Thematic factsheet[1]
Update: June 2018

WHISTLEBLOWERS

The signaling by an employee of illegal conduct or wrongdoing at the workplace must be protected, in particular where the employee concerned is a part of a small group of persons aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large. The case-law of the European Court of Human Rights established several criteria that such disclosures need to meet in order to benefit from the protection of Article 10 of the Convention. The disclosure should correspond to a strong public interest. There should be no other effective means of remedying the wrongdoing which the employee intends to uncover. Any disclosure should be made in the first place to the superior or other competent authority or body. It is only where this is clearly impracticable that the confidential information could, as a last resort, be disclosed to the public. The interest which the public may have in that particular information should be strong as to override a legally imposed duty of confidence. The damage, if any, caused as a result of the disclosure should not outweighed the interest of the public in having the information revealed. The disclosure should not be motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain. Last, in making the disclosure, the whistleblower should have acted in good faith and in the belief that the information was true and that it was in the public interest to disclose it. The principles and criteria above, established in cases concerning public-sector employees, also apply to private-law employment relationships.

Dismissal of a member of the Prosecutor General governmental interference in the administration of criminal justice to the press

Guja v. Moldova (N° 1) n° 14277/04
Judgment 12.02.2008

It was for the first time when the Court had to consider a case in which a civil servant had publicly disclosed internal information.

Facts: The applicant, who was the Head of the Press D passed two letters received by that office to a national newspaper. The first was a note from the Deputy Speaker of Parliament to the Prosecutor General enclosing a letter from four police officers who wished to apply for protection from prosecution after being charged with the illegal detention and ill-treatment of detainees. The note ended with a request by the Deputy Speaker for the Prose personally involved in th[e] case and to solve it from a deputy minister to a deputy prosecutor general and indicated that one of the police officers had a previous conviction for assaulting prisoners but had later been amnestied. After receiving the letters, the newspaper published an article noting that abuse of power was widespread in Moldova. It cited the Deputy Speaker's ap the four police offi ers as an exa ple and p inted co ies c

[1] This document presents a non-exhaustive selection of the CoE instruments and of the ECHR relevant case law. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of Article 10 of the Convention. This information is not a legal assessment of the alerts and should not be treated or used as such.

of the two letters. The applicant subsequently admitted that it was he who had passed the letters to the newspaper, but said that he had done so in order to line with a corruption drive, create a positive image of the Prosecutor's Office which the public had a legitimate interest in being informed about. There was therefore a public interest in disclosure.

he was dismissed for failing to consult his colleagues and for disclosing what it was alleged were secret documents. He made an unsuccessful application to the civil courts for reinstatement.

Law: The Court noted that in view of the lack of any laws or internal regulations governing the reporting of irregularities, the applicant had had no authority apart from his superiors to turn to and no prescribed procedure for reporting such matters. In such circumstances, external reporting, even to a newspaper, could be justified.

The second issue was whether there was a public interest in disclosure. On this point, the Court considered that the letters disclosed by the applicant had a bearing on issues of high importance in a democracy – such as the separation of powers, improper conduct by a high-ranking politician and the Government's attitude – about which the public had a legitimate interest in being

The third consideration, whether the information disclosed was authentic, was not in dispute. As to the question of what damage would be suffered by the public authority concerned, the Court found that despite the negative effects the disclosure had u interest in the provision of information about undue pressure and wrongdoing within that institution was so important as to outweigh the interest in maintaining public confidence in its independence. As to whether the disclosure was made in good faith, there was no reason to believe that the applicant had been motivated by a desire for personal advantage, held any personal grievance or had had any other ulterior motive.

The last factor to be considered on the question of proportionality was the penalty inflicted on the applicant. Here it was noted that the heaviest possible sanction (dismissal) had been imposed. In addition to the negative repercussions that had h serious chilling effect on civil servants and emp wide media coverage. Such a severe sanction could only discourage the reporting of misconduct and was difficult to justify. After weighing up all the interests involved, the Court concluded that the interference with the applicant's right to freed information, had not been "necessary in a democratic

Conclusion: violation of Article 10 of the Convention

See, also, *Guja v. Moldova (No. 2),* Application no. 1085/10, New violation of Article 10 of the Convention 27.5.2018

Dismissal of nurse for lodging a criminal complaint alleging shortcomings in care provided by private employer

Heinisch v. Germany - 28274/08
Judgment 21.7.2011

The applicant was employed as a geriatric nurse in a nursing home for a company which was majority-owned by the Berlin Land. She and colleagues regularly indicated to the management that they were overburdened owing to a shortage of staff and that services were not being properly documented. Following an inspection, the medical review board of the health insurance fund noted serious shortcomings in the care provided, including an insufficient staff and unsatisfactory care and

documentation of care. The applicant's legal counsel wrote to th
problems and enquiring how the company intended to avoid incurring criminal liability. When the company rejected the accusations, he lodged a criminal complaint alleging aggravated fraud in that the company had knowingly failed to provide the high quality care announced in its advertisements, had systematically tried to cover up the problems and had urged staff to falsify service reports. In January 2005 the public prosecutor's office discontinued same month the applicant was dismissed on without notice. The domestic courts rejected the applicant's claims in respect of her dismissal after "compelling reason" for the termination of her em

The European Court of Human Rights noted that the criminal complaint lodged by the applicant had to be regarded as whistle-blowing, and that her dismissal had interfered with her right to freedom of expression. That interference was prescribed by law and pursued the legitimate aim of protecting the reputation and rights of others, namely the business reputation employer.

As to the proportionality of the interference, the Court considered that **the principles and criteria established in *Guja v. Moldova*, a case concerning a public-sector employee, also applied to private-law employment relationships** and should be used to weigh the illegal conduct or wrongdoing on the part of his protection of its reputation and commercial interests.

Given the particular vulnerability of elderly patients and the need to prevent abuse, the information disclosed was undeniably of public interest and so satisfied the first of the *Guja* criteria. As regards the second criterion, whether alternative channels could have been used to make the disclosure, by the time the applicant lodged the criminal complaint she had already informed her superiors numerous times that she was overburdened and had warned them that a criminal complaint was possible. It was true that the legal qualification of the employer first time in the criminal complaint, but the applicant had already disclosed to her employer the factual circumstances on which that complaint was based and there was not sufficient evidence to counter her contention that further internal complaints would have been ineffective.

As to the next criterion, whether the information disclosed was authentic, the applica were not devoid of factual background and there was nothing to establish that she had knowingly or frivolously reported incorrect information. The fact that the preliminary investigations were discontinued did not necessarily mean that the allegations underlying the criminal complaint were without factual basis or frivolous from the start. There was no reason to doubt that the applicant also satisfied the fourth criterion: acting in good faith. Even though there was a degree of exaggeration and generalisation in the formulation of her criminal complaint, her allegations were not entirely devoid of factual grounds and did not amount to a gratuitous personal attack on her employer. Further, having concluded that external reporting was necessary, she had not immediately gone to the media or disseminated flyers, but had instead sought the assistance and advice of a lawyer, with a view to lodging a criminal complaint.

As regards the fifth criterion, the detriment caused to her employer, while the app had certainly been prejudicial to the company, the public interest in being informed about shortcomings in the provision of institutional care for the elderly by a State-owned company was so important that it outweighed the interest in protecting a company's the severity of the sanction, the applicant had been given the heaviest penalty possible under labour law. Not only had this had negative repercussions on her career, it was also liable to have a serious

chilling effect both on other company employees and on nursing-service employees generally, so discouraging reporting in a sphere in which patients were frequently not capable of defending their own rights and where members of the nursing staff would be the first to become aware of shortcomings in the provision of care.

The applicant's dismissal without notice had ther
had failed to strike a fair balance between the need to protect the empl
to protect the applicant's right to freedom of ex

Conclusion: violation of Article 10 of the Convention

Criminal conviction of civil servant for making public irregular telephone tapping procedures

Bucur and Toma v. Romania - 40238/02
Judgment 8.1.2013

The applicant worked in the telephone communications surveillance and recording department of a military unit of the Romanian Intelligence Service. In the course of his work he came across a number of irregularities - the telephones of a large number of journalists, politicians and businessmen were tapped, especially after some high-profile news stories received wide media coverage. He held a press conference which made headline news nationally and internationally. He justified his conduct by the desire to see the laws of his country – and in particular the Constitution – respected. Criminal proceedings were brought against him. Amongst other things, he was accused of gathering and imparting secret information in the course of his duty. He was given a two-year suspended prison sentence.

The European Court considered that this measure was not necessary in a democratic society.

(a) Whether or not the applicant had other means of imparting the information – No official procedure existed. All the applicant could do was informing his superiors of his concerns. But the irregularities he had discovered concerned them directly. It was therefore unlikely that any internal complaints the applicant made would have led to an investigation and put a stop to the unlawful practices concerned. As regards a complaint to a parliamentary commission, the applicant had contacted an MP who was a member of the commission, who had advised him that such a complaint would serve no useful purpose. The Court was not convinced, therefore, that a formal complaint to this commission would have been an effective means of tackling the irregularities. It was worth noting that Romania had passed special laws to protect whistleblowers in the public service. However, these new laws had been passed well after the activities denounced by the applicant, and therefore did not apply to him. Consequently, divulging the information directly to the public had been justifiable.

(b) The public interest value of the information divulged – The interception of telephone communications took on a particular importance in a society which had been accustomed under the communist regime to a policy of close surveillance by the secret services. Furthermore, civil society was directly affected by the information concerned, a information the applicant had disclosed related to abuses committed by high-ranking officials and affected the democratic foundations of the State. It concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The domestic courts did not take this argument of the applicant into account, however.

(c) The accuracy of the information made public – The applicant had spotted a number of irregularities. All the evidence seemed to support his conviction that there were no signs of any threat to national

security that could justify the interception of the telephone calls, and indeed that no authorisation for the phone tapping had been given by the public prosecutor. In addition, the courts had refused to examine the merits of the authorisations for the interception of the phone calls. The domestic courts had thus not attempted to examine every aspect of the case, but had simply acknowledged the existence of the requisite authorisations. What is more, the Government had failed to explain why the information divulged by the applicant was classif the full criminal case file. In such conditions the Court could only trust the copies of these documents submitted by the applicant and considered that he had reasonable grounds to believe that the information he divulged was true.

(d) The damage done to the Romanian Intelligence Service – The general interest in the disclosure of information revealing illegal activities was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution.

(e) The good faith of the applicant – There was no reason to believe that the applicant was driven by any motive other than the desire to make a public institution abide by the laws of Romania and in particular the Constitution. This was supported by the fact that he had not chosen to go to the press directly, in order to reach the broadest possible audience, but had first turned to a member of the parliamentary commission responsible for supervising the Romanian Intelligence Service.

Consequently, the interference with the applicant right to impart information, had not been necessary in a democratic society.

Conclusion: violation of Article 10 of the Convention.

Public servant sentenced to a suspended prison term for publicly accusing his superior of misappropriation and requesting an official investigation

Marchenko v. Ukraine - 4063/04
Judgment 19.2.2009

The applicant was a teacher and the head of a trade union in the school where he worked. Following allegations against the school director of misuse of school property, the applicant lodged a series of complaints with a public auditing service responsible for examining the use of funds by State-owned entities. He alleged that the director had misappropriated humanitarian aid given to the school and used the school equipment for private purposes. The public auditing service found no evidence to suggest misappropriation of school property by the director. Subsequently, the applicant lodged two criminal complaints against the director, both of which were dismissed for lack of evidence. Representatives of the applicant's trade union administration offices and displayed banners at with slogans accusing the director of professional misconduct and abuse of office. The director brought a private prosecution against the applicant, who was convicted of defamation in 2001. The courts gave him a suspended one-year prison sentence and a fine and ordered him to pay damages to the director.

According to the European Court of Human Rights, the signaling by an employee in the public sector of illegal conduct or wrongdoing in the workplace has to be protected. However, despite being a union representative acting on a matter of public concern, the applicant had a duty to respect the reputation of others, including their right to be presumed innocent and owed loyalty and discretion to his employer. In the light of that duty, any disclosure should have been made in the first place to the person's superior or other competent authority or body and, only as a last resort, to the public.

In so far as the applicant had sent to the public auditing service based and the prosecutor's office demanding investigati he could not be accused of bad faith, as he had acted on behalf of his trade union and presented various evidence in support of his allegations. That interference with his freedom of expression had therefore not been "necessary".

In so far as the applicant's conviction was, however, based on his participation in the picketing, the accusations against the director, phrased in particularly strong terms and displayed in the slogans, could be taken as allegations of fact, which, in the absence of sufficient proof of their validity, could have reasonably been deemed defamatory to be presumed innocent mining of serious offences. Moreover, neither the applicant, nor his supporters had ever attempted to employ any of the procedural means available under domestic law to challenge the inefficiencies of the investigations and the refusals to institute criminal proceedings against the director. The domestic authorities had therefore acted within their margin of appreciation in considering it necessary to convict the applicant of defamation on this account.

However, a one-year prison sentence could not be justified in the context of a classic defamation case concerning a debate on a matter of public interest. The fact that the sentence was suspended did not alter that conclusion as the conviction itself had not been expunged. The domestic courts had therefore gone beyond what would have amounted to a "necess expression.

Conclusion: violation of Article 10 of the Convention

See also, *Soares v. Portugal* (no. 79972/12) Judgment 21.6.2016 (Disciplinary proceedings brought against the applicant for having breached his duty of loyalty, as he should have first reported the rumor via internal channels within the hierarchy) : no violation of Article 10 of the Convention

Other relevant Council of Europe's tool

A. Committee of Ministers Recommendation CM/Rec(2014)7 on the protection of whistleblowers adopted on 30 April 2014

This legal instrument sets out a series of principles to guide member States when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems.

- See, in connection to it,
  Leaflet on whistleblowing and the Recommendation

  Brief Guide for policy makers aimed at the implementation of Recommendation

  Update on developments in Europe (last updated 20 April 2015)

  Report on Whistleblower Protection in Southeast Europe, an overview of laws, practices, and recent initiatives - research by Blueprint for Free Speech for the Regional Anti-Corruption Initiative of Sarajevo, released during the international and regional whistleblower events (Sarajevo, 17-19 June).

B. Parliamentary Assembly Resolution 1729 (2010) and Recommendation 1916 (2010) "Protection of "whistle-blowers"

"The Assembly invites all member states to review whistle-blowers, keeping in mind the following guiding principles:

Whistle-blowing legislation should be comprehensive:

- the definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies;
- the legislation should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services, and
- it should codify relevant issues in the following areas of law:
  - employment law – in particular protection against unfair dismissals and other forms of employment-related retaliation;
  - criminal law and procedure – in particular protection against criminal prosecution for defamation or breach of official or business secrecy, and protection of witnesses;
  - media law – in particular protection of journalistic sources;
  - specific anti-corruption measures such as those foreseen in the Council of Europe Civil Law Convention on Corruption (ETS No. 174).

Whistle-blowing legislation should focus on providing a safe alternative to silence.

- It should give appropriate incentives to government and corporate decision makers to put into place internal whistle-blowing procedures that will ensure that:
  - disclosures pertaining to possible problems are properly investigated and relevant information reaches senior management in good time, bypassing the normal hierarchy, where necessary;
  - the identity of the whistle-blower is only disclosed with his or her consent, or in order to avert serious and imminent threats to the public interest.
- This legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment).
- Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.
- Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.
- Relevant legislation should afford bona fide whistle-blowers reliable protection against any form of retaliation through an enforcement mechanism to investigate the whistle-blower's complaint and seek corrective act relief pending a full hearing and appropriate financial compensation if the effects of the retaliatory measures cannot reasonably be undone.

- It should also create a risk for those committing acts of retaliation by exposing them to counter-claims from the victimised whistle-blower which could have them removed from office or otherwise sanctioned.
- Whistle-blowing schemes shall also provide for appropriate protection against accusations made in bad faith.

As regards the burden of proof, it shall be up to the employer to establish beyond reasonable doubt that any measures taken to the detriment of a whistle-blower were motivated by reasons other than the action of whistle-blowing.

The implementation and impact of relevant legislation on the effective protection of whistle-blowers should be monitored and evaluated at regular intervals by independent bodies."

➢ See also, Resolution 1551 and Recommendation 1792 (2007) "Fair trial issues in criminal cases concerning espionage or divulging state secrets"

"the Parliamentary Assembly invites its Committee on Legal Affairs and Human Rights to look into ways and means of enhancing the protection of whistle-blowers and journalists, who expose corruption, human rights violations, environmental destruction or other abuses of public authority, in all Council of Europe member states; (…)"