

**FEBRUARY 2003**

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**DRAFT REGULATIONS TO  
PROHIBIT THE BLACKLISTING OF  
TRADE UNIONISTS – A  
CONSULTATION DOCUMENT**

**dti**

Department of Trade and Industry

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## **CONSULTATION ON DRAFT REGULATIONS TO PROHIBIT THE BLACKLISTING OF TRADE UNION MEMBERS**

### **Explanatory Note and Questions For Respondents**

Section 3 of the Employment Relations Act 1999 contains a power for the Secretary of State to introduce regulations which prohibit the compilation, dissemination and use of trade union blacklists. This document contains draft regulations for consultation. **The Government invites comments on them**

The regulations are modelled on the existing law governing the related protections against dismissal and detriment on grounds of trade union membership and activities. These provisions have been in place for many years and have become an established feature of employment law. As far as possible, the same or similar wording is used in these regulations to avoid creating possible inconsistencies.

The Government will amend the regulations following this consultation exercise. However, they will not be put before Parliament for approval or implemented until there is evidence that individuals or organisations are planning to draw up such lists, or if there is any evidence there is a demand from employers for them.

A [Regulatory Impact Assessment](#) (RIA) on these regulations is also attached at the end of this document. **The Government invites comments on the analysis contained in the RIA.**

Responses to these draft regulations, based on the questionnaire below, should be sent by 22 May 2003 to :

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## Summary of the Regulations and Questionnaire

### **Regulation 1**

This cites the title of the regulations. The date “2003” is merely illustrative. As explained above, the regulations will not be introduced until there is evidence that blacklisting is occurring or may occur.

### **Regulation 2**

This contains the precise definitions for the terms used elsewhere in the regulations.

### **Regulation 3**

*Paragraph (2)* defines a prohibited list (i.e. a “blacklist”). The definition is identical to that used in section 3 of the 1999 Act.

*Paragraphs (1), (3) and (4)* state that it is unlawful to compile, sell or supply, or use prohibited lists. Again, the wording is the same or very similar to that used in section 3 of the 1999 Act. However, wording has been added in *paragraph (4)* to ensure that the Royal Mail and other similar distributors acting in good faith are not committing an unlawful act if they distribute lists unknowingly or accidentally.

### **Q1. Is it necessary to protect organisations distributing prohibited lists unknowingly and is the protection appropriately constructed ?**

The Government is aware that there are other circumstances where the regulations should not apply because it would seriously inconvenience proper and necessary behaviour by employers or others. *Paragraphs 5 – 6* therefore define those circumstances where it is not unlawful to compile, supply or use blacklists.

*Paragraph (5)* deals with the circumstances where an individual (for example, a journalist) uses a blacklist in order to expose its existence. Because blacklisting is a covert activity, investigative journalism is likely to be an important means of bringing cases to light. Journalists are therefore likely to use prohibited lists and quote from them in exposing possible wrongdoing. The Government therefore considers it important that such actions are exempted.

### **Q2. Is this exemption for journalists necessary and appropriately formulated ? Does it provide any undesirable scope for blacklists to avoid the prohibition ?**

*Paragraph (6)* states that the prohibition on compiling or using a list would not apply when a position or office requires significant trade union experience or knowledge of trade unions. It is not possible to specify all jobs where such experience is needed. However, examples could include particular positions at a trade union (a full time union officer but not, say, a union’s catering manager), an industrial relations officer representing an employer in collective bargaining or worker appointments to a public body such as the Advisory, Conciliation and Arbitration Service (Acas).

**Q3. Is this exemption necessary ? Are there any possible disadvantages with it, allowing blacklists to avoid the prohibition ? Should there in addition be an explicit exemption for trade unions ?**

*Paragraph (7)* excludes from the application of the Regulations those that are compelled by law to compile, use, sell or supply a prohibited list.

Regulation 3 sets the overall framework for defining what is lawful and unlawful in this area.

**Q4. Is this framework appropriate ? Are there any other instances where the use of an otherwise prohibited list should be made lawful ?**

#### **Regulations 4 and 5**

Regulation 4 makes it unlawful for an employer to refuse employment to an individual because that person's name is, or is not, on a prohibited list. In other words, it is unlawful to use a prohibited list to discriminate against, or in favour of, a trade unionist in connection with recruitment. The wording is based closely on section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, which makes it unlawful to refuse employment on grounds of union membership (or non-membership). However, *paragraph (4)* places the burden of proof on the employer to show that the refusal of employment was unrelated to the use of a prohibited list, where there is reason to suppose that the employer possessed or had seen such a list containing the person's name.

Regulation 5, which is similarly based on section 138 of the 1992 Act, provides the corresponding protection for individuals to have access to the services of an employment agency.

**Q5. Are these regulations about discrimination at the point of recruitment appropriately worded ?**

#### **Regulation 6**

This Regulation provides protections against detrimental acts by employers against their current workers because their names appeared, or did not appear, on a prohibited list. Such detrimental acts could involve, say, a failure to promote, or assignment of a worker to less rewarding or less convivial duties or a dismissal in the case of a worker not an employee. *Paragraph (4)* places the burden of proof on the employer to show that the detrimental act was unrelated to the use of a prohibited list, where there is reason to suppose that the employer possessed or had seen such a list containing the person's name.

**Q6. Is this regulation about detrimental treatment at work appropriately worded ?**

## **Regulations 7 and 8**

These provide jurisdiction to employment tribunals to hear complaints about alleged breaches of Regulations 4 – 6 within the standard time limits for bringing applications to tribunals. Tribunals are already empowered to hear complaints about the existing, and related, law protecting individuals on grounds of trade union membership and activities.

**Q7. Is the employment tribunal the appropriate body to hear these complaints and are the time limits for bringing complaints appropriate ?**

## **Regulations 9 and 10**

These regulations provide the remedies which the tribunals may award where it has determined that a breach of regulations 4 – 6 has occurred. The remedies are based on those which tribunals may currently award where existing law relating to trade union membership is breached.

Regulation 10 provides that a dismissed worker who is not an employee will have the right to the same compensation as an employee.

**Q8. Are these remedies appropriate ?**

## **Regulation 11**

This deals with the particular circumstances where complaints under regulations 4 and 5 could be made against both an employer and an employment agency on the grounds of the same facts. It is closely based on section 141 of the 1992 Act.

**Q9. Is this regulation necessary and appropriately worded ?**

## **Regulation 12**

This regulation provides protection for employees against dismissal on the grounds that their names appear, or do not appear, on a prohibited list.

Complaints under this jurisdiction will be heard by employment tribunals and will be administered by them in broadly the same way as other cases of alleged unfair dismissal. However, *paragraph* (3) places the burden of proof on the employer to show that the dismissal was unrelated to the use of a prohibited list, where there is reason to suppose that the employer possessed or had seen such a list containing the person's name.

**Q10. Is this protection against dismissal appropriately formulated ?**

## **Regulation 13**

This regulation allows for the complainant or respondent to request that the employment tribunal direct that a third party be joined or sisted to proceedings under Regulations 4, 5, 6 and 12, with certain restrictions on timing. This will ensure that

actions against the user of a prohibited list (an employer or employment agency) can be widened to include the compiler or disseminator of the list. By this means, the compiler or disseminator may be ordered to pay part or all of the compensation awarded for breach of the regulations. It also permits the tribunal to order the compiler or disseminator to take other appropriate action (say, to stop producing or supplying prohibited lists) which would reduce the risk of further damage to the complainant occurring.

**Q11. Should there be a facility to join compilers or disseminators to tribunal complaints ? If so, is the facility appropriately worded ?**

#### **Regulation 14**

Section 288 of the 1992 Act restricts the ability of a worker to contract out of the statutory rights introduced by that Act, including the rights relating to trade union membership and activities. This regulation extends that restriction to rights introduced by these blacklisting regulations.

**Q12. Is this restriction on contracting out appropriate ?**

#### **Regulations 15 and 16**

Regulation 15 enables a person who has suffered or may suffer loss due to blacklisting to bring civil proceedings before a county court about alleged breaches of Regulation 3. This right would mainly apply to individuals whose names appear on blacklists. However, it might also apply to a trade union in cases where it could demonstrate a loss (for example, a loss in membership subscriptions) caused by the blacklisting of members or potential members.

The Court may award damages and grant interlocutory relief to prevent further damage occurring. The relief could therefore take the form of an interim order by the court for the compiler of a blacklist to cease undertaking such activities. The Government expects that most claimants would then seek redress at the employment tribunal rather than the Court. However, the tribunal cannot currently offer interlocutory relief to restrain or prevent any conduct by the defendant, and it is not the Government's policy to grant the tribunals such powers.

Regulation 16 deals with the circumstances where a person brings actions, or could bring actions, under the Regulations against an employer or another person in both the employment tribunal and the Court. The regulation ensures that there is no duplication of proceedings although allowing a person to bring an application for interim relief in the Court and pursue a substantive remedy in the Tribunal.

**Q13. Is it necessary to provide interlocutory relief for alleged breaches of Regulation 3 ? Should complaints about infringements of Regulation 3 be made to the Court ? If not, which other body should hear these complaints ? Are Regulations 15 and 16 appropriately constructed ?**

## **Regulation 17 and Schedule**

These regulations require a number of consequential changes to other pieces of legislation. For example, Acas's duty to conciliate tribunal claims should be extended to the new tribunal jurisdictions introduced by Regulations 4, 5, 6 and 12. These consequential changes are listed in a Schedule, which Regulation 17 brings into effect.

The Schedule also provides that the selection of an employee for redundancy on the grounds his or her name is on a prohibited list will be an unfair dismissal. It also provides that dismissed employees will be able to apply for interim relief.

### **Q14. Does the Schedule identify all necessary consequential changes to other pieces of legislation ?**

#### **Other Questions**

##### *Vetting for National Security Purposes*

It is Government policy that individuals should be vetted for national security purposes prior to their employment in certain sensitive posts. National security vetting does not involve the use of trade union blacklists, but it is possible that information used in the security vetting context might on occasion refer to the fact of an individual's union membership or activities. The Government wishes to ensure that this does not of itself bring the security vetting process within the scope of the Regulations, which are not intended to cut across or hinder that process in any way. The Regulations do not currently provide any specific exemptions or exclusions which deal with this issue. However, the Government is minded to include such specific provision within the final version of these regulations. Any provision needs to be carefully drafted to ensure that it is targeted on this activity alone, and does not provide a loophole for pernicious forms of listing activity.

### **Q15. What form should this targeted provision take ?**

##### *Coverage*

Blacklisting can affect a wide range of persons. The bulk of these Regulations therefore applies to workers. The definition of "worker" is provided in section 13 of the Employment Relations Act 1999. However, Regulation 9 is limited to employees only, in common with other legislation concerning unfair dismissal.

### **Q16. Do you consider this coverage is appropriate ?**

##### *Regulatory Impact Assessment (RIA)*

**Q17. Do you agree with the assessment of the costs and benefits of the regulations given in the RIA attached to these regulations ? Do you have any additional information which should be used in making this assessment ?**

*General*

**Q18. Are there any other comments or observations you wish to make about the regulations ?**

**2003 No.....**

**TERMS AND CONDITIONS OF EMPLOYMENT**

**Prohibition of Blacklists Regulations 2003**

*Made* ..... [ ] 2003

*Coming into force* ..... [ ] 2003

Whereas a draft of the following Regulations was laid before Parliament in accordance with section 42 of the Employment Relations Act 1999 (a) and approved by resolution of each House of Parliament:

Now, therefore, the Secretary of State, in exercise of the powers conferred on him by section 3 of the Employment Relations Act 1999, hereby makes the following Regulations:

**Citation and commencement**

1.- These Regulations may be cited as the Prohibition of Blacklists Regulations 2003 and shall come into force on .

**Interpretation**

2. In these Regulations-

“the 1992 Act” means the Trade Union and Labour Relations (Consolidation) Act 1992(2);

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(a) 1999 c.26.

(b) 1992 c.52

“the 1996 Act” means the Employment Rights Act 1996(c).

“the 1999 Act” means the Employment Relations Act 1999;

“employment” in relation to an employee, means employment under a contract of service or apprenticeship, and related expressions shall be construed accordingly;

“employment” in relation to a worker, means employment under his contract;

“the Court” means the High Court, the Court of Session, county court or sheriff court.

### **Prohibition of blacklists**

- 3.- (1) It is unlawful for any person to compile a prohibited list.
- (2) In these regulations, prohibited list means a list which
- (a) contains details of members of trade unions or persons who have taken part in the activities of trade unions, and
  - (b) is compiled with a view to being used by employers or employment agencies for the purpose of discrimination in relation to recruitment or in relation to the treatment of workers.
- (3) It is unlawful for any person to use a prohibited list.
- (4) It is unlawful for any person knowingly or recklessly to sell or supply a prohibited list.
- (5) It is not unlawful under this regulation for a person to compile, sell, supply or use a blacklist where that person can show that in the particular circumstances the compiling, selling, supplying or using was justified in the public interest because that person’s sole or principal purpose was to expose a breach or potential breach in these regulations.
- (6) It is not unlawful under this regulation for a person to compile or use a prohibited list for the purpose of employing a person or appointing to an office a person where it is reasonable to believe that significant trade union experience or significant knowledge of trade unions is a necessary requirement of employment or appointment.
- (7) It is not unlawful under this regulation to compile, use, sell or supply a prohibited list where required or authorised under an enactment, or by any rule of law or order of the court.

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(c) 1996 c.18.

## **Refusal of Employment**

**4. - (1)** Subject to paragraph (3), it is unlawful to refuse a person employment because that person's name is, or is not, on a prohibited list.

(2) A person who is thus unlawfully refused employment has a right of complaint to an employment tribunal.

(3) A person does not act unlawfully under paragraph (1) in refusing another person employment if he does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) or (7) of regulation 3, not unlawful under that regulation.

(4) Where a person is refused employment by another person that refusal shall be taken to be unlawful under paragraph (1) if-

(a) there is reason to suppose that, at the time of the refusal that other person had in his possession or had seen a prohibited list on which the name of the applicant appeared (or the name of the applicant did not appear in circumstances where it is alleged that the person was refused employment on the basis that person's name was not on the list), and

(b) that other person fails to show that the reason for the refusal, or if more than one the principal reason, was unrelated to use of the list.

(5) A person shall be taken to be refused employment if he seeks employment of any description with a person and that person-

(a) refuses or deliberately omits to entertain and process his application or enquiry, or

(b) causes him to withdraw or cease to pursue his application or enquiry, or

(c) refuses or deliberately omits to offer him employment of that description, or

(d) makes him an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted, or

(e) makes him an offer of such employment but withdraws it or causes him not to accept it.

(6) Where there is an arrangement or practice under which employment is offered only to persons appearing on a prohibited list, a person who does not appear on a prohibited list and who is refused employment in pursuance of this arrangement

or practice shall be taken to have been refused employment because he does not appear on a prohibited list.

### **Refusal of Service of Employment Agency**

5. - (1) Subject to paragraph (3) it is unlawful for an employment agency to refuse a person any of its services because that person's name is, or is not, on a prohibited list.

(2) A person who is thus unlawfully refused any service of an employment agency has a right of complaint to an employment tribunal.

(3) An employment agency does not act unlawfully under paragraph (1) in refusing a person any of its services if the employment agency does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) or (7) of regulation 3, not unlawful under that regulation.

(4) A person shall be taken to be refused a service if he seeks to avail himself of it and the agency-

(a) refuses or deliberately omits to make the service available to him, or

(b) causes him not to avail himself of the service or to cease to avail himself of it, or

(c) does not provide the same service, on the same terms, as is provided to others.

(5) An employment agency shall be taken to have unlawfully refused contrary to paragraph (1) if

(a) there is reason to suppose that, at the time of the refusal the employment agency had in his possession or had seen a prohibited list on which the name of the applicant appeared, and

(b) the employment agency fails to show that the reason for the refusal, or if more than one the principal reason, was unrelated to use of the list.

(6) For the purposes of this regulation, "employment agency" means a person who, for profit or not, provides services for the purposes of finding employment for workers or supplying employers with workers.

(7) For the purposes of this regulation as it applies to employment agencies

(a) services other than those mentioned in the definition of employment agency in paragraph (6) shall be disregarded, and

(b) a trade union shall not be regarded as an employment agency by reason of services provided by it only for, and in relation to, its members.

## **Detriment**

6.- (1) Subject to paragraph (3) a worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, of his employer for a reason related to that name being, or not being, on a prohibited list.

(2) A worker who thus suffers detriment has a right of complaint to an employment tribunal.

(3) An employer does not act unlawfully under paragraph (1) by subjecting a worker to any detriment by any act, or any deliberate failure to act, if the employer does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) and (7) of regulation 3, not unlawful under that regulation.

(4) A worker shall be taken to have been unlawfully subject to detriment by an act, or a failure to act, contrary to paragraph (1) if

(a) there is reason to suppose that at the time the act, or failure to act, took place his employer had in his possession or had seen a prohibited list on which the name of the applicant appeared; and

(b) his employer fails to show that the reason, or if more than one the principal reason, for the act, or failure to act, was unrelated to use of the list.

(5) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part X of the 1996 Act.

## **Time Limits for Proceedings under regulations 4 and 5**

7. - (1) An employment tribunal shall not consider a complaint under regulations 4 or 5 unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the date of the conduct to which the complaint relates, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as the tribunal considers reasonable.

(2) The date of the conduct to which a complaint under regulation 4 relates shall be taken to be—

- (a) in the case of an actual refusal, the date of the refusal;
- (b) in the case of a deliberate omission–
  - (i) to entertain and process the complainant’s application or enquiry, or
  - (ii) to offer employment,

the end of the period within which it was reasonable to expect the employer to act;

- (c) in the case of conduct causing the complainant to withdraw or cease to pursue his application or enquiry, the date of that conduct;
- (d) in a case where an offer was made but withdrawn, the date when it was withdrawn;
- (e) in any other case where an offer was made but not accepted, the date on which it was made.

(3) The date of the conduct to which a complaint under regulation 5 relates shall be taken to be–

- (a) in the case of an actual refusal, the date of the refusal;
- (b) in the case of a deliberate omission to make a service available, the end of the period within which it was reasonable to expect the employment agency to act;
- (c) in the case of conduct causing the complainant not to avail himself of a service or to cease to avail himself of it, the date of that conduct;
- (d) in the case of failure to provide the same service, on the same terms, as is provided to others, the date or last date on which the service in fact provided was provided.

**Time limit for proceedings under regulation 6**

**8.-** (1) An employment tribunal shall not consider a complaint under regulation 6 unless it is presented–

- (a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or
- (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

- (2) For the purposes of paragraph (1)–
- (a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;
  - (b) a failure to act shall be treated as done when it was decided on.
- (3) For the purposes of paragraph (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act–
- (a) when he does an act inconsistent with doing the failed act, or
  - (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

### **Remedies for refusal of employment and refusal of service of an employment agency before an employment tribunal**

**9.-** (1) Where the employment tribunal finds that a complaint under regulation 4 or 5 is well founded, it shall make a declaration to that effect and may make such of the following as it considers just and equitable–

- (a) an order requiring the respondent to pay compensation;
- (b) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates.

(2) If the respondent fails without reasonable justification to comply with a recommendation to take action, the tribunal may increase its award of compensation or, if it has not made such an award, make one.

(3) Compensation shall be assessed on the same basis as damages for breach of statutory duty and may include compensation for injury to feelings.

(4) The total amount of compensation shall not exceed the limit for the time being imposed by section 124(1) of the 1996 Act.

### **Remedy for Detriment before an employment tribunal**

**10.-** (1) Where the employment tribunal finds that a complaint under regulation 6 is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure complained of.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the act or failure which infringed his right.

(3) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the act or failure complained of, and

(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure.

(4) In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or Scotland.

(5) In determining the amount of compensation to be awarded no account shall be taken of any pressure which was exercised on the employer by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(6) Where the tribunal finds that the act or failure complained of was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(7) Where the detriment to which a worker is subjected is the termination of his worker's contract, but that contract is not a contract of employment, any compensation awarded under this regulation must not exceed the limit specified in paragraph (8) below.

(8) The limit mentioned in paragraph (7) above is the total of

(a) the sum which would be the basic award for unfair dismissal, calculated in accordance with section 119 of the 1996 Act, if the worker had been an employee and the contract terminated had been a contract of employment; and

(b) the sum for the time being specified in section 124(1) of the 1996 Act which is the limit for a compensatory award to a person calculated with section 123 of the 1996 Act.

### **Complaint against Employer and Employment Agency**

**11.-** (1) Where a person has a right of complaint under regulations 4 and 5 against a prospective employer and employment agency arising out of the same facts under these regulations he may present a complaint against either of them or against them jointly.

(2) If a complaint is brought against one only, he or the complainant may request the tribunal to join or assist the other as a party to the proceedings and the request shall be granted if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made after the tribunal has made its decision as to whether the complaint is well-founded.

(3) Where a complaint is brought against an employer and an employment agency jointly, or where it is brought against one and the other is joined or sisted as a party to the proceedings, and the tribunal—

(a) finds that the complaint is well-founded as against the employer and the agency, and

(b) makes an award of compensation,

it may order that the compensation shall be paid by the one or the other, or partly by one and partly by the other, as the tribunal may consider just and equitable in the circumstances.

## **Dismissal**

**12.-** (1) Subject to paragraph (2) an employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part X of the 1996 Act if the reason for the dismissal, or if more than one, the principal reason, is that the employee's name is on, or is not on, a prohibited list.

(2) An employer does not dismiss unfairly under paragraph (1) in dismissing a person if the employer does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) or (7) of regulation 3, not unlawful under that regulation.

(3) An employer shall be taken to have dismissed an employee for the reason specified in paragraph (1) if-

(a) there is reason to suppose that, at the time of the dismissal the employer had in his possession or had seen a prohibited list on which the name of the applicant appeared, and

(b) the employer fails to show that the reason for the dismissal, or if more than one the principal reason, was unrelated to use of the list.

## **Award against third parties**

**13.-** (1) If in proceedings on a complaint under regulation 4, 5, 6 or 12 either the respondent or complainant claims that the prohibited list to which the complaint relates was unlawfully compiled, sold or supplied by another person the complainant or respondent may request the employment tribunal to direct that other person be joined or sisted as a party to the proceedings.

(2) The request shall be granted if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made if it is made after the tribunal has made a decision as to whether the complaint is well-founded.

(3) Where a person has been so joined or sisted as a party to the proceedings and the tribunal-

- (a) finds that the complaint is well founded,
- (b) makes an award of compensation, and
- (c) also finds the claim in paragraph (1) above is well founded

it shall make a declaration to that effect and may make such of the following as it considers just and equitable,

- (i) an order that compensation shall be paid by the person joined instead of by the respondent, or partly by that person and partly by the respondent;
- (ii) a recommendation that the person joined or sisted take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates.

(4) If the person joined fails without reasonable justification to comply with a recommendation to take action, the tribunal may increase its award of compensation or, if it has not made such an award, make one.

(5) Where by virtue of regulation 10 there is more than one respondent, the above provisions apply to either or both of them.

### **Restrictions on contracting out**

**14.-** Section 288 of the 1992 Act (restrictions on contracting out) shall apply in relation to Regulations 4, 5, 6 or 12 as if they were contained in that Act.

### **Civil Remedy – Application to the Court**

**15.-** (1) An actual or apprehended breach under regulation 3 may be the subject of a claim in civil proceedings by the person who has suffered or may suffer loss due to the course of conduct in question.

(2) Without prejudice to any other power of the Court the Court may on an application under this regulation-

- (a) award damages, for (among other things) any financial loss resulting from any conduct in breach of regulation 3 by the defendant including compensation for injured feelings; and

- (b) grant such interlocutory relief (in Scotland, such interim order) as it considers appropriate for the purpose of restraining or preventing the defendant from pursuing any conduct in breach of Regulation 3.

### **Applications to both the Court and the Employment Tribunal**

**16.-** (1) A person who applies to the employment tribunal under these Regulations, or under Part X of the 1996 Act as it applies by virtue of these regulations, in relation to an alleged use of a prohibited list which consists of

- (a) a refusal of employment under regulation 4;
- (b) a refusal of service of employment agency under regulation 5;
- (c) being subjected to a detriment under regulation 6; or
- (d) an unfair dismissal under Part X of the 1996 Act as it applies by virtue of regulation 10;

can, in relation to that use of the prohibited list, only apply to the Court for interlocutory relief (in Scotland such interim order) for the purposes of restraining or preventing any conduct by the defendant to the application.

(2) Subject to paragraph 3, if

- (a) a person applies to the Court in relation to an alleged use of a prohibited list and
- (b) the use of the prohibited list consists of
  - (i) a refusal of employment under regulation 4;
  - (ii) a refusal of service of employment agency under regulation 5;
  - (iii) being subjected to a detriment under regulation 6; or
  - (iv) an unfair dismissal under Part X of the 1996 Act as it applies by virtue of regulation 12;

he may not apply to the Employment Tribunal in relation to that use of the prohibited list.

(3) Paragraph (2) shall not prevent an application to the employment tribunal where the application to the Court is only for interlocutory relief (in Scotland such interim order) for the purposes of restraining or preventing any conduct by the defendant to the application.

### **Amendments to primary legislation**

17.- The amendments in the Schedule to these regulations shall have effect.

## Schedule

### Amendments to primary legislation

1.- The Employment Tribunals Act 1996(a) shall be amended as follows-

- (a) In section 10(1) (National security)(b)-
  - (i) at the end of paragraph (a), the word “or” shall be omitted, and
  - (ii) after paragraph (b) shall be inserted-  
“or  
  
(b) regulation 6 of the Prohibition of Blacklists Regulations 2003.”.
- (b) In section 16(1) (power to provide for recoupment of benefits)
  - (i) at the end of paragraph (c), the word “or” shall be omitted, and
  - (ii) after paragraph (d) shall be inserted-  
“ or  
  
(e) payments by employers to employees under regulation 4, 5 or 6 of the Prohibition of Blacklists Regulations 2003.”.
- (c) In section 18(1) (cases where conciliation provisions apply)(c)-
  - (i) at the end of paragraph (g), the word “or” shall be omitted, and
  - (ii) after paragraph (h) there shall be inserted-  
“or  
  
(i) arising out of a contravention of regulation 4, 5 or 6 of the Prohibition of Blacklists Regulations 2003.”.

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(a) 1996 c.17.

(b) Section 10 was substituted by the Employment Relations Act 1999, section 41 and paragraph 3 of Schedule 8.

(c) Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(d) In section 21 (jurisdiction of the Employment Appeal Tribunal), in subsection (1) (which specifies the proceedings and claims to which the section applies)(d)-

(a) at the end of paragraph (fg) the word “or” shall be omitted; and

(b) after paragraph (i) there shall be inserted-

“;

(j) or the Prohibition of Blacklists Regulations 2003.”.

**2.** – (1) In section 105 of the 1996 Act (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed)(e) after “(7E)” there shall be inserted “or (7F)” and after subsection (7E) there shall be inserted-

“(7F) This subsection applies if the reason (or, if more than one reason the principle reason) for which the employee was selected for dismissal was the one specified in paragraph(1) of regulation 12 of the Prohibition of Blacklists Regulations 2003 (read with paragraphs 2 and 3 of that regulation).”.

(2) In section 108 of the 1996 Act (exclusion of right; qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)(f) the word “or” at the end of paragraph (hh) shall be omitted and after paragraph (i) there shall be inserted-

“or

(k) paragraph(1) of regulation 12 of the Prohibition of Blacklists Regulations 2003 applies.”.

(3) In section 109 of the 1996 Act (exclusion of right; upper age limit) in subsection (2) (cases where upper age limit does not apply)(g) the word “or” at the end of paragraph (hh) shall be omitted and after paragraph (i) there shall be inserted-

“or

(k) paragraph (1) of regulation 12 of the Prohibition of Blacklists Regulations 2003 applies.”.

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(d) Section 21 has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(e) Section 105 has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(f) Section 108(3) was amended by S.I. 1999/1436, Article 3 and S.I. 2000/1551, Regulation 10.

(g) Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

**3. – (1)** In section 161 of the 1992 Act (application for interim relief) in subsection (1) (which provides for a right to apply for interim relief when alleging dismissal by virtue of section 152) after “section 152” there shall be inserted - “or Regulation 12 of the Prohibition of Blacklists Regulations 2003”.

(2) In section 162 of the 1992 Act (application to be promptly determined) in subsection (3) (requests under section 160 (awards against third parties)) after “section 160” there shall be inserted - “ or Regulation 13 of the Prohibition of Blacklists Regulations 2003”.

(3) In section 163 of the 1992 Act (procedure on hearing of application and making of order) in subsection (1) (tribunals to determine if it is likely that the complainant has been unfairly dismissed) after “section 152” there shall be inserted “or Regulation 12 of the Prohibition of Blacklists Regulations 2003”.