

17 November 2022

**Final report by the Complaints Commissioner****Complaint number 202201164***The complaint*

1. On 7 August 2022 you asked me to investigate a complaint about the FCA.

*What the complaint is about*

2. In its decision letter the FCA described your complaint as follows:

*Part One*

You are unhappy that the FCA has opened an investigation into Firm A, further to the information you provided, but you have been given no information about what the investigation will look like.

*Part Two*

You are unhappy that the FCA has opened an investigation into Firm A, but that the FCA has not forced Firm A to apologise for the way they treated you.

*Part Three*

You are unhappy because you have been told that the FCA has no jurisdiction over Firm A accountability for failing to protect Whistleblowers. You say that this is alarming, and you ask if the FCA is not responsible for making sure Firm A adhere to their Whistleblowing policies, then who is, so that you can escalate this accordingly.

*What the regulator decided*

3. The FCA did not uphold your complaint. In Part One of your complaint the FCA explained the sharing of confidential information about firms is restricted by law

under Section 348 of the Financial Services and Markets Act 2000 (FSMA). As such, the FCA explained that it could not give you information about any discussions with Firm A, as it would contravene Section 348 and be a criminal offence. It also shared that for other reasons such as the FCA's policy on sharing information, this may also restrict its ability to share information. Under such policy, the FCA explained that it would not normally disclose whether it has or has not taken any action with the Firm concerned. Finally, the FCA notified you that its Whistleblowing team provide feedback to a whistleblower once any actions have been completed and any related case is closed. The FCA stated that feedback was sent to you on 28 September 2021. The FCA also added that the amount of information that can be shared is dependent on the circumstances of the situation and whether any actions are already in the public domain.

4. In Part Two of your complaint the FCA explained that whilst it has obligations to a whistleblower it did not mean the FCA could act on the whistleblower's behalf or intervene on individual cases and disputes such as seeking an apology from Firm A through the FCA. The FCA stated that you should seek legal advice in respect of this and any concerns about how you were treated by your employer, would need to be referred to an Employment Tribunal.
5. In Part Three of your complaint the FCA pointed out that previous emails from its whistleblowing team provided you with information about the responsibility of Firm A towards whistleblowers. It also highlighted the additional information it provided to you. The FCA said it understood you were unhappy with how you were treated and were looking to escalate your concerns, but it could not take action on your behalf. The FCA finalised this part of your complaint by including its work on action it has taken previously in relation to the treatment of whistleblowers by Firm A and that the type of product that you provided information about was no longer available.

*Why you are unhappy with the regulator's decision*

6. In your complaint to me you made me aware of the following points:

*Element One*

My complaint now that the FCA have confirmed the areas of concern I asked to be addressed had substance is that who now is responsible for the protection of me, the whistleblower. I understand there is no financial reward for whistleblowing but surely the FCA or Firm A internal Whistleblowing team have to take accountability for ensuring the protection of the whistleblower, if that has failed, who is accountable?

*Element Two*

I feel even more strongly about it now, as it has taken the FCA 10 months to investigate my complaint to them

*Element Three*

Other than my initial call to the FCA Whistleblowing team, I have never been asked for a phone call, an email for more information or a face to face meeting, how can anyone conduct an investigation without any basic questions?

*Element Four*

I feel disappointed with the level of information the FCA then subsequently shared with me

*Preliminary points (if any)*

7. During my analysis of your complaint, it is my intention to look at and investigate the points that are appropriate and closely connected with the Complaints Scheme.
8. In your complaint you have made references to what happened with your previous employer and that you would like an apology from them. I am unable to look at issues between individuals and employers as this is not a matter for the Complaints Scheme. I agree with the FCA's view that this is something you may want to seek independent legal advice on and may want to consider the matter via the employment tribunal route.

### *My analysis*

9. I have analysed all the emails you submitted to me which form the basis of your complaint. I have also been provided with the FCA case file which I have also analysed.

#### Element One

10. I understand the main crux of your matter to be ‘...who is now responsible for the protection of me the whistleblower...’ On review of the FCA’s whistleblowing procedures I think there may be a mistaken emphasis between protecting a whistleblower’s identity and protecting the whistleblower generally. The FCA’s role here in terms of protection, is to always protect the identity of the whistleblower. The FCA are unable to provide an individual with legal advice on whistleblowing for example. As the FCA shared with you in its decision letter there is a good explanation about the FCA’s whistleblowing procedures here: [Whistleblowing | FCA](#). This also provides links to the charity Protect which aims to make whistleblowing work for individuals, organisations and society. It is worth noting if this may be of help that Protect supports around 3,000 whistleblowers who call its Advice Line and works with organisations on improving their speak up arrangements and campaign for better legal protection of whistleblowers.
11. I can also see when you queried with the FCA who is responsible for the consequences of a Firm not protecting a whistleblower, the FCA informed you that it believed the responsibility would sit with the Firm in question and its whistleblowers’ champion. It also provided that the FCA’s remit is not to take on employees’ individual cases and disputes. This would be the remit of the legal system and/or an Employment Tribunal. I agree with the FCA’s assessment and explanation here. In addition to this I have also not seen anything that put into question the FCA not protecting your identity.

#### Element Two

12. I can see you first raised your complaint with the FCA on 7 October 2021 and received the FCA’s decision letter concerning your matter on 2 August 2022. As such the total delay was 9 months, 26 days. The FCA acknowledged the length of time it took to investigate your complaint to provide you with its decision

letter. It offered you an ex-gratia payment of £75 for any inconvenience the delay caused. I am pleased the FCA also apologised for the delay in considering your complaint. However I think the FCA have made an error in the amount of ex gratia it offered you, bearing in mind the total delay and its ex-gratia payments table for complaint handling delays located on its website here: [Ex-gratia payments for complaint handling delays | FCA](#). Here, complaint handling delays up to eight months shows the level of ex gratia which would be appropriate would be £75. For delays up to ten months it would be £100. As such, given the complaint handling delays in your case were 9 months and 26 days, the FCA should have offered you £100 not £75.

#### Element Three

13. Other than your initial call to the FCA Whistleblowing team, you are concerned that you have never been asked for a phone call, an email for more information or a face to face meeting and ask how anyone can conduct an investigation without any basic questions. From the information and evidence, I have seen, I did not think the FCA needed to reach out to you further to sought further information or enquiries. The FCA carefully took on board all the information you had reported to it and used this information appropriately. I am sorry that I cannot share any more information about this due to confidentiality restrictions I am bound by. Element Four of this report below goes into further detail and provides an explanation on this.

#### Element Four

14. I appreciate you feel disappointed with the level of information the FCA subsequently shared with you. The sharing of confidential information given to the FCA about firms is restricted by law under FSMA. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on the confidential material to which I have access. However, as part of the Complaints Scheme, I have access to all the FCA's complaints papers, including confidential material. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably. Sometimes this means that all I can say to complainants is that having studied the confidential material, I am satisfied that the FCA has (or has not) behaved

reasonably – but I am unable to give further details. This can be frustrating for complainants, but it is better that I am able to see the confidential material.

15. I understand you may have wanted more information shared with you. It must be noted that the FCA welcomes information from consumers who report concerns. However, as the FCA communicated with you in the decision letter, they are unable to let you know what is done with the information you provided to them. This is because Section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds about firms as confidential and restricts how that information is dealt with. Equally any information that is not restricted by s.348 FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals who also have legal protections. Under this policy the FCA will not normally disclose the fact of continuing action without the agreement of the firm concerned. I see the FCA explained this to you in its decision letter.
16. So the FCA were correct to inform you that it could not give you any information about its discussions with Firm A due to Section 348 of FSMA 2000 and also its own policy on the restriction of sharing information. I can see the FCA contacted you on 28 September 2021 informing you that the review of your disclosure to the Whistleblowing Team had concluded. The FCA Supervision Team informed you that it had assessed and considered the information you had shared with it and made enquiries with the Firm. It then included a list of actions of what this would have included which it described as:
  - i. Speaking to the firm (without disclosing a Whistleblower has approached us) to understand the concerns raised;
  - ii. providing guidance to the firm on how they should conduct certain aspects of their business; or
  - iii. requiring proof of compliance with our rules and guidance.
17. I am pleased to see the FCA shared this with you so you had an overview of what had taken place. I hope it is also reassuring to share that I can confirm based on the FCA case file which has been provided to me, I am satisfied the FCA have taken on board the information you shared with it and used it appropriately where the need arises. Unfortunately, I cannot share much more

than this, but as mentioned previously it is better that I am able to see the confidential material.

*My decision*

18. In my preliminary report I upheld Element Two of your complaint and since then, I am pleased the FCA have agreed with me. The FCA should have offered ex gratia of £100 not £75 in light of the complaint handling delays. I **recommended** the FCA make the shortfall of £25 payment to you to reflect the correct amount of ex gratia that should have been offered which was £100. The FCA confirmed with me that it accepted my recommendation and apologised for this oversight. It has also informed me that it has processed the additional payment and contacted you to apologise for the error and explain the payment will be with you soon.
19. In summary, Element Two of your complaint has been upheld, Elements One, Three and Four have not been upheld.

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Complaints Commissioner

17 November 2022