Complaints Commissioner

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7th March 2013

Dear Complainant,

Complaint against the Financial Services Authority
Reference Number: GE-L01503

I refer to your letter of 7th December 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. Under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), provides that an independent person is appointed as Complaints Commissioner 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 that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role. 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 as you would not engage with the FSA and arrange an appropriate time for a supervisory visit, the FSA issued a Warning Notice informing you that it intended to cancel your firm's Part IV Permissions. As you did not accept the FSA's decision you challenged the FSA's actions through the Upper Tribunal. Following consideration of the matter the Upper Tribunal upheld the FSA's decision and cancelled your firm's Part IV Permissions with effect from 19th September 2011. In making its decision, the Upper Tribunal made a costs award (of £8,665.50) against your firm.

As regulated activity only formed part of your firm's activities, and as you were already regulated by the Institute of Chartered Accountants in Scotland (ICAS), you applied to it for Designated Professional Body (DPB) exemption to allow you to continue to undertake regulated activity for your clients. I believe that ICAS granted you a DPB exemption to undertake regulated activity from 7th March 2012.

You allege that, as a result of the FSA failure to action the instructions it received from ICAS you have lost the servicing rights to a number of your clients. When considering your complaint, the FSA set out in its decision letter that:

> "*Initially delays were caused because the information was emailed to an incorrect FSA address. Thereafter, problems occurred because the content of the file could not be automatically uploaded given it was provided to the FSA with a duplicate entry; the FSA's troubleshooting processes were inadequate; and because there was a human error failing where the team incorrectly assumed all uploading was up to date. These collectively caused a delay to occur.*
>
> *We note that you have requested compensation in respect of the time you spent making your complaint and the time taken for writing additional correspondence with investment product provision providers and clients. As you are aware from previous complaints that you regrettably needed to make to the FSA, the FSA retains discretion on whether it makes compensatory ex gratia payments. Whilst we appreciate that events caused you to make enquiries and to make a complaint to the FSA, you have not provided proof of any financial loss in connection with this specific matter as a result of the FSA's involvement in it. We are mindful here of the fact that our letter dated 10th May 2012 invited you to submit evidence that supported your allegations. After careful consideration and with our policy on compensation in mind, we do not currently find that an ex-gratia payment award should be offered to you*".

As a result of the FSA's actions you are claiming a payment of £2,750 from the FSA. This payment has been calculated, according to the invoice you have provided, £1,050 for the 10½ hours (at £100 per hour) you say you have spent time corresponding with the FSA and a further £1,700 in respect of compensation for damaged client relationships.

Although the FSA has apologised, given that the FSA has accepted that it made errors when dealing with the 'data upload' and correspondence it received from ICAS you are looking for me to recommend that the FSA makes a financial award of £2,750 to you (which I understand is the approximate amount of the costs order the Upper Tribunal made against your firm which remains outstanding and which I have addressed previously under complaint reference GE-L01439).

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. This is an area I will return to later in my decision letter.

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 issue of a financial award and the fact that you are required to comply with the costs award issued by the Upper Tribunal. This letter will therefore consider purely the quantum of any financial award which should be made to your firm.

When responding to your complaint I note that the FSA, in its letter of 27th July 2012, felt that your complaint should be partially upheld as (although ICAS had sent correspondence to the incorrect email address and provided data which could not initially be used without manual review) there were weaknesses in the FSA's overall procedures. With this in mind the FSA has apologised for the poor service it has provided and made recommendations to improve their process to ensure that other firms are not similarly affected in the future. I am also mindful that the FSA asked you to provide evidence to support the losses that you say you have incurred and that you failed to do so, instead choosing to refer the matter to my office.

I appreciate that you have provided evidence which you state supports your claim. However, although you have provided copies of documents which you say indicates that 17 of your clients have been 'reallocated' the papers do not clearly indicate this nor, in my opinion, do they clearly indicate that any reallocation which may have occurred was the *sole and direct result* (my emphasis) of FSA's failure to process the ICAS data upload in a timely manner rather than as a result of the Upper Tribunal's decision to concur with the FSA's proposal to cancel your firm's Part IV permissions as a result of your firms failure "*to co-operate with the FSA's repeated requests to conduct a supervisory visit in order to assess [your firm's] compliance with the FSA's Treating Customers Fairly requirements*".

Although I concur that the FSA could and indeed certainly should have handled this matter better, I also have to be mindful of 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 decision letter to you of 27th July 2012 that the FSA's complaints scheme does not provide a legal right to compensation and has a discretion on whether it should make such a payment. 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.

I should at this point expand upon the issue of what I mean by the words "*sole and direct result*" used earlier. While we are considering '*ex-gratia* awards' and not legal damages that issue must nevertheless also involve a consideration of whether what has transpired in this case in the terms of financial loss arises out of the sole and direct result of failures by the FSA. I do not believe that the evidence you have submitted establishes that. When any financial loss is alleged it must be clear that the chain of causation leading to the financial loss is clear and unbroken. That is not the case in my view in the context of your complaint.

In this instance, although it is clear that the FSA failed to provide you with the level of service which was reasonable to expect 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 has also asked you to provide *clear evidence* (my emphasis) to support directly the financial loss you say that you have incurred. In my view, whilst you may have lost the servicing rights to a number of your clients you have not provided any evidence to indicate that the providers made the decision to do this after ICAS had submitted the 'data upload' to the FSA which confirmed that you were now authorised to conduct regulated activity under its DPB exemption.

Likewise, as I set out in my previous decision letter 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. I would also add that a complainant should not expect to be reimbursed for the time spent complaining to the FSA, at the rate have argued for. The Courts in the past have stated that if complainants acting on their own behalf seek to charge for their time it must, when payable, be at a modest rate such as £10 per hour and not at a commercial rate charged to their clients.

I am therefore happy that, in view of the lack of clear evidence to support your claim on a strict causation basis that your firm has suffered irreparable client relationship damage as the *sole and direct result* (my emphasis) of the FSA's actions, apology the FSA has already given is, in this case, the appropriate remedy.

I appreciate that you will be disappointed with my decision, but I would also draw your attention to paragraphs 1.5.9 and 1.5.6 of COAF.

> COAF 1.5.9 which states:-
>
> The *Complaints Commissioner* will not investigate any complaint which is outside the scope of the *complaints scheme*, but the final decision on whether a particular case is so excluded rests with the *Complaints Commissioner*.

In my view, your complaint is essentially irritation that the Upper Tribunal made a cost award against you and that the FSA is still seeking full reimbursement of this from you. The decision of the Upper Tribunal to award costs against you is simply not something I can consider under the rules of the Complaints Scheme.

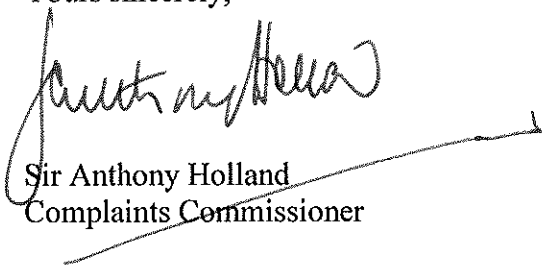
I should point out that whether a complaint is within the complaints scheme is at my sole discretion. Currently, for the reasons explained above, I do not believe that this case justifies an investigation by me. It may be that this view may change in the future but on the evidence currently available, that remains my view.

> COAF 1.5.6 which states:-
>
> Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the FSA's progress in investigating a complaint, may refer the matter to the *Complaints Commissioner*, who will consider whether or not to carry out his own investigation.

This is a relevant provision as it gives me an unfettered discretion as to whether or not I carry out an investigation. I am bound to say that on what I have read it is unfortunate that you have suffered problems in your dealings with the regulator. However, whilst you have suffered problems, that does not mean that the FSA should waive the outstanding portion of the costs awarded from you at the expense of the rest of the industry who ultimately fund the regulator. As I have set out above, the FSA was prepared to consider your claim for an *ex-gratia* payment when considering your complaint but you failed to provide clear evidence to support your claim (and in any event time spent on pursuing this matter should not be considered as part of such a claim). Likewise, when you belatedly provided this to my office it did not clearly prove that you firm was adversely affected as the sole result of the FSA's actions. Without clear causative evidence I do not feel that further investigation on my part is necessary.

I am sorry that I am therefore not able to help further in this matter and this letter therefore concludes my office's correspondence with you. I am copying this letter to the FSA.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner