BIS CONSULTATION ON BLACKLISTING – BECTU RESPONSE

Q1 We propose that in light of the activities undertaken by The Consulting Association, suitably drafted regulations under section 3 of the Employment Relations Act 1999 should now be implemented. Do you agree with this approach?

1 We note the Government's view that 'the blacklisting of trade unionists should have no place in a fair system of employment relations'. We agree with this and with the TUC's view that there is a clear need for robust and effective laws outlining blacklisting activities. The existing law has been insufficient in deterring organisations such as TCA and we therefore agree that suitable regulations under the ERA 1999 should now be implemented (though they should have been so previously). We believe there is an additional obligation to do this both under the European Convention on Human Rights and the ILO Convention, which prohibit blacklisting activities.

Q2 Do you have other evidence of trade union blacklisting?

2 We have, unfortunately, long experience of blacklisting as it affects our members. It has been applied in particular to our freelance members in the film, television and independent production sector. This particularly invidious form of blacklisting takes the form of employers not hiring freelances in future projects after they have been identified as 'bad risks' because of their trade union activities.

3 Given that freelances are continually moving from project to project on short term contracts and that the workforce varies from project to project, this is a particularly difficult area to monitor. Employers can simply choose not to hire workers who they deem to be unacceptable on grounds of previous TU activity – but will have many superficially plausible reasons for hiring others in a competitive freelance labour market.

4 These blacklisting practices are all the more insidious for being totally informal – with no written or electronic record of a list. Employers can simply communicate with each other off the record by telephone or in person to swap provide or obtain information on 'unsuitable' workers.

5 From the viewpoint of the individual trade unionists who are victimised in this way the pattern is clear – previously regular sources of employment suddenly cease to be so; and projects on which they could reasonably have expected to find work become inaccessible to them. In a sector characterised by a freelance labour market in which reputation, contacts and previous credits are vitally important as a means of finding future employment, this sort of practice can cause very significant long term damage to the careers and future work opportunities of those affected.

Q3 Do the Regulations adequately cover all the possible ways, including use of the internet and other electronic media, whereby blacklisting could be undertaken? If not, how could they be improved?

6 We fear that the sort of informal blacklisting described above – which is nonetheless as serious in its impact as any formal list – is harder to legislate for.

7 We can only suggest that - in order to have the prospect of dealing with informal blacklisting in a freelance labour market - the regulations should be framed to all to take account of the following forms of evidence:

- verbal evidence of a blacklist, including witnesses of relevant conversations
- individuals' work patterns e.g. previously regular sources of work which cease to be so; freelances in previous regular work who - otherwise unaccountably- begin to find no work or much less work than before
- employers who develop a track record of not hiring individuals who are competent and experienced but happen to be active trade unionists

8 We accept that such evidence could be difficult to compile and assess but unless information such as this is taken into account, the reality of blacklisting in a casualised freelance labour market will escape regulation.

Q4 Do the regulations adequately deal with blacklists maintained and hosted abroad?

9 We certainly hope that the focus on the British end users (both direct and indirect) will be adequate to deal with this problem.

Q5 Do you support the way the regulations clarify the meaning of a prohibited list? If not, how should a prohibited list be defined?

10 We believe that

- broad definitions should be used in the regulations

- the definition should encompass a list involving one name (very relevant to the practice described above)

- there should be a broad definition of employment covering employees, workers, freelances, casuals, fixed term contract workers and the self-employed

- the definition of discrimination is welcome i.e. treating an individual less favourably than another on grounds of trade union membership (and this anti-discrimination approach should specifically be applied to the offer of employment)

Q6 Do you support the drafting of the exemptions and should others be created? Where applicable, please explain why you consider the drafting to be defective

11 We agree with the TUC that there should be an all encompassing exemption for trade unions, without exception. Trade unions may have positive reasons for having a list of active trade unionists (e.g. future recruitment of officials).

12 However, we further agree with the TUC that there should in general be very limited exemptions from the regulation.

Q7 Do you support the Government's view that enforcement should take place via the civil law? If not, what approach would you favour?

13 We strongly believe that blacklisting is a serious enough offence to justify criminal sanctions as well as civil law remedies – as is the case, for example, with the National Minimum Wage regulations.

14 We are not convinced that the Information Commissioner (with no particular focus on employment issues), is necessarily the most appropriate enforcement agency nor that the IC currently has sufficient powers anyway

15 Whichever enforcement agency is designated, we believe it should have investigatory as well as enforcement and – very importantly - should be adequately resourced.

Q8 Do you agree with the approach taken in the regulations regarding the time limits for making applications to the Employment Tribunal? If not, what approach would you favour?

16 We agree that beyond establishing a prima facie case, the burden of proof should shift to the respondent to show they had not used a prohibited list.

Q9 Do you agree with the approach taken in the regulations regarding the time limits for making applications to the employment tribunal? If not, what approach would you favour?

17 We believe that

- the rules on time limits should be adapted to reflect circumstances where the evidence of blacklisting only comes to light a long time after an individual has been refused employment(e.g. work patterns and emerging track records as described above may only become apparent long after the event).

- the limitation date could usefully run from the time the individual became aware of blacklisting rather than from the blacklisting itself.

Q10 Do you agree with the approach taken by the regulations regarding remedies? If not, what approach would you favour?

18 We agree with the TUC that

- victims of blacklisting should be able to seek compensation from an Employment Tribunal with no upper limit (since the implications for the victims, at worst, can be loss of livelihood) but with a minimum penalty as a deterrent (before taking account of losses or injuries to feelings)

- the contributory fault provision should be deleted since the victims' only relevant actions will have been to engage in trade union activity – which should not in any way count as a 'fault'

- the mitigating steps provisions should similarly be deleted

Q11 Do you have any other views on the way the regulations should be drafted?

19 We believe that trade unions themselves should be able to bring proceedings on behalf of members affected.

20 We further believe that every person affected by a proven blacklisting activity should be entitled to compensation, regardless of whether they initiated the relevant proceedings.