Unite Legal Services

Blacklisting –
Own Up, Clean Up, Pay Up


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1) Blacklisting – the nature of the beast

Widespread employer blacklisting of trade unionists has been rife for decades in the construction industry and other sectors.

It is impossible to say how many people have been denied work over the years for simply being active in a union, but it is beyond doubt that systematic blacklisting operated in the construction industry through the Consulting Association (CA), an organisation set up and run by employers.

The CA was wound up in 2009 after its illegal activities were revealed by *The Guardian* and investigated by the Information Commissioner's Office, the independent body responsible for protecting data privacy.

The investigation found that 44 construction firms had been checking potential employees against a blacklist containing details of about 3,200 workers.

The CA's activities – which were conducted clandestinely and with the assistance of the police – infringed not only the Data Protection Act but the legal right not to be refused employment on grounds relating to trade union membership.

The scandal surrounding the CA triggered the introduction of regulations in 2010 that expressly made blacklisting unlawful but fell short of what Unite continues to campaign for which is tougher laws and tougher penalties. It also prompted claims for compensation from people whose careers had been blighted or destroyed by blacklisting.

But, alongside the legal battles to right past wrongs, the campaign against blacklisting is growing and notched a major success when Unite secured an agreement at Crossrail to protect union rights and the employment of its member, Frank Morris.

In response to this campaign, private companies and public bodies have a clear choice: either they can turn a blind eye to blacklisting within their supply chain and condone it as a practice with the legal consequences that would follow or they can use ethical procurement and choose to root the problem out, just as they would with any other form of discrimination.

This booklet outlines the legal basis for tackling blacklisting through procurement.

2) The Consulting Association – a case of conspiracy

"We live in an age in which conspiracy theories abound - but the blacklisting of building workers by big construction companies via the Consulting Association was no theory, it actually was a real live conspiracy."

House of Commons Scottish Affairs Committee, Interim Report on Blacklisting in Employment, April 2013.

The history of blacklisting can be traced back nearly a century through the CA to its forerunner, the Economic League, which was formed in 1919 to combat 'subversion' and wound up in 1993 following a scandal about its activities.

The CA was founded by a former employee of the Economic League, Ian Kerr, with £20,000 from Sir Robert McAlpine Ltd for set up costs and the purchase of the blacklist from its predecessor.

According to evidence given to the Scottish Affairs Committee (SAC) by Kerr, the CA started with 19 construction companies – many of them household names – each of which paid an annual subscription (initially £3,500) and an additional charge for every name they submitted for checking.

Kerr, who ran the CA until its demise, told the SAC that it was 'a secret organisation' which operated the blacklist as 'a secure or a secret system'.

Communication with each member company was through a designated 'main contact' and only by telephone. Members could provide information on people to be added to the blacklist and check names of people they were considering employing.

Kerr explained to the SAC how the CA handled lists of potential recruits from members. He said: "Most of the time we would go back by telephone, identify the list and say to the HR department girl or man, 'All clear'. If there was a name that we had information on, we would say to them, 'All clear, except a certain name'."

Details on the 'certain name' would then be read out from the card and the company would use the information to make a decision on whether or not to employ that individual. At the end of the process, the initial fax request would be shredded.

Following publication of the SAC report in April 2013 and claims that police colluded with the blacklisters, the activities of the CA are now the subject of a police inquiry led by the Chief Constable of Derbyshire.

According to the Independent Police Complaints Commission (letter dated 19 June 2013), 'scoping' for the inquiry has identified that 'all Special Branches were involved in providing information about potential employees who were suspected of being involved in subversive activity'.

Companies named by Kerr as founders of the CA:

Amey, Balfour Beatty Civil Engineering, Balfour Beatty Construction, Ballast Wiltshier, Edmund Nuttall, Higgs and Hill, John Laing, John Mowlem, Kier Group, Morrison Construction, Norwest Holst, Sir Robert McAlpine Ltd, Tarmac, Taylor Woodrow, Trafalgar House, Walter Llewellyn, Willmott Dixon, Bovis and G. Percy Trentham.

The CA was chaired during its existence successively by representatives from Sir Robert McAlpine, Laing O'Rouke Ltd, Kier UK Ltd, Skanska Ltd, Balfour Beatty plc and McAlpine.

Other companies that participated in the CA were: Carillion, Vinci, Costain and Crown House Technologies.

3) Blacklisting – there are laws against it

The law is clear on the protection from blacklisting trade union members should enjoy. Four major pieces of legislation are relevant to the issue, from it being unlawful to refuse employment on grounds of union membership to the right to privacy of personal information.

Trade Union and Labour Relations (Consolidation) Act 1992

This Act provides rights not to be refused employment on grounds relating to union membership (section 137), not to suffer detriment on grounds relating to union membership or activities (section 146), not to be dismissed on trade union grounds (section 152) and not to be selected for redundancy on trade union grounds (section 153).

Data Protection Act 1988

The CA's blacklist was 'a relevant filing system' under the Data Protection Act 1998 (DPA). It contained sensitive personal data (including political opinions and union membership details), and as such those controlling the list were under a duty to process the data in accordance with the principles set out in Schedule 1 to the DPA. The CA blacklist contravened the DPA in multiple ways - not least because the data was not obtained for any lawful purpose and was not processed in an open or transparent way.

Employment Relations Act 1999 (Blacklists) Regulations 2010

These regulations make it unlawful to 'compile, use, sell or supply a prohibited list' which it defines as a list which:

- contains details of people who are or have been members of trade unions or who are taking part or have taken part in the activities of trade unions;
- is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

The regulations include the right of complaint to an employment tribunal if blacklisting results in refusal of employment, detriment, dismissal or redundancy.

The European Convention on Human Rights

Blacklisting infringes Articles 8, 10, 11 and 14 of the European Convention on Human Rights (ECHR). Article 8 upholds the right to privacy, Article 10 protects freedom of expression, Article 11 says individuals have the right to join and form trade unions for the protection of their interests, and Article 14 prohibits all forms of discrimination, including on the grounds of political or other opinion.

Blacklisting is also unlawful under International Labour Organisation (ILO) Conventions. Specifically, the ILO's Freedom of Association Committee has found that blacklisting is outlawed by ILO Convention No.98, which gives protection against acts of 'anti-union discrimination' and applies to acts calculated to make employment 'subject to the condition that a worker shall not join a union' or to 'cause the dismissal of or otherwise prejudice a worker by reason of union membership'.

Blacklisting is also likely to be defamatory and to amount to a conspiracy to cause loss by unlawful means.

4) Ethical procurement

European Law

The EU rules on how public bodies and utilities award contracts for services, supplies or works are set out in the Public Sector Directive (2004/18) and the Utilities Directive (2004/17); the latter covering both public and private bodies operating in the water, energy, transport and postal services sector.

Article 45(2) of the Public Service Directive provides for exclusion of economic operators on grounds of 'grave professional misconduct', which applies to blacklisting where it is not in dispute that a particular company has taken part in blacklisting.

Article 54 of the Utilities Directive permits the exclusion criteria in Article 45 to be included as qualitative selection criteria which may be operated by contracting entities.

As a matter of EU law, therefore, both the Public Sector Directive and the Utilities Directive permit the exclusion of candidates or tenderers who have been found to have participated in blacklisting.

UK Law

In the UK, the Public Sector Directive and the Utilities Directive are implemented through the Public Contracts Regulations 2006 (as amended) and the Utilities Contracts Regulations 2006 (as amended) respectively.

Regulation 23 of the Public Contracts Regulations implements Article 45 of the Public Sector Directive into UK law. Regulation 23(4)(e) says: "*A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds... (the operator) has committed an act of grave misconduct in the course of his business or profession*".

Regulation 26 of the Utilities Contracts Regulations 2006 implements Article 54 of the Utilities Directive and makes essentially the same provision in the case of utilities.

Defining and proving 'grave misconduct'

Both Regulation 23 of the Public Contracts Regulations and Regulation 26 of the Utilities Contracts Regulations are silent as to, firstly, what is covered by the term 'grave misconduct' and, secondly, the extent of proof required.

However, there is no doubt that anything unlawful under national legislation would count as grave misconduct. It is also very likely that breaches of international law, such as ILO Conventions and the ECHR, would be considered grounds for grave misconduct. Indeed, the term is sufficiently wide that it is likely that the findings in the interim SAC report would also count.

As for the level of proof required, Article 45(2)(d) of the Public Sector Directive requires only that grave professional misconduct be 'proven by any means which the contracting authorities can demonstrate'. This means court or tribunal decisions are not required (though they can be used where claims have been successful) and that other reliable evidence – such as the findings of the SAC – would meet the standard of proof needed.

Self cleaning

In European competition law, self-cleaning refers to the possibility that a firm may have taken all necessary measures to ensure past wrongdoing will not be repeated. If this is the case, exclusion from tendering may be regarded as disproportionate.

Whether the 'self-cleaning' measures are adequate to prevent a re-occurrence of the wrongful conduct in question will depend on the circumstances of the particular case.

This includes the seriousness of the wrongdoing – including its duration, recurrence and financial impact – and the adequacy of the measures employed by the affected company to render further occurrences of wrongdoing as difficult as possible.

In making a decision on whether or not to exclude a potential supplier from a procurement process for 'grave professional misconduct', the tendering organisation would need to: a) clarify the relevant facts and circumstances, b) take account of action to repair the damage cause (such as payment of compensation or an offer of employment), and c) assess the measures taken to prevent re-occurrence (such as personnel systems or organisational changes).

5) Blacklisting – stamping it out

The trade union movement is stepping up the campaign against blacklisting on a variety of fronts. Unions are highlighting concerns about specific employers as well as supporting individual members in making claims against the companies behind the CA blacklist.

As part of this campaign, ethical procurement has an important role to play in showing that blacklisters are unwelcome to bid for contracts.

The Welsh Government has given a lead on this by issuing a Procurement Advice Note to all public bodies in Wales outlining steps that can be taken through procurement to help eradicate blacklisting.

Welsh Finance Minister Jane Hutt said: "The use of blacklists is wholly unacceptable and I fully sympathise with the individuals and their families who have suffered a terrible injustice as a consequence of contractors engaging in this practice.

"Procurement is an important part of the overall policy toolkit of the Welsh Government. Under no circumstances is it acceptable for any business in receipt of public procurement expenditure to use blacklists.

"I am determined to take action in Wales. I trust that other governments in the UK will take similar action if they have not already done so."

Unite says 'own up, clean up, pay up'

Unite believes that if employers are genuine about taking responsibility for their blacklisting activities there is one thing they can do now, without the need for lawyers, court cases or negotiations – they can give blacklisted workers a job and up-skilling where appropriate.

Unite general secretary Len McCluskey said: "The government's call for an inquiry into unions would be far better directed at the blacklisters who have destroyed the lives of thousands of working people for no reason other than being in a trade union. The Tories are shamefully diverting attention away from the real abuses of workers by unscrupulous bosses.

"Over the last 25 years, over 2,800 workers have lost their lives on construction sites, with countless others suffering from serious work-related health problems. Too many construction workers went to work but did not come home again.

"But the 44 blacklisters believed that many of the courageous and decent union representatives who wanted to support their colleagues and save lives were just trouble makers. Instead of being encouraged and supported, they were blacklisted and robbed of their dignity - lives ruined, families destroyed - in some cases it even led to suicide.

"There is now a moral urgency for justice. Blacklisting is a scandal on the scale of phone hacking. Except it was ordinary working people whose lives have been torn apart by a conspiracy hatched by a greedy elite who were prepared to go to any length to attack decent hardworking men and women. It is time they owned up, cleaned up and paid up.

"While the government continues its demonisation of trade unions we will continue the very real task of giving the best legal and industrial representation to members who have been dehumanised by employers."

The unions want the blacklisters to 'Own Up' and accept responsibility for what they have done in the past and publically apologise. They also need to 'Clean Up' and ensure that it does not happen again by having transparent recruitment procedures that are agreed with trade unions and properly monitored and that they take on and up-skill blacklisted workers.

Then they must 'Pay Up' and compensate all those who have suffered as a result of their actions. Many of those who were blacklisted were unable to work in the industry again and have had years of working in lower paid jobs or suffered years of unemployment. The least they deserve is compensation and the dignity of a full public enquiry.

Unite Legal Services

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