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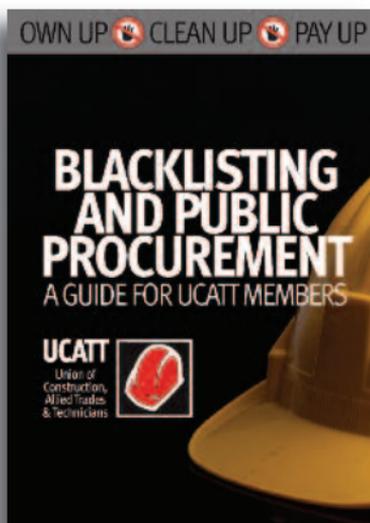
# BLACKLISTING AND PUBLIC PROCUREMENT

## A GUIDE FOR UCATT MEMBERS

**UCATT**

Union of  
Construction,  
Allied Trades  
& Technicians





## 1. What is the purpose of this guide?

This guide seeks to assist UCATT members, activists, officials and branches in lobbying their local councils and councillors, public authorities and regional governments, to stop giving public contracts – i.e. public money – to firms that have blacklisted workers and have not made up for it; or to those firms that might be blacklisting or using blacklists at present.

The key aim we want to achieve is for as many public bodies as possible to adopt a policy which confirms that blacklisting companies will not be tolerated in public procurement processes, and will be removed from public contracts already awarded if it is discovered during the course of the contract that they are engaging in blacklisting activities.

The guide is divided into different sections, including a definition of blacklisting (section 2), information on The Consulting Association (sections 3-5) and blacklisting in a legal framework (section 6). The remainder then addresses a number of different questions related to blacklisting and public procurement (sections 7-12), being the central theme of the guide.

## 2. Blacklisting: a nasty, secretive and unaccountable practice

“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.”<sup>1</sup>

In more legal terms, blacklisting describes the activity when a list of persons is “marked out for special avoidance, antagonism, or enmity

on the part of those who prepare the list or those among whom it is intended to circulate.”<sup>2</sup>

In relation to the blacklisting of trade union members, the Department for Business, Innovation and Skills defines it as “the systematic compilation of information on individual trade unionists and their use by employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade union activity.”<sup>3</sup>

### **3. What is The Consulting Association?**

In 2009, the Information Commissioner’s Office (ICO) exposed details of a large-scale surveillance operation run by a company called The Consulting Association (TCA). This company, directed by a Mr Ian Kerr, collated files on thousands of construction workers and sold the information to 44 construction companies. Over 3,200 files of blacklisted construction workers were seized by the ICO, however it later emerged that this was only a fraction of documents held by The Consulting Association.

Companies could not only buy information held on individual workers from The Consulting Association, many also supplied information on workers back to the blacklist. An individual check for information on a particular worker cost £2.20, plus an annual membership fee of £3,000. Between April 2006 and February 2009, construction companies paid just under £480,000 to The Consulting Association for membership fees and checks on individual workers.

In contrast, many of the workers who were on the blacklist of The Consulting Association had their lives ruined, unable to find employment in the construction industry, blacklisted for their trade union activities or for raising health and safety concerns.

When prosecuted for a breach of data protection in July 2009, Ian Kerr was fined just £5,000 for breaching the Data Protection Act and had to pay £1,187 in costs. While court proceedings against the user/provider companies were launched in 2013, so far all companies have escaped without penalty or punishment.

Instead of owning up to their wrongdoing and offering meaningful compensation, eight of the companies that operated the blacklist - Balfour Beatty, Carillion, Costain, Kier, Laing O'Rourke, Sir Robert McAlpine, Skanska UK and Vinci PLC – have unilaterally launched the “Construction Workers Compensation Scheme”. The scheme offers compensation of around £4,000 for a worker whose name was on the blacklist, and possible higher payments if they can prove discrimination or an impact on their employment. Signing up to the scheme comes along with a gagging clause. UCATT continues to advise members on this matter.

### **4. Legal action against the blacklists**

In 2013, UCATT launched legal action against the companies that operated the blacklist. In November 2013, UCATT, through its legal team at OH Parsons, issued the first claims in the High Court. The number has risen to 86, and a few dozen more should be issued in 2015.

In a first victory at the High Court in July 2014, the judge hearing the case agreed that hundreds of separate cases made by victims of blacklisting will be heard together under a Group Litigation Order. This means that all of the blacklisting cases are being dealt with as part of the same process and the legal teams for UCATT, Unite, GMB and the Blacklist Support Group are working together on this.

In a further victory for UCATT the Judge ruled that the names and addresses of blacklisted workers will not be made publicly available

and will be kept in a sealed envelope which the Judge has control over. Therefore the blacklisting companies will not be given access to the names and addresses of their victims whose lives they destroyed or be able to replicate the blacklist seized by the ICO. It is likely the first cases will go to trial in the spring of 2016.

## 5. Which companies used The Consulting Association?

The more than 40 construction firms that used the services of The Consulting Association include renowned household names, such as Balfour Beatty, Carillion, Costain, Kier, Laing O'Rourke, Sir Robert McAlpine, Skanska UK and Vinci PLC (the companies which, as mentioned above, are trying to escape justice through the "Construction Workers Compensation Scheme").

Below is the list of the companies that used the blacklist. <sup>4</sup>

- Amec Building Ltd
- Amec Construction Ltd
- Amec Facilities Ltd
- Amec Ind Div
- 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 Nutall Ltd)
- C B & I
- Cleveland Bridge UK Ltd
- Costain UK Ltd
- Crown House Technologies (Carillion/Tarmac Const)
- 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 Limited – Ex Member
- Morgan Ashurst
- Morgan Est
- Morrison Construction Group – Ex Member

- N G Bailey
- Shepherd Engineering Services
- Sias Building Services
- Sir Robert McAlpine Ltd
- Skanska (Kaverna/Trafalgar House PLC)
- SPIE (Matthew Hall) – Ex Member
- Taylor Woodrow Construction Ltd – Ex Member
- Turriff Construction Ltd – Ex Member
- Tysons Contractors – Ex Member
- Walter Llewellyn & Sons Ltd – Ex Member
- Whesoe Oil & Gas
- Willmott Dixon – Ex Member
- Vinci PLC (Norwest Holst Group).

## 6. Blacklisting and the law

In 1999, legislation enabled UK Government to pass regulations against blacklisting, but it failed to do so. Only a year before the blacklist was uncovered, UCATT had been lobbying the Government to pass regulations, only to be told that there was no need for them as there was no evidence of blacklisting.

### 6.1 Employment Relations Act 1999 (Blacklists) Regulations 2010

The year after The Consulting Association's office was raided, blacklisting of individuals was made unlawful through the Employment Relations Act 1999 (Blacklists) Regulations 2010. The Regulations make it unlawful to compile, supply, sell or use a "prohibited list" (i.e. a blacklist).<sup>5</sup>

There are two criteria which define a prohibited list. Firstly, the list must contain details of current or former trade union members or "details" of persons who are taking part or have taken part in trade union activities. A list might contain details of both trade unionists and non-trade unionists.

Secondly, the list must have been compiled with a view to being used by employers or employment agencies for the purposes of discrimination when recruiting or during employment on grounds of trade union membership or activities. Both criteria

must be met for a list to be prohibited.

As well as the general prohibition against compiling, selling, supplying and using a blacklist, the Regulations also make it unlawful for an employer/employment agency to

- refuse a person employment for a reason related to a prohibited list;
- dismiss an employee for a reason related to a prohibited list;
- subject a worker to any other detriment for a reason related to a prohibited list.

Individuals may enforce the rights contained in the Regulations through the employment tribunal or the county court in England and Wales (or the Court of Session in Scotland).

UCATT was highly disappointed with the new anti-blacklisting regulations when they were introduced in 2010, as the measures are so weak that they will not prevent blacklisting from occurring. The regulations do not even make blacklisting a specific criminal offence and only prevent workers from being blacklisted for undertaking narrowly defined 'trade union activities'. There is no freestanding right not to be blacklisted. Rights only arise if the consequences of blacklisting result in refusal of employment, detriment, dismissal or redundancy.

The regulations also fail to grant an automatic right to compensation for any worker who discovers they have been blacklisted. If a blacklist is discovered, workers will not be told automatically they have been blacklisted. Because of these deficiencies, UCATT has been campaigning to have the regulations overhauled so that they are truly effective.

Other legislation relating to blacklisting are the Data Protection Act 1998 and the Trade Union and Labour Relations (Consolidation) Act 1992.

## **6.2 Trade Union and Labour Relations (Consolidation) Act 1992**

British law contains various measures designed to protect workers from anti-union activity – such as blacklisting - by employers. These are largely set out in the Trade Union & Labour Relations

(Consolidation) Act 1992 and include:

- Section 137 - refusal of employment on grounds relating to union membership
- Section 146 - detriment on grounds relating to union membership or activities
- Section 152 - dismissal on grounds relating to union membership and/or activities
- Section 153 - selection for redundancy on grounds relating to union membership and activities.

These rights can be exercised by those who have suffered refusal of employment, detriment short of dismissal, or acts of dismissal on grounds of their trade union membership and/or activities due to their employer or prospective employer accessing a blacklist.<sup>6</sup>

### **6.3 Data Protection Act 1998**

The Data Protection Act sets out how personal information is used by organisations, businesses or the government. The fundamental purpose of the Data Protection Act is based on eight principles, requiring that information is:

- 1 – fairly and lawfully processed
- 2 – processed for limited purposes
- 3 – adequate, relevant and not excessive
- 4 – accurate
- 5 – not kept for longer than is necessary
- 6 – processed in line with employees' and members' rights
- 7 – secure
- 8 – not transferred to countries outside of the European Economic Area without adequate protection.

So the Data Protection Act 1998 can be used against the compiler or holder of a blacklist and anyone using data from it.<sup>7</sup> In July 2009, Ian Kerr of The Consulting Association was convicted under the following

provisions of the Data Protection Act:

- Processing personal data without being registered under the Act with the Information Commissioner contrary to section 17.
- Failing to notify the Information Commissioner of his wish to be registered contrary to section 18; and
- Not being on the register of data controllers held by the Information Commissioner in accordance with the Act (section 19).

## **7. How can blacklisting be tackled via public procurement?**

We believe that blacklisting or potential blacklisting on public contracts should be tackled via two routes:

- a. stopping blacklisters getting public contracts in the first place; and
- b. enabling the cancellation of a contract if a company is found to be blacklisting after the awarding of a contract or when work has already begun.

## **8. How to stop blacklisters getting public contracts**

### **8.1 Can contracting authorities exclude blacklisters?**

The first question arising here is: can contracting authorities exclude blacklisters? The positive answer is, in principle, yes. This is because blacklisting can amount to an act of grave misconduct and so can justify exclusion of a company based on Regulation 23(4) of the Public Contracts Regulations 2006.<sup>8</sup>

The exact wording of this paragraph provides that: “A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator ... (e) has committed an act of grave misconduct in the course

of his business or profession”.<sup>9</sup> However, exclusion

- must be proportionate and considered on a case-by-case basis.
- must be justified on the evidence (for example an admission by a company or a court decision)
- is not a means of punishing operators for past wrongdoing, but rather a tool to put right past wrongdoing and ensuring that it does not reoccur (see concept of self-cleaning below).<sup>10</sup>

## **8.2 When is the exclusion of a company proportionate?**

Self-cleaning means that a company has taken measures to put right its earlier wrongdoing and to prevent it from reoccurring.

Self-cleaning encompasses a four stage process:

1. Clarification of the relevant facts and circumstances
2. Effective repair of the damage caused
3. Personnel measures
4. Structural and organisational measures.

If, on the basis of this four stage assessment, an economic operator demonstrates that they have effectively self-cleaned, then exclusion from a public contract is likely to be disproportionate. A company cannot be excluded solely because they have not apologised for blacklisting, but it could be considered – on an individual basis – whether a lack of apology amounts to insufficient self-cleaning.<sup>11</sup>

## **8.3 Information that contracting authorities can request from companies**

The 2006 Public Contracts Regulations allow a contracting authority to request:

- confirmation from a company that there has not been any complaint of blacklisting
- details of those complaints, and the company’s handling of them
- details of a court judgement and level of damages awarded.<sup>12</sup>

## 8.4 Scottish approach to combatting blacklisting in tendering processes

In November 2013, the Scottish Government published a Scottish Procurement Policy Note that goes beyond the general advice given by the Welsh Government on blacklisting in procurement. This is based on the Government being “determined to ensure that blacklisting is not used in connection with the performance of public contracts in Scotland”.<sup>13</sup>

In order to exclude unabashed blacklisters in the procurement process, the Government has introduced three new questions in the standard Pre-Qualification Questionnaire (sPQQ) which require suppliers to disclose if they have breached relevant legislation. All public bodies are asked to adopt the new questions and use them in tendering exercises where feasible.

a) Has your organisation ever compiled, used, sold or supplied a prohibited list which:

- contains details of persons who are or have been members of trade unions ... and
- is compiled with a view to being used by employers or employment agencies for the purposes of discrimination ... within the meaning of The Employment Relations Act of 1999 (Blacklists) Regulations 2010?

b) Has your organisation ever refused a person employment

- because he is, or is not a member of a trade union, or
- because he is unwilling to accept a requirement ... to become or cease to be ... a member of a trade union ...?

c) Has your organisation breached the Data Protection Act 1998 or been served with an enforcement notice in relation to unlawfully processing personal data in connection with any blacklisting activities?

If a company has answered ‘Yes’ to any of the above questions, they are requested to provide details and state any remedial action they have taken. Remedial action should include action by a company to:

- make an appropriate apology

- provide a statement regarding future conduct
- cooperate with investigating authorities to clarify facts and circumstances
- take concrete, technical, organisational and personnel measures to prevent further criminal offence or misconduct
- comply fully with any tribunal ruling; and
- pay compensation in respect of any damage caused by wrong-doing.

## **9. How to enable the cancellation of an already awarded contract?**

If a company is found to engage in blacklisting after the awarding of a public contract, or it comes to light that the company engaged in blacklisting in the past but has not declared this in the tendering process, UCATT wants to see the cancellation of the contract. We want the blacklisting firm to be replaced by a reputable one that respects the rights of its workforce – including potential workers that apply for a job.

However, there is no automatic right to terminate a contract where a company was or is still currently involved in blacklisting unless this is explicitly stipulated in the contract. The ability of a public authority to take action will depend on the terms of the contract agreed with the company.

UCATT therefore would like all public authorities to have a right to terminate the contract where a company is found to engage in blacklisting.

This can be achieved by introducing a clause in the procurement process which allows for the termination of a contract if a company is found to be blacklisting.

### **9.1 Scottish approach to terminate a contract where blacklisting is found**

The Scottish Government, through its Scottish Procurement Policy Note,

has already introduced such new contract clause in their standard terms and conditions that provides for the termination of a contract if a supplier is found to have breached legislation relating to blacklisting in the course of the contract.

“The Service Provider must not commit any breach of the Employment Relations 1999 Act (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or commit any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities. Breach of this clause is a material default which shall entitle the Purchaser to terminate the Contract with immediate effect.”

All public bodies are asked to include this clause in current tendering exercises where this is feasible; those public bodies who do not use the Government’s standard terms and conditions are asked to amend their own terms and conditions.

## **10. Resolutions on blacklisting passed by local authorities**

It is very encouraging that already over 100 local authorities have passed resolutions or policy banning blacklisting in public contracts.

The exact provisions and demands of these policies often vary, with some worded more strongly than others, some being only a general condemnation of blacklisting, others addressing the tendering stage while again others request the termination of a contract already underway where blacklisting is detected.

Below is a non-exhaustive list of local authorities that have already passed a motion on blacklisting, with examples of the exact wording.

### **Cambridge City Council**

“Cambridge City Council deplores the illegal practice of 'blacklisting'

within the construction industry and will ensure that any company known to have been involved in blacklisting practices, and not to have indemnified their victims, will not be invited to tender for contracts until they have:

1. Identified the steps taken to remedy blacklisting for all affected workers
2. Identified the steps taken to ensure blacklisting will not happen again, and
3. Given assurances that they do not employ individuals who were named contacts for the Consulting Association. ..." (July 2014)

### **Cheshire East Council**

"Cheshire East Council deplores the practice of blacklisting carried out by some building and construction companies, which have denied employment to workers who were carrying out legitimate trade union activities such as health & safety representatives. In noting the Prime Minister's comments that blacklisting is 'a completely unacceptable practice, and the previous government were right to bring in legislation to make it unlawful.' Council resolves: to make clear to all construction companies bidding for Council contracts that any unlawful blacklisting of workers will not be tolerated." (July 2014)

### **Dundee City Council**

"Dundee City Council is deeply concerned by recent revelations that some major construction companies have been involved in denying employment to workers who have been engaged in trade union activity...." The Council resolves to ... "where lawful to do so to exclude companies involved in blacklisting of trade unionists from securing future Council contracts. Where lawful to do so, request that companies that tender for Council contracts demonstrate that they have processes in place to encourage the reporting by workers, including those who are

trade union members, of workplace concerns, particularly in respect of health, safety and welfare.” (August 2013)

### **Manchester City Council**

“Manchester City Council is deeply concerned by revelations that major companies have been involved in “blacklisting” in order to deny employment to workers who have engaged in trade union activity, such as reporting breaches of health and safety regulations... The use of such blacklists is unacceptable and cannot be condoned, as it has a potentially negative impact on the employment rights of Manchester construction workers. ... This Council has constructive relationships with trade unions and upholds the right to freedom of association, and we expect all suppliers and partner organisations to do the same.” (October 2013)

### **Newham Council (London Borough)**

“This Council resolves: to ... make clear to companies bidding for Council contracts that any unlawful blacklisting of workers will not be tolerated; to ask Legal Services to explore what action the Council can take in respect of companies that have engaged in blacklisting and haven't paid compensation to workers.” (February 2013)

Other councils that have adopted a policy on blacklisting include:

- Bolton Council
- Dumfries and Galloway Council
- Hull City Council
- Islington Council  
(London Borough)
- Knowsley Council
- Liverpool City Council
- Midlothian Council
- Milton Keynes Council
- Plymouth City Council
- Portsmouth City Council
- Preston City Council
- Rochdale Borough Council
- Rother District Council
- Sheffield City Council
- Southampton City Council
- Torfaen County Borough Council
- Tower Hamlets Council  
(London Borough)
- West Dunbartonshire Council

## **11. How to help prevent or stop blacklisting in public contracts**

1. Remind your council/councillors of the blacklisting of building workers over the past decades, finally brought to light with the discovery of The Consulting Association in 2009. To this day none of the companies has paid up for the misery it has brought to the lives of the blacklisted workers.

Instead, they have launched a compensation scheme which they introduced unilaterally without the backing of the trade unions. In UCATT's view, the compensation payments offered through the scheme are completely inadequate. It is a PR-driven exercise by which the blacklisters seek to evade proper compensation payments and court proceedings.

2. As a first step, ask for the adoption of a council resolution on blacklisting that through the procurement process enables the exclusion of blacklisters from public tendering as well as the termination of a contract where they are found blacklisting during the course of public work.

3. Report back to UCATT or let us know where we can assist.

## **12. Is there a draft resolution I can propose to my local council?**

You are welcome to copy and amend the draft resolution below:

*Council XYZ is aware of the destructive practice of blacklisting that occurred for decades in the UK construction industry and the disastrous effects it had on many of the workers that were included on the blacklist.*

*Most of the workers on the blacklist of The Consulting Association were trade unionists, many of them were blacklisted for*

*raising a legitimate health and safety concern with their employer.*

*This Council is determined that blacklisting should never occur again. We will*

*a) make provisions in our public tendering procedures to exclude blacklisters from public contracts if they are either still blacklisting or have not put into place genuine actions agreed by the blacklisted workers or their representatives concerning past blacklisting activity; and*

*b) make provisions in our terms and conditions for public works that provide for the termination of the contract if a supplier is found to engage in blacklisting activities during the course of that contract.*

## Notes

<sup>1</sup> Keith Ewing, Ruined Lives. Blacklisting in the UK construction industry, August 2009.

<sup>2</sup> <http://thelawdictionary.org/black-list/>

<sup>3</sup> BIS Guide on Blacklisting. The Blacklisting of Trade Unionists, March 2010.

<sup>4</sup> [http://en.wikipedia.org/wiki/Consulting\\_Association#cite\\_note-ICO-companies-list-11](http://en.wikipedia.org/wiki/Consulting_Association#cite_note-ICO-companies-list-11). The same information was originally contained on the Information Commissioner's Office website, but unfortunately is now no longer available from that website. ("The use of brackets indicates where companies have undergone a change of name or where subsidiaries have been absorbed by parent companies. Ex members may no longer exist or no longer avail themselves of the service.")

<sup>5</sup> BIS Guide on Blacklisting. The Blacklisting of Trade Unionists, March 2010

<sup>6</sup> Ellie Reeves, Blacklisting, North West Employment Law Update Conference, November 2011.

<sup>7</sup> Ibid.

<sup>8</sup> Welsh Government. Blacklisting in the Construction Industry. Policy Advice Notice (PAN) for the Public Sector in Wales, September 2013.

<sup>9</sup> [www.legislation.gov.uk/uksi/2006/5/regulation/23/made](http://www.legislation.gov.uk/uksi/2006/5/regulation/23/made)

<sup>10</sup> Welsh Government. Blacklisting in the Construction Industry. Policy Advice Notice (PAN) for the Public Sector in Wales, September 2013.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> The Scottish Government, Scottish Procurement Policy Note, November 2013.

## **Contacting UCATT**

If you need any further guidance or support, do not hesitate to contact your regional office or UCATT head office:

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