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Trade unions: blacklisting

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Summary

Blacklisting is the practice of compiling information on individuals concerning their trade union membership and activities, with a view to that information being used by employers or employment agencies to discriminate in relation to recruitment or treatment. It has a long history, dating back at least to 1919 and the formation of the Economic League.

In March 2009 the Information Commissioner published evidence of blacklisting carried out by an organisation called The Consulting Association. This led to the enactment of the *Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493)*, which prohibit the compilation, use, sale or supply of blacklists.

In July 2014 a number of construction companies said to be involved in blacklisting - Balfour Beatty, Carillion, Costain, Kier, Laing O'Rourke, Sir Robert McAlpine, Skanska UK and VINCI PLC – unilaterally established a compensation scheme for individual workers affected by the practice. The scheme was criticised by unions, who saw it as an attempt by the firms to limit their liabilities.

Also in July 2014, the High Court agreed to hear a group claim brought by workers and unions on behalf of their members, against contractors known to have used The Consulting Association's services. There have been recent reports in the media that the parties have settled out of court, with the total value of the settlements amounting to approximately £75 million in favour of the affected workers.

This note sets out the background to the 2010 Regulations, the law relevant to blacklisting and some recent developments.

1. Introduction

Blacklisting is the practice of compiling information on individuals concerning their trade union membership and activities with a view to it being used by employers or employment agencies to discriminate in relation to recruitment or treatment. It has a long history, dating back at least to 1919 and the formation of the Economic League, an organisation that sought to "combat what its members saw as subversion and opposition to free enterprise".[1] The League provided member companies with a system for checking potential recruits "to see whether they are known to the League as active members or supporters of one of the revolutionary groups of the far Right or far Left".[2] It was alleged that the League maintained a card index of names obtained from sources such as press articles about industrial action;[3] many of those named would have been active trade unionists.[4]

Since 1990 it has been unlawful to refuse a person employment on the basis of that person's trade union membership or lack thereof.[5] Earlier legislation provided employees with the right not to have action taken against them by their employers with the purpose of preventing or deterring union membership or participation in union activities.[6] However, until relatively recently, there was no specific prohibition targeted at the production of lists that facilitate discrimination against union members. While section 3 of the *Employment Relations Act 1999* empowered the Secretary of State to make regulations prohibiting the compilation, use, sale or supply of such lists, it was not until 2010 that this power was exercised.

The enactment of a regulation-making power rather than an outright prohibition was ostensibly due to an absence of recent evidence of blacklisting, as explained in a Department of Trade and Industry review of the 1999 Act:

> there have been no known cases of union blacklisting – overt or covert – since the 1980s. In part, these changes reflect the improved state of employment relations today. In line with good regulatory practice, the Government considers it is inappropriate to introduce regulation where there is no evidence that a problem has existed for over a decade.
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> ....
>
> The Government will act quickly to outlaw blacklisting, if there is any evidence that individuals or organisations are planning to

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1 House of Commons Scottish Affairs Committee, *Blacklisting in Employment: Interim Report, Ninth Report of Session 2012–13*, HC 1071, 26 March 2013, p5

2 Letter from Michael Noar, Director General of the Economic League, to the Clerk of the Employment Committee, 20 December 1988

3 Mark Hollingsworth and Charles Tremayne, *The Economic League: the Silent McCarthyism*, National Council for Civil Liberties, 1989

4 See: *Employment Relations Bill 1998/99*, Library Research paper 99/11, 5 February 1999 pp23-4

5 *Employment Act 1990*, section 1, subsequently consolidated into the *Trade Union and Labour Relations (Consolidation) Act 1992*, section 137

6 *Employment Protection (Consolidation) Act 1978*, ss.23-26

> draw up such lists, or if there is any evidence that there is a demand from employers for them.[7]

In line with this commitment to act quickly, the Government consulted on draft regulations with the intention that, should evidence emerge, finalised regulations could swiftly be brought into force.[8]

During March 2009 the Information Commissioner published evidence of blacklisting carried out by an organisation called The Consulting Association (TCA). TCA provided approximately 40 companies in the construction sector with information about the trade union activities of prospective employees.[9] On 11 May 2009 the Minister for Employment Relations, Pat McFadden, said that, in the light of this evidence, the Government was "minded to introduce regulations under section 3 of the 1999 Act".[10]

Draft regulations were laid before Parliament on 5 January 2010, subject to the affirmative resolution procedure. On 2 March 2010 blacklisting became subject to express statutory prohibition, by way of the *Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493)*.

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7 DTI, *Review of the Employment Relations Act 1999*, February 2003, p66

8 Ibid; DTI, *Draft Regulations to Prohibit the Blacklisting of Trade Unionists – A Consultation Document*, URN 03/648, February 2003

9 Explanatory Memorandum to the Employment Relations Act 1999 (Blacklists) Regulations 2010, p2

10 HC Deb 11 May 2009 c33WS

2. The legal framework

2.1 The 2010 Regulations

Prohibited lists

The *Employment Relations Act 1999 (Blacklists) Regulations 2010* prohibit the compilation, use, sale or supply of trade union blacklists.[11] Blacklists are termed "prohibited lists", defined in regulation 3(2). Prohibited lists are those that contain details of persons who are/have been members of trade unions or who are taking part/have taken part in the activities of trade unions, which are compiled with a view to being used by employers or employment agencies to discriminate in relation to recruitment or treatment.

The "general prohibition" in regulation 3 is subject to exceptions set out in regulation 4:

- a person supplies a prohibited list but does not know and could not reasonably be expected to know they are supplying a prohibited list;
- the list is compiled, used or supplied in the public interest in order to bring to light a contravention of the regulations, provided no individual's details are published without their consent;
- the list is compiled, used, supplied or sold in relation to consideration of a person's appointment to an office for which trade union experience or membership is required;
- the list is required or authorised by an enactment, any rule of law or an order of the court;
- the list is used or supplied in relation to legal proceedings, or legal advice, where observance of the regulations is at issue.

The Regulations make it unlawful to refuse to employ a person, or subject a worker to any detriment, or for an employment agency to refuse an individual any of its services, for a reason related to a prohibited list.[12]

Remedies

The Regulations provide remedies under four heads: refusal of employment or employment agency services; detriment; unfair dismissal; and breach of statutory duty.

If an employer or employment agency refuses to employ a person for a reason related to a prohibited list used in contravention of the general prohibition, that person may complain to an employment tribunal. Regulation 8 provides that, if the tribunal finds the complaint is well-founded, it may make an order for compensation of not less that £5,000 and not more than £65,300, and/or make recommendations to carry out action "for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates."[13] Failure without reasonable justification to comply with such

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11 *Employment Relations Act 1999 (Blacklists) Regulations 2010*, regulation 3(1)
12 Regulation 5; regulation 6
13 *Employment Relations Act 1999 (Blacklists) Regulations 2010,* regulation 8(1)

a recommendation may result in an increase in the award of compensation or an award of compensation where one has not been made.[14]

Where an employee is subjected to detriment in relation to a prohibited list used in contravention of the general prohibition, regulation 11 enables a tribunal to award compensation of between £5,000 and £65,300.

Under regulation 12, which inserted section 104F into the *Employment Rights Act 1996*, an employee will be regarded as having been unfairly dismissed if his dismissal related to a prohibited list and his employer contravened the general prohibition or relied on information he ought reasonably to have known was supplied in contravention of it. The remedies for dismissal on this ground are, principally, a "basic award" of not less than £5,000 and a "compensatory award", compensating the employee for loss of future earnings and other financial losses, currently capped at £78,962 or one year's salary, whichever is lower.[15]

Regulation 13 provides that a breach of the prohibition of blacklisting is actionable as a breach of statutory duty. A claim for breach of statutory duty can be brought by an individual or other party that has suffered loss and must be brought in the civil courts rather than the employment tribunal. The Court may make any "such order as it considers appropriate for the purpose of restraining or preventing the defendant from contravening" the prohibition on blacklisting (e.g. an injunction).[16] Importantly, a claim for breach of statutory duty – unlike a claim in the employment tribunal – is not subject to a cap on compensation, and has a longer limitation period (six years, as opposed to three months for tribunal claims).

If either the claimant or respondent in a blacklisting case claims that the blacklist was prepared by a third party, the tribunal may recommend that the third party carry out actions to obviate the disadvantage caused or award compensation against it.[17]

2.2 Trade Union and Labour Relations (Consolidation) Act 1992

Under section 137 of the *Trade Union and Labour Relations (Consolidation) Act 1992* it is unlawful to refuse a person employment because he is, or is not, a member of a trade union. Section 138 makes it unlawful for an employment agency to refuse a person its services due to any of a number of specified reasons related to union membership or activity.

Under section 146 a worker has the right not to be subjected to detriment by his employer due to any of a number of specified reasons related to union membership or activity.

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14 *Employment Relations Act 1999 (Blacklists) Regulations 2010,* regulation 8(4)
15 *Employment Rights Act 1996,* s. 124
16 *Employment Relations Act 1999 (Blacklists) Regulations 2010,* regulation 13(3)(a)
17 *Employment Relations Act 1999 (Blacklists) Regulations 2010,* regulation 15

The dismissal of an employee shall be regarded as unfair[18] if the principal reason for his dismissal was one of a number of reasons related to union membership or activity specified in section 152. Section 153 makes similar provision in relation to selection for redundancy.

2.3 Other relevant law

Data protection

The *Data Protection Act 1998* governs the processing of personal data, including information contained in paper files and computer records. The Act enumerates eight data protection principles,[19] which include a requirement that data are only obtained for lawful purposes and are processed in accordance with data subjects' rights under the Act. "Sensitive personal data", which includes an individual's union membership status, is subject in most cases to a requirement to obtain the data subject's "explicit consent to the processing" of the data.[20]

The 1998 Act requires organisations that processes personal data ("data controllers") to register with the Information Commissioner's Office unless they are exempt.[21] Failure to do so is a criminal offence.[22] The Information Commissioner may serve a data controller with a monetary penalty if it is satisfied that there has been serious contravention of the Act by the controller which would cause substantial damage/distress, which was deliberate or the controller knew or ought to have known there was a risk of such a contravention occurring. For serious breaches occurring after 6 April 2010, the maximum penalty is £500,000; prior to that the maximum was £5,000.[23]

European Convention on Human Rights

The *Human Rights Act 1998* gave domestic effect to the *European Convention on Human Rights* (the Convention). The Act requires public bodies, including the courts, to act in way which is compatible with the Convention rights.[24] So far as it is possible to do so, courts must interpret legislation in a way which is compatible with the Convention rights.[25] Domestic courts and tribunals are required to take into account judgments of the European Court of Human Rights (ECtHR) when determining questions in connection with Convention rights.[26]

Blacklisting raises human rights issues, most obviously the right to freedom of association in Article 11 of the Convention:

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18 Under Part X of the *Employment Rights Act 1996*
19 *Data Protection Act 1998*, Schedule 1, Part 1
20 *Data Protection Act 1998*, Schedule 3
21 *Data Protection Act 1998*, section 17(1)
22 *Data Protection Act 1998*, section
23 See: ICO, Data Protection Act 1998 - Information Commissioner's guidance about the issue of monetary penalties prepared and issued under section 55C (1) of the Data Protection Act 1998, 2012; *Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 (SI 2010/31)*, regulation 2
24 *Human Rights Act 1998*, s.6
25 *Human Rights Act 1998*, s.3
26 *Human Rights Act 1998*, section 2(1)

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Both unions and union members may rely on Article 11.[27] The ECtHR has held that Article 11 requires national law to ensure "real and effective protection against anti-union discrimination".[28]

Additionally, blacklisting raises privacy issues. Article 8 of the Convention provides that "Everyone has the right to respect for his private and family life, his home and his correspondence". The ECtHR has held repeatedly that Article 8 applies to the collection and storage of employees' personal information.[29] Blacklisting may also interfere with the right to freedom of expression under Article 10.[30]

Charter of Fundamental Rights of the European Union

Article 12(1) of the Charter of Fundamental Rights of the European Union provides:

> Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

The Charter has direct effect in national law to the extent that the latter implements EU law, e.g. the Data Protection Directive (Directive 95/46/EC), implemented in UK law by the *Data Protection Act 1998*. Domestic law that is inconsistent with Charter's provisions will be disapplied by the courts.

International Labour Organization

The International Labour Organization was founded in 1919 as part of the Treaty of Versailles that ended World War I, and became in 1946 an agency of the newly formed United Nations. Convention No.98 on the Right to Organise and Collective Bargaining (1949), which was ratified by the United Kingdom on 30 June 1950 (the first country to ratify it[31]) and entered into force on 18 July 1951, provides in Article 1:

> 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
>
> 2. Such protection shall apply more particularly in respect of acts calculated to--
>
> (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
>
> (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union

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27 *Young James and Webster v United Kingdom* (1982) 4 EHRR 38

28 *Danilenkov v Russia* (Application No 67336/01) 30 July 2009, para 124; see also: *Wilson v United Kingdom* [2002] ECHR 552

29 For example, *Copland v. The United Kingdom* [2007] ECHR 253, para 44

30 See *Palomo Sanchez v Spain* [2011] ECHR 1319

31 ILO website Ratifications of C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (accessed 24 February 2014)

> activities outside working hours or, with the consent of the employer, within working hours.

In 1991, Article 1 formed the basis of a complaint to the International Labour Organization by the Trades Union Congress (see below). The Convention forms part of international law and is not directly effective in domestic law, although will be relevant to its interpretation and to the interpretation of the UK's aforementioned obligations under EU and human rights law.[32]

International Covenant on Economic, Social and Cultural Rights

Article 8 of the United Nations' International Covenant on Economic, Social and Cultural Rights provides, materially:

> 1. The States Parties to the present Covenant undertake to ensure:
>
> > (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.

The UK signed the Covenant on 16 September 1968 and ratified it on 20 May 1976.[33] As with ILO Convention No.98, the Covenant is not directly effective domestically but is relevant to the interpretation of domestic law and of the UK's obligations under international law.

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32 See *Wilson v United Kingdom* [2002] ECHR 552

33 UN Treaty Collection, International Covenant on Economic, Social and Cultural Rights, STATUS AS AT : 24-02-2014 05:00:28 EDT

3. Background to the 2010 Regulations

Although the *Employment Act 1990* made it unlawful to refuse a person employment on grounds related to union membership,[34] it did not prohibit the compilation of blacklists. Growing concern of about the blacklisting activities of organisations such as the Economic League led to a Select Committee inquiry into recruitment practices.

3.1 Employment Select Committee Report

The Employment Select Committee published its report, *Recruitment Practices*, in 1991 and recommended that if a prospective employee is refused employment he should be entitled to details of information relied upon by the employer in making its decision, as well as the name of any agencies consulted. The report also concluded that:

> legislation should provide that, with the exception of previous employers providing reference, all organisations supplying information about potential employees should be subject to licensing and to a code of practice perhaps similar to the licensing system for employment agencies under the Employment Agencies Act 1973.[35]

The Committee took evidence from the Economic League, summarised in its report:

> The League said that their service to employers of providing information about applicants existed to provide details of those who belong to revolutionary organisations dedicated to undercover subversion of industry. They say that their information of this kind as distinct from their records of general political information, relates to about ten thousand people…. The League say that they will provide any applicant with the information held on them, if any. To do this they request from the applicant full details of their past employment, National Insurance Number, etc., and this has given rise to the suspicion that this information will be added to the League's records: the League, however, deny this. They also claim never to have had to retract anything they have said, or to have had to apologise, or to have been sued. They supplied us with documents which they said were from revolutionary organisations advocating, and supplying advice on, industrial sabotage.
>
> The League also told us that an employer should pass on to an applicant any information obtained on them from the League, and suggests that the provision of such information should be subject to legislation and a code of practice.
>
> Critics of the League tell of a completely different state of affairs, with inaccurate information being handed out in secret, with employers rejecting applicants simply on the basis that the League had information about them, rather than weighing carefully what this information was, and with **information being kept on**

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[34] Replaced by section 137 of the *Trade Union and Labour Relations (Consolidation) Act 1992*

[35] Employment Committee, *Second report: Recruitment practices,* Volume 1: Report, HC 176-I, 23 January 1991, pp.xi-xii, paras 46-47

> **many more than the ten thousand individuals quoted by the League**.[36]

In its response to the Committee's report, the Government said the Committee's proposals

> would add to burdens on business and to public expenditure … [and] might also add to the burdens of many other bodies who routinely supply information and references in confidence on potential employees.
>
> …
>
> The Government believes that employers must be free to obtain information in confidence about potential employees. However, we would also stress that both suppliers and users of such information should satisfy themselves about its quality.[37]

Prior to publication of the Committee's report there had been attempts in Parliament to outlaw or control employment blacklisting, particularly in relation to trade unionists. During the passage of the *Employment Bill 1989/90* the then Shadow Secretary of State for Employment, Tony Blair, unsuccessfully moved an amendment to the Bill which would have banned "blacklists of people who seek employment but are refused as a result of information received about their trade union activities".[38]

3.2 Trades Union Congress complaint to the International Labour Organization

On 20 December 1991 the Trades Union Congress (TUC) presented a complaint against the Government to the International Labour Organization (ILO). The TUC argued that UK law provided insufficient protection against anti-union discrimination, basing its complaint on Convention No.98 on the Right to Organise and Collective Bargaining (see above).

The TUC's submission was summarised by the ILO's Freedom of Association Committee as follows:

> that British law and practice fail to meet the requirements of Article 1 of Convention No. 98 in that there is no effective legal protection against anti-union discrimination at the time of recruitment. The TUC illustrates its allegations by referring to a series of particular cases, where individual workers either were unable to find work or were dismissed shortly after their hiring, because they appeared on a "black list" of militant trade unionists established by the Economic League, which prospective employers allegedly consulted.
>
> ….
>
> The 1990 Employment Act provides no protection for those whose livelihoods have already been affected by its [the Economic League's] operations. Until 1989 the Economic League held files on at least 22,000 individuals. They now claim to hold only 2,000 but this cannot be verified. In June 1990 they admitted to 10,000 before the Select Committee on Employment. The 1989 list was

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36 Ibid, p.xi

37 *Government Reply to the Second Report of the Committee in Session 1990-91,* HC 406, 1 May 1991, p.x

38 SC Deb (D) 13 February 1990 c54

> recently obtained by journalists from the national newspaper, the Daily Mirror, which obtained evidence that the Economic League was operating a blacklist for subscribing companies on which the names of many trade unionists appeared. The largest single group of workers on the Economic League's register were those in the construction industry, and the data was kept on its "K-list" containing the names of individuals who had been denied employment or dismissed shortly after commencing employment, for no apparent reason. These include cases of skilled working people who were unable to find employment despite acute shortages of their skills.[39]

In response, the Government contended that the Convention requirements were satisfied by existing legislation, including the *Employment Act 1990*, which entitled a prospective employee to take an employer to a tribunal if he considered that he was refused employment on the basis of his trade union membership. This failed to persuade the Committee, which recommended that UK law should provide express protection against blacklisting:

> the Committee … urges the Government to extend to the workers an express protection against blacklisting or other forms of discrimination based on trade union membership or past trade union activity, with a view to bringing the law in the United Kingdom into conformity with Convention No. 98.
>
> ….
>
> The Committee reiterates that all practices involving the blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and that, in general, governments should take stringent measures to combat such practices.[40]

Despite the Committee's recommendations, there was little Parliamentary activity on the issue between the Select Committee report in 1991 and the *Employment Relations Bill 1998/1999*.

3.3 The Employment Relations Act 1999

In the White Paper *Fairness at Work* the Labour Government proposed to "prohibit blacklisting of trade union members".[41] The *Employment Relations Bill 1998/1999* – which became the *Employment Relations Act 1999* - proposed a regulation-making power rather than an outright prohibition of blacklisting. During the Bill's Parliamentary debate the then Minister for Small Firms, Trade and Industry, Michael Wills, described the Government's approach:

> Under clause 3, the Secretary of State will have the power to introduce regulations that prohibit the compilation and use of lists that contain information about individuals' trade union membership and trade union activities with a view to their being used by employers or employment agencies in recruitment. We

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39 ILO, Interim Report - Report No 283, June 1992 Case No 1618 (United Kingdom) - Complaint date: 20-DEC-91, paras 424-426

40 ILO, Report in which the committee requests to be kept informed of development - Report No 287, June 1993
Case No 1618 (United Kingdom) - Complaint date: 20-DEC-91, para 267

41 DTI, *Fairness at Work*, Cm 3968, May 1998, p.27, para 4.25

> have opted for the regulatory route, rather than making specific provision in the Bill.
>
> We have done so for several reasons. It allows for extensive prior consultation with interested parties … It is a complicated area of the law, and the Government believe that further consultation of the details of the prohibition would be beneficial ... We hope to ensure that the regulations are effective in preventing what should be prevented and in providing access to that to which access should be provided. Obviously, we must also protect legitimate data processing activities such as are used in journalism or the maintenance of staff records ... The approach that we have adopted in the Bill will also enable regulations to be adapted if necessary to deal with any unintended consequences … to take account of the increasing application of the Data Protection Act 1998 … and to combat any misplaced ingenuity that may be exercised by people trying to evade the prohibition. Hon. Members will have the usual opportunity to scrutinise the regulations, which will be laid before both Houses, and a full debate will take place on the regulations under the affirmative resolution procedure that will apply [to this provision].[42]

In line with the Government's intention to consult prior to any prohibition of blacklisting, in February 2003 it published a consultation document accompanied by draft regulations; the intention being that if evidence of blacklisting came to light there would be regulations ready to go.[43] In the same month, the Government published a review of the operation of the 1999 Act, noting that legislation would only be introduced if there was "evidence that blacklisting practices are surfacing again in this country".[44] In March 2009 the Information Commissioner uncovered evidence.

3.4 The Information Commissioner's investigation of the Consulting Association

On 6 March 2009 the Information Commissioner published details of an investigation into the activities of an organisation named the Consulting Association (TCA), operated by a Mr Ian Kerr, which revealed that TCA had blacklisted thousands of workers in the construction industry:

> An investigation by the Information Commissioner's Office (ICO) has uncovered a database containing details on 3,213 construction workers which was used by over 40 construction companies to vet individuals for employment. The information includes sensitive personal information such as construction workers' personal relationships, trade union activity, as well as people's employment history.
>
> The information has been seized by the ICO during a raid in Droitwich, West Midlands. Ian Kerr, the owner of a firm known as the Consulting Association, appears to have run the database for over fifteen years. The ICO has uncovered evidence at Kerr's premises that named construction firms subscribed to Kerr's

42 SC Deb E (12th sitting) 18 March 1999
43 DTI, *Draft Regulations to Prohibit the Blacklisting of Trade Unionists – A Consultation Document,* URN 03/648, February 2003
44 DTI, Review of the Employment Relations Act 1999, February 2003, p66

> system for a £3,000 annual fee. Companies could add information to the system and pay £2.20 for details held on individuals. Invoices to construction firms for up to £7,500 were seized during the raid.
>
> The ICO has served an Enforcement Notice ordering Mr Kerr to stop using the system. Mr Kerr is to cease trading by the end of this week and he now faces prosecution by the ICO for breaching the Data Protection Act.[45]

It appears the Information Commissioner's Office was made aware of the activities of TCA by an article in the *Guardian* published on 28 June 2008.[46] The article discussed anecdotal evidence that blacklisting was ongoing in the construction industry. The Committee report explained the events that followed publication of the article:

> The Deputy Information Commissioner, David Smith, told us that, subsequent to that article, the ICO traced TCA to Droitwich and sought and obtained a search warrant for the premises…. The ICO obtained the search warrant from Manchester Crown Court, then searched TCA's premises in February 2009.[47]

Ian Kerr was prosecuted under the *Data Protection Act 1998* in 2009 for failure to register as a data controller. He was fined £5,000 which, at the time, was the maximum fine under the Act. The maximum fine is now £500,000 (see above discussion of the Act).[48]

Prior to his work with TCA, Ian Kerr worked for the Economic League from 1963 until 1993, where he was involved with the collation of data on individual workers.[49] A 2013 Scottish Affairs Committee report (see below) on blacklisting describes the inception of TCA and its relationship with the Economic League:

> When the Economic League was wound down in 1993, many of the companies which had been involved in the Services Group decided that the purpose of the group was still valid and sought to carry it on in another form. Mr Kerr told us that he was approached to become 'Chief Officer' of a new organisation, which became the Consulting Association, and that a number of construction companies were involved in its inception. He named them as Amey, Balfour Beatty Civil Engineering, Balfour Beatty Construction, Ballast Wiltshier, Edmund Nuttall, Higgs and Hill, John Laing, John Mowlem, Kier Group, Morrison Construction, Norwest Holst, Sir Robert McAlpine Ltd, Tarmac, Taylor Woodrow, Trafalgar House, Walter Llewellyn and Willmott Dixon. In the early days of TCA, Mr Kerr told us that Bovis and G. Percy Trentham were also involved, but quickly dropped out.
>
> The Consulting Association was set up with a Chairman and a Vice-Chairman, drawn from the subscriber companies. The first

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45 Information Commissioner's Office press notice, *ICO seizes covert database of construction industry workers*, 6 March 2009. Some press coverage of the ICO's action is attached at the end of this note ("Groups 'paid' for data on workers", *Financial Times*, 7 March 2009; "National: Special report: Blacklists: 'Do not touch' - the covert database that kept union activists out of work", *The Guardian*, 6 March 2009).

46 'Enemy at the gates' the *Guardian,* 28 June 2008

47 Ibid, p12

48 See: ICO blog: Prosecution of construction blacklist used strongest powers we had, ICO website, 29 August 2012 [accessed 6 February 2013]

49 See Scottish Affairs Committee, Blacklisting in Employment: Interim Report, Ninth Report of Session 2012–13 HC 1071, 26 March 2013, p7

> Chairman was Cullum McAlpine, a director of Sir Robert McAlpine Ltd, and the Vice-Chairman was Tony Jennings, of John Laing. The main purpose of TCA was to provide 'reference checks' on individuals. Cullum McAlpine confirmed to us that the motive behind TCA was that "It was going to provide a reference service to and from the members." For this, subscriber companies paid an annual fee, initially £3,500, and paid an additional charge for each name they submitted for checking. The transaction in information was two-way: as well as submitting names for checking to TCA's database, the subscriber companies would also supply information on individuals to be added to the database.
>
> ....
>
> The origin of the database from which TCA drew its information is still unclear to us. Mr Kerr told us that TCA inherited a core collection of files and reference cards from the Services Group and the Economic League.[50]

3.5 Employment Relations Act 1999 (Blacklists) Regulations 2010

The Information Commissioner's investigation of TCA led to calls for the Government to use the regulation-making power in the *Employment Relations Act 1999* to prohibit blacklisting.[51] A former Labour backbencher, Michael Clapham, raised the issue in an adjournment debate on 23 March 2009:

> Section 3 of the 1999 Act provides that the Secretary of State may make regulations prohibiting the compilation of lists that contain details of members' trade unions or persons who have taken part in the activities of trade unions, and lists which are compiled with a view to being used by employers or employment agencies for the purpose of discrimination in relation to recruitment or to the treatment of workers. The Minister will know that in 2003, the Government consulted on the regulations. A number of trade unions and trade union law firms responded to say that rather than wait for evidence of blacklisting, the Government should enact the regulations immediately. They did not. But now that evidence has emerged that blacklisting is taking place, it is time to bring them into effect.[52]

The then Minister for Employment Relations, Pat McFadden, said that the Government would assess whether the activities undertaken by TCA represented blacklisting activity of the kind contemplated by section 3 of the 1999 Act:

> My hon. Friend mentioned section 3 of the Employment Relations Act 1999, which provides a power for making regulations to outlaw blacklisting. As he said, we have produced draft regulations, on which we consulted in 2003. They would allow individuals to obtain compensation for being refused employment or for suffering discrimination by their employer because of their inclusion on a trade union blacklist. Those complaints would be determined by the employment tribunal. In addition, people,

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50 Ibid, pp7-8

51 For example: EDM 1020 of 2008-09, *Workers and employees in the construction industry*, 9 March 2009.

52 HC Deb 23 March 2009 c144

> including trade unions, could claim damages from the compilers, disseminators and users of the blacklists for financial loss.
>
> ….
>
> our position [was] that we would not consider implementing the regulations until clear evidence arose. That was the position in 2003. The investigation [into TCA] began in the middle of last year, when my Department learned that the Information Commissioner was investigating allegations of blacklisting.
>
> ….
>
> Our objective is to assess precisely whether the activities undertaken represent the kind of blacklisting activity that section 3 of the 1999 Act was designed to cover. The Secretary of State and I will examine the evidence in the case and we will examine the papers. We will take the matter seriously and the Government will make a decision on how to proceed.[53]

In a Written Ministerial Statement on 11 May 2009 Mr McFadden confirmed that the Government would bring regulations into force:

> We consulted on draft regulations in 2003 but they were not implemented. We took that decision because it was then widely believed that blacklisting of this type had been eradicated in the UK. Following the investigation of the Information Commissioner into the affairs of the Consulting Association (TCA) renewed evidence has come to light. The investigation showed that, within the construction industry, a covert vetting system has operated. My officials have worked closely with the Information Commissioner's Office (ICO) during its investigation and they have examined the detailed information which the ICO seized from the TCA. We have discovered that much of the information held by the TCA concerned the trade union activities of individuals and gave a very unfavourable account of their suitability for employment.
>
> In the light of these developments, the Government are minded to introduce regulations under section 3 of the 1999 Act. To ensure we have drafted them correctly and taken account of subsequent developments, BERR will launch a short public consultation early this summer seeking views on revised regulations. We will then seek parliamentary approval of the final draft regulations this autumn, bringing them into effect at the earliest opportunity thereafter.[54]

The Government consulted on revised draft regulations. The consultation ran from 7 July to 18 August 2009.[55] Draft regulations were laid before Parliament on 5 January 2010, subject to the affirmative resolution procedure. On 2 March 2010 blacklisting became subject to statutory prohibition by the *Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493)*.

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53 HC Deb 23 March 2009 cc146-8
54 HC Deb 11 May 2009 c33WS
55 The blacklisting of trade unionists: revised draft regulations, National Archives (accessed 25 November 2013)

4. Subsequent developments

4.1 Compensation scheme

In October 2013 a number of construction firms announced that they planned to establish a compensation scheme for blacklisted workers.[56] The Construction Workers Compensation Scheme (TCWCS) opened on 4 July 2014.

TCWCS was established by a number of construction companies - Balfour Beatty, Carillion, Costain, Kier, Laing O'Rourke, Sir Robert McAlpine, Skanska UK and VINCI PLC – without reaching prior agreement with trade unions. Unions have responded critically, largely because TCWCS is seen as providing inadequate compensation; applicants are required to waive any future legal claims; and the companies involved do not admit any liability.[57] The Scottish Affairs Committee's reports on blacklisting discuss the scheme in greater detail (see below).

Overview of TCWCS

TCWCS operates according to rules set out in this document.[58] Its main features are:

- an individual submits an online enquiry form
- this is cross-referenced with details held by the Information Commissioner's Office, to see if the applicant was blacklisted
- depending on the degree of information held about the individual, he will be entitled to either Fast Track compensation (if just his name was held) or the choice between that and a Full Review (if The Consulting Association (TCA) held further information about him on an index card)
- to progress with the application, the applicant must waive the right to bring a claim arising out of blacklisting by TCA or the Economic League
- Fast-Track compensation ranges between £4,000 - £20,000; Full Review compensation is limited to a maximum of £100,000

The *Guardian* has reported offers of up to £60,000, although unions have argued that the offers fall short of the amounts to which workers should be entitled.[59]

4.2 Scottish Affairs Committee Inquiry

In April 2011 the Scottish Affairs Committee commenced an inquiry into health and safety in Scotland, which revealed evidence of workers who raise health and safety concerns being labelled as "troublemakers".[60]

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56 Construction firms to compensate unlawfully blacklisted workers, the *Guardian,* 10 October 2013 [accessed 6 February 2014]

57 Blacklisting compensation scheme a travesty of justice, UCATT website, 4 November 2014, [accessed 6 February 2014]

58 The Construction Workers Compensation Scheme Rules, 18 September 2014

59 Former electrician on industry blacklist offered £60,000 payout, *The Guardian*, 9 June 2015

60 Inquiry into Health and Safety in Scotland, Parliament website (accessed 27 March 2014)

This led to the launch on 27 June 2012 of an inquiry in blacklisting in employment.[61]

The Committee produced three interim reports; the first was published on 16 April 2013; the second on 14 March 2014; the third on 19 May 2014.[62] The Committee published its final report on 18 March 2015.[63] The report's conclusion summarised the earlier reports, and recommended that the Government undertake a full public inquiry into blacklisting:

> The odious practice of blacklisting has blighted the working lives of many people in Scotland and elsewhere in the UK. The extent of this practice, the measures required to stop it, and to make amends for the consequences of its use in the past, have already been the subject of three interim reports by this Committee during this Parliament. We stand by and reiterate the conclusions and recommendations of those reports.
>
> In our second report on this matter, Blacklisting in Employment: addressing the crimes of the past; moving towards best practice, we welcomed the Welsh Government's pioneering approach to tackling blacklisting through public procurement. One of the key elements of that approach was that companies who have participated in blacklisting should undertake self-cleaning before being allowed to bid for future public contracts. We concluded that self-cleaning was an important step as it places responsibility on contractors to demonstrate how they have changed, and to make amends for their past blacklisting activity. We not only recommended that firms that have been involved in blacklisting should be required to demonstrate how they have self-cleaned before being allowed to tender for future public contracts, we were also of the view that firms which do not participate fully in an agreed compensation scheme after having been caught using the blacklisting service of the TCA or any similar conspiracy, should be deemed not to have 'self-cleaned'. We welcome the Welsh Government's recent announcement (11 March 2015) which bans the use of false self-employment umbrella payroll contracts on public works contracts.
>
> In our previous reports we also concluded that the UK and devolved Governments should recognise the absolutely crucial role that they play as client or funders of the vast majority of construction work in the UK; and that the role of the client, properly exercised, allows enormous control, not only over the construction companies but also their subcontractors and suppliers. As noted above, we recommended that firms that have been involved in blacklisting should be required to demonstrate how they have self-cleaned before being allowed to tender for future public contracts, and those who have not self-cleaned should not be allowed to tender for public contracts.

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61 Blacklisting in employment, Parliament website (accessed 27 March 2014)

62 House of Commons Scottish Affairs Committee, *Blacklisting in Employment: Interim Report*, Ninth Report of Session 2012–13, HC 1071, 16 April 2013; House of Commons Scottish Affairs Committee, *Blacklisting in Employment: addressing the crimes of the past; moving towards best practice*, Sixth Report of Session 2013-14, HC 543, 14 March 2014; House of Commons Scottish Affairs Committee, *Blacklisting in Employment-Update: Incorporating the Government's Response to the Sixth Report of Session 2013-14*, Thirteenth Report of Session 2013–14, HC 1291, 14 May 2014

63 House of Commons Scottish Affairs Committee, *Blacklisting in Employment: Final Report*, Seventh Report of Session 2014–15, HC 272, 18 March 2015

A central theme of our inquiry throughout has been to seek adequate redress for the victims of blacklisting and for their families. We have not made comment on the Group Litigation which is currently proceeding through the High Court, as this would not be appropriate. However, we have made regular comment on the Construction Workers Compensation Scheme, initially in an attempt to facilitate agreement between the scheme and the trade union workers in order to guarantee the most robust scheme and best possible outcome for the victims of blacklisting and their families.

This report focuses on that scheme. We are disappointed that agreement was not reached between the scheme and the trade unions and that the scheme was subsequently launched unilaterally. Despite lack of agreement, the material produced to launch the scheme- including a letter to all Members of Parliament- implied that agreement had been reached. This misleading wording has cast doubt on the sincerity and motives of the companies behind the scheme. Our disappointment was further compounded by some of the details of the scheme: the low levels of compensation being offered; the fact that those participating in the High Court litigation are not eligible to access the scheme; and the scheme's failure to incorporate any type of positive action measures to upskill and reemploy the victims of blacklisting.

Despite the flaws in the scheme, our main concern is that the victims of blacklisting receive at least some measure of compensation. We therefore call on the ICO to redouble its efforts to find and contact as many of those names who were on the original TCA list as possible. While we acknowledge the concerns the trade unions have in sharing data with the blacklisters, they should work with the ICO and the scheme to facilitate rather than obstruct this process. Our key concern is that whether through litigation or through participation in the compensation, workers, the victims of blacklisting and their families are compensated. This is why we recommend that the deadline to the scheme be extended to allow those participating in the litigation to also access the scheme.

While we have been critical of the scheme, the amounts of compensation offered and the motivations of the companies behind the scheme–we acknowledge they have at least taken a small step to acknowledge their past behaviour and make amends. Other companies have not stepped up to the mark–and have neither acknowledged their complicity in blacklisting not taken any steps to eradicate this practice in the future. This attitude, combined with inadequate voluntary codes of best practice in terms of recruitment in the sector does not provide us with a sufficient guarantee that the practice of blacklisting is an exclusively historic one.

Our concerns in this area have been exacerbated both by recent allegations in relation to the employment practices of Atlanco Rimec, and the dubious practices of bogus self-employment/umbrella companies as highlighted in our Zero hours contracts in Scotland report. We stand by our previous recommendations that direct and transparent recruitment practices are by far the best way of eradicating blacklisting in the construction industry, and that such practices should be standard for all public sector contracts in the construction industry.

> Despite the progress and positive steps which have been taken during the course of our inquiry, in this final report we have identified that many questions in relation to the practice of blacklisting remain unanswered. We are specifically concerned as to whether the extent and breadth of the practice is fully known, and whether this odious practice is ongoing within the construction industry. We are convinced that the only way to fully answer these questions is through a full Public Inquiry. We recommend that the Government take immediate steps to launch such an inquiry as a matter of priority in the new Parliament.[64]

4.3 High Court litigation and settlement

On 10 July 2014 the High Court agreed to join together a substantial number of blacklisting claims, and made a Group Litigation Order.[65]

There have been reports in the media that the parties involved have settled. Unite reached a settlement with construction firms, which covered 256 workers who are to receive over £10 million. UCATT reached settlement for 156 workers, who will receive £8.9 million. GMB settled for a £5.4 million, covering 116 workers.[66] A GMB press release describes the settlements:

> GMB understand the total value of settlements for GMB, UCATT, GCR and Unite members is around £75m for 771 claimants including legal costs on both sides estimated at £25m. An unknown number of people, who in the face of continuing denial and obstruction from the companies, chose to take the much lower sums offered in their inferior compensation scheme.
>
> Analysis of the figures show that the areas with the largest settlements for blacklisted workers were Humberside, £420,000 (10 workers), Greenock in Inverclyde with £405,000 (6 workers), London with £240,000 (9 workers) and Merseyside with £225,000 (2 workers).
>
> …
>
> The regional figures … show Scotland has the highest settlement figure of £1,665,000 (32 workers) followed by the North West, £650,000 (13 workers) and Yorkshire & The Humber, £630,000 (17 workers).[67]

According to a report in the *Guardian*, compensation to individuals ranged from £25,000 to £200,000.[68] Alongside these settlements, the firms involved issued a formal apology.[69]

4.4 Information Commissioner call for evidence

During a Westminster Hall debate, on 8 February 2017, about blacklisting in the construction industry, the Parliamentary Under-

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64 Ibid., pp21-23
65 Blacklisting victims' cases to be heard as one supercase, *Construction Manager*, 11 July 2014
66 Construction workers win payouts for 'blacklisting', BBC News, 9 May 2016; Construction firms strike blacklisting settlement, BBC News, 29 April 2016
67 GMB Win £5.4m Against Blacklisters, GMB press release, 9 May 2016
68 Construction firms apologise in court over blacklist, *The Guardian*, 11 May 2016
69 Ibid.

Secretary of State for Business, Energy and Industrial Strategy, Margot James, indicated that the Information Commissioner plans to issue a call for evidence into blacklisting:

> The Information Commissioner intends to undertake a call for evidence later this year to develop her understanding of the underlying issues, building on her office's observations from its extensive investigations into blacklisting complaints. In an area where there have been many allegations, that is an important step forward in establishing a true picture of the level of blacklisting that may or may not take place now.[70]

A press release from the trade union Unite suggested the call for evidence would not begin until 2018.[71]

4.5 Smith v United Kingdom

In April 2017 the European Court of Human Rights handed down judgment in *Smith v United Kingdom 54357/15*. Mr Smith's claim was rejected.

David Smith had been a victim of blacklisting while working in the construction industry, engaged through employment businesses as an agency worker. He had issued domestic proceedings, based in part on section 146 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (see above) and in part on health and safety grounds under the *Employment Rights Act 1996*. The domestic proceedings failed on the basis that at the material times Mr Smith was engaged as an agency worker. The rights he sought to rely on are available only to employees – i.e. persons with employment contracts. Agency workers are typically not defined as employees vis-à-vis end users of their services.[72]

Mr Smith's case before the European Court of Human Rights was based on a claimed failure of the State to safeguard his Article 8 (right to privacy) and 11 (freedom of association) rights under the European Convention on Human Rights (see above section on the legal framework).

Mr Smith's argument was unsuccessful. Under Article 34 of the Convention, the Court can hear claims by those who are "victims" of a violation of rights by the State. In this case, the State had acted, via the Information Commissioner; had legislated in response to blacklisting; and had provided

> a combination of domestic remedies which proved to be effective in the applicant's case, resulting in an acknowledgement of the violation of the applicant's rights, and giving appropriate redress[73]

Notably, Mr Smith had by that point secured £50,000 in compensation as part of the settled High Court claim (see above). As such, the European Court dismissed Mr Smith's claim on the grounds that he was not a "victim" within the meaning of Article 34.

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70 HC Deb 8 February 2017 c183WH
71 A year on from High Court case blacklisting battle continues, Unite website, 9 May 2017 [accessed 3 June 2017]
72 See *Employment Status*, Commons Briefing papers CBP-8045
73 *Smith v United Kingdom 54357/15*, para 40

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