

**The Blacklisting of Trade Unionists:
Consultation on Revised Draft Regulations**

Submissions from the Employment Lawyers Association

10 August 2009

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Employment Lawyers Association

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent both claimants and respondents in the civil courts and employment tribunals. It is therefore not the ELA’s role to comment on the political merits or otherwise of consultation documents or draft legislation, rather to make observations from a legal standpoint. The Legislative and Policy Committee of the ELA consists of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and to respond to proposed new legislation.

A sub committee was set up by the Legislative and Policy Committee of ELA under the chairmanship of Bronwyn McKenna of UNISON Legal Department, 1 Mabledon Place, London, WC1H 9AJ, to consider and comment on the BIS consultative document – The Blacklisting of Trade Unionists: Consultation on Revised Draft Regulations (“the regulations”). Its report is set out below. A list of members of the working party appears as Annex 1.

Introduction and summary

The ELA’s role in the context of any consultation exercise is that of identifying areas of legal complexity and suggesting ways in which these may be resolved so that legislation is clear, effective and workable. We do not, therefore, offer answers to all of the questions posed.

At the outset, we wish to confirm our understanding that this practice is not just found in the construction industry and also occurs in fields such as banking and financial services. The headline points that we are making in this response include the lack of statutory definitions which we think will give rise to legal uncertainty. In addition, members of the working party felt that the time limit provision in general trade union victimisation was not appropriate here and that it would make more sense to use another test. No particular test is, however, prescribed in this response. In the view of the working party consideration could be given to having a questionnaire process to assist the identification of the issues and Tribunal management of cases. A questionnaire procedure would arguably better align the regulations with other discrimination legislation.

Question 3

Do the regulations adequately cover all the possible ways, including use of the internet and other electronic media, whereby blacklisting could be undertaken? If not, could this be improved?

We consider that there may be ambiguity in relation to the application of the regulations to self-compiling websites e.g. using the format of a blog. We would therefore suggest that the regulations are clarified so that is clear on the face of the regulations whether or not such sites are covered. If such websites are within the scope of the regulations, there may then be a need to devise exemptions for innocent parties.

Question 4

Do the Regulations adequately deal with blacklists hosted and maintained abroad?

The ELA's view is the regulations should be further amplified, for the reasons given below. It is fully appreciated that the regulations target use of blacklists in employment decisions rather than blacklists themselves, apart from the third party provisions in regulation 13. The ELA observes that the 1999 Act does confer the power to make regulations prohibiting compilation of blacklists themselves.

By regulations 5, 6 and 9, the employer or employment agency itself breaches the regulations when (i) it has compiled, used, sold or supplied a prohibited list or (ii) it has relied on information supplied in relation to a prohibited list or knows or reasonably ought to know that there is a breach of regulation 3. By virtue of regulation 2(3), regulation 3 prohibits compilation, use, sale or supply wherever they take place, if the person's actions would be prohibited if they took place in Great Britain (emphasis added).

In its consultation, the Government recognises that this may leave some undesirable lacunae such as the accessing and use of blacklists of workers in Britain by recruitment intermediaries, agents or consultants which may occur outside Great Britain. There may never be a supply of information to the employer in Great Britain, but there may have been use on behalf of the employer. As Section 3(2) (a) and (b) of the 1999 Act recognises, use and supply are distinct. The ELA's view is that Regulation 2(3) arguably applies not just to supply but to any of the prohibited actions. There is however a risk of a narrow reading which may give rise to legal uncertainty.

Websites hosted outside Great Britain are also a particular problem although a UK based employer who accesses such a website will have had information supplied to them and thus regulation 2(3) will be engaged.

The ELA submits that greater clarity would be added by:

- (i) providing that, in relation to work otherwise within the tribunal's jurisdiction, an employer in Great Britain shall be deemed to be vicariously liable for the actions of their employees and agents acting within the course of their employment or scope of their authority, whether or not the employees' and agents' actions took place in Great Britain; and
- (ii) making it clear that regulation 2(3) applies to all actions referred to in regulation 3.

This would more clearly bring within the scope of the regulations persons outside Great Britain who do not themselves supply a prohibited list, but who use such a list in order to make recommendations in relation to work within the jurisdiction.

Question 5

Do you support the way the regulations clarify the meaning of a prohibited list? If not, how should a prohibited list be defined?

For ease of reference, our response to this question is broken down to cover both limbs of the definition in regulation 2(1). Our starting point is the need to ensure, where possible, consistency with other employment legislation and to avoid the need for judicial interpretation.

Part (a) of the definition in regulation 2(1)

This refers to a prohibited list being one “which contains details of members of trade unions or persons who have taken part in the activities of trade unions”.

We have a number of comments about this part of the definition. In the first instance, as also noted in our 2003 response, there is no definition of “trade union” included in the regulations (although we note and welcome the clarification supplied in relation to membership of sections of unions provided in regulation 2(2)). To ensure clarity, reference could usefully be included in regulation 2(1) to the definition contained in section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 3 (6) of the Employment Relations Act 1999, which stipulates that, in general (and save for a few exceptions), the definitions/meanings applied in the 1992 Act also apply to section 3 of the 1999 Act, lends support to this suggestion.

We further note that the definition refers to memberss and personss. It is possible that there may be doubt as to whether the regulations apply to the maintenance of multiple lists each containing one name. The definition section could usefully make it clear that for the avoidance of doubt such multiple lists of single names are caught by the regulations.

In addition, regulation 2 does not specifically cover a list of details of former members of trade unions in its definition of a prohibited list, and we consider that there should be particular reference to this in order to assist with the practical application of the regulations. The ELA’s response to the previous consultation in 2003 also made this point. We would suggest that this part of the definition be amended so that the words “or former members” are inserted after the words “contains details of members ...” in part (a). We consider that this would be an appropriate amendment, given that s3(1)(a) of the 1999 Act (and indeed regulation 2(1)(a) itself) specifically make provision in relation to a list of those individuals who have in the past taken part in trade union activities. To distinguish between a list of individuals who have taken part in union activities in the past (which, under current drafting, would be a prohibited list) and a list of those who were union members in the past (which, under current drafting, may not) would, we submit, give rise to legal uncertainty.

Equally, the regulations make no specific reference to the inclusion of details of suspected members of trade unions/persons who are suspected to have taken part in the activities of trade unions. We consider that this will give rise to confusion. This might be remedied by the words “or suspected members” being inserted before the words “of trade unions” in part (a). Similarly, the words “or who are suspected of having taken part” could be inserted after the words “who have taken part” in part (a). We note that under s 3(3) (i) of the 1999 Act, there is provision to include supplemental/consequential provisions in the regulations.

We consider that, to assist with interpretation, regulation 2(1) could specifically state that a list containing “details” of relevant persons would include a list that was simply

a list of names of such persons. We would also point out that the clarification of a “list” provided at section 3(5) of the Employment Relations Act 1999 has not been incorporated into regulation 2(1) and we consider that it would be appropriate for it to be so incorporated to remove any legal doubt.

Part (b) of the definition at regulation 2(1)

This stipulates that the list is one which “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.”

We suggest that it might be useful to include a definition of a “worker” for the purposes of part (b). Whilst we note that s3 (5) of the 1999 Act refers to the definition of a worker given at s13 of the 1999 Act, we consider that the definition might usefully incorporate a reference to those seeking work as well as those in work for example amalgamating the definition at s13 of the 1999 Act with the definition of a “worker” in s 296 of the 1992 Act.

We would therefore request that due consideration is given to the definition of worker to eliminate the confusion which may otherwise arise.

We consider that the question of the purpose of a compiled list changing over time which was raised in the ELA’s response to the 2003 consultation (copy attached as Annex 3) is still of concern. Whilst we note that the current consultation document seeks to allay concerns (at paragraph 2.18 of the consultation document) on the basis that a change of purpose would almost always be accompanied by the compilation of a new list, it is submitted that there may be situations where no amendment or manipulation is required, at least not for a period of time after compilation of the original list (and it may be that inappropriate use of such a list occurs prior to any amendment or manipulation taking place). To remedy this ambiguity, we consider that the words “or is used” could be inserted after the words “with a view to being used” in part (b). We would again refer to the provisions of s 3(3) (i) and (j) of the 1999 Act.

Question 6

Do you support the drafting of the exemption and should others be created? Where applicable, please explain why you consider the drafting to be defective.

While the members of this working party are not specialists in data protection law, we assume that the Government has proposed regulation 4(3) (c) because of data protection concerns. However unless the obligation to obtain individual consent of all those named on a list in order to publicise contraventions of regulation 3 is required by data protection law, we consider this should be removed. Information on a list might not allow a reader readily to identify the individuals on the list. For instance, a list might consist of national insurance numbers rather than names. If so, compliance with Regulation 4(3) (c) would be impossible and a prospective “whistleblower” would thus be stifled. Alternatively, if a list consisted of names but not addresses, or contained the details of a large number of individuals, compliance with this regulation by a single individual would probably not be practicable. Appropriate safeguards might include taking reasonably practicable steps to obtain consent or to restrict the disclosure of named individuals whose consent could not be secured.

The ELA would also propose further exemptions for:

- those who “supply” a prohibited list to a legal adviser for the purpose of obtaining legal advice; and
- those who “use” a prohibited list solely for the purpose of providing legal advice.

The exemption for trade unions which is set out in regulation 4(4) is too restrictive. The imposition of a reasonableness requirement as contained in regulation 4(4) (c) is arguably too narrowly drawn. Trade unions maintain multiple lists for purposes of holding trade union office and are subject to the highest level of data protection regulation. The rationale for this reasonableness requirement is therefore unclear.

Question 7

Do you support the Government’s view that enforcement should take place via the civil law? If not, what approach would you favour?

In the opinion of the ELA enforcement of the regulations should take place via the civil law given the practical legal problems which would arise in trying to fix criminal liability to the activities of an employers' blacklisting organisation. The ELA's preference for a civil enforcement mechanism is, however, predicated on our other comments in relation to the time limits for making applications to the Employment Tribunal which are set out in response to question 9 below.

Section 13 of the DPA 1998 provides a remedy for damage caused by a data controller to a person. There is no DPA remedy against a company that has used a blacklist to harm that person. In this regard, we note the conviction of Ian Kerr for failing to notify as a data controller contrary to the DPA.

Question 8

Do you agree with the approach taken by the regulations regarding the burden of proof? If not, what approach would you favour?

Yes, there are obvious parallels with anti-discrimination legislation. Adopting a similar approach would make it easier to advise clients on the effect of the regulations as there is a settled body of case law.

The ELA also submits that consideration should be given to making provision for administering a statutory Questionnaire, given the difficulties in proof referred to in the consultation relating to Q4 and the burden of proof provisions. This would also better align the regulations with other discrimination legislation. In discrimination proceedings, Questionnaires can serve a useful purpose in identifying the issues, facilitating the early resolution of claims and assisting Tribunal management of cases.

Question 9

Do you agree with the approach taken in the regulations regarding the time limits for making applications to the employment tribunal? If not, what approach would you favour?

We note that the regulations adopt the test used for time limits in existing trade union legislation i.e. the ‘reasonably practicable’ test. This is a two stage test.

Stage 1 – was it reasonably practicable to present the claim within 3 months? If not.

Stage 2 – what further period would be reasonable for the claimant to present their claim?

We observe that the regulations propose modifying the test of ‘reasonable practicability’ in relation to this legislation. The stated intention is to encourage Employment Tribunals to use their discretion to allow claims to proceed where the existence of the blacklist was not known at the time the decision was effected; paragraph 2.26 of the consultation document. The Courts have, however, taken a restrictive approach when applying the test of ‘reasonable practicability’ e.g. see the Court of Appeal decisions in the cases of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119 and *London Underground Ltd v Noel* [1999] IRLR 621 (note the comments of Gibson LJ at paragraph 21 of the Judgment). The ambit of this test has been more recently considered by the Court of Appeal in the July 2009 case of *Gisda Cyf v. Miss Lauren Barratt* [2009] EWCA Civ 648. The Court noted:

"The Employment Tribunal has only a limited power to extend the time. It must be satisfied that it was not reasonably practicable to comply with the time limit. The power is sparingly exercised"

Notwithstanding the suggested modification the ELA has some concerns about the proposed approach. Most fundamentally, we are concerned that ambiguity around the effect of the proposed modification of the “reasonable practicability” test will create legal doubt and generate unnecessary satellite litigation. Our concerns are developed further below.

First, the reasonably practicable test may not be clear or workable in the context of blacklisting cases given the covert nature of blacklisting activities. For the reasons stated in the consultation document, it will be highly unlikely that a claimant will be aware when the discriminatory decision was taken against them. Assuming, as is highly probable, that this information does not come to the claimant’s attention until after the three month time limit has expired, the claimant will need to present their claim ‘...within such further period as the tribunal considers reasonable....’. Uncertainty as to whether claimants have satisfied this test could lead to complex and expensive satellite litigation on this issue. Satellite litigation will create delay which may affect the clarity of the evidence which the Employment Tribunal will have to consider in these cases.

Second, the application of the reasonably practicable test does not easily fit the likely factual context to a blacklisting complaint. It is likely, for example, that a claimant will only become aware of their having been blacklisted when a clear enough pattern of unsuccessful job applications – perhaps over years - emerges. It is by no means certain that an Employment Tribunal would decide that it was not reasonably practicable to commence proceedings until within three months of the final unsuccessful application notwithstanding the intended modification.

Thirdly discrimination statutes predominantly adopt the “just and equitable” test for the extension of limitation. The approach in the regulations is therefore inconsistent with other discrimination statutes.

Finally we note that the provisions on time limits are based on corresponding provisions found in the 1992 Act (see paragraph 2.9 of the consultation paper). However we would respectfully suggest that there is now a very strong case for distinguishing how courts and Tribunals apply time limits when considering “blacklisting” cases in comparison to other claims brought under the 1992 Act.

Blacklisting by its very nature is covert and therefore claimants are highly unlikely to be aware that they have been subjected to this discriminatory practice. As the TCA case illustrates, these matters often do not come to light until many years after the event. This contrasts with the factual context of existing claims under the 1992 Act where we would suggest claimants are much more likely to be aware that they have been subjected to an unlawful act at the time that act occurred or within a relatively short period afterwards.

A number of alternative approaches are posited by ELA and these are set out below.

Concealment

The regulations could incorporate the concept of concealment cases as set out in s.2ZA of the Equal Pay Act 1970. That Act defines concealment cases as cases where an employer or other person has deliberately concealed any fact which is relevant to the contravention to which the proceedings relate; and, without knowledge of which, the claimant could not reasonably have been expected to institute the proceedings. In such cases, the limitation period is set as being 3 months from the date on which the claimant discovered the qualifying fact(s) in question or could, with reasonable diligence, have discovered it. This approach may be more germane to blacklisting cases than the “reasonably practicable” test.

Limitation Act 1980 (‘LA’)

As the claimant will not be immediately aware of either the fact they are blacklisted or that they have suffered any harm, perhaps a better approach would be to adopt the approach used in the LA when setting time limits for pursuing personal injury claims.

The relevant provisions are attached as Annex 2. Section 11(3) gives the Courts the ability to consider the date of knowledge of the injury when determining when time begins to run for the purposes of pursuing a personal injury claim. Given that knowledge of being blacklisted is almost always likely to occur significantly after the date of the discriminatory act/date when the claimant suffered harm, then this approach would perhaps be a better way of looking at the time limit question for these regulations.

If this approach was adopted then consideration would need to be given as to whether to apply the discretion to extend time contained in section 33 of the LA. Using the ‘date of knowledge’ as the point when time begins to run would, we submit, avoid unnecessary satellite litigation in the Employment Tribunals on the question of time limits under this jurisdiction.

The ‘just and equitable’ test

Finally, the “just and equitable” test could be adopted in the regulations in preference to the “reasonably practicable” test to reflect other discrimination law. The just and equitable provision has been applied in the Employment Tribunals and specific reference has been made in two cases to the relevance of the Limitation Act 1980, i.e. in *British Coal Corporation v. Keeble* [1997] IRLR 336, EAT, and *Chohan v. Derby Law Centre* [2004] IRLR 685, EAT. It has been held by the Employment Appeal Tribunal that the Employment Tribunal’s discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (‘LA’). Section 33 of the Limitation Act requires courts to consider the prejudice each side would suffer if an extension were refused. Relevant factors include:

- the length of and reasons for the delay.

- the extent to which the cogency of the evidence could be affected by the delay.
- whether and how far the respondent party has co-operated with any requests for information.
- how promptly the claimant acted once they knew of the possibility of taking action.
- steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

The discretion that the Employment Tribunal has to extend time using the ‘just and equitable’ test contrasts with claims where the ‘reasonable practicability’ test applies as in the latter an Employment Tribunal is not required to consider the issue of prejudice to the respondent.

However, for this approach to be effective we would submit that the time for commencing proceedings ought to run from the date when the claimant became aware of the discriminatory act rather than the date when the discriminatory act occurred. Otherwise, as claimants are unlikely to be aware of this discrimination taking place until months/years after the event, they will have to rely on the discretion of Employment Tribunals to pursue this claim. This is in turn likely to lead to much unnecessary satellite litigation.

Question 10

Do you agree with the approach taken by the regulations regarding remedies? If not, what approach would you favour?

Sections of the consultation document propose that the regulations should be modelled on the discrimination statutes e.g. paragraph 2.25. The upper limit to compensation for economic loss set out in regulation 8(4) does not sit easily with an approach otherwise based on discrimination principles. Potentially, claimants’ losses due to blacklisting may be more analogous to those of applicants in the armed forces and pregnancy related dismissal cases, i.e. *MOD v. Cannock* [1994] IRLR 509, EAT.

We are unclear as to how the contributory fault provisions in regulation 11(6) would work in practice. This provision is not paralleled in any other form of discrimination legislation. Guidance may need to be provided to Tribunals as to how to operate this aspect of the regulations.

Question 11

Do you have any other views on the way the regulations have been drafted? Please submit any drafting suggestions if you have them.

The ELA wishes to make the following comments of a minor typographical nature on the drafting of the regulations.

Regulation 4(4) (b) (i) is curiously worded. Should it state “experience or knowledge” rather than “experience of knowledge” as appears in the draft regulation?

A stray comma appears at the end of regulation 5(2).

The word “or” has apparently been omitted from regulation 12(1). It should be added between “E” and “against” in the final line.

**Employment Lawyers Association
10 August 2009**

ANNEX 1

Members of the working party

Bronwyn McKenna (UNISON)
Christopher Tutton (Irwin Mitchell LLP)
David Scott (Minster Law)
David Sorensen (Morrish Solicitors LLP)
Gary Morton (7 New Square Chambers)
Shubha Banerjee (Unite the Union)
Paul McFarlane (Weightmans LLP)
Sally Gold (Cheshire East Borough Council)
Sandhya Drew (Tooks Chambers)
Tom Potbury (Pinsent Masons LLP)

ANNEX 2

Extract from the Limitation Act 1980

Section 11

(3) An action for personal injuries shall not be brought after the expiration of the period applicable in accordance with subs (4) and (5 – re death) below.

(4) Except where (5) applies, the period applicable is 3 years from a) the date on which the cause of action accrued or b) the date of knowledge, if later, of the person injured.

Section 14

References to date of knowledge in section 11 are reference to the date on which he first had knowledge of the following facts:

- a) that the injury was significant
- b) that the injury was attributable in whole or in part to the act or omission alleged to constitute negligence or breach of duty
- c) the identity of the Defendant
- d) if it is alleged that the act or omission was that of a person other than the Defendant, the identity of that person and the additional facts supporting the bringing of the action against the Defendant; and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant

A person's knowledge includes knowledge which he might reasonably have been expected to acquire a) from facts observable or ascertainable by him b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person shall not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain and, where appropriate act on that advice.

Section 32

Where the action is based on fraud of the Defendant or any fact relevant to the claimant's cause of action has been deliberately concealed from him by the Defendant, the period of limitation shall not begin to run until the claimant has discovered the fraud or concealment or could with reasonable diligence have discovered it.

Section 33

If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which the provisions of section 11 prejudice the

claimant and any decision of the court under this section would prejudice the Defendant, the court may direct that those provisions shall not apply to the action.

In acting under this section, the court shall have regard to:

- a) the length of and reason for the delay on the part of the claimant
- b) the extent to which, having regard to the delay, the evidence to be adduced is or is likely to be less cogent
- c) the conduct of the Defendant after the cause of action arose, including the extent to which he responded to requests reasonably made for information
- d) duration of any disability
- e) the extent to which the claimant acted reasonably and promptly once he knew the whether or not the act or omission giving rise to injury was attributable, might be capable of giving rise to an action in damages
- f) the steps taken to obtain advice and the nature of the advice received

ANNEX 3

EMPLOYMENT LAWYERS ASSOCIATION

RESPONSE TO DEPARTMENT OF TRADE AND INDUSTRY'S "DRAFT REGULATIONS TO PROHIBIT THE BLACKLISTING OF TRADE UNIONISTS – A CONSULTATION DOCUMENT"

Employment Lawyers Association

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of consultation documents or draft legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Paul Evans of Rowley Ashworth, 247 The Broadway, Wimbledon, London SW19 1SE to consider and comment on the Department of Trade and Industry's consultative document *Draft Regulations to Prohibit the Blacklisting of Trade Unionists* ("the regulations"). Its report is set out below. Contributions were also received from Alison Wetherfield (McDermott, Will & Emery).

Introduction

Views are sought on the regulations. In particular, a number of questions are identified for discussion and responses invited in relation to these. ELA views its role in the context of any consultation exercise as that of identifying areas of legal complexity and suggesting ways in which these may be resolved so that legislation is clear and effective. We do not, therefore, offer answers to a considerable number of the questions posed.

Miscellaneous drafting comments have been made in answer to question 18 where the question relating to the regulation in question did not ask whether the regulation was *appropriately worded*.

Q 6 Is this regulation [regulation 6] about detrimental treatment at work appropriately worded?

The definition of *prohibited list* in regulation 3 does not require that the list contains the names of workers. Regulation 6(1), however, provides *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*. Three points arise:

- (1) The reference to *that name* should be replaced by a reference to *his details* for the sake of consistency with regulation 3(2) (a).
- (2) The reference to *name* is also inappropriate as a list might be compiled by

reference to other unique identifiers.

- (3) The reference to *that name* in any event makes no sense as no name has previously been referred to in regulation 6.

Q 7 Is the employment tribunal the appropriate body to hear these complaints and are the time limits for bringing complaints appropriate?

It is of assistance to both employers and employees if new statutory rights/causes of action fit logically into the framework of existing statutory rights/causes of action. The most obviously comparable existing statutory rights/causes of action are those contained in part III of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”). Having regard to the fact that complaints in relation to rights under part III are heard by employment tribunals, and the time limits for those complaints, we believe that the employment tribunal is the appropriate body to hear complaints under the regulations and that the time limits specified in the regulations are appropriate.

Q 9 Is this regulation [regulation 11] necessary and appropriately worded?

There is a typographical error in the second line of regulation 11(2): *assist* should be *sist*.

Q 10 Is this protection [regulation 12] against dismissal appropriately formulated?

Such protection is more typically provided by amending the Employment Rights Act 1996 (“the ERA”) – see, for example, sections 101A (Working time cases) and section 104A (the national minimum wage). If there is to be no such amendment in relation to the regulations, we wonder whether the definition of dismissal contained in section 95 of the ERA should be expressly imported into the regulations? Otherwise there may be room for argument as to whether regulation 12 applies to constructive dismissals. (See the recent problems in this respect in relation to the Disability Discrimination Act 1995 in **Catherall v Michelin Tyres plc** [2003] IRLR 61 EAT and **Commissioner of Police of the Metropolis v Harley** [2001] IRLR 263 EAT.)

Q 12 Is this restriction on contracting out appropriate?

A similar restriction is contained in practically every piece of legislation regulating the statutory rights of employees. As such we believe the restriction is appropriate.

Q 18 Are there any other comments or observations you wish to make about the regulations?

Regulation 2

1. Regulation 2 provides... *employment in relation to a worker, means employment under his contract*. The words *under his contract* are unclear and should be clarified. [Paul - took out rest b/c s.3(5) of ERA cross-refers for definition of worker to section 13 ERA]
2. The regulations refer at various points to *employer*. We suggest a definition be included, bearing in mind that the regulations apply to *workers* and not just employees. Exactly who is the “employer” of certain categories of workers (e.g. agency workers) may be difficult to determine and the definition should take account of this.
3. The regulations do not define *trade union*. We suggest a definition be included. The definition contained in section 1 of TULRCA would be appropriate.

Regulation 3

4. Regulation 3(2)(a) provides that a *prohibited list* is a list which... *contains details of members of trade unions or persons who have taken part in the activities of trade unions*. We wonder whether the definition should refer to *members or former members*. Whilst the EAT did hold in **Harrison v Kent County Council** 1995 ICR 434 that in the context of a claim under section 137 TULRCA it was not possible to divorce the fact of trade union membership from the incidents of membership such as union activities, *activities of trade unions* and membership of trade unions are clearly not synonymous.
5. Regulation 3(2)(b) provides that a *prohibited list* is a list which... *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*.

Whilst we recognise that this tracks exactly the language of Section 3 ERA, to prove the purpose for which a list was compiled will pose considerable evidential difficulties. In any event, a list of trade union members which could be used by employers for blacklisting could have been compiled for a completely different purpose. For example, an employer at a construction site where the work had concluded might have a list of those it had employed at that site, which had originally been compiled for payroll purposes. If the employer had experienced industrial relations problems at that site then that list in the hands of the same or another employer could be *used* for blacklisting purposes in relation to future construction site work. Without a definition of "compiled" which broadens its application beyond initial assembly, such use would not apparently fall within the remit of the regulations.

Regulation 4

6. In Regulation 4(4) (a) the individual to whom employment is not offered is referred to both as *a/the person* and *the applicant*. For the sake of consistency all references should be to *a/the person*.

Legislation 16

7. In Regulation 16(l) (d) there is an inaccurate cross-reference to regulation 10, which should read regulation 12.

Schedule

8. In paragraph 1(a), (b) *regulation 6*... should read (c) *regulation 6*. In paragraph 2, (7F) should read (7G).

Employment Lawyers Association
28 April 2003