

7 October 2020

Final report by the Complaints Commissioner**Complaint number FCA00670***The complaint*

1. On 20 August 2020 you asked me to review a complaint about the FCA. You had approached me last year, and I had asked you to make your complaint first to the FCA, as is the norm under the rules of the Scheme.

What the complaint is about

2. The FCA summarised your complaint as follows:

'Part One

You allege that you were misled by Andrew Bailey and [FCA staff member S] in relation to both the existence, and the FCA's knowledge, of a statement made on [Bank X]'s intranet in 2008. In your response to my letter of 7 April 2020, you explained that Part One applies to all of the comments you made in the Parliamentary debate on whistleblowing and those made in your letter to Andrew Bailey of 8 October 2019. This includes the following points:

- a. You had been told by [staff member S] that [Bank X] had investigated whether there was an intranet statement and it had concluded that there was no such statement. You were told that the FCA could give no further information at that time. This was two months after the FCA had received an intranet statement from another source that was similar in meaning to the one your constituent had referred to.*
- b. Andrew Bailey misled you when he told you that the statement discussed by [Bank X's] CEO in 2009 with the Treasury Select Committee (TSC) had been in the public domain for nearly ten years.*

c. *In its dealings with you, the FCA repeatedly denied knowledge of the intranet statement your constituent referred to even though internal FCA emails have revealed it had the statement in March 2014 and those emails contained the comment “the intranet notice that [your former constituent] refers to was online between 17 September 2008 and January 2009... as staff used it to take reassurance that all was well which would tend to support [your former constituent’s] allegations”.*

d. *You alleged that the FCA’s quote to The Times amounts to defamation of character.*

The Complaints Commissioner has already explained to you that he would not investigate an allegation of defamation of character under the Complaints Scheme and you amended your complaint to an allegation that the FCA’s quote was unjustified and unacceptable. This separately forms Part Two of this complaint so I have not considered it under Part One.

Part Two

You believe it was unjustified and unacceptable for the FCA to say that your Parliamentary statement made in the whistleblowing debate of 3 July 2019 was “completely untrue”.

Part Three

You feel that the response you received from Andrew Bailey dated 21 October 2019 failed to engage with your letter of 8 October 2019.

What the regulator decided

3. The FCA did not uphold your complaint. It said:

I have not upheld Part One as I have not found that you were misled by Mr Bailey or [staff member S]. It was reasonable for [staff member S] to say that no further information could be provided regarding [the complainant’s] allegations because the Confirmed Statement received by the FCA was not [Statement A] that [your former constituent] was pursuing. My view is that further information could not be shared regarding the Confirmed Statement because of the confidentiality restrictions which had been explained. It is also a consideration that the

Complaints Team had been asked to review [your former constituent's] dissatisfaction with [staff member S's] responses.

I think that at times the FCA could have been clearer in some of its correspondence regarding the availability of the statement discussed [.....] at the TSC. However, the line that you refer to from Mr Bailey's letter of 6 April 2018 was taken in isolation and did not include the preceding two sentences which provided more information. Overall, my view is that the FCA has, in the main, stated or alluded to the fact that it was not the statement itself that had been in the public domain but rather it was the fact the statement existed that was in the public domain.

I have not upheld Part Two as the FCA's response to the reporter from The Times was limited to your comments on whether the FCA received [Statement A], which it did not. I also reviewed the other points you made about [your former constituent's] case during the whistleblowing debate for completeness and my view is those points were not accurate.

I have not upheld Part Three because I do not think Mr Bailey's response of 21 October 2019, in which he confirmed he did not accept the arguments you had made, was unreasonable given that the points you made had already been addressed and the FCA's stance on them had, in my view, previously been made clear.

Why you are unhappy with the regulator's decision

4. You consider that the FCA should have told you that it was aware that a similar statement to statement A had been issued by Bank X. The fact it did not means it was not acting in the public interest but covering up for the bank and misleading you.
5. Notwithstanding who wrote the statement, you feel that the existence of such a statement amounted to market abuse by Bank X in 2008 and that the FCA should be concentrating on this point rather than arguing the narrower point of who wrote the statement.

6. You do not agree that you took Andrew Bailey's comments out of context. You feel the statements the FCA Chief Executive makes should be clear and accurate.

My analysis

Part One

7. The background to this complaint is that your former constituent contacted the FCA in 2013 to say that, whilst an employee of Bank X in 2008, he had seen a statement 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 former constituent did not have a copy of this message but recalled seeing it. I will call this statement A.
8. Your former constituent, and you, continued to correspond with the FCA on this and other matters. During that correspondence, the FCA told your former constituent and you 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 former constituent and you that it did not consider those investigations were inadequate and therefore the FCA would not take further action unless new evidence emerged which warranted revisiting the decision.
9. In 2017 after your former constituent had received information from a subject access request to my office, and following further correspondence with the FCA, your former constituent and you were 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.
10. A meeting to discuss Statement A and B (among other matters) was held between you, your former constituent, and the FCA's then Chief Executive as well as a number of other people on 5 March 2018. There was further correspondence and the FCA asked me to write to you and your former constituent about what I had seen in the FCA records regarding statement B, and which I did on a number of occasions between April and November 2018.

11. You feel that the FCA misled you about Statement A. I can see that the FCA addressed this matter in a letter Andrew Bailey wrote to you on 6 April 2018.
12. The FCA's position is that neither it, nor Bank X, have found a statement which matches the terms of the statement your former constituent 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.
13. 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.
14. The Serious Fraud Office wrote to you on 31 July 2014 to say 'you may be aware that an intranet message similar to the one described by [your former constituent] was posted on Bank X's intranet in September 2008. Details of this are in the public domain through a hearing held by the house of Commons Treasury Committee on 10 February 2009....This message remained on the bank's intranet for some time, but your constituent alleges that a different, subsequent message was posted closer to the time when the bank's difficulties became publicly known.'
15. In your complaint to me you say that the FCA ought to have told you about the existence of statement B.
16. The FCA's position is that you were aware that statements such as statement B existed (see paragraph 14). However, the FCA's focus was the specific statement A, rather than general statements on the subject matter. The FCA could not identify the specific statement A you and your constituent alleged had been made.
17. There is a clear dispute between you and the FCA about both the inferences and conclusions that should be drawn from this. You feel the FCA ought to have drawn your 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 that you were aware of the existence of similar statements such as statement B, and that further, these had already been acknowledged publicly.

18. The FCA has given you a full explanation about its position which you do not accept.
19. I appreciate there is a difference in opinion about what, if anything, should have been disclosed to you 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 you. I also note that your former constituent was insistent that it was the particular statement, Statement A, that he was interested in.
20. I appreciate you feel strongly that that the existence of the statement should have been disclosed to you by the FCA at an earlier point. While I think that would have been helpful, I am afraid that I do not think that the failure to disclose it is of great significance, given that the existence of a statement of that kind was already public knowledge. The FCA has already acknowledged that some of its statements should have been clearer – it was knowledge of the statement, rather than the statement itself, that was in the public domain. Andrew Bailey's letter said that 'it is important to note that existence of a statement in similar terms has been publicly acknowledged since 2009, if not earlier', though a later sentence in the letter referred to the statement having been in the public domain.
21. 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.
22. In your letter to me, you say that 'For the FCA to focus upon the narrow point of who made these statements misses the point'. The FCA has focussed upon the point because your former constituent focussed on it. 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 in earlier complaints.

23. In your response to my preliminary report you have said that ‘a bank responsible for the most appalling and irresponsible behaviour, which has had such devastating consequences for so many people, has got away with it because the regulator fails to hold them to account’. 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.

24. For these reasons, I do not consider that the FCA behaved unreasonably, and I do not uphold Part One of your complaint.

Part Two

25. Turning to Part Two, the FCA has defended its statement to the Times that what you said in a Parliamentary debate was ‘entirely untrue’. The FCA said to you:

The FCA was contacted on 3 July 2019 by a reporter at The Times. He asked whether the FCA would be responding to the allegation you made in the whistleblowing debate that Andrew Bailey had misled you regarding Mr Wright’s case in relation to an internal email which appeared to support Mr Wright’s case only being disclosed under a subject access request. The FCA responded with the quote “This is completely untrue and we have previously written to [you] to explain this”.

26. As I understand it, the FCA’s comment related to your allegation that you had been misled. As I have said in paragraph 19 above, I have seen no evidence that the FCA sought to be dishonest with you. I recognise that you consider that the FCA ought to have revealed to you the existence of statement B, but I think that that is a matter of opinion.

27. For those reasons, I do not uphold Part Two of your complaint.

Part Three

28. Finally, on Part Three of your complaint, it seems to me that by the time Andrew Bailey wrote to you on 21 October 2019, there had been exhaustive discussion of the points at issue, although unfortunately not agreement. In

those circumstances, I do not think that his reply – effectively that he had nothing further to add – was unreasonable.

29. I do not uphold part three of your complaint.

My decision

30. The origin of this prolonged matter is the very serious mismanagement of Bank X, and the concerns about the adequacy of the regulation of the financial services sector more generally. These have been the subject of extensive public debate, and improvements to the system continue to be debated.

31. The interactions between your former constituent, you, and the FCA have been unsatisfactory, have been the subject of prolonged correspondence; and have involved my office. As you know, I have been critical of some aspects of the FCA's handling of earlier parts of this matter.

32. In my view, your complaint is the culmination of all these matters, and has arisen because of confidentiality restrictions upon the FCA, some sub-optimal communication by the FCA, and some fundamental disagreements about approach. However, I have seen no evidence of deliberate misleading, and in the circumstances, and for the reasons given, I do not uphold your complaint.

33. You have expressed concern that I have formed my view without focusing on the seriousness of your complaint, based on the fact I completed my review of your complaint within two weeks, whereas the FCA had taken months to review your complaint. I can assure you that I have considered your complaint thoroughly: I was already acquainted with the main facts surrounding your complaint, and that helped to expedite my investigation.

Antony Townsend
Complaints Commissioner
7 October 2020