

Regulations to prohibit the Blacklisting of Trade Unionists

Regulatory Impact Assessment

1 (i) Title of proposed measure

Prohibition of Blacklists Regulations 2003

2 (i) The issues and objectives

It is currently unlawful for employers to discriminate against individuals on grounds of their trade union membership and activities. However, it is not unlawful for blacklists to encourage employers to discriminate in this way by supplying them with information identifying trade unionists. This was an anomaly which section 3 of the Employment Relations Act 1999 sought to close by introducing a regulation-making power to prohibit union blacklisting.

The aim of the regulations is to make it unlawful to compile, use or supply lists which contain details of trade union members or activists, and which are compiled with a view to being used by employers or employment agencies for the purpose of discrimination in recruitment or in relation to the treatment of workers.

2. (ii) Risk assessment

Blacklisting has occurred in the past. For example, during the 1980s, the Economic League produced and sold blacklists to employers. This organisation subsequently folded.

There is no evidence of current blacklisting activity. To minimise the risk of over-regulating, the Government does not propose to implement regulations until there is evidence of this practice returning.

There is evidence of blacklisting in other countries and the return of blacklisting in this country cannot be ruled out. Should it re-appear, there is a risk that many individuals could suffer hardship whilst regulations were being prepared. The Government therefore wishes to finalise its draft regulations in advance to minimise the risk of delay.

The Government is conscious that some organisations may draw up and use lists of trade unionists for perfectly proper reasons. In particular, trade unions might have good reasons to do so. There is a risk that this legitimate activity might be prohibited or significantly curtailed if regulations did not permit certain forms of listing to occur. The regulations have dealt with this risk by creating various exemptions.

3. (i) Identification of options

The regulations do not put forward a range of options, though the consultation document seeks views on whether respondents have alternative ideas to put forward in relation to such important issues as the enforcement mechanisms and the exemptions.

Under the Data Protection Act 1998, data controllers must follow certain data protection principles, and particular obligations are placed on them where sensitive personal data (which includes trade union membership) is involved. The Act provides some protections to trade unionists in dealing with blacklisting organisations. However, the Government, having consulted the Information Commissioner, considers that the general data protections are insufficient to produce the desired aim of outlawing blacklists and ensuring that blacklisted individuals are appropriately compensated for any loss.

In the past, blacklisters have been driven by ideological as well as commercial considerations. The Government considers that this factor would greatly reduce the effectiveness of any non-regulatory approaches to the control of blacklisting, and so none is put forward as an option within the consultation document.

3 (ii) Issues of equity and fairness

Trade unions perform key roles in achieving fairness at work, and in assisting individuals who otherwise would find it difficult to represent themselves. In line with internationally agreed legal standards, all individuals (except in special categories) should have the right to belong to, and become an active member in, a trade union. These regulations therefore support the fair treatment of individuals at work.

4 (i) Benefits

If these regulations were introduced, it would mean that blacklisting had re-appeared or was threatening to re-appear. Blacklisting encourages unacceptable discrimination at work. This disadvantages the workers on blacklists who might face prolonged periods of unemployment as a result. It would also result in the misallocation of labour across the economy.

To provide an illustrative example, the gross average wage for an engineering worker is £31,527. If, due to blacklisting, an employee were unable to find a job in their chosen industry and had to find an occupation offering a lower salary - £12,294 for a catering worker¹ for example, then the costs to the individual would be high even if the impact on the economy as a whole was relatively small. The regulations would therefore bring benefits by reducing or eliminating the losses of earnings that could arise.

Trade unions perform useful tasks at the workplace in helping secure the proper and productive organisation of work. They depend for their effectiveness on securing the services of union members in becoming lay representatives of the union. The perceived fear of being discriminated against by employers is one reason why many unionised workplaces lack local representatives. By reducing these fears, these regulations would bring benefits in encouraging the supply of potential lay

¹ New Earnings Survey 2002, pp 22 and 26. The wage £31,527 is for “Civil, Structural, Municipal, Mining and Quarrying Engineers” and £12,294 for a catering worker.

representatives for unions. This should benefit unions, employers and other union members.

5 (i) Business sectors affected

We do not have any information as to whether any sectors have used blacklists in the past more than others. The sectors that would be more likely to be affected would be those where there is already a strong trade union presence and/or a history of adverse relations between unions and employers. As mentioned above, organisations such as trade unions which handle trade union data for ordinary business reasons would need to examine the regulations closely to ensure their practices remain lawful. The regulations contain exemptions giving scope for their legitimate activities to continue unchanged.

It is not known how far employment agencies keep information about the trade union membership of their employees. We know from research commissioned by the DTI that approximately 550,000 agency workers are placed per annum. Additionally 600,000 workers are placed into permanent jobs during the same period.²

We do not have any evidence that charities and the voluntary sector have used blacklists.

5 (ii) Total compliance costs

Many organisations will be completely unaffected by the regulations because they would never consider using the services of a blacklister. The prohibition of the compilation and use of blacklisting has effects on those who produce the lists and thereby lose their business if they can no longer sell them. As stated above, at present there are no known instances of such activity, and it is highly unlikely whether a significant number of organisations would ever wish to provide such services to employers.

The current data protection legislation already prohibits the use of blacklists to some extent.

Organisations might face one-off costs in checking whether their current employment and recruitment practices comply with the new law, including the exemptions it contains. This might especially affect trade unions and other organisations who collect and use union information.

Unions would need to check that their own practices do not inadvertently break the law. This cost may, however, be greater for larger unions that have more thorough records of their members. The average cost is estimated to be £156 for one union on the assumption of one day's work for a union official and one clerical assistant³. In

² Labour Market Trends, October 2000

³ Cost = [(1/5 x £483.3) + (1/5 x £292.8)]. Data on Earnings from the New Earnings Survey 2002, pp 20 & 25.

the UK there are 199⁴ listed trade unions, therefore the estimated cost for these trade unions is £34,000⁵.

The cost to employers can be broken down in two areas. Firstly, there are those employers who may use such lists, however, the cost borne by them as a result of the legislation is likely to be negligible. Secondly, larger and possibly multi-site companies may have to check to see that they are complying with the legislation in all their recruitment processes. For example, personnel policies may prohibit the use of blacklists, but, if recruitment takes place at a decentralised level, then there may be a need to check procedures or to revise or reissue guidance.

In the majority of cases, these checks are likely to be minimal and will involve no more than an hour's work. However in some cases, these checks may be more substantial (to establish whether companies are complying with the legislation for example) and as such may involve a day's work. The cost of these checks is estimated to be £305,000. This assumes that the process will involve one hour of a manager's time in the majority of cases and 1 day's work in the minority of cases⁶.

6 (i) Impact on small business

We do not know whether small businesses are more or less likely to use blacklists than other organisations. However, unionisation is typically low in such businesses and many might consequently see little reason to use the services of blacklisters.

⁴ Certification Office Annual Report 2001-02, number of unions on lists at 31 March 2002.

⁵ Total Cost = 199 x £168.

⁶ Small Business Service, Statistics for the UK for 2001, Companies with more than 500 employees. Total Cost (£305,026) = (447 x 2065.4) + (4018 x £29.96). We assume that in the majority of firms are 90% of all large firms (4018 of 4465 firms). The minority of cases is assumed to be 10% of all large firms and corresponds to 447 firms.

Data for earnings is from the New Earnings Survey 2002, pp 20 ("General Managers, Large Companies and Organisations").