Complaints Commissioner

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25th October 2013

Dear Complainant,

Complaint against the UK's Financial Services Regulators
Reference Number: GE-L01589

I refer to your letter of 11th October 2013 in connection with the above. I am now writing to advise you that I have completed my investigation into your complaint.

At this stage, I think it would be worth explaining my role and powers. Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions. Section 84(1)(b) of the 2012 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.

From 1st April 2013, as part of changes implemented by the Government, the FSA was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulator of the UK's financial services industry. I would add that although the FSA has been replaced, transitional provisions have been put in place to enable the continued consideration of complaints against the FSA.

As set out in the consultation paper (CP12/30 Complaints against the regulators) and confirmed in the policy statement (PS13/7 Complaints against the regulators), any complaints which have not been concluded as of 1st April 2013 will continue to be investigated by the FCA Complaints Team with the cooperation of the PRA if needed and my office.

Your complaint

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

- You were incorrectly advised to transfer your preserved final salary occupational pension scheme (defined benefit scheme) to a personal arrangement on the basis that such a transfer would provide you with greater benefits.

- On 7th September 2001, you were contacted by the FSA who informed you that it would undertake the required Pension Review loss assessment as the adviser who had recommended that you should transfer your preserved benefits to a personal pension arrangement, Firm A, was no longer trading,

- On 25th March 2002, the FSA wrote to you again to inform you that it had completed the initial review of the advice you were given and had established that the transfer may not have been in your interests and, as a result when you came to retire you may be financially disadvantaged. As the adviser was no longer trading, the FSA was passing your case to the Financial Services Compensation Scheme (FSCS) for further assessment.

- On 3rd April 2003 the FSCS wrote to you stating that the review of your pension transfer was now complete and it had been established that you had been financially disadvantaged. The letter also explained that Firm B, which had taken over responsibility for the advice Firm A had provided, was prepared to augment your pension in line with the Regulator's guidelines. The augmentation calculation was designed to calculate what redress was needed to be added to your pension plans to provide you with assumed benefits equal to those which you would have received from your employers' schemes. The FSCS enclosed Firm B's offer letter which was dated 31st March 2003.

- On 7th April 2003 you signed Firm B's acceptance letter which stated that you "*accept this offer of compensation in full and final settlement of my Pension Review claim against [Firm A]*"

- You have now established that, although redress was added to your plan, this has had little, if any, impact on the value of your plan or the presumed benefits you will receive at retirement. Although redress was added (in line with the PIA's guidelines) you believe that the benefits you will receive from your personal pension arrangements will be considerably lower than those which you would have received from your employers' schemes.

- As such you believe you have been disadvantaged as a result of the guidance (and assumptions) which were made by the Regulator. As it was the Regulator which completed the calculations (on behalf of the FSCS and Firm A) you are looking for the FCA (as the successor to the FSA) to arrange for your individual arrangements/circumstances to be reviewed and for further redress to be added to your pension arrangements.

Coverage and Scope of the Scheme

The transitional complaints scheme provides as follows:

9.1 The transitional 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 under FSMA. The transitional 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.*

9.2 *To be eligible to make a complaint under the transitional complaints scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.*

9.3 *The transitional complaints scheme does not apply to the Bank's functions under Part 5 of the Banking Act 2009 (overseeing inter-bank payment systems) as this was not previously subject to these complaints arrangements.*

I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. FSMA (as the relevant legislation in place at the time) stipulated in Schedule One that the FSA is exempt from "liability in damages". It stated:

(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.

I have referred to FSMA here as it was FSMA which was the relevant legislation when the FSA considered your complaint. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. You have not adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The transitional complaints scheme nevertheless then goes on to provide in paragraph 6.6 that:

> *Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This 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 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.*

Given this it is my view, given my conclusions in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the FCA (or indeed FSA or PIA) which is incompatible with the Human Rights Act 1998 which directly caused you to lose your possessions as the issue you are complaining about directly stems from the advice you received from your financial advisers coupled with your acceptance of the subsequent compensation package "*in full and final settlement*" of that alleged loss.

My Position

Having had the opportunity to review the papers presented to me, it is clear that the FCA accepts that the manner in which it handled your initial enquiry fell below its normal standards. To reflect this, the FCA offered you an ex-gratia payment of £50.00 which you accepted. Given that you have already accepted this payment in settlement of the poor service the FCA provided to you, this is not something I intend to comment upon further in this Decision Letter.

Before I comment on the events which led to the loss you say you incurred, I feel it may be useful if I make some general comments, by way of background, to explain why the exercise which became known as the Pension Review was instigated. In the mid-1990s, the Personal Investment Authority (PIA), as the relevant Regulator at the time, identified that a large number of consumers may have been incorrectly advised by the industry to either leave or transfer out of defined benefit schemes which offered guaranteed future retirement incomes. As such, the PIA (through the Securities and Investment Board) instigated an industry wide review to identify which consumers had been adversely affected and in so doing also introduced a standardised manner of offering redress to consumers.

Where a consumer was advised to transfer from a defined benefit scheme and had retired, the redress calculation looked to increase the consumer's pension income to that which, in so far as could be calculated, would be likely to be received under the defined benefit scheme. Redress would be provided by the adviser (and not the product provider) who provided the relevant advice or, where the adviser was no longer trading, by the Investors Compensation Scheme (ICS), which was the predecessor of the Financial Services Compensation Scheme.

Where a consumer was advised to transfer from a defined benefit scheme and had not retired, any redress calculation which was to be undertaken would again look to increase the consumer's pension income to the level that would be likely to be received under the defined benefit scheme. There were two ways the desired outcome could be achieved and the options available to consumers generally depended upon the consumer's retirement date.

Where the consumer's retirement was imminent (a matter of months away) the redress calculation could be deferred (with the consumer's agreement) with a no-loss guarantee being offered. This meant that, when the consumer retired a few months later, the adviser would provide redress in line with consumers who had already retired (i.e. ensuring that benefits received matched those available from the defined benefit scheme).

However, as a large number of consumers were affected, and many consumers would not retire for a considerable period of time and to enable advisers to deal with redress in a timely manner (so consumers would be protected from the impact of advisers ceasing trading before any of their affected consumers retired), it was accepted that assessing each case at retirement (i.e. giving 'no-loss guarantees') was an inappropriate option. The PIA therefore consulted on how to address these problems. This is particularly relevant to cases such as yours where, at the time of the calculation retirement was not imminent and would not occur for a number of years. As a result of this consultation it was felt that an augmentation of a pension fund was the most appropriate option.

This augmentation exercise entailed the adviser making mathematical actuarial and investment assumptions (in line with specific guidelines issued by the PIA surrounding growth and annuity rates) on what benefits the plan would provide at the retirement date and therefore what lump sum would be required (at the calculation date) to provide the difference in the assumed benefits. That calculated lump sum was then added to the consumer's pension arrangements. Although this method allowed cases to be resolved, it carried a risk that the assumptions would not all materialise and, as a result, the augmented pension plans would not provide the benefits consumers would have received under their defined benefit schemes. I would add that once a consumer had accepted the offer of redress, and their pension plan had been augmented, no further reviews would be carried out and further redress would not be added (regardless of the future performance of the consumer's pension arrangements). In other words final and complete closure occurred if the consumer accepted the proffered calculated redress.

In this case you are unhappy that the assumptions the PIA instructed the industry to use have not been borne out by events. However, this is not the fault of the regulator. The PIA consulted on the method of redress that should be adopted and, once it was decided that augmentation was the appropriate method, on what future growth and annuity rates should be used in the augmentation calculation. The selected growth and annuity rates were viewed as being reasonable across the industry given *the prevailing circumstances* (my emphasis) at that time.

I now come to your specific comments regarding the 'loss calculation' which was undertaken by the FSA in late 2002 or early 2003. I appreciate that you feel that the FSA put itself in the place of your adviser, Frim A, by undertaking the required loss calculation, but this is not the case. The advice you received to transfer your preserved benefits pension benefits away from the defined benefit schemes was incorrect. This advice was provided to you by an adviser from Firm A *rather* (my emphasis) than the Regulator.

It is also clear that the adviser who provided you with this incorrect advice had insufficient assets to meet its liabilities and therefore ceased trading *before* (my emphasis) it had completed all of its required loss assessments. Your pension transfer fell into this category and had not been reviewed by Firm A prior to its closure. I would add here that, had the Regulator not undertaken the required calculation your pension would not have been reviewed and you *would not* (my emphasis) have received any compensation whatsoever.

For the sake of completeness I should also add that, although some of Firm A's assets were acquired by Firm B, as Firm A was in default (i.e. it did not have sufficient assets to meet its liabilities) at the time of its acquisition by Firm B, Firm B had entered into an arrangement with the ICS, whereby the ICS would undertake the appropriate loss calculations and would also meet a certain section of Firm A's Pension Review liabilities (with the remainder falling upon Firm B).

I would also add that this agreement appears to have passed responsibility for the completion of the Firm A's outstanding Pension Review to the ICS (and later the FSCS following the legislative changes introduced on 1st December 2001). However, from the correspondence I have seen it does not appear that the FSCS had the appropriate resources to complete the necessary loss calculations and therefore entered into a further agreement with the FSA. This agreement resulted in the FSA undertaking the appropriate data gathering and calculation exercises (in line with the rules introduced by the PIA) before passing the cases back to the FSCS for assessment and, where necessary, the payment of compensation.

For the sake of clarity the FSA *only* (my emphasis) undertook the data gathering exercise and completed the loss assessment calculations on behalf of the Firm A (through the ICS/FSCS) and did not take responsibility for the overall position you found yourself in. I would also add that there is nothing to suggest that the review of your pension arrangements the FSA conducted was not completed in accordance with the guidelines issued by the PIA.

Whilst it is unfortunate that the assumptions have not been borne out (particularly given what has taken place since 2008 and which no one seems to have anticipated) this does not mean that either the regulators acted inappropriately when setting the review guidelines and assumptions. Before instructing the industry to use the assumptions that it did the PIA undertook a consultation exercise. The PIA therefore fulfilled its obligations under the relevant legislation in place at that time (the Financial Services Act 1986).

I appreciate that you do not feel that the PIA's rules offered affected consumers sufficient protection against investment risk and still left them subject to losses resulting from the actions of advisers. As indicated above, where assumptions were made, there was always a risk that the assumptions would not be borne out and consumers may still be adversely affected. However, there was also the possibility that, if investment returns were greater than assumed, consumers could also benefit from higher pension benefits. Whilst I sympathise with the position you find yourself in, the fact that the assumed returns have not borne out does not mean that the regulators acted inappropriately when issuing the guidance/instructions that it did to the industry or when undertaking the required assessments.

Although I have made the above comments, I have done this for the sake of completeness and to assist your understanding of the position you now find yourself in. I am also aware that the FCA has provided you with a brief explanation on the background which led to the Pension Review and why many consumers received redress by way of the augmentation of their pension plans.

Whilst you clearly feel that the review has failed to achieve its aims, as I have set out above, to allow firms to complete the review in a timely manner the PIA introduced guidance which allowed firms to undertake an augmentation exercise which carried a risk that the assumed growth and annuity rates may not in reality be achieved. Although unfortunate, this does not mean that the Regulator at the time, the PIA, was incorrect to use the rates that it did, particularly as the assumptions were only agreed upon after a consultation exercise. I would also add that when you accepted the offer of compensation from Firm B (in respect of the advice you received from Firm A) you did so on the basis of a "*full and final settlement of my Pension Review claim against [Firm A]*". As I have indicated above, accepting the compensation on this basis ultimately means that whatever the position at retirement your case *cannot* (my emphasis) be reopened or reviewed.

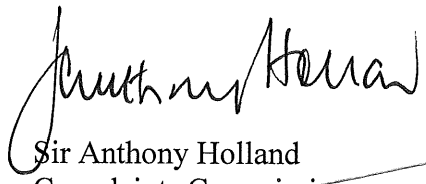
Conclusion

I know that you are unhappy that you have been financially disadvantaged as a result of the advice you received from your financial advisers to transfer your preserved defined benefit scheme to personal arrangements. I can also understand your considerable concern over the likely reduction in the future income you will receive.

Although it is disappointing that the redress you received under the Pension Review augmentation exercise did not increase the value of your plans significantly to enable them to equal now the benefits you would have received from the defined benefit schemes, this is not the fault of the Regulator. Calculations of this sort are not an exact science and even more is that the case given the events of the past six years. The fault ultimately lies with the advice you received from your adviser to transfer your deferred benefits to a personal arrangement rather than the actions of the regulators.

I am sorry but from the information presented to me there is nothing to indicate that the FSA acted inappropriately when conducting the loss calculation on behalf of Firm A and the FSCS or that the FCA failed to investigate adequately your complaint. It is my Decision for the detailed reasons that I have set out that the Regulator does not have any responsibility for the position in which you now find yourself.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner