Complaints Commissioner

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12th September 2011

Dear Complainant,

Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01305

I write with reference to your emails and enclosures of 30th June and 11th August 2011 and your email of 8th September 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 your displeasure at the manner in which the FSA considered your application to become authorised.

2. You feel that the FSA could have made a decision about your fitness and propriety (and re-approved you) within three months of your application being received. You add that the overall time taken to consider the application for approval to conduct controlled functions submitted by you (and other ex-Network A) advisers was inappropriate and as a result you (and many of your ex-colleagues) have lost the customer bank(s) you had built up.

3. You are unhappy that the FSA, when considering your complaint, refused to investigate what you consider to be the most important part of the complaint, namely that the FSA treated you unfairly or even negligently when assessing your application for re-authorisation. Specifically you say the FSA placed you in a position where you were unable to respond to the concerns it raised about your fitness and propriety, particularly as you believe that the FSA relied upon incorrect and flawed information when arriving at its decision to refuse your application.

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."

I should record at this point that I have found no evidence of any bad faith on the part of the FSA or indeed anyone involved in this matter.

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".

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 Network A.

Your complaint can, be split into two parts. The first is the delay in the FSA's consideration of your application and the second is the decision the FSA arrived at having considered your application (together with the manner in which the FSA considered your application).

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 Preliminary 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 offer you reassurance 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. I understand that this was ultimately made harder for you as a result of the Warning Notice you received.

You add that the excessive delays were inappropriate and resulted in financial implications as you could not work in the Financial Services industry and also lost the customer base you had created as you were unable to 'service' your customers. Additionally you say that the FSA did not appropriately, nor proportionally, consider the risks and that the FSA requested considerable information from you which you do not feel was necessarily required by the FSA when assessing your fitness and propriety.

I must, however, in fairness to the gravamen 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?*" This question is followed, no doubt equally swiftly, by "*why did the Regulator appear to base its opinion on information which was flawed and not give me the opportunity to challenge this*?"

As part of my investigation into your complaint I have asked the FSA to comment on its involvement with the Network A and the action it was taking which led, as you indicate, to the deferral of a your application (together I believe with those of large number of other applications for approval from ex-Network 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 Network A and given the sensitivity of the issues involved.

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 Network 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) as often as it could bearing in mind the confidentiality restriction and ongoing Enforcement action against the firm, which limited the disclosures which could be made. I share the FSA's regret that on this occasion it could not have provided further updates, due to the restrictions I have mentioned, if only because peoples' livelihoods were involved.

However, ultimately 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 Network A), the FSA may wish to make significant further enquiries which are to satisfy itself that the adviser meets its fitness and propriety requirements. Such enquiries can, unfortunately do, delay consideration of an application.

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 Network 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. 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 requested information from you). Given the information the FSA has provided to me, together with the serious concerns it had over Network A, I do not feel that it should have acted differently, or was able to consider fully (and grant approval) in the time span you have indicated.

Although I can understand your displeasure at the time it has taken for the FSA to consider your application, the FSA can only approve an individual (and in effect allow that person to undertake controlled functions in the UK's Financial Services industry) if it is sure that the individual meets its standards (and therefore meets its fitness and propriety requirements).

Clearly, the FSA had concerns about the compliance procedures adopted by Network A. This resulted in the FSA also having concerns about the conduct (or practices) adopted by those who had acted as advisers for Network A. Given these concerns, and Network A's decision to close its sales force, the FSA to fulfil its obligations under the Act, had to satisfy itself that the ex-Network A advisers could meets its fitness and propriety requirements. It is unfortunate that the FSA could not immediately do this, but given the serious concerns the FSA had (and which are set out in Network A's Final Notice) before it could re-authorise individuals it had to undertake detailed investigations. It is these investigations which resulted in the delay to the consideration of your application.

I now turn to the second question which was posed, namely, why did the FSA not allow me to challenge the information it was given and used in accessing my application. In addressing this question, I feel that it may be useful if I comment on the events which transpired from November 2009.

Following the decision by Network A's parent firm to close it (following an Enforcement Investigation by the FSA), you looked for employment through a new network, Firm B, and subsequently submitted an "*Application to perform controlled functions under the approved persons regime*" (commonly referred to as a "*Form A*"). The FSA received the Form A on 2nd November 2009. The FSA subsequently received a qualified "*Notice of ceasing to perform controlled functions*" (commonly referred to as a "*Form C*") from Network A on 30th November 2009.

Under Sup 10.12.5 the FSA must process a fully completed Form A within three months of receipt. However, where the FSA has concerns over the fitness and propriety of the individual concerned, it is able to request additional information from a previous employer or network before it considers fully an application. I would add that when the FSA requests additional information, it is able to defer consideration of the application until it has received the requested information.

In this case, I understand that as the FSA had received a qualified Form C from Network A (i.e. one which included information which gave the FSA cause for concern), the FSA, correctly in my opinion, felt that it could not assess your application without first obtaining additional information from Network A. It is unfortunate that this information took some time to produce, but this is not the fault of the FSA and does not, in my opinion, indicate that the FSA did not comply with the requirements set out within its rules book or acted inappropriately when considering your application.

I also understand from the information which has been provided to me that, although Firm B decided to withdraw its support for your application before the FSA had considered your fitness and propriety, you did not support this decision. As such, although FSA received Firm B's "*Notice to withdraw an application to perform controlled functions under the approved persons regime*" (commonly referred to as a "*Form B*") on 9th March 2010, I understand that you had refused to sign the form.

As the Form B had not been signed by you, the FSA could not withdraw your application and informed you that it could, if you wished, still arrange for your fitness and propriety to be considered by the Regulatory Transactions Committee (RTC). Acting upon your request, the FSA agreed to consider your application without a supporting firm.

Although the FSA's Authorisations Division had concerns over your fitness and propriety to undertake a controlled function under the approved persons regime (and was recommending that your application be refused) the decision on whether an application should be refused rests with the FSA's RTC, and not with the FSA's Authorisations Department.

In this instance, based on the information it holds, the FSA's Authorisations Department has used its discretion to recommend (to the RTC) that your application should be declined. Complaints about the FSA's use of a discretion given to it under the Act cannot be investigated under the complaints scheme and I would draw your attention to paragraph 1.4.2A of COAF which states:

Circumstances under which the FSA will not investigate

COAF 1.4.2A The *FSA* will not investigate a complaint under the *complaints scheme* which it reasonably considers amounts to no more than dissatisfaction with the *FSA's* general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged.

Ultimately a decision on an individual's fitness and propriety is made by the RTC, which is an independent body, after consideration of all of the facts presented by it by the FSA. Whilst the RTC will consider recommendations made by Authorisations, ultimately, as I have explained above, it is at liberty not to follow Authorisations recommendation if it deems fit.

The RTC considered your application on 31st March 2010. Following consideration of the evidence which the FSA had collated and presented to it, the RTC concurred with Authorisation's view and rejected your application. This resulted in the FSA issuing a Warning Notice to you on 8th April 2010. The Warning Notice set out the FSA's reasons for rejecting your application and also confirmed what action you needed to take if you disagreed with the decision the RTC had reached, i.e. you could 'appeal' or challenge the RTC's decision by refer the matter to the Regulatory Decisions Committee (RDC).

As a result of the issue of the Warning Notice, I believe that you obtained legal representation and began the process of collating sufficient evidence/information to make a representation to the RDC. However, although the date by which your representations had to be made had been extended to 10th June 2010, on 8th June 2010 your legal representatives informed the FSA that you no longer wished to contest your case before the RDC. I understand from your response to my Preliminary Decision that your decision to do this was as a result of your financial situation which meant that you could not, at that time, continue to afford legal representation.

Whilst legal representation may be regarded as beneficial, it is not essential and the recipient of a Warning Notice can challenge the FSA's decision to issue such a notice successfully themselves without legal representation. I would add here for the sake of completeness that I am aware of cases where individuals have successfully challenged the FSA's decision to issue Warning Notices at the RDC without legal representation.

Ultimately, the only way in which the FSA's decision to refuse an applicant's request for authorisation can be challenged is through the RDC (and subsequently, if necessary, through the Upper Tribunal). In this instance, although the FSA granted you the opportunity to have the application considered by the RDC, you declined to do this at that time (my emphasis). I appreciate that you are unhappy that you "*cannot 'now' challenge*" the FSA's decision to issue you with a Warning Notice, but this is not something I can consider under the jurisdiction given to me.

I appreciate that you are now looking for either me to review your fitness and proprietary or for me to instruct an independent body to do so. Although I can understand why you would like me to do this and believe that your aim is hopefully that I can provide you with approval to hold a controlled function under the approved persons regime in the future. Unfortunately, this is simply not something I can do. The only way for that problem to be solved would have been for you (my emphasis) to have contested the Warning Notices before the RDC. The Warning Notice itself at 5.2 on page 6 thereof states:

> "*You have the right to make written and oral representations to the FSA. If you wish to make written representations you must do so by 22 February 2010 or such later date as may be permitted by the FSA. Any representations that you make will be considered by the Regulatory Decisions Committee ("RDC") which, having considered such representations, will decide whether or not the action proposed in the Warning Notice should be taken. Written representations to the FSA should be sent to Mrs Kate Rowley, Secretary to the RTC, at the above address. If you wish to make oral representations, you should inform Mrs Rowley not less than 5 business days before 10 May 2010. Mrs Rowley will send the appropriate papers and information to the RDC Office, which will then contact you regarding the arrangements for the RDC to consider the matter.*"

In my view the FSA could not be clearer in pointing the way forward and indeed I believe that you clearly understood this and in fact were intending to do this. Similarly, whilst the FSA extended the deadline for you to make representations to it, ultimately you decided (my emphasis) to withdraw from this process just two days before the submissions had to be made. I can appreciate why you did this but ultimately that was your decision and not one which was influenced by the FSA. The fact that you did not challenge the decision at the time does not mean that the either I or the FSA should (or in deed can) reopen the case now.

I would add here for the sake of completeness that the fact that the FSA has refused your application and issued you with a Warning Notice, does not mean that you are unable to work in the Financial Services industry in the future. The FSA will consider the concerns giving rise to the issue of the Warning Notice when considering any future application. Likewise, should the FSA deem that a future also be declined, you will of course be able to challenge such a decision at the RDC. However, to this you would require now require either a firm to support your application or need to create your own firm (which would involve it obtaining Part IV Permissions).

I also appreciate that you feel that the FSA obtained a significant amount of additional information from you and, despite doing so did not consider this adequately when arriving at its decision. Instead, you feel that the FSA relied upon, what you describe as incorrect information, which you maintain you did not have not had the opportunity to challenge or to correct the FSA's views before it arrived at its decision.

I can understand your views on this but ultimately, I understand that the FSA did consider the information you provided to it and would reiterate that if you felt that the FSA had not considered adequately your comments then the RDC was the appropriate (and only) forum for this to be discussed. Ultimately, by choosing to withdraw from the RDC process you, in effect, accepted willingly the FSA's view on the information presented to it and lost the opportunity to challenge this.

I know that you feel that the FSA, by rejecting your application is, in effect, preventing you from working in the UK's Financial Services Industry, and has breached your Human Rights. However, I would also add here that given the responsibility placed upon the FSA under the Act to ensure that consumers are protected adequately, I do not feel that the FSA's decision to recommend that your application was refused was a breach of your Human Rights within the provisions of either the Act or the Human Rights Act 1998.

If you felt that the Authorisations and/or the RTC misinterpreted some of the information which was presented to it (or was provided with incorrect information), and this resulted in it making the incorrect decision to decline your application, then you had the option (and the right) as I have pointed out to challenge this decision at the RDC. Although this option was open to you, you (my emphasis) declined to do this. That would have been the appropriate way forward, and indeed the only way (save for an application for judicial review), to challenge the FSA's actions in respect of your application.

The complaints scheme is not the appropriate forum for the consideration of this type of issue. Although Authorisations makes a recommendation to the RTC on whether an application should be approved or declined, ultimately it is up to the RTC to decide. As explained above, the correct procedure for challenging this type of issue is through the RDC and not (my emphasis) through the complaints scheme. Complaints of this nature are expressly excluded from the complaints scheme, paragraph 1.4.3 of COAF states:

> **COAF 1.4.3 - Complaints that are more appropriately dealt with in another way**
>
> The *FSA* will not investigate a complaint under the *complaints scheme* which it reasonably considers could have been, or would be, more appropriately dealt with in another way (for example by referring the matter to the *Tribunal* or by the institution of other legal proceedings).

In this instance to appeal against the RTC's decision (and its issue of a Warning Notices) should have been made to the RDC which is the appropriate body to deal with matters such as this. I have previously expressed my views regarding representations to the RDC as part of the Enforcement Process (http://www.fscc.gov.uk/documents/views/recent-issues-nov09.pdf) and, whilst these comments were specifically directed at firms and individuals going through the Enforcement Process, they are equally applicable to cases where an application for approval to conduct regulated activity have been made but following assessment by the RTC have been declined. My reasons for this stance are now set out:

1) If representations throughout the process are made this removes the opportunity for the FSA or RDC to state that by not making representations you have apparently accepted the FSA or RDC position in its entirety.

2) It is quite conceivable that during the course of oral representations and the consequent interaction between the RDC and yourself that important matters which would affect the decision of the RDC could have come to light, which you had not realised were significant and hence had not been mentioned or to which proper weight had not been given in the written submissions.

3) Clearly where you have concerns over the information the FSA has used, you should take any opportunity which is presented to you to clarify your views and provide an explanation or give further information where necessary.

4) If you believe you have nothing to hide and demonstrate this position by its willingness to answer questions put to it by the RDC this can only be to your benefit in relation to the RDC decision. If you are unwilling to bear such scrutiny it can only lead to the RDC calling your integrity into question (or in this case it has not had the opportunity to consider your application and review the RTC's decision).

5) It is not the case, nor should it be, that by exercising this right the position of the alleged offending firm or individual is thereby prejudiced.

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.

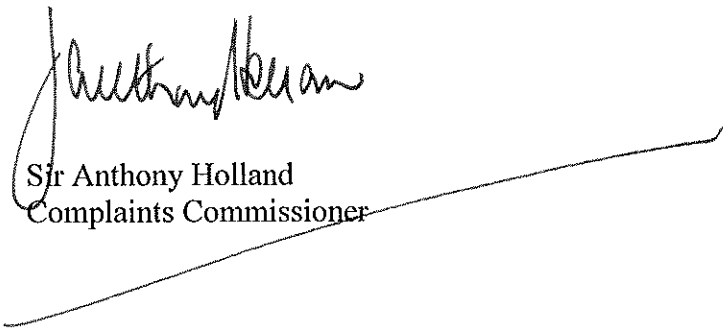
It is unfortunate that you were unable to conduct regulated activity after Network A 'released' you but, as I have explained above, the FSA must satisfy itself that an individual meets its fitness and propriety requirements before (my emphasis) it can grant approval. In this case, it appears that the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

It is, I am afraid, unfortunate 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. Similarly, although you clearly dispute the FSA's decision that you application should have been rejected, and although you were clearly given instructions on how you could challenge this it appears that you decided not to do this.

I would add here that it appears to have been you choice and your decision to withdraw from the RDC process. Whilst I understand that your decision to withdraw from the RDC process may have been influenced significantly by your financial position, this was not the fault of the FSA. Likewise, as I have set out above, whilst legal representation at a RDC hearing may be beneficial it is not a formal requirement and given the manner in which the RDC operates, individuals are free to represent themselves at RDC hearings and have done so successfully in the past.

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