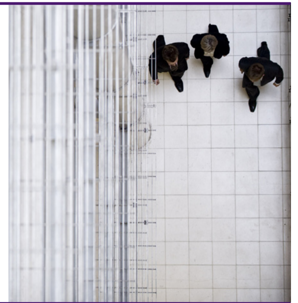

Legislation Update

Employment

THE NEW TRADE UNIONIST BLACKLISTING REGULATIONS – A STEP INTO THE DARK?

The Employment Relations Act 1999 (Blacklists) Regulations 2010 came into force earlier this month, borne from the discovery that 44 employers within the construction industry had been paying to use a blacklist of more than 3,000 individuals to vet individuals for employment. The blacklist included sensitive personal information, including the constructive workers' trade union activities. The Regulations make the use of such blacklists unlawful and create a new legal risk for employers to manage when dealing with industrial relations and trade union issues.

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In broad terms the Regulations make it unlawful: (i) to compile, supply, sell or use a 'prohibited list'; (ii) for an employer to refuse employment to a job applicant, to dismiss an employee or to subject an employee to any other detriment for a reason related to a 'prohibited list'; and (iii) for an employment agency to refuse to provide its services to an individual for a reason related to a 'prohibited list'.

A 'prohibited list' has two essential features. Firstly, it must contain 'details' of people who have been or are trade union members or who have taken or are taking part in trade union activities. Secondly, the list must have been compiled with a purpose (but not necessarily the only purpose) of facilitating the less favourable treatment of the people on it either in recruitment or during employment on the grounds of their trade union membership or activities.

It is worth noting that a prohibited list can be in pretty much any recorded format. It does not even need to be held in one document or location as the Regulations provide that information which is stored separately but which is linked in some way (eg, because it can be gathered by a search engine) constitutes a list. Emails and entries on a blog or social networking forum could even constitute a prohibited list.

An employer cannot avoid the Regulations by getting a third party to carry out the prohibited action for it as the Regulation also make the indirect use of a prohibited list unlawful if the employer knew or should reasonably have known that a prohibited list was being used. This means that employers may well want to know how and why lists used by intermediaries such as vetting agencies have been compiled, and to instruct their labour supply companies in writing not to use them.

In England and Wales complaints against employers and employment agencies under the Regulations can be brought in the Employment Tribunal and the County Court. In Scotland complaints are brought in the Court of Session. A complainant has 3 months from the act complained of to bring a claim in the Employment Tribunal but there is the usual discretion for this time limit to be extended by the Tribunal if it is just and equitable to do so. In reality any reliance on a prohibited list will tend to remain hidden for some time so it is likely that the discretion will be applied regularly to ensure that complainants have an effective remedy. In a County Court or Court of Session claims must be brought within 6 years.

The Regulations provide assistance to the complainant as they borrow the 'reverse burden of proof' from discrimination law. This means that if the complainant can show facts from which, in the absence of any other explanation, the Tribunal could conclude that there had been a breach, then it must do so unless the respondent employer convinces the Tribunal otherwise. This means, for example, that if an individual can show that his name was on a prohibited list and he was refused employment despite being suitably qualified then the Tribunal must conclude that the refusal to employ was for a reason related to a blacklist unless the respondent can demonstrate a different reason. Arguably unfair even in discrimination cases, this reverse burden is likely to be still harder for employers to discharge in blacklist cases. Suppose the employer's defence is that he simply did not know that the individual was a union member or on any prohibited list, both in principle an absolute defence to a charge of discrimination on union grounds. How is the employer (or at

least the individual recruiting officer) to prove that lack of knowledge? It is to be presumed, or at least hoped, that the candidate/employee would not get over the preliminary hurdle of establishing primary facts from which the Tribunal could conclude that there had been a breach if he could not show that knowledge on the part of that individual, but this cannot be guaranteed. We are left in the position that an employee on a blacklist is much better protected by the law than one who is not. The letter can be turned down for a job or dismissed in his first year on very tenuous grounds and will have no rights in consequence, but the former treated the same way for the same reason would have an instant claim. It is not hard to foresee unions going out of their way to bring blacklists to employers' attention in order to shift the burden of proof to the employer.

The amount of compensation primarily depends upon the loss suffered although there is the possibility of compensation for injury to feelings in some cases. Similar to other trade union based complaints there is a minimum level of £5,000 compensation which must normally be awarded in the Employment Tribunal where compensation is subject to the normal adjustments up and downwards. There are no maximum or minimum awards in the County Court or Court of Session.

Employers will now need to tread carefully when recording and using information about employees and job candidates. These rules are not limited to the construction sector or other traditionally unionised environments. They place a premium on an employer's recording at the time the reason why any candidate did not get the job or an employee was dismissed, and the more intangible the reason, the greater the importance of their doing so. Nothing in these Regulations prevents an employer dismissing union members on lists, or refusing to hire them, but they do require it to have **and prove** some non-discriminatory reason for doing so. There is no substitute for decent records.

"Employers will now need to tread carefully when recording and using information about employees."

FURTHER INFORMATION

For further information relating to this newsletter, please contact Simon Ost, an Employment Partner in our Manchester office (0161 830 5285, simon.ost@hammonds.com) or your usual contact in the Hammonds Employment team.

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If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email richard.green@hammonds.com.

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