

31 December 2020

Final report by the Complaints Commissioner**Complaint number FCA00841***The complaint*

1. On 5 October 2020 you complained to me about the FCA's investigation of your complaint. My preliminary report was issued on 30 November 2020 and both you and the FCA have commented.

What the complaint is about

In its letter to you the FCA described your complaint as follows:

Part One:

You submitted a CF30 application on 13 August 2019 which, after discussions with the FCA's Authorisations department, was later withdrawn. Your engagement with this department led to the matter being referred to Supervision. The Supervision team considered this as a potential breach of Principle 11 and, on review of the information, sent you an email reminding you about the need to be co-operative with the FCA and your responsibilities under SMCR.

Part Two:

You asked for two calls between yourself and Authorisations, which took place prior to the matter being referred to Supervision, to be reviewed. You submitted a subject access request to obtain copies of the call notes, which you feel are inaccurate and biased. To resolve your complaint, you have asked for any reference to a breach of Principle 11 to be removed from your file.

What the regulator decided

2. The FCA did not uphold your complaint. The FCA did however, acknowledge the delays caused with your complaint and offered you an ex-gratia payment of £50.00.
3. The FCA informed you that the CF30 application was referred to as 'non-routine' as certain information pertaining to the candidate's past conduct, was not initially disclosed. As such, the FCA stated Authorisations are expected to liaise with Supervision where necessary if they have concerns about the information provided or the conduct of the firm during the application process.
4. The application was also referred to Supervision as Authorisations had concerns about the level of due diligence carried on the individual for the CF30 application.
5. Based on what they had been provided with, Supervision decided that it was appropriate to remind of you of your Principle 11 duties given at the time the very recent SMCR implementation.
6. When the FCA Complaints Team reviewed the matter, they also believed it was reasonable to expect the matter to be highlighted to Supervision for their consideration.
7. The FCA Complaints Team also concluded that Supervision appropriately exercised their supervisory judgement by following up on the concerns raised by Authorisations.

Why you are unhappy with the regulator's decision

You have told me:

8. *You do not believe that failing to supply two pieces of documentation and withdrawing the application, warrant being accused of breaching Principle 11 of the Principles for Business. You believe if the Case Officer had really wanted to discuss the matter further then you would have done so. However, you informed me that as you were told in no uncertain terms that the Case Officer was minded to refuse and offered the option of withdrawal, you could not see any benefit deriving from it as the decision had been made not to appoint the Applicant.*
9. *An extensive email exchange with the Supervision department offered you no explanation and the matter was passed to the Complaints Team for adjudication.*

10. *Your communications have been misconstrued and used against you. You refute the allegations against you, which has caused significant mental anguish, never having previously been accused of such a serious matter.*
11. *You state that it was strongly intimated that the individual was unlikely to be approved and the case handler wanted the application withdrawn. As a result, you obliged and withdrew the individual's application. In the light of the intimation you mention there was no benefit in obtaining the requested documentation and potentially putting the Applicant's existing position at risk.*
12. As a resolution to your complaint, you would like your FCA file updated to remove any references that you breached Principle 11 and removal of any reference that you have been uncooperative.

My analysis

13. In summary, I can see you submitted a CF30 application to the FCA in 2019. The FCA expressed concerns about the individual who was subject to the CF30 application and the due diligence carried out by your Firm. As such, the FCA provided you with options once these concerns arose.

Communications with the FCA and 'failing to cooperate'

14. As a starting point, I can see you raised your concerns with the FCA early on regarding the delay and the way the application was being handled. This accelerated the first telephone conversation between yourself and the Case Officer which took place on 17 October 2019. I have been provided with notes of the calls in the FCA case file. The Case Officer summarised their record of the telephone calls which took place on the 17 October 2019 and 1 November 2019.
15. Looking at the call note from 17 October 2019 I can see the FCA apologised for not being able to review the application when they said they would and the Case Officer informed you she would prioritise the application. You confirmed you understood the information that was being relayed to you and the Case Officer confirmed that she would be sending you an email requesting further information. It was also mentioned by the Case Officer that you should call her if you did not understand the questions, to which you confirmed that you would.

16. In addition to the call notes, I have also been provided with the FCA case file. I can see the first occasion the FCA made you aware of the requirement for further information pertaining to the CF30 the application, was on 1 November 2019 during a telephone conversation.
17. In the note of that call it was highlighted that the requested information needed to be provided within 10 days and if this was not possible, there were three further options available to you. The Case Officer informed you she would send you an email shortly after the telephone call setting out your options and the information required.
18. You have told me, *'you acted on the options provided by the Case Officer'* and accepted and acted on *'Option 1,'* which was to withdraw your application altogether. You made the FCA aware of this in an email sent on 6 November 2019 and you told me you did not employ the individual into your firm thereafter.
19. The FCA's Authorisations, Supervision and Complaints Team concluded, that you *'failed to cooperate with the regulator when invited to'*. I can see your communication with the FCA included at the very least, two telephone conversations with the Authorisations Case Officer and an email response you had sent to the Case Officer. This email was sent prior to withdrawing the CF30 application. In the FCA decision letter, the FCA stated:

'Having reviewed the call notes/email exchanges between yourself and Authorisations and having liaised directly with the team on their reasons for referring the matter to Supervision, I am satisfied that they acted reasonably in this case.'
20. Based on what I have seen in the call notes and the FCA case file, overall, I am satisfied that you were proactive in your telephone communications with the FCA. The FCA allege that you *'failed to cooperate'*, however I am unable to see that this was the case in your communications with them.
21. The decision letter later highlighted the email you had sent to the Case Officer on 6 November 2019:

"Further debate on the matter will I believe be fruitless and I find it too emotionally draining but please feel free to telephone me on my mobile should

you wish to discuss the matter. We have divergent views but as the regulator I accept your decision and Form B will be submitted under separate cover.”

22. I can see you had already had two telephone conversations with the Case Officer, regarding the information request and options available to you.
23. The FCA Complaints Investigator reviewed your email response and concluded that you *‘did not wish to discuss the case further with the Case Officer’*. It was also noted that you would be submitting a Form B to withdraw the application and bring the matter to a close. Based on your email and decision to withdraw the application, the FCA concluded:

“Taking this into consideration alongside your reference to the impact on your emotional well-being, the Case Officer had to be mindful about any potential benefit of a further conversation. As a result of the Form B withdrawal and your response, the Case Officer made a decision not to call you.

Taking the above into consideration, alongside the Case Officer not receiving the necessary information and not being able to substantiate if you had conducted adequate due diligence, I believe it was reasonable to expect the matter to be highlighted to Supervision for their consideration.”

24. It seems to me that the FCA’s ultimate deciding factor to refer you to Supervision, was based on its opinion that you were being ‘uncooperative’ in the email of 6 November 2019.
25. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on the confidential material to which I have access. However, as part of the Complaints Scheme, I have access to all the FCA’s complaints papers, including confidential material. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably. Sometimes this means that all I can say to complainants is that, having studied the confidential material, I am satisfied that the FCA has (or has not) behaved reasonably – but I am unable to give further details. This can be frustrating for complainants, but it is better that I am able to see the confidential material. Based on the information and evidence that has been provided to me, I do not agree with the FCA that your behaviour in your email amounted to you

being 'uncooperative'. I also disagree with the FCA that the matter needed to be highlighted with Supervision at all, which I will discuss in this report later.

26. The starting point is that I have not been provided with any emails that evidence your behaviour as being 'uncooperative'. This would indeed be the basis for making such a determination.
27. I am satisfied that your email sent to the FCA on 6 November 2019 shows that you accepted the FCA's decision and you would act accordingly. I am also unable to conclude that your email or any emails for that matter, conveyed the message that you were being 'uncooperative'.
28. I can see your preference was not to discuss the matter again on the phone, however you still invited the FCA to contact you if they wished to discuss the matter. By this point; you had already had two separate telephone conversations with the FCA and it is reasonable to assume you understood what your options were. Therefore, a third telephone conversation regarding the same points may not have been necessary and became a repetitive conversation engaging on the same point. It is unsatisfactory for the FCA to not provide all the email evidence they relied on. It is also a concern for me that the FCA Complaints investigator referenced reviewing such 'emails' in the decision letter, but again, the FCA has failed to provide this to me. This is material which should have been sent to me for the purposes of my investigation.
29. Overall based on the call notes and FCA case file I am satisfied that you were co-operative with the FCA in your communications with them, specifically during telephone calls and in email correspondence.

Referral to Supervision and application of Principle 11

30. You informed me that you did not believe failing to supply two pieces of documentation and withdrawing as indicated by the Case Officer, warrant being accused of breaching Principle 11 of the Principles for Business.
31. You also mentioned an extensive email exchange with the Supervision department offered you no explanation and the matter was passed to the Complaints Team for adjudication.

[Principles for Businesses Principle 11](#) provides as follows:

11 Relations with regulators

A firm must deal with its regulators in an open and cooperative way and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

32. I am concerned with the FCA's application and interpretation of Principle 11 in this case. Supervision contacted you on 18 December 2019 by email as follows:

"Supervision have been made aware that you failed to co-operate with the regulator by declining to provide the information needed to make an assessment of Mr X's suitability and also declining to discuss the matter further with our Authorisations colleagues when invited to do so. This is contrary to the FCA's expectations under Principle 11 of our Principles for Businesses."

33. Part of the Complaints Scheme includes looking at the way in which regulators have acted or omitted to act, including complaints alleging mistakes and lack of care. I think the FCA (specifically Authorisations and Supervision) did not act reasonably. I have carefully considered the FCA case file including the confidential information provided to me. The evidence shows me that you were always open to discuss the matter with Authorisations if they wished, as evidenced in your email and the call notes. I have not seen anything that suggests you declined to discuss the matter further when invited to do so. So, I find the FCA were wrong to question your honesty and integrity. It is also concerning that the FCA Complaints Team did not challenge this and investigate further when I would have expected them to do so. So, I am satisfied that there was likely no breach of Principle 11 on your part.

34. You mentioned '*an extensive email exchange with the Supervision department offered you no explanation and the matter was passed to the Complaints Team for adjudication*'. As I have outlined previously, I disagree with Supervision's actions. From looking at the information that has been provided to me, I think the FCA could have done better in their communications with you once the matter was passed to the Complaints Team.

35. On 1 March 2020 you asked Supervision to review the two telephone conversations you had with the Case Officer in Authorisations. The FCA Complaints Team responded to your email on 14 April 2020 and informed you

that 'Supervision do not record calls and are unable to review this as per your request'. You subsequently requested transcripts of the two telephone conversations on 17 April 2020. The communication that followed from here is rather disappointing and careless from the FCA. You received an update email from the FCA Complaints Team on 7 May 2020. In this email you were given the impression that there was a possibility that call recordings were available. It is regretful that you were given this conflicting information. I can see you took the time to respond to this email on 18 May 2020 and informed the Complaints Team that they themselves, had confirmed with you previously on several occasions that there were no call recordings. From what I can see there was no reason for the Complaints Team to have miscommunicated this information, having previously confirmed that calls were not recorded. This conflicting information caused confusion and the team should have known whether calls were recorded or not and been familiar with your matter.

My decision

36. I have upheld parts one and two of the complaint.
37. I recommended that the FCA increase its ex-gratia payment from £50.00 to £75.00 to account for the inconvenience caused to you by the conflicting information provided to you, during its complaint's investigation and the trouble and upset caused, by referring to your behaviour as being 'uncooperative'. The FCA has agreed to this recommendation.
38. I also recommended that the FCA remove the Supervision case file record, thereby eliminating any record of you having breached Principle 11 and failing to cooperate.
39. In response to my preliminary report the FCA has acknowledged that the Authorisations department could have placed less emphasis on the word 'co-operate' when referring the matter to Supervision. However, the FCA has not accepted my recommendation that the Supervision case file should be removed. Instead, they say they will amend their records to ensure concerns surrounding your obligations with respect to non-disclosure and due diligence checks are recorded as opposed to any inference that you were non-co-operative. The FCA has also pointed out that its Authorisations Case Officers need to be confident

that they can refer matters to Supervision where they have concerns. I agree with the latter point, and I am not suggesting otherwise. I am concerned with this specific case, rather than the process in general. From the evidence available to me, I do not think the FCA have been able to appropriately justify their concerns. I myself have not seen, nor have I been provided with any evidence or consistent material, that satisfies me otherwise.

40. I recognise that you are unhappy with the FCA's response and I can only repeat my recommendation that I urge the FCA to accept my recommendation in removing your Supervision case file record. I have taken this matter as far as I can under the Scheme, and I hope that my decision gives you some personal reassurance of my stance and thank you for bringing this matter to my attention.

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Complaints Commissioner

31 December 2020