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Luxleaks

Whistleblower’s freedom of expression violated due to criminal conviction

Par Malak El Addal le 17 March 2023

Can an employee who discloses to the media documents protected by professional secrecy and relating to the tax practices of multinationals be recognized as a whistleblower and thus benefit from the full protection of art. 10 ECHR ? Yes, says the European Court of Human Rights, which found a violation of this provision by the Luxembourg authorities in Halet v. Luxembourg of February 14, 2023 (no. 21884/18).

Between 2012 and 2014, several hundred tax rescripts and tax declarations highlighting highly advantageous tax agreements between an auditing firm, acting on behalf of multinational companies, and the Luxembourg tax authorities, were published in various media (Luxleaks). An initial internal investigation by the company revealed that an employee at the time had given a journalist 45,000 pages of confidential documents, including 20,000 pages of tax documents. A second internal investigation – also carried out by the company – established that another employee at the time, Mr. Raphaël Halet (the former employee), had in turn given confidential documents to the same journalist. These additional documents consisted of fourteen tax returns from multinational companies and two accompanying letters, obtained at his place of work.

After being dismissed by his employer, the former employee was prosecuted and fined EUR 1,000 on appeal. Following the rejection of his appeal in cassation, the former employee appealed to the Court, claiming that his right to freedom of expression had been violated. The Court found no violation of art. 10 ECHR, and the former employee requested that the case be referred back to the Grand Chamber.

The Court points out that the concept of whistleblower has not yet been given an unequivocal legal definition. To determine whether (and to what extent) the former employee can benefit from the protection afforded to whistleblowers under art. 10 ECHR, it therefore decided to apply the criteria developed in an earlier judgment (Guja v. Moldova, no. 14277/04) concerning the disclosure of confidential information obtained in the course of a professional relationship. In so doing, it noted that, in the present case, recourse to the media was admissible given the nature of the information disclosed (the employer’s usual and lawful activities), that the documents transmitted were authentic, that the former employee had acted in good faith and that the information disclosed shed new and important light in the context of the debate on “tax avoidance, defiscalization and evasion”. On this last point, the Court considered that the information revealed was undeniably of public interest.

Over and above the reputational and financial damage caused to the employer, the Court recognized that, admittedly, the disclosure at issue was made at the cost of data theft and a breach of the professional secrecy to which the former employee was bound. However, in view of the importance, at both national and European level, of the debate on the tax practices of multinationals, it considers that the public interest in disclosing the information in question outweighs any harmful effects resulting from it. Taking into account the dissuasive effect of the cumulative penalties imposed on the employee (dismissal and criminal conviction), the Court considers the criminal conviction to be disproportionate.

On the basis of all the foregoing considerations, the Court concludes by a majority (twelve votes to five) that there has been a violation of art. 10 ECHR.

In Switzerland, Parliament rejected the bill on the protection of whistleblowers in 2020, after more than fifteen years of legislative efforts. As a result, the status quo remains in Swiss law : in whistleblowing cases, it is up to the civil courts to weigh up the interests at stake and to determine, where appropriate, whether the whistleblowing action taken by the employee complies with the principle of proportionality. In this respect, the Swiss Federal Supreme Court applies a cascade approach to whistleblowing : in principle, the employee must first address his employer, then an authority and finally, as a last resort, public opinion (through the media, for example) if the circumstances justify it (cf. ATF 127 III 310). A similar approach can be found in criminal matters : the admission of the safeguarding of legitimate interests as a justifying fact exempting the whistleblower from any criminal sanction presupposes, in particular, that external denunciation is necessary to achieve the desired aim and that it is the only means of achieving the latter (principle of proportionality).

However, Swiss jurisprudence has not specified the circumstances that would make direct denunciation to the competent authority, and a fortiori to public opinion, admissible. From this point of view, the case under review is of interest insofar as it illustrates a case of direct recourse to the media, which was accepted by the Court on the grounds that the practices in question related to the employer’s usual activities, and were not in themselves illegal. We can therefore assume that this ruling will clarify, or even temper, the application of the cascade method when, as in this case, only direct recourse to the media is likely to constitute an effective means of alert. In general terms, the Court’s result underlines the uncertainty inherent in the weighing of interests, and should encourage Swiss courts to adopt a case-by-case approach.
