Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA00433

What the complaint is about

1. The complaint has a complex history.
2. Your wife first complained to the FCA on your behalf in December 2015 that the FCA had failed to process your approved person's application effectively, which had led to you losing income for four months. The FCA partially upheld this complaint on and apologised to you. In its decision letter of 10 June 2016, the FCA stated that, although it had not breached its internal deadline of 90 days in reviewing your applications, the FCA accepted that it should have stopped treating them as non-routine after approving your application for firm L in July 2014. The FCA also notified you that, following your approval in January 2016, it would no longer treat your applications as non-routine (unless new information came to light).
3. However, as the FCA had not breached the statutory deadline for approving your application, the FCA concluded that no compensation was due.
4. Your wife was not satisfied with the outcome and approached me for an independent review of your case. I concluded the review under reference number FCA00137 (unpublished) in which I agreed with the FCA's decision. However, I recommended that it offer you an ex gratia payment for twice failing to recognise that your applications should have been treated as non-routine.
5. In November 2016 you approached the FCA with further complaints on the matter. The FCA described your complaint as follows:

> *Element One*
>
> *You allege that the FCA had sufficient clarity about information provided by [firm S] prior to the application for your approval from [firm I]. If that was the case, you say the non-routine process should not have been followed at all, or alternatively that the matter should have been resolved during the application for your approval from [firm I].*
>
> *Element Two*
>
> *You are unhappy with the conduct of FCA staff during an interview which took place on 5 September 2013. You say it was excessive for the FCA to have a solicitor at that interview and that you were treated like a criminal.*
>
> *Remedy*

You are seeking a total amount of compensation, including interest at 8%, of £76,852 for lost earnings and emotional distress caused by the allegations.

6. You also raised a series of supplementary questions.

7. The FCA did not uphold your complaint. Its decision letter of 14th September 2017 ran to 13 pages, plus an annex containing answers to your supplementary questions. The letter included the following:

> *You have asked the FCA to compensate you for a loss of earnings to the sum of £45,852 and make a payment of £31,000 for emotional distress. I have seen no evidence that the FCA caused you to lose income by virtue of any mistake or oversight on its part or any evidence that it acted unreasonably and therefore caused you emotional distress. I hope it is clear from the conclusions above that if you had been open and honest with [firm I] and subsequent firms about the circumstances of your departure from [firm S], it is likely each application would have been processed far more easily. My colleague concluded during her investigation into complaint reference 4504 that there were no delays beyond the FCA's statutory time limit for processing any of these applications and the Commissioner's findings under his reference FCA00137 support that conclusion.*

Why you are unhappy with the regulator's decision

8. You then referred your complaint to me and summarised your complaint about element one as follows:

> *In summary, and following on from the original complaint, the applications made to the FCA subsequent to the [firm I] application were "flagged" by the FCA which resulted in unnecessary delays and scrutiny. I was treated unfairly and discriminated against for a situation that arose from false information given by a regulated firm ([firm S]) which I have proved to be a lie.*
>
> *These delays have caused irreparable damage to my career, caused great distress to myself and my family and have caused a tangible, quantifiable loss of earnings.*
>
> *The FCA have refused to deal with this issue and continue to avoid questions.*
>
> *I would like the Complaints Commissioner to revisit this issue as I still seek redress from the FCA for the damage they have caused.*

9. You also referred the second element of complaint to me and claim the FCA has avoided answering your questions.

Preliminary point

10. I cannot re-investigate the questions relating to delay because they have already been considered under the previous complaint. I appreciate you may remain unhappy but the complaints process for those matters has been exhausted. For the avoidance of doubt, I should say that I have carefully considered the material you have sent me in support of this second complaint, and nothing I have seen suggests that my decision in relation to delays should be revised.

My analysis

Element one

11. It was established in my decision FCA00137 that your approved person applications were handled as non-routine by the FCA after firm I applied for you to perform the CF30 controlled function in February 2012. You did not disclose the fact that you had been sent an email by firm S dismissing you for alleged gross misconduct, and in fact you wrote that you had resigned from that firm. That application was withdrawn before it could be approved. You have continued to argue that you withdrew your application because you believed that the FCA had received confirmation from firm S that you had in fact resigned, and therefore the issue was resolved. However, I am afraid the evidence does not support this.

12. The origin of the problem was caused by the discrepancy between your and firm S's accounts of the reason for your leaving the firm. This was not of the FCA's making.

13. The FCA had conflicting information from you and firm S about the circumstances of your departure from the firm, and substantial reasons for making further inquiries about your fitness. Therefore, the FCA was right to deal with the application as non-routine.

14. You argue that the matter should have been resolved during your application for approval from firm I.

15. I can see the FCA has provided you with a comprehensive account of how matters progressed under the firm I application until it was withdrawn. The facts are not in dispute: firm I submitted an application for you in February 2012 and the FCA reviewed it as non-routine. The application was withdrawn before it could be determined by the FCA. The FCA had not breached its statutory deadline for determining the application.

16. You argue that the FSA could have sorted out the discrepancy between your and firm S's versions of the circumstances of your departure from firm S if it had disclosed the issue to you and firm I, and that this would have resolved both your application to firm I and subsequent applications. You say:

> *the FSA was aware of this conflicting information on the 27th February 2012 and chose not to disclose this information to a member firm. If they had made [firm I] aware of this the whole issue would have been expedited. The fact the FSA did not disclose this information led to undue stress, financial and reputation damage to both [me] and [firm I].*

17. I appreciate you feel strongly that the FCA should have immediately alerted both firm I and you to the discrepancy. However, the FCA has addressed this point in its responses to you on several occasions. The FCA's response as to why it did not disclose the discrepancy at the outset but rather went down the route of asking firm I questions was:

> *The purpose of the FSA's enquiry was twofold: to examine whether the firm had met its own obligations to carry out due diligence and to examine whether you had been open and honest with the firm.*

18. The FCA went on to say that it could not disclose to you or firm I directly the information firm S had given it because of the confidentiality restrictions imposed by s348 of the Financial Services and Markets Act 2000.

19. In my view, the FSA's handling of the firm I application was reasonable. It had information which raised significant questions about your application, and it pursued them properly.

20. In conclusion, I have not seen any evidence that the FCA acted unreasonably during the course of the firm I application review process, and therefore I do not uphold your complaint that the FCA should have resolved the matter before the application was withdrawn.

21. I turn now to the handling of the two subsequent applications – those from firm A and firm L. The firm A application was approved as a routine application, but the subsequent application from firm L was not. One of your complaints is that you believe you have never been given a direct answer as to why the FCA decided to refer your firm L application for non-routine processing given that it had 'green-channelled' your previous application at firm A. You have pointed out that the information supplied in both applications (to firm A and firm L) was identical.

22. I do not agree that the FCA has not answered this question directly. The situation, as explained to you, is as follows.

23. On 13 September 2012, the FSA received an application for approval from firm A for you. The application form noted you had not been dismissed nor that you had been suspended. The case was 'green-channel' processed in error on the basis of the information supplied in the application and you were authorised on 17 September 2012. Because of the unresolved history, your application should have been the subject of non-routine processing, although I appreciate you could not have known this when the application was approved. You have asked for 'documented proof' of the 'greenchanelling'error. I suggest you approach the FCA if you require specific documents, but it is clear to me that the error occurred.

24. At some point after the approval process, the FCA became aware of the fact that there were issues it wished to pursue with your approval. It contacted firm A and you to make further enquiries. On 1 February 2013 the FCA wrote to you to say it believed you had not fully disclosed all relevant details on your application. The FCA enquiries concluded with a letter on 22 February 2013 from the FCA to you which said:

> *Dear [complainant],*
>
> *I am writing to you in reference to our recent communication regarding your approved person's position (CF30) at [firm A] and in particular the FSA's concerns regarding disclosure requirements. I would like to remind you that the firm and individual making the application are to make full disclosure to the FSA regarding all relevant material in regards to a candidate's application. This consists of details of previous employment issues including the issues you experienced at [firm S] and also the discussions that you had with the FSA's Non-Routine Individuals Team during your [firm I] application. If there is any doubt about the relevance of disclosure, it should be included (as per the application guidance and declaration).*

25. You have asked why the FCA did not 'unnapprove you' if your application had been green-channelled in error, and also why it continued to refer your application to non-routine processing once it had satisfied itself in its enquiries with firm A. The FCA has already answered this question in its decision letter to you as follows:

> *The FSA was satisfied that you had disclosed the dismissal to firm A, but concerns remained about your previous non-disclosures. The case officer wrote to you on 22 February 2013 to remind you of your obligations to disclose "the issues you experienced at firm S and also the discussions that you had with the FSA's Non-Routine Individuals Team during your firm I application." It appears that, given that firm A was satisfied with your suitability, the FSA decided not to refer you to Enforcement despite the non-disclosure..*

26. The FCA then received a new application for your approval from firm L on 3 July 2014. This application contained the same disclosure as the one for firm A. The FCA had concerns that the information you had supplied did not constitute the full disclosure they were expecting from you, and which they had told you was expected in their letter of 22 February 2013. In my view the letter of 22 February makes it clear that you were expected to disclose more fully in future applications. This did not happen here. Your view is that you did not understand that the letter was asking you to make further more detailed disclosures in future applications. This is unfortunate but I do not think that was the fault of the FCA.
27. This application took a number of months to resolve, as the FCA conducted further reviews. In its decision letter, the FCA has given a you a thorough account of the discrepancies t sought to untangle, and I will not repeat them here. Further, at the interview you attended at the FCA on 5 September 2014, this issue was discussed and the FCA explained to you that it expected you to be fully open in your disclosure on future applications. I note you also provided your reasons for submitting the information in the way you had, and it was discovered during the discussion that you had erroneously understood that firm S had sent an email to the FCA confirming your version of events, and that the matter had been resolved, when in fact that was not the case. You had also misinterpreted the FCA's letter of the 22 February 2013 and its conclusion of its review at firm A to mean that your disclosure form for firm A had been adequate, which also was not the case.
28. These issues were discussed at the meeting held on 5 September 2014 and in that interview you said you understood the explanation as to why the firm L application was being processed as non-routine. You also confirmed that in future applications you would write fully and extensively about the matters above.
29. In conclusion, I believe the FCA has answered your query about the application process for firm L fully, and I consider that the FCA's answer is reasonable. I recognise that you continue to believe that the FCA has been inconsistent in handling the applications and unclear about the level of disclosure required or expected. However, having carefully reviewed the documents, I am afraid I do not agree.

30. I now turn to the second element of your complaint to me in which you complain about the FCA's conduct of the interview held on 5 September 2014:

> *4 hour interview, with a FCA solicitor present, [J] was cross examined and grilled in an oppressive, aggressive and accusatory manner to the point at one stage [J] was reduced to tears. If they have made the recording of the "interview" available to you I trust you will agree this was heavy handed and unnecessary.*

31. The FCA's decision letter on this element of complaint states:

> *In respect of your feeling that you were 'treated like a criminal', I am sorry you felt that way. At the start of the interview it was explained, and you accepted, that you were not being compelled to attend or answer and that no powers were being used in respect of the interview. You were reminded that it was a criminal offence to give false or misleading information, but you had seen that warning on each of the application forms you had signed. I appreciate that the interview must have been stressful for you, given your future career was at stake, but the FCA's approach was in the context of reasonable concerns that you may have sought to mislead several regulated firms about the circumstances of your departure from [firm S]. I do not consider that the interview was conducted using unreasonable language and there was no indication that pressure was unreasonably placed on you.*
>
> *I do not think it was unreasonable for a legal adviser from Enforcement to attend the interview in order to support the case officer, particularly if they had been minded to refuse the application. That is because the Authorisations team is represented by the Enforcement Legal team at cases before the Regulatory Decisions Committee (which determines contested authorisations cases) and in appeals to the Upper Tribunal and beyond. It would have been potentially unfair if the lawyer's attendance created a particular inequality of bargaining power – for example if they were introducing complex legal concepts or the discussion became overly technical – but that does not appear to be the case from the recording. The interview was led by the case officer and I do not believe the lawyer's attendance was unfair to you.*
>
> *I must conclude on this element that the interview was properly conducted and in the context of all of the events I have described above, I believe the FCA acted reasonably throughout.*

32. I have listened to the recording of the interview. While I recognise that to be questioned about these matters was inevitably difficult, in my view the FCA conducted the interview professionally and courteously. I do not consider that the interview would be considered by a disinterested observer to have been "oppressive, aggressive, and accusatory".

Additional questions

33. During the course of the FCA investigation, and after it issued its decision letter, you posed a number of questions to the FCA. The decision letter contained an appendix of 10 pages, giving answers to 41 questions. On 5 October 2017, in response to further

correspondence from your wife, the FCA sent a further letter with further supplementary answers.

34. I am afraid that I consider that the accusation that the FCA has avoided answering your questions or not given direct answers is wholly without merit. It seems to me that the FCA has devoted considerable time and resources to giving you full explanations.

35. I recognise that you will be very disappointed with my conclusions. The events set out in your complaints have had a severe effect upon you. However, having carefully considered these matters on two occasions, I am satisfied that – although there were two instances of delays and a bureaucratic error which were acknowledged in response to the first complaint - overall the FCA's actions have been proper, and their explanations have been sufficient.

Antony Townsend

Complaints Commissioner

26 March 2018