

8 June 2020

## Final report by the Complaints Commissioner

### Complaint number FCA00676

#### *The complaint*

1. You are unhappy with the way in which the FCA dealt with your application to undertake controlled functions, and the way your subsequent subject access request and complaint were handled. I am sorry for the delay in completing my review of your complaint: it took over two months to obtain all the necessary documents on your complaint from the FCA.

#### *What the complaint is about*

2. The FCA summarised your complaint as follows;

##### *Part One*

*You allege that the FCA made a decision on your application for controlled functions ('CF') using limited evidence. You allege the FCA staff who conducted the interview, prevented you from giving fuller answers to the questions asked by the FCA.*

*Furthermore, you allege that the FCA staff in the interview interrupted you when you offered answers to the questions. You also allege, when you asked for clarification in respect of the question, no explanation was offered.*

*In your opinion, because of the way the Second Interview was conducted the FCA hasn't reached a proportionate outcome. You think the FCA solely relied on your performance in the Second Interview and didn't take in to account all available evidence.*

*You say the FCA threatened you with a Warning Notice ('WN') if you continued with your application, which added additional stress for you. You are of the view that the FCA did not understand the reasons for the withdrawal*

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*of your previous applications to the Prudential Regulation Authority ('PRA') via Bank A and Bank B.*

*Part Two*

*You think that the FCA has failed to process the Data Subject Access Request ('DSAR') specified by the General Data Protection Regulation 2018 ('GDPR') correctly.*

*What the regulator decided*

3. The FCA did not uphold part one of your complaint. It explained how the process had operated, and gave you some details of the steps which the FCA had taken in considering your application, emphasising that because the position was at a 'significantly senior' level, additional scrutiny was required.
4. The FCA conceded that you had been interrupted at times during the interview, but it claimed this was only to refocus the discussion at times when it strayed off topic. It disagreed that you had not been given sufficient opportunity to provide full answers. The FCA explained that it had taken into consideration a wide range of factors in determining your application, and not just the matters discussed in the Second Interview. Finally, it said that you had not been threatened with a warning notice.
5. The FCA assured you that an internal email, which was written by a member of the interview panel and which you claim was inaccurate, did not have an impact on the FCA's decision to reject your application as it was sent after the decision had been made.
6. It also said the letter the FCA sent you after your Second Interview by Authorisations could have more clearly distinguished the specific feedback from that interview and then separately set out the overall reasons why the FCA was not satisfied of your fitness and propriety to hold the functions applied for.
7. With regard to part two, the FCA apologised for the poor customer service you received from its Information Disclosure Team, but excluded your more general complaint about the processing of your personal data from the Scheme as that falls under the remit of the Information Commissioner's Office.

*Why you are unhappy with the regulator's decision*

8. You sent me a detailed letter explaining why you disagree with the FCA's decision. I have summarised your main points as follows:

FCA failings in the handling of the application process (Element One)

9. You consider that the FCA did not take into consideration the full range of evidence to support your application outside of the Second Interview. You believe this is because
- a. During a telephone conversation with FCA staff at which your solicitor was present on 2 November 2018, the FCA indicated that its decision regarding your suitability for the proposed role was reached solely on the basis of 'the recommendation...made by the Panel from Second Interview'.
  - b. In the same phone call 'the Authorisations representative noted that information from your other roles and interactions with the regulator would have been available to the Panel but she could not confirm that she had seen it.'
  - c. You have seen no evidence the FCA authorisations team considered evidence from either the supervisory teams overseeing your other firms, nor that it reviewed a number of documents (such as your CV, Skills Gap Analysis document and details of your induction programme) as part of the process.
10. You feel it unreasonable of the FCA to rely on a lack of detailed responses in the Second Interview in forming a view as to your competence and capability to perform the proposed roles firm X. You believe this because:
- a. When you asked the FCA panel members whether you had articulated your responses in sufficient depth you were reassured by the FCA, on each occasion, that your responses were satisfactory. You gave two examples.
  - b. You were interrupted when answering questions, and on at least one occasion when you wished to return to a question to provide a more substantive and nuanced response, the FCA noted that 'I think we covered that area' and did not allow you to further elaborate or fully respond to the

question; and when it was clear you did not understand a question, the Panel members did not provide clarity.

- c. The Panel alleged that you were unable to articulate in sufficient detail 'the conduct risks specific to the sector or the behaviours that would result in a good culture' and 'the risks relevant to migration to new IT systems', but did not explicitly ask you questions that probed those areas in detail during the course of the Second Interview.
- d. You are concerned because an internal email written by a member of the Panel on the Second Interview panel provides a jaundiced view of your application and track record. It is also inaccurate and prejudicial towards you. Although the Panel member wrote it after the Panel had taken a decision to recommend rejection of your application, you consider that the Panel member would have had it in mind at the time he sat on the Second Interview panel and the decision was reached, and that this would have influenced his decision in the case.

FCA failings in the handling of the complaint (Element Two)

11. The FCA Complaints Team said this about the letter sent to firm X after your Second Interview:

*I do think the letter the FCA sent you after your Second Interview by Authorisations could have more clearly distinguished the specific feedback from that interview and then separately set out the overall reasons why the FCA was not satisfied of your fitness and propriety to hold the functions applied for.....I therefore apologise on behalf of the FCA for the inconvenience this caused you.*

You say despite this apology you never received further feedback.

12. You consider your complaint was handled without due care, as illustrated by the inaccuracies and inconsistencies in the FCA decision letter, and the lack of evidence offered in the letter underpins a failure to provide a clear explanation for the decision reached on the application.
13. You say that 'Whilst the FCA upheld my complaint that the DSAR was not processed correctly and in a timely manner, they have not been able to provide

me with any comfort that the basis of the numerous and heavy redactions is appropriate when indeed it appears rather 'random'. In addition, there is still information which I am aware exists pertaining to meetings and conversations which I have had with the FCA'. (Element 3)

*Preliminary point*

14. I appreciate your concern about the way in which your Data DSAR request was handled. In your response to my preliminary point, you record your concern that internal FCA notes to which I have referred have not been made available to you in response to your DSAR request as you believe they should. I sympathise with your concerns. However, complaints about personal data are more appropriately reviewed by the Information Commissioner's Office (ICO) which is the regulator for the GDPR, and not by me. I understand you have already referred the matter to the ICO. For that reason, I am not reviewing element three of your complaint under the Scheme.

*My analysis*

Element One: FCA failings in the handling of the application process

15. The FCA received an application from firm X for you to hold controlled functions at a number of regulated entities within its group. In connection with this, you attended an interview at the FCA on 23 July 2018 (First Interview). Following this interview, the FCA provided firm X with a feedback letter on 30 July 2018.

16. The FCA informed the firm that it required a Second Interview with you and followed this up in a letter dated 16 August 2018. In this letter, the FCA said

*As outlined in our letter of 30 July 2018, the First Interview panel was not satisfied that [you] demonstrated the requisite capabilities and skills necessary to be able to perform the roles applied for. The purpose of the Second Interview is to continue our assessment of this area and [your] competence and capability in the context of the role. It also gives [you] an opportunity to provide the FCA with further information to support the application.*

*If, following the Second Interview, the Panel still has concerns over the candidate's competence and capability to perform the role, and is therefore*

*unable to recommend the application is approved, FSMA requires the FCA to follow the Statutory Notice procedure.*

*The FCA's Regulatory Transactions Committee would consider the recommendation to refuse the application, and if it agreed issue a Warning Notice. If [you] wished to make oral or written representations these would be heard by the Regulatory Decisions Committee.*

17. The firm confirmed to the FCA via email that it had disclosed this letter to you in advance of the Second Interview.
18. You have said to me that firm X informed you that you had received positive feedback from the FCA following your First Interview on 23 July in a telephone conversation between the firm and the FCA on 28 July 2019. I cannot comment on what firm X may have said to you, but to my mind the letter from the FCA dated 16 August 2019 makes the FCA position about the outcome of the First Interview and what the next steps are clear.
19. You have expressed concerns about the application process because you do not feel that its entirety was taken into account in determining the outcome at the Second Interview. The FCA's explanation of the process is as follows:

*The findings from the first desk based review formed the basis for the First Interview. Similarly, both the findings from the initial desk based review and from the First Interview informed the focus of the Second Interview. Each stage of the assessment built on the previous one. As such, the final decision contained within the Feedback Letter was arrived at in consideration of the assessment in its entirety.*
20. You have said to me that this explanation contradicts another given to you during a telephone conversation on 2 November 2018 with FCA staff at which your solicitor was present, in which the FCA indicated that its decision regarding your suitability for the proposed role was reached solely on the basis of 'the recommendation...made by the Panel from Second Interview'.
21. Th FCA does not have a recording of this telephone conversation. However, I have been provided with a file note of the call dated 5 November 2018 which records the following:

*[You] asked whether the decision had been made on the basis of the first or Second Interview. [X] explained that the recommendation was made by the Panel from Second Interview. [Y] noted that feedback from the First Interview was taken into account in preparing for the Second Interview. [Z] explained that the Second Interview panel had different membership to the first and that this was part of our process.*

22. The file note above shows the FCA explained that the First Interview informed the Second Interview, and this is consistent with the FCA explanation of the process to you.
23. You remain concerned about how the desk-based review was undertaken and what role it played in the process. From the evidence available to me, I can see that the second FCA interview panel was emailed extensive documents in preparation for the interview. This included the documents the FCA mentions in its decision letter, as well as a number of other documents it did not mention to you, but which include a set of prepared questions with a wide range of possible answers which would have been acceptable to the FCA in response to each question. Guidelines like these are often available to interview panels to ensure evaluation of candidates is made against consistent and relevant criteria and to eliminate bias. I can see the FCA also obtained feedback from the supervisors of the other firms in which you hold appointments. I understand this was not disclosed to you in your DSAR request: I cannot comment on why that happened, but I can assure you that extensive information, both desk-top and related to the First Interview, was supplied to the Panel members of the Second Interview.
24. You said to me that during your telephone conversation with the FCA on 2 November 2018, the Authorisations representative noted that information from your other roles and interactions with the regulator would have been available to the Panel, but she could not confirm that she had seen it. I have read the file note of this entire conversation carefully, but it does not reflect the point you make. I am therefore not able to reach a firm conclusion on what was said. I can, however, assure you that the Panel members were emailed all the necessary documents mentioned in paragraph 23 before the Second Interview.

25. I have seen the Second Interview panel debrief (an assessment document created after the Second Interview) in which the panel members discuss aspects of the First Interview. The process appears to have been thorough.
26. My preliminary view is that the application process as such is not inherently unreasonable: each stage is informed by the preceding one. Any positive comments about a candidate are taken into account. The process was explained in the letter of 16 August 2019 and again in the conversation you had with the FCA on 2 November 2018. I can see no evidence that the FCA has been inconsistent in explaining the process.
27. I now turn to your concern about the way the Second Interview was conducted.
28. You have made the point that during the interview you queried whether you had articulated your responses in sufficient depth, and were reassured by the FCA, on each occasion, that your responses were satisfactory. You say at no point during the course of the interview did you receive any indication from the FCA that insufficient detail had been provided by you in respect of the questions posed. You believe it was therefore unreasonable of the FCA to rely on a lack of detailed responses in this interview in forming a view as to your competence and capability to perform the proposed roles at firm X.
29. You have referred to two examples where you asked the Panel member if you had answered a specific question, to which they responded that you had, and a further example where you wished to return to a specific question but were told that it had been covered.
30. I appreciate you feel that the FCA did not explicitly ask you questions that probed certain areas in detail during the course of the Second Interview. However, it appears to me that you were asked a range of questions, and generally had the opportunity to answer them as you chose: it was not the panel's responsibility to prompt you.
31. Panel members did interrupt you during the interview and the FCA has acknowledged this. Your view is that these interruptions prevented you from fully responding to questions. The FCA's view is that this took place on a few occasions to steer the conversation back to the questions when the answers you provided lacked sufficient detail.



32. Having carefully studied the transcript, it is my view that you were given sufficient opportunity to demonstrate your knowledge of the areas under investigation.
33. At the beginning of the interview you said, 'I've tried to keep my answers short in the context of what you ask but please do say if I haven't answered your question'. Your expectation after this may have been that the FCA panel members would provide you with feedback after each of your responses. While the FCA did not explicitly say that it would not give you feedback, I do not think that it needed to do so. In any interview of this kind, the onus is on the candidate to satisfy the panel, and the panel cannot be expected to give an instant view on the adequacy of the answer. Where the interviewee has clearly misunderstood the question, or asks for clarification, the panel should intervene – and I can see that that happened during the Second Interview. But I do not consider that the panel misled you into believing that the answers which you had given were satisfactory.
34. I do not think the interview process was flawed in any fundamental manner. The FCA might, however, wish to consider whether the material it provides to interviewees in advance of interviews could provide information about how the interview will be conducted, and the fact that feedback on questions cannot be given.

#### Internal email

35. You are concerned because an internal email written by a member of the Second Interview panel provides a jaundiced view of your application and track record. You feel it is also inaccurate and prejudicial towards you and may have influenced members' view of your application.
36. I have seen the Second Interview Panel's debrief paper. The paper is a summary of the panel's views on the outcome of the interview and its recommendations. You are already aware of the recommendations as those were set out in a letter written 29 September 2018 to firm X which you have seen. I did not see any reference in this document to the non-disclosures as being 'dubious'. In fact, I can confirm that the panel's ultimate view was that the non-disclosures were a genuine mistake: and this view has been communicated

to you. The debrief document does not go into any further detail about the non-disclosures.

37. I appreciate you are concerned about one member's interpretation of the disclosures, and whether that coloured his overall judgement about your application. The debrief document supports the view that the non-disclosures did not play a significant part in the decision. The decision following your interview:
- a. Was reached by a panel of members, and not just one person.
  - b. Appears to have been an evaluation of your answers against specific criteria for the technical questions.
  - c. Took account of the overall factors involved in determining the decision, including issues such as your time commitments, and the First Interview. For example, it was felt that 'the candidate had completed more research in the areas of concern since the First Interview'. However, ultimately the view of the Panel was that expressed in the feedback letter of 29 September 2019.
38. My conclusion is that the internal email appears inaccurate, and the word 'dubious' is unwise for an official email, since it is unclear what it means. However, it did not play a part in the decision on your applications. I have **recommended** that the FCA checks to ensure that that email is not available to colour decisions on any future applications which you might make and the FCA has accepted my recommendation.
39. It is not my role to substitute my judgement for the FCA's on regulatory matters. However, having studied the documents it appears to me that the decisions taken on your applications followed a reasonable and thorough process.

### **Element Two FCA failings in the handling of the complaint**

40. The FCA Complaints Team said this about the letter sent to firm X after your Second Interview:

*I do think the letter the FCA sent you after your Second Interview by Authorisations could have more clearly distinguished the specific feedback from that interview and then separately set out the overall reasons why the FCA was not satisfied of your fitness and propriety to hold the functions*

*applied for.....I therefore apologise on behalf of the FCA for the inconvenience this caused you.*

You say despite this apology you never received further feedback.

41. I asked the FCA to comment on your point above. The FCA reiterated their position that 'The findings from the first desk-based review formed the basis for the First Interview. Similarly, both the findings from the initial desk-based review and from the First Interview informed the focus of the Second Interview. Each stage of the assessment built on the previous one. As such, the final decision contained within the Feedback Letter was arrived at in consideration of the assessment in its entirety'.
42. My reading of the Complaints Team reply is that it is slightly off point. If there is more feedback the FCA could give it would be not 'the overall reasons' why the FCA was not satisfied with your application, but rather specific examples of what your technical answers should have covered (but did not).
43. You consider your complaint was handled without due care, as illustrated by the inaccuracies and inconsistencies contained within the FCA decision letter.
44. You are concerned at what you feel is an overemphasis on your non-disclosures to the Panel and you wonder whether, despite the FCA's statement to the contrary, this issue did in fact have a bearing on the outcome of your application. From the evidence available to me, I do not consider that the FCA treated your non-disclosures as anything other than a genuine mistake in their deliberations about the outcome of your application.
45. You also say that:
  - a. The FCA state '...in my opinion, it follows that you were given time to prepare for the second interview'. At no stage have I claimed that I was not given time to prepare for the interview.
  - b. The FCA wrongly state the reasons you gave for withdrawing your application for controlled functions with Bank A and Bank B.
  - c. FCA assert that 'You say the FCA threatened you with a Warning Notice...'. At no stage have I ever alleged that I was threatened

- d. The FCA state 'I do not think...that the FCA deliberately delayed your application'. I am confused as to why this is stated when I have never made this allegation.
46. You believe these inaccuracies show that the Complaints Team challenge to the application process through your complaint has not been handled fairly and with the appropriate care.
47. I agree with you that the FCA Complaints Team got these points wrong, when it should not have. I have **recommended** the FCA apologise to you for this, and the FCA has accepted my recommendation.
48. However, the main thrust of your complaint is about the fairness of the application process, how the FCA reached their decision and the quality of the feedback on that process. The FCA Complaints Team did look at these issues, and I feel its overall assessment was reasonable despite the inconsistencies.

*My decision*

49. My view of your complaint is this: I do not uphold your complaint that the application process for controlled functions is unfair in general, or as applied to your application, for the reasons I have given above. I appreciate that you continue to feel that the process was unfair to you, but I have not seen any evidence of this.
50. Nevertheless, I have suggested that the FCA might consider whether interviewees should have further information about what to expect at interviews. The FCA has accepted my suggestion and 'intends to produce a short guide for candidates invited to attend an interview to explain what the candidate can expect from the interview. The guide will explain the format of the interview, explain the role of the Panel members and seek to make clear that candidates should not expect contemporaneous feedback on responses provided during the interview'.
51. I have also **recommended** that FCA Authorisations should write to you in greater detail substantiating its MTR letter of 28 September 2018, and the FCA has accepted my recommendation. You have asked that the letter should make clear that the decision relates only to the application for this particular role and the firm in question, and any new application would be assessed on its own

merits. I agree this would be reasonable and suggest the FCA considers this wording.

52. I uphold your complaint that the Complaints Team did not handle your complaint with sufficient attention to accuracy. It could have done more to address your concerns. While there are confidentiality restrictions which preclude the FCA from providing you with certain information, in this case I consider that the FCA could have provided you with a fuller explanation in order to assure you your concerns were adequately considered. I have provided additional information in my report to you which I hope will explain some of the issues more fully. I have **recommended** the Complaints Team should apologise to you for the errors in the decision letter, and the FCA has accepted my recommendation.

53. I have **recommended** that the FCA should ensure that the email about which you have complained is not used in any decisions about future applications you might make. The FCA has accepted my recommendation and states that 'It is unlikely that the email referred to would be accessible to those assessing any future applications. However, the FCA intends to ensure that the Commissioner's Final Report is logged and made accessible to any person assessing future applications relating to [you]. The log will also be annotated to make clear that the email referred to must be disregarded in the assessment of any future applications.'

Antony Townsend  
Complaints Commissioner  
8 June 2020