

Cleaning up Sport: The growing use of employee informants

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These themes were also brought into sharp focus in the Lance Armstrong scandal story a few years ago.

In this article we discuss:

- The key points in the FIFA and Armstrong cases
- The extra jurisdictional nature of the US justice system
- Whistle blowing protection- internationally and within the GCC
- Actions that a GCC employer can take to protect whistleblowers and punish wrongdoers

Football deflated

What should have been just another routine week for FIFA has turned into a spate week of arrests of several high ranking FIFA officials on corruption charges. The investigation began in surreal circumstances- a pursuit down Fifth Avenue of a larger than life character riding a mobility scooter who had two expensive apartments, one for him and one for his cats^[1]. The man, Chuck Blazer, was a high ranking FIFA executive who was living the high life with no ostensible explanation for how it was being funded.

This led firstly to an IRS investigation and then an FBI one. In 2011 Blazer was given a choice to cooperate with the FBI investigation or face the full wrath of the bureau and with the real possibility of a long stretch in prison. He chose to cooperate. Since then Blazer has given up several colleagues and friends and recorded incriminating FIFA conversations involving corrupt practices.

Spinning tales

Rewind a few years to the Lance Armstrong case. The US anti doping authority, USADA, compiled a damning report against Armstrong including testimonies from 11 former teammates that he used performance-enhancing drugs. This led to Armstrong being stripped of his 7 Tour De France victories by the international cycling union, UCI.

The common threads in both cases are the use of employee informants and the long reach of the US justice system.

Employee informants

The growing use of employee informants by the US justice and anti-doping authorities follows the very successful use of these very same tactics in dealing with organised crime and racketeering enforcement over the last few decades.

When one employee breaks ranks it often leads to a cascading effect whereby his evidence is put to another of his colleagues and they are given the option to cooperate or face the full force of the law. As more employees cooperate the pressure on the hold-outs becomes colossal. Hence a compelling dossier can be built up by sheer numbers of witnesses who are prepared to testify. In the Armstrong case all his

teammates of note testified against him. There were previous investigations into the allegations against him but they didn't assemble such a powerful collection of voices.

It is too early to say how the FIFA case(s) will proceed but one assumes that the FBI feels it has enough evidence already to obtain verdicts and may also benefit from the 'cascading effect' described above.

Long reach

In the case of the FIFA charges, the US investigators were able to charge people, including non-US citizens living outside of the USA for crimes that were not committed on US soil. This can happen if an aspect of the alleged crime takes place within the USA. For example, if an e-mail has passed through a US based server, or a wire transfer (for the purposes of bribery) originates in the US, this can be used as evidence to indict a person under US law.

In respect of the FIFA investigation, the US and Swiss governments have worked together jointly, but it is ultimately Switzerland's prerogative to extradite the officials. In order to extradite non-US citizens, US authorities need to prove that the alleged crimes are also crimes in Switzerland.

In some cases, defendants in other European countries have been able to delay their extraditions to the U.S. for over a decade., However, even if these officials are not extradited to the US, the US can issue notices to other countries, that would allow for immediate arrest and detainment of the FIFA officials if they ever set foot in that country.

The Armstrong case was interesting in that the USADA investigation led to the loss of his titles won in France and which were validated by the UCI. USADA claimed it had the power to nullify his titles on the basis that it is a constituent body of the World Anti-Doping Agency (WADA) and the UCI is a signatory to the WADA Code. Ultimately this interesting jurisdictional issue became academic as the UCI took swift action, on the basis of the USADA report, to nullify the Tour result itself.

Whistle blowing protection- internationally and within the GCC

The US (Sarbanes-Oxley Act 2002) and UK (Public Interest Disclosure Act 1998) provide protection for employees if they raise allegations of wrong doing for reasons of public interest. Many other jurisdictions have similar provisions.

Currently there is no similar whistle blower protection legislation in the GCC. However the UAE government issued a draft bill to establish an anti-corruption authority named "The Federal Authority for Combating Corruption" (FACC). The bill states that the FACC, once established, will issue regulations to protect whistle-blowers. Such regulations shall guarantee the freedom, security and well-being of whistle-blowers and protect them from being prosecuted criminally, civilly or administratively.

The bill defines a whistle-blower as a person who reveals information - in good faith - pertaining to a crime relating to corruption without being a principal or accessory to the reported crime. In addition to this, a witness, expert or victim will also be considered as whistle-blowers. Whistle-blowers report actions that come to their knowledge regarding allegedly dishonest or illegal activities occurring in a government department or private company or organisation. The bill creates a general presumption that a whistleblower is acting in good faith if the whistleblower reports the crime for the apparent benefit of the public interest and in the belief that there is enough information or proof to justify reporting it.

Interestingly the protections envisaged by FACC would not have been available to the key witnesses mentioned above in respect of the FIFA or Armstrong cases as they were accomplices to the criminal act.

Notwithstanding the lack of legislation in the region many employers have put in place their own whistle-blowing policies in order to promote greater accountability. Additionally, many companies offer a compliance disclosure hot line, for employees to contact when the normal channels for airing grievances or

concerns are unavailable or inappropriate.

Actions that a GCC employer can take to protect whistleblowers and punish wrongdoers

Where a sporting organisation (or indeed any employer in the GCC) is faced with a whistle-blowing case it will have to, in the absence of legislation, rely on its own internal procedures in respect of the protection to afford to the whistle-blower and the procedures for moving forward with the investigation. If these policies and procedures are not already in place then the recent stories emanating from Zurich will surely focus the minds of administrators to implement them as a priority.

In respect of the employee who is the subject of the whistle-blower's allegations ("**Suspect**") he will be entitled to his statutory employment protections which includes the right to certain minimal due process in respect of a disciplinary/termination decision. Specifically the Suspect is entitled to know the allegations made against him and the evidence in support and be allowed to provide his defence.

Accordingly a practical issue may arise in relation to what level of confidentiality/anonymity can be provided to the whistle-blower. If the whistle-blower's allegations can be verified by other sources then no issue arises. However if the whistle-blower's direct evidence is critical to the disciplinary hearing then the organisation needs to consider what undertaking to provide anonymity it can give, if any, to a whistle-blower in such circumstances.

If the Suspect is found guilty of the alleged offence then he may be terminated in accordance with the applicable Labour Law. Practically however there are hurdles. Unlike the US and UK, gross misconduct is defined in the GCC countries and very narrowly so. The Labour Court, particularly in the UAE, would expect to see judicial findings to uphold allegations of dishonesty or bribery. Therefore from a practical perspective the sporting organisation or employer is unlikely to be prepared to wait for a judicial process to reach completion (including appeals) so in certain cases the decision is made to terminate the employee in the knowledge that there is a legal risk of a compensation claim.

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[1] Source: The Guardian 27 May 2015