a firm (or its Compliance Consultants) as its adopted (and possibly recommended) procedures and processes are looked at in minute detail, with the benefit of hindsight, and may be open to criticism. Additionally, there is also the concern for a firm that, should any shortcomings be identified, it will result in further and possibly more intrusive FSA attention and visits.

However, during these visits neither party, particularly the FSA as a professional regulator, should allow situations to develop and 'relationships' to deteriorate to levels where allegations of unprofessional behaviour can be made (against any party involved in, or who were present at, the visit). FSA staff should do their utmost, however difficult that may be, and I realise that sometimes that may be very difficult indeed, to ensure positively that supervision visits are conducted in a professional manner and that 'relationships' are not allowed to deteriorate during a visit as appears to have happened on this occasion. Where the firms involved are "small firms" then inevitably there has to be recognition of that factor and therefore that a greater degree of sensitivity may be involved in carrying out any visit. That is my starting point which needs to be coupled with the further one which identify below in considering this complaint.

In making this comment I accept that sometimes the FSA can be faced with difficult situations. This is particularly true where there are potential misunderstandings and where the firm (and/or its advisers) feel that any adverse comments are unjustified (whether ultimately this is, or is not, the case) or are taken as a personal attack or personal criticism rather than in the context of a general comment of what has been found or as genuinely constructive criticism. In these cases it is important that *all parties* (my emphasis) continue to act professionally.

Having made those general observations I turn now to the particular facts surrounding your complaint. These facts have an important bearing on my view of that part of your complaint that I can consider. The visit that was made on 1st September 2010 by Assessor X and Assessor Y was made following protracted correspondence between various personages within the FSA and one of the directors of Firm A after an earlier TCF assessment which conducted by Assessor Z in May 2010 (for the sake of completeness I should confirm that this assessment did not take the form of an actual visit to Firm A's offices).

The correspondence, which followed the earlier TCF assessment from May 2010, plainly indicates that Firm A felt on that occasion that it had either been misunderstood by the FSA assessor in question (not those who were involved on the 1st September visit) or that Firm A itself had failed to understand what the outcome of that first visit actually was.

That degree of misunderstanding is not altogether surprising given that initially Assessor Z, on that first occasion had stated, according to a director of Firm A, that

> "*the outcome of her assessment was that we had passed this as being able to demonstrate that the message of TCF had been taken on board and implemented but that she would give me the benefit of the doubt as, in the case of some of my earlier answers, she had not been convinced that this was the case*".

However, having said that, according to the director of Firm A, the assessor shortly afterwards changed her mind and indicated that she had "failed Firm A". There was an explanation then given as to why there had been a reversal of the initial finding, which I suspect did not satisfy Firm A or that director. The reason for referring to that first visit and in the detail I have done is to indicate that the background is relevant to the circumstances of the second visit and given the history of what had gone before, any second visit would need to be carried out with a more than usual degree of sensitivity. That factor needs to be coupled together with the starting point I have referred to earlier.

My Final Decision is that I do not believe that it was. Given that my conclusions are based on paper evidence and to some extent on what clearly involves an issue of who said what and in what manner it is right that I now set out my reasons for this conclusion.

Firstly, as I have already said as a result of what had gone before a greater degree of sensitivity was needed than would usually be the case. That as well as factoring in that "small firms" demand a recognition of their size are my starting points.

Secondly, the complainant set out in some detail the nature of what was said and to whom which in substance has been borne out by a similar account by a director of Firm A. While it might be suggested that each would back the other up I do not believe that that would be necessarily a rational explanation. The complaint was by an independent contractual Compliance Officer "off her own bat", so to speak, and without apparently involving Firm A at all.

Thirdly, the Stage 1 investigation by the FSA did not contact Firm A to discover what its view might be of your complaint. The reason given by the FSA was:

> "*In respect of contacting the firm, I was content that her version of events would be replicated by the firm and was therefore satisfied that the very full details of the complaint that she provided were sufficient to investigate the matter in full*".

That reasoning however is erroneous in its assumptions in that there was no indication, at that point, that Firm A would support the complainant's account. Indeed it might be thought that for the sake of a "quiet life" and given all that had gone, before following the first visit, Firm A would not, in any circumstances wish to involve itself in what would inevitably now be a yet further difficult argument. Small firms perhaps not surprisingly tend to have a healthy regard for the muscle of the FSA and it might be thought would not wish to upset it unduly. I note that the FSA, in its response to my Preliminary Decision, has indicated that it was aware you had made Firm A aware of your intention to make a complaint and stated that:

> "*...[you were] lodging a complaint and [Firm A was] happy for [you] to do so as [it] agreed with [your] comments. In view of this [the FSA is] happy that the firm would support [you] in full and were not afraid of the FSA*".

However, although the FSA held this view, you do not work for Firm A (and were making the complaint on your own). There was nothing to indicate that this was in fact the true position and Firm A could well have adopted a different position had the FSA chosen to ask. It remains my view that a careful investigation for the sake of completeness would have enquired as to Firm A's views.

Fourthly, as it turned out, when I contacted Firm A it was only too anxious to unload, in even greater detail than the complainant, the whole history of both visits. In essence and in many important details it supported the complainant's view and did so with a submission of the full correspondence with the FSA starting with some detailed notes made by a director of Firm A on 26th May 2010 and finishing with correspondence dated 21st March 2011 to the FSA. It was clear from a reading of those submissions by Firm A that the second visit by the FSA had not displayed a sufficient degree of sensitivity that I would have expected *given what had gone* (my emphasis) before. I was also disappointed that the FSA's Stage 1 investigation had not uncovered all this material for the reasons that I have identified as being unsatisfactory.

Fifthly, and this reason involves a considerable degree of caution on my part, as I must not seek in anyway what so ever and this in not my intention to challenge the tenor of any guidance or advice arising out of the FSA's visit in question. It is clear that arising out of the visits there were issues that needed to be addressed and hopefully are now being addressed (indeed I note from the notes provided by Firm A that at the time of the 1st September 2010 visit it had adopted some of the recommendation Assessor Z had made at the 26th May 2010 TCF assessment).

However, bearing that in mind and exercising the appropriate degree of caution I came to the view that my Preliminary Decision on the first part of the complaint was, in the round, valid and that conclusion was fortified by a particular comment arising out of the stage 1 investigation set out in the emails surrounding that investigation. I still maintain that view in this my Final Decision. I quote directly from the relevant email:

> ***"TCF Assessor Y made a factually incorrect statement during the introduction, when he described the FSA's Handbook as "minimum standards" and the FSA's use of "best practice" in the context of TCF assessments. This caused Director B of Firm A some concern immediately thinking that the assessment would be made against some unknowable "best practice" that may not be relevant for this firm.'***
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> *I think [the complainant] may have misunderstood this point. I used the term 'minimum standards' as part of a general explanation of the development of the TCF Assessment programme. I was explaining that the assessment programme came out of the focus on the principle of treating customers fairly and the FSA's initiative on TCF. This was part of a move to more principles based form of regulation where the focus was on ensuring that firm's met the principles rather than FSA trying to create detailed rulebooks to cover all possible eventualities. The specific rules in COBS are generally 'minimum standards', and firms are expected to comply with the principles for businesses more generally. We are not judging firms against 'unknowable best practice' - our expectations in respect of treating customers fairly are set out very clearly in the roadshows for firms prior to assessment and in numerous communication documents that have been published over the last few years".*

The relevance of that extract is that it confirms in my view that what was said in that context was said. That plainly there appears, at best, to have been a misunderstanding arising out of this particular point and it is not something that is referred to in the letter of 8th September 2010 from the FSA following the inspection visit of 1st September 2010. As a side issue I also find myself unable fully to understand the point that is being made by the respondent in that email. It seems perhaps rather muddled to me but that is as far as I should go before crossing the line into wrongly considering the details of the guidance offered by the FSA. I only refer to it as an additional reason that in part impinged upon my overall conclusion on the validity of the essentials of your that part of your complaint that I can consider.

Conclusion

My role is that of an independent reviewer of the FSA's handling of complaints. In this instance it is clear that the relationship between you and the FSA deteriorated during its visit to the firm of 1st September 2010. Whilst this should not have happened, it is clear from the information presented to me that it did. It is also clear that while there are different recollections of some of the events which transpired that day there are some basic factors that I consider relevant and which I have outlined above.

While I was not present at the visit and it is difficult, from the limited papers presented to me, for me to come to a view on whose recollections of the events is *wholly* (my emphasis) correct, the conclusion I can reach is that the 'relationship' between you and the FSA's Assessors did deteriorate during its visit to the firm. Clearly, whilst this should not have been allowed to happen, it did, and the conclusion that I have reached is that that should not have been allowed to happen.

I have noted in its response to my Preliminary Decision that the FSA has adopted a position which could be described as defensive. I can understand that in some respects, but as I remarked earlier my starting points are those which I have identified and I do believe that it is incumbent for any regulator to proceed in matters involving its regulatory duties so as to ensure relationships are sustained on a level footing wherever possible. It has provided arguments which, in my opinion, do not carry sufficient weight to indicate that my views were incorrect or that I need to review my position and alter my conclusion in my Final Decision.

The fact that it did happen to a large extent, and this is my Final Decision, must be attributed in part to the Assessors. That is a matter of regret given the importance of regulators such as the FSA carrying out its important roles with understanding, clarity and a relevant degree of sensitivity appropriate to the occasion and the circumstances. I accept the FSA's view that that Assessors X and Y have, between them, conducted a large number of TCF visits without complaint but this does not indicate that during this particular visit the comments made by the complainant may not, for the reasons I have set out, be justified.

While I can make, in all the circumstances, no particular and useful recommendations, and indeed I cannot think of any that would be relevant given the considerable experience of the FSA's team involved, nevertheless I do uphold that part of your complaint I have considered earlier for the reasons I have set out earlier in this Final Decision.

Yours sincerely

Sir Anthony Holland
Complaints Commissioner