[2015] UKUT 0252 (TCC)

Case number FS/2012/0024

Financial Services and Markets Act 2000 – failure to make proper disclosure of conflict of interest – breach of APER Statement of Principle 1 – sanction and penalty

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

FINANCIAL SERVICES

IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

BETWEEN

ANGELA BURNS

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

(formerly known as the Financial Services Authority)

Respondent

Tribunal: **Andrew Bartlett QC (Judge of the Upper Tribunal)**

Catherine Farquharson

Mark White

Determined on the papers

Date of written decision: 14 May 2015

DECISION

DETERMINATION

1. For the reasons set out below, in our judgment the appropriate action for the Authority to take is to prohibit Ms Burns from carrying out a CF2 function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm, and to impose a financial penalty of £20,000.

INTRODUCTION

2. By a decision notice dated 28 November 2012 the Authority imposed on Ms Burns a financial penalty of £154,800 and made a prohibition order pursuant to s56 of the Financial Services and Markets Act 2000. These sanctions were based on findings by the Authority that she had misused non-executive director positions to seek to advance her own commercial interests and failed to disclose conflicts of interest, so that she was in breach of Statement of Principle 1 (approved person must act with integrity in carrying out controlled function) and lacked fitness and propriety under the 'Fit and Proper' test for approved persons.

3. Ms Burns denied the Authority's allegations and referred the matter to the Tribunal.

4. The discrete allegations of misconduct pursued by the Authority upon the reference were ten in number. Following an oral hearing, by our first decision dated 15 December 2014, [2014] UKUT 0509 (TCC), we upheld or partly upheld four of the allegations and dismissed six of the allegations. We concluded that Ms Burns was in breach of APER Principle 1 and was not a fit and proper person to carry out the CF2 function.

5. Our function now is to determine what, if any, action is appropriate for the Authority to take. In particular, our task is to decide (a) whether a prohibition order should be imposed, and, if so, of what width, and (b) the appropriate financial penalty for the misconduct.

6. We have received written submissions from the parties. The Authority seeks a prohibition from carrying out any function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm, and argues for the same financial penalty as was imposed in the Authority's decision notice. Ms Burns argues that the prohibition should be limited in scope and time, and that there

should be no financial penalty. She also raises arguments concerning losses and costs which she says she has incurred.

7. As was stated in *Carrimjee v Financial Conduct Authority* [2015] UKUT 0079 (TCC), at [15] and [330], the Tribunal is not bound to assess penalty by following the Authority's published policies but pays them due regard when carrying out its overriding objective of doing justice between the parties, taking into account all the circumstances of the case. To this we would add the observation that the appropriate outcome must be considered not only in the context of the positions adopted by the parties but also having regard to the public interests promoted by the Financial Services and Markets Act 2000.

OUR FINDINGS IN MORE DETAIL

8. The Authority's allegations were divided into (1) failures to disclose conflicts of interest (paragraph 5.2(1) of the Authority's amended Statement of Case) and (2) use of fiduciary position as a non-exec to solicit a personal benefit (paragraph 5.2(2) of the Authority's amended Statement of Case).

9. The allegations which we rejected were those relating to non-disclosure in paragraphs 5.2(1)(b), (c), (d), (f), (g) and (h) of the Authority's amended Statement of Case.

10. We upheld the allegation of reckless breach of Statement of Principle 1 by failure to make disclosure to MGM at MGM's board meeting on 25 February 2009, during which Vanguard was referred to, of the fact that she was concurrently soliciting a non-exec position and consulting work with Vanguard.

11. We did not uphold the allegations of reckless breach of Statement of Principle 1 by misuse of fiduciary position as a non-exec to solicit a personal benefit. We did, however, find that there was a reckless breach of Statement of Principle 1 because Ms Burns sought to create a situation where she would have a personal interest which could conflict with the interests of MGM or Teachers, without prior disclosure to or consent of MGM or Teachers. As regards MGM, this was based on her emails to Vanguard dated 24 and 26 February 2009. As regards Teachers, this was based on her email to Vanguard dated 5 November 2010. To this limited extent only, we upheld the allegations in paragraphs 5.5(2)(a), (b) and (c) of the Authority's Statement of Case.

12. It was on the above basis that we found that Ms Burns was in breach of APER Statement of Principle 1 by failing to act with integrity on 24, 25 and 26 February 2009

in the performance of her CF2 controlled function as a non-exec of MGM and on 5 November 2010 in the performance of her CF2 function as a non-exec of Teachers. On each of the four occasions she turned a blind eye to the ethical issues which arose. It is common ground that she did not receive any personal benefit from the breaches. At the main hearing there was evidence concerning disclosures which she had made in other circumstances. We consider that if matters had progressed further in her hoped-for relationship with Vanguard, she would eventually have made proper disclosure, albeit later than she ought to have done.

13. It is relevant to note that the Authority accepted in its Decision Notice[1] that Ms Burns' badly worded email of 5 November 2010 was not a demand for money. However, in the Authority's amended Statement of Case the email of 5 November 2010 was presented as a solicitation of payment for introducing Vanguard to MGM and to Teachers notwithstanding a clear conflict of interest, ie, a corrupt payment. This interpretation was actively pursued at the hearing.[2] We did not uphold the Authority's contention.

ASSESSMENT OF THE PARTIES' SUBMISSIONS

14. The Authority in its written submissions of 26 January and 2 March 2015 maintained the appropriateness of the prohibition order and penalty set out in the Decision Notice. It presented its figures by reference to the application of its published policies on penalty for the relevant periods.

15. In our judgment the Authority did not make a realistic reassessment of the position in the light of the fact that six out of its ten allegations failed and, out of the four which succeeded, three were upheld to only a limited extent. We find the Authority's submissions to be unsatisfactory and unpersuasive in a number of respects, including the following:

    a. The Authority painted a picture of misconduct over a period of two years, in contrast to the isolated instances (three days in February 2009 and one incident in November 2010) which we found to be established.

    b. The Authority incorrectly interpreted our decision as having held that Ms Burns improperly misused her position as a director to try to benefit herself. We found that the problem with her approaches to Vanguard on 24 and 26

[1] At paragraph 7.9.
[2] Eg, in paragraphs 2 and 84 of the Authority's Written Opening Submissions.

February 2009 and 5 November 2010 was not the fact that she made reference to her non-exec positions but that she made the approaches without prior disclosure to and consent of MGM or Teachers.

c. The Authority referred to and relied upon our concerns, as expressed in our decision, about the unsatisfactory nature of some aspects of Ms Burns' evidence, and about the untrue application forms. While we were entitled, and indeed required, to take those matters into account in deciding on fitness and propriety, we do not consider that they either can or should be taken into account in the consideration of the appropriate financial penalty. They did not form part of the alleged misconduct which was the subject of the Authority's Decision Notice and which was referred to us.

d. The Authority contended that Ms Burns' conduct had caused detriment to both Vanguard and Teachers. We did not find this to be proved. Vanguard could have continued with its presentation to Teachers if it had chosen to do so. It was not shown that Vanguard, if it had done so, would have had a realistic prospect of being selected (see paragraphs 61 and 69 of our first decision).

16. In the circumstances, we find ourselves in wholesale disagreement with the Authority's assessment of the level of seriousness of the proven breaches, and accordingly with the level of financial penalty arrived at by the Authority. Furthermore, the Authority's contention that it would be appropriate to prohibit Ms Burns from carrying out any function in relation to any regulated activity rests on a more negative view of her conduct than that taken by the Tribunal.

17. Ms Burns summarised her lengthy written submissions of 5 February 2015 by asking the Tribunal:

"1. To limit the scope of the prohibition to the CF2 function and to the time served in the effective ban imposed since May 2011

2. To find that the Authority's calculations of penalty are inaccurate, in that they involve the double-counting of inappropriate 'deterrence' penalties and mis-allocate impact-weightings and 'uplift' calculations. Correct calculation produces a de minimis result

3. To eschew any financial penalty under either the 'old regime' or the current regime, given that no disgorgement is required in remedy and no detriment has been brought, or was intended to be brought, to policyholders or consumers

4. To consider compensation to the Applicant for losses incurred through the unfounded allegation of bribery maintained by the Authority for four years

5. To consider the award of costs against the Authority for the poor conduct of this case post 19 April 2011 and their unjust conduct at the Tribunal hearing"

18. As regards submission 1, we accept that it is appropriate in the circumstances of this case, given the limited nature of the breaches, to define the prohibition order by reference to the CF2 function. We do not have power to limit the time period of a prohibition order. If at some future date Ms Burns applies for the prohibition order to be lifted, the Authority will be obliged to consider any such application in the light of the circumstances pertaining at the time. It is difficult to see how the order could be lifted while Ms Burns maintains her denial that she was in breach of the proper standards of conduct. We cannot foresee how the situation may alter in the future, particularly after her appeal to the Court of Appeal is resolved.

19. As regards submissions 2 and 3, it will be apparent from what we have said above that we consider that the penalty of £154,800 is wholly excessive, given our findings.

20. Submission 4 is a reference to the matter to which we have referred at paragraph 13 above. It is not apparent to us how Ms Burns would have any claim against the Authority for damages. Even if she did have such a claim, it would not be within our jurisdiction to deal with it. However, the burden of contesting mistaken allegations is something that we are entitled to take into account in mitigation of penalty.

21. In all the circumstances, we consider that the appropriate level of penalty is £20,000. This reflects the limited extent to which the allegations against Ms Burns were upheld, and contains a discount in recognition of the burden upon her and prejudice suffered through facing substantial allegations which we concluded were unfounded.

22. Submission 5 concerns whether there should be an order against the Authority for the payment of Ms Burns' legal costs. We take this to be an application made under the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, rule 10(3)(d) and 10(3)(e). It is not apparent to us that the Authority understood submission 5 in this sense, and it has not responded to it. If Ms Burns wishes to pursue such an application, she should clearly identify in writing the particular matters she relies on under rule 10(3)(d) and/or rule 10(3)(e) within 21 days from receipt of this decision, and we will then give procedural directions for it to be resolved. Nothing in the present decision is intended to express any view on the merit or lack of merit of any such application.

23. In Ms Burns' further submissions of 13 March 2015 we have not found anything relevant to our present task which we have not already taken into account.

24. Our conclusion is as set out in paragraph 1 above.

Andrew Bartlett QC

Judge

(signed on original)

Release date 15 May 2015