

7 October 2020

Final report by the Complaints Commissioner**Complaint number FCA00666***The complaint*

1. On behalf of your client you asked me to review a number of complaints about the FCA. Your client is a former employee of Bank X and has, over the years, provided information to the FCA about Bank X.

What the complaint is about

2. The FCA issued two decision letters.
3. The first decision letter issued on 31 October 2019 was about your client's complaint that the FCA had failed to treat a complaint he made about a member of FCA staff, individual S2, in confidence. Your client was also concerned that the FCA may have breached his confidence on other occasions.
4. You sent me this complaint (Complaint 1), but given that you had another outstanding complaint with the FCA, we agreed that I would wait until you had received your response from the FCA so I could review the totality of the matters if your client were dissatisfied with the outcome of the second complaint.
5. The second decision letter was issued by the FCA on 20 February 2020, and it summarised your client's complaint (Complaint 2) as follows:

A member of the FCA's staff said, in an email December 2013, that a statement (MAS) which you alleged had been made by Bank X in 2008 could not be found and repeated that in May 2014 – after the FCA had been supplied with a copy of the statement in March 2014.

That same staff member told your client, on two occasions, that the FCA's email of December 2013 was factually correct – when they knew it wasn't.

The FCA's Chief Executive [at the time] Andrew Bailey told parliament "a statement containing the substance of your client's allegations had been in the FCA's hands since 2014". You want to know why he later said "disingenuously" that the statement was made by [Bank X's CEO].

Why Andrew Bailey said MAS was covered in the FSA's report on Bank X's failure and the Treasury Select Committee hearings of 2009 – when they were not?

Why Andrew Bailey said MAS was public knowledge for 10 years – when it had not been?

That the FCA should have contacted your client when MAS came to light as it would have vindicated his previous allegations.

That the FCA has failed to protect bank staff, customers and shareholders affected or misled by MAS.

What the regulator decided

6. In its first decision letter, dated 31 October 2019, the FCA did not uphold Complaint 1 but apologised that your complaint about an individual had been disclosed to that individual, and confirmed that there had been 'no other instances of this kind'.
7. In its second decision letter dated 20 February 2020, the FCA decided not to investigate Complaint 2 on the basis that all the issues complained about took place more than 12 months before the raising of this complaint, your client was (or should reasonably have been) aware of the issues at the time, and there was 'no reasonable ground for the delay'.
8. The FCA also said that although it would not formally investigate those points, it considered all of them had been covered in the previous investigations of your client's complaints.

Why you are unhappy with the regulator's decision

9. You disagree that your client's complaints as summarised in the FCA decision letter of 20 February 2020 had been reviewed previously by the FCA, and that they are out of time. You also disagree with the decision in the FCA letter of 31 October 2019 not to uphold your client's complaint. You have written at length

to me about your concerns. I can summarise your client's complaints to me as follows:

- a. FCA staff member S and the FCA misled your client in statements to him in 2014 and 2015 (element one);
- b. Andrew Bailey misled your client that the statement MAS was made by Bank X's CEO and was in the public domain (element two);
- c. Andrew Bailey misled your client that the statement had been dealt with in the FSA's report into the failure of the Bank and by the Treasury Select Committee (element three);
- d. your client's former MP, an ex-employment lawyer, had been unable to advise your client properly of his tribunal and PIDA rights because he was led to believe by the FCA there was no 'substance' to your client's allegations (element four).

10. With respect to the FCA's decision letter issued on 31 October 2019, (element five) your client

- a. disagrees with the FCA not upholding his complaint whilst at the same time acknowledging it forwarded his email against your client's wishes to a member of FCA staff;
- b. disagrees that the FCA was right not to inform him of the above when it became aware in 2018;
- c. disagrees he made unfounded allegations against FCA members of staff;
- d. feels the FCA did not answer the question as to whether there were other instances when 'information provided in confidence to the FCA was not treated as such'.

Preliminary points

11. I have reviewed a complaint about MAS made by your client in 2014 (<https://frccommissioner.org.uk/wp-content/uploads/FSA01611.pdf>). That focused on what, if any, action the FSA undertook against Bank X in response

to MAS. It was a different matter from the complaint you now raise in element one.

My analysis

FCA staff member S and the FCA misled your client in statements to him in 2014 and 2015 (element one), and

Your client's former MP, an ex-employment lawyer, had been unable to advise your client properly of his tribunal and PIDA rights because he was led to believe by the FCA there was no 'substance' to your client's allegations (element four).

12. The issues discussed in element one of the complaint arose following a data subject access request you made to my office in 2017.
13. These issues were the subject of protracted correspondence (but not a formal investigation) between you and me and the FCA until November 2018. Given you have been aware of these issues since 2017, the FCA is correct in saying that you knew about them for longer than 12 months before raising the complaint, and I agree with the FCA that they should not be considered further under the Scheme.
14. I can see, however, from the FCA file, that it has provided you with a full response on this matter in correspondence leading up to your complaint.
15. The background to this complaint is that your client contacted the FCA in 2013 to say that, whilst an employee of Bank X in 2008, he had seen a statement (MAS) published on Bank X's intranet in 2008 issued by Director X which asked staff to reassure shareholders that the Bank was well capitalised. Your client did not have a copy of this message but recalled seeing it. I will call this statement A.
16. Your client continued to correspond with the FCA on this and other matters. During that correspondence, the FCA told your client in 2014 that it had liaised with Bank X, which had undertaken its own investigations as to whether such an intranet statement (A) had been circulated and concluded it had not. The FCA also told your client it did not consider those investigations were inadequate and therefore the FCA would not take further action with respect to

statement A unless new evidence emerged which warranted revisiting the decision.

17. In 2017 after your client had received information from a subject access request to my office, and following further correspondence with the FCA, your client was told by the FCA that an intranet statement, similar in substance to the one your client referred to, had in fact been posted on Bank X's intranet at around the same time your client alleges in 2008. I will call this Statement B.
18. A meeting to discuss Statement A and B (among other matters) was held between you, your client, his MP, and the FCA's Chief Executive as well as a number of other parties on 5 March 2018. There was further correspondence and the FCA asked me to write to you about what I had seen in the FCA records regarding message B (which I will refer to below), and which I did on a number of occasions between April and November 2018.
19. You feel that the FCA misled your client about Statement A. I can see that the FCA addressed this matter in a letter Andrew Bailey wrote to your client's MP on 6 April 2018.
20. The FCA's position is that neither it, nor Bank X, have found a statement which matches the terms of the statement your client insists it holds (statement A), that is, a statement which was issued by director X and included the phrase 'well capitalised', and expressed to be used to provide reassurance to shareholders.
21. The FCA states the existence of a statement in similar terms (B) had been publicly acknowledged since at least 2009 (when the CEO of Bank X acknowledged the existence of this statement before the Treasury Select Committee). However, Statement B differs in that it does not appear to have been issued by director X and does not include the phrase 'well capitalised' or refer to shareholders.
22. The FCA states it was also aware that your client had been in correspondence with Bank X on this matter. The Bank had informed your client that although it could not find a statement matching statement A in its records, it had found statements of a similar nature which it had posted on its intranet.

23. The FCA's position is that given the above, your client was aware that statements such as statement B existed. However, the FCA's focus was a specific statement A, rather than general statements on the subject matter. The FCA could not identify the specific statement A your client alleged had been made.
24. In your complaint to me you say 'The FCA has latterly relied on preposterous assertions that it was a statement slightly different to the one [my client] whistled as if this had confused them.' It is your view that the FCA 'lied' to your client in 2014 by not telling him about the existence of a similar statement, B, of which it was aware.
25. I can see from the information before me that knowledge of statement B and similar statements made by Bank X was in the public domain at the time your client made allegations about statement A to the FCA in late 2013. It was referred to in the Treasury Select Committee hearing in 2009. You have sent me a letter dated from 2014 from the Serious Fraud Office to your client's former MP in which it is made explicit that statements similar in nature to statement A, in particular statement B, had been acknowledged in public.
26. There is a clear dispute between you and the FCA in respect of both the inferences and conclusions that should be drawn from that information. You feel the FCA ought to have drawn your client's attention to the existence of a similar statement to statement A, whereas the FCA says it was responding to the more narrow point of the existence of a specific statement A, as it relied on the fact Bank X had informed your client of the existence of similar statements, and that further, these had been acknowledged publicly.
27. The FCA has given you a full explanation about its position which you do not accept.
28. I am sorry to hear how the matters above have affected your client. I appreciate there is a difference in opinion about what, if anything, should have been disclosed to your client about the existence of statement B. However, I have not seen any evidence to show that the FCA sought to be dishonest in its correspondence with your client, and I would not be able to take this matter further even if it were not out of time.

29. In response to my preliminary report, you have proposed that statement A and statement B are in fact the same statement. From the evidence available to me, I cannot determine this, as I have told you before. But what I can say, as I have said to you before, is that the substance matter of the statement is one the FCA and I have looked into before. The matters leading up to the collapse of Bank X, and subsequent events, have been the subject of an exhaustive public inquiry, which go well beyond the scope of this Scheme.
30. You also say that the FCA, in particular FCA staff member S's actions 'of April and May 2014 and September and October of 2015 denied [my client] the potential of bringing a PIDA based tribunal against Bank X, on the basis that the FCA had concealed the existence of the statement at the time he was effectively constrictively dismissed in 2013', and that your client's former MP was misled by the FCA and so could not advise him. I do not think that this is a matter which the FCA has investigated, but in my view it is well outside the usual 12-month time limit.
31. However, I have outlined above the main points I have seen from the evidence available to me, namely that the FCA was aware that your client knew that statements similar to statement B existed but that he alleged a different statement, (A) was posted on Bank X's intranet site, which is why the FCA focused on the existence of statement A. I have not seen statement A in the files I have received from the FCA. The Complaints Scheme cannot deal with PIDA questions. If your client wishes to review his options for PIDA claims the best course of action would be for him to seek legal advice. If he feels it would be helpful to rely on my final report in obtaining legal advice, he may do so if he chooses.

Andrew Bailey misled your client that the statement was made by Bank X's CEO and was in the public domain (element two)

and

Andrew Bailey misled your client that the statement had been dealt with in the FSA's report into the failure of the Bank and by the Treasury Select Committee (element three)

32. The FCA view remains that the underlying issues of these two elements of complaint are those already covered by the earlier investigations: namely dissatisfaction with the FCA's handling of MAS and/or its disclosure of its involvement in MAS. However, during the course of my enquiries, the FCA accepted that it should review these complaints. My preliminary view was that the best course of action is to allow the FCA to review these complaints first, as that is usually the best way to resolve matters..
33. In your response to my preliminary report you said that as the FCA had the chance to deal with these matters prior to my involvement and 'chose not to', you now request that I deal with these matters.
34. I have considered your request and reviewed the points you raise. The FCA has recently reviewed a similar complaint from your client's former MP on the same matter. The FCA has acknowledged that some of its statements should have been clearer – and that it was knowledge of the statement, rather than the statement itself, that was in the public domain.
35. I agree that the FCA should have drafted more carefully, but again I do not think that much hangs upon this – it was the fact that statements of this kind had been made, rather than their precise wording, which was important.
36. I agree that it is the existence of statements of this kind which is the important point, but that has been acknowledged for more than ten years, and I have looked at that matter previously. The matters leading up to the collapse of Bank X, and subsequent events, have been the subject of exhaustive public inquiry, which go well beyond the scope of this Scheme.

The FCA's decision letter of 31 October 2019 (element five)

37. On 3 October 2019 your client complained that he had been tipped off by an anonymous party that in 2015 the FCA had disclosed an email from him to a member of staff against your client's wishes, and did not inform your client either at the time or when the then Chief Executive became aware of the matter. Your client also asked the FCA whether there were other instances of this happening.

38. The FCA responded on 31 October 2019. It confirmed that there were no other instances of a breach of your client's confidence identified. The letter did not uphold the complaint but
- a. acknowledged that it did disclose an email against your client's wishes to a member of staff and apologised to your client, as it could have investigated your client's allegations without notifying the staff member S2;
 - b. said that your client should nevertheless have inferred from the FCA responses in 2015 that it had disclosed your email to staff member S2;
 - c. said that the FCA's Chief Executive's office was made aware that your email had been disclosed against your wishes in 2018, but decided not to bring it to your attention given your history of making unfounded allegations against staff member S2.
39. I find the logic of the FCA's response difficult to follow. It seems obvious to me that the letter should not have been disclosed against your client's wishes save in exceptional circumstances and that, having realised that it had been, the FCA should have given you an explanation. The FCA claims that you have made unfounded allegations against its staff, but that is not really relevant to the issue. The FCA has simultaneously rejected your complaint and apologised for what happened.
40. I uphold the complaint that your client was not informed either in 2015 or again in 2018 that his email had been disclosed to staff member S2. I have **recommended** the FCA apologise to your client for this, but the FCA has not accepted this recommendation. The FCA says it *'has already apologised for the error that took place in 2015 which meant that the complainant's expectations were not met, whilst noting that disclosure in some form was necessary to investigate the (unfounded) allegations. It will not apologise again.'*

My decision

41. I agree with the FCA that element one of your client's complaint is out of time. I appreciate you disagree on this point and feel the complaint should not be time barred. Regardless of whether the complaint is out of time or not, both the FCA and I have addressed the substance of the complaint. I am satisfied the FCA has provided you with a full explanation about the matter in previous

correspondence. I appreciate you are not satisfied with the FCA's explanation, but I have not seen any evidence to substantiate your view that the FCA lied to your client.

42. The FCA has acknowledged, with respect to element two and three of your complaint, that some of its statements should have been clearer – and that it was knowledge of the statement, rather than the statement itself, that was in the public domain. I agree with the FCA.
43. Element four of your complaint has not previously been considered by the FCA, but I consider it is more appropriately dealt with elsewhere. If you client wishes to consider PIDA claims, the best course of action is for him to take legal advice.
44. I **uphold** your client's complaint in element five that the FCA did not inform your client in 2015 and 2018 that it had not disclosed one particular email from them to a member of FCA staff against your client's wishes. I **recommend** that the FCA apologises for this, although the FCA has indicated that it will not accept this recommendation.

Antony Townsend
Complaints Commissioner
7 October 2020