



Llywodraeth Cymru
Welsh Government

Code of Practice

Blacklisting in the Construction Industry

Policy Advice Note (PAN)
for the Public Sector in Wales



May 2017

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1. Introduction

(i) POINTS TO NOTE – please ensure you read this section first

- The information set out in this document is not legal advice and is not intended to be exhaustive – contracting authorities should seek their own independent advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases. This document reflects the position as at May 2017.
- This Procurement Advice Note (PAN) builds on, and is consistent with, the information available in the Procurement Route Planners (PRPs) on <http://prp.gov.wales/toolkit/?lang=en> the note therefore assumes a certain level of knowledge of public procurement.
- Although this guidance note is primarily written to cover blacklisting in the construction industry, the principles equally apply to other industries/sectors.

(ii) Issues Addressed

This Procurement Advice Note (PAN) was first produced by the Welsh Government in 2013 and has now been updated. It is designed to inform public sector organisations about the issue of blacklisting/use of prohibited lists concerning individuals within the construction industry (or any other industry). This note details the background to blacklisting/use of prohibited lists, outlines the relevant legislation that applies in this area and provides an update on the current situation. This note will be of specific interest to staff involved in the procurement and delivery of construction activities.

2. What is 'blacklisting'?

The UK Government defines blacklisting; 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'.

Blacklists are referred to in specific blacklisting legislation as 'prohibited lists' when concerned with trade union activity. However, a blacklist could potentially contain further details on individuals who have reported concerns, for example, regarding health and safety and/or environmental matters.

Blacklisting can be very damaging to the careers and livelihoods of individuals who have been denied employment opportunities. It is known to have been used by construction companies operating in Wales and to have involved Welsh construction workers.

The blacklisting of individuals is an unlawful practice and legislation has been put in place to prohibit its use. It is important therefore that public sector organisations are aware of the relevant legislation and how it is applied.

Background to 'blacklisting'

In 2009, the issue of blacklisting in the construction industry came to national prominence. The media widely reported that the Information Commissioner's Office (ICO) had carried out an investigation into a private business called The Consulting Association (TCA).

The ICO found that TCA had been providing a service to over 40 construction companies, many of them major companies in the construction sector, appraising the suitability for employment of individuals. It found a blacklist and files containing extensive information on more than 3300 individuals across the UK, which was used to vet individuals and deny people employment for reasons including being a member of a trade union or having raised health and safety concerns. It is thought that over 100 of these individuals already identified live in Wales.

An individual who ran TCA was subsequently prosecuted and fined for failing to comply with the Data Protection Act 1998 and to register as a data controller.

3. Legislative Framework

UK Legislative Framework relevant to blacklisting

The issue of blacklisting cuts across several areas of legislation (shown below) but following the TCA investigation, the UK Government deemed these existing provisions insufficient to effectively address the issue. As a result, specific Blacklist regulations were introduced by the publication of The Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493). The Blacklisting Regulations make it unlawful to compile, use, sell or supply “prohibited lists”, which are lists containing details of trade union members or activists, past or present, used for employment vetting purposes.

The Data Protection Act 1998 (DPA)

The creation, supply or use of a blacklist is likely to amount to a breach of the DPA. The DPA controls how personal information is used by organisations, businesses or the government. The ICO has powers to bring about compliance with the Data Protection Act 1998 and related laws. These include criminal prosecution, non-criminal enforcement and audit.

Anyone who processes personal information must notify and register with the ICO as a data controller and comply with the eight principles of the Data Protection Act. The ICO will update the register of data controllers, which is available to the public for inspection. If an individual has been operating a blacklist, it will have no legitimate reason for processing an individual’s information in this way. By operating such a list, individuals can be prosecuted for failure to comply with the Act and failure to register as a data controller, as was the case with an individual in the TCA.

Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)

The Act, amongst other things, defines trade unions and states that they are the subjects of legal rights and duties. It protects the rights of workers to organise into, or leave, a union without suffering discrimination or detriment.

Section 137 of this Act made it unlawful for employment to be denied on trade union grounds or non-trade union grounds. The blacklisting of workers therefore gives rise to potential employment tribunal claims under Section 137 of TULRCA.

The Employment Relations Act 1999 (Blacklists) Regulations 2010

The Employment Relations Act 1999 (Blacklists) Regulations 2010 amongst other things:

- define a prohibited list (e.g. a blacklist) and prohibit the compilation, dissemination and use of prohibited lists;
- make it unlawful for organisations to refuse employment, to dismiss an employee or otherwise cause detriment to a worker for a reason related to a prohibited list;
- make it unlawful for an employment agency to refuse a service to a worker for a reason related to a prohibited list;
- provide for the employment tribunal to hear complaints about alleged breaches of the regulations; and
- as an alternative, provide for the courts to hear complaints from any persons that they have suffered loss or potential loss because of a breach of the regulations.

Breach of the general prohibition against the compilation, use, sale or supply of a prohibited list is actionable in the civil courts as a breach of statutory duty.

4. The Situation as at May 2017

Welsh Government

The Welsh Government has taken a firm stance against blacklisting and was the first Government to publicly denounce it. In June 2013, Jane Hutt AM, the then Minister for Finance, issued a Written Statement condemning the use of blacklists. The statement can be accessed at the link: www.wales.gov.uk/about/cabinet/cabinetstatements/2013/blacklisting/?lang=en.

The Welsh Government also published the first version of this Procurement Advice Note, outlining the strongest possible approaches that can be taken through public procurement to address the issues raised by blacklisting in a way that complies with the legal obligations. This has now been updated to reflect the developments in recent years and this updated PAN forms part of the toolkit being published alongside the Code of Practice on Ethical Employment in Supply Chains, which also includes a new Guide to tackling Blacklisting which contains practical details for both public, private and third sector buyers and suppliers.

Scottish Affairs Committee's Inquiry

The Scottish Affairs Select Committee launched its Inquiry into Blacklisting in 2012.

The Committee published its first interim report 'Blacklisting in Employment' in April 2013, focusing specifically on the work of The Consulting Association (TCA). The Committee's inquiry has continued over the intervening years and several reports have been published, with the final report 'Blacklisting in Employment: Final Report' being published in 2015, which focused on the Construction Workers Compensation Scheme, (TCWCS), launched in July 2014.

Ian Davison MP, Chair of the Committee, commended the Welsh Government, which, he said had "taken a clear and unequivocal ethical stance on this issue and provided a political lead which many other bodies in the public sector have subsequently followed."

The Committee, in its reports, set out how firms that have been caught blacklisting can make amends and must undertake a process of 'self-cleansing'. The reports include a number of recommendations which the UK Government is considering. More information on the Inquiry can be accessed via the following link: www.parliament.uk/blacklisting-in-employment.

High Court Group Litigation Order

A long-running legal battle in the Royal Courts of Justice concluded in May 2016, with blacklisted workers receiving both an apology from the construction companies involved in the blacklisting case, and also compensation.

5. Addressing Blacklisting through Procurement

This section gives an overview of the legal issues relating to addressing blacklisting through procurement. This information is intended as a guide only and should not be considered to be a substitute for appropriate legal advice.

Can contracting authorities exclude blacklisters?

In principle, yes, blacklisting can amount to one of the grounds for discretionary exclusion under Regulation 57(8) of the Public Contracts Regulations 2015 because it might amount to either a violation of labour laws under Regulation 57(8)(a) or an act of grave professional misconduct under Regulation 57(8)(c) and so could justify exclusion of an economic operator. However:

- exclusion must be proportionate and considered on a case-by-case basis – a blanket ban would not be lawful;
- exclusion must be justified on the evidence – for example, an admission of wrongdoing by the economic operator or a decision of a tribunal, court or other public body exercising similar functions. In theory, it may be possible to rely on other evidence but in practice it is difficult to envisage circumstances where other evidence will suffice; and
- exclusion is not a means of punishing economic operators for past wrongdoing, but rather a means of putting right past wrongdoing and ensuring that it does not re-occur (self-cleansing).

When will exclusion be proportionate? The concept of self-cleansing

The concept of self-cleansing encompasses circumstances in which an economic operator has taken measures to put right its earlier wrongdoing and to prevent it from re-occurring. Where an economic operator has self-cleansed, exclusion would generally be disproportionate.

Regulation 57(13) of the Public Contracts Regulations 2015 states that where the exclusion grounds apply to an economic operator, it may provide evidence to the effect that measures taken are sufficient; to 'demonstrate its reliability despite the existence of a relevant ground for exclusion'. If the contracting authority considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

To self cleanse, the economic operator must prove it has:

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

These measures shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Should the contracting authority consider such measures to be insufficient, it must provide the economic operator with the reasons for that decision.

The Public Contracts Regulations 2015 (Regulation 57 (12)) sets out that the period in which an economic operator may be excluded under one of the discretionary grounds of exclusion is 3 years from the date of the relevant event.

It is not possible to exclude an economic operator solely on the basis that it has not apologised for blacklisting. There may be some scope to consider whether a lack of apology or statement of regret indicates insufficient self-cleansing, but this must be considered carefully on a case-by-case basis.

What type of information can contracting authorities request?

The Public Contracts Regulations 2015 allow a contracting authority to ask economic operators questions in relation to blacklisting, during the selection stage of the procurement process. In the SQuID (Supplier Qualification Information Database), economic operators are asked if they have been found to have employed the practice of blacklisting in the last three years and if so, to include details outlining the circumstances, including actions they have since taken to put matters right.

In the event that there has been an adverse finding by a court or tribunal, it would also be reasonable to request details of the judgement and level of damages awarded.

Can contracting authorities terminate contracts with an economic operator that has or is engaged in blacklisting?

There is no automatic right to terminate a contract where an economic operator has been or is engaged in blacklisting. A contracting authority's ability to take action will depend on the precise wording of the contract terms and the materiality of the blacklisting to the contract. In respect of new public contracts, contracting authorities may wish to consider whether to revise their current contract terms and conditions to include a right to terminate the contract where an economic operator engages in blacklisting.

Action taken under contract terms should be considered on a case by case basis and legal advice obtained.

6. Guidance and Tools

Some of the policy guidance documents and supporting tools that are available to you for use in your procurement activity (in alphabetical order) include:

- Department for Business, Innovation and Skills – BIS Guidance on Blacklisting (March 2010); and
- Procurement Route Planner (PRP).

Supplier Qualification Information Database (SQuID), Value Wales

<http://prp.gov.wales/toolkit/?lang=en>

Sustainable Risk Assessment (SRA), Value Wales

<http://prp.gov.wales/toolkit/?lang=en>

Should you require further information or have had any experience with blacklisting in your procurements please contact:

Value Wales: vwpolicy@wales.gsi.gov.uk

7. Acknowledgements

Value Wales is pleased to acknowledge that it has drawn upon the following publications and organisations to supplement its own research to produce this note:

- Department for Business, Innovation and Skills
- Public Contracts Regulations 2015
- The Data Protection Act 1998
- Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)
- The Employment Relations Act 1999 (Blacklists) Regulations 2010