



7<sup>th</sup> February 2011

Dear Complainant

**Complaint about the Financial Services Authority**  
**Reference: GE-L01210**

I write with reference to your email of 4<sup>th</sup> November 2010 in relation to your complaint against the Financial Services Authority (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 the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint that comes within the complaints scheme. 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 correspondence with my office, I understand your complaint relates to the following issue:

You recently applied for authorisation to conduct regulated activity within the UK. Following a long assessment process by the FSA's Authorisation and Central Reporting Division (Authorisations), it made a recommendation to the Regulatory Transactions Committee (RTC) that your application for approval should be declined on the basis of a believed non-disclosure of material facts (criminal convictions which occurred several years ago). Following consideration of your application, the RTC agreed with Authorisations and declined your application and in doing so issued you with a Warning Notice.

As you were unhappy with the decision, and in accordance with the terms of the Warning Notice, you asked the Regulatory Decisions Committee (RDC) to review your application. Following a hearing the RDC felt that any non-disclosures were not deliberate although that there had been a non-disclosure for whatever reason and, as the FSA did not contest the fact that what non-disclosure that had taken place was not deliberate on your part, instructed the FSA to proceed and to grant your authorisation.

You feel that as the FSA did not challenge or contest the RDC's decision in that regard it was aware that it had not followed the correct procedures and you now feel that it acted inappropriately by persisting with the hearing rather than approving your authorisation.

I note from your FSA complaint form that you are looking for the FSA to compensate you for your legal fees, the lost income and the costs (losses) you say you have incurred as a result of the FSA's actions in delaying the granting of your authorisation

### **My Position**

I should also at this point make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that FSA is exempt from "liability in damages". It states:

- "(1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.*
- (2) (Irrelevant to this issue under investigation)*
- (3) Neither subparagraph (1) nor subparagraph (2) applies*
  - (a) if the act of omission is shown to have been in bad faith; or*
  - (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998."*

COAF nevertheless then goes on to provide that in paragraph 1.5.5 that:

*"Remedying a well founded complaint may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex-gratia basis." If the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."*

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a "compensatory payment on an ex-gratia basis".

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

*"It is unlawful for a public authority to act in a way which is incompatible with a Convention right"*.

The only Convention right that I consider may be relevant is contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998. That provides:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.*

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case.

I have now had the opportunity to review the papers both you and the FSA have presented to me. I have also both listened to a recording of the hearing on 23<sup>rd</sup> June 2010 and read the entire transcript of that recording. From all this I understand that the FSA has considered your concerns and informed you of its findings in its letter of 1<sup>st</sup> November 2010. I also believe that this letter explains, in detail, why the FSA was unable to uphold your complaint.

Although I sympathise with the position you find yourself in it is clear from the FSA’s letter of 1<sup>st</sup> November 2010 that a great deal of consideration was given to the assessment of your application to conduct regulated activity. I note that you have asked for my office to call you to discuss the matter in more detail. Although, having viewed the complaint form that you submitted to the FSA and the comments you made in your email to my office, in my opinion, the nature of your concerns are clear and do not need further clarification, my Senior Investigator has discussed your complaint with you. This is particularly the position after reading the transcript of the hearing that took place at the RDC. For ease of reference I provided a copy of that transcript with my Preliminary Decision.

As I am sure you are aware, when assessing an application the FSA (through Authorisations) must satisfy itself of the fitness and propriety of the applicant (at each time he applies for approval and/or authorisation). In this case, whilst you had previously been approved, when applying for direct authorisation the FSA has to reassess an individual’s fitness and propriety and in doing so considers the application in more detail. It is clear from the FSA’s file that whilst undertaking this process the FSA became aware of what it believed, on valid evidence, amounted to the incomplete disclosure (which amounts to non-disclosure) of your previous criminal convictions.

When assessing an application, the FSA takes non-disclosure of relevant material extremely seriously (whether or not the non-disclosure was intentional or as a result of an incorrect interpretation of the form or a simple misunderstanding of what was required). As such, in this instance it appears that Authorisations felt the non-disclosure was significant enough for it to recommend to the RTC that your application should be declined.

I note that in the transcript of the hearing you accepted that you had, albeit not deliberately failed to make a full disclosure (my emphasis) of the relevant details of your past. I refer to just two of your statements from the transcript in that context (one at line 633 and another at line 861 to 864):

*“I only made a partial disclosure of my criminal record ... And I didn’t fill the forms in correctly”*

And

*“And I did honestly forget about some of the offences I’d committed ... And the majority of the offences I did disclose”*

Plainly therefore there was an admitted non-disclosure and that is not something for which the FSA can be held responsible for or for the subsequent delay that that in turn caused to your application. I would add here that in your subsequent correspondence with the FSA in relation to this application it is clear that it asked you to provide further details of all of your criminal convictions. It is also clear from this correspondence that you failed to fully do so and that some of the offences which you committed only came to light when the FSA conducted a Criminal Records Bureau (CRB) check.

Although Authorisations made a recommendation to the RTC, it was the RTC, which is an independent body, which ultimately made the decision to decline your application. Whilst the RTC will consider recommendations made by Authorisations, it is at liberty not to follow these recommendations if it deems fit. In this instance, following careful consideration, it appears that the RTC decided that it could not support your application. It therefore followed Authorisation's recommendation to decline it and issued you with a warning notice confirming this.

As I have indicated above, when assessing an application, the FSA requires an applicant to disclose all (my emphasis) material facts which could affect his fitness and propriety. The FSA also takes a serious view when material facts, which could impact on how it views an applicant's fitness and propriety, later come to light (which were either not disclosed by the applicant on the application form or during subsequent correspondence with it). In this instance, Authorisations appears to have identified such non-disclosures (on your original Personal Investment Authority (PIA) application and again when considering your more recent FSA application) and took this into account when making a recommendation to the RTC. The RTC, although independent of Authorisations, appears to have concurred with Authorisations' view that this alleged non-disclosure significantly impacted upon your fitness and propriety.

It is unfortunate that the RTC viewed this matter in a different way to the RDC but that would primarily be because it did not have the benefit of hearing the detailed and helpful oral presentation of your case as the RDC did. You exercised your right to challenge the RTC's decision at the RDC, which was the correct thing for you to do in the circumstances. Whilst the RDC held a different view on the non-disclosures to that held by the RTC (and Authorisations), this does not mean that the RTC (and therefore the FSA as a whole) was incorrect to hold the view it did. Indeed on the paper evidence before it it was probably an inevitable conclusion at the time. Likewise, the fact that the RDC overturned the RTC's view does not on its own mean that the RTC (and ultimately Authorisations on behalf of the FSA) followed incorrect procedures or made incorrect decisions when assessing your application.

Similarly, whilst I can and do appreciate why you feel the procedures adopted by Authorisations and the RTC were flawed, given that Authorisations did not challenge the RDC's eventual decision, it appears from the information I have seen that the RTC's decision to decline your application was based upon what it believed to be the non-disclosure of material facts. I would add that Authorisations is only able to explain its position to the RDC who then makes a decision. Authorisations is unable to challenge any decision the RDC may make. However, when this was reviewed by the RDC it appears to me that the RDC felt that any non-disclosures were not intentional or could be explained away (as well as possibly being outweighed by you turning your life around as you patently had) and therefore, the FSA had little reason to challenge this decision further.

Indeed, I note that the RDC panel, when giving its decision, said it “*understands why (Authorisations) were reluctant to grant this [approval]: because of the burden of proof, because of a number of things that (you have) accepted today were things that (you) could have done better and should have done something slightly differently*”. It then continues that despite this it is “*satisfied about is that (you are) a fit and proper person*” and it “*will direct [the FSA] that (your) application therefore – [your] approval is accepted*”. It added that “*there are explanations, not dishonest explanations for those elements of the apparent non-disclosures*” although the panel decided that it would not go into further explanation of this comment. I have no doubt that your achievements in overcoming your seriously disadvantaged background also weighed heavily in your favour.

In your response to my Preliminary Decision you have commented that Authorisations appears to have accepted and indeed concurred with the RDC’s view that you correctly completed the applications forms in that it may not have required you to disclose your convictions. Having reviewed the transcript, I believe that Authorisations did accept that your interpretation of the PIA application form does not appear to be unreasonable and that this may well have led to your criminal convictions not being disclosed. However, it appears that only the non-disclosure of the convictions on the PIA application form was discussed at the RDC hearing and no discussions took place regarding the partial non-disclosure of your convictions on the FSA’s Form A or in your subsequent correspondence with Authorisations. I would add here that, from the documentation I have seen, and indeed from a brief mention in the transcript of the RDC hearing it appears that the non-disclosure of your convictions on the FSA’s Form A also appears to have been one the reasons why Authorisations made a recommendation to the RTC that your application should be declined.

I would also add that, although you maintain the FSA failed to follow the correct procedures, other than the highlighting that the Authorisations did not, in your words, challenge the RDC’s decision (a point which I have commented on above) you have presented little, if any evidence, to show how the FSA had failed to follow the correct procedures. Subject to a comment I make later I have no doubt that there were no procedural irregularities.

I would however add that, although you say you incurred considerable expenses and lost considerable income as a result of the RTC’s decision to decline your application, in the absence of further evidence that the FSA failed to follow the correct procedures, there is little further that I can do for you. Indeed, I am not entirely sure why, until your authorisation was granted, that you took the step of resigning from your existing role with a network.

I note that you indicated to my Senior Investigator that you resigned from your previous network as the FSA had informed you that you could not work in the industry. I have also reviewed the correspondence you exchanged with the FSA between 29<sup>th</sup> May 2009 (when it received your application to become authorised) and 1<sup>st</sup> September 2009 when it received a Form C from the network. This clearly shows that the FSA did not communicate such a view to you. Indeed, the first mention in the FSA’s correspondence with you, that it was minded to refuse your application to become directly authorised, was during a telephone conference call which took place on 15<sup>th</sup> September 2009 and followed up in an email later the same day. Whilst the FSA did inform you that it was minded to recommend that your application be refused it did so on 15<sup>th</sup> September 2009 which it must be noted, was after (my emphasis) you had already left your previous network and therefore, in my opinion, could not have influenced your decision to resign from the network in any way whatsoever.

I would add that the decision to decline your application to become directly authorised would not necessarily have affected your existing authorisation through the network. Additionally, I would point out that there is nothing (in the papers presented to me) to indicate that the FSA led you to believe anything different prior to your resignation from the network taking effect. As such, in my opinion there is insufficient, if any, evidence to suggest that the losses you say you have incurred are a solely (my emphasis) the direct result of Authorisations' and the RTC's decision you decline your application to become directly authorised by the FSA.

Additionally, I would also point out that given that the FSA did not receive your application to become authorised directly by it until 29<sup>th</sup> May 2009. It is therefore unclear to me why, on 9<sup>th</sup> April 2009, you informed your previous network that you intended to terminate your authorisation through it with effect from 9<sup>th</sup> July 2009 (although you later extended this period until 31<sup>st</sup> August 2009) when your direct authorisation had not been granted. As you resigned from the network before (my emphasis) actually submitting your application to the FSA, given the time it takes for the FSA to consider an application and grant approval, I believe you would have still lost income and incurred expenses irrespective of whether Authorisations had recommendation approving or refusing your application.

I have also noted that you have asked me to reconsider my views that the FSA has breached Article 1 of the First Protocol set out in the Human Rights Act of 1998 by preventing you from working. The Act places four statutory objectives upon the FSA, as the UK's financial services regulator. These are:

- Market Confidence
- Financial Stability
- Consumer Protection
- Reduction of Financial Crime

When fulfilling its role of consumer protection, the FSA must consider the fitness and propriety of those wishing to be authorised. As such, the FSA holds the power to prevent individuals from working in the financial services industry. Given that Authorisations felt that you had failed to fully disclose a number of criminal convictions to it, Authorisations and the RTC took a view, which in my opinion does not appear unreasonable given the circumstances, that this non-disclosure cast doubt on your overall fitness and propriety. Whilst, upon further consideration by the RDC it was the non-disclosures were unintentional or could be 'explained away', this does not mean that the decision Authorisations and the RTC made were incorrect given the information available to them. As such, I do not believe that Authorisations (or the FSA) has breached Article 1 of the First Protocol set out in the Human Rights Act of 1998 when carrying out the functions conferred upon it by the Act.


## **Conclusion**

Under COAF, my role is an independent reviewer of the FSA's handling of complaints. From the papers presented to me, I have seen little, if any, evidence to support your claims of wrong doing on the part of the FSA that has caused you injury or is ground for complaint. The partial non-disclosure of your past record, albeit not deliberate, is the sole cause of what transpired. There was, I accept, considerable delay on this part of the FSA in dealing with your application and that is particularly unfortunate in all the circumstances of the case. Whilst the RTC (on behalf of the FSA) took a strong view on your application, as I have indicated above, the fact that this decision was overturned by the RDC does not of itself mean that the FSA's position was incorrect or that it failed to follow the correct procedures. I am therefore unable to uphold your complaint

My only concern in this unhappy matter relates to the RDC hearing and the FSA's process at the hearing in the context of full disclosure of the CRB information regarding your past convictions. My recommendation is that there is a need for a protocol between the CRB and the FSA which allows for all (my emphasis) the relevant information to be available in a timely way to the RDC panel and to such others as the FSA and the CRB consider relevant. I have no doubt that can be put in place and indeed that the FSA has already recognised the necessity for such a change in this area and is currently working to produce such a protocol.

I am sorry that I am therefore not able to help further in this matter. I do however offer my best wishes on your future venture, hope that it is successful and congratulate you on what, after a difficult start, you have achieved in your life.

Yours sincerely



Sir Anthony Holland  
Complaints Commissioner

