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Luxleaks: Whistleblowing and human rights

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Tuesday, June 22nd, 2021

Tax authorities have relied on informers for investigative leads perhaps since taxes were first imposed. In the 21st Century high profile cases of theft of taxpayer information by employees of service providers including banks and professional firms have provided data not only of interest to tax authorities but also as a driver of international tax reform. In the UK, revelations by an employee of HMRC, the tax authority, was also one of the triggers for the BEPS project.

Several legal issues arise in such cases such as the use to which the information may be put by tax authorities and admissibility as evidence in court. The relationship between individuals making the revelations and their employers as well as criminal liability in some cases, make this a perilous area. Recent legislative developments to give a measure of protection to whistle blowers. The [EU Directive on the protection of persons who report breaches of Union law 2019/1937](#), among other things, covers “breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.” (Article 2(1)(c)). In every case, the balance between protection of whistle blowers and the rights of others and other legal values is not easy to define with precision.

One recent such case before the European Court of Human Rights concerning the balancing of rights is [Halet v. Luxembourg \(21884/18\)](#) (11 May 2021). Raphaël Halet, an employee of PwC Luxembourg provided several hundred advance tax rulings and tax returns prepared by his employer to journalists he had contacted and which were then used in a television programme. He also provided further information to the International Consortium of Investigative Journalists who subsequently [published the material online](#). Mr Halet and two colleagues were charged in Luxembourg with among other things theft, fraudulent access to a system for processing or automated transmission of data, violation of business and professional secrecy and possession of stolen computer data. One colleague was acquitted on the ground that he had not participated in the offenses. The conviction of another was overturned on appeal by the Luxembourg on the basis that he satisfied the “whistle blower” defence based on article 10 of the European Convention on Human Rights.

Freedom of expression

Article 10(1) confirms the universal right to freedom of expression. This is however subject to duties and responsibilities and may be subject to restrictions or penalties prescribed by law and as are necessary in a democratic society (Article 10(2)).

The ECtHR ruled that Mr Halet's conviction for passing on confidential documents to a journalist who subsequently published engaged Article 10 as a whole: it was an interference with the exercise of his right to freedom of expression. However, the interference was prescribed by law (the Criminal Code) and had pursued the legitimate aim of preventing the disclosure of confidential information and protecting the employer's reputation. The issue before the court was whether the interference was proportionate to that aim.

Whistle blower defence

The ECtHR established six criteria for the whistle blower defence under article 10 in balancing the competing legal values:

- (1) the disclosure must be in the public interest,
- (2) the information disclosed is true,
- (3) informing the public through the media was the only realistic means of alerting them,
- (4) the applicant acted in good faith,
- (5) the public interest in receiving the information must be balanced against the harm caused to the employer by the disclosure, and
- (6) the proportionality of the penalty.

The court concluded that Mr Halet could be classified as a whistle blower for this purpose. This followed firstly, from the "hierarchical bond" between him and his employer. This entailed "a duty of loyalty, reserve and discretion on his part". That duty it said was a particular feature of whistleblowing. Secondly, he had contacted a journalist in order to disclose confidential information obtained in the course of his employment.

The first four requirements of the defence were not in dispute when the case came before the EctHR.

Public interest v harm caused by the disclosure

Harm

The Luxembourg Court of Appeal had ruled that the disclosure of documents that were subject to professional secrecy had caused harm to PwC. In particular, from the to the firm's reputation was damaged and client confidence in its internal security arrangements was lost. That harm suffered by PwC outweighed the public interest

The fact of the widely reported controversy arising out of the Luxleaks disclosures itself demonstrated that PwC had suffered harm. Staff turnover increased at the firm subsequent to the publicity. At the same time, the number of employees increased significantly. The firm's financial position did not appear to have suffered lasting harm. There was "every indication" that its reputation had not ultimately been compromised, at least not among the companies that made up its client base. The Luxembourg court according found that PwC had undoubtedly suffered harm in the short term. However, no longer-term damage to its reputation had been established.

Damages awarded

The Luxembourg courts awarded PwC symbolic damages of one euro. The ECtHR ruled that this was irrelevant in assessing the harm. Under Luxembourg law, a court cannot not award compensation in excess of the amount claimed by the civil party. It was common practice in Luxembourg for individuals or entities which had sustained non-pecuniary damage, including substantial damage, to waive monetary compensation and simply seek recognition of the damage and a symbolic award.

The EctHR agreed that the careful evaluation of the evidence showed that the damage to PwC's reputation had been real and tangible.

Public interest

The Luxembourg Court of Appeal found that those disclosures had been of limited relevance because the documents had not provided any information that was vital, new or previously unknown even if it was liable to "concern and shock people". The EctHR ruled that the first three elements were essential in this case.

The ECtHR upheld the Luxembourg court's conclusions on the conviction, that the harm to caused PwC outweighed the public interest. Furthermore, recognising the domestic court's margin of appreciation in this sphere, the domestic courts had struck a fair balance between the need to protect the rights of the employer and the need to protect the employee's freedom of expression.

Proportionality of the penalty

The Luxembourg courts imposed a modest fine of 1,000 euros on Mr Halet. The EctHR concluded that this was a relatively mild penalty. It would not have a real chilling effect on the exercise of the freedom of expression but would "encouraging those concerned to consider the legitimacy of their intended actions."

The penalty might be contrasted with the conviction in 2015 by trial in absentia of Herve Falciani an employee of HSBC Private Bank in Switzerland who was sentenced to five years in jail for economic espionage for revealing public information about foreign entities in Lebanon, France, Germany, and the UK (see for example, [BBC News](#)). In that case it was said that he stole clients' information to sell for personal gain. In the Halet case, it was found that his actions were "disinterested" in the sense of no personal financial gain.

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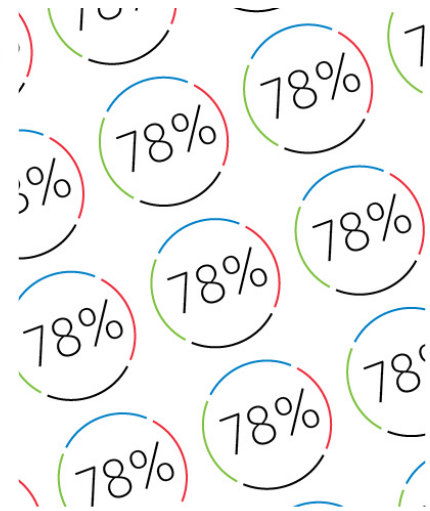
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