

## **Recent Developments in Blacklisting**

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The current blacklisting controversy first emerged in 2009 when the Information Commissioner's Office (ICO) revealed evidence of blacklisting by an organisation called The Consulting Association (TCA) which had provided approximately 40 companies in the construction sector with sensitive personal information about *inter alia* the trade union activities of over 3000 workers. In response, The Employment Act 1999 (Blacklists) Regulations 2010 were passed which (regulation 3) prohibit the compilation, use, sale or supply of any list ('prohibited list') which contains details of any person who is, or has been, a member of a trade union or who has taken part in trade union activities. Regulation 5 allows for complaints to be made to an employment tribunal where an employer refuses employment to a worker whose name can be found on a prohibited list. The Regulations' limited scope (particularly with regard to the absence of an investigatory regime and the lack of criminal penalties; see C. Barrow, 'The Employment Relations Act 1999 (Blacklists) Regulations 2010 (2010) 39 *Industrial Law Journal* 300) has been widely criticised and it must be questioned to what extent they will be beneficial in restricting if not eradicating the practice of blacklisting. To date, the Regulations have been at issue in two cases before the Employment Appeal Tribunal (EAT): *Maunders v Wellwise Group (Wellwise Oilfield Services Ltd) and others* [2012] All ER (D) 93 (Aug) and *Miller and others v Interserve Industrial Services Ltd* [2013] ICR 445. In both cases, employees alleged a breach of regulations 3 and 5 on the basis that they had been denied employment on the grounds of being trade union members who had been involved in unofficial industrial action. In *Maunders*, it had been suggested to the claimant by a security guard when he was not allowed to enter his workplace that he had been blacklisted whereas in *Miller*, the claimants were refused employment at an oil depot after having been put forward for the jobs by their trade union. The claims were unsuccessful in the employment tribunal and on appeal. While the EAT's decision in *Maunders* turned on a material irregularity and was remitted to the tribunal, the decision in *Miller* is more illustrative of the potential approach of the courts in interpreting the Regulations. In *Miller*, it was accepted that the employer had created a 'mental list' of individuals which it did not wish to employ. However, the tribunal did not accept that the employer's decision was linked to the claimants' trade union activities.

Instead, it found it justifiable that the employer had felt 'bullied' by the trade union to employ the claimants and had, in response, decided to 'dig his heels in'. The EAT agreed with the tribunal's finding by applying the 'because of' test drawn from discrimination law in order to elucidate the employer's principal reason for not employing the claimants. In addition, the EAT required trade union activities to have formed at least part of the employer's motivation (whether consciously or subconsciously) in not hiring the claimants. In its analysis, the EAT found that the employer's principal motivation was driven by the pressure placed on it by the trade union rather than the claimants' union activities. The EAT's decision is interesting for two reasons. First, the tribunal in effect widened the scope of regulation 3 by accepting that a 'mental list' could be sufficient for the Regulations to apply. Second, the EAT has provided an indication of what it may accept as a 'reasonable explanation' by an employer in order to prevent a breach of the Regulations. The burden of proof in the Regulations is effectively reversed meaning that if there are facts from which a tribunal can infer that the employer breached the general prohibition contained in regulation 3 and in the absence of a reasonable explanation, the tribunal should find that the employer had acted in contravention of the Regulations. In *Miller*, the EAT recognised the employer's feelings of 'bullying' as a reasonable explanation for the use of a list prohibited under regulation 3. Such acceptance of a margin of subjectivity in favour of the employer will make it difficult for workers to rely on the Regulations in the absence of specific proof that an employer refused employment on the grounds of trade union activities. However, as blacklisting is by its very nature a covert act which is difficult to prove, this in effect puts into doubt the added value of the Regulations.

It is likely that the effects of the ICO's revelations will continue to be felt for some time across the judicial system. There have been numerous claims brought against individual construction companies known to have been implicated in TCA's activities. For the most part these were lodged prior to the introduction of the Regulations and alleged a breach of either s137, s146 or ss152-3 of the Trade Union and Labour Relations (Consolidation) Act 1992 which protect individuals against the denial of employment, detriment, dismissal or selection for redundancy on the grounds of trade union membership. The vast majority of claims failed the pre-hearing review stage as claimants had either exceeded the time limit for bringing a claim; the employer who had engaged in

blacklisting had ceased to exist; or, there was insufficient proof that refusal of employment, detriment or dismissal had actually occurred on the grounds of an individual's trade union activities. One case which progressed to a full hearing but in which the claimant was ultimately unsuccessful paved the way for the Union of Construction, Allied Trades and Technicians (UCATT) to lodge a test case in August 2011 with the European Court of Human Rights on behalf of one of its members: *Brough v The UK*, Case number 52962/11. The applicant primarily alleges a breach of the right to freedom of association under article 11 ECHR as a result of the UK government's failure to provide any or sufficient protection from blacklisting as well as adequate penalties for perpetrators and remedies for victims of blacklisting. The case is currently pending with the Court having sent a number of questions to the parties.

More recently, in March 2012, a group of workers brought a claim in the High Court against eleven construction companies involved in blacklisting. Separate claims were issued by a number of trade unions (GMB, UNITE and UCATT) between June and November 2013; all of which have since been consolidated by way of a Group Litigation Order. The case is expected to conclude by April 2016 at the latest. In July 2014, eight of the companies affected by the High Court action unilaterally launched 'The Construction Workers' Compensation Scheme' (TCWCS) which operates both fast-track and full review processes offering between £4,000 - £20,000 (under the former) and £100,000 (under the latter) in compensation for construction workers whose names were found on TCA's blacklist. While the TCWCS aims to resolve claims within two weeks through the fast-track process and within three to six months in the case of a full review, there would be no admission of liability on the part of the companies. The TCWCS also offers to cover any legal costs of workers involved in the High Court case wishing to join the scheme in return for their withdrawal from the court action. The Scheme is to remain open for two years. The TCWCS has been heavily criticised by trade unions and campaigners. In July 2014, a number of individuals involved in the TCWCS appeared before the House of Commons' Scottish Affairs Committee which also suggested a number of changes to be made to the Scheme including extending its operation to three years and making provision for the payment of interim damages which could be increased following the decision in the High Court action.

The Regulations seem to have had little impact on restricting the practice of blacklisting. In April 2011, the Scottish Affairs Committee in the course of an *Inquiry into Health and Safety in Scotland* found evidence that workers who raised health and safety concerns were referred to as 'troublemakers'. This has resulted in the launch of an inquiry in 2012 by the Committee (*Blacklisting in Employment*) into the extent of blacklisting in Scotland and to make proposals for its eradication. A first interim report which focussed predominantly on historical practices of blacklisting along with TCA's activities was published on 16 April 2013; a second report identifying best practice approaches was published on 14 March 2014. The latter report considered the possibility of following the Welsh and Scottish government's introduction of (non-mandatory) requirements which prohibit enterprises known to have engaged in blacklisting from taking part in public procurement for public contracts until they engage in a process of 'self-cleaning'. The report also considered the introduction of a compensation scheme for affected workers and endorsed direct employment and transparent recruitment practices as standard for all public sector contracts in the construction industry. The Committee is currently collecting further evidence, particularly on possible legislative reforms aimed at eradicating blacklisting, before it submits its final recommendations to the Government.

The blacklisting controversy has been ongoing for a number of years. The Regulations introduced in 2010 have had little impact in practice and further changes to the Regulations seem necessary if they are to fulfil their aim of limiting or eradicating the practice of blacklisting. In particular, the question of penalties for those who engage in blacklisting has not been adequately addressed. The outcome of the pending High Court case and the final report of the Scottish Affairs Committee's Inquiry into *Blacklisting in Employment* could be particularly influential in this regard. It remains to be seen what, if any, impact the unilateral introduction of the TCWCS will have on the High Court case. While the decision of the European Court of Human Rights is not expected for some time and depending on its outcome, it could also pave the way for the UK government to introduce more stringent legislation in this regard. What seems obvious is that the current controversy is unlikely to subside without further legislative attempts being

made to limit or eradicate the practice of blacklisting which seems to stretch far beyond the historical evidence revealed by the ICO in 2009.