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“A cultural shift is needed to believe the whistleblower”

Despite high-profile failures in the banking industry to operate robust whistleblowing procedures, the financial regulator has yet to show unequivocal support for those who risk their livelihoods to blow the whistle. By **Hannah Laming and Miranda Ching**.

Public concerns were recently raised in response to the whistleblowing cases against Barclays plc and Royal Bank of Canada. With its strategy currently under the spotlight, how effective is the Financial Conduct Authority’s approach to whistleblowers? Can it only go so far without a cultural shift, combined with a move towards financially incentivising the whistleblower?

In May 2018, the FCA attracted significant criticism over its treatment of Jes Staley, the CEO of Barclays plc. Staley was fined after he had sought to unmask the identity of a whistleblower using the bank’s own compliance and investigations team. The FCA concluded that, while he had breached the standard of care required and expected of a chief executive, they did not find that he had fallen short of the standards of fitness and propriety, enabling Staley to continue in his position.

Furthermore, in July this year, a former Royal Bank of Canada currency trader was found to have been fired in 2016 after making repeated complaints concerning his employer’s compliance procedures. The trader in question, John Banerjee, won an unfair dismissal case at the employment tribunal. Critical of the bank’s conduct, the tribunal described it as being ‘egregious’. The tribunal further noted:

“[Banerjee] is dogged in the extreme and, on occasions, chose the wrong battles to fight. No doubt, he was a thorn in the side of his management. Most people choose to stay silent when something is wrong, as they want a quiet life. Those who blow the whistle must have remarkable and, at times, exhausting determination. Employers should take that into account when looking at whistleblowing complaints and ensure that they protect genuine



whistleblowers, even if they find them somewhat enervating.”

The tribunal clearly felt that employers (especially in the financial services sector) ought to work harder in protecting genuine whistleblowers. It should be noted that the bank strongly disagreed with the verdict. In any event, due to the public nature of the proceedings, Banerjee believes his career in the financial services industry to be over. The FCA is now reportedly investigating the bank’s whistleblowing practices.

This controversy has shown no signs of abating. In September this year, a group of self-described ‘banking whistleblowers’ confronted the FCA’s chief executive, Andrew Bailey, about the regulator’s treatment of whistleblowers. At the meeting, an audience member told Mr Bailey that he had blown the whistle 15 years ago while working in a bank, but this led to the demise of his career. He did not believe that the FCA was supporting major disclosures and commented that “the treatment of whistleblowers in this country is absolutely appalling”. He also said that cases similar to his were being ignored, claiming “There’s thousands of people that have been destroyed by banks, and you guys are supposed to be sorting that out but you’re not.”

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Clearly, there continues to be a high level of concern over how financial institutions treat whistleblowers and, in turn, questions arise over whether the FCA's approach to believing whistleblowers and protecting them is adequate.

The law

The United Kingdom's Public Interest Disclosure Act 1998 provides the primary protection for whistleblowers who raise concerns about matters of public importance at work. It protects their disclosures in circumstances that would otherwise be a breach of confidence, leading to their potential dismissal.

Regulated financial services firms must comply with SYSC 18 of the FCA Handbook on whistleblowing. In short, SYSC 18 sets out the requirements on regulated firms for the implementation of internal procedures, communications and handling of whistleblowing disclosures, provides for the role of the 'whistleblowers' champion', and implements obligations under MiFID regulations.

Importantly, SYSC 18 outlines the link between effective whistleblowing measures on the one hand alongside fitness and propriety on the other. On this point, the FCA would regard as a serious matter any evidence that a firm had acted to the detriment of a whistleblower. Such evidence could call into question the fitness and propriety of the firm or relevant members of its staff. This could affect the firm's continuing satisfaction of threshold condition 5 (Suitability), or an individual's status as an approved person or a certification employee.

The FCA's stance on whistleblowing

Given the recent examples of the poor treatment of whistleblowers, in June 2018 Christopher Woolard, the FCA's director of strategy and competition, announced that the regulator had increased the resources it allocates to investigate whistleblower complaints. Woolard said that "The reality is whistleblowers provide some of the best intelligence we get as an organisation." However, Woolard also said that "We have to be aware of what the motives are that prompt people to be whistleblowers." In saying this, Woolard appeared to signal the FCA's institutional reluctance towards believing whistleblowing complaints, even though it is increasing funding in this area.

As such, despite legislative and regulatory reform, questions remain over the extent to which protection from reprisals sufficiently incentivises whistleblowers to come forward. As we saw in the case of Banerjee, blowing the whistle may, in practice, mean that the whistleblower will be giving up substantial earning opportunities in order to serve the public interest.

As set out above, the FCA Handbook specifically highlights the link between effective whistleblowing

and fitness and propriety. However, critics say that the outcome in the case of Jes Staley suggests that the FCA is failing to take strong action against banks and individuals by applying a light touch to senior executives.

Such a stance is consistent with the FCA's reluctance to adopt financial incentives for whistleblowers. In a 2014 study, the FCA and Prudential Regulation Authority argued that there was no evidence to support the contention that monetary awards led to better enforcement outcomes. It was said that financial incentives presented a number of 'moral hazards': malicious reports might be encouraged, conflicts of interest that could be exploited in court by the subjects of any enforcement action would arise, and internal compliance programmes would be undermined, as would the duty of approved persons to be open with their regulator.

What emerges strongly from the report is a perceived societal distaste for payments to whistleblowers and a fear that this would lead to the opening of the floodgates for malicious employment claims. In fact, Woolard's recent public statement, which warned against potentially nefarious motives that might prompt false whistleblowing claims, indicates that the FCA's current position has not moved far beyond what it was in 2014. Unfortunately, it is one which is at odds with public opinion. It is also directly at odds with the tribunal's decision in Banerjee, which called for employers to consider how difficult it must be for whistleblowers to go public and to focus their efforts on protecting genuine whistleblowers.

HMRC's approach to informants

It may be helpful at this point to consider HM Revenue & Custom's approach to the matter of informants and whistleblowers. For many years, HMRC has made payments to whistleblowers who report tax fraud and evasion. The amount of the payment is discretionary, depending on what is achieved as a direct consequence of the information provided. In 2017, HMRC established a dedicated hotline to make it easy for members of the public to report tax fraud and evasion. As a consequence, HMRC received more than 40,000 tip-offs and paid out £343,500. Following major tax scandals being brought to light through the Panama Papers, the Government has made clear its priority to crack down on tax evasion and unexplained wealth.

Conclusion

HMRC's informant programme is but one illustration of how regulatory authorities can effectively incorporate a paid incentivisation programme to strengthen their enforcement agenda. In this regard, it would appear that current government policy on tax reform is

closely aligned with measures to incentivise whistleblowers.

Recent cases and anecdotal evidence of institutional and cultural barriers suggest that whistleblowers within the banking and finance industry find it particularly hard to speak out, for fear of the potential ramifications for their reputation and future earnings potential. It is difficult to see why, in the face of HMRC's success,

the FCA remains reluctant to introduce a similar programme.

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