

Whistleblowing: the good, the bad and the ugly

Rachel Clark explains everything you need to know about blowing the whistle, a practice that is on the rise

There was a 10% increase in tax whistleblowing in 2019/20.¹ This may have been inspired by widespread furlough fraud: by 1 July 2020, 4,500 employees had blown the whistle on their own employers,² and the revenue is already reviewing 27,000 ‘high risk’ cases where abuse or fraud is suspected.³

Genuine, public-spirited whistleblowing can be a huge force for good. However, the UK regime is badly in need of reform. Further, tax whistleblowing can attract an ugly character – the malicious informant – who must be held in check.

The good

The Government has paid out over £43 billion through the Coronavirus Job Retention Scheme (the ‘furlough’ scheme).⁴ Although there has been plenty of speculation, no final announcement has been made as to how the public coffers will be replenished in the years to come. Whatever is decided, it is clearly vital to make sure that sums paid out fraudulently can be recovered quickly and efficiently.

Whistleblowing is one of the keys. HMRC does not have the manpower to personally check every claim, and so it is heavily reliant on informants to pinpoint fraud. A strong whistleblowing culture also acts as a deterrent, keeping cheats on their toes – if a prospective fraudster thinks they could be reported by their employees, customers or competitors, then they will be less likely to take the risk.

The bad

Despite the crucial role that whistleblowing has to play in the UK tax system, there are significant gaps in the regime, particularly when it comes to encouraging and protecting those who blow the whistle.

¹ <https://www.ftadviser.com/your-industry/2020/09/01/hmrc-receives-73-000-tax-evasion-reports/>

² *ibid*

³ <https://www.bbc.co.uk/news/business-54066815>

⁴ <https://www.gov.uk/government/collections/hmrc-coronavirus-covid-19-statistics>

Immunity

First, whistleblowers are not guaranteed immunity from prosecution.

Tax and financial affairs are often shared only with a person's inner circle, and not known to the wider public. This means many whistleblowers may be directly or indirectly involved in the fraud they report. For example, in the context of furlough fraud, an employee may be reporting their own employer.

However, there is no formal criminal immunity scheme for tax whistleblowers in the UK. This may prevent individuals coming forward, even though their involvement is only as a minor accessory to fraud.

A regime providing immunity, or guaranteeing softened penalties, for those who help the revenue in its investigations, could elicit serious disclosures. The regime could be reserved for those who come forward 'unprompted' (to borrow wording from the tax penalties legislation), thus protecting only those who genuinely help HMRC; those who seek simply to 'come clean' once they know they are already on the revenue's radar, would not benefit.

Compensation

Secondly, there is no transparent reward scheme. Some £473,000 was paid to tax informants in 2019/20 – an increase of 63% on the previous year.⁵ However, HMRC has not disclosed how many people this was split between, what offences were involved, or whether any eligibility criteria were applied.

The lack of a clear system for rewarding tax informants is a missed opportunity. Tax is a sector where huge sums can be recovered by virtue of a single disclosure. A percentage of those funds could be paid to the whistleblower, to reward them for their time and the risk they took in coming forward. Of course, a sensible cap could be applied, and it could be a pre-condition of payment that the whistleblower agrees to provide a witness statement and give evidence in proceedings. Payment could be made only once the sums have been collected and any time limit to appeal has expired.

Compensation schemes have been shown to reap substantial rewards abroad. For example, in the United States, the IRS pays informants awards of 15-30% of tax collections exceeding \$2 million and resulting from a report.⁶ There is a discretionary regime for smaller value cases. Last year, just over \$120 million was paid to a total of 181 whistleblowers, and \$616.8 million was collected in taxes.

⁵ <https://www.thetimes.co.uk/article/473k-in-payouts-for-those-snitching-on-tax-dodgers-cb6fkrh05>

⁶ <https://www.irs.gov/compliance/whistleblower-informant-award>

The ugly

In sectors other than tax, such as health and safety, it is easy to see why someone would have a personal interest in blowing the whistle – to prevent dangerous situations which could injure them or others in the future. When it comes to tax, however, the authorities rely on public-spiritedness.

In desperate times like these, it is unfortunately more likely that some will seek to use the regime with mixed motives, including to gain competitive advantage or seek personal revenge. For example, a disgruntled employee who benefitted from the furlough scheme (whether legitimately or fraudulently), but has since been made redundant, could inform the revenue that they were made to work throughout the relevant period.

The revenue must remain alive to this ugly risk and carefully scrutinise all disclosures to ensure that they are evidentially sound. It should also be made clear that making a false report could constitute a criminal offence (e.g. falsely accusing someone else of furlough fraud in order to cause them loss could even constitute fraud by false by false representation under section 2 Fraud Act 2006).

Practical steps

To protect against some of the risks identified above, prospective whistleblowers may wish to consider the following practical steps:

Legal advice: Seek legal advice to establish whether or not you are potentially implicated in the fraud you are about to report. Such liability can be unexpected. For example, it is possible for a company to be liable if it turns a blind eye to furlough fraud by a contractor under the corporate criminal offence of failing to prevent the facilitation of UK tax evasion (section 45, Criminal Finances Act 2017).

Choice of method: If you are exposed, then consider whether it would be appropriate to broach the “Contractual Disclosure Facility” with the revenue, instead of disclosing online via the “HMRC Fraud Hotline”⁷. If the CDF is on offer, then immunity will be provided by HMRC in exchange for “complete and accurate” disclosure.⁸

Data protection: Consider whether disclosure would breach confidentiality provisions or any data protection laws. The revenue might not be able to use

⁷ https://www.tax.service.gov.uk/shortforms/form/TEH_IRF

⁸ <https://www.gov.uk/government/publications/code-of-practice-9-where-hm-revenue-and-customs-suspect-fraud-cop-9-2012>

such evidence (for example, because it constitutes ‘criminal property’ under the Proceeds of Crime Act 2002, or because to do so would be so unfair that the documents would be excluded from evidence in criminal proceedings under section 78, Police and Criminal Evidence Act 1984).

Record-keeping: Keep clear tax records, in order to rebut any false claims made by fraudulent whistleblowers, should the need arise.

Policies: If you are a corporate, implement clear whistleblowing policies, which offer protection from retaliation. Not only will this protect those who blow the whistle, but it may also protect the company – employees will be more likely to come to management first, rather than going directly to HMRC, meaning the company is able to control the messaging.

Compensation: Although it is not clear on what basis HMRC will offer a financial reward, it may be worth asking! However, if refused, it may already be too late to turn back.

What next?

Back in 1998, the UK became the first EU nation to introduce legal rights and protections for whistleblowers, with the Public Interest Disclosure Act 1998. However, there has been little progress since.

In June 2019, the All Party Parliamentary Group on Whistleblowing described the existing framework as “complicated, overly legalistic, cumbersome, obsolete and fragmented”⁹. It has provided 10 recommendations, including a review of compensation, a better regulatory framework and the introduction of an Independent Office for the Whistleblower.

It is hoped that the specific issues faced by tax whistleblowers will be addressed as part of their project to reform the whistleblowing landscape. The area is ripe for reform, and a transparent regime could restore trust in the system, at a crucial time for the revenue.

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⁹ <https://www.appgwhistleblowing.co.uk/news>