

## How much opinion can a regulator have on your personal life?

By Andrew Katzen

**F**ew who work in the financial industry can have failed to notice that the regulatory environment for professional advisers has changed significantly over the past five years.

Over this period the Financial Conduct Authority has taken a growing interest in behaviour that occurs in what may once have been considered someone's 'personal' life.

Unpleasant, offensive and (sometimes) illegal activity - such as bullying and sexual harassment - has been held by the FCA to constitute non-financial misconduct, which merits serious sanction.

It is a policy that we might, for lack of better term, call a #MeToo approach, and it is being adopted across the regulatory world.

But nearly five years on from the agency's first public pronouncements on this topic, how is the policy working out for the FCA, for other regulators like it, and for the professionals they oversee?

### **"Sexual harassment is misconduct"**

In September 2018, Megan Butler, then the FCA's executive director of supervision – investment, whole and specialists division, wrote to MP Maria Miller to expand on comments she had made to parliament's Women and Equalities Committee.

In her letter, Butler was explicit in saying that, as far as the FCA is concerned, "sexual harassment is misconduct".

She spelt out various ways this approach would impact the agency's misconduct procedures, including on the senior manager programme under which FCA-regulated individuals must be "fit and proper".

"Senior managers must be approved by us," Butler wrote. "We assess their competence, honesty, integrity and reputation to ensure that they are fit and proper to do so.

"This means we will, for example, consider if an individual has had a criminal conviction, sanctions for discrimination, harassment or sexual misconduct."

Two years later, in November 2020, the FCA banned three men from working as financial advisers following findings by its Regulatory Decisions Committee that they were not "fit and proper".

Russell David Jameson was banned following his criminal conviction for child pornography offences. Mark Horsey was banned following his conviction for voyeurism. Frank Cochran was banned following his convictions for sexual assault, engaging in controlling and coercive behaviour and a harassment offence.

None of the men challenged the decision by referring their cases to the Upper Tribunal.

The FCA, it seemed, was good to Butler's word. As Mark Steward, executive director of enforcement and market oversight, said at the time: "The FCA expects high standards of character, probity and fitness and properness from those who operate in the financial services industry and will take action to ensure these standards are maintained."

## **Boundaries of personal life**

The FCA is not the only professional regulator to have adapted its misconduct procedures to better fit evolved social mores.

In January 2020 the Solicitors Regulation Authority announced that Ryan Beckwith, formerly a partner at magic circle law firm Freshfields Bruckhaus Deringer, had breached its professional standards by having sex with a colleague after a social event at which both

had been drinking alcohol.

Beckwith admitted to the Solicitors Disciplinary Tribunal that he had kissed the woman his appraisee – in a pub and then accompanied her in a taxi to her home, where he said consensual sexual encounter took place.

For his part, Beckwith said that the incident, which started outside the office, ended in a private home and for which no criminal prosecution was ever brought, was beyond the SRA's remit.

The SDT disagreed. It ruled that Beckwith had acted without integrity and had threatened the trust placed in him by the public. He was ordered to pay £200,000 in costs and a £35,000 fine.

However, unlike the FCA cases mentioned above, Beckwith appealed.

In November 2020 the High Court reversed the SDT's decision. It ruled that for sexual misconduct cases that had not resulted in a criminal conviction, disciplinary findings should only occur when there is a clear link to, and resultant breach of, the SRA's code and principles.

The High Court's ruling was definitive: poor personal behaviour should not, necessarily and on its own, result in professional sanction.

"Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it," Justice Swift wrote in his judgement. "Popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit."

## **The Frensham quandary**

In October 2020 the FCA banned Jon Frensham from working as financial adviser after he was convicted of attempting to meet a child following acts of sexual grooming – a crime for which he received a 22-month jail sentence, suspended for 18 months.

Like Beckwith before him (but unlike David Jameson, Horsey and Cochran), Frensham challenged his ban. He referred the RDC's decision to the Upper Tribunal.

This time the court upheld the ban. But it did so primarily on the basis that Frensham had failed to be frank with the regulator about his circumstances.

Crucially, the Upper Tribunal rejected the FCA's apparent assumption that a criminal conviction of Frensham's sort should automatically lead to prohibition.

"The basis on which the Authority seeks to link Frensham's lack of personal integrity to his professional role on the basis of the nature of the offence alone is speculative and unconvincing," the court ruled.

In order to prove non-financial misconduct, it said the FCA needs to show clearly how the behaviour in question breached specific FCA rules and principles.

As if the parallel with Beckwith's case was not clear enough, the Upper Tribunal cited the High Court judgement in that case directly, re-iterating its warning that regulators should "not act... on popular outcry".

## **Where to now?**

There was a time, not so long ago, when a regulated professional might relatively easily define which areas of his or her life their regulator was entitled to police, and which areas it couldn't.

Generally speaking, misbehaviour committed in the office was regulated; misbehaviour in the pub, at home or on the golf course wasn't.

This simple distinction is no longer the case. But after an initial burst of enthusiasm for their new responsibilities, adverse higher court rulings have led regulators such as the FCA to reassess their activity in this new era.

The 'new normal' has not yet been established. The higher court rulings are unlikely to stop

the FCA and other professional regulators from taking action to crack down on bad personal behaviour.

But the court results may give the regulators pause to think. In order to prove misconduct they will need to show how the behaviour in question clearly infringes their own misconduct rules, no matter how disturbing, outrageous or even criminal that behaviour may be.

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