Complaints Commissioner

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17th December 2013

Dear Complainant,

Complaint against the UK's Financial Services Regulators
Reference Number: FSA01594

Part 6 of the Financial Services Act 2012 (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 charged with the task of investigating those complaints made about the way the regulators have themselves carried out their 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 the changes implemented by the Government, the FSA was replaced by the FCA, the Prudential Regulation Authority (PRA) and the Bank of England as regulators 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 your complaint relates to the inactions of the FSA, in relation to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new Transitional Complaints' Scheme.

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. In practice, this means that, although the governing legislation will have changed there will be no change to the manner in which, or the terms under which, your complaint is investigated.

Your complaint

In general terms you are unhappy with the action of the Regulator as you believe that its actions amount to a deliberate attempt to fabricate evidence against you in an effort to discredit you and prevent you from obtaining future employment in senior compliance roles within the UK's financial services industry.

Although the Regulator, in its response of 27th September 2013, has stated that, as a result of its investigation it has found that its actions "*indicate a 'lack of care' on the part of the FSA but not a 'lack of integrity' as you have alleged. Therefore, we cannot uphold your complaint. However, we apologise on behalf on the FSA for the 'lack of care' taken in the way in which they recorded and interpreted intelligence*".

Despite the Regulator apologising, in your submission to my office you say that you "*do not accept the FCA findings; moreover given that [you] do accept the findings I cannot accept the apology offered*". You also add that as a resolution to your complaint you are looking for "*justice for [your] family and [you], [you] want [your] belief system repaired, moreover, in the event [you] can stop something like this happening to others in the future then that too will be a positive outcome*".

Coverage and scope of the transitional complaints 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:*
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> *a) mistakes and lack of care;*
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> *b) unreasonable delay;*
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> *c) unprofessional behaviour;*
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> *d) bias; and*
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> *e) lack of integrity.*
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> *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.*
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> *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 you first raised your complaint and when the actions about which you are unhappy occurred. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. I would add here for the sake of completeness that you have not alleged that the FSA (or the FCA) acted in bad faith nor have you 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.*

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the Regulators (either the FSA or the FCA) which is incompatible with the Human Rights Act 1998. The Regulator accepts that its actions amount to a 'lack of care' but these actions have not impacted adversely upon you. I should add here that the Regulator did not prevent you from obtaining employment in a senior compliance role within the Financial Services industry as it has recently granted you approved person status to enable you to undertake a controlled function. It is also unclear to me how the Regulator's actions could have impacted adversely upon your family.

My Position

I have now had the opportunity to consider the issues you have raised. From this it is clear from your complaint that you made a whistle blowing allegation against your previous employer in August 2008. Subsequently, in December 2008, you instigated Employment Tribunal proceedings against your previous employer. I believe that, possibly as a result of these proceedings, your previous employer then had your approved person status removed which resulted in you complaining to the FSA. I also understand that your employer's actions led to you instigating further (separate) Employment Tribunal proceedings in February/March 2009.

Subsequently, in May 2009, you engaged in mediation talks with your previous employer. These 'talks' resulted in your employment terminating and with you entering into a Court approved 'confidentiality agreement' with your previous employer. However, in December 2009 you set out that you contacted the Regulator to make a further whistle blowing allegation surrounding the conduct of two approved persons who were acting for your previous employer. It is unclear from the papers presented to me when the actions about which you were complaining occurred.

Although the Regulator considered the information you had presented, you felt that the action taken by the Regulator was insufficient and challenged both the Regulator and the individual with whom you had been dealing. In my opinion, it is your subsequent 'challenge' which appears to have generated the emails which you allege indicate that the staff employed by the Regulator set out to "*fabricated allegations against [you] which were designed to discredit [you] and challenge [your] integrity*".

However, although you are clearly unhappy with the tone which has been adopted by the Regulator's staff in the internal emails, the contents of the emails do not, in my opinion, indicate there was any attempt to "*fabricated allegations against [you] which were designed to discredit [you] and challenge [your] integrity*". The internal emails simply set out, albeit in what could be regarded a rather blunt manner, that it was believed that when you left your previous employer you entered into a compromise agreement with it. However, despite having entered into a compromise agreement, you were continuing to press the Regulator to take action against the firm and/or a number of its employees and were unhappy that the Regulator was undertaking the action which you thought that it should. It appears that as members of FSA staff thought that this may be against the spirit, if not the terms, of the compromise agreement, this *possibly could be considered to bring into question* (my emphasis) your fitness and propriety.

It is unfortunate that the Regulator recorded this information as a whistleblowing allegation, rather than as intelligence and, I note that the Regulator has provided a clear explanation for this in its decision letter. For completeness, the Regulator has stated that:

> *"Having discussed this matter with EFCD [the Enforcement and Financial Crime Division] they confirmed that any such intelligence or information should always be logged. The reason for logging the information in this instance was for the reason given above. EFCD said that they were satisfied that the decision to log the information was correct. We agree that simply logging information does not necessarily mean that any judgments were made and no interpretation of the information was needed at this point. Logging information that poses a risk of adverse publicity in relation to any of the FSA/FCA's functions seems both sensible and appropriate.*
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> *An intelligence log was created, on 23 February 2010, by an FSA officer in EFCD. The log showed that the source was untested, the intelligence was evaluated as 'cannot be judged' and it was noted that the information should only be disseminated within the FSA".*

The Regulator continues that

> *"EFCD explained that at the time this intelligence was flagged to the department there was only one member of the Whistleblowing Desk and it was mere chance that the intelligence was allocated to this officer, rather than a different officer within the department. They added that this in no way reflected that they thought this was whistleblowing intelligence. EFCD said that the sole purpose of the 'Whistleblowing disclosure', i.e. creating the intelligence, was to log the fact that you had been talking to the media. It was simply a piece of intelligence that needed to be logged and had nothing to do with EFCD's whistleblowing function. It is coincidental that the intelligence referred to you as a whistleblower and that it was logged on a Whistleblowing disclosure form by a member of the whistleblowing desk".*

I appreciate that you refuse to accept this explanation but, in my opinion, the explanation the Regulator has provided appears reasonable and, although the substantial submission you have provided to my office sets out why you remain unhappy, it does not provide sufficient, if any evidence, to dispute the Regulator's explanation and support your own assertions. I would also add that, in my opinion, the Regulator's view is further supported by the process change which occurred *prior* (my emphasis) to your complaint being submitted.

I now come to your request for me to undertake a further investigation into the Regulator's conduct. When undertaking an investigation into a complaint, I have to be mindful of the actions of the both the Regulator and the complainant both before and after the complaint, the manner in which the Regulator has considered a complaint, the impact the Regulator's actions (or inactions) had on the complainant and the possible remedies available to a successful complainant (as set out in paragraphs 6.6 and 6.7 of the rules of the Transitional Complaints Scheme). Paragraphs 6.6 and 6.7 (under the sub-heading of "[w]hat are the possible outcomes for the complainant?) state:

> What are the possible outcomes for the complaint?
>
> 6.6 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.

6.7 If the relevant regulator(s) decide not to uphold a complaint, they will give their reasons to the complainant, and will inform the complainant of their right to ask the Complaints Commissioner to review the relevant regulator(s)' decision.

In this instance, although the Regulator accepts that the manner and way in which it recorded the 'intelligence' amounted to it acting with a 'lack of care', it did not feel that it acted with a 'lack of integrity'. However, it should also be noted that when your concerns were brought to the attention of the Regulator's Complaints Team, it issued you with an apology for the way it had recorded and reported the 'intelligence' it held about you before the matter was referred to my office. In my opinion, as it does not appear you have been significantly disadvantaged or inconvenienced in any way by this particular issue, (given that you have been reapproved and now undertake a controlled function), in view of the comments I have set out above, I believe that the apology the Regulator has made to you is a sufficient remedy.

Conclusion

I am sorry that you are, overall, unhappy with the outcome of the Regulator's investigation into your complaint, and I appreciate that you will be disappointed with my view that I believe that the Regulator has considered adequately your complaint and that, in my opinion, has provided you with the appropriate remedy by way of an apology. Whilst I understand that you feel further investigations are necessary, given what I have set out above from the information presented to me there is nothing to suggest that the Regulator acted in a way that can be described as acting with a 'lack of integrity'.

It is clear that the Regulator was aware that you had entered into a non-disclosure agreement with your previous employer. Despite your assertions to the contrary, it was not, in my opinion, unreasonable for the Regulator to conclude that as you have referred your employer to an Employment Tribunal on two occasion, had complained to the Regulator about your employer's decision to remove your approved person status and had left following the signing of a compromise agreement that your 'departure' from the firm was not entirely amicable. Given this, and as you were continuing to 'press' the Regulator to take action against your previous employer (and would not accept the Regulator's view on what action should be taken), I believe that it was also reasonable for the Regulator to question whether you were in breach of the compromise agreement you had voluntarily entered into and, if you had, whether this could be regarded questioning your fitness and proprietary. It was therefore appropriate for the Regulator to request that its concerns be recorded. This is what I believe is being said in the internal emails which were exchanged between members of the Regulator's staff.

It is unfortunate that the 'intelligence' was recorded in the manner that it was, and to this end the Regulator has accepted that it showed a 'lack of care' and for this it has apologised. However, this has not impacted on your ability to obtain subsequently a senior compliance role or receive approved person status from the Regulator.

Given that the FSA has apologised to you and in light of the views which I have expressed above, I would also specifically draw your attention to paragraphs 6.14 and 6.8 of the complaints scheme which states:

6.14 The Complaints Commissioner will not investigate any complaint which is outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with the Complaints Commissioner.

In my view, that complaint relates to your displeasure that, although the Regulator accepts that it acted with a 'lack of care' it does not agree with you assertions that it "*fabricated allegations against [you] which were designed to discredit [you] and challenge [your] integrity*".

I should point out that whether a complaint is within the new Transitional 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.

> 6.8 Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the relevant regulator(s)' progress in investigating a complaint, may refer the matter to the Complaints Commissioner, who will consider whether 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. On what I have read, whilst the Regulator has made mistakes in the manner and way in which 'intelligence' was recorded there is no evidence of any *deliberate* (my emphasis) wrong doing by the Regulator. As both the Regulator and I have set out above, in light of the information it was aware of, it had concerns that, what could be described as a continued pursuit of your previous employer, this could bring into question your fitness and propriety, given this it felt these concerns should be recorded. This is a reasonable approach for the Regulator to adopt.

In my opinion, it is the way and manner in which these concerns have been recorded which has ultimately led to your complaint. Whilst it is unfortunate, given that the Regulator did make mistakes when recording these concerns, it has apologised for this error (which I believe does result from a 'lack of care'). As such, given the apology that the Regulator has made, I do not believe that anything further would be gained by any additional investigation by me.

I am therefore copying this letter to the Regulator and I am filing my papers.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner