

Review

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UNION BLACKLISTING NOW UNLAWFUL

The Employment Relations Act 1999 (Blacklists) Regulations (“the Regulations”) came into force on 2 March 2010. They follow a high profile prosecution by the Information Commissioner in 2009 relating to a blacklist of union members to which around 40 construction companies subscribed.

The Regulations make it unlawful to use blacklists to:-

- dismiss employees
- refuse employment or employment agency services
- subject a worker to a detriment while in employment

for a reason related to the blacklist (referred to in the Regulations as a “prohibited list”).

The Regulations also prohibit the compiling, using, selling or supplying of a blacklist containing the details of people who are or were trade union members or who are or were involved in trade union activities.

To be a prohibited list one of the list’s purposes must be discrimination on the grounds of trade union membership or activities. The list does not need to specifically refer to trade union membership or activities, but it must have been compiled with a view to being used for the purposes of discrimination on these grounds, either in the recruitment process or during employment.

There is no definition of trade union activities in the Regulations. Interestingly, the Government’s guidance to the Regulations states that participating in official industrial action would “probably” be categorised as a trade union activity (but not participation in unofficial action). This contrasts with the right not to suffer detriment or be dismissed on the grounds of trade union activities under Sections 146 and 152 of the Trade Union Labour Relations (Consolidation) Act. To fall within those sections the trade union activities have to be at “an appropriate time” defined as outside work hours or at a time agreed with the employer, which industrial action usually is not.

The list can contain details of both trade unionists and non trade unionists and still qualify as a prohibited list. Both trade unionists and non trade unionists on the list would be protected.

The Regulations contain a number of exemptions including where a person does not know (and could not reasonably be expected to know) that they are supplying a prohibited list; where the supply or use of a list is in the public interest; or where the list is used in order to obtain legal advice on whether the Regulations themselves have been breached.

Compensation can be awarded and in cases of refusal of employment or refusal of the services of an employment agency there is also a power to make a recommendation

aimed at reducing the adverse effect suffered. Dismissal for a reason relating to a prohibited list is automatically unfair.

Any person who has suffered a loss or a threatened loss as a result of a breach of the Regulations may claim damages in the county court or make an application to prevent the breach. The Government guidance says that this can include a trade union, presumably because they could suffer a loss of members. It is not possible for the same person to bring a claim in the employment tribunal and the county court in respect of the same conduct except to try and prevent a future breach of the Regulations.

The burden of proof for these cases operates in the same way as for many aspects of discrimination law - the claimant must show

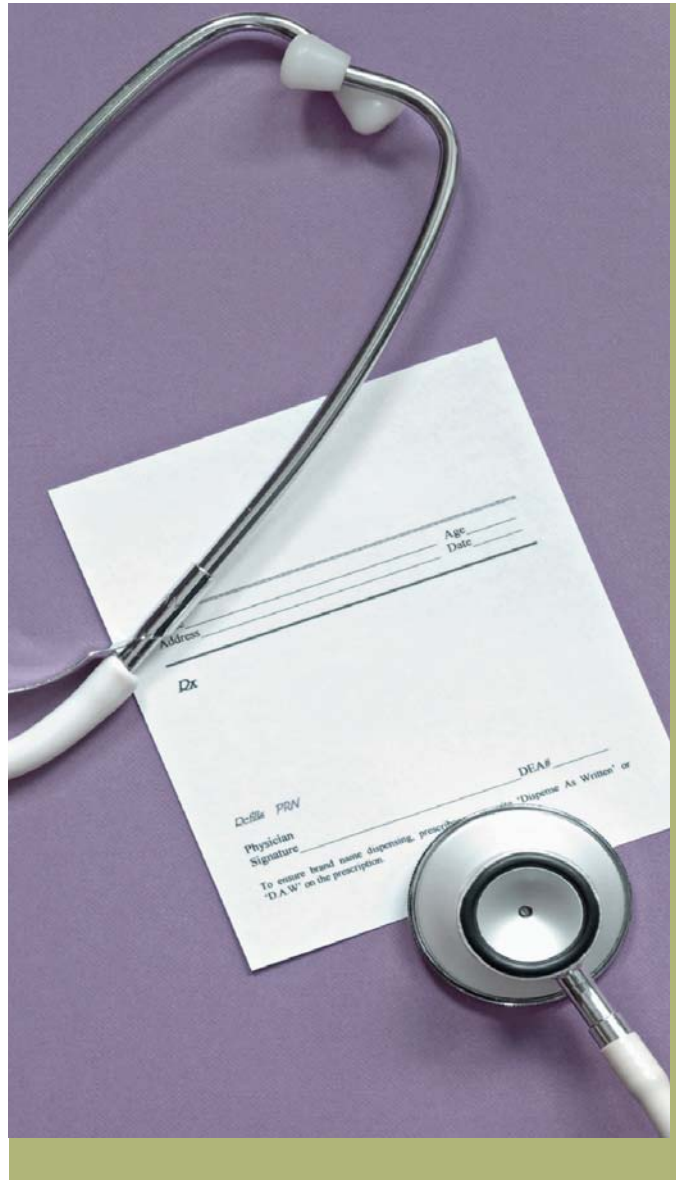
facts from which the court or tribunal could conclude that the respondent / defendant has breached the Regulations, the burden of proof will then move to the respondent / defendant to provide an explanation for those facts which discloses no breach.

Claims about blacklists must be made to an employment tribunal within three months of the conduct although the tribunal does have the power to extend the time limit if it is just and equitable to do so. Court claims must be brought within six years. Employment tribunals can award up to £65,300 and awards are generally subject to a minimum of £5,000. Compensation awarded can cover both financial loss and injury to feelings.

The Government guidance to the Regulations can be found at www.bis.gov.uk



MAY BE FIT FOR WORK? THE NEW SICK NOTE REGIME



Under Regulations that came into force on 6th April 2010* doctors will no longer certify an employee as “fit for work”.

Instead the new form (Med3 A4/10) will give the doctor two options; to advise that the person either:-

- **is not fit for work, or**
 - **may be fit for work if adjustments are put in place**
-

The adjustments can include:-

- **a phased return to work**
 - **altered hours**
 - **amended duties**
 - **workplace adaptations**
 - **other adjustments**
-

If the doctor ticks the “may be fit for work” box he will also give information about the functional effects of the employee’s condition. The doctor will say what period of time his advice covers. The maximum period it can cover during the first six months of sickness has been reduced to three months.

If the employee may be fit for work with adjustments but the employer is unable or unwilling to make the adjustments necessary to allow the employee to return to work the doctor’s statement will count as a “not fit for work” statement and the employee does not have to go back to the doctor to confirm this.

If the employee wants to go back to work before the end of the period specified by the doctor and the employer agrees, he can return to work before the end of the statement period without going back to the doctor.

If the doctor’s statement is that the employee “may be fit for work” with adjustments that the employer is willing and able to make but the employee does not want to return to work, the employer should consult further with the employee to find out why and, if necessary, take the advice of an occupational health specialist. If this does not resolve the matter, the employer may resort to applying its absence policy/procedure.

The employer is not obliged to follow the advice in the doctor's statement although a failure to do so may count against the employer in any subsequent unfair dismissal claim should he decide to dismiss the employee. The employer is, of course, still required by the Disability Discrimination Act to make reasonable adjustments to avoid putting a person who is disabled for the purposes of that Act at a substantial disadvantage.

The new Regulations do not affect the requirement on the employer to pay statutory sick pay (although there may well be disputes about the adequacy of the adjustments should an employee, who the doctor says "may be fit for work", does not return).

The doctor's statement is still not required until the seventh calendar day of sickness.

Many employers already discuss with their employees at an early stage of sick leave the possibility of returning to work with some adjustments. For them these changes may be little more than administrative. The new Regulations may encourage other employers to be proactive in cases where the employee could return to work if adjustments were made and he wants to do so. It is hoped that they will not be used by employers to try to force employees back to work too soon on the basis of having made adjustments which are not adequate.



***The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 (SI 2010 137)**

FATHERS TO BE GIVEN NO EXCUSE NOT TO TAKE FULL RESPONSIBILITY FOR CHILD CARE – BUT NOT YET!

The Additional Paternity Leave Regulations 2010 will give fathers up to six months' additional paternity leave provided the mother has returned to work. However, they only apply to children born, or expected to be born (or matched for adoption) on or after 3rd April 2011.

The leave cannot start before 20 weeks after the birth (or match for adoption) and no later than 12 months after it. The leave can only be taken in groups of completed weeks.

Fathers taking paternity leave during the mother's 39 weeks maternity pay period may be paid statutory paternity pay (currently £124.88 per week or 90% of the employee's average weekly earnings, whichever is lower).

This will give parents the opportunity of sharing paid leave between them. As well as furthering equal opportunities, this measure is likely to be of even more relevance in the current economic climate where fathers may well have found themselves in lower paid employment than their partners.



'This will give parents the opportunity of sharing paid leave between them'

STOP THE PRESS!!

Kevin Hunkin v Royal Mail [2010]

Simpson Millar LLP acted for the successful Claimant in Kevin Hunkin v Royal Mail [2010] (unreported). In this case it was found that even where there is an agreed attendance procedure it is not enough for the employer to comply with the minimum terms of that procedure: it must act reasonably in all of the circumstances. In this case the Claimant was dismissed as his absences breached the attendance procedure. The attendance procedure, which had been agreed with the recognised union, allowed the employer to use discretion when deciding whether or not to apply the procedure. However it transpired during evidence from the Respondent that discretion was in practice only applied in 'extreme' circumstances. The Claimant was a long standing and satisfactory employee who had been absent partly because of his disability and amongst other things, an emergency operation. The tribunal found that the employer should have used its discretion to discount absences which related to the Claimant's disability and emergency operation given its size and resources and that it had failed to show that the Claimant's particular place of work had been affected by his absence.



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