

AUTHORISATION – Part IV permission – Cancellation – Fit and proper person – Whether Applicant falls short of Threshold Condition 5 – Whether Applicant has failed to conduct business with integrity and in compliance with proper standards and failed to treat customer fairly – Yes – Reference dismissed

Case No: FIN/2006/0014

IN THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

BETWEEN

NEIL HAWORTH

The Applicant

– and –

THE FINANCIAL SERVICES AUTHORITY

The Authority

**Tribunal: TERENCE MOWSCHENSON QC
MAURICE BATES
COLIN SENIOR**

Sitting in public in London on 22nd March 2007

The Applicant was not represented and did not appear.

Daniel Thornton of the Financial Services Authority, for the Authority

DECISION

1. By a reference dated 11th October 2006 Neil Haworth (“the Applicant”) referred to the Tribunal a Decision Notice dated 14th September 2006 from the Financial Services Authority (“the Authority”) whereby the Authority acting pursuant to section 45 of the Financial Services and Markets Act 2000 (“the Act”) informed the Applicant (a sole trader insurance intermediary) that, on the basis he had failed to comply with an award made by the Financial Ombudsman Service (“the FOS” and “the FOS Award”), the Authority had decided to cancel his Part IV permission.
2. On the morning of the hearing the Tribunal received a letter dated 20th March 2007 from the Applicant stating that due to the costs involved the Applicant would not be attending the hearing personally. The Tribunal has taken into account the Applicant’s comments on the Decision Notice and the Statement of Case contained in his letters to the Tribunal dated 7th October 2006 and 7th December 2006 respectively and have read all the material supplied to the Tribunal including the Applicant’s responses to letters from the Authority relating to the implementation of the FOS Award.
3. The Tribunal also had evidence in the form of witness statements from Mr Andrew Honey (“Mr Honey”) the Head of the Insurance Department of the Small Firms Division of the Authority and Mr Duncan Hardy (“Mr Hardy”) an actuary with Hazel Carr Plc a financial services outsourcer which processes pension review cases on behalf of a number of large insurance companies. Mr Hardy also gave evidence as to the manner in which the Financial Services Compensation Scheme calculation of loss referred to below had been calculated.

Background

4. The Applicant was authorised by the Personal Investment Authority (PIA) on 18th July 1994. On 27th July 2001 he applied to cancel this authorisation. On 1st December 2001 his authorisation (which had not by then been cancelled) was “grandfathered” into an authorisation by the Authority from 1st December 2001 into authorisation to carry on designated investment business (“the Grandfathered Authorisation”).
5. On 8th January 2002, a former client of the Applicant, a Mrs Bevan, referred a complaint she had in respect of the Applicant to the FOS. Her complaint arose out of advice given to her by the Applicant in about March 1990 not to join the pension scheme of British Aerospace (“BAe”) but to invest in a personal pension scheme with Standard Life. Accordingly she transferred benefits which had accrued to her under two other schemes (Midland Bank PLC and the Principal Civil Service Pension Scheme) to Standard Life and started to pay premiums to the Standard Life scheme. Mrs Bevan had another opportunity to join the BAe scheme in 1993 and discussed whether to join it with the Applicant. The Applicant did not advise Mrs Bevan to join the BAe scheme and she did not do so. Mrs Bevan ceased to be employed by BAe on 3rd May 1996. Mrs Bevan’s health had begun to deteriorate in 1993 and she received State incapacity benefit from 13th July 1994. Mrs Bevan’s complaint was that had she joined the BAe Scheme she would have qualified for ill-health benefits in the BAe scheme resulting in her receiving a larger pension when she becomes eligible to receive her pension.

6. On 22nd September 2003 the FOS issued the FOS Award in favour of Mrs Bevan. The FOS considered that Mr Haworth should have advised Mrs Bevan to join the BAe Scheme in 1990 and that Mr Haworth should establish whether Mrs Bevan had suffered a loss as a result of the decision to contribute towards a personal pension scheme rather than joining and contributing to the BAe scheme from 1st March 1990 to 13th April 1996. The FOS also found that the Applicant had contributed to the delay in dealing with the complaint by prevarication. Accordingly the Ombudsman directed that the Applicant (i) without further delay carry out a loss assessment in accordance with certain regulatory guidelines and (ii) pay Mrs Bevan £300 to compensate for the delay, distress and inconvenience caused.
7. On 25th September 2003 Mrs Bevan accepted the FOS Award in full and final settlement of her complaint and on 29th September 2003 the FOS wrote to the Applicant informing him of Mrs Bevan's acceptance and emphasised that the FOS Award was binding upon him. On 27th October 2003 the Applicant responded to the FOS indicating that he had had to respond to a number of complaints which had had a detrimental effect on his financial position and that he had to inform the FOS that it might be some considerable time "if ever" that he would be in a position to comply with the requirements of the FOS Award.
8. On 4th November 2003 the Authority accepted the Applicant's application to cancel the Grandfathered Authorisation.
9. On 24th May 2004 the Applicant applied to the Authority for authorisation in respect of general insurance business, and also for related individual approval.
10. By 18th August 2004 Mrs Bevan's file had been passed to the Financial Services Compensation Scheme ("FSCS") on the grounds that the Applicant had ceased to trade.
11. On 14th January 2005 the Authority authorised the Applicant to carry on general insurance business (and granted him related approval).
12. On 31st May 2005 the FSCS stated that it had received a preliminary assessment that calculated (using the relevant regulatory guidance) Mrs Bevan's potential loss as £10, 432.46 ("the FSCS Calculation"). However, as the FSCS was unable to determine that the Applicant had insufficient funds to meet the FOS Award Mrs Bevan's claim was rejected on that basis.
13. The Applicant has not accepted the basis on which the FSCS Calculation was made and has not carried out the loss assessment and or paid any redress to Mrs Bevan.
14. Accordingly the Authority issued the Decision Notice on the basis that it considered that the Applicant was failing to satisfy the threshold conditions set out in Schedule 6 to the Act in that the Applicant was not conducting his business soundly and prudently and in compliance with proper standards. The Authority considered that the Applicant had

failed to comply with Principle 6 (Customers' interests) of the Principle for Business and Threshold Condition 5 (Suitability) in failing to comply with the FOS Award.

Threshold Condition 5 (Suitability) and Principle 6

15. Section 41 of the Act requires the Authority to ensure, in giving or varying permission under Part IV of the Act, that the person concerned will satisfy and continue to satisfy the threshold conditions set out in Schedule 6 to the Act.
16. Threshold Condition 5 provides that:

The person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances, including-

...

(c) the need to ensure that his affairs are conducted soundly and prudently.
17. Principle 6 of the Authority Principle for Business requires firms to pay due regard to the interests of its customers and treat them fairly.
18. The Authority's Rule 3.9.14 (1) in the part of the Handbook entitled "Dispute Resolution: Complaints" ("DISP") requires a firm, or in the case of a sole trader, the sole trader, to comply promptly with any money award or direction made against it by the FOS.
19. As a sole trader the Applicant also needs to satisfy the standards imposed upon an approved person. Part of the Authority's Handbook (COND) provides guidance on the conditions that an authorised person must satisfy and a part ("FIT") provides guidance on the criteria for the assessment of the fitness and propriety of an approved person.
20. In assessing whether an authorised person's is fit and proper the Authority will have regard to all the circumstances: see Threshold Condition 5 and COND 2.5. 1 D; in considering whether an authorised business is conducted soundly and prudently the Authority is required to have regard to whether the person conducts his business with integrity and in compliance with proper standards (COND 2.5.4(2)(a)G) and also may have regard to whether the authorised person has contravened any of the provisions of the regulatory system (COND 2.5.6 (4) G).
21. In relation to an approved person FIT provides guidance as to the matters which the Authority will have regard including, in determining a person's honesty and integrity, include whether he has contravened any provision of the regulatory system (FIT2.1.3(5) G), whether he has been the subject of a justified complaint (FIT, 2.1.3 (6) (G)) and whether the person has been candid and truthful in all his dealings with any regulatory body and demonstrates a readiness and willingness to comply with the requirements of the regulatory system (FIT 2.1.3 (13) G).

The importance to the regulatory system of complying with a FOS Award

22. Mr Honey provided evidence as to the purpose and importance of the FOS. We accept his evidence which appears to be uncontroversial.

23. The FOS exists to provide an independent and binding right of recourse (including the award of compensation if appropriate) for consumers with complaints. The Authority does not get involved in individual complaints but pursues a wider view of its consumer protection objective as provided for in sections 2 (1) (c) and 5 of the Act.
24. Sections 2 (1) a) and 3 of the Act provide that the Authority has a market confidence objective. If consumers are to be encouraged to take appropriate investment advice from authorised firms then they have to be treated fairly and their rights protected. One of the purposes of the FOS is to bolster the protection of consumer protection and encourage confidence in providers of regulated financial services. One way in which it does so is by providing an inexpensive and quick way of resolving disputes as to the quality of service provided and providing an alternative to expensive and lengthy legal proceedings. Accordingly it is important that FOS awards are respected and implemented by regulated firms; if FOS awards are not promptly honoured then consumer's confidence in the regulated financial services sector will be damaged, as it will in the FOS itself. Any failure to observe an award is serious because it can cause disproportionate damage to confidence in the FOS and thus to the financial services sector. Furthermore those firms which ignore awards gain a competitive advantage as against firms which comply with awards notwithstanding the costs involved.
25. Notwithstanding the importance of observance of FOS awards the consequence of failing to observe them has to be considered on a case by case basis.

The Applicant's response to the FOS Award
The loss review

26. We note that in paragraph 2.19 of the Decision Notice the Authority accepts that correspondence from the Authority dated about 4th November 2003 which informed the Applicant of the cancellation of the Grandfathered Authorisation did not make it as clear as it could have done that he remained liable to implement the FOS Award.
27. There is no evidence that the Applicant has made any attempt to implement the FOS Award after mid April 2006 when, on any view, he must have been aware that he remained liable to fulfil the FOS Award in the light of the letter dated 13th April 2006 from the Authority in which the Authority expressed its concerns about his failure and warned him that he was in breach of Principle 6 and DISP 3.9. 14 (1) R. The Applicant did not offer, or undertake, to implement the FOS Award in correspondence with the Authority in 2006 after receipt of the letter.
28. In his letters to the Tribunal dated 7th October and 7th December 2006 the Applicant does not suggest that he carried out any review as required by the FOS Award; further he does not indicate any willingness to implement the FOS Award in the letters. Rather his contention is that he is not prepared to accept the FSCS Calculation because he disagrees with the principles upon which it was compiled; he contends that the FSCS Calculation is wrong because it incorrectly assumed that Mrs Bevan was employed by BAe between July 1994 and May 1996 (with an income of £17,695 in the 1995/96 tax year) when, so he contends, between July 1994 and May 1996 Mrs Bevan was not in "pensionable service" (because in this period Mrs Bevan was in receipt of incapacity benefit). Accordingly, he contends any payment by him would in some way be illegal.

29. The Applicant's contention does not deal with the Authority's concerns as to the Applicant's conduct. The Applicant was directed to carry out a review and failed to do so. It is no answer to that criticism to criticise the manner in which the FSCS carried out the review which the Applicant should have, and failed, to carry out. If the Applicant wished to challenge the principles of the FOS Award there were other remedies available to him.
30. Notwithstanding that he disagrees with the principle of the FSCS Calculation the Applicant, even at this late stage, has not sought to carry out a loss review.
31. The merits of the FOS Award are not properly in issue before the Tribunal despite the Applicant's criticism of it as that criticism does not deal with the grounds relied on by the Authority for issuing the Decision Notice or justify a failure to comply with it. However as the Applicant laid so much reliance upon his criticism of the FOS Award as justifying his failure and at the request of the Authority we are prepared, somewhat reluctantly, to express a view on the FOS Award.

The FOS Award

32. We consider that the Applicant's criticism of the principle upon which the loss is calculated is misconceived. Mr Hardy (the actuary who performed the FSCS Calculation) gave evidence in his witness statement that, in his experience, it is common for an employee in an occupational pension scheme to continue to accrue pension benefits for periods where he is absent due to illness and then when he exits the scheme, for the scheme to calculate benefits using a notional salary assuming the employee had remained working normally, rather than by reference to the greatly reduced actual earnings received because of the absence caused by ill health. Mr Hardy also found support for this view from the relevant BAe Pension Scheme Explanatory Booklet which at page 22 states that an employee's membership of the scheme would continue if the employee was absent for any period of time due to illness or injury. In a letter dated 2nd February 2007 in a letter written on behalf of the pension trustees of the BAe pension scheme to the Authority the trustees confirmed that Mrs Bevan's pension benefits would not have been affected had she been in receipt at any time of incapacity benefits.
33. In his letter dated 7th October 2006 the Applicant also contends that the augmentation of Mrs Bevan's personal pension would amount to a breach of Inland Revenue rules for pension contributions. This is presumably on the basis of Mrs Bevan not having sufficient relevant earnings after July 1994. This point is misconceived. The relevant tax rules make it clear that such a redress payment does not amount to a "contribution" to a personal pension (see paragraph 26.23 of IR76/2000). The augmentation of Mrs Bevan's personal pension as required by the FOS Award would not therefore give rise to a breach of Inland Revenue rules.
34. Further, in his letter dated 20th March 2007 to the Tribunal the Applicant suggests that the FSCS Calculation did not take into account certain premium overpayments by Mrs Bevan which should not have been in her personal pension and which were later refunded. The overpayments according to the Applicant would have resulted in an excess value being attributed to Mrs Bevan's pension as at 1st April 2003. In fact the FSCS Calculation took into account the rebates, i.e., the correct fund value was used. The

premiums paid by Mrs Bevan and taken into account by Mr Hardy who made the FSCS Calculation were net of the overpayments.

35. In his witness statement Mr Hardy explained how the loss to pension investors who had been mis-sold personal pension schemes between 1988 and 1994 as opposed to being advised to join occupational pension schemes is calculated. He also described how Mrs Bevan's loss was calculated. The loss is calculated using an effective date of 1st April 2003 together with the personal pension fund value as at that date. The redress is then converted into a percentage of the fund value as at that date. That percentage is then applied to the value of the personal pension fund as at the date the compensation is to be paid. Thus if an investor's personal pension fund was worth £5,000 as at 1st April 2003 and the amount of redress as at that date was £7,500 then the redress is expressed as 150 per cent of the personal pension fund. At whatever date the compensation is to be paid, a calculation of 150 per cent of the value of the personal pension fund as at that date would be made and the amount of redress would equal the product of that figure.
36. In the case of Mrs Bevan Mr Hardy calculated the redress percentage as being 191.88 per cent. Mr Hardy assumed that Mrs Bevan would have been a member of the BAe scheme from 6th April 1990 (the first date she was eligible to join after the Applicant's advice) and 3rd May 1996 (the date her employment was terminated). The calculation yielded a loss amount, including an amount for future charges (because personal pensions bear their own charges) of £10,432.46 as at 1st April 2003. The value of Mrs Bevan's pension fund as at 1st April 2003 was £5,436.93, so the redress payable was 191.88 per cent. Mr Hardy explained the calculation in his witness statement and in the course of the hearing. The assumption underlying Mr Hardy's calculations as to the date of termination of employment and the amount of her pension had she joined the BAe scheme are confirmed by an email dated 8th February 2007 from the BAe pension fund service centre.
37. As noted above, the Applicant's criticisms of the FSCS Calculation were matters of principle. We reject the criticisms and consider that on the evidence before us the FSCS Calculation of 191.88 per cent of the value of Mrs Bevan's pension fund as at the date the payment is to be made is correct.

The payment of £300

38. As at the date of the hearing the Applicant had not paid the £300 and has not given any indication of an intention to pay it. This modest amount has now been outstanding since 25th September 2003. The Tribunal notes the explanation proffered by the Applicant to the Authority in his correspondence with the Authority following a letter dated 13th April 2006 in which the Authority first raised its concerns as to the failure to comply with the FOS Award the matter having recently been brought to the attention of the Authority. The Applicant asserted that he had taken some steps to pay the £300 in November 2003 by arranging for a transfer from his bank account but that credit of £300 to his account in May 2004 suggested that the amount, unknown to him so he asserts, had not been paid. He claimed in his letter of 21st May 2006 to the Authority that he had been unaware of the non payment till he discovered the position following the Authority's letter dated 13th April 2006. Notwithstanding his apparent acceptance of the fact that the £300 had not been paid, he has not paid the amount since then and it remains unpaid. The Applicant

did not deal with the non payment of the £300 in his letters dated 7th October and 7th December 2006 to the Tribunal.

39. The Decision Notice also refers to the fact that the Applicant claimed in a letter dated 4th August 2006 that he was unaware of the FOS Award until 31st May 2005 when he received a preliminary assessment from the FSCS that they assessed the loss at £10,432. We do not accept that that can be correct in the light of FOS's letter to the Applicant dated 29th September 2003, the Applicant's letter to FOS dated 27th October 2003 and the reply from FOS dated 19th November 2003 all of which dealt with the FOS Award. In the letter dated 19th November 2003 the FOS wrote that the FOS had been informed that the Applicant was "considered officially resigned and our Final Decision remains available to Mrs Bevan to take legal action to have the decision enforced. ". The letter went on to refer the Applicant to the Authority's Handbook, specifically DISP 3 dealing with Complaint Handling procedure of the FOS to the effect that a firm must comply promptly with any money award or direction of the FOS. Furthermore the contention that the Applicant did not know of the FOS Award is inconsistent with his assertion that he thought he had paid the £300 element of the FOS Award in November 2003. In the light of the letter we consider the Authority's concession in paragraph 2.19 of the Decision Notice generous but we approach this matter on the basis that the concession was correctly made.
40. In his letter dated 7th October 2006 to the Tribunal the Applicant states that he had only been "given access to the FOS award findings in a letter dated 29th September 2006 and had the opportunity to see the results of the Investors Event Calculation Report . ". That statement was made in response to paragraph 2.17 (b) (ii) of the Decision Notice which asserted that the Applicant had not provided any evidence that he had taken any steps to comply with the FOS Award. The letter dated 29th September 2006 to which the Applicant refers was a letter from the Authority which enclosed the papers supporting the FSCS Calculation communicated to the Applicant by letter dated 31st May 2005. If the Applicant intended to suggest that he was unaware of the FOS Award till 29th September 2006 we reject that contention. Such a contention is inconsistent with his attempting to pay the £300 and also with the correspondence between him and FOS in the latter half of 2003.
41. We also note that in its letter dated 29th September 2006 the Authority invited the Applicant to supply evidence of a lack of financial resources if the Applicant could not discharge the FOS Award due to lack of means. The invitation was not taken up.
42. We note that the Applicant has failed to implement the FOS Award, take any positive steps to implement it (other than possibly to attempt to pay the £300), or indicate an intention to implement. Also he has failed to engage in the Tribunal proceedings which he initiated other than to write the letters dated 7th October and 7th December 2006.

Conclusion

43. The Tribunal is unanimous in its decision.

44. The Tribunal considers that the Applicant's failure to comply with the FOS Award showed a disregard of Mrs Bevan's interests and was unfair treatment within Principle 6. It can be inferred that she used the scheme run by the FOS in the expectation that the Applicant would comply with the rules and regulations applying to him including those set out above. Even taking the date on which the Applicant should have implemented the FOS Award as being in April 2006 (in the light of the Authority's concession set out in paragraph 2.19 of the Decision Notice) the Applicant's failure to take any steps to implement the FOS Award since that date is a serious breach of Principle 6 as is his failure to manifest any intention to implement it.
45. Furthermore we are satisfied that the conduct described above manifests a lack of suitability within Threshold Condition 5. The Applicant's conduct in failing to implement the FOS Award, or to manifest any intention to implement it, and the manner in which he responded to the Authority by suggesting that he was unaware of the FOS Award shows that he was failing to conduct his business with the degree of integrity or in compliance with the proper standards expected of an authorised or approved person thereby being a risk to the Authority's consumer protection objective and is inconsistent with an appropriate appreciation of the standards expected of him as an authorised sole trader.
46. Accordingly the reference is dismissed. The Authority is directed to cancel the Applicant's Part IV permission.

TERENCE MOWSCHENSON Q.C.
CHAIRMAN