

**THE BLACKLISTING OF TRADE
UNIONISTS**

**BIS Guidance on Draft
Blacklisting Regulations**

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The Blacklisting of Trade Unionists

It is a common practice for employers or employment agencies to seek references on potential recruits or otherwise vet individuals for employment. Those vetting practices should be transparent, fair and open, and they should comply with the Data Protection Act 1998 and the data protection principles that the Act lays down¹.

In contrast, the blacklisting of trade unionists is an unfair and insidious practice. It involves the systematic compilation of information on individual trade unionists and their use by employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade union activity. Early in 2010, draft Regulations² to prohibit the blacklisting of trade unionists were laid in Parliament for approval.

The Regulations are designed to avoid interfering with normal listing or vetting practices which are not intended to discriminate against trade unionists. For example, they should not impact on the way trade unions and employers work with each other in drawing up and using lists of trade unionists who pay their union subscriptions from their pay at source (via the so-called "check-off" system).

This document summarises the draft Regulations and provides guidance on their application in practice.

What is prohibited?

The Regulations make it unlawful to compile, supply, sell or use a "prohibited list" (i.e. a blacklist). This core feature of the Regulations is termed the "general prohibition".

What, more precisely, is a prohibited list or a blacklist?

There are two criteria which define a prohibited list.

First, the list must contain "details" of current or former trade union members or "details" of persons who are taking part or have taken part in trade union activities. "Details" could include names, addresses, National Insurance numbers, occupations or work histories. It is likely that such lists would refer to the trade union activities or trade union membership of individuals, but lists which do not refer to such matters might also qualify as a prohibited list if its purpose was to discriminate against trade unionists.

It should be noted that a list might contain details of both trade unionists and non-trade unionists. Such mixed lists would also qualify as a "prohibited list",

¹ Guidance on the Data Protection Act 1998 can be found at www.ico.gov.uk/for_organisations/data_protection_guide.aspx

² The Employment Relations Act 1999 (Blacklists) Regulations 2010.

and both the trade unionists and non-trade unionists on them would be protected under the Regulations.

Details could be given in any language, including encrypted or encoded forms. They could also include photographs, cuttings from newspapers or links to web sites.

Second, the list must have been compiled with a view to being used by employers or employment agencies for the purposes of discrimination when recruiting or during employment on grounds of trade union membership or activities. In turn, "discrimination" means treating a person less favourably than another on these grounds.

In some cases, lists will have been compiled for several purposes. Such a list will still be prohibited if just one of its purposes is to facilitate discrimination on grounds of trade union membership or activities. The protections provided by the Regulations apply to all those on the lists, irrespective of the reason for the listing of the particular individual.

Both criteria must be met for a list to be prohibited.

It is likely that many lists might meet the first criterion because there are many millions of trade unionists in the country, and employers or others will often, and possibly unknowingly, draw up completely lawful lists, such as staff directories, which will identify individuals who happen to belong or once have belonged to trade unions. These will not be prohibited because they do not meet the second criterion about the harmful and discriminatory purpose of the list.

Exceptions from the prohibition?

There are five categories of exception from the general prohibition relating to the compilation, sale, supply or use of blacklists. Under these exceptions, individuals, organisations or other persons will not contravene the general prohibition if:

First, they supplied a prohibited list in circumstances where they could not reasonably know it was a prohibited list.

This exception enables, for example, the Royal Mail or other postal service providers to deliver prohibited lists as part of their normal service without fear of committing an unlawful act. The exception might similarly apply to organisations which deliver information in electronic form.

or

Second, individuals or organisations compiled, supplied or used a list in order to draw attention to a possible or actual breach of the blacklisting regulations, and, in so doing,

- no information about a person on the list was published without their consent; and
- the activity is justified in the public interest.

This exception is therefore designed to enable journalists, their sources or whistleblowers safely to divulge information about blacklists in order to draw attention to a failure to comply with this law. The public interest test ought to ensure that reckless, vexatious or other undeserving disclosures do not attract the protection.

or

Third, individuals or organisations compiled, sold, supplied or used a prohibited list for the sole or main purpose of

- appointing or electing an office-holder in a trade union; or
- appointing a person to a post or office where the appointee must have experience or knowledge of trade unions, and it is reasonable to apply such a requirement.

Lists are often compiled or used in appointment or recruitment processes. This exception is designed to enable prohibited lists to be used in those limited and relatively uncommon situations where information about a person's trade union involvement or experience is an essential criterion or factor relevant to selection processes. This would happen in certain union appointments where union rules require the appointee to be a member of the trade union. It also applies to situations - for example, where an industrial relations expert is sought for an academic or personnel role - and it is reasonable to require that person to have knowledge or experience of trade unions.

or

Fourth, individuals or organisations compiled, sold, supplied or used a prohibited list in order to comply with a statutory or legal requirement, or to obey a court order.

or

Fifth, individuals or organisations supplied or used a prohibited list in connection with legal proceedings or to obtain or provide legal advice about actual or potential compliance with the regulations.

This exception enables lawyers to access evidence about blacklists when advising clients about their compliance with the Regulations. It does not of course provide a protection for lawyers to operate a blacklist on behalf of their clients.

What is a list?

The Regulations do not provide an all-encompassing definition of a "list". However, a list would include any index or other set of items whether recorded manually, electronically or in other forms. This will cover a wide range of scenarios.

As a general rule, a list would have to contain details of two or more people. This implies that one-person records would not constitute a list, as long as each one was genuinely unconnected to other records. However, where a one-person record is related to other records because, for example, they have been compiled for a common purpose, the records are linked and would together qualify as a list.

Information on a list need not be held all in one location. Data can be held in many different locations and on different machines using a variety of software. A data base which is dispersed on a functional or geographical basis could still constitute a list, for example, if they were all linked to single file system or search engine. Haphazard or unstructured collections of information could also qualify as a list if it could be shown that they were connected in some way and were used for the same purpose. For example it is possible that information contained in blogs or forums on social networking sites could qualify as a list, where, say, it was organised systematically or linked by search engine, though much would depend on the facts of each circumstance.

What happens if a list is held outside Great Britain?

The Regulations apply to Great Britain only. However, their provisions make some allowance for the fact that lists may be held or compiled in another country or beyond any country's borders. They do so by making it unlawful for a person in GB to use information from a list in a foreign country to discriminate where that list would qualify as a prohibited list, if it were located in this country. Thus, key elements of the Regulations cannot be evaded by placing the list offshore.

What are trade union activities?

There is no definition of this term in the Regulations. It could encompass a range of a member's involvement with a trade union, such as attending union meetings at an appropriate time, writing articles in a union journal, standing for office in a trade union or acting as a workplace representative of the trade union, for example, as a safety representative. Participating in official industrial action would also probably be categorised as a trade union activity. This means that a list of strikers which was drawn up in order to discriminate against them in employment could constitute a blacklist. In contrast, involvement in unofficial industrial - such as strike action which is not endorsed, organised or authorised by the trade union - would not qualify as a trade union activity.

What is unlawful?

As well as the general prohibition against compiling, selling, supplying and using a blacklist, the Regulations also make it unlawful for an employer

- to refuse a person employment for a reason related to a prohibited list;
- to dismiss an employee for a reason related to a prohibited list; and
- to subject a worker to any other detriment for a reason related to a prohibited list.

The Regulations make it unlawful for an employment agency to refuse its service to a worker for a reason related to a prohibited list.

A “reason related to a prohibited list” is not defined in the regulations but should cover a wide range of circumstances. For example, an employer refusing employment to a person who was on the blacklist because it revealed he was a trade unionist would be refusing employment for a reason related to a prohibited list. The data and information held by a blacklister may be inaccurate, and accurate information may be misinterpreted by users. Thus, a person who was refused employment because it was mistakenly believed that he was on a blacklist would have been refused employment for a reason related to a prohibited list.

In all cases, the employer or employment agency must also have contravened the general prohibition or have relied on information supplied by a person who contravened in the general prohibition. In the latter case, the employer or employment agency must know or ought reasonably to know that the supplier of the information had contravened the general prohibition. The direct use of the blacklist by the employer or employment agency to check whether the individual was on the list would contravene the general prohibition. So, for example, if an employer rang, faxed or e-mailed a compiler or holder of a list to check a name, and then took discriminatory action as a result, the employer would be acting unlawfully. The indirect use of a blacklist is also prohibited. An employer's or agency's indirect use of the list via one or more intermediaries, including intermediaries based outside Great Britain would also constitute a contravention of the general prohibition. It is not a defence for the employer or agency to claim that they did not know that information came from a prohibited list if they ought to have known that it did. Therefore, before using the services of a vetting agency or other third party, employers and other users should take steps to scrutinise and understand how that organisation collects information and operates its listing practices.

How is the law enforced and what are the remedies?

Individuals may enforce the rights contained in the Regulations through the employment tribunal or the county court in England and Wales (or the Court of Session in Scotland).

Employment tribunal

Complaints against employers and employment agencies for refusing employment or services, for dismissal or for detriment can be made by the individual concerned to the employment tribunal.

Either the complainant or the responding employer or agency may ask the tribunal to join others to the proceedings who have also allegedly contravened

the general prohibition in relation to the complaint. This means that a compiler or distributor of a prohibited list, or organisations who had used the prohibited list on behalf of the employer or employment agency, could also be joined to the proceedings as a respondent. Consequently, if the employment tribunal upholds the complaint, those joined may be required to pay all or part of the compensation awarded to the complainant.

In general, an individual must complain to the tribunal within three months of the alleged unlawful conduct in question. The tribunal may extend that time limit where it is just and equitable to do so.

Any blacklisting activity is likely to be covert, and therefore evidence of a blacklist's existence may come to light many months or even years after it was used by an employer to discriminate against an individual. The discretion given to the employment tribunal to extend time limits for bringing complaints may therefore be particularly relevant to such cases. However, the tribunal is also likely to be mindful of avoiding cases where its ability to determine the issues is prejudiced because of the passage of time.

When considering a complaint, if there are facts from which the tribunal could conclude, in the absence of any other explanation, that the employer had contravened the general prohibition or had relied on information supplied from the prohibited list, the tribunal must conclude that the employer did so, unless the respondent demonstrates otherwise. For example, if a complainant could show that an employer had been a subscriber to a blacklist on which his name was included and that he had been refused employment a number of times despite being appropriately qualified, the tribunal must conclude that the employer had contravened the general prohibition if there is no other credible explanation. This approach in effect reverses the burden of proof. The same evidential burden applies when the county court or Court of Session determines a complaint, as described below.

Appeals against the decisions of the employment tribunal may be made to the Employment Appeal Tribunal.

The remedies for a breach of the regulations are very similar to those provided under existing trade union law where individuals are discriminated against on the grounds of their trade union membership and activities. This law is described in detail in another BIS guide "union membership - rights to membership or non-membership" (www.berr.gov.uk/whatwedo/employment/trade-union-rights/index.html)

There are some specific elements of the remedies available.

When determining the level of compensation, a minimum award of £5,000 applies (in the case of unfair dismissal, this minimum applies to the basic award element of the compensation). This amount may be adjusted downwards where the tribunal considers that the prior conduct of the complainant makes it just and equitable to do so. For example, the tribunal might consider that the award should be reduced or disapplied where the individual was listed for reasons unrelated to trade union membership such as

a person's violent or unsafe conduct at work. Other adjustments, upwards or downwards, may also be made.

The amount of compensation is calculated on the basis of the amount of loss suffered as a result of the contravention of the general prohibition. This amount which may in certain circumstances include compensation for injury to feelings is subject to a maximum amount of £65,300.

County court or Court of Session

Individuals, trade unions and other organisations may complain to the county court (or the Court of Session) that the general prohibition in the Regulations had been breached or was likely to be breached by another person or persons where they have suffered a loss, or may suffer a loss, as a consequence of that breach. In other words, any person may make a complaint against an alleged compiler, distributor, seller or user of a prohibited list, provided they have suffered a loss or are threatened by a potential loss.

As a general rule, the court will not consider a complaint if it is made more than six years of the alleged breach occurring.

Where the court upholds the complaint, it may award damages to the complainant. This award may include compensation for injury to the feelings of the complainant. No minima or maxima apply to the size of these awards.

Also, the court may make an order to restrain or prevent the defendant from breaching the general prohibition. For example, an order may require the defendant to cease using a prohibited list. Any breach of the court's order would be a contempt of court, and punishable accordingly.

A person may not make a complaint to the employment tribunal and to the court in relation to the same conduct, unless the person wishes to obtain an order from the court to restrain or prevent a defendant from contravening the general prohibition. This means that, in respect of obtaining compensation, a complainant needs to choose between using the employment tribunal or the court.

