

05 September 2018

Final report by the Complaints Commissioner

Complaint number FCA00318

The complaint

1. You asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and by the regulator. I apologise for the length of time it has taken to review this complaint.

What the complaint is about

2. You complained to the FCA that you had provided information about Bank X to the FCA's Whistleblowing Team, in which you set out your concerns about various inappropriate behaviours within the Bank, to the detriment of customers, and you allege that the FCA did not act appropriately on this information.

3. You also alleged that the FCA had a duty to you as a whistleblower to provide an opinion at your employment tribunal (ET) hearing about whether or not the Bank had behaved appropriately, but the FCA failed to do so.

4. You contacted the Police with your allegations, and the Police told you that it would not be taking action because the FCA had informed the Police that it was taking no further action. You believe that the FCA's actions in relation to this investigation amount to interference with a criminal investigation, and you complained to the FCA about this.

5. You also considered that the FCA's actions had been compromised by the fact that one of the FCA staff who was involved in handling the intelligence provided had previously been an employee of Bank X, and you added a complaint about that matter.

What the regulator decided

6. The FCA did not uphold your complaints. It issued two decision letters to you, one was about eight months after your complaint and one about 14 months after. It said:

- a. The information you provided had been prioritised and carefully considered, and appropriate action had been taken;
 - b. The FCA was under no obligation to provide an opinion to the ET and does not normally become involved in private disputes. It said that the ET had apparently been able to reach a judgment in your case without seeking the FCA's views;
 - c. There was no evidence to support your allegation that the FCA inappropriately intervened in a police investigation;
 - d. There was no evidence to suggest that the member of staff who had previously been employed by Bank X had behaved inappropriately. The person concerned had not been involved in the decisions about how to pursue the information which you had supplied.
7. The FCA's decision letter went into considerable detail about the steps which it had taken.

Why you are unhappy with the regulator's decision

8. Your complaint letter to me consisted of 40 pages of representations. I believe your main reasons for disagreeing with the FCA's decision letter are as follows:

Element one

You feel the FCA has failed to adequately investigate Bank X as a result of your whistleblowing disclosures.

Element two

You believe the FCA ought to disclose to you and the public in general what actions it took as a result of your disclosures.

Element three

You believe that the FCA made knowingly false representations to the Police in order to thwart an investigation into the wrongdoings alleged by you.

Element four

You believe that the FCA had a duty of care to support you as a whistleblower, namely by providing an opinion at your ET hearing.

Element five

You believe the FCA gave conflicting statements as to why it would not provide an opinion at your ET.

Element six

You believe that the FCA's failure to provide the requested opinion resulted in a miscarriage of justice as the ET did not find you had made protected disclosures.

Element seven

You were relying on the FCA complaint response, so you could appeal your ET judgment, but that response was so delayed that you lost the opportunity to appeal.

Element eight

You consider that the response was not only badly delayed, but deliberately misleading.

Element nine

You believe Bank X 'skewed the ET's judge' at your tribunal, and that he went beyond his remit as it was not his role to adjudicate on 'wrongdoing'. You further invite me to comment on various aspects of the ET with respect to alleged falsification of statements by Bank X employees.

Element ten

You believe that Bank X whistleblower policy and PCAW Model whistleblower policy, both approved by the FCA, were knowingly not consistent with the ET case law.

Element eleven

You repeat that an FCA employee who may have been involved in reviewing your disclosures to the FCA was conflicted as they had worked for Bank X before.

Element twelve

You have concerns about the FCA's response to your Subject Access Request, both how long it took for them to provide a response and the substance of that response.

Element thirteen

You have subsequently expressed concern that the FCA may not have provided me

with all the information it holds on your complaint, based on the fact that in response to your Subject Access Request the FCA Freedom of Information Team did not disclose to you a recording of a telephone call between you and FCA staff.

Preliminary points

9. I should explain first what I cannot investigate.

10. First, I cannot rule on points of law, nor can I interfere with decisions of courts and tribunals: their findings are binding upon me. This means that I cannot investigate elements six and nine. Nor can I consider element ten, since that would involve interpreting the law, unless there were clear evidence of the FCA *deliberately* circumventing the law – and I see no evidence of that. These are matters which would be for the courts to decide.

11. Element twelve: any concerns you have about the FCA's response to your Subject Access Request should be raised with the Information Commissioner's Office: that Office is responsible for such matters, and I cannot intervene.

12. For the reasons above, I cannot investigate elements six, nine, ten and twelve of your complaint.

13. I should also explain that it is not my role to interfere with the FCA's reasonable exercise of its discretion on regulatory issues. As the FCA has explained to you already, it is a risk-based regulator and has to make judgements about how to deploy its resources to best effect. This means that there will be some issues where it decides to take no action at all because the risk or impact is very low; some where it may decide that informal action is sufficient to persuade regulated entities to come into compliance; and others where it decides to use its formal powers. There will often be scope for debate about whether the regulator has made the right call in a particular case, but the mere fact that I might have done something differently would not be a reason for me to uphold a complaint: the question which I have to address is whether the FCA's actions fall within the range of actions which a reasonable regulator would take.

14. Finally, this complaints scheme is about the actions or inactions of the FCA. I cannot intervene in the dispute between you and your former employer.

My analysis

15. You were an employee of Bank X and you were told by them that a redundancy situation arose. You submitted a formal grievance to Bank X, setting out various concerns you had, but that grievance was not upheld and your employment with Bank X ended shortly after.

You commenced ET proceedings the month after your effective date of termination and approached the FCA as a whistleblower the month after that, setting out a number of allegations against Bank X.

16. Following your initial report, there was a large volume of correspondence between the FCA and you over the next two years, as well as lengthy telephone conversations and face to face meetings.

17. You continued raising concerns about Bank X, and the FCA continued to engage with you, but you were not satisfied with its responses and made a complaint.

18. The ET found that you had been unfairly dismissed but that this was due to redundancy and not on the other grounds alleged by you.

19. While there is a lot of background information relevant to your complaint and I appreciate that you have been through long and difficult processes with the Bank, the FCA and the ET, for which you have my sympathy, it is not necessary for me to set these out in greater detail in order to make a decision about your complaint.

Element one

You feel the FCA has failed to adequately investigate Bank X as a result of your whistleblowing disclosures

20. Having reviewed the FCA files and internal correspondence, I can see substantial evidence that the FCA took your allegations seriously. The information you provided was distributed for a thorough assessment to be made by the areas whose work covers the issues raised (including but not limited to the supervisors of Bank X), and the work was coordinated.

21. Consideration was given to the nature of the allegations, whether they were of concern to the regulator and, if they were, whether any of the “business as usual”, remediation action work or any other continuing project work was addressing the issues and whether further work was necessary.

22. I am satisfied that the FCA took considerable and appropriate steps within its regulatory remit to respond to the information that you had provided. Some of the factors which the FCA had to take into account were explained to you in some detail during the meeting you held with the FCA a few weeks after you first contacted them.

23. The FCA’s complaints investigation was detailed, thorough, and appropriately

challenged the internal decisions made and actions taken by the FCA teams. I do not uphold this element of your complaint.

Element two

You believe the FCA ought to disclose to you and the public in general what actions it took as a result of your disclosures

24. The FCA is on record as welcoming information from public-spirited individuals who bring forward issues for its consideration. However, as you were advised, the FCA will not generally provide feedback on what action has been taken in response to the information that it receives. 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 places restrictions on how that information is dealt with. In addition to this, 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. As a result, there is no general right for members of the public to know the outcome of reports that they make.

25. 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.

26. I acknowledge that there is a difficult balance to be struck between on the one hand protecting confidential information to enable the regulator to do its job, and on the other the need to give whistleblowers, and the public sufficient information and confidence to judge whether or not the regulatory system is operating effectively. Whether or not the current position strikes the right balance is a legitimate matter for debate, but it is not one that can be resolved by this Complaints Scheme. I am satisfied that the FCA's statement that it could not inform you of any action to be taken, or not taken, in response to the information you provided about Bank X, was reasonable in the circumstances. You had already been given significant information about the FCA's general approach.

27. I do not uphold this element of your complaint.

Element three

You believe that the FCA made knowingly false representations to the Police in order to thwart an investigation into the wrongdoings alleged by you

28. Having reviewed the correspondence between the FCA and the Police, it is clear to me that the FCA engaged with the Police, and did not provide them with misleading information or thwart an investigation. There was a mis-understanding by the Police about the position of the FCA. This was, however, rectified by the FCA, which made it clear to the Police that they were not seeking to prevent the Police from taking any action that the Police might consider appropriate.

29. Your view is that the Police were influenced not to investigate alleged offences under the Fraud Act 2006 because the FCA would not be prosecuting under FSMA 2000 or the Financial Services Act 2012. However, the Police are an independent organisation, and it is up to the Police to decide whether to pursue an investigation or not. I have not seen any evidence that the FCA tried to influence the Police. I cannot look at the actions of the Police under this scheme. However, if you feel the Police have acted inappropriately in response to the information you provided them, you should complain to them directly

30. I do not uphold this element of your complaint.

Element four

You believe that the FCA had a duty of care to support you as a whistleblower, namely by providing an opinion at your ET

31. The FCA has a duty of care to whistleblowers in respect of protecting their confidentiality, but no obligation to provide opinions or evidence as a voluntary witness for claimants in private disputes. Further details of the FCA's approach can be found at <https://www.fca.org.uk/firms/whistleblowing/our-role>.

32. The FCA, for various legal and policy reasons, including s348 of FSMA, does not offer opinions in legal disputes between individuals and regulated firms.

33. It is clear you disagree with this policy.

34. I have reviewed the FCA's internal correspondence and information on the "whistleblowing pages" of the FCA's website in relation to this particular point and it is my view that their rationale for this policy decision appears reasonable.

35. I appreciate your wider point that your request for an FCA opinion was not to settle a

‘private dispute’ but rather to comment on whether the alleged actions of Bank X were in the public interest. However, this would still have necessitated the FCA providing an opinion at an ET, which is not its policy.

36. In so far as the public interest is concerned, the FCA has explained to you that the activities you complain about were unregulated at the time you worked for Bank X.

37. In so far as the specific circumstances about one particular transaction which you alleged was a protected disclosure at the ET, it was for the Tribunal judges to apply their legal and practical expertise to the given set of circumstances and determine whether an employee was a whistleblower for the purposes of PIDA 1998 (which he or she may not be, even if he or she is classed as a whistleblower for the purposes of the ‘prescribed person’ they made their *potentially protected* disclosures to) and whether they should receive compensation under the same Act.

38. The Tribunal could have asked the FCA to provide an opinion on any of the points you raised, but they did not do so.

39. The ET accepted that Bank X genuinely decided to reduce its headcount and your unfair dismissal was due to Bank X not following the correct redundancy procedure. If you wished to dispute the ET’s findings, the appropriate way to do this was through an appeals process in the courts. This Scheme cannot intervene in that matter.

40. The fact that the FCA does not get involved in individual ET cases does not mean that they do not take notice of the concerns raised, such as yours in relation to how whistleblowing procedures work within regulated firms, and consider these from a regulatory point of view. As explained above, the FCA did consider the issues you raised about whistleblowing within Bank X and the banking industry as part of their continuing work in this area and changes have now been made to provide more stringent protection to whistleblowers.

41. I do not uphold this element of your complaint.

Element five

You believe the FCA gave conflicting statements as to why it would not provide an opinion at your ET.

42. On a number of occasions, you were told that the FCA does not get involved in private disputes between regulated firms and individuals and do not attend court hearings at the request of one party or the other as a matter of policy (as set out above).

43. You were told by email that *'we do not currently hold an opinion which we can provide to the Tribunal and therefore there is no suitable individual at the FCA in a position to give an opinion. If the Tribunal contacts the FCA, we would explain this and other points to them'*. This is the statement which you believe contradicts the others.

44. Having reviewed the files and the contemporaneous records of discussions about whether the FCA would be able to provide an opinion at your tribunal hearing, it is clear to me that careful consideration was given to this issue, and the possibility of meeting your request was looked into. The FCA's conclusion was that this would not be possible for a number of reasons, including the FCA's policy not to get involved in such litigation, confidentiality restrictions, and the fact that the FCA did not have an opinion. Furthermore, it was decided that if the ET needed any clarification, it could always contact the FCA directly.

45. I understand why you found the wording of the FCA email confusing, but I do not think that it was contradictory: the FCA gave you a number of reasons why it would not intervene in the ET proceedings. I recognise that you think that the FCA ought to have had an opinion on the matter, but I do not consider that the FCA's position was unreasonable.

46. As such, I cannot uphold this element of your complaint.

Element seven

You were relying on the FCA complaint response so you could appeal your ET judgment, but that response was so delayed that you lost the opportunity to appeal.

47. The FCA took over a year to issue its decision on your complaints, although partly this was due to the complexity of the case and you raising further points throughout the process. I see nothing to suggest that this delay was designed to prevent you from appealing (noting that the normal period for appeals of Employment Tribunal decisions is 42 days, although extensions can be granted). I consider, nevertheless, that the delay was unnecessarily prolonged and I welcome the fact the FCA has apologised to you for this. The purpose of the Complaints Scheme is to resolve matters without recourse to the courts, not to provide material for court proceedings, so while I agree that the FCA should, and has, apologised for the delay, I do not otherwise uphold your complaint. In any event, having read the ET judgment it seems to me highly unlikely that the complaint response would have been of much use to the Tribunal.

48. I also note here that significant amounts of time were spent by a number of people within the FCA to explore all the possible ways in which you could be assisted throughout your

correspondence with them. They showed concern for your wellbeing and took additional steps, such as meeting you in person, to try to provide you with the most support possible under the circumstances. I am satisfied that efforts were made to assist you as much as possible, rather than to hinder you.

49. I consider that the FCA was right to apologise for the delay in resolving your complaint, but I do not otherwise uphold this element of your complaint.

Element eight

You consider that the response was not only badly delayed, but deliberately misleading

50. I have found nothing to suggest that the complaint response was deliberately misleading. You have drawn my attention to the inaccuracy in the description of the opinion which you sought from the FCA in advance of the hearing – you were seeking an opinion on which of two possible answers was correct, not asking the FCA to support you – but while it is regrettable that the description was not more accurate, it does not affect either the FCA's or my conclusions.

Element eleven

An FCA employee who may have been involved in reviewing your disclosures to the FCA was conflicted as they had worked for Bank X before.

51. In response to this complaint, in essence, you were told that the member of staff about whom you complained, while having managerial responsibilities in relation to the handling of confidential intelligence, had no role in the decisions about how that intelligence was used.

52. The documentary evidence supports the FCA's position. I have seen the unredacted email to which you drew my attention, but that does not show any evidence that the member of staff concerned played any role in decisions about how to respond to the information which you supplied. I cannot uphold your complaint about this matter.

Element thirteen

You have subsequently expressed concern that the FCA may not have provided me with all the information it holds on your complaint, based on the fact that in response to your Subject Access Request the FCA Freedom of Information Team did not disclose to you a recording of a telephone call between you and FCA staff.

53. You allege that the FCA has demonstrated a lack of integrity in failing to disclose the call recording. You consider that the absence of the call recording allowed members of FCA

staff to misrepresent the purpose of your meeting with the FCA's Whistleblowing team, which was held around seven months after you initially contacted the FCA. You also have concerns that the FCA is cherry picking the information it has provided me on your complaint.

54. I have been provided with an extensive file from the FCA which provides the details of the background to your complaint, your communications with the FCA and the FCA's internal review of the information you supplied. The information is more than sufficient for me to see that the FCA has recorded and reviewed the substance of your complaints.

55. I appreciate that you were not provided with a telephone recording as part of your DSAR. You sent me the recording, and I have listened to it carefully. In my view, there is nothing in the recording to show that the FCA misled you. If you wish to make a complaint about the fact that the recording was not initially disclosed to you, that is something the Information Commissioner would have to review. However, I have seen no evidence that the FCA has sought to hide information from you, or from me.

My decision

56. For the reasons set out above, I am afraid that I am unable to uphold your complaint. I understand that this is not the outcome you were hoping for, but I repeat my reassurance that, having studied a large quantity of documents, I am satisfied that the FCA took extensive and reasonable action in response to your whistle-blowing, and there is nothing to suggest that the FCA acted in bad faith.

57. I recognise that you consider that the FCA should have done more, and that is a legitimate opinion, but it is not a basis on which I can uphold a complaint.

Antony Townsend
Complaints Commissioner
5 September 2018