Complaints Commissioner

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20th July 2011

Dear Complainant,

Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01256

I write with reference to your letter and enclosures of 24th February 2011 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 that your complaint relates to the following:

1. You are unhappy with the outcome of the FSA's investigation into your complaint in relation to the length of time the FSA took to consider your application to become re-authorised following the closure of the firm through which you were previously authorised.

2. You feel that the FSA has not complied with the guidelines set out within the Regulator's Compliance Code (RCC), particularly sections 3 (concerning economic progress and impact), 4 (risk assessment) and 7 (information requirements).

3. You are unhappy with the FSA's suggestion that the treatment of ex-Firm A advisors was not covered by the RCC even though it adds that this was an individual decision and not a general policy or principle. You are also unhappy that the FSA will not confirm whether, given a similar set of circumstances, it will take a similar view.

4. You also indicate that as a result of the FSA's actions, you have been deprived of the right to work and have suffered financially as a result of the FSA's actions.

Coverage and Scope of the Scheme

COAF provides as follows:

(1) The complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions. The complaints scheme covers complaints about the way in which the FSA has acted or omitted to act, including complaints alleging:

(a) mistakes and lack of care;

(b) unreasonable delay;

(c) unprofessional behaviour;

(d) bias; and

(e) lack of integrity.

(2) [deleted]

(3) To be eligible to make a complaint under the complaints scheme, a person (see COAF 1.2.1G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the FSA's actions or inaction.

I should also 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 the 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 or 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 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". I formally record at this point given the above statutory provisions that I have found no evidence of bad faith.

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 rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol 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.

My Position

I have now had the opportunity to review the papers both you and the FSA have presented to me. From these papers, it is clear that you are unhappy with the outcome of the FSA's investigation into your complaint.

I understand from your correspondence that you had worked in the financial services industry for a considerable length of time. I also understand that, until November 2009, you had worked as an independent financial adviser being authorised through Firm A.

Following the decision by Firm A's parent firm to close it (following an Enforcement Investigation by the FSA), you looked for employment through a new network and subsequently submitted an "Application to perform controlled functions under the approved persons regime" (commonly referred to as a "*Form A*") which was received by the FSA on 30th November 2009. However, although you believed that you had correctly (and fully) completed the Form A, and Sup 10.12.5 indicates that the FSA must process a fully completed Form A within three months of receipt, you state that the FSA did not do this. Ultimately you say that, due to the delays, the supporting firm withdrew your application by submitting a "*Notice to withdraw an Application to perform controlled functions under the approved persons regime*" (commonly referred to as a "*Form B*") which the FSA received on 4th May 2010.

You feel that, as an ex-Firm A adviser, you were prevented from working in the financial services industry by the FSA and, when considering your application, you do not feel that the FSA paid any regard to sections 3, 4 and 7 of the RCC.

I now wish to turn to what lies at the core of the problem in investigating matters of this kind. I apologise in advance therefore both for the length of this Final Decision as well as the background that I detail but it is right that your complaint and concerns are addressed in depth in order to create the feeling that all the issues you have raised have been adequately considered by me.

I feel that gravamen of your complaint can most succinctly be expressed to the effect that the FSA's untoward delay in considering your application led you to leaving the financial services industry since it was not possible for you to obtain new employment within the financial services industry without first obtaining authorisation from the FSA.

You add that the excessive delays were inappropriate and resulted in financial implications to you and the staff you indicate you employed (as you were in effect prevented from advising customers and therefore working). You add that the FSA did not appropriately nor proportionally consider the risks and that the FSA requested considerable information from you (and your ex-colleagues) which you do not feel was necessarily required by the FSA when assessing your fitness and propriety.

I must, however, in carrying out a detailed investigation of your complaint now go into more detail. My starting point must be the Act itself. Section 2 of the Act sets out the FSA's general duties in the following manner:

(1) In discharging its general functions the Authority must, so far as is reasonably possible, act in a way—

  (a) which is compatible with the regulatory objectives; and

  (b) which the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are -

  (a) market confidence;

  (b) public awareness;

  (c) the protection of consumers; and

  (d) the reduction of financial crime.

(3) In discharging its general functions the Authority must have regard to—

  (a) the need to use its resources in the most efficient and economic way;

  (b) the responsibilities of those who manage the affairs of authorised persons;

  (c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

  (d) The desirability of facilitating innovation in connection with regulated activities;

  (e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;

(f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;

(g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority.

(4) The Authority's general functions are—

(a) its function of making rules under this Act (considered as a whole);

(b) its function of preparing and issuing codes under this Act (considered as a whole);

(c) its functions in relation to the giving of general guidance (considered as a whole); and

(d) its function of determining the general policy and principles by reference to which it performs particular functions.

(5) "General guidance" has the meaning given in section 158(5).

From this you will see that, although the Act requires the FSA to discharge its regulatory objectives, it gives it discretion over how it does this providing that its act in a way which:

(a) is compatible with the regulatory objectives; and

(b) the Authority considers most appropriate for the purpose of meeting those objectives.

The composite effect of these provisions is to create an inevitable tension between the requirements of advisers (when providing them with approval), through the exercise of the FSA's regulatory powers and the protection of consumers (by ensuring that those offering advice do meet the FSA's fitness and propriety requirements). In effect the FSA has to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives. Issues like the ones raised in your complaint therefore will inevitably involve a consideration of difficult and differing courses of action for any regulator when seeking to deal both with prudential regulation and consumer protection. That is the generic background to the issues raised by your complaint.

Quite reasonably therefore any complainant will then pose the question relevant to this issue "*well what exactly did the FSA, as the regulator, do which led to the delay particularly given the requirements of SUP 10.12.5?*" Followed, no doubt equally swiftly, by "*why did the Regulator appear to disregard the requirements of sections 3, 4 and 7 of the RCC when considering my application*?" In answering those questions however Parliament has imposed restrictions upon both the FSA and myself by the imposition of section 348 of the Act as to how those questions can be answered in the case of a complainant.

In summary, Parliament by virtue of Section 348 of the Act imposes upon the FSA, as the regulator, a ruling of confidentiality in the context of disclosing its response or position when acting in the discharge of its function as the relevant regulator. This means that, other than in limited circumstances, the FSA is unable to disclose any information about what action it did or did not take against a firm or individual (and the reasons for that decision).

In this instance, while I do not believe that the exceptions apply and I cannot comment further, I do myself have the power to delve more deeply into such matters, in my role as Complaints Commissioner, to enable me to be satisfied as to the propriety of what the FSA has done. I am however limited, in most cases, as to the further disclosure of the details that I am informed about. I am therefore unable, directly, to answer the questions you have posed.

As part of my investigation into your complaint I have asked the FSA to comment on its involvement with Firm A and the action it was taking which led, as you indicate, to the deferral of a large number of applications for approval from ex-Firm A advisers. Although I am unable to comment on the information the FSA has provided in any great detail, in my view, I consider that at the time, the FSA took all appropriate steps relevant to the concerns it had over Firm A and given the sensitivity of the issues involved. In assessing this matter, in this instance, I believe that the delay which occurred in the FSA completing its assessment of your application was appropriate, necessary and proportionate given all of the circumstances and concerns it had about Firm A.

The position therefore is that I have obtained freely from the FSA the appropriate information to satisfy myself that the FSA exercised and made its judgements on a reasonable basis. I must say that having regard to the concerns it had (which resulted in it taking Enforcement action against Firm A) and its statutory obligations (as set out within the Act and which I have referred to above) the FSA took a course of action which appears appropriate, proportionate and reasonable in all of the circumstances.

Although the FSA accepts that there was delay in the consideration of your Form A, the FSA has provided me with justification for this. I also understand that updates were provided to your sponsoring network (as it was the one which submitted the application) although the FSA tells me that it was unable to do this as often as it would have liked to have done (due to the impending Enforcement action against Firm A and confidentiality restrictions which are imposed until such time as that information, by way of a Final Notice, has been made public). I share that view and the FSA's regret that on this occasion it could not have provided further information to you or your sponsoring firm despite it being conscious of the need for frequent and detailed updates, if only because peoples' livelihoods were involved.

The FSA must ensure that those looking to hold a controlled function (particularly one where financial advice is offered to consumers) can meet its fitness and propriety requirements. Clearly when there are genuine and significant concerns about a previous firm for which an adviser had worked (such as Firm A), the FSA may wish to make significant further enquiries which to satisfy itself that the adviser meets its fitness and propriety requirements. Such enquiries can, unfortunately, delay consideration of an application.

In arriving at this view, I am mindful that the FSA was in the continuing process of considering your application (as can be seen by the fact that it was requesting information from you) when it was withdrawn. It is unfortunate that delaying your approval had financial implications for you (and any staff you employed), however the FSA must (my emphasis) satisfy itself that an individual meets its fitness and propriety requirements before (my emphasis) it grants them approval to conduct regulated activity. Under the Act the FSA must either grant an individual approval or refuse to do so. It is unable, as you suggested, to grant approval on a conditional basis.

Given the information the FSA has provided to me and the concerns it had over Firm A I do not feel that the FSA has disregarded the requirements of the RCC. The principles contained within the RCC apply when determining general policies and principle, or setting standards, but cannot apply to individual cases.

Clearly, where the FSA has genuine and/or significant concerns, irrespective of the contents of the RCC, the responsibilities placed upon it by the Act means that it must make adequate enquiries to satisfy itself even if this means that consideration of an application may be significantly delayed or that the applicant may be required to provide additional information. Although I can and do sympathise with the position you find yourself in I am afraid, from the information I have been provided by the FSA, it is clear that due to the concerns it had over Firm A, until its further enquiries were complete, it was unable to assess fully your application or confirm that you had met its fitness and propriety requirements.

Conclusion

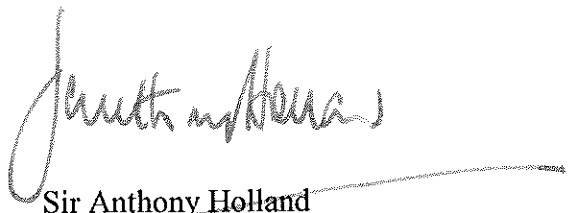
As I have explained above, the FSA has satisfied me that, it acted appropriately when considering your application. Although it is unfortunate that it cannot comment further on the matter (and the specific nature of the enquiries the FSA undertook), from the information presented to me it is clear that the FSA took a course of action which appears appropriate, proportionate and reasonable in all the circumstances at the time.

It is unfortunate that you were unable to conduct regulated activity after Firm A 'released' you but, as I have explained above, the FSA must satisfy itself that an individual meets its fitness and propriety requirements before (my emphasis) it can grant approval. In this case, it appears that the FSA understandably wanted to complete its further enquiries before assessing fully your application. This, although delaying the approval process considerably, does not appear to be an unreasonable position for the FSA to adopt given the significant concerns it had about Firm A.

It is, I am afraid, regrettable that there were considerable delays in assessing application but given the circumstances, I do not think that this is something that the FSA could have avoided no matter how unsatisfactory that may be. Nevertheless I strongly urge upon the FSA to continue to bear in mind at all times the need to avoid delay whenever possible given that what is involved is the applicant's livelihood. That consideration does impose upon any regulator the special need to avoid unnecessary delay which, for the avoidance of doubt, I accept that in this unfortunate case it was unable to avoid.

Similarly, the fact that Section 348 of the Act prevents the FSA (and me) from confirming in detail what action it took, is not by itself evidence that it neither gave your concerns proper consideration nor that it failed to act upon concerns brought to its attention. I am sorry, but in the absence sufficient of evidence to show that the FSA failed to discharge its duty under the Act, I am unable to uphold your complaint.

Yours sincerely



Sir Anthony Holland
Complaints Commissioner