

28 January 2020

Final report by the Complaints Commissioner

Complaint number FCA00671

The complaint

1. You wrote to me on 6 November 2019 about the FCA's decision not to uphold your complaint about the way in which it had treated an application about your company's authorisation.

What the complaint is about

2. Although the background to your complaint is complex, the complaint itself is not. You had had difficulty in securing Professional Indemnity Insurance (PII) for your firm, and you wished to remedy the situation by cancelling your firm's direct authorisation and instead becoming an Appointed Representative (AR) of another firm. However, the FCA put your application on hold, because its Supervision Department was conducting a review of your firm as part of a more general review of firms involved in giving advice on defined benefit pension scheme transfers.
3. In essence, your complaint is that the FCA's decision to put your application on hold was unnecessary and unfair: it delayed your ability to become an AR and earn money, it placed your staff's jobs at risk, and it could disadvantage your clients.

What the regulator decided

4. In its decision letter, the FCA said:

During my investigation, I had the opportunity to speak with the supervisory area which visited the firm on [date]. It is understood that information was provided to the firm prior to and during the visit. In addition, the FCA has also been publishing information around its work with firms authorised to provide defined benefit pension transfers, according to their websites.

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As such, any applications submitted to the FCA by firms affected by this work would be placed on hold while the FCA determines whether the practices and procedures of the firms are up to expected standards. This is done as a precaution as the investigation has not yet concluded.

I also examined the communication you had with the FCA I understand that copies of the same documents were provided to you as part of a subject access request. I wanted to look at this information to understand why you felt that the FCA had reached a conclusion before assessing all information available. I have not seen any evidence that the FCA automatically assumed wrongdoing – rather, it is looking into the data gathered to assess whether the practices and procedures at the firm may lead to instances of unsuitable defined benefit transfer advice.

Due to the above, I am unable to uphold your complaint...I am satisfied that the FCA's decision to put on hold your AR application, and the decision to visit the firm were reasonable.

Why you are unhappy with the regulator's decision

5. You have told me that you disagree with the FCA's decision for the following reasons:
 - a. You have never complained about the fact that your firm has been selected for a visit – you accept that the regulator has the right to make such visits;
 - b. It is months since the visit, but your application remains on hold;
 - c. There is no evidence that your firm has behaved improperly;
 - d. Even if your application were accepted, you and the firm would remain liable to regulatory action if the FCA considered that you had broken the rules;
 - e. The FCA has failed to deal with your application within the six-month time limit.

My analysis

6. I agree with you that the FCA's decision letter mistakenly stated that you were complaining about the FCA's decision to visit your firm, whereas your complaint

was restricted to the consequences of that visit upon your application. I do not, however, think that that error affects the core issue.

7. The matter I have to consider is this: were the FCA's reasons for putting your application on hold sufficient, bearing in mind the adverse effect that the delay would have upon your business and possibly your clients?
8. The FCA's decision letter did not give a reason for its assertion that it was necessary to put your application on hold, and the documents which I initially obtained were not sufficient. I therefore asked the FCA for a fuller explanation, both before issuing my preliminary report and subsequently.
9. The FCA's explanation can be summarised as follows:
 - a. Refusing the application would keep a firm in the financial industry, meaning that if consumers are not satisfied with your service they are able to approach the firm for redress should this be appropriate. Additionally, because your firm has no PII against which consumers could make a claim, keeping your firm authorised enables clients to complain to the Financial Ombudsman Service (FOS): if your firm's authorisation were cancelled, clients would have to go to the Financial Services Compensation Scheme, which has an upper award limit of £85,000, much lower than the FOS's;
 - b. Even after cancellation the FCA has certain investigative and enforcement powers, and the power to apply to the court for injunctions, restitution orders, administration or winding-up, but the powers to issue statements of misconduct, levy financial penalties, and order restitution under section 384 of the Financial Services and Markets Act 2000 would not apply;
 - c. Because of the above, if the FCA's supervision activity uncovers serious matters, if the cancellation had been granted consumers could lose out.
10. In its decision letter, the FCA told you that *any applications submitted to the FCA by firms affected by this work would be placed on hold while the FCA determines whether the practices and procedures of the firms are up to expected standards.* In the light of the points which you had made about the risks involved in not allowing you to become an appointed representative, I asked the FCA 'whether a real evaluation of the risks was undertaken in [your] case, or whether he was subject to what was in effect a blanket policy' to defer applications. The FCA

responded that *Yes, the Complaints Commissioner is right that there is a risk but wrong in that this is a blank [sic] policy approach. Consideration would be given on a case by case basis.* This gave the clear impression that there had been an evaluation of the risks when deciding to put your application on hold.

11. The FCA has subsequently explained to me that there is, in fact, a block on all such applications while supervisory inquiries under this particular initiative are continuing. However, as soon as the inquiries are concluded (which can be at an early stage) the application is then considered. I conclude that the statement in the FCA's decision letter was correct, but I record my concern that the first explanation given to me was misleading. There was not a case-by-case assessment of the risk of deferring the application.
12. It is not my role to substitute my regulatory judgement for the FCA's. It seems to me that the arguments set out in paragraph 9 are credible ones for applying a policy that firms' applications for cancellation should be deferred pending reviews of their defined benefit scheme transfer advice, and for that reason I do not uphold your complaint.
13. I do, however, make the following observation. A blanket policy of deferral pending review becomes less defensible the longer the deferrals last. You have made the point – with which I have some sympathy – that you supplied information to the FCA in October 2018, that the visit took place in June 2019, and you remain *in limbo*. The longer the deferral remains in place, the greater the risks to you, your firm and your clients. It is therefore important that the FCA concludes its review, and considers your application, as soon as possible.
14. You have also said – in your response to my preliminary decision – that the FCA has missed the statutory deadline for considering your application. This was not a matter which I have formally considered as part of your complaint, but I have asked the FCA to comment. The FCA has told me that it is working to the 12-month statutory deadline for incomplete applications:

The firm provided the last of the files requested to undertake the file review on 4 November 2019, it was on this date that the application became complete. As such, the FCA are working to the 12 month statutory deadline, which requires a decision by 17 April 2020.

My decision

15. I do not uphold your complaint, but I urge the FCA to complete its review as soon as possible, to enable your application to be considered.

Antony Townsend

Complaints Commissioner

28 January 2020