Complaints Commissioner

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23rd July 2010

Dear Complainant

Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01140

Thank you for your letter of 13th May 2010, which details the elements of your complaint against the FSA.

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the Financial Services Authority (FSA) has itself carried out its own investigation of a complaint. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. Full details of Complaint Scheme can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF.

Your Complaint

From your letter of 13th May 2010, I understand that you have paid part of your FSA fees for the 2009/2010 accounting year (representing the time that you were authorised) and the complaint you wish me to investigate relates to your displeasure that the FSA is pursuing you for the balance of your fees for the remainder of the 2009/10 accounting year.

Specifically, you are unhappy that you are required to pay fees for the whole of the accounting year when your business closed, and you ceased to be regulated, midway through the accounting year (on 19th August 2009).

My Position

As part of my investigation into your concerns I have obtained and reviewed the FSA's investigation file. When considering your complaint I have also referred to the FSA's handbook which sets out its rules and the requirements it imposes on individuals and firms who wish to be authorised and the arguments you made when referring the complaint to my office on 13th May 2010. From these papers I understand that your business closed as it became uneconomic for it to continue. You indicate that this was partly due to Provider X's decision to stop the payment of renewal commission and have commented that the FSA would not assist you in your attempts to persuade Provider X to overturn this decision.

Although you have not asked me to investigate this particular issue, I feel I should comment on this. Whilst Provider X is authorised by the FSA, the payment of renewal commission to a related business is a commercial arrangement between your firm and Provider X. In my opinion, it is inappropriate for the FSA to intervene in commercial disputes between the firms it regulates and is not a matter in which it should and can become involved. If you felt that the commercial arrangement you had entered into with Provider X, and the assurances you say it had given you, were enforceable then you should have taken legal advice on this matter and possibly pursued the alleged breach of this arrangement/contract through mediation or the courts.

I have also noted your comments that you were not visited by the FSA's Supervision Team during the time you were authorised by it. As you are aware, the FSA adopts a risked based approach to supervision and the fact that the FSA's Supervision Team did not visit you is, in my opinion, an indication that it believed you were complying with its rules and that you posed a low risk to consumers. As such, the fact that the FSA did not visit you should be regarded as a positive rather than a negative and is, in my opinion, not something about which you should complain.

I now come to the complaint you have asked me to investigate. When you closed your business (and applied for the cancelation of your firms Part IV permissions), you say you did not do this until after 1st April 2009. I have also noted that, you have not disputed the arguments put forward by the FSA, but have simply stated in your submission to me that as your firm closed in August 2009, you believe it is unfair that you are liable for a whole years fees and believe that a 'pro-rata' calculation (i.e. the payment of fees from 1st April to 18th August 2009) would be more appropriate

Before I comment further on your complaint I must make you aware that I have previously made a general comment about the way in which I view complaints relating to the cancellation of permissions on my website under the heading of "Views of the Commissioner" (http://www.fscc.gov.uk/documents/views/recent-issues-nov09.pdf). I would add that as part of the authorisation process you agreed to be bound by the FSA's rules as set out in its handbook. I would add that I have not seen any evidence of your firm previously challenging the effect of the rules surrounding the payment of fees or how these were calculated.

I believe the FSA's position is clearly explained in the Fees handbook which sets out the rules with regard to how fees are calculated and the FSA's policy on the repayment of fees when a firm cancels its authorisation midway through the account year. Having reviewed the FSA's decision letter of 11th May 2010, I note that it also referred you to its Fees handbook. With this in mind I would specifically I would draw your attention to paragraph 4.2.9 of the Fees handbook which states:

FEES 4.2.9G Fee payers ceasing to hold relevant status or reducing the scope of their permission after start of relevant period

The *FSA* will not refund periodic fees if, after the start of the period to which they relate:

(1) a fee payer ceases to have the status set out in column (1) of the table in FEES 4.2.11 R

Although I have considered your comments that it is inappropriate for you to pay a whole year's fee when you were only authorised for part of the year, the FSA's rules and position are clearly set out and by receiving the FSA's approval to conduct regulated business you agreed to accept and to comply with these rules. I have not seen any evidence that you have previously challenged these rules when you were authorised by the FSA, and as a result feel that you accepted to be bound by them.

I would also add that, as the FSA explained in its decision letter of 11th May 2010, the reason for the rigidity of this rule is because the FSA relies on the data which firms supply for the setting of the overall level of fees the firms which it authorises are required to pay. In my opinion, should it waive or reduce the fees for your firm, then it would have to waive the fee (or at least part of the fee) for all of the firms which applied to cancel their authorisation during the accounting year. Clearly this would have significant implications for the FSA's overall funding and as a result, the remainder of the authorised firms would be subject to, and have to pay, additional fees. This is clearly a situation which could be considered unfair and is something which the FSA could not allow to develop. I would further add that the FSA did consult with the industry prior to the introduction of this rule and, as explained in its decision letter, the industry overwhelming voted in favour of it, as it allowed firms to know what their annual fees would be and as a result enable them to budget accordingly.

I would add that I note from your telephone conversation with Recovery Agent Y (and I will return to this telephone conversation later in this letter) that you say you have taken legal advice and that legal advice has led you to believe that the FSA will be unable to enforce the payment of balance of the fees due for 2009/10 through the courts. Although you say that you have received this advice, I note that this was given to you informally and was not recorded in writing.

Whilst I do not dispute the advice you say you received, I am somewhat concerned that you are relying upon an informal legal view, for which you did not pay, rather than formal written advice. Specifically, with an informal opinion, there is no record of whether the opinion given to you was based upon full and considered arguments, and indeed was made after fully considering the FSA's rules (to which you agreed to be bound) or to the outcomes of any previous cases where the FSA has made reference to the courts. Similarly, although you say you have taken advice, it is unclear whether your legal adviser has explained fully the potential consequences of an unsuccessful defence of any legal action the FSA brings against you to recover the outstanding payments through the courts.

In your response to my preliminary you also added that the FSA had not provided you with the service you expected and, in particular, you highlighted to me that there were six letters and emails you sent to its Revenue department to which it had not responded. I have asked the FSA to comment on this which it now has done.

The FSA has confirmed that it responded to your email of 11th December 2009 by telephone (around an hour after it was received) and as such did not feel that a written response was warranted. Similarly, Revenue did not respond to your email of 29th June 2010 as the matter was already being dealt with by my office and as such it felt, correctly in my opinion, that it would be inappropriate for it to comment further and in any event, there was little it could add.

Whilst you say, and I do not dispute, that you sent four other emails and letters to the FSA's Revenue department, following a search of its records, it has been unable to trace the receipt of this correspondence. As the Revenue department does not appear to have received this correspondence (and there does not appear to be any record of it being passed to another area of the FSA), it was unable to respond to you. Whilst I can understand that the lack of a response was and continues to be frustrating for you, it does not mean that the FSA has failed to provide you with a good service.

Conclusion

Ultimately the position is that you/Firm A agreed to the rules and guidance laid down in the FSA handbook in signing its original application for authorisation. The onus is subsequently on you/the firm to know and abide by all of the FSA rules and guidance. All firms who wish to cancel their Part IV permissions (authorisation) to carry on regulated activities must formally apply to the FSA using the appropriate form and do so before (my emphasis) the dead line to avoid incurring fees for 2009/10.

In this instance the deadline for submission of the appropriate form was 31st March 2009 if you did not wish to pay fees for the whole of the 2009/10 accounting year. As the FSA has explained in its correspondence with you this date was applied consistently to all FSA regulated firms and as the application for cancellation was not received until May 2009 (and applied on 18th August 2009), the whole fee for the 2009/10 accounting year is payable.

I appreciate that you stated that you closed your firm midway through the year but, in my opinion, this is of little consequence. The onus is upon the firm (and you) to comply with the FSA's rules (and deadlines) and unfortunately, as you did not do this you/your firm must bear the responsibility for your failings to comply with the FSA's rules. From these papers there is no evidence which demonstrates any breach of the rules by the FSA.

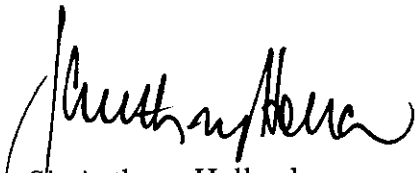
Therefore your complaint cannot be upheld and as a consequence the fee remains payable in full. Although I am unable to uphold your complaint, I am mindful that you say that you are now on a limited income. As such, I have noted that the FSA is willing to allow the fee to be repaid in instalments and you should therefore contact Recovery Agent Y and agree an affordable repayment plan with it.

I referred earlier to the telephone conversation you had with Recovery Agent Y, a debt collection agency employed by the FSA. The person you received the telephone call from was a Ms A. I have listened to that telephone call. The call lasted just over 10 minutes and in my view, was badly handled by the company concerned who in this context represents the FSA. While it did not represent harassment it was certainly a conversation that the company should not have allowed to develop in the way that it did.

You made it clear, after a somewhat difficult beginning on the part of both of you, that you preferred to see the matter resolved in Court. The company seemed disinclined to accept the finality of that statement. The result was a somewhat hectoring approach with continual interruptions and which I consider does not reflect well on the FSA.

That is all I can say concerning this issue as your complaint to me did not refer to this part of your original complaint directly. However, you did in your complaint to the FSA raise the issue of the telephone call who conceded that Recovery Agent Y did not "*handle the situation as well as they might have done*". I agree with that conclusion.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner