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REGULATORY INTELLIGENCE

# UK bank-led redress service employee blows whistle on scheme conduct, lawmaker calls the scheme "sludge"

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Rachel Wolcott and Lindsey Rogerson, Regulatory Intelligence

An internal Business Banking Resolution Service (BBRS) whistleblower has made a protected disclosure to William Wragg MP (Con) alleging the scheme was managed to keep redress to a minimum. The scheme, which cost £40 million to run but paid less than £2 million in redress, will close in December.

The BBRS, established by seven banks as an independent process for reviewing legacy disputes brought by small and medium enterprises (SMEs), is little more than an a "sludging exercise," Wragg told Regulatory Intelligence in a statement.

The whistleblower's disclosure and Wragg's comments come as the Financial Conduct Authority (FCA) is to decide on the best way to deal with SME banking complaints that currently fall outside the Financial Ombudsman Service's (FOS) remit.

Earlier this month, Economic Secretary to HM Treasury Andrew Griffith confirmed the BBRS would be closing at the end of the year. He further indicated that an FOS expansion was the government's preferred option for dealing with SME banking disputes in future.

The Treasury Select Committee (TSC) will convene its own inquiry into SME lending this autumn. It will cover access to funding, dispute resolution, and redress. It has not yet decided whether to call BBRS Chair Lewis Shand-Smith to give evidence.

**Whistleblower**

As of June 2023, only 28 cases directly adjudicated by BBRS have yielded financial awards, BBRS's own figures showed. An additional 56 cases were settled between complainants and banks, with some BBRS involvement, resulting in financial awards.

A BBRS spokesperson said the service helped "hundreds of SMEs" tackle a range of complex business banking complaints, with many walking away with "life-changing sums of money."

"To date substantially more than £1 million in financial awards have been made to SMEs," the BBRS spokesperson said.

The largest single redress payment to an SME was £1,200, the whistleblower told Wragg.

The BBRS was deliberately run contrary to its own rules, its employees lacked competence to understand and judge complex cases, and some of its decisions were arbitrary, the whistleblower said.

"In addition to financial awards, the BBRS has also secured non-financial awards that have had a transformational impact for SME owners. These have included rearranging lending terms and conditions, as well as discharges from personal guarantees and debt recovery rearrangements," the BBRS spokesperson said.

**BBRS governance criticised**

At the same time, lawmakers have criticised the BBRS board's governance practices, as well as the "threatening" tactics it used to manage its reputation.

"Forty million pounds to set up. Less than £2 million paid out in three years. Six hundred claimants. Twenty-eight payouts. The accusation that the BBRS is little more than a sludging exercise is increasingly irrefutable," Wragg, the co-chair of the All-Parliament Party Group for Fair Business Banking, said.

A BBRS spokesperson did not deny its lawyers Schillings and Osborne Clarke sent at least six letters to individual scheme critics, including journalists, threatening them with Strategic Lawsuits Against Public Participation (SLAPPs).

"We have previously taken steps to protect our reputation from defamatory and baseless remarks, as damage to our reputation may prevent SMEs from seeking our help for their unresolved disputes," the spokesperson said.

BBRS also used DeHavilland Information Services, a political strategy advisor, to track critics' and MPs' social media accounts.

"I don't think it is controversial to suggest that a redress service shouldn't be spending more money on threatening journalists and spying on MPs' Twitter accounts than on payouts for the decades-long injustices it was supposed to rectify. That the board felt the need to sign off on these dirty tactics and pay BBRS directors such sky-high amounts to carry them out, is questionable to say the least," Wragg said.

In the two years to December 31, 2022, the BBRS paid its eight directors/non-executive directors £2.3 million. Sally Berlin replaced Alexandra Marks as Chief Adjudicator on 24 May 2022.

The highest-paid director earned £911,000 over the same two-year period, according to BBRS's annual report.

In all, the BBRS had 30 employees in 2022, earning a collective £3.1 million in pay and pension contributions.

**Sludge**

The FCA's final guidance (FG22/5) on its new Consumer Duty noted, "there can be commercial incentives for firms to create friction points (often called 'sludge') that deter their customers from taking action in their interests, such as making a complaint or switching product or provider."

Sludge is not consistent with the Consumer Duty, it said. However, the Consumer Duty only applies to micro-enterprises, not SMEs.

The FCA had an observer role on the steering group which established the BBRS, but it does not have oversight of the BBRS nor hold any formal role within it. While it does not regulate SME lending, the FCA does concern itself with banking conduct. In 2019, Andrew Bailey, Bank of England governor and former FCA chief executive, said banks should be accountable for SME lending under the Senior Managers Regime (SMR).

The FCA does, however, regulate the seven banks funding BBRS, which are Barclays, Virgin Money (including Clydesdale Bank and Yorkshire Bank), Danske Bank, HSBC UK, Lloyds Banking Group (including Lloyds Bank and Bank of Scotland), NatWest Group (including Royal Bank of Scotland, NatWest, and Ulster Bank Northern Ireland), and Santander UK. An FCA spokesperson declined to comment on the record about whether it was satisfied that the BBRS was fully independent from its sponsoring banks.

**SLAPP threats**

The BBRS sent at least six letters threatening legal action –SLAPPs – to its critics and a prominent business journalist, according to those who received them. The letters sought to stop recipients from questioning the BBRS's independence and from discussing whether its bank-appointed member should be registered as a "person with significant control" in the BBRS's entry on Companies House, the UK corporate register.

The UK government defines SLAPP actions as, "an abuse of the legal process, where the primary objective is to harass, intimidate, and financially and psychologically exhaust ones' opponent via improper means." The government is concerned that SLAPPs threaten free speech and the rule of law, and it has consulted on curtailing their use.

**Bank Appointed Member**

The BBRS's Bank Appointed Member is a corporate body registered in the UK named Resolution Service Appointed Member Limited. It is comprised of representatives from the seven participating banks and acts as the vehicle for them to interact with the BBRS. Unlike the other six independently voting members and non-executive directors, the Bank Appointed Member has no voting rights, the BBRS said.

In February 2021 – the same month it officially opened -- the BBRS changed its company articles and memorandum to give the Bank Appointed Member (BAM) powers of control or veto over any rules of the scheme.

"The Company and its directors shall not carry out any of the matters set out in the Schedule to these Articles without the prior written approval of the Bank Appointed Member," the articles say.

"The BAM does not exercise significant influence or control over BBRS. The BAM holds some reserved powers, which is commonplace for voluntarily funded independent organisations. The underlying purpose is to ensure that the BBRS continues to use its funding provided by the participating institutions as intended – to address SMEs' business banking disputes. The limited role of the BAM has always been clear and has not changed," the BBRS said.

However, the SME Alliance and Robert Chase, the former chairman of Norwich City Football Club, who passed away in March, commissioned an opinion from Simon Reevell KC on BBRS, which covered the Bank Appointed Member issue.

"Article 7.2k prevents Scheme Documents being amended unless the necessary approvals have been obtained, and the combination of Article 8.1 and the schedule prevents Article 7.2k or the definition of scheme Document being changed without the written consent of the Bank Appointed Member. The bank therefore enjoys a veto in respect of rule changes and finds itself in a fundamentally more favourable position than was the case under the previous articles," Reevell said.

The BBRS should register the Bank Appointed Member as a person of significant control, Reevell said.

**Waiting on the FCA**

The BBRS's Contemporary Scheme is currently scheduled to receive cases until the end of 2023. The future of SME dispute resolution depends on the outcome of an FCA consultation about widening the FOS's remit to include larger SME banking complaints.

The FCA is seeking to understand whether current thresholds for SMEs to be able to refer complaints to FOS continue to be appropriate according to its policy objective. Its objective is to provide FOS access to SMEs it thinks are likely to have insufficient resources to resolve disputes with financial services firms through the legal system.

(Rachel Wolcott and Lindsey Rogerson, Regulatory Intelligence)

Complaints Procedure

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