BLACKLISTING

Introduction

For many years trade unionists, and those of us who represent them, believed that employers accessed or operated blacklists of activists. This is particularly true of the construction industry although by no means exclusive to it.

Earlier this year the Information Commissioner exposed a blacklist held by the Consulting Association Ltd. The blacklist was accessed by some of the largest construction companies in the UK.

The government has the power to legislate against blacklists, but chose not to do so. The discovery of the Consulting Association's blacklist has highlighted the UK legal system's failure to adequately protect victims of this secret and unaccountable practice.

Although it can be argued that the holding or accessing of a blacklist is not, in itself, unlawful, it is interesting to note that those employers who accessed the Consulting Association have not sought to defend the practice. This reflects a generally held abhorrence of the use of covert surveillance and blacklisting against trade unionists.

In the 1870s Sidney & Beatrice Webb referred to the *"freedom allowed to employers"..."to make all possible use of black-lists and character notes"* which prevented trade unionists from getting work (Webbs, 1920:284).

More recently, the activities of the Economic League were held up to scrutiny. The Guardian, in 1990, reported that the Economic League maintained a blacklist which was said to have *"...had 40 current labour MPs on its files including...Gordon Brown and prominent trade unionists as well as journalists and thousands of shop floor workers"*

In 1991 the House of Commons' Employment Committee investigated the Economic League. Its report referred to evidence that it had received about *"...inaccurate information being handed out in secret, with employers rejecting the applications simply on the basis that the League had information about them, rather than knowing carefully what the information was and the information being kept [about] many more than the ten thousand individuals quoted by the League" (HC 1991:paragraph 42)*

The Committee recommended that legislation be introduced to give workers the same rights as consumers who were turned down by credit reference agencies. This meant that information supplied to employers about potential employees should be passed to the employee refused employment, with the employee given the chance to refute the information.

The Committee also proposed that the organisations that provided the information about employees should be licensed and subject to a code of practice but, did not recommend a complete ban on blacklisting. The then, Conservative government did not enact even these relatively limited proposals.

In 1992, the TUC complained to the ILO that there was no effective protection against discrimination brought about by the operation of blacklists. The ILO Freedom of Association Committee upheld the complaint. They found that UK law fell short of Article 98 of the ILO Convention i.e. in the Right to Organise and Collective Bargaining (1949).

Article 1 states that *"workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment"* and that:

"Such protection shall apply more particularly in respect of acts calculated to make the employee and/or worker subject to the condition that he shall not join a union or shall relinquish trade union membership" or "cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours, or, with the consent of the employer, within working hours"

The ILO Freedom of Association Committee stated 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... in general, governments should take stringent measures to combat such practices"*

The ILO Committee of the Experts broadly endorsed these recommendations in 1994. Nevertheless the UK government took no action to introduce legislation to remedy this state of affairs.

1. The Existing Legal Framework

(a) Under the Employment Relations Act 1999, Section 3, the Secretary of State may make Regulations prohibiting the compilation of lists which:

- Contain details of members of trade unions or of persons who have taken part in activities of trade unions and
- Are complied with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment in relation to the treatment of workers.

The Act also provides that the Secretary of State may make regulations prohibiting the use of blacklists; and the sale or supply of them.

These powers were never used.

In 2003 the government had committed itself *"quickly to outlaw blacklisting, if there is evidence that individuals or organisations are planning to draw up such lists, or if there is any evidence that there is a demand by employers for them"* (DTI 2003: paragraph 3.20). The government proposed to prepare draft regulations to be *"presented to Parliament for approval without delay, should evidence suggest that they are necessary".*

UK Law contains a number of measures which are designed to protect workers from anti-union activity by employers. These are largely set out in the Trade Union & Labour Relations (Consolidation) Act 1992 and include:

- Section 137 refusal of employment on grounds relating to union membership
- Section 146 detriment on grounds relating union membership or activities
- Section 152 dismissal of employee on grounds relating to union membership and/or activities

- Section 153 selection for redundancy on grounds relating to union membership and activities

These rights can be exercised by those who have suffered refusal of employment, detriment short of dismissal, or acts of dismissal on grounds of their trade union membership and/or activities due to their employer or prospective employer accessing a blacklist.

(b) The Data Protection Act 1998 can also be used against the compiler or holder of a blacklist and anyone using data from it.

Ian Kerr of the Consulting Association was convicted under the following breaches:

- Processing personal data without being registered under the Act with the Information Commissioner contrary to section 17.

- Failing to notify the Information Commissioner of his wish to be registered contrary to section 18; and

- Not being on the register of data controllers held by the Information Commissioner in accordance with the Act.

The normal sanctions under the Data Protection Act 1998 are enforcement notices. Nevertheless failure to comply with the registration provisions is a criminal offence. Criminal proceedings under the Act require the consent of the DPP or the Information Commissioner. A person found guilty of an offence is liable to summary conviction to a fine of up to £5,000 or on indictment to an unlimited fine (Section 60). Where a person is convicted under the Act, the Court can "*order any document or other material used in connection with the process of personal data and appearing to the Court to be connected with the commission of the offence to be forfeited, destroyed or erased*" (Section 60(4)).

The Macclesfield Magistrates Court committed Ian Kerr to the Crown Court as, according to Construction News 23 July 2009, "*the maximum fine they could levy – of £5,000 was wholly inadequate*"

On 16 July 2009 Ian Kerr was fined £5,000 by the Knutsford Crown Court.

It is not clear whether the Consulting Association records were forfeited and destroyed or if they had been returned to Ian Kerr.

If Kerr's sentence was light, then the companies who used the Consulting Association have got off even more likely. Attached is a table showing the companies who have been found to have used the services of the Consulting Association. These represent some of the biggest and most well known construction companies in the UK. None have been charged with any offence nor have they been ordered to pay compensation to any of the people against whom they searched.

The records seized from the Consulting Association make reference to other organisations who have not been identified. This suggests that the list of known companies may only be the tip of the iceberg.

The ICO explained its failure to take action against construction companies in a press release dated 4 August 2009. There it is stated that "*...it is not a criminal offence to breach the data protection principles, which is why the ICO chose only to prosecute Ian Kerr for failing to notify as a data controller*" [ICO 2009]. A number of companies were told that with immediate effect they must:

- Refrain from using, disclosing or otherwise processing any personal data obtained from Mr Kerr unless the processes are necessary for the purposes of complying with any obligation under the Act or by law or for obtaining legal advice or for the purpose of, or in connection with, any legal proceedings.

- Ensure that if any personal data relating to recruitment is obtained from a source other than the data subject, the data subject is, insofar as is practicable, provided with the information specified in paragraph 2(3) of part (ii) of Schedule 1 to the Act in accordance with the First Data Protection Principle.

- Ensure that if any personal data relating to recruitment is disclosed to a third party for use in connection with recruitment of workers, the data subject is, insofar as is practicable, provided with the information specified in paragraph

2(3) at part (ii) of Schedule 1 of the Act in accordance with the First Data Principle

These notices were issued against only 14 of the 44 companies identified. For reasons that have never been explained, notices were not issued against the heaviest users of the Consulting Association which included McAlpine and Skanska. They appeared to have made between 12,000 and 13,000 enquiries in a single year but no action was taken against them.

Apart from being registered with the ICO, data processors including the Consulting Association and the companies who used its services, must comply with 8 data protection principles in the Act. The first principle states that "*Personal data should be obtained only for one or more specified and lawful purposes, and shall not be further processed with any manner incompatible for that purpose or those purposes"*. It will be hard to argue that the blacklist was being used for a lawful purpose when it was designed to prevent the employment of trade union activists and to enable employers to discriminate against them on grounds of their trade union membership and/or activities.

The first data protection principle provides that data must now be processed unless one of the conditions in Schedule 2 are met. In the case of sensitive personal data one of the conditions in Schedule 3 must also be met. Schedule 2 requires the data subject to have given his/her consent to the data processing. Schedule 3 requirements he/her to have given explicit consent.

Breach of these principles could in theory lead to a claim for compensation by workers on the basis that the Act provides that "*an individual who suffers damage by reason of any contravention by the data controller of any of the requirements, of [the] Act is entitled to compensation from the data controller for that damage"*. This means that unless damage can be proved (and distress alone may not be enough) it may not be possible to recover any compensation for simply appearing on the blacklist.

2. Proposed Regulations

The government has recently concluded a consultation by the Department of Business Innovation and Skills on the blacklisting of trade unionists. It is now going to bring forward regulations on the question of blacklisting.

The government's current proposals are as follows:

- It will be unlawful to maintain and use a blacklist; but not a criminal offence to do so. Individuals will have to bring civil proceedings against either a compiler or a user, and damages will be recoverable only if lost can be proved.

- It will be unlawful to refuse someone employment for a reason that relates to a prohibited list, with the right of complaint to an Employment Tribunal by anyone who is refused employment, with compensation to include injury to feelings.

- It will be unlawful to subject an employee to a detriment by any act or the failure to act in relation to a prohibited list, with the right to complaint to an Employment Tribunal to anyone who does suffer such a detriment.

Similar provisions will apply to employment agencies as employers. The normal three month time limit will apply for pursuing a claim to an Employment Tribunal.

It is currently a criminal offence to compile and maintain a blacklist. It is not a criminal offence to supply information to the holder of a blacklist, to solicit information from the controller of a blacklist or to use one. These draft regulations do not adequately address these issues.

Currently however there is no freestanding right not to be blacklisted. Rights only arise if the consequences of blacklisting result in refusal of employment, detriment short of dismissal, or dismissal/redundancy. The government's current proposals do not adequately address these problems.

Other issues that have arisen relate to the apparently narrow drafting of the Regulations. For example the regulations are stated to apply to:

"Details of members of trade unions or persons who have taken part in activities of trade unions"

This appears to imply that an individual has to be active in his/her trade union before the draft regulations apply. It may be possible to construct this form of words so as to include listed individuals who simply belong to a trade union or trade unions.

The definition of trade union activities is also problematic. The approach of the courts in the past has not always been consistent. It is not clear whether taking part in industrial action will be included in the definition. If so this raises the possibility that a list of individuals who have taken part in an industrial action only, may not be covered by the draft regulations.

Further concerns about the scope of these regulations have been raised in the government's consultation paper:

"It was suggested in the 2003 consultation that the term should be defined in the regulations to ensure that the participation in unofficial industrial action and criminal activities in the name of a trade union were not covered. The government considers it very unlikely that such behaviours would ever be categorised as trade union activities for these purposes"

While in no way condoning criminal offences, there is a very real danger that employers will be led to believe that it is acceptable to keep a blacklist of workers who may have committed criminal offences in the course of a trade dispute. Minor criminal offences can quite easily be committed in the course of industrial dispute e.g. obstruction of the highway while on the picket line.

The exclusion of unofficial action in the scope of the regulations is even more unacceptable. Many unions have had experience of activists carrying out actions

which would amount to unofficial industrial action, whether or not the Court has intervened.

It would be a bizarre outcome if employers were allowed to continue to compile and use blacklists for trade unionists who had been convicted of minor criminal offences in the course of industrial action and/or had engaged in unofficial action. It should be borne in mind that there has been repeated criticisms of the UK government by the ILO concerning the restrictions on the rights of trade unions to take industrial action and solidarity action

An exclusion of both criminal offences and unofficial industrial action will only perpetuate existing injustices.

The draft regulations do not contain a freestanding right not to be blacklisted. In addition they contain no right to be compensation for breach of that right.

The regulations state that:

- It will be possible for an individual to bring legal proceedings to recover any loss he or she may have suffered due to blacklisting.

- Anyone refused employment due to the maintenance or use of a blacklist will be able to claim through an Employment Tribunal if the refusal of employment was for a reason relating to the blacklist.

- Anyone claiming to suffer a detriment as a result of blacklisting will be able to apply to an Employment Tribunal to recover any losses caused as a result.

While these provisions are helpful, they do not go far enough.

The regulations should provide a basic award of compensation for the mere fact of being blacklisted without proof of any loss. There should of course be the additional right to claim any losses which can be attributed to the blacklisting of course.

The Courts should be empowered to order the forfeiture of blacklists.

The blacklist should then be retained by the ICO. In such circumstances the ICO will be under a legal obligation to inform anyone on the blacklist that they were on the list and on any legal remedies that may be available to them.

Finally, there should be criminal sanctions for those who compile, maintain and access blacklists.

3. Compensation for Existing Victims

The draft regulations do not provide any means of compensating those individuals who appeared on the Consulting Association blacklist. Apart from failing to provide a freestanding right for those who appear on blacklists, the draft does not propose compensation for those who suffered loss as a result of their name appearing on the Consulting Association blacklist nor does it recognise the failure of the government to take steps earlier to make this conduct unlawful.

In his paper "Ruined Lives" which comments on blacklisting in the UK construction industry, and was prepared for UCATT, Keith Ewing proposes three basic levels of compensation for those who appeared on the Consulting Association blacklist:

- A flat rate amount to everyone on the list in recognition of the violation of their right to privacy. This would be based on a fixed amount for every year an entry appeared in relation to the individual concerned. This means that a person entering the blacklist in 1975 would be entitled to more than someone whose name first appeared in 1995.

- A compensatory amount based on a reasonable estimate of projected loss of earnings to anyone who can show that he/she had applied for specific vacancies during the period in question and that the blacklist was consulted by the company or companies concerned; and

- A aggravated amount for injury to feelings to those whose file is judged to be particularly offensive e.g. where it contains abusive or defamatory comments, information about medical conditions, or information about political views or activities.

Ewing suggests that it would be unfair for the cost of this compensation to be met by the taxpayer not least because trade unions themselves are tax payers. Ewing proposes:

"Primary legislation should therefore be introduced to impose a levy on those companies which made use of the blacklist, this levy to finance the retroactive

compensation fund, which in turn would be allocated in accordance with the foregoing principles".

4. Human Rights

Blacklisting raises a number of human rights issues. Governments should take steps to address them.

Blacklisting clearly impacts on the rights to freedom of association as guaranteed by a number of international agreements and conventions including the European Conventions on Human Rights Article 11. This guarantees the right of individuals to join and form trade unions for the protection of their interests.

Blacklisting also raises questions about privacy rights and in particular Article 8 ECHR which provides that:

"Everyone has the right to have respect for his private and family life, his home and his correspondence"

Article 8 has been widely interpreted by the European Court of Human Rights to apply to the compiling and processing of information and the sharing of information within the government, without the consent of the individuals to whom the information relates

Table 1

What Blacklist Firms Invoiced Contractors (£)

Figures for financial year 2008/09 (Q4 for 2007/08)

	Q4	Q1	Q2	Q3	Totals
Amec/Amec industrial division	25	25			50
Morgan Est	33	88	130	62	313
Spie Matthew Hall		25	25		50
Morgan Ashurst	25	25	25	25	100
Balfour Beatty Civil Engineering	187	189	235	165	777
Balfour Beatty Scottish and Southern	25	25		25	75
Balfour Kilpatrick	1,885	1,929	2,031	1,309	7,154
Cleveland Bridge	385	3,584	592	1,320	5,881
CBI/CB&I	1,137	763	1,635	147	3,683
Costain	25	25	25	25	100
Crown House Technologies/Crown House	898	557	532	491	2,477
Diamond/Diamond M&E	25	25	25	25	100
Emcor	1,063	521	458	25	2,067
Haden Young	491	99	25	25	640
HBG Construction/Bam Construction	25	25	25	25	100
Kier	25	25	25	25	100
Laing	706	1,107	1,107	792	3,711
Sir R McAlpine	5,218	5,951	12,839	2,834	26,842
NG Bailey	911	803	803	568	3,084
Edmund Nuttall/Bam Nuttall	183	156	143	154	636
B Beatty Infrastructure/Balfour Beatty Infra Ser.	117	57	70	57	301
Shepherd Engineering	25	25	25	25	100
Skanska Construction	7,960	7,577	6,838	5,749	28,123
Vinci	277	345	339	134	1,096
Whessoe	25	25			50
SIAS Building Services		64	25	25	114
Balfour Beatty			25		25

Source: *Construction News*, 23 July 2009

Ibid.