

# Ruined Lives

## Blacklisting in the UK Construction Industry



**A Report for UCATT**

Professor Keith Ewing

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# Foreword

## Ruined Lives

Before this year, most people thought that blacklisting had died out in the 1980's with the demise of the Economic League. Yet many construction workers, especially union activists, were regularly denied work that they were eminently qualified for, leading to increasing fears that blacklisting still took place. In March 2009 those fears were found to be entirely justified.

Following an investigation by the Information Commissioner it was revealed that the Consulting Association, run by Ian Kerr, had been operating a blacklist of over 3,000 construction workers for decades. A staggering 44 major construction companies were revealed to have been using the Consulting Association's services. Household construction names earning £100's of millions from publicly procured work were denying construction workers a living.



The investigation showed that blacklisting in construction was endemic and that Ian Kerr and construction employers had callously and systematically ruined the lives of thousands of construction workers, many of whom were forced out of the industry because of blacklisting.

Following the exposure of the Consulting Association's blacklist, construction workers have been given the opportunity to contact the Information Commissioner to discover if they have been blacklisted and receive a copy of their file. A large number of UCATT members, activists and officials were blacklisted. When I investigated my own situation I discovered I had been blacklisted. It was revealing to discover that my file dated back to the 1970's and even included my involvement in the Charter Group Conference in 1974.

Blacklisting is not illegal; Kerr could only be prosecuted under data protection laws. The 1999 Employment Relations Act created provisions for outlawing blacklisting but the necessary regulations were never introduced, as the Government wrongly believed that blacklisting no longer took place. Following lobbying from UCATT, the Government has now acted, promising new Regulations in the autumn following what UCATT considers to be an unnecessary consultation exercise.

This publication, written by Professor Keith Ewing of the Institute of Employment Rights on behalf of UCATT, is a truly comprehensive response to that consultation.

It argues that the Regulations must not be too narrowly defined. Currently the Government is suggesting that blacklisting should only be outlawed for trade union activities, but we know from the files that blacklisting occurred for many reasons and not solely on the narrow definition of trade union activities.

This document argues very persuasively why all forms of blacklisting should be outlawed. In the case of the Consulting Association much of the information on workers' files was about health and safety issues, workers demonstrating about dangerous sites or whistleblowing about unsafe practices. It is disgraceful that construction companies were prepared to blacklist workers for trying to protect themselves and their colleagues and it is essential that the new Regulations be properly worded in order to ensure that such a situation could never again be repeated.

Equally we argue that blacklisted workers have experienced an injustice and compensation should be paid.

I hope that this excellent publication will be used to lobby MPs and others to ensure that, whatever the industry, all forms of blacklisting are once and for all finally made illegal.

Blacklisted construction workers deserve justice but equally it is essential that these vile practices are outlawed once and for all.

*A. S. Ritchie*

**Alan Ritchie** *General Secretary UCATT*

# Introduction

**1.1** The blacklisting of trade unionists burst again to public prominence earlier this year when the Information Commissioner exposed details about a large-scale surveillance operation being run by Mr Ian Kerr from a back-street office in the Midlands. Tipped off about the blacklist as long ago as 2006,<sup>1</sup> the Information Commissioner revealed that the Consulting Association Ltd held records of hundreds of trade unionists, shattering the complacency that blacklisting was a thing of the past, and that we now have adequate laws to deal with it. This is self-evidently not the case, and suggests that the government's failure in 2003 to proceed with Regulations to outlaw the practice was a grave mistake. Following the revelations about the Consulting Association, the government has, however, published a Consultation Paper with proposals for reform, and Draft Regulations to indicate what that reform might look like. Although large construction companies have been complicit in the operation of these blacklists, no company has been prepared publicly to defend the practice, which requires the strongest laws to stamp out. Blacklisting is a nasty, secretive and unaccountable practice that causes untold misery for individuals who are entrapped unwittingly by its covert nature, incapable of challenging what is being said and used against them, and unable to understand why their lives are being blighted by the failure to secure work. Although the government has quickly condemned the practice, its proposals do not adequately meet the need for robust legislation.

**1.2** As might be expected, blacklisting also raises a number of sensitive human rights issues, which governments might have been expected to take steps to address. The first and most obvious of these human rights relates to the right to freedom of association, as guaranteed by a number of international instruments, including the ECHR, article 11. This guarantees the right of individuals to form and join trade unions for the protection of their interests. But blacklisting also raises additional questions about privacy rights and in particular article 8 of the ECHR, which provides that

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

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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 government, without the consent of the individuals to whom the information relates.

## A Brief History

**2.1** Blacklisting of trade unionists has a long and dishonourable tradition in the United Kingdom, and not enough has been done to stop it. The great trade union historians Sydney and Beatrice Webb refer to the 'freedom allowed to the employers' in the 1870s 'to make all possible use of 'black-lists' and 'character notes', by which [trade unionists] were prevented from getting work' (Webbs, 1920: 284). When trade unionists tried to put an end to the practice in legal proceedings, they were told that they had no cause of action, on the ground that the predominant purpose of the employer in operating a blacklist was to promote his own self-interest rather than cause harm to the workers in question.<sup>2</sup> In contrast, 'if a trade union secretary published a perfectly accurate list of firms which were 'non – union', with the intention of warning trade unionists not to take service with them, this gave each of the 'blacklisted' firms the right to sue him for damages (ibid: 598), as in a dispute in the London building trade in the 1890s. In that case, a building company successfully sued the London Building Trades' Federation for circulating a blacklist, the court taking the view that while the union was acting to promote its own interests (which were acknowledged to be the 'final cause' of their action), their 'primary motive' was to injure the employer, 'and prevent them carrying on their lawful trade or business with that freedom which is the privilege of Englishmen'.<sup>3</sup> So while it was lawful at common law for an employer to blacklist trade unionists, it was not lawful for trade unionists to blacklist non – unionists or employers.

### The Select Committee Inquiry

**2.2** In more recent times, blacklisting has been associated with an organisation called the Economic League that was set up in 1919 to 'reinforce support for democracy, personal freedom and free enterprise' (Ewing, 1994), or in the view of some 'to fight Bolshevism'.<sup>4</sup> According to The Guardian, in 1990 the Economic League – which is well known for having maintained a blacklist of trade unionists - was said to have 'had 40 current Labour MPs on its files, including the [then] chancellor, Gordon Brown, and prominent trade unionists, as well as journalists and thousands of shopfloor workers'. An investigation by the House of

<sup>1</sup> For full details of the employment tribunal case that exposed the Kerr blacklist, see the feature article in *The Morning Star*, 13 May 2009, p 7.

<sup>2</sup> *Jenkinson v Nield* (1892) 8 TLR 640; *Bulcock v St Anne's Master Builders' Federation* (1902) 19 TLR 27.

<sup>3</sup> *Trollope v London Building Trades' Federation* (1895) 72 LT 342, at p 343.

<sup>4</sup> The Guardian, 9 September 2000.

Commons Employment Committee in 1991 heard from the TUC that the 'unsavoury', 'sinister' and 'all too often inaccurate' practice of blacklisting 'affects the job prospects of thousands of individuals', referring to evidence from former employees of the Economic League, former personnel managers of firms that had used the League's services, and blacklisted employees themselves. According to the TUC, this evidence 'bears witness to the inaccurate and unreliable nature of much of the League's information, noting that the League 'makes no attempt to check the accuracy of its records', with individuals being branded as unsuitable for employment on the basis that 'they attended meetings of unions or voluntary organisations, or if they wrote to a newspaper, or their name appeared on a petition'. The TUC was equally concerned that employers using the services of the League did not check the information supplied, but 'do not ask what information is held, but reject applicants simply on the ground that they are on the Leagues' files' (TUC, 1990). These concerns were echoed by the Committee in its report which referred to the evidence it had received about 'inaccurate information being handed out in secret, with employers rejecting applications simply on the basis that the League had information about them, rather than weighing carefully what the information was, and information being kept [about] many more than the ten thousand individuals quoted by the League' (HC, 1991: para 42).

**2.3** The Economic League was given a very uncomfortable time by the Select Committee, oral evidence being taken from its Director General, and its Director of Information and Research. Although acknowledging that they had 10,000 names on their list (including MPs), they were reluctant to say who their clients were or how much they paid, though it transpired at a subsequent oral evidence session with Ford Motor Company that the latter had been clients and had paid £25,000 in the previous year, after having been pressed hard to provide this information.<sup>5</sup> The League's records were kept in manual files at a time when the Data Protection Act 1984 applied only to computerised records. For its part, however, the League said that 'they will provide any applicant with the information held on them, if any. To do this [the League] request[s] from the applicant full details of their past employment, National Insurance numbers, etc', though the Select Committee pointed out that 'this has given rise to the suspicion that this information will be added to the League's records' (HC, 1991: para 40). Clearly unimpressed, the Committee recommended that legislation should be introduced to give workers the same rights as consumers who were turned down by credit reference agencies. Thus, information

supplied to employers about potential employees should be passed on to the employee who is refused employment, and the employee should be given a chance to refute the information. In addition, it was proposed that organisations that provide information about employees should have to be licensed and subject to a code of practice, modelled on the Employment Agencies Act 1973 (paras 46 and 47). But although falling a long way short of a recommended ban on blacklisting, even the notions of transparency and accountability on the part of those who operated them was too much for the government of the day, despite the fact that the Employment Act 1990 had made it unlawful to refuse to employ someone because he or she was a trade union member, a provision that would have been more effective if blacklisting was also unlawful.

#### • **The ILO Complaint**

**2.4** Blacklisting has also attracted the interest of the ILO, following a complaint by the TUC in 1992, alleging that there was no effective protection against discrimination of workers because of the operation of employer blacklists. The complaint drew attention in particular to the activities of the Economic League, whose files at that time were thought to contain 22,000 names. In support of its complaint, the TUC provided evidence of individuals who had been told that their failure to find employment was due to their having been blacklisted by the Economic League, these cases relating mainly to the construction industry, about which the Economic League had most data. In upholding the complaint, the ILO Freedom of Association Committee found that British law fell short of the requirements of ILO Convention 98 on the Right to Organise and Collective Bargaining (1949). This is one of the core instruments of the international labour code, and provides by article 1 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 employment of a 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'.

**2.5** According to the ILO Freedom of Association Committee, '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

<sup>5</sup> House of Commons Employment Committee, Minutes of Evidence, 17 October 1990, HC 176-II (1990-91), Q 842 - 4.

to combat such practices'. Indeed, article 3 of Convention 98 provides that 'machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in [article 1]'.<sup>6</sup> But nothing was done to implement these recommendations, which were broadly endorsed by the ILO Committee of Experts in 1994. This failure to implement the ILO recommendations was not for a want of an opportunity, the then Conservative government being very active in legislating on trade union law, with the Employment Act 1990 being followed by the Trade Union Reform and Employment Rights Act 1993. But the focus of the Conservatives was mainly to restrict trade union rights rather than protect trade unionists, and there were in any event close links between the Economic League and the Conservative Party before the League was wound up in 1993. Nevertheless, in light of recent decision of the European Court of Human Rights under article 11 of the ECHR,<sup>7</sup> this jurisprudence of the ILO supervisory bodies will be vitally important in the event of a complaint to that Court by individuals who now know that they have been blacklisted by the CA, and who claim that their blacklisting violated their rights under articles 8 and 11 of the European Convention on Human Rights.

## The Consulting Association

**3.1** Which brings us to the Consulting Association. The kind of work undertaken by the Economic League is reported to have been continued by its Director General "through his family firm, Caprim Ltd [which] continued to alert businesses to individuals and organisations he claimed were opposed to private enterprise".<sup>8</sup> According to the Guardian, through Caprim, the Director General of the Economic League 'continued warning firms of those he believed could 'weaken a company's ability to manage its affairs profitably'.<sup>9</sup> It is not known what happened to Caprim, but on 6 March 2009 the Information Commissioner's Office issued a Press Release in which it was alleged that 44 construction companies had used the services of the Consulting Association Ltd run by a man called Mr Ian Kerr.<sup>10</sup> According to the ICO, this man is believed to have 'run the database for over 15 years', and it was said to have included the details of 3,213 construction workers, which he traded for profit. According to the ICO, a raid of the CA on 2 March 2009 'uncovered evidence... that named construction firms subscribed to Kerr's system for a £3,000 annual fee' It was stated further that '[c]ompanies could add information to the system and pay £2.20 for details held on individuals', and that [i]nvoices to construction

firms for up to £7,500 were seized during the raid'. Between April 2006 and February 2009, construction firms paid a total of £478,937 to the CA. According to press reports, details of workers' trade union activities and past employment conduct were said to have been recorded on cards.<sup>11</sup>

### • The Conviction of Mr Kerr

**3.2** Mr Kerr was convicted under the Data Protection Act 1998, which provides as follows

- Personal data must not be processed unless the data controller is registered under the Act with the Information Commissioner (s 17);
- A data controller who wishes to be registered must give notification to the Information Commissioner (s 18); and
- The Information Commissioner is to maintain a register of data controllers and to enter any data controller who applies in accordance with the Act (s 19).

Failure to comply with the registration provisions is a criminal offence, though the Act normally relies principally on instruments such as enforcement notices and complaints for its enforcement. Criminal proceedings under the Act require the consent of the DPP or the Information Commissioner, and a person found guilty of an offence is liable on summary conviction to a fine of up to £5,000, or on indictment to an unlimited fine (s 60). It is also the case that where someone is convicted under these provisions, the court is empowered to 'order any document or other material used in connection with the processing of personal data and appearing to the court to be connected with the commission of the offence to be forfeited, destroyed or erased' (s 60(4)).

**3.3** According to the ICO, Mr Kerr was convicted for processing data without giving notice to the Information Commissioner as required by the Act. According to the specialist construction press, however, the £5,000 fine handed down to Ian Kerr by the Knutsford Crown Court on 16 July 2009 was greeted 'with shock by legal experts and safety lobbyists alike', on the ground that the case had been committed to the Crown Court by the Macclesfield Magistrates Court because 'the maximum fine they could levy – of £5,000 – was 'wholly inadequate'.<sup>12</sup> A partner in a construction law firm was quoted as saying with admirable restraint that'

it was definitely a surprising outcome, in particular given the magistrates court had made it explicitly clear it had committed the case because of its

<sup>6</sup> Case No 1618 (283rd Report of the Freedom of Association Committee (Interim Conclusions) and 287th Report of the Freedom of Association Committee. See Ewing, 1994: 11-12.

<sup>7</sup> Demir and Baykara v Turkey, 12 November 2008.

<sup>8</sup> The Guardian, 9 September 2000.

<sup>9</sup> Ibid.

<sup>10</sup> [http://www.ico.gov.uk/upload/documents/pressreleases/2009/tca\\_release\\_060309](http://www.ico.gov.uk/upload/documents/pressreleases/2009/tca_release_060309).

<sup>11</sup> The Guardian, 6 March 2009.

<sup>12</sup> Construction News, 23 July 2009.

limited sentencing powers. For the crown court to issue a fine no greater than the magistrates maximum limit, it seemed a little weak.<sup>13</sup>

Just as significantly perhaps, it is not known if the CA's records were forfeited and destroyed, or if they have been returned to Mr Kerr. If they have been returned,

and if the data are to be processed lawfully in the future, not only will the CA be required to register with the ICO, but the processing of data about an individual's trade union membership is sensitive personal data and will require the consent of the individuals concerned.

**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
Whesoe	25	25			50
SIAS Building Services		64	25	25	114
Balfour Beatty			25		25

Source: *Construction News*, 23 July 2009

<sup>13</sup> Ibid.

- **No Punishment for the User Companies**

**3.4** But just as there was concern about the light sentence imposed on Mr Kerr, so there was dismay that the companies who sustained his business (and in some cases may have supplied the data) got off scot-free. The companies alleged by the ICO to have been involved are:

- **Amec Building Ltd; Amec Construction Ltd; Amec Facilities Ltd; Amec Industrial Division; Amec Process & Energy Ltd; Amey Construction** Ex-member; **B Sunley & Sons** Ex-member; **Balfour Beatty; Balfour Kilpatrick; Ballast (Wiltshire) plc** Ex-member; **Bam Construction (HBC Construction); Bam Nuttall (Edmund Nuttall Ltd); C B & I; Cleveland Bridge UK Ltd; Costain UK Ltd; Crown House Technologies; (Carillion/Tarmac Construction);**
- **Diamond (M & E) Services; Dudley Bower & Co Ltd** Ex-member; **Emcor (Drake & Scull)** Ex ref; **Emcor Rail; G Wimpey Ltd** Ex-member; **Haden Young; Kier Ltd; John Mowlem Ltd** Ex-member; **Laing O'Rourke (Laing Ltd); Lovell Construction (UK) Ltd** Ex-member; **Miller Construction Ltd** Ex-member; **Morgan Ashurst; Morgan Est; Morrison Construction Group** Ex-member; **NG Bailey;**
- **Shepherd Engineering Services Ltd; Sias Building Services; Sir Robert McAlpine Ltd; Skanska (Kvaerner/Trafalgar House plc); SPIE (Matthew Hall)** Ex-member; **Taylor Woodrow Construction Ltd** Ex-member; **Turriff Construction Ltd** Ex-member; **Tyson Contractors** Ex-member; **Walter Llewellyn & Sons Ltd** Ex-member; **Whesoe Oil & Gas Ltd; Willmott Dixon** Ex-member; **Vinci plc (Norwest Holst).** <sup>14</sup>

**3.5** This, however, may only be the tip of the iceberg, for there are other companies involved in this operation whose identity is unknown. Yet despite this massive involvement of construction companies in the CA's operation, the ICO has limited powers to deal with them. As the ICO pointed out on 4 August 2009 in a Press Release, '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). Under the Act, he may only issue an enforcement notice which effectively means stop doing it, and only if you don't will it be a criminal offence. 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 processing is necessary for the purpose 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, in so far as is practicable, provided with the information specified in paragraph 2(3) at 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 the recruitment of workers, the data subject is, in so far as is practicable, provided with the information specified in paragraph 2(3) at Part II of Schedule 1 to the Act in accordance with the First Data Protection Principle.

But although the ICO claims that it took action to the fullest extent possible under the law, what is less convincing is that enforcement notices were issued against only 14 of the 44 companies. Not only is this a small number of the users of the CA's services, the list does not include some of the heaviest users, including McAlpine and Skanska, for reasons that are not revealed, despite each making what appears to be between 12,000 and 13,000 inquiries in a single year. This does not seem an adequate response to the very real hardship suffered by the blacklisted individuals, as reported in the national and regional press.<sup>15</sup>

<sup>14</sup> See [www.ico.gov.uk/upload/documents/pressreleases/2009/tca\\_release\\_060309](http://www.ico.gov.uk/upload/documents/pressreleases/2009/tca_release_060309)  
<sup>15</sup> The matter has also been raised in Parliament by Mr Michael Clapham MP.

**Table 2**  
**Companies Served Enforcement Notices**

Balfour Beatty Civil Engineering	Balfour Beatty Engineering Services (HY)
Balfour Beatty Construction Scottish & Southern	Balfour Beatty Engineering Services
Balfour Beatty Infrastructure Services	CB&I UK
Emcor Engineering Services	Emcor Rail
Kier	NG Bailey
Shepherd Engineering Services	SIAS Building Services
Balfour Beatty Construction Northern	

Source: *Construction News*, 4 August 2009

## The Source, Content and Processing of CA Files

**4.1** In order to operate a data base on the scale of that operated by the CA, it would have been necessary for people to have supplied information. The suppliers are thus as culpable as the operators and users of the blacklist, yet little seems to be known about who they are, and little attention has been paid to who they might be. It is clear that some of the information was provided by construction companies, and it may be that information was provided by other industry insiders. But it is not known – and it has never been publicly disclosed - whether any of the information was supplied by or to the security service or the Special Branch. Yet it is common knowledge that in the 1970s trade unionists would have been under surveillance by the security service and by the Special Branch, and it is now common knowledge that security service and Special Branch surveillance of trade unionists was greatly increased at this time (Milne, 1994: 274-6). Many of the CA's subjects are building workers from Liverpool and the North West, and many of the entries are made shortly after the dispute that led to the imprisonment of Ricky Tomlinson and Des Warren, the early release of Tomlinson from prison being blocked by the Director General of MI5 on the ground that 'he was involved in a communist plot to destabilise Britain'.<sup>16</sup> It is also known that on Merseyside at this time 'every week Ford would secretly submit a list of the latest job applicants to the local Special Branch', whose officers 'were expected to check these lists against our known subversives, and if any were seen on the list then strike a line through it' According to one Special Branch officer, it was 'very, very important that the unions were monitored'.<sup>17</sup> If it is the case that the CA or its predecessors supplied information to or were supplied information by the security service or Special Branch, this would raise important questions under the ECHR,

for it would almost certainly not have been done 'in accordance with law' for the purposes of the Convention, simply because there was no law at the time authorising such conduct.

### • The Content of the Files

**4.2** We have access to a small number of the files held by the Consulting Association, and before commenting on the adequacy of the government's response to the problem of blacklisting, it is necessary to give a brief account of what these files reveal. Fuller details are to be found in **Appendix 1**, in which the identities of the individuals in question have been concealed. So far as the **methods** of the surveillance system operated by the CA are concerned, a number of aspects are noteworthy:

- in many cases the information is very old, in some cases going back to the early 1970s. In one case, the only entry is for activities undertaken in 1977 (shop steward who participated in a march and rally). Indeed in many of the files we have seen, the first entries were made in the mid 1970s;
- it is clear that information was supplied by companies and to companies. In one case, it seems that the CA was contacted by a client company about a subject, who the CA advised to take up references for the subject who had applied for a job. Shortly thereafter, the client company phoned back with details of the references for entry in the CA database. While some of the companies are identified by the code used by the CA, it has not been possible to identify all of the companies;
- it is also clear that the CA had a network of spies who were supplying information, spies whose identity was concealed by code. One such spy was L5 who supplied information that a subject was 'extremely militant and destructive' and that

<sup>16</sup> *Shropshire Star*, 5 March 2009.

<sup>17</sup> BBC News, 24 October 2002.

See [http://news.bbc.co.uk/1/hi/programmes/true\\_spies/2351547.stm](http://news.bbc.co.uk/1/hi/programmes/true_spies/2351547.stm)

company 264 would not re-employ him; on 23 March 1979 and again on 2 November 1979 L5 was informed by CA that E was on a list from company 236 and company 1179 respectively. On 11 November 1987, there is redacted information 'Via L5. Di informed'. As both a provider and a recipient of information, who is L5?

It appears that the telephone was the chosen means of communication, with some companies (such as McAlpine and Balfour Beatty) being expressly referred to as having 'phone-checked' individuals.

**4.3** So far as the **substance** of what is recorded is concerned, the files we have seen typically contain very detailed personal information, including name, address(es), and date of birth, as well as national insurance number. We have also seen files with photographs of the subject (sometimes in the company of others), and in one case a home phone number and details of the subject's car (with registration number), as well as pages from his cv. In addition, the files will typically contain information about union membership, as well as

- the offices which the individual in question held within the union (whether he had been a steward, a safety representative, a full time official, a member of a regional committee, or the NEC), as well as involvement with any unofficial groups operating within the union;<sup>18</sup>
- any particular activities in which the individual may have been engaged, such as particular disputes and attendance on picket lines, involvement in health and safety campaigns and other union campaigns, and participation on marches and demonstrations;
- any political affiliations and activities of the individual, in one case the file recording that the subject had signed a petition against the 'militant witch-hunt' in the Labour Party' in the 1980s, and that he had been a candidate for the Socialist Labour Party in 2001;
- newspaper articles in which the individual in question has been mentioned (or radio broadcasts in which he may have participated), as well as letters to the press which might have been signed by the subject, these again relating to both trade union and political activities;
- miscellaneous other personal details about individual targets such as serious medical conditions, while

many of the entries are highly judgemental and personally abusive, though it is not necessary to repeat the highly offensive abuse here.

It is also the case that at least one of the files we have seen is contradictory about the subject's 'political motives', while another makes draws attention to criminal activity at a site with the words 'the following cannot be proved' being underlined. So why include it? And why include extensive details about tribunal cases in which individuals may have been involved?

#### • **Government Access to the Files**

**4.4** Although we have seen only a few of the files kept by the CA, it appears that the government in contrast has seen all or most of them, or has at least received a detailed report about their content. This in itself is a matter of some concern, if it is the case that sensitive private information has been provided not only to the government, but specifically to a government department with close links with business. It would be a matter of even greater concern if it were established to be the case that the government was given access to sensitive personal information in an unredacted form (unless of course this has been done with the consent of the individuals concerned). Were such to be the case, different kinds of questions would have to be asked about the Convention rights of the individuals concerned. It is true that under the Data Protection Act 1998 there are a number of exceptions that allow for the processing of data without the need to comply with the data protection principles. These exceptions include the processing of data for research purposes (s 33), a purpose for which both the ICO and BIS could plausibly rely if it is the case (and we do not know) that the sensitive personal data of hundreds of trade unionists have been made available to the government. But even if the processing of this data is permissible under the Data Protection Act 1998, there are also questions under the Human Rights Act if it is the case (and we do not know) that the data have been processed in an unredacted form. While it might be lawful, the question is whether it would be proportionate, particularly in view of the concerns expressed by the European Court of Human Rights about the inter-governmental transfer of confidential personal information.<sup>19</sup> Even though information remains confidential once processed, concerns arise because it becomes known to 'a wider circle of public servants'.<sup>20</sup>

**4.5** Not only does it appear that the files have been seen by BIS, it also appears that the information has been carefully analysed by the government, with the Consultation Paper recording that

<sup>18</sup> One file (not any of those in Box 1) also reveals that the CA had a separate card for the Joint Sites Committee, referred to in one subject file as 'an unofficial grouping, without formal union-backing, formed to fight what it sees as poor pay and conditions where those exist on sites'.

<sup>19</sup> *MS v Sweden* (1997) 28 EHRR 313.

<sup>20</sup> *Ibid.*

The overall purpose of the records held by the TCA was to assist members in identifying people who from their viewpoint might be classified as trouble-makers and who might therefore affect the delivery of construction work on schedule. Some records refer exclusively to poor work performance, including bad health and safety practices and violence against colleagues. However, these are the minority. Most – about 75 per cent of the 1,600 records held by TCA – concern trade unionists and, more precisely, activities associated with trade unions, including acting as a representative or involvement in industrial action’ (BIS, 2009: para 1.11).

This passage invites a number of interesting questions, such as

- Who are the other 25% (that is to say 400) whose records are held by the CA if they do not concern trade unionists, and what steps are being taken to protect them?
- Why is there no mention in the government’s analysis of the records that they also contain information about the medical condition and political activities of the individuals in question?

Given that the Government’s obvious access to CA information has given it an unassailable command of the information on which its proposals for law reform are based, it would have been helpful for a fuller account of the content of the files to have been given (provided of course the files were disclosed to government for analysis in a manner that was both lawful and proportionate). **For example, why not an account of the fact that some of the activists targeted were campaigning for better rather than bad health and safety practices?** It is very difficult for anyone else to assess the extent to which the Regulations are an adequate regulatory response to the mischief to which they are directed, in view of the fact that they do not have access to the same information. It would have been helpful too if other interested parties had been invited to see the evidence on the same terms as the government, and it would have been appropriate for these terms to have ensured that personally identifying information had been redacted.

## The Existing Legal Framework

**5.1** There are a number of measures which are designed to protect workers from anti – union activity by employers. By section 137, the **Trade Union and Labour Relations (Consolidation) Act 1992** makes it unlawful for an employer to refuse to employ someone because of his or her membership or non – membership<sup>21</sup> of a trade union, a provision first introduced by the Employment Act 1990, s 1. Unlike the provisions of sections 146 (detriment) or 152 (dismissal), section 137 does not apply to the refusal of employment because of past trade union activities or because of having used trade union services. However, the courts have taken a fairly broad view of section 137, and in one case dismissed an employer’s argument that an individual could lawfully be excluded from employment because of his trade union activities rather than his trade union membership. Section 152 of the 1992 Act is also important in this context in the sense that someone’s identity as a trade union activist may come to light after he or she has been engaged, leading to an early dismissal when the employer discovers the true nature of the employee’s past trade union activities. Here too the law has been widely read to protect from dismissal an employee who is being dismissed not because of trade union activities with his or her current employer but because of activities with a previous employer.<sup>22</sup> So someone refused employment because of trade union membership (as widely construed) based on information contained on a blacklist will be the victim of unlawful action, while someone sacked because of information contained on a blacklist may be able to bring an action for unfair dismissal.

### • Data Protection Act 1998

**5.2** The Data Protection Act also has a bearing on these matters, as already pointed out. As we have seen, it is an offence for a data processor to fail to register with the ICO. If anyone uses illegally sourced data, they can be required to stop by means of an enforcement notice issued by the ICO. But what about the individual worker whose data are being processed? Apart from being registered with the ICO, data processors (who would include organizations like the CA and the companies who used its services) are required to comply with the eight data protection principles in the Act. The first data principle provides that ‘personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes’. It would be hard to argue that a trade union

<sup>21</sup> *Harrison v Kent County Council* [1995] ICR 434. However, that decision purported to follow the Court of Appeal decision in *Associated British Ports Ltd v Palmer* [1994] ICR 97, which was subsequently over-ruled by the House of Lords in *Wilson v Associated Newspapers* [1995] 2 AC 454. As is well known, the law as explained in the latter was found by the European Court of Human Rights to breach article 11 of the

ECHR (*Wilson v United Kingdom* [2002] IRLR 128), and it is strongly arguable that in light of the Strasbourg court’s decision and the interpretive obligation imposed on courts by the Human Rights Act 1998, that the British courts would continue to read section 137 widely to include trade union activities as well as trade union membership.  
<sup>22</sup> *Fitzpatrick v BRB* [1992] ICR 221.

blacklist is being used for lawful purposes, given that its purpose is by covert means to prevent the employment of trade union activists (or to facilitate discrimination against such activists) in breach of the Trade Union and Labour Relations (Consolidation) Act, 1992. But in any event, the first data protection principle also provides that data are not to be processed unless one of the conditions in Schedule 2 are met, and in the case of sensitive personal data unless one of the conditions in Schedule 3 are also met. So far as relevant to trade union blacklists, Schedule 2 requires the data subject to have given his consent to the data processing, while Schedule 3 requires him to have given his explicit consent.

**5.3** Under the Act trade union membership information is said to be sensitive personal data, and as such cannot be processed without the consent of the individual to whom it relates. (Information relating to the individual's racial or ethnic origin; political opinions; physical or mental health or condition, or criminal record are also sensitive personal data.) But although trade union membership is sensitive personal data, it is unclear if trade union activities would fall into this category, the Act stating expressly that sensitive personal data includes information as to 'whether he is a member of a trade union', leaving it difficult to imply that trade union activities are included. However, the distinction is unlikely to make much difference for present purposes, as it is unlikely that either consent or explicit consent has been given to Kerr or to the construction companies by workers to process their personal data for the purposes of blacklisting! Breach of these principles could lead to a claim for compensation by workers, with the Act providing that 'an individual who suffers damage by reason of any contravention by a data controller of any of the requirements of [the] Act is entitled to compensation from the data controller for that damage'. In the absence of damage, however, it is very difficult to recover for distress alone, and it certainly is not possible to recover for the fact of being blacklisted per se. Nevertheless, under these arrangements, it may be possible in limited circumstances for a blacklisted worker to bring proceedings in the county court, though the problem of proof of damage may be insurmountable.

• **The Employment Relations Act 1999**

**5.4** Under the Employment Relations Act 1999, s 3, The Secretary of State may make regulations prohibiting the compilation of lists which -

- contain details of members of trade unions or persons who have taken part in the activities of trade unions, and

- are 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 Act also provides that the Secretary of State may make regulations prohibiting (a) the use of lists to which subsection (1) applies; and (b) the sale or supply of lists to which subsection (1) applies. These powers have never been used, though it is under these provisions that the new Draft Blacklist Regulations (on which the government is now consulting) have been made. A proposal to introduce regulations in 2004 was aborted because there was no evidence at the time that blacklisting was a problem. Nevertheless, the government committed itself 'quickly to outlaw blacklisting, if there is evidence that individuals or organizations are planning to draw up such lists, or if there is any evidence that there is a demand for employers for them' (DTI, 2003: para 3.20). Indeed, as a contingency measure the government proposed to prepare Draft Regulations, to be 'presented to Parliament for approval without delay, should evidence suggest they are necessary' (ibid).

**5.5** Although the government has brought forward Draft Regulations in the wake of the CA affair, it is unclear whether they are an adequate response to the problem as it has been revealed to exist. As we have seen, it is currently a criminal offence to compile and maintain and blacklist; but not to supply information to a black-lister, solicit information from the controller of a list, or to use one. It is also already unlawful or unfair to be excluded or dismissed from employment because of trade union membership; but there is no right not to be blacklisted unless this leads to adverse employment consequences. Neither of these gaps in the law is adequately addressed by the government's proposals which overlap too much with existing protections. So it is proposed by the government that

- It will be unlawful to maintain or use a blacklist; but not a criminal offence to do so. Individuals will have to bring civil proceedings against either a compiler or user, and damages will be recoverable if only if loss can be proved;
- It will be unlawful to refuse someone employment for a reason that relates to a prohibited list, with a right of complaint to an employment tribunal by anyone who is refused employment, with compensation also to include injury to feelings;
- It will be unlawful to subject an employee to a detriment by any act or deliberate failure to act in

relation to a prohibited lists, with a right of complaint to an employment tribunal for anyone who does suffer such a detriment.

Similar provision is made in respect of employment agencies as employers, and the normal three month time limit applies for the bringing of complaints before employment tribunals. **There is no power to order the destruction or forfeiture of prohibited lists.**

## The Inadequacy of the Government's Response

**6.1** One major concern about the government's proposals relates to their scope. As we have seen, the CA collected information about the trade union activities (as widely defined) of individuals, as well as information about their political views and medical condition, which are sensitive personal data under the Data Protection Act 1998. This information is collected only because of the trade union activities of the individuals concerned and should be covered in any new law. A prohibited list for these purposes should thus be defined to include such information. As currently drafted, the Regulations apply to

'details of members of trade unions or persons who have taken part in the activities of trade unions'

On one reading this would appear to mean that it is unlawful to maintain a list with any details about someone **because** he or she has taken part in trade union activities. That is to say, if a list is being kept about someone because he or she has taken part in trade union activities, it will be unlawful to maintain a list which includes **any** information about the individual in question. **For the avoidance of doubt the word any should be inserted before details in Draft**

**Regulation 3**, to prevent any suggestion that it is only information about trade union activities that would otherwise fall within the definition of a prohibited list.

- **'activities of trade unions'**

**6.2** The million-dollar question then is what is meant by 'activities of trade unions' for these purposes. Section 3 of the Employment Relations Act 1999 provides that 'expressions used in this section and in the Trade Union and Labour Relations (Consolidation) Act 1992 have the same meaning in this section [as in that Act] (s 3(6)). As pointed out by BIS, however, 'there is no definition of 'trade union activities' given in the 1992 Act, where the term is frequently used', though it is incorrect to say, as the government does that the phrase is used 'always in conjunction with the words

'at an appropriate time' (BIS, 2009). The phrase is used first in sections 146 and 152 of the 1992 Act where there is protection against discrimination and dismissal for anyone who takes part 'in the activities of an independent trade union at an appropriate time'; and again in section 170 where there is a right to unpaid time off work for the purpose of taking part in 'the activities of the union'. As might be expected, there is a difference in the approach of the courts and tribunals to these two different sets of provisions: while sections 146 and 152 are not unreasonably (but not generously) construed to cover a wide range of trade union activity, section 170 is very narrowly construed. So far as section 170 is concerned, an important case is *Luce v Bexley London Borough Council*<sup>23</sup> where teachers were refused time off work to attend a lobby of Parliament about legislation affecting teachers. In holding that this was not a trade union activity, Mr Justice Wood said that in defining trade union activities for the purposes of what is now section 170, 'it cannot have been the intention of Parliament to have included any activity of whatever nature', and that 'in a broad sense the activity should be one which is in some way linked to [the] employment relationship, ie, between that employer, that employee and that trade union'. It would be extremely surprising if for the purposes of blacklisting, activity of this kind were not to be protected.

**6.3** There is, however, an even more urgent concern. In the case of TULRCA, s 170, but not in the case of TULRCA, sections 146 and 152, it is expressly provided that 'the right conferred by subsection (1) does not extend to activities which themselves consist of industrial action, whether or not in contemplation or furtherance of a trade dispute' (s 170(2)). However, although it is not expressly provided that taking part in industrial action is excluded from sections 146 and 152, such an exclusion is implicit in the existence of the separate legal regulation of dismissals for taking part in industrial action, and has been so held by the courts. It seems implausible that Parliament would say that the right to take part in the activities of a trade union includes the right to take part in industrial action when the same Act provides that dismissal for taking part in industrial action will not be unfair unless certain conditions are met. In any event, it is unlikely that industrial action will be undertaken at an appropriate time (that is to say outside working hours or during working hours with the consent of the employer), and would be excluded for that reason. But even if industrial action were to be taken at an appropriate time (as in the case of a ban on voluntary overtime - by definition taking place outside working hours), it seems highly improbable that this would be regarded as a

<sup>23</sup> [1990] ICR 591.

trade union activity for these purposes. There is thus a real uncertainty about whether taking part in industrial action would be a trade union activity for the purposes of the Regulations, if the Regulations are to have the same meaning as the 1992 Act, and a cautious court might well be inclined to the view that it is not, regardless of which of the uses of the phrase trade union activities in the 1992 Act is adopted for the purposes of the Draft Regulations.

- **Other Concerns about Scope**

**6.4** Quite apart from the uncertainties of scope caused by the narrow drafting and narrow construction of the phrase trade union activities in the 1992 Act, additional concerns have been raised by the government's Consultation Paper where it is said that

It was suggested in the 2003 consultation that the term should be defined in the regulations to ensure the participation in unofficial industrial action and criminal activities in the name of the trade union were not covered. The Government considers it very unlikely such behaviours would ever be categorised as trade union activities for these purposes. For example, because unofficial industrial action by definition is not authorised by the trade union, it is difficult to see how such activity would be categorised as a trade union activity. In contrast, all forms of official industrial action are likely to qualify because the qualifying phrase 'at an appropriate time' is deliberately not used in this context. Case law suggests that the courts would not seek to designate any criminal activity as a legitimate trade union activity. The Government does not therefore intend to supply any clarification of this term's meaning in the regulations' (BIS, 2009: para 2.19).

Although there is no reason to be sanguine about the inclusion of official industrial action within the definition of trade union activities, nor is there reason to be as confident about the need to exclude participation in unofficial action or criminal activity. While no one condones the deliberate commission of criminal offences, the government's proposals nevertheless give rise to the worrying prospect of private organizations and employers being led to believe that it is acceptable to keep blacklists of workers who may have committed criminal offences, whenever committed, whatever the nature of the offence, and regardless of the way in which the matter was disposed of. There is in any event no reason why all criminal activity should be excluded from the definition of trade union activity, as in the case of the person arrested on a picket line for obstruction of the highway, simply the unfortunate victim of the exercise of police discretion.

**6.5** There are thus minor offences which can quite easily be committed in the course of trade union activity, and there is no reason why the activity in question should cease for that reason to be a trade union activity. Similarly, the exclusion of unofficial action would be even more unacceptable. The activities of a trade union are not simply the activities officially sanctioned by the national office of the union, as made clear by the EAT in *British Airways Engine Overhaul Ltd v Francis*<sup>24</sup> where a shop steward representing a group of women in dispute with their union held an inpromptu meeting and issued a press release criticizing the union. The shop steward was disciplined for issuing a press release without company approval and complained that the employer's action was unlawful as having been taken against the steward because of her trade union activities. The EAT said that

It seems here that these women were getting together, as union members, to discuss matters with which the independent trade union was concerned. It does not seem to us to be conclusive against Mrs Francis's claim that they did not do so at a meeting of some committee or at a formal meeting of the branch. They were a well defined group of the union, meeting with their shop steward, and even though the criticism they might be making might not be acceptable to higher branches, or higher officials in the union, it seems to us that they were still engaged in their discussion, their criticism, and in their resolution, in the activities of an independent trade union. It seems to us to be really ignoring the reality of the issue, and the immediacy of the issue to the women at this time, to say that it was all too remote from the activities of the union.

It would be a curious outcome if employers were to be told that they could continue to use blacklists of trade unionists who had engaged in unofficial action, which apart from anything else risks violating ILO Convention 98, given the repeated criticism of the United Kingdom by the ILO about the restrictions on the right of trade unions to take industrial action to support workers dismissed for taking unofficial action. **The Regulations should thus apply not to 'trade union activities', but to 'activities associated with trade unions', a helpful phrase used by BIS (2009: para 1.11) to describe the content of the CA files.**

<sup>24</sup> [1981] ICR 278.

# Compensation and Penalties

**7.1** It is a major failure of the Draft Regulations that there is no right not to be blacklisted, and no right to be compensated for breach of that right. This is not to deny that there are genuine improvements on the present law, in the sense that

∑ if an employer or anyone else violates the terms of Draft Regulation 3, it will be possible for an individual to bring legal proceedings to recover any loss he or she may have suffered;

- if anyone is refused employment and there is evidence that the respondent has kept or used a blacklist, the worker will be able to bring an action in an employment tribunal if the refusal of employment was for a reason related to the blacklist;
- if anyone claims to have suffered detriment as a result of blacklisting, he or she will be able to bring an action in an employment tribunal to recover for losses that have been caused as a result.

This, however, is not enough. **There should be a right to a basic award of compensation for the fact of being blacklisted**, regardless of any loss suffered, though of course there should be an entitlement to an additional compensatory award for any losses that flow from the fact of being blacklisted. The amount of the basic award should vary according to the volume of material and the length of time the individual has been on the blacklist. **The courts should also be empowered to order the forfeiture of blacklists.**

Where a blacklist is forfeited either as a result of legal proceedings (civil or criminal (on which see paras 7.2 – 7.3 below)), **the blacklist should be retained by the ICO**, who should have a legal obligation to inform anyone on the blacklist that they are on the list and of any legal remedies that may be available to them

## • ∑Criminal Sanctions

**7.2** Nor is it sufficient that breach of the Regulations should give rise to civil proceedings only. This is justified by the government on the ground that

Enforcement of these regulations should be viewed in conjunction with the enforcement of related legal requirements. Trade union blacklists will generally breach both these regulations and the 1998 Act, because blacklists must generally operate on covert lines to be effective. As the TCA case has illustrated, the IC has strong powers both to investigate breaches of the 1998 Act and to undertake criminal prosecutions. If blacklisting

occurs in the future, it may well be uncovered via an investigation of the IC, and lead to prosecutions under the 1998 Act. The Government does not therefore see a need, and it would be a wasteful use of scarce public resource, to establish a new investigative role for a public authority to uncover breaches of these regulations' (BIS, 2009: para 2.22).

It is a matter of some regret that the government should regard public responsibility for the stamping out of blacklisting to be a waste of money, an approach to the question of remedies that appears to contradict the government's stated belief that 'individuals should be adequately protected under the law by **a robust enforcement regime**' (ibid). It is also an approach that appears to contradict the government's stated policy objectives, as set out in the Consultation Document, that the purpose of the Regulations is to 'give a clear signal **about the unacceptability of blacklisting** and that regulation is necessary to stamp out this practice' (ibid). The most stringent enforcement regime calculated to stop disgraceful behaviour, and the most effective way of giving a signal that a particular form of conduct exceeds the boundaries of community acceptability, is by use of the criminal law. There is no more robust a sanction and no more greater an indication of unacceptability, particularly if in the case of companies, liability were to attach to both the company (by way of fines) and its personnel (by way of fines and imprisonment) when the law is casually, systematically and routinely flouted.

**7.3** Apart from anything else, contrary to what the government suggests, the TCA case exposed the weaknesses of the 1998 Act rather than the strengths of the ICO. It revealed that while proceedings could be brought against Mr Kerr, they could **not** be brought against the companies, all but 14 of the 44 of which got off scot-free, with only enforcement notices being issued in the case of the 14 which attracted the ire of the ICO. There was no question of criminal liability of the companies or their personnel for disgraceful conduct which, in the words of Alan Ritchie, has ruined lives. The government's proposals will perpetuate this unacceptable state of affairs exposed by the CA case, where it is a criminal offence to compile and sell access to blacklists, but not an offence to buy access to and use them. There seems no reason why the big multinational companies that trade in this information should (a) continue to have an immunity from the criminal law, or (b) not be treated in the same way as the small fry their largesse nourishes and sustains. As pointed out by BIS, these companies are 'large and well-resourced organizations [that] did not act in

ignorance of the law' (BIS, 2009: 34). This is not to suggest that damages should not be available, but damages should be in addition to rather than instead of criminal liability. It is wholly unacceptable that responsibility for policing conduct of large employers which is offensive to community standards (as well as human rights) should be shoved off to individuals - often without substantial resources - to enforce the law themselves, particularly in view of the obstacles to enforcement caused by conduct which by its nature is covert. These obstacles (which would be even more formidable were the blacklist to be held offshore) suggest that the law can only properly be enforced by a State agency with the powers that only State agencies can exercise, and with resources that well exceed those of the victim of this kind of conduct.

### • **Compensation for Existing Victims**

**7.4** Quite apart from the foregoing concerns, there are also concerns that no provision is made to compensate the individuals who suffered loss as a result of the activities of the Consulting Association and the failure of the government to take steps earlier to make this conduct unlawful. Neither the existing law nor the new Regulations will provide relief to a large number of people who have been the victims of blacklisting by the CA, including -

- Those whose rights were violated before either the Employment Act 1990 or the Data Protection Act 1998 were introduced;
- Those whose claim is that their privacy has been breached by their inclusion on the blacklist, whether or not the information was processed;
- Those who are unable to prove that they have been refused employment because of the use of the blacklist (as where the identity of the company is unknown)

The failure to address this issue of retrospective compensation compares with the position in 1980 when the then Conservative government was elected with a pledge to act against closed shop arrangements. At the same time, the European Court of Human Rights held that the dismissal of three railway workers in circumstances where a union membership agreement was introduced violated their right to freedom of association under article 11 of the ECHR.<sup>25</sup> Faced with the prospect of multiple claims to the Strasbourg court from workers who had been dismissed in similar circumstances, the then Conservative government introduced a retroactive compensation scheme for the benefit of those

employees who had been dismissed between 1974 and 1980 when the law was changed.<sup>26</sup> The scheme was set up by statute and administered by a retired senior civil servant in what was then the Department of Employment. There is a compelling case for the introduction of a similar scheme to compensate those people who have been discriminated against not because they have been dismissed for non membership of a trade union, but because they have been blacklisted because of their trade union activities. What is sauce for the goose, is sauce for the gander.

**7.5** In order to qualify for compensation under the proposed scheme, it would be necessary for the individual in question to show that he or she was on the CA blacklist. Thereafter he or she would qualify for one or more of three levels of compensation:

- 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 formula of £x for every year an entry appeared in relation to the individual concerned. So someone entered in 1975 would be entitled to more than someone entered in 1995;
- A compensatory amount of a reasonable estimate of projected loss of earnings for anyone who can show that he or she had applied for specific vacancies during the period in question, and that the blacklist was consulted by the company or companies concerned; and
- An aggravated amount for injury to feelings for those whose file is judged to be particularly offensive, for example because it contains abusive or defamatory comments, information about medical conditions, or information about political views or activities.

It would be unfair if the costs of this compensation scheme were to be met by the taxpayer, and unfair to expect trade unionists as taxpayers to meet the losses caused by the companies which were responsible for the abuses which have taken place. 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.

<sup>25</sup> *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38.

<sup>26</sup> For full details of the scheme, see Ewing and Rees (1983).

# Conclusion

**8.1** The blacklisting revealed by the CA case raises a number of serious concerns about the extent to which the United Kingdom complies with a number of legal obligations, most notably the European Convention on Human Rights, on at least three different grounds:

- The first concern relates to the source of the information on the CA blacklist and the role of any public authorities in supplying or receiving information. This needs to be addressed. If it is the case that any public authorities were working in any official capacity with the CA or its predecessors, issues would arise under articles 8 and 11 of the ECHR because there was no legal authority for such surveillance by the State at the time;
- The second concern relates to the failure on the part of successive governments to take steps to prevent the blacklisting of individuals, and the failure to activate the Employment Relations Act earlier. The very fact of being blacklisted may in itself have been a breach of Convention rights, while it is almost certainly the case that individuals will have suffered losses which they will now be unable to prove and from which there is no redress; and
- The third concern relates to the possibility that sensitive personal data may have been shared with BIS (and perhaps others), albeit for benign purposes. It needs to be established how BIS became aware of the contents of the CA files, and the manner in which the information was made available to them. Depending on the way in which these data were processed, there is at least a risk that there has been another breach of the Convention rights of the individuals in question.

**8.2 Turning to the government's proposals, the key problem is the refusal to acknowledge a legal right not to be blacklisted.** From that starting point, it would have been sensible in the light of recent experience to ask a number of basic questions about the gaps in the existing law that undermine any such right. These questions are (i) what is currently prohibited and how; and (ii) what are the gaps that need to be filled? The existing law (in the form of the Data Protection Act 1998) applies criminal sanctions to the compiler of the blacklist, but not to the person who supplies, solicits, or uses information. Similarly the existing law (in the form of TULRCA 1992) provides a civil remedy by way of a complaint to an employment tribunal if refused employment because of trade union

membership, but provides no remedy for being blacklisted per se. The two overriding needs for which the law thus fails to provide are (i) criminal sanctions for supplying, soliciting and using blacklist material; and (ii) a right to compensation for the fact of being blacklisted. Otherwise, there are a number of specific questions and concerns about the government's proposals which ought to be addressed. These are as follows:

- The **scope of prohibited conduct** is too narrow, and should apply not only to 'compile, use, sell or supply a prohibited list', but should apply also to the supplying of information for a prohibited list, and the soliciting and use of information on a prohibited list (para 5.5);
- The proposed Regulations should be amended to make it clear that prohibited conduct applies to **any** details about members of trade unions or persons who have taken part in activities associated with trade unions, where this is being done for the purpose of discrimination (para 6.1);
- The **meaning of trade union activities** is undefined, referring back to the contradictory and unsatisfactory provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 where the term is too narrowly construed by the courts (paras 6.2 – 6.5);
- The proposal not to define trade union activities to include **industrial action** because the courts will 'read it in' is implausible, given that participation in industrial action does not constitute a trade union activity for the purposes of the 1992 Act (paras 6.2 – 6.3);
- The proposed **exclusion of all forms of criminal activity** from trade union activity is too narrow. Trade union activists may be arrested for trivial offences (such as obstructing the highway) or trespass while on trade union approved business (para 6.4);
- The suggestion that the protection should apply only to **official trade union action** is too narrow. This would make the protection against blacklisting even narrower than the corresponding provisions of the 1992 Act where action directed against the union has been protected (para 6.5);
- The proposed application of the Regulations to the activities of trade unions is thus too narrow and should be amended or defined to apply to the

phrase used by BIS to describe the content of the CA files, that is to say **activities associated with trade unions** (para 6.5);

- There should be a right to a **basic award of compensation for the fact of being blacklisted**, regardless of any loss suffered. The amount of the basic award should vary according to the volume of material and the length of time the individual has been on the blacklist (para 7.1);
- Where blacklisting of an individual has caused loss, **there should be an entitlement to an additional compensatory award** for any losses suffered as a result, and an individual should be able to apply to an order for the forfeiture of a blacklist (para 7.1);
- The Regulations should clearly provide for **the forfeiture of a prohibited list**, and the notification of all people whose names are included on such a list, in all cases where a person has been convicted of an offence relating to a prohibited list, or where an individual has successfully brought a civil action (para 7.1);
- Where a blacklist is forfeited either as a result of civil or criminal proceedings, **the blacklist should be retained by the ICO**, who should have a legal obligation to inform anyone on the blacklist that they are on the list and of any legal remedies that may be available to them (para 7.1);
- The proposal that it should not be a **criminal offence** to maintain or use blacklists considerably undermines the purpose of the Draft Regulations and raises serious questions about precisely what added value they will bring to the existing law (paras 7.2 – 7.3);
- **It should be a criminal offence to supply, compile, solicit or use information in connection with a prohibited list**, and there should be liability attaching to both the company concerned, as well as any individual officers or employees of the company who have been involved (paras 5.5, 7.2 – 7.3, 8.1);
- It should be an offence to supply information for a **blacklist which is being held overseas**, and it should be an offence to solicit information from such a blacklist or to use information supplied by such a blacklist, whether directly or indirectly (paras 7.2 – 7.3, 8.1);
- The Regulations offer no redress for the hundreds of

people whose rights have been violated in some cases for more than 30 years; there is a need for a **retroactive compensation scheme** for the victims of blacklisting similar to the scheme introduced in 1982 for closed shop dismissals (paras 7.4 – 7.5).

Unless these matters are fully addressed, it is almost inevitable that the blacklisting scandal will be pursued at the highest levels, and if necessary to the European Court of Human Rights, where victims will be able fully to assert their rights under article 8 and 11 of the European Convention on Human Rights.

**8.3** In the meantime, one final matter needs to be addressed. The employment tribunal case which led to the exposure of the Consulting Association Ltd and the conviction of Mr Kerr,<sup>27</sup> is also said to have revealed other commercial practices which are unworthy of the companies which are said to have been involved. The dismissal of the three men who brought the employment tribunal proceedings of 2006 coincided with a constructive dismissal claim by the director of a construction company, which was said to be the ‘keeper of one of the blacklists’.<sup>28</sup> The scorned director provided three lists totalling 1,087 names implicating five companies, but also helped the three men involved in the employment tribunal proceedings to track down a witness who admitted that the contractors by whom the men had been employed ‘had been put under pressure by [the main contractor] to fire [one of the three men]’. It also transpired that the sub-contractor was made aware of the blacklist by the main contractor, ‘who they said threatened to give them no more contracts if they employed us’.<sup>29</sup> That is to say, the men claim that the main contractor told the sub-contractor that these men are on a black-list and must be fired. This exposes a problem not fully addressed either by the Draft Regulations or by the existing law (whereby it is unlawful to put commercial pressure on someone to require work to be done by people who are not members of trade unions, with affected individuals being entitled to sue for damages for loss suffered as a result).<sup>30</sup> Quite apart from the provisions of the Draft Regulations, there is a need for change here too, to make it clear that it is unlawful to use commercial pressure to exclude or dismiss from employment someone because he or she appears on a blacklist by reason of activities associated with trade unions. This could be done by amending the Draft Regulations, as the section 3 of the Employment Relations Act 1999 empowers the government by regulation to amend primary legislation, a power already proposed for other purposes in the Draft Regulations.

<sup>27</sup> See footnote 1 above.

<sup>28</sup> *The Morning Star*, 13 May 2009.

<sup>29</sup> *Ibid.* Neither of the companies (main contractor or sub-contractor) (which are named in *The Morning Star*) is included on the ICO lists of 44 or 14 companies referred to in the text above.

<sup>30</sup> Trade Union and Labour Relations (Consolidation) Act 1992, s 145.

# Appendix 1

## Sample Material from Consulting Association Files

- **A and B** – A's file contains his date of birth, his national insurance number, and employment information from 1982 to 1988. He is said by a source (280) to have been 'very troublesome', and as being 'old style Communist Party'. It contains additional information about offices A held in the union between 1989 and 2001 (delegate to regional conference, elected member of general council, shop steward convenor), along with information about his activities in these roles (including circulars and letters to the press). There is also information about a serious medical condition. The ICO reveals that one source of this information is Vinci plc (Norwest Holst Group)
- **B's** file contains his national insurance number and his occupation, and does not appear to contain any information pre-2003. It records that in December 2003 he was involved in a dispute with an unnamed company. It is further recorded that B 'slowed job, looked for increase of rate of a third. Brought in H&S issues. Intimidation of workforce. Very plausible'. It is also recorded that B was one of four men on a project in the North West, and finally that 'would not recommend for employment'. The source of this information was the CA's main contact in 3280
- **C** – the file contains his date of birth, his national insurance number, and his occupation, as well as his union membership. It mainly covers the period from 1975 to 1986, and notes that C had been employed by one company in 1976 for five months and that they would not re-employ him; that he was employed by a second company in 1976 for four months and that 'they had no complaints'; and that he had been employed by a third company in the same year and that 'under normal circumstances he was OK but give him an inch and he started trouble'.

All this information was provided by a source who had contacted the CA about C along with a list of other people. The CA had advised the source to take up references which it duly did, and phoned back on the next day with the foregoing details. Subsequent information records that in 1979 C was now a full time officer of the union, and that in 1980 'as a new boy he is out to make a name for himself and is acting militantly'. Three subsequent entries in 1985 and 1986 record that C was a union organiser and that he had signed a petition against the 'militant witch-hunt' in the Labour Party'. Thereafter, the only entry relates to C's candidature

for the Socialist Labour Party at the general election in 2001.

- **D** – the file contains his date of birth, national insurance number, occupation, and his postal address (including four previous postal addresses). The information on the file goes back to 1982, it being recorded that 'After making the usual check with us in March 1982, which gave a negative result Co 278 engaged this man on the 23.3.82... After a months employment he was proving to be a strong union agitator and disturbing factor on site. He has since been elected shop Steward of his union UCATT on the site. They [the employer] would like to get rid of him and would not re-employ him'.

It was also revealed that four checks were made to the CA by four companies between July 1985 and May 1986; that in 1986 a source had revealed that D was employed by them but that when his contract terminated at the end of the year, they would not re-employ him; and that in 1994, he 'applied to 3223 [Balfour Beatty] Main Contact given details with request for current reference. Co has not employed'. The file is completed with an entry about D's employment on 27 March 2003 – he was working for 3252/A39's \*\*\*\*\* project'.

- **E** – the file contains his date of birth, national insurance number, occupation, and his postal address. According to the file, E 'became joiners' shop steward which was the start of continuous trouble. Not politically motivated, but well versed in trouble-making. More astute than [REDACTED]. Well versed in manipulation situations. Known to travel to London for work with sub-contractors'. A different entry for the same man, however, records that he is 'very militant', and that he is 'a troublemaker and politically active. Also prepared to use intimidation'.

This file indicates the active presence of someone called L5. On 17 August L5 supplied information that E was 'extremely militant and destructive' and that company 264 would not re-employ him; on 23 March 1979 and again on 2 November 1979 L5 was informed by CA that E was on a list from company 236 and company 1179 respectively. On 11 November 1987, there is redacted information 'Via L5. Di informed'. It also appears that inquiries were made by McAlpines and by Balfour Beatty by both of whom he was 'phone-checked'. The last entry was for 1989.

- **F and G** - the file contains F's date of birth, national insurance number, occupation, and his postal address. According to the file, F is 'very militant', 'politically active', 'will use intimidation', a 'militant troublemaker', and 'a very militant person'. All of the entries were from 1975 to 1979, and there is a great

deal of redaction of informers and people who were informed. It appears that the ICO was unable to identify any of the six companies involved.

The file contains G's date of birth, national insurance number, occupation, and his postal address. Here too there is information from L5 about events in March 1976, though the first entry is 1985, and the last is 1988. Another 'reported militant troublemaker. The file contains details of the companies who employed him in this period, and job applications he made. He had been name checked by Laing O'Rourke and Crown House, but another four companies were unknown.

- **H** Again this file contains details of date of birth, national insurance number, occupation and address. It also refers to his place of origin. The first entry was in 1990, and stated that he had organised a petition with the union about homelessness. He was described as 'bad news' by the main contact at one company, and two years later he was seen on what was described as an 'unlawful picket'. There are various bits and pieces of intelligence about his movements and activities, including a remark that 'unable to confirm but possibly the same person who was...'. There are articles from Construction Weekly in which the subject is referred to (and photographed) in relation to his dismissal for trade union activities, as well as an articles in UCATT Viewpoint and New Times which were written by the subject or in which he is referred to.

There are also some detailed allegations relating to the individual's involvement with an unofficial grouping within the union, the Joint Site Committee, said by UCATT Viewpoint to be a London based rank and file organisation. The file also states that in 1994 the individual was involved with the 'Building Industry Link' – said to be a new UCATT backed house-building campaigning group. In 1996, the file refers to a press article 'which refers to previous membership of CP' and later in 1996 he is said to be 'active'. There is a letter to UCATT Viewpoint in 1998 also on the file. Some of the information (including the address) appears to have been incorrect, and much of it is hotly contested. The last entry in this file was 1998.

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**THE  
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UCATT is the UK's only trade union specialising in construction, with 125,000 members spread over England, Wales, Scotland, Northern Ireland and in the Republic of Ireland.

UCATT members work both in the private and public sectors, the latter including Local Authorities, NHS and the prison service. UCATT represents its members in all employment matters such as pay, terms and conditions, pensions and training.

It actively campaigns to improve construction workers' conditions, such as in the areas of bogus self-employment, directors' duties, health and safety and asbestos.

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