

## FINDINGS AND RECOMMENDATIONS: January 2017

### CIVIL SERVICE CODE

### COMPLAINT TO THE CIVIL SERVICE COMMISSION

Ref: 229

### FINDINGS OF THE PANEL OF INVESTIGATION

#### AUTHORITY

1. The Constitutional Reform & Governance Act 2010 requires the Minister for the Civil Service to publish a code of conduct for the Civil Service (known as the 'Civil Service Code'). The Act also prescribes the minimum requirement for this Code, namely that:
  - a. civil servants must carry out their duties to assist the administration they are employed to serve, whatever its political complexion;
  - b. civil servants must "carry out their duties with integrity and honesty; and with objectivity and impartiality".
2. The Constitutional Reform & Governance Act 2010 outlines the functions of the Civil Service Commission. It gives as one of the functions, in relation to the Civil Service Code:

*9 (5) The Commission –*

  - a) *Must determine procedures for the making of complaints and for the investigation and consideration of complaints by the Commission;*
  - b) *After considering a complaint, may make recommendations about how the matter should be resolved.*

#### OUTLINE OF THE COMPLAINT

3. The complaint was submitted by a Meat Hygiene Inspector working at the Food Standards Agency (FSA) concerning the way in which a whistleblowing disclosure he raised with the FSA was handled, its investigation and outcome. The disclosure concerned a contractor (**Person A**) working for the FSA, who the complainant believed was falsifying official records in order to cover up poor food hygiene practice within a food business operator premises. The complainant believes that

the investigation into his concerns was badly handled and that he suffered a detriment for raising them.

4. The complainant also makes a number of allegations about the conduct of several civil servants in the course of the investigation which, he argues, amounted to breaches of the Civil Service Code.
5. The complainant's allegations about the potential risk to public health, are that:
  - a contractor (**Person A**) working on behalf of the FSA was falsifying official records at the Food Business Operator premises where the complainant worked as a Meat Hygiene Inspector. The complainant believes the records were falsified to hide high levels of faecal contamination on meat being produced at the premises and to make it appear that the Food Business Operator was complying with hygiene regulations when they were not. The complainant believes that this represented a danger to public health by potentially allowing contaminated meat to enter the human food chain.
  - the FSA failed to act in an appropriate manner when the complainant raised his concerns on 15 January 2015, and did not follow its own Whistleblowing Policy. As a result, there were delays in investigating the complaint, which led to an escalation of issues and the deterioration of already poor working relationships – which in turn led to complaints of bullying and harassment and the raising of grievances. An official investigation into the complainant's concerns did not take place until March 2015. The key aspect, which is the malpractice concerning contamination recording, therefore continued unchecked for a longer period than would otherwise have been the case.
  - although the official FSA investigation into the complainant's concerns upheld the complaint and confirmed that **Person A** had falsified contamination records as the complainant had said, **Person A** was subsequently permitted to recommence duties on behalf of the FSA. This came about when the contractor organisation commissioned its own investigation into the concerns and came to conclusions that were different from the FSA, despite the FSA accepting that the findings of its own investigation were credible. The complainant also asserts that, in between the report of the investigation into his concerns by the FSA and that of the contractor, during which time the FSA had ordered that **Person A** should not be allowed to undertake work on their behalf, **Person A** did in fact undertake such work on two occasions.
6. The complainant's allegations about the improper handling of his concerns by civil servants at the FSA are that:
  - when the complainant originally raised his concerns, a senior FSA Manager (**Person B**), attempted to dissuade him from pursuing his concerns, asking that he 'park' or 'drop' them on the back of actions agreed at a meeting.

- the complainant's Line Manager (**Person C**) failed to take seriously his concerns about **Person A** and, rather than investigate the issue, attempted to blame the complainant's colour vision deficiency, despite the fact that it had already been established that this could not have had a bearing on the issue.
  - a Senior FSA Manager (**Person D**) was not objective in considering the concerns, but chose to side with the contractor and was responsible for the management decision which allowed **Person A** to be re-deployed to undertake duties on behalf of the FSA.
  - Senior FSA Manager (**Person E**), when reviewing the findings of both the FSA 's and the contractor's investigations into the complainant's concerns, failed to take into account the findings of the FSA's own investigation and interview key witnesses, thereby facilitating the operational decision to allow **Person A** to be re-deployed to undertake duties on behalf of the FSA.
7. The complainant also believes that as a result of his disclosure, he has suffered a detriment in that he has been isolated and bullied, resulting in a breakdown of his mental health.

## **METHODOLOGY OF INVESTIGATION**

8. The investigation of this complaint was conducted by the Commission's secretariat and adjudicated on by a panel comprising two Civil Service Commissioners and the (then) Chief Executive of the Civil Service Commission
- Kathryn Bishop, Interim First Civil Service Commissioner
  - Isabel Doverty, Civil Service Commissioner
  - Clare Salters, Chief Executive, Civil Service Commission
9. The panel based their initial assessment on an examination of the evidence provided by the complainant, the reports of the FSA'S investigation into the complainant's concerns and that of the contractor organisation, the conclusions drawn and the actions taken as a result. The panel assessed these findings, independently against the requirements of the Code.
10. Having carefully considered this evidence the panel also asked further questions of the complainant and civil servants at the FSA involved in the investigations into the complainant's concerns. The responses to these questions were assessed by the panel, enabling them to reach their conclusions.

## **EVIDENCE**

11. The panel had access to a wide range of evidence supplied by both the complainant, the FSA and other officials involved in the investigations. These included in particular:

**A:** Letter from complainant dated February 2016

- B:** Email from complainant dated March 2016
- C:** Letter in response to CSC approach from FSA dated 5 April 2016
- D:** FSA letter in response to CSC questions dated 5 May 2016
- E:** FSA letter in response to CSC questions dated 10 June 2016
- F:** Report of initial visit to FBO by **Person G**
- G:** Official report of the investigation by the FSA into the complainant's concerns
- H:** FSA review of the handling of concerns raised by the complainant
- J:** Executive summary of review of handling of concerns
- K:** Investigation of falsification allegations made by complainant about **Person A** by contractor organisation
- L:** Outcome of complainant's grievances appeal by **Person H**
- M:** Complainant's evidence supporting his assertion that public health is put at risk by false recording of contamination data
- N:** Report of the Peer Review into the case by FSA Scotland

12. The complainant raised his concerns under the FSA's official whistleblowing policy on 16 January 2015, submitting his evidence via email to a Senior FSA Manager (**Person F**). He received confirmation from **Person F** that he would be protected as a whistleblower. He heard nothing more for two weeks in which time **Person A** was alerted to the complaint when FSA veterinarian **Person G** visited the plant on a 'fact finding' mission on 30 January 2015. During this visit **Person G** was told by **Person A** that the complainant's colour vision deficiency was the reason for the concerns. At no point was the complainant interviewed despite the fact that he had information pertinent to the case. On 25 February 2015, the complainant contacted **Person F** and was told that an investigation into his concerns was underway. However, although a fact finding exercise was taking place, the formal investigation was not to commence until March 2015.
13. On 13 March 2015, the same day that the complainant was informed that the FSA would be officially investigating his concerns, he was told that he would be moved away from his contractual place of employment to another Food Business Operator, 30 miles from his home. On 2 April 2015, the complainant raised a formal grievance over the FSA's decision to redeploy him.
14. On 22 April 2015 the complainant was informed that that the official investigation into his concerns by the FSA had concluded and that his concerns were upheld. On 23 April 2015 the complainant was informed that he could return to his home plant. When back at the plant, a local supervisor was in attendance every day to monitor the complainant's work. The complainant had been referred to Occupational Health in February 2015, with his agreement, in connection with his colour vision deficiency. The FSA point out that recommendations from this referral were intended to assist the complainant and included some monitoring of his work. Additionally, the FSA point out, a new rotation system had been implemented in his absence and ergonomic risk monitoring and monitoring of contamination data management was put into effect and applied to the whole team. However, the report of the appeal into the complainant's grievances points out that the reasons for his monitoring do

not appear to have been explained to him and the manner in which his monitoring was carried out was described as oppressive by other Meat Hygiene Inspectors who were interviewed. On 15 May 2015, the complainant raised a second formal grievance over what he considered excessive monitoring of his work.

15. The contractor organisation then launched its own investigation into the complainant's concerns and additionally **Person A** officially complained about the complainant, accusing him of bullying, and officially complained via his solicitor about the findings of the FSA investigation. During this time, the complainant was required to be interviewed by the contractor organisation who, according to the complainant, implied on a number of occasions, that he had been lying about the behaviour of **Person A**.
16. On 7 January 2016 the complainant was told that both of his grievances – about his compulsory redeployment and the excessive monitoring of his work, had failed.
17. On 18 January 2016, Senior FSA Manager (**Person E**), concluded in his handling of the complaint by **Person A**, and in looking at the reports of the investigations by both the FSA and the contractor organisation, that although there was no reason to question the outcome of the official FSA investigation, that no one party was undeserved of criticism. He also recommended that the decision not to deploy **Person A** to work on behalf of the FSA be reviewed by operational management. **Person A** was subsequently permitted to return to work for the contractor organisation performing duties on behalf of the FSA.
18. On 24 February 2016, the complainant referred his complaint to the Civil Service Commission.
19. On 22 June 2016, FSA Appeals Decision Manager **Person H**, upheld the appeals on both of the complainant's grievances. The grounds for upholding the appeals were that the Decision Maker failed to take into account relevant evidence of other witnesses and representations made by the complainant at the original grievance hearings. The investigation report that informed the original decision stated that there was an 'indirect' connection between the whistleblowing complaint and the deterioration of the relationship between the complainant and **Person A** which should have led to the Decision Maker dealing with the question of why the management decision to redeploy the complainant did not appear to address the issue of the FSA's duty to protect a whistleblower. On the matter of the complainant's close supervision on his return to his home plant, one of the justifications was that he had been 'caught' not wearing colour blindness correction glasses. However there was a counter narrative to this, which was that the complainant was not actually inspecting anything at the time he was seen without the glasses, that a bedding in period to get used to them had been agreed with **Person B**, and that the complainant had in fact been told to take them off when not actually using them for inspection in order to increase their effectiveness. One witness when interviewed, remarked that in his long experience, he had never seen anyone observed in this manner and that it was intimidating.

## CONSIDERATION OF THE EVIDENCE AND FINDINGS

20. The panel considered the evidence and came to the following conclusions:

***That, although there was no direct risk to public health, there was an indirect risk because the FSA did not take appropriate action in regard to the allegations of falsification of contamination data by Person A***

21. At the heart of this case, is the question of whether or not there was a risk to public health and, if so, whether appropriate action was taken to address it.
22. According to the FSA, there is no risk to public health even if inaccurate recording takes place as contamination is always picked up on the production line by Meat Hygiene Inspectors and remedial action is taken there. They advise that no meat is allowed to enter the food chain until it receives the health mark and this is never applied to a contaminated carcass as identified on the production line. However, when the complainant was asked for his assessment of this statement, he disagreed strongly, stating that the recording of contamination data is essential in order to spot trends which enables otherwise invisible contamination to be detected.
23. The panel recognised that it did not have the necessary professional expertise to reach a judgement on the question of whether there had been a risk to public health as a result of misreporting. The panel therefore recommended that the FSA request an independent peer review of the risk assessment associated with this decision. The FSA invited Food Standards Scotland to conduct the review, and the findings of this are summarised below.
24. The peer review carried out by Food Standards Scotland concluded that **there was no direct risk to public health**. The report states that ‘The act of recording has no impact on the judgement of the fitness of the carcasses concerned, as this judgement has already been conducted by the trained inspectors on the line (those who recorded the contamination in the first place). The recording of contamination on the electronic system comes at a later stage, when the carcasses have already been assessed as being fit for human consumption or not’. In concluding as to whether there was a direct impact on public health, the report goes on to say ‘post mortem inspection is an individual assessment of each carcass being presented at the time, as all are judged on their merits. Therefore the actions of the OV (in this case **Person A**) would not have affected in any way the health marking of the carcasses as fit for human consumption by the trained officers on the line.
25. However, the peer review did identify a **potential indirect risk to public health**. The report also states: ‘the alteration of the contamination figures could misrepresent the efficacy of the Food Business Operator’s Hazard Analysis and Critical Control Point controls, potentially leading to inappropriate enforcement action being taken by the officers at the premises. The mis-recording of contamination has the

potential to impact on the overall enforcement actions taken (or not taken) by the OV responsible for the establishment, as they will not have the correct evidence at their disposal when making enforcement decisions. Mis-representing this data could therefore mask the need for robust enforcement action to be taken on FBOs which were not adequately controlling contamination, thus presenting a potential indirect risk to public health'.

26. The facts of this case show incontrovertibly that there was mis-recording (under-reporting together with some over-reporting) of faecal contamination in carcasses. Although the panel accepts that the actions of **Person A** had no bearing on the fitness for consumption of carcasses leaving the FBO at the time, the peer review has confirmed there was a potential indirect risk to public health associated with the actions of **Person A**. The FSA has admitted that it failed to follow its own whistleblowing policy initially and the seriousness of the allegations were not properly considered until some time after they were initially raised. The key aspect, which is the malpractice concerning contamination recording, continued for a longer period therefore than would otherwise have been the case. This potentially exposed the FSA to risk. The Civil Service Code makes it clear that you must not ignore inconvenient facts, which would appear to have happened in this case and so the panel decided that this was a breach of the Civil Service Code.

***That Person B tried to influence the investigation into the complainant's concerns and dissuade him from pursuing them***

27. The Code requires that, if someone raises a concern, the Department has a responsibility to consider it properly. The FSA has confirmed that, in a meeting with the complainant's Union Representative, **Person B** 'proposed that the whistleblowing issue should be parked or withdrawn on the back of the actions agreed'.
28. Although the Commission acknowledges that the FSA's motivation may have been to improve working relationships between the complainant and **Person A** (the FSA explained that the request 'was a well intended suggestion targeted at creating the best opportunity and environment for mediation to produce a sustainable outcome'), **Person B's** actions nevertheless failed to comply with the requirement to consider seriously concerns raised.
29. The panel therefore decided that this was a breach of the Code requirement to consider properly any concerns that are raised.

***That Person C tried to influence the investigation into the complainant's concerns and failed to take them seriously***

30. In addition to the requirement, in relation to 'Objectivity' not to 'ignore inconvenient facts', the Code states, in relation to 'Impartiality', that civil servants 'must not act in a way that unjustifiably favours or discriminates against particular individuals'. In February 2015, the complainant had agreed with **Person C** to an Occupational Health

referral, as his colour vision deficiency had been cited as one of the reasons for his possible transfer to another Food Business Operator and was the subject of complaints made against him by both the Food Business Operator and **Person A**. The referral would clarify the position as to what the complainant could inspect and where adjustments needed to be made. However, there was no reason to assume that it had any bearing on the concerns that he had raised and this was borne out both by the report of the referral and the official FSA report of the investigation into his concerns. The account given by the complainant of his Line Manager, **Person C**, trying to blame the complainant's colour vision deficiency for the concerns and not taking seriously the concerns about **Person A's** behaviour, suggests that **Person C** ignored the 'inconvenient fact' of an allegation of a potentially serious risk to public health and acted in a way that unjustifiably favoured **Person A** and unjustifiably discriminated against the complainant.

31. The panel decided therefore that this was a breach of both Objectivity and Impartiality.

***That Person E did not take proper account of the formal FSA investigation when considering the complaint made by Person A about the complainant and the findings contained in the FSA investigation, and decided against interviewing a key witness whose evidence could have been relevant. This in turn led to the operational decision to allow Person A to be re-deployed to undertake duties on behalf of the FSA.***

32. The Code states that, to comply with the core value of Objectivity, civil servants must not ignore inconvenient facts or relevant considerations when providing advice or making decisions. Although FSA management had been asked by Union officials to interview a key witness (a Meat Hygiene Inspector who had important information that would have supported the allegations made against **Person A**), **Person E** decided not to interview him. The FSA explain that this witness had previously been interviewed and that they were aware of the information he had provided. However, according to Union officials, interviewing this witness was one of the agreed outcomes of a meeting between FSA management and Union officials, who expressed an opinion that it was necessary for this witness to be interviewed in order for **Person E** to come to an unbiased opinion. The FSA state that the agreed outcome of this meeting was to interview the witness 'if required' and go on to say that there was no evidence provided that this witness had information, which hadn't already been provided at interview previously.

33. In the view of the Panel, it is difficult to understand how **Person E**, in his response to the complaint made against the complainant by **Person A** could say that 'no one party should consider themselves undeserved of criticism' whilst at the same time say that there was no reason to doubt the findings of the original investigation. The original FSA investigation clearly found that contamination levels had been under-recorded by **Person A**.



34. Taken in conjunction with the above, is the question as to whether FSA management took into account all the relevant facts when making the decision to permit **Person A** to be redeployed to undertake work on behalf of the FSA. The FSA cite a number of reasons that were taken into account and informed this management decision. These included, the risk that preventing **Person A** from being allowed to return to work would be subject to legal challenge; the fact that the complainant stated that he had known about the falsification of data by **Person A** for some eighteen months before finally reporting it (because he felt that his concerns would not be taken seriously); the unreliability of evidence from a key witness; a lack of motive for **Person A** to falsify the data, and the poor nature of working relations between various parties at the premises.
35. The Commission was puzzled that the assessment appeared not to have placed much weight on the findings of the FSA's own investigation, which clearly found that **Person A** had falsified the contamination data. When challenged on this point, the FSA state that they 'do not consider that the official FSA investigation was faulty in so far as it examined a particular aspect of the case'. However when the case was looked at more broadly, they felt that 'it fell within a range of reasonable responses to take into account mitigation evidence in determining their decision'. They go on to say that they 'exercised their managerial prerogative to balance the risks involved against the possible outcomes arising from that decision'.
36. The Civil Service Code is clear that 'inconvenient facts' should not be ignored in making decisions. The panel felt that in arriving at the decision to allow **Person A** to return to work on behalf of the FSA, that the FSA should have taken more account of the findings of their own investigation into the complainant's concerns and the potential for a further indirect risk to public health and that the failure to do so was a breach of the Civil Service Code.

***That there was insufficient evidence to reach a view on whether Person D ignored inconvenient facts about the case and inappropriately gave authority for Person A to return to work to undertake duties on behalf of the FSA ahead of the formal decision to allow him to be redeployed on FSA business.***

37. Before this decision to allow **Person A** to be re-deployed, on two occasions **Person A** returned to work for the contractor, for one day on each occasion. **Person D** was responsible for authorising this. The FSA state that this was due to communication issues between senior and operational management at the contractor organisation, and as soon as this was discovered that they ensured that **Person A** was suspended from duty. **Person D** seems to have been somewhat remote from the case and, as he has now left the FSA, it is difficult to gather further evidence. The panel concluded there was insufficient evidence to determine whether a breach of the Civil Service Code had taken place.

***That the complainant was penalised and suffered a detriment as a result of raising his concerns.***

38. Paragraph 16 of the Code states that if you raise a concern, 'your Department or Agency must consider your concern and make sure that you are not penalised for raising it'. In the FSA's correspondence with the Commission, they have expressed their belief that the complainant had not suffered a detriment for raising his concerns and he had been supported throughout the process by management. The complainant, however, believes that he was penalised for raising his concerns: first through his compulsory relocation to another place of work on the day that the official investigation into his concerns commenced, and secondly through the excessive and oppressive monitoring of his work upon his return to his home plant at the conclusion of the investigation. The complainant raised grievances about both of these incidents. Both of the grievances initially failed, but both were subsequently upheld upon appeal.
39. The Commission found no evidence that the FSA put in place arrangements to ensure that the complainant did not suffer detriment as a result of having raised his concerns. It did, however, find evidence – outlined in the report of the grievance appeal, conducted by **Person H** – that the complainant was penalised as a result of raising his concerns.
40. The FSA originally stated that the decision to redeploy the complainant was taken 'because of the breakdown in the relationship between him and **Person A** ... and the consequent deterioration in the quality of the inspection services being provided at the plant'. However, the appeal outcome stated that the investigation report that informed the original decision stated that there was an 'indirect connection' between the whistleblowing complaint and the deterioration of the relationship between the complainant and **Person A**. This indicates that the compulsory move of the complainant was, as he suspected, partially linked to his having raised a complaint. On the matter of the second grievance, the complainant's excessive monitoring, the appeal outcome states that although there may have been some good reasons for the additional oversight, these were not explained to the complainant. Additionally, one of the justifications for the close supervision was that the complainant had been 'caught' not wearing colour blindness correction glasses. However, **Person H**'s report upholding the complainant's grievance appeal explains that the complainant was not actually inspecting anything at the time he was seen without his glasses and he had been told to take them off when not inspecting anything, to increase their effectiveness. The evidence of another Meat Hygiene Inspector described the monitoring as 'oppressive' and that in his long experience he had never seen anybody observed in this manner and that it was 'intimidating' whether intentionally or not.
41. In view of the above, the panel concluded that the complainant suffered a detriment as a result of having raised his concerns and that that this was a breach of paragraph 16 of the Civil Service Code.

***That the FSA's original grievance investigation failed to meet the standard of objectivity required by the Civil Service Code.***

42. As mentioned above, the Code states that civil servants 'must not ignore inconvenient facts or relevant considerations' when making decisions. It is clear from the appeals decision letter, written by **Person H**, that some key facts or relevant considerations were ignored in the investigation into the complainant's original grievance cases.
43. In his letter upholding the complainant's grievances, **Person H** says '*my decision is that the conclusion reached by the original decision manager was not one that could reasonably have been made in all the circumstances because it was reached in the absence of a transparent consideration and evaluation of all available evidence and other relevant factors*'. The panel therefore concluded that the FSA breached the requirement for Objectivity in the Civil Service Code because it ignored key facts and considerations in its investigation of the original grievance.

**RECOMMENDATIONS**

44. As noted above, during the course of this investigation the Commission recommended that the FSA commission an independent peer review of the incident to assess whether there had been a risk to public health. The FSA accepted that recommendation and the conclusions of the peer review are reported in this Decision Notice.
45. As a result of the grievance appeals outcome, the complainant has received separate apologies from **Person B** and **Person C**. Normally the Commission would make recommendations as to how the FSA might improve its policies and procedures for hearing concerns. However, the Commission understands that the FSA has considered what action it might take to ensure an improvement in how it manages those staff who raise concerns and how they take decisions in the context of a live case. The FSA has already reviewed its Whistleblowing and Raising a Concern Policy, which is now more robust, and its launch in June 2016 has been supported by a communications plan managed by the Head of Openness. This has included meetings with all leadership teams to initiate a cascade of information across the entire organisation together with a range of direct communications with staff. This work has now completed and the FSA has reported back to the Commission.
46. The panel acknowledged the work that had been done by the FSA in light of the issues arising from this case, which included the targeting of senior leadership within the organization to explain their responsibilities in regard to the raising of concerns and awareness sessions that had been run for all staff.
47. The Commission notes the FSA staff responses to the questions on the Civil Service Code in the 2016 annual People Survey and that there has been an improvement on 2015. The Commission will continue to monitor the survey for evidence of further improvement.

48. The Commission will review the FSA's practices for dealing with Code complaints and its efforts to promote the Code when it next conducts a scheduled Recruitment Principles compliance visit.
49. This Decision Notice will be published on the Civil Service Commission's website and summary details of this case will be published in the Commissions 2016/17 Annual Report and Accounts.

#### **REQUEST FOR REVIEW**

50. The Commission will consider representations from complainants, or those complained against, for review of the Commission's decision and recommendations that suggest that it has made factual errors or errors of factual interpretation in its decision making.
51. The Commission will not normally accept a request to review its decision or recommendations if the request is received more than 20 working days after the date of its findings.
52. There is no mechanism for appealing against the decision of the Civil Service Commission in a Civil Service Code complaint case.

Civil Service Commission  
January 2017