

22 March 2021

Final report by the Complaints Commissioner**Complaint number FCA00876***The complaint*

1. On 21 December 2020 you asked me to investigate a complaint about the FCA.

What the complaint is about

2. The FCA summarised your complaint as follows:

Part One

Your complaint relates to an application your former firm, X (the firm), made to the FCA under the Approved Persons regime. As part of the application you made a disclosure of your dismissal from your previous employment. You said that the FCA contacted the firm and suggested that you did not satisfy the fitness and propriety criteria to perform the Compliance Oversight and Money Laundering Reporting Officer functions when considering the reasons for your dismissal. You feel that the FCA was not fair in assessing your application and did not consider your mitigating statement.

Part Two

You are unhappy because you could not submit an appeal to the Regulatory Decisions Committee (RDC). This is because your application did not reach the decision stage but was withdrawn. You said that the FCA told you that the decision to withdraw the application was a matter for you and your firm. However, you feel that you were pressurised by the FCA to sign the Form B and withdraw the application as the FCA's correspondence with the firm indicated your application would otherwise be rejected.

To resolve the complaint, you would like the FCA to provide you with confirmation that any future assessment would not be based wholly on the past dismissal and you would also like compensation for the distress caused to you.

What the regulator decided

3. The FCA did not uphold your complaints. The Complaints Team explained that:

The Authorisations Team gave firm X the opportunity to explain how they had assessed your fitness for the role in an email. The email states “If you wish to progress the application, please explain how you have found [You] to be fit and proper to perform the role applied for. Alternately you may wish to withdraw the application.” I cannot see that any pressure was applied, the email was presenting the firm with the options available to it. The FCA did not indicate any preference as to which option firm X should decide to pursue. The firm exercised its options and responded to this by withdrawing the application. The Team received a Form B (for withdrawn applications) signed by you and the firm and the application has since been closed as withdrawn. Although you feel that the FCA pressured you to withdraw the application, it was ultimately the firm who took this course of action with your agreement as you signed the Form B. It is worth noting that it was not compulsory for you to withdraw the application and that you could have asked the FCA to continue to assess your fitness and propriety regardless of whether the application remained supported by the firm. As the application was withdrawn, the FCA did not decide on the application. For that reason, there was no right of appeal for you to escalate it to the RDC. However, the Team have informed me that you could apply separately for a new role and that they would make their assessment of any future application taking into account of all relevant information and would assess the application on its own merits.

The FCA also offered you an ex gratia payment of £75 for delays in handling your complaint.

Why you are unhappy with the regulator's decision

4. You have made these points to me:
5. With respect to firm X you say: 'Head of Compliance called me to a meeting with the HR manager to inform me that the FCA had confirmed they will not approve my application and advised that the application be withdrawn, this was based on my previous dismissal, which as a result, they had deemed me not to be Fit and Proper for the CF10 & CF 11 functions. The EU head of Compliance in the presence of the HR Manager then said I had to sign the Form B immediately as the FCA had confirmed to him on phone that they will not approve my application'. You feel that the FCA exerted pressure on firm X.
6. You feel that the FCA did not properly take into account your personal statement of growth (although the FCA says it did in its decision letter) or the fact you 'held an MLRO function after my dismissal which was approved by the FCA' when it sent an email to your firm saying it was not satisfied you were fit and proper.

My analysis

7. The background to your complaint is that some years ago whilst undertaking a junior compliance role (which did not require FCA approval) with firm Z, you were dismissed for gross misconduct related to misuse of the company internet. After that you obtained employment as a PSD individual with a Payment Institution (PI) firm. The PI firm notified the FCA of your appointment. The current regulation of PI firms is that appointments are notified to, rather than authorised by the FCA.
8. At some point you decided to move to a different employer where you were to apply to be approved as a CF10 and 11 (now SM16 and 17); you made full disclosure of your employment history and you and your new employer expected the application to be approved. The FCA, however, raised concerns and sent an email to your firm; subsequently your employer decided to withdraw the application, with your consent.
9. If you had carried on with the process without the support of the firm, it could have resulted in the Regulatory Transactions Committee (RTC and not RDC as the FCA letter states) declaring you fit and proper - or not fit and proper - for the role / controlled function you had applied for. However, as there would have

been no “supporting firm” at this point, you would have had to make a new application if another firm (or even the same firm) had wanted to employ you in a specific controlled function. You cannot be deemed fit and proper through an unsupported application and then go on to perform controlled functions without reapplying.

10. You have been advised that you need to disclose all relevant information, should you want to apply again, and that the FCA will assess your application on its merits and in light of the information provided at the time of the new application.
11. For this reason, while I have sympathy with your position, my view is that any challenge to the FCA’s email to the firm in which it expressed an opinion (but not, as the FCA states, a conclusion about the outcome of the application) should have been raised with the RTC at the time it was issued, with or without the support of your firm. It is not a matter for the Complaints Scheme.
12. I can, however, review matters related to process. I understand your concerns that it is not clear to you how else you can prove your ‘rehabilitation’ and that you are worried that future applications on your behalf will be subject to the same response by the FCA. Ultimately, only the RTC (with recourse available to the RDC and Upper Tribunal) can make a determination of whether you satisfy the criteria for fitness and propriety, however, there are some issues surrounding process which I invited the FCA to consider in order to enhance transparency.
13. In 2018, my predecessor expressed concern in report FCA00425 about a lack of clear information on the FCA’s website about the process of applying for approved person status and the options available to firms and individuals. The FCA committed to reviewing the information on its website to see if changes could be made which make it clearer to, among others, individuals so they are fully aware of the option to have their fitness and propriety determined in the event that the applicant firm withdraws their support. In its decision letter to you, the FCA say ‘It is worth noting that it was not compulsory for you to withdraw the application and that you could have asked the FCA to continue to assess your fitness and propriety regardless of whether the application remained supported by the firm’. However, in response to my queries, the FCA has confirmed that it was up to the firm to advise you of this, as the FCA did not have any direct

correspondence with you during the process. The FCA has confirmed that a number of changes have been made to its website but not in respect of this point. The FCA says it 'will reconsider making further amendments to the website regarding the rights of an individual in the event of a firm withdrawing their support of their application.' I will continue to monitor this.

14. I cannot comment on the conversation firm X had with the FCA after which the firm allegedly told you the FCA would not confirm the application, as I do not have any record of this conversation. What is clear however, is that the FCA Authorisations Team emailed the firm with respect to the application and simultaneously:
 - a. Expressed a view that it was not satisfied you were fit and proper person;
 - b. Asked the firm to clarify how they had considered that information and satisfied themselves that you were fit and proper to hold the functions applied for.
 - c. Told the firm it had the option to withdraw the application.

15. I asked the FCA to consider if, by posing all three points above at the same time, perceptually it can be conceived by the firm that a predetermination had already been made on the part of the FCA about the fitness and propriety of the candidate, and if there is a reason questions can't be asked first before the FCA writes to the firm with its preliminary view about a candidate's fitness and propriety. The FCA has responded that it provided a preliminary view of the candidate's fitness and propriety to the firm so it was aware of the areas of concern, and in light of these concerns, the firm was asked to provide further evidence or analysis regarding the candidate's fitness and propriety in the areas highlighted. The FCA further said that 'The concerns that we had are expressed in a direct way in order to provide the fairest opportunity to the applicants to address them and to consider their options as set out above. We therefore do not propose to change our approach as we believe it to be transparent and fair'.

My decision

16. You have reiterated to me that firm X was very clear in telling you the FCA had asked it to withdraw the application and I understand you remain worried about the outcome of your future applications. I appreciate your concerns, but as I said before, I cannot comment on the conversations which took place between firm X and the FCA. Paragraphs 9-11 above remind you of some of the options available to you in any future applications if similar circumstances arise.

Amerdeep Somal

Complaints Commissioner

22 March 2021