



XXV MEETING OF EUROPEAN LABOUR COURT JUDGES 28-29 NOVEMBER 2017, BUDAPEST, HUNGARY

WHISTLE-BLOWING

National Reports¹ – Preparatory Questionnaire for the
European Labour Court Judges Meeting

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¹ The views and opinions expressed therein are those of the authors and do not necessarily reflect those of the International Labour Organization.

Report by Judge Koen MESTDAGH

1. How would you define “whistle-blowing”?

As: “the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action”

(Near, J.P., & Miceli, M.P., (1985). Organizational dissidence: The case of whistleblowing. *Journal of Business Ethics*, 4, 1 – 16, p. 4).

2. Is whistle-blowing regulated by statute law in your country?

Only (partly) in the public sector: the *Act of 15 September 2013 relating to the reporting of presumed harm to integrity within a federal administrative authority by members of its staff*, sets up a procedure to report unlawful or unacceptable actions. The Flemish government has also set up such a procedure for its administrative authorities.

Although the provisions of the Act of 15 September 2013 also apply to those staff members who are employed with a labour contract (as a rule staff members of administrative authorities are unilaterally assigned by the Crown and have ‘civil servant’ status), this is not considered as labour law (private law) but as administrative law (public law).

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

The Act of 15 September 2013 defines a ‘presumed harm to integrity’ as: the presumption of

- an act or omission to act by a staff member that forms an infringement to the laws, decrees, directives, internal rules and internal procedures that apply to the federal administrative authorities and their members of staff;
- an act or omission to act by a staff member, holding an unacceptable risk for the life, health or the security of persons or for the environment;
- an act or omission to act by a staff member, obviously manifesting a serious shortcoming to the professional duties or in the management of a federal administrative authority;
- a conscious order or advice given by a staff member to commit a ‘harm to integrity’ as meant in a), b) or c).

The former does not include bullying, sexual harassment or discrimination, which are subject to specific legislation.

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

The Act of 15 September 2013 offers some protection against possible measures holding negative consequences for the employment and work conditions of the whistle-blower. The description of these possible measures show clearly that the protection is typically aimed at persons with 'civil servant' status. It seems difficult to apply it by analogy to staff employed with a labour contract.

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

Belgian labour law doesn't have provisions concerning whistle-blowing and thus far it isn't topic of discussion amongst practitioners of labour law. I know only of one publication – the adaptation of a student thesis – in a series that presents few scientific value and an annotation of a labour court judgment by the same author.

I presume that whistle-blowing is a topic of corporate governance rules established by major companies such as banks and multinationals, but I doubt that codes of conduct concerning whistle-blowing are much widespread in our labour market.

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

We haven't had a famous case like that of Edward Snowden or Kelsey Manning. It is hard to tell how public opinion, steered by the media, would react if we had a national case.

5. Is there case law dealing with whistle-blowing concerning labour law?
- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

I found just one dismissal case dealing with whistle-blowing:

the financial director of a company explained in an email to the CEO that he couldn't sign a letter to the company auditor affirming that the accounts didn't contain significant anomalies due to fraud, since he found that the CEO had committed major fraud; the financial director was immediately put on leave with pay for two weeks and subsequently dismissed without notice; the labour court considered that the whistle-blowing was justified since the CEO was criminally charged (the criminal case against the CEO was still pending) and judged that the dismissal of the financial director was abusive; he was granted a lump sum of € 6.000 on top of the usual compensation for dismissal without notice (Labour Court of Liège, 26 November 2012, Soc. Kron., 2013, 209).

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

There are no existing rules on this topic.

7. Does it make any difference what kind of employee passes on information?

There are no existing rules on this topic.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

Yes. According to article 17, 3°, a), of the Labour Contract Act, the employee is obliged to refrain, both during and after the contract, from revealing any fabrication or business secret or any secret concerning personal or confidential affairs which he may have learned by performing his duty.

- Is it common practice to include confidentiality clauses in employment contracts?

Although not necessary, confidentiality clauses are often included in the contract of an employee who is likely to receive confidential information.

- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

I have no information on this.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?
- May illegal activities of customers or other business partners of the employer be reported?

There are no existing rules on this topic.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

No.

11. Does it matter which motives an employee has for blowing the whistle?

There are no existing rules on this topic, but I can imagine that whistle-blowing will more easily be found unjustified if the whistle-blower acts out of spite, e.g. because he missed a promotion.

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

There is no general answer to this question.

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

Let's presume that the employee was immediately dismissed without compensation. If it turns out that the information was not correct but it appears that the employee acted in good faith, it is

possible that the judge decides that there was no sufficient ground for a dismissal without notice and therefore allows the employee a compensation. On the other hand it is unlikely that the judge would decide that the dismissal also was unfair.

14. Are there any provisions for a whistle-blower to remain anonymous?

No

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

No. Belgium has not ratified Convention No. 158 and UNCAC has no direct effect. Violation of these instruments could not be submitted to our court as a ground for annulling a judgement.

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

The aforementioned Act of 15 September 2013 (see question 2) has given the federal Ombudsman an important role to play in dealing with insider information coming from the staff members of the federal administrative authorities. It's also the duty of the federal Ombudsman to ensure the protection against retribution provided by this act.

But I have to repeat that the private sector, ruled by labour law, is not concerned by all this.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

There are no specific sanctions. Generally the employer can decide by himself if dismissal for compelling reasons (without notice nor compensation) is justified and if the employee takes the case into court, the labour court will control if the employer's decision was justified. Only if the employee concerned is an elected employee's delegate in the Work Council or the Health and Safety Prevention Council, the employer has to bring the case before the labour court and ask the court to recognise that the misconduct of the employee justifies dismissal for compelling reasons.

The employee also could be condemned to pay damages, but only if his behaviour is considered by the labour court to be fraudulent or a serious misconduct.

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

Falsely reporting to the state authorities that someone has committed a criminal offence, is in itself a criminal offence when done willingly and knowingly. It can be punished with 15 days up to 6 months of imprisonment and a fine of 50 up to 1.000 euro (x 8). Only passing such false information on to the media could be considered as spreading slander, which also is a criminal offence that can be punished with 8 days up to 1 year of imprisonment and a fine of 26 up to 200 euro (x 8).

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

Not really. Although the provisions of the aforementioned act of 15 September 2013 also apply to persons working for a federal administrative authority with a labour contract and these employees thus enjoy some protection against retribution, it probably will not make any difference in the end. If the public employer is determined to dismiss the employee, the Federal Ombudsman can't really prevent this and if the labour court finds that the dismissal was unfair, the compensation allowed to the employee probably won't differ from the compensation allowed to an employee in the private sector who does not enjoy any protection against retribution.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

No

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

The phenomenon of whistle-blowing seems quite marginal. In my opinion the legislator should refrain from creating another set of special provisions in labour law concerning whistle-blowing. Let the labour courts deal with problems that occasionally may occur according to the general principles of (labour) law. Of course this means that the whistle-blower doesn't have real protection against retribution (dismissal), but I don't think that our world of labour is waiting for another ground for protection against dismissal.

Finland

Report by Judge Ari Wirén

1. How would you define "whistle-blowing"?

Whistle-blowing is informing authorities or the public about illegal or unethical practises of the organization where the whistle-blower is working.

2. Is whistle-blowing regulated by statute law in your country?

No.

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

-

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

No.

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

There has been relatively little discussion about whistle-blowing. The only sources I have found are an article by Dr. Jur. Riku Neuvonen: "Pilliiinpuhaltajien asema Suomessa". Viestintäoikeuden vuosikirja 2016 pp. 241-254 (The Position of Whistle-Blowers in Finland, Finnish Yearbook of Information Law 2016) and a report of a working group of the Finnish Ministry of Justice "Korruptioepäilystä ilmoittavien suojele". Oikeusministeriön mietintöjä ja lausuntoja 25/2016, 24.5.2016 (Protection of persons who inform authorities about suspected corruption, Reports of the Finnish Ministry of Justice 25/16). A public hearing has been held (see a summary of the hearing. Oikeusministeriön mietintöjä ja lausuntoja 57/2016).

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

In general, the Finnish society has been very quiet about whistle-blowers. Foreign cases like the cases of Chelsea Manning, Wikileaks and Edward Snowden have been reported but the discussion in Finland has been very lame. There has been an unsuccessful citizens' initiative for protection of whistle-blowers in 2013, but it was only supported by 4,179 Finnish citizens instead of the required 50,000 citizens. (There are about 5,5 million Finns).

5. Is there case law dealing with whistle-blowing concerning labour law?

Yes, we have had some cases at the Labour Court of Finland and the Supreme Administrative Court of Finland.

- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

In judgment LC 2013:191 of the Labour Court of Finland an employee of the City of Turku had informed members of the City Council about the activities of a company owned by the City of Turku and criticized the terms of an important contract of the company. There were many articles in newspapers about the same matters. Even after the City Council approved the contract the employee continued with new articles giving false information about the activities of the employer causing damages and harm to the company. The Labour Court weighed and balanced the employee's right of freedom of speech and the duty of loyalty in the judgment. The dismissal of the employee was deemed lawful.

Other cases include SAC 2011:19: written warning given to a professor, LC 1993:47: dismissal of a plumber and LC 2008:68: dismissal of a clerical employee.

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

There is some protection by the police for whistle-blowers. You can pass on information about crimes anonymously to the police by phone through police tip line.

In the cases mentioned above false reports to the media and to state authorities (in one case to Russian authorities) were treated in the same way.

7. Does it make any difference what kind of employee passes on information?

No.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

Difference must be made between trade secrets and business secrets and general information. According to Chapter 3 Section 1 Employment Contracts Act an employee shall avoid everything that conflicts with the actions reasonably required of employees in their position. This duty of loyalty includes that the employee must not cause harm or damage to the employer in much wider sense. The duties of the employee include prohibition against utilizing or divulging trade secrets and business secrets (Chapter 3 section 4) and prohibition against competing activity (Chapter 3 section 3).

The prohibition against utilizing or divulging trade secrets and business secrets continues even after termination of the employment contract if the information in question was obtained unlawfully. There has been an old case at the Finnish Market Court (MC 1988:2) where a company was prohibited to use drawings and tools that had been acquired from a contractor during a sub-contracting contract.

- Is it common practice to include confidentiality clauses in employment contracts?

Yes, increasingly so.

- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

Yes, increasingly so.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?

According to new Swedish legislation (Act 2016:749, in force since January 1st, 2017) only exposing serious crimes (to be punished with a prison sentence) and comparable wrongdoing can be protected against retaliation of the employer on certain terms. In my opinion this kind of labour legislation would be welcome even in Finland.

The working group mentioned above did not propose any new legislation for the protection of whistle-blowers. The recommendations proposed were to favour anonymous whistle-blowers to authorities.

- May illegal activities of customers or other business partners of the employer be reported?

I have found no case-law dealing with this problem.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

No. Cf. Swedish act (2016:749) section 7.

11. Does it matter which motives an employee has for blowing the whistle?

Yes. Intention to harm or cause damage is treated more vigorously.

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

See cases SAC 2011:19 and LC 2013:191 above. Both courts weighed and balanced freedom of speech and duty of loyalty.

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

The employee is bound by the duty of loyalty.

14. Are there any provisions for a whistle-blower to remain anonymous?

See 6 supra.

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

Not in case law so far. The report of the working group 25/16 has dealt with this on pp. 12-16 and 35.

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

No.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

An employee may be dismissed because of breach against duty of loyalty, e.g. if he or she has divulged to third parties the employer's trade secrets or business secrets. The employee may be liable for the losses caused thereof to the employer.

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

There are provisions in Finnish Criminal Code about crimes against breach of secrecy and trade secrets/business secrets.

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

No.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

According to the Finnish Penal Code, Chapter 15 section 9 there is a crime, threatening a person to be heard in the administration of justice for which the penalty may be fine or imprisonment for up to three years.

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

No. We should follow the Swedish example and protect whistle-blowers who expose serious crimes (to be punished with a prison sentence) and comparable wrongdoing to the proper authorities. I am not very fond of protecting whistle-blowers who expose similar wrongdoing to the public.

Hungary

Report by the following Judges: dr. Csaba BAGJOS , dr. Veronika GUBA , dr. Annamária FÜRJES , dr. Szilvia HALMOS , dr. Zsófia LELE

1. How would you define "whistle-blowing"?

There is no common legal definition for whistle-blowing in Hungary. For the purposes of this questionnaire, we may define whistle-blowing as the disclosure of information about a perceived

wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.¹

Relevant cases can be disaggregated into two groups:

- 1) Where the actor of the wrongful act is the employer; the addressee of the whistle-blowing is any of a third person (typically: public authorities). In this questionnaire, we will refer to this type of whistle-blowing as “WB1”.
 - 2) Where the actor of the wrongful act is a third person (typically: a colleague of the worker or a business partner of the employer); the addressee of the whistle-blowing is the employer. In this questionnaire, we will refer to this type of whistle-blowing as “WB2”.
2. Is whistle-blowing regulated by statute law in your country?
- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?
 - Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

The following laws are particularly relevant in terms of the legislation on whistle-blowing especially in employment:

<i>Act</i>	<i>Relevant provisions on whistle-blowing especially in employment</i>
Act no. CLXV of 2013 on Complaints and Reports of Public Interest (commonly abbreviated as „Whistle-blowing Act“; hereinafter: the WA) ²	General purposes of the protection of whistle-blowers; types of whistle-blowings (including WB1, WB2); fundamental rules of employers’ whistle-blowing system; lawful purposes of employees’ whistle-blowing; data protection rules related to the operation of an employer’s whistle-blowing system
Act no. CXII of 2011 on Informational Self-determination and Freedom of Information (commonly abbreviated as „Data Protection Act“, hereinafter: DPA)	Duties of employers and rights of employees in relation of the processing of the personal data of employees
Act no. I of 2012 on the Labour Code (hereinafter: LC)	Confidentiality duty of the employee and the employer and exceptions relevant with respect to whistle-blowing cases; legal consequences of confidentiality duty under labour law
Act no. V of 2013 on the Civil Code (hereinafter: CC)	Definition of business secret
Act no. LVII of 1996 on the Prohibition of Unfair Market Behaviour (hereinafter: PUMB Act)	Prohibition for (former) employees to use the business secrets of their (former) employers in an unfair way

¹ Source: [https://transparency.hu/wp-content/uploads/2010/12/Whistleblowing - an effective tool in the fight against corruption - Policy Position.doc](https://transparency.hu/wp-content/uploads/2010/12/Whistleblowing_-_an_effective_tool_in_the_fight_against_corruption_-_Policy_Position.doc), section 1

² For the English version of the Act see: http://corruptionprevention.gov.hu/download/7/a2/90000/KIM%20555_2013-4.pdf

The provisions of the WA cover both types of whistle-blowing (WB1 and WB2).

- In terms of WB1:

The personal scope of the WA covers public entities,³ required to deal with complaints⁴ and public interest disclosures⁵ the adjudication of which does not fall under the scope of any other proceedings. Any action taken as a result of a public interest disclosure which may cause disadvantage to the whistleblower shall be unlawful even if it would otherwise be lawful.⁶ Except some specified cases of offence, complainers and whistle-blowers shall not suffer any disadvantage for making a complaint.⁷ Without an explicit consent, the personal data of the whistleblower shall not be made public.⁸

If the whistle-blower is an employee, who makes a whistle-blowing against his/her employer, it is not the WA but the LC which provides for the criteria of a lawful whistle-blowing. Under labour law, the employee, in general, has to meet some specific compliance requirements, as follows.

- (1) The employee shall not engage in any conduct by which to jeopardise the legitimate economic interests of the employer, *unless so authorised by the relevant legislation*.⁹
- (2) The freedom of expression of the opinion of the employee is subject to the following general restriction: workers may not exercise the right to express their opinion in a way where it may lead to causing serious harm or damage to the employer's reputation or legitimate economic and organisational interests.¹⁰
- (3) The employees shall maintain confidentiality in relation to business secrets obtained in the course of their work. Moreover, employees shall not disclose to unauthorised persons any data learned in connection with their activities that, if revealed, would result in detrimental consequences for the employer or other persons. However, the requirement of confidentiality *shall not apply to any information that is declared by specific other legislation to be treated as information of public interest or public information and as such is rendered subject to disclosure requirement*.¹¹

So we can establish that, although the labour law prescribes general compliance requirements for the employee, there are some specific exemptions to these latter, which open the opportunity for the employees to blow the whistle against their employers without the breach of their duties under labour law.

³ WA, section 1, subsection (1)

⁴ A *complaint* is a claim for the termination of a violation of individual rights or a harm of individual interests, the adjudication of which does not fall under the scope of any other proceedings, in particular judicial or administrative proceedings. A complaint may also imply a proposal. [WA, section 1, subsection (2)]

⁵ A *public interest disclosure* calls the attention to a circumstance, the remedying or the termination of which is in the interest of the community or the whole society. A public interest disclosure may also imply a proposal. [WA, section 1, subsection (3)]

⁶ WA, sections 11-12

⁷ See in detail under Question 13.

⁸ WA, section 3

⁹ LC, section 8, subsection (1)

¹⁰ LC, section 8, subsection (3)

¹¹ LC, section 8, subsection (4)

- In terms of WB1:

The WA grants the opportunity for private employers to operate their own whistle-blowing system, to handle its own employees' whistle-blowings in a uniform and predictable manner.¹² The WA reassures the right for all employers to define their own rules of conduct applicable to their employees, which right is enshrined anyway in the LC as well.¹³ The rules of conduct may restrict the personal rights and the privacy of the employees, if the restriction is deemed strictly necessary for reasons directly related to the intended purpose of the employment relationship („necessity test“) and if proportionate for achieving its objective („proportionality test“). The rules of conduct shall be available to anyone.¹⁴

The purpose of a justified employee's whistle-blowing is to reveal the violation of either the law or the aforementioned rules of conduct.¹⁵ The above referred section 8, subsection (3) and section 8, subsection (4) of the LC do not apply here, because the information disclosed by the employee is not addressed to a third person, but to the employer itself.

It should be stressed that the establishment of such a system is only an option for employers. The procedural rules of the investigation of the whistle-blowings shall be published by the employer. The WA sets up the fundamental requirements of the whistle-blowing system, primarily focusing on the authorisation of the employer to process specific personal data of the whistle-blower employee, and the protection of these data (see in detail below).¹⁶

3. [Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?](#)

As outlined above under Question 2, the WA sets up the basic legal framework of employers' whistle-blowing systems. In addition, the LC and the DPA provide for the labour law and the data protection aspects of these systems. The operational rules of a specific employer's whistle-blowing system may be regulated in detail by the employer's own policy.

4. [Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?](#)

The Hungarian legislator focused on the protection of whistle-blowers, so they are considered more as a hero than as a traitor. Except some specified cases of offence, complainants and whistle blowers shall not suffer any disadvantage for making a complaint, the Act ensures anonymity for them (see in detail below). However, in cases where it becomes clear that a whistle-blower has disclosed untrue information of crucial importance in bad faith, he/she may face legal consequences, as described below, under Question 13.

¹² WA, sections 13-16

¹³ LC, section 17

¹⁴ WA, section 13; LC, section 9, subsection (2)

¹⁵ WA, section 14, subsection (1)

¹⁶ WA, sections 14-16

Nevertheless, an analysis of the regulation on whistle-blowing executed by an NGO asserts that there is still a need for a shift in culture in terms of judging the role of whistle-blowers. The importance of whistle-blowing in the detection and prevention of wrongdoing is still generally under-valued. It is an inexpensive risk management tool with particular benefits for emerging democracies with less established oversight mechanisms. Whistle-blowing is also a tool to sound the alarm at early stages, potentially even before any damage has been caused. Nevertheless, whistleblowers are often perceived as disloyal, rather than as champions of the public interest. In many countries they are viewed as untrustworthy, and sometimes even as spies or traitors.¹⁷

5. Is there case law dealing with whistle-blowing concerning labour law?

- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

The WA entered into force on the 1st of January 2014, therefore there is still no published case-law based on this Act. Previously there was no regulation on WB2. However, WB1 had been regulated for more decades, further labour law similarly provided for the confidentiality duty of the employer and the employee, and the employer also had to meet the data protection requirements enshrined in the DPA. The Supreme Court¹⁸ released a few decisions concerning whistle-blowing cases, applying the earlier effective, relevant legislation.

Case 1.: The employee prepared an estimation and expert opinion of the distance heating costs, which were unfavourable to the citizens and the debts of some users were also calculated into the costs. The plaintiff sent it to the mayor and two members of the local council. The employer terminated the employment relationship of the plaintiff by extraordinary dismissal, alleging that the plaintiff intended to damage the legitimate economic interests of the company and disclosed information to third persons without authorisation. The court found that the interests of the company to uphold this estimation were not legitimate. It was a public interest reporting to persons whose duty is to deal with cases of public interest. The Supreme Court held that the extraordinary dismissal was unlawful and ordered a new proceeding regarding compensation.¹⁹

Case 2.: Three former employees of a waste water management company along with sixteen colleagues initiated a court procedure against their former employer and demanded a court declaration that their dismissal without notice (extraordinary dismissal) was unfair. The former employees turned to the mayor of the city, complaining about their low salaries. At the same time they informed the mayor that as instructed by their superior they had to dump the waste material and waste water into the river as the waste management containers had been full for seven years. They also gave an interview to a commercial television channel on the same issue. The defendant claimed that the employees tarnished the good reputation of the company, and their superior, and violated business secrets. However, he did not claim that the allegations were unfounded. The court found that even if the opinions of the employees were sharp, it cannot be regarded as a false public interest

¹⁷ [https://transparency.hu/wp-content/uploads/2010/12/Whistleblowing - an effective tool in the fight against corruption - Policy Position.doc](https://transparency.hu/wp-content/uploads/2010/12/Whistleblowing_-_an_effective_tool_in_the_fight_against_corruption_-_Policy_Position.doc), section 5

¹⁸ The Supreme Court was the legal predecessor of the Curia, which is currently the single highest instance forum of the Hungarian judiciary.

¹⁹ Judgement of the Supreme Court, no. BH 2002/31.

reporting, regardless of potential information finding that the employees concerned did not fulfil their duties according to the instruction of the superior and to the professional standards. The court invalidated the dismissals and a criminal procedure was initiated against the superior for damaging the environment.²⁰

Case 3.: Members of the Works Council were dismissed without notice, because they informed a third party (the owner) and the media on a litigation regarding a hotel and other estates. According to the employer, they violated his/her business secret and jeopardised his/her legitimate economic interests. According to the Supreme Court, there is a confidentiality obligation of Works Council members, but this cannot be a barrier to their activities in employee representation. They are obliged to keep the secrets of the employer, if disclosure of an information would jeopardise the legitimate economic interests of the employer, which was not proven by the employer. The Works Council used statutory rights to protect the welfare of employees regarding these holiday sites. This cannot be considered as a “conduct that would render the employment relationship impossible”. An interpretation to the contrary would seriously impede the fulfilment of the statutory rights of the Works Council, since it commonly leads to conflicts with the employer. Therefore, such a fair exercise of rights (in good faith) cannot be the legal basis of a termination without notice.²¹

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

Yes. The protection of whistle-blowers is provided for those who follow the procedure defined by the WA.

Any employee may make a complaint or a public interest disclosure to the body entitled to proceed in matters relating to complaints and public interest disclosures.²² Public interest disclosures may also be made through a central, protected electronic system for public interest disclosures.²³ In these cases, any person making a lawful whistle-blowing enjoys the protection granted by the WA, as described under Questions 1, 13 and 14.

On the contrary, if an employee abandons the lawful ways of whistle-blowing, and prefers to turn to the media, he/she presumably breaches his/her compliance obligations under labour law. The relevant provisions of the LC have been cited under Question 1. If the employee's action jeopardises or damages the employer's legitimate economic and organisational interests, he/she may even face a dismissal without notice.²⁴ Further, he/she can be obliged to assume liability for damages or to pay “damages for pain and suffering” for the employer as a pecuniary compensation for the violation of the employer's personal rights.²⁵

²⁰ Judgement of the Supreme Court, no. BH 2003/344.

²¹ Judgement of the Supreme Court, no. BH 2007/1633.

²² WA, section 1, subsection (4)

²³ See more: Questions 14 and 16.

²⁴ LC, section 78, subsection (1)

²⁵ LC, sections 9 and 179

7. Does it make any difference what kind of employee passes on information?

The WA does not make any difference, but the employers have the opportunity to determine different levels of responsibility for specific employees' groups adjusted to their position in the enterprise's hierarchy. According to section 52, subsection (1), point d) of the LC, the employee's fundamental duties include that he/she shall perform work in such a way that demonstrates the trust vested in him for the job in question. This indicates that an employee in a higher position or in possession of many confidential information on the employer bears liability on a stricter basis for unlawfully releasing information to third persons.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

- Is it common practice to include confidentiality clauses in employment contracts?
- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

As referred above, section 8, subsection (4) of the LC enshrines a general confidentiality requirement for the employee, with some exceptions (see in detail under Question 2). Since it is a mandatory provision of the LC, neither collective agreements, nor the individual agreement of the parties may derive from this. So this provision constitutes an implied term in every employment contract. However, numerous employment contracts include explicit confidentiality clauses, often reiterating the above cited section of the LC.

Further, the employer is entitled to unilaterally introduce „employer's policies“.²⁶ These are, under certain circumstances, binding on employees without any reference in the employment contracts or in any other collective or individual agreements. An employer's whistle-blowing system may be set up in the form of such an employment policy.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?

- May illegal activities of customers or other business partners of the employer be reported?

The criteria of the justified whistle-blowing in both WB1 and WB2 cases are described under Question 2. Neither the LC (for WB1), nor the WA (for WB2) distinguishes between more and less serious wrongdoings as potential subject matters of whistle-blowings. However, as for WB2, it is notable that the employer has a large margin of discretion in defining the types of the employees' disclosures they accept in the whistle-blowing system: they may dismiss the whistle-blowing of minor misdemeanours. In WB1 cases the whistle-blowing of the acts of third persons can equally be the subject matter of a complaint or a public interest disclosure. In terms of WB2, the law does not exclude the admission of these whistle-blowings, however the employer's policy on whistle-blowing may define in detail the scope of the third persons the illegal actions of whom may be reported by the employees.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

No, there is no general legal obligation to inform the employer before going public.

²⁶ LC, section 17

11. Does it matter which motives an employee has for blowing the whistle?

As we referred above, WB1-type whistle-blowings against the employer have two forms: complaints and public interest disclosures (as defined under Question 2). For the admissibility of a complaint it is required that the whistle-blower demonstrates that the illegal action violates (violated) his/her rights or harms (harmed) his/her individual interests.²⁷

In cases of WB2, the motives of the whistle-blower are not relevant, if the blower is an employee or a business partner of the employer. However, anyone else may use the employer's whistle-blowing system provided that he/she can demonstrate his/her individual interest in blowing a whistle or in remedying the harmful conduct representing the subject matter of the whistle-blowing.²⁸

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

The law does not require the application of proportionality test in cases of WB1.

In cases of WB2, the employer is free to define the conditions of the admissibility of whistle-blowings in its own whistle-blowing system, so it is at its discretion to decide whether to apply a proportionality test or not. The WA authorises the employer, if the harm of public or crucial private interests is not proportional to the protection of the right of the person concerned, to dismiss the investigation of the whistle-blowing.²⁹

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

- In cases of WB1:

According to the general rule, the whistle-blower may not suffer any disadvantages due to the whistle-blowing.³⁰ As an exception, the whistle-blower may face the following consequences, if it becomes clear that a complainer or a whistleblower has disclosed untrue information of crucial importance in bad faith (hereinafter: false whistle-blowing):

- if the whistle-blowing gives rise to an indication that a crime or an offence has been committed, the personal data of the complainer or the whistleblower shall be disclosed to the body or person entitled to carry out proceedings;
- if there is good reason to consider it likely that the complainer or the whistleblower caused unlawful damage or other harm to the rights of others, his or her data shall be disclosed upon the request of the body or person entitled to initiate or carry out proceedings.³¹

The WA does not specify in further detail the potential material legal consequences of a false whistle-blowing. According to the individual facts and circumstances of the case, the whistle-

²⁷ WA, section 1, subsections (2) and (3)

²⁸ WA, section 14, subsection (6)

²⁹ WA, section 15, subsection (1)

³⁰ WA, section 3, subsection (2)

³¹ WA, section 3, subsection (4)

blower employee may face specific sanctions under labour law, if the breaching of the compliance-duty of the employee (LC, section 8, as cited above) or the violation of the personal rights of the employer (LC, section 9) can be established, as follows:

- paying damages³²,
- disciplinary actions,³³
- termination of the employment relationship with or without notice³⁴.

In excessively severe cases, even liability under criminal law may arise (e.g. liability for false accusation).³⁵

- In terms of WB2:

The above described consequences of false whistle-blowing (i.e. authorisation for disclosure of the personal data of the whistle-blower to the body or person entitled to carry out proceedings).³⁶ Upon the reception of the whistle-blowing the whistle-blower shall be informed on the consequences of a whistle-blowing in bad faith.³⁷

The material legal consequences of a false whistle-blowing depend on the individual facts and circumstances of the case, and may range from sanctions under civil law (e.g. remedies for the violation of personal rights) to criminal law sanctions (e.g. liability for false accusation).³⁸

14. Are there any provisions for a whistle-blower to remain anonymous?

Yes, the rules on the confidentiality of the personal data of the whistle-blower are of crucial importance in both types of WB.

- In WB1 cases:

The personal data of the whistle-blower may be disclosed exclusively to the person or the organ having authority to investigate the case, and only if the law authorises this person or organ to process the personal data concerned or if the person concerned expressly permitted it. Exceptions to this rule have been described under the previous question. Without the express consent of the person concerned, his/her personal data may not be disclosed to the public.³⁹

As referred above, the WA requires the Commissioner of Fundamental Rights⁴⁰ to operate a protected, electronic system for the central processing of whistle-blowings.⁴¹ In this network, the above described data protection provisions shall apply as well.⁴²

- In WB2 cases:

³² LC, section 179

³³ LC, section 56

³⁴ LC, section 66, subsection (2), section 78

³⁵ See in detail under Question 18.

³⁶ WA, section 14, subsection (5)

³⁷ WA, section 14, subsection (6)

³⁸ See in detail under Question 18.

³⁹ WA, section 3, subsection (3)

⁴⁰ Official ombudsperson in the Hungarian constitutional system.

⁴¹ WA, sections 4-10

⁴² WA, section 4, subsection (3)

Whistle-blowing systems shall be designed so as to ensure that the whistle-blower can be identified by nobody but those who investigate the whistle-blower report. Until the investigation is closed or formal prosecution is initiated as a result of the investigation, those who investigate the whistle-blower report shall keep confidential all information about the substance of the whistle-blower report and the persons concerned and, with the exception of informing the person concerned, shall not share such information with any other organisational unit or employee of the employer organisation.⁴³

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

The UNCAC has been ratified under Hungarian law.⁴⁴ Articles 32 and 33 of the UNCAC require the State Parties to guarantee effective protection for the witnesses and the reporting persons in cases of corruption. Hungarian national statutory law on the protection of witnesses and whistle-blowers, as referred in the implementation requirements under Questions 16, 17 and 20 meets this requirement. There are only a few judicial cases in the field of whistle-blowing, as referred under Question 5. However, the witness protecting activity of the courts is rather extensive (see more details under Question 20).

The jurisprudence-analysing working group of the Curia,⁴⁵ in its analysis on the case-law on the termination of employment relationships with and without notice asserted that, although the ILO Convention No. 158 is formally not ratified under Hungarian labour law, the requirements and the spirit of the Convention penetrate the regulation of the LC on the termination of employment relationship, and numerous provisions of the LC comply with the Convention.⁴⁶ Since the subject matter of a predominant proportion of lawsuits in the field of labour law is the legal consequences of the termination of an employment relationship, the case-law is very extensive in this aspect.

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

Yes, there are more authorities and other official organs dealing with such information.

- As referred above (Question 14), the Commissioner of Fundamental Rights ("ombudsman")⁴⁷ operates a protected electronic system for the central processing of whistle-blowings. Whistle-blowing reports are registered by an anonymised code, and are published on the Internet without any data relating to the identity of the whistle-blower. Thereafter, the

⁴³ WA, section 15, subsection (2)

⁴⁴ The UNCAC was ratified by Act no. CXXXIV of 2005, the ILO Convention No. 158 has not yet been ratified by Hungary.

⁴⁵ The Curia is the single supreme judicial forum of Hungary.

⁴⁶ Kulisity, M: *Termination of employment relationship from an international perspective (in Hungarian); Annex no. 1 to the summary report of the jurisprudence-analysing working group of the Curia on the practice of the termination of employment relationships with and without notice*, 2014, pages 59-85.

(http://lb.hu/sites/default/files/joggyak/a_felmondasok_es_azonnali_hatalyu_felmondasok_gyakorlata_-_osszefoglalo_jelentes.pdf)

⁴⁷ The constitutional status of the Commissioner is described under Question 14

ombudsman transfers the report to the competent authority for investigation and ensures adequate data protection measures during the whole procedure. An important development of the WA is that the ombudsman may launch an inquiry into the practice of authorities which refuse to act upon public interest disclosures.⁴⁸

- Whistle-blowers can also directly turn to the authority having authority to take action in the reported case. If the whistle-blower has not turned to the adequate authority, the recipient has to forward the case to the competent authority and has to inform the whistle-blower of that at the same time.⁴⁹
- The labour inspectorate and the labour inspection units of the metropolitan and county government offices⁵⁰ have responsibility to perform general inspections on compliance with labour law regulations, occupational safety and health and other related labour issues.⁵¹ Employment complaints may be whistle-blown also to these authorities as well.
- The Hungarian National Authority for Data Protection and Freedom of Information is responsible for supervising and defending the right to the protection of personal data and to freedom of information. Their responsibilities extend to cover both the state and private sectors.⁵² An employee may report irregularities of the data processing activity of the employer.
- The Equal Treatment Authority is responsible for investigating the complaints filed for the violation of the principle of equal treatment and enforcing that principle. The authority shall proceed in the cases of clients suffering discrimination, for instance in the field of employment.⁵³
- Any person can submit a complaint or an informal complaint to the Hungarian Competition Authority (HCA) when he/she observes a behaviour which infringes the Competition Act, the Act on Trade or the Act on Business Advertising Activity and which falls within the competence of the HCA. This can be an important market indication, which supports the work of the authority and may result, subject to the decision of the HCA, in the initiation of a proceeding.⁵⁴ Since employees may be witnesses of infringements of the aforementioned acts in the field of competition law, the protection guaranteed by the WA for a whistle-blower may encourage them to lodge such a complaint.
- The WA introduced the possibility to contract a „lawyer for the protection of whistle-blowers“. Any private legal person may decide to assign an independent lawyer/attorney for receiving and managing whistle-blower reports relating to the activities of that assigning legal person. For the purposes of the activities of the lawyer for the protection of whistle-blowers, all indications of circumstances the remedying or discontinuation of which are in the legal or lawful business interest of the legal person or contribute to putting an end to an infringement or to a threat to public security, public health or the environment occurring in relation to the activities of the legal person shall be whistle-blower reports.⁵⁵

⁴⁸ WA, sections 4-10

⁴⁹ WA, section 7

⁵⁰ The metropolitan and county government offices are the regional administrative bodies of the government with general powers (Source: <http://www.kormanyhivatal.hu/hu/jasz-nagykun-szolnok/hirek/organisation>). They have special units for the specific branches of the administration.

⁵¹ http://www.ommf.gov.hu/index.php?akt_menu=263

⁵² <https://www.naih.hu/general-information.html>

⁵³ <http://www.egyenlobanasmod.hu/eng>

⁵⁴ http://www.gvh.hu/en/legal_background/introduction_to_the_procedures_of_the_gvh/complaints_and_informal_complaints/4256_en_complaints_and_informal_complaints.html

⁵⁵ WA, section 17

We could mention two good examples for a WB2 system existing in the Hungarian judiciary.

- In 2012, the National Office for the Judiciary⁵⁶ (hereinafter: NOJ) of Hungary established a binding policy for all courts to regulate the system and the proceeding of the acceptance and handling of individual complaints and whistle-blowings, and to ensure the protection of the reporting persons.
- A wide range of public and private sector organisations employ equal opportunities officers/representatives including all high courts, regional appellate courts, the Curia⁵⁷ and the NOJ.⁵⁸ All these courts and the NOJ have established their own policies for equal opportunities and employment. According to these policies, „equal opportunities officers“, functioning at every court referred above and the NOJ, monitor and evaluate compliance with equal opportunity laws, guidelines and policies to ensure that employment practices give equal opportunity without regard to race, religion, colour, national origin, sex, age or disability. The equal opportunities officers are also responsible for handling individual, discrimination-related complaints from the workers of the courts or the NOJ. The protection of whistle-blowers and the method of the handling of complaints is regulated by the equal opportunities policies of the courts or the NOJ.

The WA enshrines a set of rules on the protection of whistle-blowers against retribution, in compliance with the UNCAC, as follows.

- According to the most important, general rule, any action taken as a result of a public interest disclosure which may cause disadvantage to the whistle-blower shall be unlawful even if it would otherwise be lawful.⁵⁹
- We have reported in detail about the protection of the personal data of the whistle-blower under Question 14.
- Special protection is granted for whistle-blowers using the electronic whistle-blowing system of the Commissioner of Fundamental Rights. They may request that their personal data are only made available to the Commissioner. The Commissioner shall abridge the public interest disclosure in order to ensure that it does not contain any data that may enable the identification of the whistleblower.⁶⁰
- As for the criminal protection of whistle-blowers, Act no. II of 2012 on Misdemeanour Offences (less serious criminal acts) is relevant. Any person who takes any detrimental action

⁵⁶ The National Office for the Judiciary (hereinafter: NOJ) was established in 2012 as the central administrative organ of the judicial system, which is an entity independent from the government.

⁵⁷ The Hungarian judiciary includes 4 levels:

- 1st level: district courts (110)
- 2nd level: high courts (20)
- 3rd level: regional appellate courts (5)
- 4th level: Curia (1)

The labour and administrative judiciary is separated from the ordinary court system at the lowest level. This branch includes the following levels:

- 1st level: administrative and labour courts (20)
- 2nd level: high courts (20)
- 3rd level: Curia (1)

⁵⁸ The National Office for the Judiciary (hereinafter: NOJ) was established in 2012 as the central administrative organ of the judicial system, which is an entity independent from the government.

⁵⁹ WA, section 11

⁶⁰ WA, section 6

against a person who has made a public announcement commits a misdemeanour.⁶¹ However, the lack of case-law shows that this criminal protection is rarely applied.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

As already referred, any action taken as a result of a public interest disclosure which may cause disadvantage to the whistle-blower (dismissal or liability for damages) shall be unlawful even if it would otherwise be lawful.⁶² Exceptions to these rules in the cases of unlawful whistle-blowings and the potential legal consequences under labour law have been described under Question 13.

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

In Hungarian public law only the criminal law imposes sanctions against unlawful whistle-blowing. Unlawful whistle-blowing itself is not a criminal offence. However, a criminal proceeding can be conducted against a whistle-blower who acted in bad faith for the commission of the followings:

- false accusation⁶³
- misleading of authority⁶⁴
- defamation⁶⁵
- criminal offences with ^{classified} information⁶⁶

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

No.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

A whistle-blower may qualify as a witness if he/she is requested to deliver evidence in a lawsuit. In lack of special provisions for whistle-blowers, both the general provisions for whistle-blower protection, as described under Questions 16 and 17, and witness protection are applicable. In criminal law, witness protection is regulated by Act no. LXXXV of 2001 on the Protection Programme for Participants of Criminal Procedures and Persons Co-operating with the Criminal Justice (hereinafter: Witness Protection Act)⁶⁷ and by Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter: CCrP). In criminal cases the witness is obliged to appear before the authorities and to make statements about facts and events. The state is obliged to protect the witness from detrimental consequences or stress deriving from the situation. According to section 95 of the CCrP, the witness

⁶¹ Act no. II of 2012, section 206/A

⁶² WA, section 11

⁶³ Act no. C of 2012 on the Criminal Code (hereinafter: CrC), section 268

⁶⁴ CrC, section 271

⁶⁵ CrC, section 226

⁶⁶ CrC, section 265

⁶⁷ For the English version of the Act see: <http://www.selec.org/doc/Hungary.pdf>

shall be provided protection of life, physical integrity and personal freedom in return for fulfilling the obligation of giving an uninfluenced statement. The forms of witness protection can be both physical and legal. The legal protection is ensured by both substantive criminal law provisions and the rules of criminal procedure. The substantive criminal law protects, in a general way, the body, integrity and freedom of persons, but it also contains special provisions on the protection of witnesses.⁶⁸

A wide range of protection measures can be applied for witnesses, which may also protect whistleblowers, but the laws are focusing on serious crimes.

In civil cases, according to Act no. III of 1952 on Code of Civil Procedure⁶⁹ (hereinafter: CCivP), the court may decide to hold a closed hearing, where it is deemed absolutely necessary for the protection of classified information, trade secrets or any other information that is rendered confidential by specific other legislation. Furthermore, in particularly justified cases the court may bar the public from the hearing when examining witnesses with a view to keeping the witnesses' data confidential, and the holding of the hearing in closed session is absolutely necessary for the protection of the life and safety of the witness and his/her family.

The court shall handle the personal data of witnesses other than their names separately from all other documents, in strict confidentiality, if they were notified by the party. The personal data of witnesses may be accessed only by the court, the clerk keeping the records (transcriber) and the public prosecutor. The court shall ascertain during the proceedings that, apart from the party calling the witness and the public prosecutor, the parties and other persons involved in the action shall not be able to obtain the personal data of witnesses.

The court shall handle the personal data of witnesses in strict confidentiality also if so requested by the witness before questioning. In this case, confidential handling shall apply to those data kept off limits from the opposing party of the party calling the witness (any adverse party involved in the action), other than the public prosecutor.⁷⁰

All the courts in Hungary joined the witness care programme introduced by the NOJ in 2014. The goal of witness care is to ensure that the witness can exercise his/her rights and fulfil his/her obligations as it is required during the court procedure. To achieve this goal, every court has witness caretakers, who are informing the witnesses about their rights and obligations. These pieces of information are also available on the website of the high courts and in the client areas of the district courts and high courts. From 2015, a wide-scope and efficient victim protection programme has been added to the national witness care programme. The NOJ is committed to enable the victims to receive customised and professional assistance, although it is primarily not the courts' task to provide this. Therefore it was necessary to create an information network with the help of which the court can direct the victim to the adequate organisation. 17 out of 20 high courts have interview rooms for protected witnesses as of the first half of 2016, but the district courts without a designated witness room also try to provide a separate waiting facility for witnesses. The number of witness caretakers has been growing dynamically from year to year; there were 227 witness caretakers at the beginning of 2016.⁷¹

⁶⁸ Karsai, K. – Szomora, Zs., *Criminal law in Hungary*, Wolters Kluver, 2010, pages 167-

168 https://books.google.hu/books/about/Criminal_Law_in_Hungary.html?id=hhIS8O8udBoC&redir_esc=y

⁶⁹ CCivP, section 5

⁷⁰ CCivP, section 171

⁷¹ http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/obh_2016_1_eng_report_20170404web.pdf

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

The adoption of the Whistle-blowing Act is certainly a development to welcome. The Act represents a comprehensive and uniform regulation by extending whistle-blowing protection in both the private and public sector. It provides a legal framework for both types of WB (WB1 and WB2). Providing anonymity to the whistle-blower is one of the main principles of the statutory law, without which the new system could not operate effectively. However, the commentaries articulate criticisms about the WA as well. It is suggested that it is an unreasonable restriction that no sensitive data may be processed in the employer's whistle-blowing system. For example, the criminal records of an investigated person may be relevant, and sometimes it may also be unavoidable to process data revealing racial, national or ethnic origin, political opinions and any affiliation with political parties, religious or philosophical beliefs in case of the investigation of a discrimination case. Information on the trade union membership of the people involved may also be necessary to obtain.⁷²

Further, it appears to be unclear whether employers have a positive obligation to report any and all crimes they might, as the operators of hotlines, come across while processing the reports. It is also questionable whether foreign regulations might also be relevant when assessing whether a reported conduct qualifies as a crime.⁷³

In the view of an NGO, although Hungary's new 2014 legislation extends whistle-blowing protection in both the private and public sector, its regime is weak, because it requires corporate compliance officers to inform the targets of whistle-blower disclosures that they are the subject of a complaint, which undermines the credibility of subsequent investigations. The Act does not designate any agency to protect whistle-blowers and defines no specific procedure to examine whistle-blower reports. While the law introduced a protected electronic system operated by the ombudsman, there are no robust and effective methods to examine reports.⁷⁴

As the new legislation is recent and only a few judgements have been so far published, the case-law does not offer any room for valuation.

Ireland

Report by Judge Kevin Foley

1. How would you define "whistle-blowing"?

Whistle-blowing, or protected disclosures, as it is known in Irish law is defined by section 5 of the Protected Disclosures Act 2014 as involving the disclosure of 'relevant information' Relevant information is in turn defined as information which : -

⁷² Domonkos, M., *New Whistle-blowing Law Generates New Data Privacy Issues in Hungary*, <https://iapp.org/news/a/new-whistleblowing-law-generates-new-data-privacy-issues-in-hungary/>

⁷³ http://www.oppenheimlegal.com/media/news/11/Newsletter_Whistleblowing2.pdf.

⁷⁴ Whistle-blowing Protection in Romania and Hungary. Transparency International, https://www.transparency.org/files/content/corruptionqas/Whistleblowing_regulations_in_Romania_and_Hungary_2015.pdf

*(a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and
(b) it came to the attention of the worker in connection with the worker's employment.
(3) The following matters are relevant wrongdoings for the purposes of this Act—
(a) that an offence has been, is being or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged,
(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,
(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or
(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.*

2. Is whistle-blowing regulated by statute law in your country?

Yes. See answer to question 1, above

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

The relevant legislation provides that the motivation of the person making the disclosure is irrelevant.

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

The legislation covers all workers. The principal purpose of the legislation is to provide workers who make protected disclosures with protection against any form of penalisation in employment in consequence of having made the disclosure.

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

The Protected Disclosures Act is primary legislation and not a code of conduct. The legislation is relatively new and the Labour Court has limited experience of its application. However, the protection of whistle-blowers is a matter of considerable controversy and discussion in Ireland in consequence of some high profile cases outside the employment law sphere.

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

It is regarded as morally, and legally, justified and acceptable. Many high profile whistle –blowers are regarded as having done a public service by their actions in making disclosures.

5. Is there case law dealing with whistle-blowing concerning labour law?

As indicated above the legislation is relatively new and the Court has limited experience of its application.

- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

The Irish legislation is not based on the disclosure being ‘justified or unjustified’. If it is a protected disclosure (which is judged by reference to its subject matter) it attracts the protection of the Act. Moreover, as indicated above, the motive or reason for the disclosure must be regarded as irrelevant. Consequently, if a disclosure is a protected disclosure it cannot be unlawful.

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

The Act specifically allows for the making of disclosures to public authorities. However, disclosure to the media is only protected where the subject matter of the disclosure is of a serious nature, which is undefined in the legislation.

7. Does it make any difference what kind of employee passes on information?

It makes no difference

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?
- Is it common practice to include confidentiality clauses in employment contracts?
 - Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

Such provisions are commonly used in individual contracts of employment. However, any such contractual provision cannot offset or supplant the provisions of the Act.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?
- May illegal activities of customers or other business partners of the employer be reported?

Disclosures concerning the commission or anticipated commission of ‘an offence’ are protected. The terms ‘offence’ means any act or omission which is contrary to the criminal law. It is not limited by reference to its seriousness.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

Generally yes. However, if the person making the disclosure genuinely believes that the employer may destroy evidence of wrong-doing he or she may go to relevant public authorities.

11. Does it matter which motives an employee has for blowing the whistle?

As indicated above, the legislation expressly provides that motive is irrelevant

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

No. there is not such test

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

If knowingly false information is given the person could face consequence in defamation. However, *mala fides* would have to be established

14. Are there any provisions for a whistle-blower to remain anonymous?

Yes, there is provision for the person making the disclosure to remain anonymous. However that can be lost where it becomes necessary to effectively investigate the matters disclosed

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

No

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

In some public bodies there is an office described as a 'confidential recipient' to whom disclosures can be made in confidence

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

If the protection of the Act is lost the person concerned can be subjected to disciplinary sanction by his or her employer. There may also be consequences in civil law, such as an action for defamation in the circumstances described at question 13

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

No. There are no sanctions in criminal law

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

No.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

All Irish employment rights enactments prohibit any form of penalisation of workers for appearing as a witness in proceedings under the enactment in question. If a person is penalised for giving evidence in court, in a matter unrelated to employment law, the matter can be dealt with under the law applicable to contempt of court. It is a contempt of court, punishable under the criminal law, to interfere with the administration of justice and that would arise if any form of retaliatory action was taken against a person who gave evidence in court proceedings in either a civil or a criminal action.

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

The legislation in this jurisdiction is robust and seems effective. It will, however, be kept under review.

Israel

Report by Hon. Judge Yigal Plitman, President of the Israeli National Labour Court

1. How would you define “whistle-blowing”?

Whistle-Blowing is the act of notifying about an unlawful behaviour or wrongdoing perpetrated in an organization, in an attempt to rectify that behaviour. The notification is made to a person/ body- whether inside or outside that organization- which may take action against the behaviour. In the context of a workplace, an employee who reports about such acts in his surrounding, is a whistle-blower (hereinafter- **WB**).

2. Is whistle-blowing regulated by statute law in your country?

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

Yes. Whistle-blowing is mainly regulated by two relevant statutes- The State Comptroller Act (5718)-1958 (hereinafter: **The State Comptroller Act**) and The Protection of Employees (Exposing Offenses and Damages to the Integrity or Proper Administration) Act (5757)-1997 (hereinafter- **The Protection of Employees Act**). Both statutes regulate the procedure in which a WB may stop retaliatory actions taken against him by the employer, in response to his whistle-blowing, and the scope of the protection given to him under the relevant circumstances. It is important to mention that while the former applies only to public organizations (supervised by the State Comptroller), the latter applies also in the private sector. A third statute- The Encouragement of Integrity in the Public Service Act (5752)-1992- as its name states- aims to encourage the act of whistle-blowing in the public sector by granting a WB with an official document stating that his complaint was found justified- if that is in fact the case- and may even result in awarding a WB a certificate of appreciation by the Israeli President.

It should be noted that alongside these statutes, there are several provisions in numerous acts containing an obligation to supervise and report any unlawful behaviour in an organization to the proper authorities. According to these provisions, a failure to comply with this duty may result in criminal liability.

- According to the statutes detailed above and current case law, the act of whistle-blowing is always permissible. The only caveat is that there is no guarantee that the WB will be given legal protection in cases where his whistle-blowing resulted in any act of retaliation against him, and even to the termination of his employment. The extent of that protection, as mentioned above, is dependent on whether or not the WB acted in accordance to the criteria stated in the statutes.

- According to The Protection of Employees Act, in order to be eligible to the Labour Court's protection, the WB must show that his initial act of whistle-blowing was reported in good-faith; that it involved a violation of a statute- committed by the organization he works at- and if it is a public organization, the nature of the complaint may also be an offense on the integrity or any deviation from proper administration made by the organization; and that the report was made to the appropriate body that is authorized to investigate it. In addition, the WB must show that he was mistreated due to the whistle-blowing. In order to accomplish this, the WB has to meet the following conditions: first, he must file the current suit to the Labour Court within a year of his whistle-blowing; second, he has to prove that his employer harmed him and worsened his working conditions- or even fired him; and third, that there was no reasonable or legitimate reason to do so. Proving these factors will demonstrate that there is a possibility that the act of whistle-blowing effected his work situation, and will shift the burden to the employer to show that the WB's change in employment terms/ termination, does not have anything to do with his initial whistle-blowing. If the employer fails to do so, the Labour Court has the authority to award the WB with damages, and under some circumstances- even to order he would be reinstated to his prior position.

- According to The State Comptroller Act, the State Comptroller, serving as the Ombudsman, has the authority to award the WB, in the case of a public organization supervised by the State Comptroller, with damages, and under some circumstances- even order he would be reinstated to his prior position or be hired by another organization run by the same employer. This can happen in cases where the WB shows that he was mistreated in his workplace or even fired, and that it was done

without just cause, legal authority or against rules of proper administration; that the whistle-blowing was done in good-faith and according to standard procedures; and that there is a connection between the harmful act committed against him and the whistle-blowing.

- It is important to mention that a WB cannot utilize both mechanisms stated in The Protection of Employees Act and The State Comptroller Act at the same time, as the State Comptroller, serving as the Ombudsman, may not provide any assistance in an issue that is being litigated at a judicial body.

Though the statutes themselves do not state the purpose of whistle-blowing, it has been discussed at length in the case law. For example, it has been said that the act of whistle-blowing strengthens the legal regime and guarantees the public interest of keeping the integrity in public and private organizations, and allows for people to enjoy their right to work in a place free of corruption. The idea is that a true complaint about illegal or immoral behaviour improves the manner in which the system operates, protects against further acts of corruption and allows to increase the level of performance and sense of values. There is an important significance in exposing corruption and deviation from the proper procedure, in order to maintain the public trust in the public and private systems.

As stated earlier, WB in both private and public sectors- of all fields- are protected under the two relevant statutes, as long as they meet the criteria listed there.

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

Usually, WB are treated as traitors in their place of work. The rest of the employees see them as those responsible for harming or at least causing disturbance in the workplace, as people that cannot be trusted and who do not demonstrate any loyalty. It should be noted that the working relations in the workplace are a factor the Labour Courts take under consideration, when deciding whether to order the re-hiring of the WB who was fired by his employer. This is because there is no doubt that the work environment has a tremendous effect on the productivity, and productivity is a goal to be protected. However, to the general public, people who go out of their way to report about an illegal or immoral act in their workplace- knowing the price they will most likely have to pay and their willingness to risk everything in order to ensure the proper behavior of both public and private organizations- are perceived as heroes. This is especially true if the corruption in question is severe, and effects the public's day-to-day life.

5. Is there case law dealing with whistle-blowing concerning labour law?
- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

Yes. There are several cases- both litigated in the Labour Courts and in the Supreme Court- sitting as the High Court of Justice- dealing with whistle-blowing in the workplace. They are mostly brought about by employees/ former employees, claiming that they were WB, and that they were harmed due to their actions.

- A case in which the National Labour Court ruled that the plaintiff's (a WB) was fired because of his whistle-blowing and ordered to re-hire him- though to a different governmental office- was Labour Appeal No. 502/05 **Greti v. The State of Israel- Ministry of Interior Affairs**. In that case the appellant claimed that it was his whistle-blowing about the improper behavior that took place at the department he worked at (the Foreign Employees Enforcement Unit at the Ministry of Interior Affairs) caused him to lose his job. The Regional Labour Court- and later the National Labour Court- agreed that it was the appellant's criticism that contributed to the decision to fire him. The National Labour Court found that the appellant, as a WB, deserves to be given the protection The Protection of Employees Act allows, and that the State's solution to find him a job at the Ministry of Aliyah and Immigrant Absorption represents the proper balance between the remedy of reinstating him to his prior position- as The Protection of Employees Act states as a potential remedy- to the court's discretion on this matter- taking under consideration the time the appellant originally held that position before being fired; the influence of his return to his former workplace on work relations; the discoveries made upon his initial complaint; etc.

- As mentioned earlier, there are no unlawful acts of whistle blowing. There are, however, incidents in which the WB will not be given any protection by the Labour Courts and/ or the Ombudsman, due to the fact these bodies found no foul play made by the relevant organization towards the WB, or if the WB did not meet the criteria listed in the two relevant statutes. Such a decision, for example, was given by the Supreme Court (sitting as the High Court of Justice in HCJ no. 1837/07 **Boger v. The National Labour Court** (Sept. 1, 2008) (hereinafter- **Boger case**). In that case, the appellant claimed that he was fired from his job as an engineer in the Israeli Water Company (hereinafter- "**Mekorot**"), after informing different officials within "Mekorot"- and later in public conventions- on different occasions that "Mekorot"'s water engineering policy is flawed. He stated that if it will not be repaired, Israel will suffer substantial monetary losses, and it might even become a danger to the public's health. It was claimed that the appellant kept trying to promote his views with regard to "Mekorot"'s actions and the way he believe it ought to operate in such a manner, despite "Mekorot"'s warnings that there will be consequences to his behavior, and it might even cost him his job. At a later date, "Mekorot" signed a collective agreement with The Histadrut Ha-Clalit (the biggest employees' organization in Israel), dealing with "Mekorot"'s structural changes, and downsizing the number of employees in it. The appellant was notified his name appears in the list of employees meant to leave the company, and he was given the different reason for it- none of which had to do with his long time criticism about the company. Though the Regional Labour Court (and later the National Labour Court) agreed that the procedures taken by "Mekorot" with regard to the appellant's termination of employment were not done properly, it also ruled there was no cause for ordering "Mekorot" to reinstate the appellant to his prior position. The Regional Labour Court determined that though the appellant was a true nuisance for "Mekorot", especially because of his constant criticism against its policy- a fact that might have been a factor in the decision to include his name among the employees that lost their job as a result of the application of the collective agreement- he does not fall under the category of a WB, and thus is not entitled to the protections The Protection of Employees Act affords. The National Labour Court affirmed the Regional Labour Court's conclusions on these matters. The High Court of Justice adopted the National Labour Court's decision, and rejected the appellant's appeal.

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

7. Does it make any difference what kind of employee passes on information?

No, it does not. Under The Protection of Employees Act, any employee at any organization, may file a report about an action he deems to be unlawful (and in a public organization- even if he believes it to be a deviation from proper rules of administration). The State Comptroller Act also does not differentiate among the employees at a public organization, and allows each and every one of them to pass on such information.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

- Is it common practice to include confidentiality clauses in employment contracts?
- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

- Though some employment contracts include confidentiality clauses, they mostly relate to trade secrets, but there is no general provision- implied or otherwise- to keep any information the employee comes across during his employment secret- especially if it involves any illegal or immoral behaviour made by the relevant organization.

- It is possible to first refer the employees to an internal system of compliance- whether as part of the employment contracts or as a common policy. It is not common.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?

- May illegal activities of customers or other business partners of the employer be reported?

- As far as The Protection of Employees Act- even minor misdemeanours may be subject of justified whistle-blowing.

- As far as The State Comptroller Act- minor misdemeanours will not suffice. The illegal activities reported have to be corruption, severe violation of a statute, or severe obstruction of the rules of proper administration.

- It is possible to report about illegal activities of customers or other business partners of the employer, as it sometimes may be deemed to be also an improper activity of the employer.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

Yes. The Labour Courts have interpreted the obligation stated in The Protection of Employees Act- which requires the WB to report the information to the proper authority- as an obligation to first approach the employer himself as such an internal investigation holds numerous benefits. However, the courts also stated that if the attempt to get any cooperation and assistance from the employer seems futile or that the WB has a reasonable cause to believe he will be severely harmed by it or that

the organization will manipulate the situation- the WB may approach directly an external body of investigation (e.g. the police).

11. Does it matter which motives an employee has for blowing the whistle?

Generally speaking, the WB must act in good-faith while engaging in whistle-blowing. This demand mostly means he may only act if he has a substantial reason to believe the information he reports is in fact true and sound. However, it seems that the demand to act in good-faith does not extend to the WB's motives, and therefore it is not relevant what his motives were upon dispensing the information.

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

See answer # 9.

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

Yes. Both relevant statutes entitle the WB protection against any type of harassment, arising from his whistle-blowing, even if it turns out that the information he provided was wrong, and did not constitute an illegal act or any deviation from the rules of proper administration performed by the organization he works at. This is the case as long as it is proven that at the time he passed-on the information, he believed, in good-faith that it is correct, and did not have any way of knowing otherwise.

14. Are there any provisions for a whistle-blower to remain anonymous?

The answer is dependent on the WB. Generally speaking, the initial act of whistle-blowing may be done anonymously. For example, a complaint against a public organization regarding its involvement in an illegal act, or an act that violates proper administration may be submitted to the State Comptroller, anonymously. Another example allowing an anonymous complaint- is one submitted to the police. However, in order to receive protection from the courts or the State Comptroller- in his capacity as an Ombudsman- in case there are consequences to the whistle-blowing, the WB must show he sustained an injury because of his whistle-blowing. If his report to the proper authorities was anonymous to begin with, there is no way to show a correlation between the two.

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

No. Neither documents are mentioned in the Israeli case law on this matter (both the Supreme Court and the National Labour Court's decisions).

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

Yes. In Israel the State Comptroller also serves as Ombudsman. Under this capacity- and according to the State Comptroller's Act, the Ombudsman may award protection to WB in a public organization (supervised by the State Comptroller). This is done in cases of a WB, who filed in good-faith a complaint about acts of corruption, a severe violation of a statute or a severe offence to the proper administration of that organization, and suffered a retributive behaviour by his employer because of that report. The Ombudsman has the authority to conduct an investigation on the matter, and eventually- if he finds the WB was targeted due to his report- even issue an order to reinstate the WB to his former job (if he was fired), and/ or award him with damages.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

The act of whistle-blowing, in general, is not considered unlawful in Israel. However, the WB will only be awarded the protection of the relevant statutes, if his initial report was made in good-faith, when he was in fact under the impression the information he passes is correct- even if it later turns out to be wrong. In case the WB knew he was filing a false complaint, not only will he be left without any protection from the courts, but he may also be forced to pay damages to his employer.

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

Knowingly filing with the police a false complaint about an offense- is deemed a criminal offense.

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

There are a few differences when it comes to the protection the WB is entitled to in private and public organizations. First, the protection under the State Comptroller Act only applies to the public sector- and is not relevant to the private sector. This Act protects WB who was hurt upon reporting acts of corruption and severe violations of a statute or breach of proper administration in his organization. Second, though The Protection of Employees Act applies to both public and private organizations, the scope of the protection differs. While WB, who works for the private sector, only enjoys protection against retribution from his employer if the act he reported on constituted a violation of a statute, a WB at the public sector may also enjoy such protection if the act in question was either a violation of a statute or a deviation from the integrity or the proper administration of that organization (Art. 4(2) to the Act). Another difference detailed in The Protection of Employees Act between a WB in a private or a public sector has to do with the remedy granted: while the remedy of issuing an order reinstating the WB to work (in case he was fired) applies to all WB in public organizations, it only applies to private organizations which employ over 25 persons (Art. 3(b) to the act).

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

As mentioned earlier, both The Protection of Employees Act and The State Comptroller's Act provide the WB protection in an event his whistle-blowing caused him any harm, this defence obviously extends to any retribution act caused due to his testimony- a testimony he must provide if called upon to do so by the court. If the employee who is called as a witness is not a WB, he is still protected from retribution. This protection is given in accordance to The Penal Law (5737)-1977, which considers harassment of a witness as a misdemeanour.

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

It seems that the current law in this field is proper, and adequately regulates the act of whistle-blowing and the defenses to the WB. As mentioned above, the employee is free to engage in this activity, but must take under consideration the repercussions of such behavior- if it is later discovered that it was not done in good-faith. It should be mentioned that The Protection of Employees Act was even amended so it shifts the burden of proof to the employer, to prove the WB was not harmed due to his whistle-blowing. However, there is some criticism heard in the academic literature in this field, according to which the courts are not applying The Protection of Employees Act to its full extent, and that many WB are left unprotected in the face of retributive actions taken by their employers. It is important to stress, however, that in many events the Labour Courts are forced to balance between two opposite interests. On one hand, the desire of the WB to return to his job, without any negative implications of his whistle-blowing. On the one hand, the fact that the courts cannot control the minds of the employer and the rest of the employees, who might view the WB as a traitor to the organization and find it difficult to work with him, thus harming the harmony in the workplace. The Labour Courts operate in a very delicate environment, in which people's emotions and views are involved, and the courts are left to navigate in this field, hoping to cause the minimal harm to the workplace and to all of the individuals who work there- including the WB.

Italy

Report by Judge Filippo Curcuruto

1. How would you define "whistle-blowing"?

In Italy we could make reference to a specific law provisions, namely art. 54 bis of the legislative decree n. 165 of year 2001, regarding the statute of the public employees. Drawing on it we could say that a whistleblower is a public employee who denounces to the public prosecutor or to the special administrative body which deals with the problems of corruption (A.N.A.C.- Autorità nazionale anticorruzione) to his/her hierarchical superior any unlawful conduct he/she has become aware of for reasons depending of his/her job.

2. Is whistle-blowing regulated by statute law in your country?

Yes, but only in the public sector.

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

The purpose of the whistle-blower doesn't matter.

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

In the public sector every branch is covered by the above mentioned legal provisions.

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

Whistle-blowing is a general topic of discussion in labour law.

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

The answer is YES for both the questions.

5. Is there case law dealing with whistle-blowing concerning labour law?

Not in a straight or direct way. Reference to the whistle-blowing is sometimes made in judicial decisions to give the judicial reasoning more strength.

- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

See the above answer.

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

Passing the information to the media is not covered by the aforementioned law provision.

7. Does it make any difference what kind of employee passes on information?

No.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

YES. The employee has a duty of fidelity toward his employer (art. 2005 of our civil code). This means that he is not allowed to divulge information about the company if the disclosure could result in any harm for the employer. Therefore what counts is the importance of the information.

- Is it common practice to include confidentiality clauses in employment contracts?

It depends on the rank of the employee. It's common practice in contracts with high rank employees.

- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

Some systems of compliance are organized. I wouldn't speak of common practice.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?

As said in answer n. 1, in the public sector the whistle-blowing is protected if it refers to an unlawful behaviour, that is, to a seriously illegal conduct. Till now no special provisions have been set up for the private sector.

- May illegal activities of customers or other business partners of the employer be reported?

YES with reference to the public sector.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

According to the article of law quoted in answer n. 1 the whistle-blower is protected if he informs his/her employer or the public authorities mentioned in that article. If he prefers go public first he shouldn't enjoy the same protection. e

11. Does it matter which motives an employee has for blowing the whistle?

No.

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

Protection to the whistle-blower is not granted if commits defamation or slander, that is if he/she is aware of the falsity of the facts he has denounced.

14. Are there any provisions for a whistle-blower to remain anonymous?

Yes. Alinea 2 of the above mentioned art. 55 bis stipulates that the identity of the denouncing person cannot be disclosed unless the disclosure is essential for the defense of the accused person.

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

See answer n. 5

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

We have a public body (the aforementioned ANAC) dealing in general with the corruption issues.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

Both.

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

It's a criminal offence if the whistle-blower knows that what he has revealed is false. See answer n. 13.

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

YES because there isn't any law provisions regarding the private sector.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

The witness has a duty to disclose what he/she knows. Therefore treating him/her less favourably because of what he told to the Court as witness is totally unlawful.

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

We probably need a law regarding the whistle-blowing also in the private sector.

Norway

Report by Judges Jakob Wahl, Tron Løkken Sundet and Marit B. Frogner

1. How would you define "whistle-blowing"?

Introductory remarks:

Rules on whistleblowing are laid down in the Norwegian Working Environment Act (2005) (WEA). The rules were evaluated in 2016, and the conclusion was that they for the most part were well-functioning; however, there were room for improvements. In 2016, a committee of experts was appointed to review and evaluate the current legislation on whistleblowing. The objective is to further strengthen the protection of the employee. The report will be presented in 2018.

Meanwhile, and to strengthen the protection of the employee and make the rules more accessible, the rules were amended with effect from 1 July 2017 (introducing a new Chapter 2A of the WEA).

The particular rules on whistleblowing (“varsling”) apply to notifications by the employee that relate to “censurable conditions” in the undertaking (see no. 2 below). Should the employee not be covered by the special rules on whistleblowing, the general freedom of expression applies and implies that in most cases, the employer may not impose sanctions.

As part of their duties concerning health, environment and safety, employees have a *duty* to “immediately notify the employer and the safety representative” when they become aware of faults or defects that may involve danger to life or health or in cases of injuries or diseases related to work. The obligation to notify also applies in cases of harassment or discrimination at the workplace. We will not comment any further on the employee’s duty to notify in this respect.

2. Is whistle-blowing regulated by statute law in your country?

Yes, see above under 1.

The following is a brief overview of the rules in WEA chapter 2A:

According to section 2 A-1, the employee has a “right” to notify concerning censurable conditions at the undertaking. Employees that are hired also have a right to notify to the hiring entity.

The employee shall follow an “appropriate procedure” in connection with notification. The employee has notwithstanding the right to notify in accordance with the duty to notify or the undertaking’s routines for notification. The same applies to notification to supervisory authorities or other public authorities. The employer has the burden of proof that notification has been made in breach of the requirement on “appropriate procedure”.

Retaliation against an employee who notifies according to the rules is prohibited, cf. section 2 A-2. There are rules on a shift in the burden of proof – if the employee submits information that gives reason to believe that retaliation has taken place, it shall be assumed that such retaliation has taken place unless the employer substantiates otherwise. The employee may claim compensation without regard to the fault of the employer. Compensation may be claimed for economic and non-economic loss.

The employer has an obligation to develop routines for internal notification or implement other measures that facilitate internal notification, cf. section 2 A-3. This duty applies if the circumstances in the undertaking so indicate. With effect from 1 July 2017, this obligation applies to all undertakings that employ at least five employees. The routines shall be developed in cooperation with the employees and their representatives. There are minimum requirements to the content.

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

As mentioned above, the matter must relate to “**censurable conditions**” in the undertaking. “Censurable conditions” is interpreted widely – it includes criminal matters, branches of law and regulations, matters related to the environment and matters that are deemed to be in breach of general accepted norms and views in the society. This implies, according to the preparatory works of the law, that matters that the employee based on his or her personal opinion finds unacceptable, are not covered – for instance based on his or her personal belief, religion etc.

Matters that relate to the individual employee and his or her employment relationship only, are not covered. However, this has been criticized and there is obviously an overlap between issues that relate to the individual employee on the one hand and what may be considered censurable conditions on the other. However, as the specific rules on whistleblowing relates to censurable conditions “in the undertaking”, this will basically include most issues that may relate to an employment relationship. Even if it is not considered a whistleblowing according to the special rules in Chapter 2A, there are several other rules that seek to facilitate concerns regarding the employment environment. The employee has of course a fundamental freedom of expression.

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

The WEA apply to all sectors, both private and public, with the exceptions of shipping, hunting and fishing, and military aviation. The Seafarers’ Act (2013) also has rules on whistleblowing.

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

Yes, it is a topic of discussion.

Some cases involving whistleblowing have been highly debated in media, and as mentioned under no. 1, the rules were amended in 2017 to strengthen the protection of the employee and there is an ongoing work to consider further amendments.

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

As the rules on whistleblowing are wide and the employee has a wide freedom of expression, the threshold for such expressions to be unlawful is high. There have not been any cases that typically fall within this category recently.

Notwithstanding, a few cases have been subject to considerable media coverage. These cases did not necessarily result in court cases. When an employee notifies, it is quite common that the undertaking engages a law firm to investigate the matter and prepare a report, and based on the recommendation given, the undertaking will take the necessary steps with a view to rectify any faults or shortcomings. Some of these reports have been made public.

One of the most recent – and famous – cases on whistleblowing involved a police investigator in Bergen. The case was in brief that an eight year old girl was found dead, and the police investigation concluded that she had committed suicide. The investigator complained to his superiors, claiming that there were mistakes and shortcomings in the investigation, and that the girl may have been killed. He was later retaliated against and was on sick leave for a long period. Later, the criminal case concerning the death of the girl was reopened, criminal charges were filed against the stepfather and he was subsequently convicted for having caused her death. The police investigator became a “hero” and received the Freedom of expression prize in 2015. The Police was fined NOK 100,000 (approximately €10 500) for gross lack of judgement in the course of duty. However, it was a lengthy process, and it

sparked a renewed debate on the protection – or rather lack of protection – that applies to whistleblowers in practice.

In some of the cases where the courts have found that the employee have been subject to retaliation in connection with notification, and, with a few exceptions, the amounts that have been awarded have in general been small. Further, the risk that the employee may end up paying not only his or her own legal costs, but also of the employer should he or she lose the case, may in practice function as a disincentive for bringing legal actions.

5. Is there case law dealing with whistle-blowing concerning labour law?

- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

As mentioned above under No. 4, there have been several cases.

One example of a case where the employee was considered to be a whistle-blower was in 2009 (Borgarting appeals' court – LB-2009-36995). The employee was employed as a “non destructive testing” technician in an undertaking engaged in industrial radiography. Shortly after commencing work he discovered criticisable and unlawful incidents and practice, including a lack of compliance with regulations concerning protection against radiation. He informed his superior, who disagreed. He therefore informed the managing director (B), who considered it to be a problem of cooperation between the employee and his superior. After some time the employee again informed B. Later, he informed the Norwegian Labour Inspectorate. The Norwegian Radiation Protection Authority also issued an order to ensure compliance with the regulations. The employee argued that he had been subject to retaliation and filed a claim for compensation. The court found that the employee had followed an appropriate procedure, and that he had been subject to retaliation. He was awarded compensation for economic loss, but not for future loss. He was still employed by the undertaking, however, the court acknowledged that it was not likely that he would return to his workplace. The employee received rehabilitation benefit from the Social Services and the court referred to the general principle of mitigation of loss. Compensation for non-economic loss was awarded with NOK 100,000 (approximately € 10,500).

In 2003, before the adoption of the “new” rules on whistleblowing, the Supreme Court found that there were grounds for summary dismissal of an employee who had sent emails with very harsh criticism and serious allegations towards one of the employer’s customers. The email was sent to all his colleagues and three persons employed by the customer. In the court hearings, the employee argued that a whistle blower – an employee who is watchful, and not afraid to notify, is valuable both for the company and the society as a whole. The Supreme Court agreed, however, they found that the freedom of speech could not protect the employee against retaliations when an employee put forward allegations concerning serious criminal misconduct without any factual support. This case has been viewed as an example of unacceptable and disloyal behaviour. If the case had been considered today, it is in our view likely that the courts would have found that the employee had not followed an appropriate procedure and, consequently, that we would not be protected against retaliation.

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

Yes. As mentioned in no. 2 above, the employee may always notify supervisory or other public authorities.

Notifications to the media may – based on an assessment of the facts of the case, be found to be in breach with the requirement that the employee must follow “appropriate procedures”. Factors that may be taken into account in this assessment is whether the employee first tried to notify internally, the seriousness of the matter, whether there is an urgent matter, whether the undertaking has established routines etc. In general, if the employee has tried to notify/inform internally and raised the subject in the undertaking, and this has not resulted in any response, the employee has a wider margin of appreciation in choosing his or her channels – including contacting the media.

7. Does it make any difference what kind of employee passes on information?

No. However, the rules on whistleblowing apply to matters that the employee has become aware of in connection with his or her employment.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

- Is it common practice to include confidentiality clauses in employment contracts?

Yes, this is common. The rules on whistleblowing do not release the employee of his or her duty of confidentiality. The employee may thus be under an obligation to respect confidentiality concerning technical, personal and other classified information. However, as mentioned above, there will in most cases be an alternative to notify internally in the undertaking and to the relevant public authority.

- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

As mentioned above under no. 2, most undertakings are obliged to establish routines for internal notification. The routines shall be in writing and contain, inter alia, an encouragement to notify about censurable conditions and how to proceed when making a notification. The rules may not limit the employee’s statutory right to notify.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistleblowing? Or is the whistle-blower protected only if certain serious crimes are reported?

- May illegal activities of customers or other business partners of the employer be reported?

Yes, there is as mentioned under no.2, no requirement that there is a (serious) crime. The particular rules on whistleblowing apply to censurable conditions in the undertaking. Thus, activities that relate to customers etc. may not necessarily be covered by these rules. In 2017, the WEA was amended to make clear that the rules on whistleblowing also applies to workers that are hired out, with a right for these workers to report on censurable conditions in the firm that hires them. See below under no. 14 concerning protection of sources of information.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

No, see above under no. 2 and no. 6. This will be a factor when assessing whether the employee has followed appropriate procedures.

11. Does it matter which motives an employee has for blowing the whistle?

No.

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

See no. 2 above concerning the assessment whether the employee has followed appropriate procedures.

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

According to the preparatory works of the Act, the employee must be in "reasonable" good faith. This has been considered by the courts when they assess whether the employee had reason to believe that there were in fact censurable conditions. In this assessment, the courts will attach weight to whether the employee easily and without much work could have examined and clarified the truth of the matters. There is no requirement that the employee shall make a thorough investigation.

14. Are there any provisions for a whistle-blower to remain anonymous?

Yes. When supervisory authorities or other public bodies receives notification on censurable conditions, the name of the employee or other information that may identify the employee shall be kept secret, cf. section 2 A-4 of the WEA.

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

No.

We are not aware of any cases involving whistleblowing where the UNCAC has been referred to or played any role.

(Norway has not ratified ILO convention No. 158.)

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

The various Ombudsmen may be addressee of notification/whistleblowing. There are no particular rules that applies in cases of notification to this public body, see no. 14 above.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

See above under no. 1. The employee has a statutory “right” to notify concerning censurable conditions. Should the notification not fall within the scope of the particular rules on whistleblowing (“varsling”), the employee will – as mentioned – have his fundamental freedom of expression.

However, breaches of confidentiality, harassment etc. may be sanctions – this may include, but is not limited to, warning, dismissal (with or without notice) etc. A claim for damages is possible if the conditions are met. However, this is uncommon.

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

See above under 17. Breach of confidentiality may be a criminal offence.

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

No.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

Yes. Any sanctions would be unjustified.

21. In general: Do you think that your statute and/or case law deals with the problem of whistleblowing adequately?

This is a complex question. The legal framework is extensive, and the employee clearly has freedom of speech. The special rules on whistleblowing have placed a focus on the importance of a culture of openness. Business ethics’ and legislation in this respect has changed over the years. This, combined with influence from whistleblowing-cases in other countries, has led to a change in legislation. The aim and focus seems to have shifted more towards a culture of openness and an internal culture in the undertaking when it comes to handling notifications internally.

However, the rules on whistleblowing and their application are subject to certain conditions and in the end, to the discretion of the court when they assess the facts of the case. There are examples in case law where the employee has notified about several matters and incidents – and quite often – on several occasions. The courts are left to examine whether each notification relates to a “censurable condition” and whether the employee followed “appropriate procedures”. The rules on burden of proof, and the possibility of being awarded compensation for non-economic loss, implies that the employee has a strong interest in being covered by Chapter 2A of the WEA.

The general and strong employment protection will of course also protect the employee, however, in practice, exclusion and informal sanctions seem to be the most common reactions, and legal proceedings may not always be feasible or an alternative in practice.

Sometimes, the employer argues that the employee is not a whistle-blower, but rather a “quarrelsome person”. The employer may clearly disagree with the employee, however, even if allegations/assumptions are wrong, the employer may not impose any sanctions or negative reactions if it is a “whistleblowing” according to Chapter 2 A.

As mentioned above, the employee may institute legal proceedings and claim compensation. However, the risk of losing the case or, if succeeding, being awarded a minor compensation only, may in practice be an obstacle for an individual employee. Our impression is that the union to a smaller degree has assisted their members in such cases compared to other labour disputes and issues.

The rules have been evaluated, and they are currently being considered with a view to further improve and strengthen the protection. In this assessment, legislation must also strike a balance between a strong protection of the whistle-blower on the one hand, but also a protection of legitimate interest of the employer and other employees on the other. For instance, wrongful allegations against other colleagues concerning sexual harassment, misappropriation of funds etc. may be extremely detrimental for the one who – maybe wrongfully – is accused of such behaviour. Anonymity of the whistle-blower may in practice make the following-up even more difficult, and the accused employee may also in practice find him-/herself left without adequate and efficient possibilities of defence if the allegations are vague and undocumented.

Slovenia

Report by Judge Marjana Lubinič

1. How would you define “whistle-blowing”?

Whistle-blowing is an act of a worker or a public servant who (in good faith) reports illegal or corruptive or harmful conduct of the employer.

2. Is whistle-blowing regulated by statute law in your country?

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

Whistle-blowing in Slovenia is not explicitly regulated by statute law. There are no special provisions for labour law matters.

The Constitution in general provides the right to freedom of expression, public speaking and public informing. In our case law whistle-blowing could be included.

Labour law provides for a general protection against retaliatory measures or unlawful dismissal or intolerable treatment (harassment, threats, mobbing etc.). Although employees have to abstain from actions that cause damage to the employer or harm its business interests, they are protected if they disclose information in good faith and in public interest.

Public servants are bound (under the Civil Servants Act) by the Code of Conduct. The public official is expected to perform tasks professionally, conscientiously, impartially and with quality, while taking into account only the public interest and the specific circumstances of the case. Public officials are required to be courteous both in their relations with the citizens they serve as well as with their superiors, other public officials and subordinate staff. Public officials who believe that they are required to act in an illegal manner or to do something improper or unethical that would constitute a breach of the Code of Conduct are legally required to report such illegal requests and activities to the competent authority. They are protected against harassment, threats and similar acts, which jeopardize the performance of public duties.

Legal protection is explicitly provided also for those who report corruptive actions to a special national commission for prevention against corruption.

3. [Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?](#)

It is not a general topic of discussion. It only features in the context of codes of conducts or enforcement of an employment contract.

4. [Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?](#)

In general they are seen as heroes because “they dare”.

5. [Is there case law dealing with whistle-blowing concerning labour law?](#)
[- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.](#)

Example I:

An employee, a public servant (she worked for Public Agency), sent an e-mail to all of the employees. She claimed that the director of the Agency violated the employees rights, that his acts were corruptive and harmful for the Agency and employees, that his authority was “repressive” etc. The employee was dismissed and she consequently filled a lawsuit against her employer on the grounds of unlawful termination. The court of first instance dismissed her action. It held that her dismissal was justified, because the plaintiff as an employee should be loyal to her employer, that she shouldn't cause damage to the employer and that she harmed the director's reputation. This decision of the

court of first instance was later upheld by the court of second instance (i.e. Higher Labour and Social Court - the appellate court). The plaintiff lodged a request for revision of the final court decision at the Supreme Court of the Republic of Slovenia. She argued that her intention was not to cause any harm or damage, that she acted in good faith and public interest and that her right to freedom of expression had been violated.

The Supreme Court reversed the decision of the courts of second and first instance and decided that the plaintiff's constitutional right to freedom of expression had been violated. The Court referred to Article 10 of the ECHR and held that public officials indeed are expected to be loyal, reserved and discrete in relation to their employer, however in the case at hand, the plaintiff pointed out to the conduct, she sincerely believed to be illegal. She acted in good faith, not following her personal but public interests and was not offensive in the process of doing so (she did exaggerate but objectively speaking did not cross the line of intolerable behaviour). Therefore the Supreme Court decided that she enjoys protection against termination (dismissal). In its decision, the Supreme Court referred to several ECHR cases: *Guya v. Moldova* no. 14277/04, *Langner v. Germany* no. 14464/11, *Rubins v. Latvia* no. 79040/12, *Sanches v. Spain* no. 28955/08, *Kharlamov v. Russia* no. 27447/07, *Balenović v. Croatia* no.. 28369/07).

Example II:

An employee gave an interview to a national newspaper. He claimed that some actions of the leadership of a company where he worked were illegal and wrongful. He disclosed also some internal business information. His employment contract was terminated. He was accused of harming the employer's reputation and of unlawful disclosure of the company's business secrecy. The Supreme Court established that prior to the events that led to the plaintiff's dismissal, the employer itself publicly pointed out to the plaintiff as being the one, who harmed the company. It further established that business information, disclosed by the plaintiff could in fact not be regarded as a business secrecy, since the company itself publicly disclosed similar information in the company's annual report. The Supreme Court held that he had the right to introduce his views on the company's managing, in an act of defence against previous public accusation made against him and go public with it, since accusations against him were made in the same way by the employer. He acted in good faith, his intention was not to harm anyone but to defend his good name and dignity. The Supreme Court stated that the obligation to abstain from actions that cause damages to the employer or harm its business interests, is not absolute.

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

No.

7. Does it make any difference what kind of employee passes on information?

No.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

- Is it common practice to include confidentiality clauses in employment contracts?

- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

The Employment Relationships Act lays down that a worker may not exploit for his private use nor disclose to a third person employer's business secrets defined as such by the employer, which were entrusted to the worker or of which he has learnt in any other way. Data which would obviously cause substantial damage if they were disclosed to an unauthorised person are considered as business secret. The worker is liable for the violation, if he knew or should have known for such nature of data. Disclosure of business secrets is therefore prohibited directly by the law.

It is also common practice that employment contracts include confidentiality clauses (especially for executives and other leading employees). But it is not a common practice to refer to a system of compliance.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?

Even minor misdemeanours may be a subject of justified whistle blowing.

- May illegal activities of customers or other business partners of the employer be reported?

Yes. Particularly in public sector.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

No. But the court has to consider if there were any other more discreet ways available to disclose such information.

11. Does it matter which motives an employee has for blowing the whistle?

Yes.

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

Yes.

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

The employee bears a risk of sanctions (termination of the employment contract), but he/she can justify his/her action with good faith.

14. Are there any provisions for a whistle-blower to remain anonymous?

There is a provision in The Media Act that editor, journalist or author shall not be obliged to disclose the source of information, except in cases provided for in criminal law.

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

Yes.

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

Yes. Commission for Prevention of Corruption deals with information of corruptive actions. The informers are protected by the Integrity and Prevention of Corruption Act . Ombudsman deals with information of violation of human rights.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

Disciplinary sanction, termination of employment contract, compensation for damages

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

The Slovenian Criminal Code defines slander as a criminal offence (whoever asserts or circulates anything untruthful about another person who is capable of damaging his honour or reputation and which he knows to be false) as well as defamation (whoever asserts or circulates anything false about another person, which is capable of causing damage to the honour or reputation of that person; if the perpetrator proves either the truth of his assertions or that he had reasonable grounds to believe in the truthfulness of what has been asserted or circulated, he shall not be punished for defamation).

The Code of Obligations provides the legal entities (employers in our case) with the right to be financially compensated for the damage caused by their ruined or damaged reputation or goodwill (i.e. immaterial damage), without prejudice to their right to be compensated for any material damage.

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

No.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

He/she is protected. The Labour Code provides a general protection against retaliatory measures.

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

No. Labour legislation provides protection only by general rules. Only in case of reporting a corruption, workers and civil servants are protected by the provisions of the Integrity and Prevention of Corruption Act, which is more precise.

Spain

Report by Judge María Milagros Calvo Ibarlucea

1. How would you define “whistle-blowing”?

Spreading information about lawful or unlawful stuff from inside to the authorities when unlawful or to the media when unlawful or not

2. Is whistle-blowing regulated by statute law in your country?

Criminal law makes it compulsory for any citizen to make known to the authorities any unlawful behaviour known because of the professional position of the citizen.

Regarding labour law, any worker can denounce before the Labour Inspectorate any employer dismeanor.

The Labour Ministry had made available a mailing system for denounces where the denouncer may keep himself anonymous, what is not allowed when denouncing before the labour Inspectorate.

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

There is not definition when regarding the one that is addressed to the media, except when dealing with stuff protected by special rules about secret.

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

The provisions are as I have said before, regarding to unlawful employers' behaviour

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

Not as a matter of affairs coming into labour courts.

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

When unlawful actions, it is seen as morally justified. Neither heroes nor traitors

5. Is there case law dealing with whistle-blowing concerning labour law?
- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

Yes there have been but they scarcely come to Supreme Court

[Additional information] Having found some cases I would like to fill the blank giving four examples of whistle blowing and how our judges pronounced about the dismissals.

- First case

The court (Appellation) pronounced unfair dismissal the one affecting the employee due to statements spread all over the company about her transfer to another town and what her opinion and her husband, and her lawyers's were.

The judgement of the appellation court was final being denied access to Supreme Court.

- Second case

STC 88/1985-19-7

Origin: La Coruña Social Court 16-2-84. Supreme Court Sixth Chamber.

The employee had taken part in a TV program making some criticism about the sanitary systems (psychiatric branch) in the territory where he acted as clinic chief medical Doctor using words as "archaic", assistencial chaos, imported systems without a proper adaptation etc.

Social Court at La Coruña pronounced unfair dismissal, being the comments made just a criticism of the systems but not a breaching of the contractual good faith "bona fide".

The Supreme Court rejected the suit from the employee who had been asking from the beginning the absolute nullity of his dismissal, not just unfair, as having affected a fundamental right, the one to freedom of speech.

The Constitutional Court allowed his appeal and pronounced absolute nullity of dismissal because, the first judge, having stated there was not cause for dismissal should have made the right decision to protect the right for freedom of speech.

- Third case

Supreme Court: Denied appeal to the one of the employee when who decided to one the company who had dismissed him. The claimant was the employee of a company contractor of the Town council. In a plenary meeting of the town council the claimant made comments about illegal agreements between the council and the company, talked of corruption.

The first Judgement, from the social court pronounced unfair dismissal.

The second one from the higher court pronounced favourably about the company appeal thus pronouncing fair dismissal and rejected the employee's appeal dismissal.

The employee had tried the Supreme Court but his appeal was rejected because of non admittance reasons.

- Fourth case

Canarias 31-10-2015

Unfair dismissal. Six employees were dismissed because before different press media in the town hall denounced several deficits in the Educational Service. They appeared dressed in black, with white gloves and carrying empty water carafes.

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

It could make a difference specially if at the end there is not a guilty judgement

7. Does it make any difference what kind of employee passes on information?

That depends of the kind of company and the special rules about secrecy, of course when we are talking not of unlawful actions

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

It could be implied in the "bona fides" in the onus imposed by the law code to the employees

- Is it common practice to include confidentiality clauses in employment contracts?

As I said it depends on the companies and the employee's position

- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

Depends on the sort of companies

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistleblowing? Or is the whistle-blower protected only if certain serious crimes are reported?

When illegal there is always protection; when not depends of the value given in each case to the information right.

- May illegal activities of customers or other business partners of the employer be reported?

Yes, they can

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

No there is not

11. Does it matter which motives an employee has for blowing the whistle?

It matters when deciding about values of information right, measure of damages and advantages of the whistle-blowing

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

Yes

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

That's a question to be solved at court. Of course he /she may try to be justified

14. Are there any provisions for a whistle-blower to remain anonymous?

Yes as I said before

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

No, there is not a sort of Ombudsman to that purpose Informer are protected being granted their indemnity.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

May be both

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

That depends on the field the activities are developed

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

No it does not as a principle but maybe when dealing with a public employer there is a duty of secrecy in certain limits

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

Yes it is a indemnity protection granted

21. In general: Do you think that your statute and/or case law deals with the problem of whistle-blowing adequately?

Yes i think it does

Sweden

Report by Judge Sören Öman

1. How would you define “whistle-blowing”?

According to a 2016 act whistle-blowing is when an employee reports serious wrongs in the activities of his or her employer. The report can be made (i) internally to the employer, through a representative or according to a designated whistle-blowing procedure, (ii) to the employee’s labour union or (iii) through publication, or disclosure for publication, or by giving a report to an authority. Serious wrongs are defined as crimes punishable by a prison sentence or comparable wrongs. It is sufficient that the employee in the report puts forward concrete suspicions of such serious wrongs.

2. Is whistle-blowing regulated by statute law in your country?

There is a special 2016 act that gives a whistle-blower protection against reprisals from his or her employer.

- If so, under which conditions is it deemed to be justified? Does your national law define any purpose of whistle-blowing?

The employee is protected if he or she reports serious wrongs to the employer or to his or her labour union. If the employee has made a report to the employer and the employer has not taken appropriate action and in a reasonable manner informed the employee to what extent measures have been taken, or there has been a special reason not to report to the employer (i.e. the employer is the problem), the employee may, if he or she has sufficient reason to believe that there are serious wrongs, publish the information, report it for publication or to an authority.

The purpose of whistle-blowing is to make the serious wrongs go away, but there is no definition regarding this in the act.

- Are there any special provisions for labour law matters? Do they cover all employers or only certain branches (e.g. finance)?

All employers are covered by the act.

3. Is whistle-blowing a general topic of discussion in labour law or does it only feature in the context of codes of conduct?

There has been some public debate.

4. Is whistle-blowing generally seen as morally justified if unlawful or unacceptable actions by state authorities or private employers are made public? Are whistle-blowers in such cases seen as heroes or rather as traitors?

They would mostly be seen as heroes by the media.

5. Is there case law dealing with whistle-blowing concerning labour law?

The first case is from 1937.

- If possible, give an example of a case in which whistle-blowing was deemed to be justified and one in which it was deemed to be unlawful.

In one case dismissals of privately employed ambulance personnel on the ground that they had reported to the media wrongs regarding the ambulances and the employer's lack of activity was rendered null and void (AD 1997 no. 57).

In another case a nurse's aide in an intensive care unit had repeated times made reports to the media about his colleagues treating patients differently on ethnic origin grounds. This had led to serious disruptions in the collaboration between staff in the unit that the employer, despite appropriate measures, had not been able to rectify. Eventually, the employer transferred the nurse's aide to another unit. This measure was upheld by the court since the employer was considered to have had valid reasons for it. (AD 2011 no. 15.)

6. Does it make a difference if an employee reports unlawful activities to the state authorities (public prosecutor, police) or if he/she passes on such information to the media?

See above regarding the 2016 act.

7. Does it make any difference what kind of employee passes on information?

Not according to the 2016 act, but in general public sector employees has a better protection against reprisals for disclosing information than private sector employee.

8. Is there an implied term in any employment contract to keep secret any information an employee comes by when performing his/her duty?

Yes, for private sector employees regarding information that may harm the employer.

- Is it common practice to include confidentiality clauses in employment contracts?

It is standard practice for higher level employees in the private sector.

- Is it common practice to refer to a system of compliance including procedures of internal reporting in employment contracts?

We have never seen it.

9. May any kind of illegal activities - even minor misdemeanours - be subject of justified whistle-blowing? Or is the whistle-blower protected only if certain serious crimes are reported?

See above regarding the 2016 act.

- May illegal activities of customers or other business partners of the employer be reported?

Such reports are not covered by the 2016 act, unless the activities can be seen as part of the employer's activities.

10. Is there a legal obligation to inform the employer or to remonstrate within the employer ("compliance") before going public?

See above regarding the 2016 act. This may also be seen as inherent in the duty of loyalty in all private sector employment relationships.

11. Does it matter which motives an employee has for blowing the whistle?

Not according to the 2016 act.

12. Do you apply a proportionality test when deciding whether or not whistle-blowing was lawful in a given situation?

Not according to the 2016 act.

13. What risk does an employee bear if his/her information turns out to be not correct? Can he/she justify his/her actions if he/she acted in good faith?

Yes. For protection according to the 2016 act it is sufficient that the employee in the report puts forward concrete suspicions of serious wrongs

14. Are there any provisions for a whistle-blower to remain anonymous?

No, not in general. Media representatives has a duty not to disclose their sources.

15. Do either the UN Convention against Corruption – UNCAC – and/or the ILO Termination of Employment Convention (No.158) play any role in your court practice?

The National Labour Court has referred to the ILO Convention but not the UN Convention.

16. Are there any kind of special public organisations ("Ombudsman") which deal with and may act upon insider information? If so, are informers protected against retribution by their employer?

No, not in the private sector.

17. If whistle-blowing is deemed unlawful: What sanctions are there in labour law? (dismissal, damages?)

The whole range of sanctions, but the measure will be upheld only if it has the required justification.

18. Are there any sanctions against unlawful whistle-blowing in public law? Is it a criminal offence?

Disclosure in contravention of a statutory secrecy obligation is a criminal offence. The 2016 act does not protect an action that is a criminal offence.

19. Does it make any difference if whistle-blowing is directed against a public or a private employer?

Yes.

20. If there is a court case against an employer - civil or criminal - and if an employee is called as a witness: Is he/she protected against retribution? How?

It would be a criminal offence if an employee were to be subject to violence or threats of violence because he or she has testified in court.

21. In general: Do you think that your statute and/or case law deals with the problem of whistleblowing adequately?

Yes.
