Complaints Commissioner

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4th September 2012

Dear Complainant,

Complaint against the Financial Services Authority
Reference Number: GE-L01439

I refer to your letter of 8th June 2012 in connection with the above. I am now writing to advise you that 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 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

From your correspondence with my office, I understand your complaint relates to the following issues:

> You are unhappy with the manner in which the FSA has treated you. Specifically, I understand that whilst you were challenging the outcome of the FSA's Enforcement action through the Tribunal you felt that it was inappropriate for you to pay the fees invoices the FSA had sent to you. However, you agreed with the FSA that the issue would be resolved once the Tribunal had considered your referral.
>
> Subsequently, once the Tribunal had confirmed the Regulatory Disputes Committee's decision (which it did around 19th September 2011) you made arrangements for the outstanding fees of £2,762.10 to be paid, with the FSA receiving your cheque on or around 26th September 2011.

Despite the outstanding fees having being paid your firm was contacted by a firm of debt collectors, instructed by the FSA, who were looking to recover the outstanding fees which had been paid. Although the FSA upheld your subsequent complaint, and accepted that there had been errors, as it had failed to notify the debt collection agency that your fees had been paid, you were unhappy with the financial award of £50 the FSA had made to you, as you felt this was "derisory".

You, on behalf of your firm, therefore sent the FSA an invoice for £2,950 which is the amount you believe your firm should receive as a result of making the complaint about the FSA's actions. The invoice shows that the £2,950 you were requesting was made up of a compensatory payment of £2,500 (which was based upon what you believe to be the average PPI award) together with a charge for your time of 3¾ hours at a hourly rate of £100 plus VAT).

Although the FSA accepted that it had previously failed to notify the debt collection agency that you had settled the invoice, and assured you that this had now been addressed, you subsequently received yet further contact from the debt collection agency again chasing payment of the outstanding fees.

You again complained to the FSA, and in so doing issued it with a further invoice for £2,950 (calculated in an identical manner to the first invoice you submitted). This increased the amount you believed the FSA should award you to £5,900 (which included a compensatory payment of £5,000). Following a review of the matter the FSA rejected your proposals (as set out by the invoices) but accepted that a further financial award was appropriate. The FSA therefore increased the financial award it was prepared to make to you by £100, increasing the overall award to £150.

You say you remain unhappy with the situation and feel that the quantum of the award is even more inadequate given that you believe the FSA's actions were "*unprofessional and constitute gross administrative incompetence*" and you also believe the "*provision of misinformation to an outside organisation was wilful and deliberate [as] it was done consciously*". Although your firm initially issued the FSA with two invoices each for £2,950 (making a total of £5,900), following the FSA's second decision letter (which was dated 13th March 2012), you issued the FSA with a credit note for £2,850 reducing the amount you were looking for the FSA to award your firm to £3,050.

I also understand that, as a result of your unsuccessful application to the Tribunal, a costs award of £8,665.60 was made against you. I believe that you have made payments of £2,765.60 (on 28th February 2012) and a further £2,850 (on 23rd April 2012) which leaves a balance owing to the FSA of £3,050.

I believe that you are now looking for me to review the quantum of the financial award the FSA has made to you and for me to recommend that the FSA should settle the outstanding invoices you have sent to it and in doing so effectively clear the balance of the Tribunal fees which are due to the FSA.

Coverage and Scope of the Scheme

COAF provides as follows:

(1) The complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions. The complaints scheme covers complaints about the way in which the FSA has 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.

(2) [deleted]

(3) To be eligible to make a complaint under the complaints scheme, a person (see COAF 1.2.1G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the FSA's actions or inaction.

I should also make reference to the fact that my powers derived as they are, from statute contain clear limitations in the important area of liability in damages. The Act stipulates in Schedule One that the 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

As part of my investigation into your concerns I have obtained and reviewed the FSA's investigation file. In reviewing your complaint I have considered the comments you have made when corresponding both with the FSA and my office.

Whilst it is clear that you remain unhappy with the outcome of FSA's investigation into your complaint, I believe that your displeasure primarily surrounds the quantum of the award and not the overall outcome of the FSA's investigation into your complaint. My stage two investigation and this Final Decision will therefore consider the quantum of the financial award that the FSA has made to you

I can and do appreciate why you are unhappy with the FSA's conduct in this matter, nevertheless, the FSA has a statutory exemption from liability in negligence except where there is evidence of bad faith. In this instance, whilst it is clear that the FSA failed to notify the debt collection agency that the outstanding fees invoice had been settled in full, there is no evidence that the FSA acted in bad faith.

I appreciate that you allege that the FSA acted wilfully and not by omission, but, as the FSA explained in its decision letter of 9th February 2012, this was due to a weakness in its procedures (which had have now been amended) *rather* (my emphasis) than as a result of bad faith on the FSA's part. The FSA's subsequent failure to notify the debt collection agency that the invoice had been settled also appears to be the result of negligence on the FSA's part rather than bad faith.

I appreciate that you have intimated that the FSA has acted in bad faith, but, as I am sure you will appreciate bad faith is a serious allegation which attracts a heavy burden of proof. This is because fundamental to the legitimacy of public decision making is the principle that official procedures should not be infected with improper motives such as fraud or dishonesty, malice or personal self interest. Given the extremely serious nature of an allegation of bad faith, a mere assertion of bad faith is insufficient evidence of bad faith.

Ultimately, other than suggesting that the FSA acted in bad faith, you have not provided any evidence at all that would cause me to consider that your allegation of bad faith could be sustained within that basic requirement. Assertions and implications are easily made but are not, and never can be, sufficient to produce a finding of bad faith on the part of a public authority or individual within that authority without clear evidence of malicious wrong doing that you have failed to provide.

Whilst it is unfortunate that the FSA failed to notify the debt collection agency that the invoice had been settled this omission or failure could, at worst, be described as negligence which, although could be regarded as unacceptable, does not amount to evidence of the Regulator acting in bad faith.

I now come to the quantum of the financial award the FSA has made to you. When responding to your complaint, I note that the FSA, in its letters of 9th February and 13th March 2012, felt that your complaint should be upheld and has also apologised for the poor service it has provided in failing to notify the debt collection agency that the outstanding fees invoice had been settled in full. The FSA has accepted that the service it provided did not meet the standards it and the public expect. That is not surprising in the circumstances.

I also appreciate that the FSA could and indeed certainly should have handled this matter better. However, I also have to be mindful of the actions of both the FSA and the complainant both before and after the complaint, the manner in which the FSA has considered a complaint, the impact the FSA's actions (or inactions) had on the complainant and the possible remedies available to a successful complainant (as set out in paragraph 1.5.4 and 1.5.5 of COAF). Paragraphs 1.5.4 and 1.5.5 of COAF (under the sub-heading of "[w]hat are the possible outcomes for the complainant?) state:

> COAF 1.5.4 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.
>
> COAF 1.5.5 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.

The FSA set out in its second decision letter to you of 13th March 2012 that the FSA's complaints scheme does not provide a legal right to compensation. The FSA has consulted publicly on this issue on a number of occasions before, during and after the drafting of the Act. The FSA must also be mindful of its statutory obligations of using its resources economically and efficiently. It also has regard to the fact that it is funded by the financial services industry.

With this in mind, the FSA's Board's view is that the FSA should retain a wide discretion on whether it will make a compensatory payment on an *ex-gratia* basis following a complaint investigation. This is a view that I concur with particularly having regard to the way that the FSA is funded and the impact such payments will ultimately have on the regulated community and, therefore, indirectly, on the consumers who purchase financial services products or use services provided by regulated firms.

In this instance, although it is clear that the FSA failed to provide you with the level of service which was reasonable to expect (by not informing the debt collection agency that the outstanding fees had been paid), when this was brought to the Complaints Team's attention it immediately accepted this, looked to remedy the situation, and issued you with an apology before the matter was referred to my office. Likewise, the FSA accepts that it subsequently failed to notify the debt collection agency after the first complaint had been upheld. The FSA accepts that this failure is unacceptable and offered you a further unreserved apology and, in so doing, offered you a further financial award.

Although I accept that you would have spent a small amount of time complaining to the FSA and this may also have resulted in a small amount of expenditure (such as postal costs), I believe that the complaint forms you submitted adequately set out the situation. With this in mind, I do not believe that further redress (after the issue of the credit note) for the correspondence you say you produced in bring this matter to the attention of the FSA (amounting to a total of 4½ hours of work at a hourly rate of £100 plus VAT hours work) or the significant compensation payment (of £2,500) you have requested can be justified in this case.

However, I am mindful that the FSA's failures in this respect have been significant and I feel that the financial award it has made does not reflect the extent of its failings. With this in mind, I am recommending that the FSA should make a further award of £350 to you (to increase the total award for the FSA's errors in this matter to a total of £500).

Conclusion

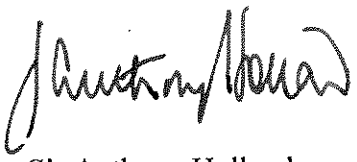
In assessing a complaint, I have to have regard to the FSA's investigations and findings, together with the further representations complainants make to my office. In this instance, it does not appear that the FSA has provided you with the level of service a member of the industry and/or public would expect. The FSA has accepted this and made a financial award to you to reflect this.

I appreciate that you feel this award was insufficient given the circumstances and, whilst I accept that the FSA does have to be mindful as to how it uses its resources and as to how it is funded, I agree that an award of £150 does not appear to reflect the internal incompetency of its actions. With this in mind, I am recommending that the FSA should increase the award it is to make to you by £350 (to a total of £500).

This falls considerably below the amount you feel that you are entitled to but other than the time you have spent setting out in writing your complaint to the FSA (which, in my opinion, was achieved by the completion of the complaint form), it is unclear how your firm has been further adversely affected by the FSA's actions (as neither the FSA nor the debt collection agency it uses notify credit rating agencies that firms have outstanding debts). *Ex-gratia* payments are always relatively modest and are not in any way similar to damages nor should include an element of profit in a complaint such as yours which is implicit in the 'bills' you have put forward to the FSA.

I would finally add that, given that any financial award the FSA may make to you as a result of my recommendation will be paid directly to you, any outstanding balance of the monies due to the FSA as a result of the award the Tribunal's made to the FSA, must be paid immediately and in full (and without deduction for the financial award I am recommending).

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner