

15 June 2020

## Final report by the Complaints Commissioner

### Complaint number FCA00584

#### *The complaint*

1. In April 2019 you contacted me because you were concerned about what you saw as the FCA's lack of progress in pursuing whistleblowing intelligence which you had supplied. I discussed the matter with the FCA, and in May 2019, the FCA agreed to take the matter on as a priority. For various reasons, discussed further in this report, you did not receive a response to your complaint until March 2020, and you approached me on 9 April, asking me to review the FCA's decision.

#### *What the complaint is about*

2. The FCA described your complaint as follows:

##### *Part One*

*You allege the FCA's Whistleblowing team (WBT) has not been engaging with you promptly since you provided it with intelligence. You also don't consider that this team has acted in a transparent way with you, despite your frustrations.*

##### *Part Two*

*You are concerned that the WBT has not concealed your identity as you requested. You believe the team are not being transparent, are not acting with candour and not being empathetic towards you.*

##### *Part Three*

*You allege that the Supervision team investigating your concerns hasn't acted in a timely or efficient way. To resolve your complaint, you'd like the WBT team to improve its processes.*

FCA00584

#### *Part Four*

*You are unhappy that one of the allegations which were due to be discussed at a meeting with the FCA, was suddenly removed from the agenda. You considered it disrespectful and uncourteous.*

#### *What the regulator decided*

3. The FCA partially upheld Part One of the complaint. While explaining that the FCA was inevitably restricted in what it could reveal to whistleblowers about the actions which it takes, since s348 of the Financial Services and Markets Act and the FCA's own policies make much of its interactions with regulated firms confidential, the FCA acknowledged that the whistleblowing team could have been more prompt and clearer in some of its communications with you.
4. The FCA also identified a two-month delay in the whistleblowing team passing some information from you to the supervision team – although it said that this did not appear to have had an effect upon the inquiries which supervision was making.
5. The FCA partially upheld Part Two of the complaint. Although it said that your identity had been properly protected, it said that in one respect you had not received sufficient assurance on that point, and that there had been one instance of your alias – although not your real name – being disclosed within the FCA. (You have drawn my attention to the fact that your alias was breached a second time in the more general breach of complainants' data which occurred last year, but you are pursuing that separately with the Information Commissioner's Office.)
6. The FCA did not uphold Part Three. While it understood why you would have felt frustrated that it took twelve months for the FCA to complete its investigations into the two issues which you had raised, it considered that the matters had been properly investigated within a reasonable timescale.
7. Part Four of your complaint was upheld. You had raised two issues of concern about the bank, but only one of them was discussed at the meeting. The FCA said that, while the decision not to discuss one of the two issues at its meeting with you was justifiable, the fact that you were given so little notice of this was

not defensible – there should have been better communication from the supervision team to the whistleblowing team.

8. The FCA offered you £100 because of the delay in sending you a decision on your complaint. It also said that the whistleblowing team would *consider ways to improve the way it checks documents before they are shared internally, to ensure they do not contain any identifiable information, and would in future ensure that whistleblowers receive an update every 12 weeks.*

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

9. In asking me to reinvestigate your complaint, you have said:

*Overall in the matters we are discussing the FCA has demonstrated fundamental failings in its ability to execute the two investigations, to manage a whistleblower trying to help and to manage a complaint process to a deadline or reasonable level of communications. I have read your annual report and many of your 2019 decisions and realise these problems are systemic - all the more reason for me to try and see this through.*

10. In particular:

- a. You consider that the information given to you at the end of the FCA's investigation of your intelligence was not sufficient – you comment that you received a better explanation in the Complaints Team decision letter, and that that information should have been given to you earlier. You suggest that the concluding communications from the FCA whistleblowing teams to whistleblowers should be of a higher standard;
- b. You consider that the pace of the FCA's investigation was inadequate;
- c. You infer that the FCA's investigations of your intelligence, which raised serious issues of consumer detriment, were superficial.

*Preliminary points*

11. Your complaint raises two linked problems which I frequently encounter in dealing with complaints. The first is the question of the FCA's exercise of its discretion. It is not my role to substitute my regulatory judgement for the FCA's. The FCA is rightly given a wide discretion in how it applies its inevitably finite

resources to tackle the multiple risks which it encounters. My role is limited to considering whether the FCA has acted reasonably in the circumstances.

12. The second problem is confidentiality. Like the FCA, I am required under s348 to respect the confidentiality of information supplied by third parties to the regulators; and the FCA has additional confidentiality policies to enable it to regulate effectively. I have access to the FCA's confidential papers, and on occasions I seek the FCA's agreement to release additional information where I think that that is justified. Even where I cannot release additional information, I am able to say whether or not I am satisfied that the FCA's actions (or omissions) have been reasonable.
13. These issues are particularly acute in cases, like yours, of whistleblowing. On the one hand, confidentiality has to be respected; but on the other, whistleblowers – and the public more widely – need to have enough information to be assured that the regulator is doing its job.
14. I note that in December 2018 you acknowledged the limitations in the feedback which you were likely to receive from the FCA; but I can see how, over the succeeding 12 months, you became increasingly frustrated by the apparent lack of action.
15. Within the confines of the law and the FCA's policies, I shall attempt to give you as much information as I can.

*My analysis*

16. I am analysing your complaint under two headings:
  - a. The way you were treated as a whistleblower;
  - b. The way your information was treated.

The way you were treated as a whistleblower

17. As explained in paragraphs 3, 5 and 7 above, the FCA has already concluded that it could have treated you better, and I welcome its candour on that issue. Although the record shows that the Whistleblowing Team did make efforts to update you, these were not sufficient to provide you with the reassurance that you needed. Furthermore (although you were unaware of it at the time), there was one internal breach of your alias. The FCA's recommendations should go

some way to addressing these deficiencies, although I would say two things: first, I query whether 12-weekly updates are sufficient for some whistleblowers, given their inevitable anxieties about their situation; second, in those updates, the FCA needs to be as bold as it can be in disclosing information, if the updates are to provide meaningful reassurance.

18. You have drawn my attention to the fact that, in your view, the communication from the Whistleblowing Team when it closed your case was noticeably less helpful than the explanation which you received from the Complaints Team. I agree with you.
19. The Whistleblowing Team's email of 20 December 2019 did give you some information. It told you that the FCA had pursued both the issues which you had raised, that it had spoken to the bank concerned, including speaking to the bank's internal audit function. You were, therefore, given some reassurance that your information had not been ignored. To that I can add that, having studied the FCA's confidential papers, I can confirm that what you were told was correct – significant work was undertaken and inquiries were made as a result of your disclosures.
20. The FCA's decision letter from the Complaints Team went into significantly more detail than the Whistleblowing Team's closure note. Although it did not, for confidentiality reasons, describe the detailed nature of the engagement with the bank, or the outcomes, it gave you a much better impression of the scale of the work which had been involved.
21. I think that the FCA should consider whether the Whistleblowing Team could give rather fuller responses, along the lines of that given by the Complaints Team, when it closes a case, particularly where – as in your case – significant amounts of material have been supplied by the whistleblower.

The way your information was treated

22. This is a more difficult issue, because of the confidentiality problems. As I have already indicated, it is clear to me that the FCA did not ignore your information – on both the issues which you had raised, there was research and there were interactions with the bank.

23. You had raised two issues. The first issue – the one which the FCA discussed with you at the meeting – was relatively straightforward, and led to some very clear outcomes, as I can see from the confidential papers. I recognise that you consider that the FCA ought to have dealt with the first issue more quickly, and you are frustrated that you do not know the details of how the issue of consumer detriment was addressed. For the reasons I have explained above, it is not my role to substitute my judgement for the FCA's. What I can, however, say is that the papers I have seen do show that there was a clear focus on consumer detriment, and I do not think that the time taken by the FCA was indefensible.
24. The second issue – the one which you considered the more important, and which you considered involved a very large sum of investor detriment - is harder for me to assess.
25. The material you disclosed on this second issue amounted to 51 pages of highly detailed and complex allegations. The FCA was one of four international agencies to which the disclosure was made. In your covering letter you said:
- I can be contacted at [ ] should you wish to have a walk through of the materials. Should you wish to discuss further I would prefer you to talk to each other [i.e. the four agencies] and organise collective multi agency briefing session/sessions as I will need to take time off work to assist you all. I propose two 90-minute conference calls a week apart at a time of your convenience. You can then assess any further support you want from me.*
26. In contrast with what happened in relation to the first issue – when the supervision team asked you some further questions, and then discussed the matter at the meeting – there were no follow-up questions to you on this second issue. Given the complexity of the issue, I can see why this caused you concern, particularly since it is clear from the confidential papers that the FCA team recognised the complexity of the matter.
27. I am satisfied that the FCA undertook significant work in response to the material which you had sent. It is not my role, nor have I the expertise, to challenge the outcomes of that work, but I can say that it appears to have been thorough and logical. Given the complexity of the work, the need to protect your identity, and

the need to interact with the bank, I do not consider that the FCA's actions were unnecessarily delayed.

28. However, I do consider that the fact that the FCA neither asked you any follow-up questions, nor engaged with you on this issue at the meeting, was a mistake, for two reasons:
  - a. First, it would have enabled the FCA to satisfy itself that it had fully understood your concerns in a complex area, and that you had no further information;
  - b. Second, it would have reassured you that FCA had grasped the issues you were raising.
29. The confidential papers show that there was some surprise internally at the fact that the team involved with issue 2 declined to join the meeting, and an unsuccessful attempt was made to persuade them to attend. The team responded that they considered they had done enough work on the issue already, but that 'if, however, you want to', the team dealing with issue 1 could ask you whether you had any evidence of actual detriment. This did not occur.
30. In my section on preliminary points, above, I made it clear that it was not my role to substitute my views for the FCA's regulatory judgements, and I claim no expertise in the field relating to your allegation against the bank. I know that you would like me to make findings on the adequacy and rigour of the FCA's investigations into both the issues which you have raised, but I am afraid I cannot do that. The furthest I can go is to say that it is clear to me from the confidential papers that substantial inquiries were made: it is not the case that your concerns were ignored or overlooked.
31. However, I make the following comments about the FCA's handling of this second issue:
  - a. In July 2019, you had been waiting for over six months to hear further news about your disclosures;
  - b. You had made the effort to attend a meeting with the FCA to discuss the matters;

- c. The meeting would have been an opportunity to test the FCA's understanding of your allegations, and therefore its provisional conclusions. It would also have allowed the FCA to see whether you had further evidence which might influence its understanding of the matter;
  - d. I do not understand why that opportunity was not taken, both to ensure that the FCA had the best possible information, and to demonstrate to you that it was taking your disclosures seriously;
  - e. That, coupled with the rather generic feedback given to you by the Whistleblowing Team at the end of your engagement with them, undermined your confidence;
  - f. In addition, the delays in handling your complaint have left you very dissatisfied.
32. In your response to my preliminary report, you have said that if the supervision team considered that it needed evidence of actual consumer detriment, 'Surely that is a threshold issue that they should have challenged me on, quickly and collaboratively, within a matter of weeks'. I have some sympathy with that view. You have supplied me with some further information on that point which, with your permission, I will forward to the FCA and invite it to consider.

*My decision*

33. I have no reason to question the FCA's regulatory judgements in this matter, but I do consider that its interactions with you, particularly on the second issue, were not handled as well as they should have been, and this caused you to lack confidence in the FCA's actions.
34. To a partial extent, this was remedied by the FCA's decision letter in response to your complaint.
35. I **recommend**:
- a. The FCA considers the importance of demonstrating to whistleblowers that it has fully understood the information supplied, and giving whistleblowers the opportunity to provide supplementary information and clarification;



- b. The FCA considers whether whistleblowers can be given fuller information when their cases are closed, to give them greater confidence that their disclosures have been appropriately pursued;
- c. The FCA considers whether 12-week updates are sufficient in all whistleblowing cases.

36. I am pleased to say that the FCA has accepted all these recommendations, and has undertaken to update me on their implementation.

Antony Townsend  
Complaints Commissioner  
15 June 2020