

*Draft Regulations laid before Parliament under section 3 of the Employment Relations Act 1999, for approval by resolution of each House of Parliament.*

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DRAFT STATUTORY INSTRUMENTS

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**2010 No. 0000**

**TERMS AND CONDITIONS OF EMPLOYMENT**

**The Employment Relations Act 1999 (Blacklists) Regulations  
2010**

*Made* - - - - - *[date]*

*Coming into force* - - - *[date]*

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The Secretary of State for Business, Innovation and Skills makes the following Regulations in exercise of the powers conferred by section 3 of the Employment Relations Act 1999(a).

In accordance with section 42 of that Act, a draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament.

*Introductory provisions*

**Citation, commencement and extent**

1. These Regulations—

- (a) may be cited as the Employment Relations Act 1999 (Blacklists) Regulations 2010,
- (b) come into force on the day after the day on which they are made, and
- (c) extend to Great Britain.

**Interpretation**

2.—(1) In these Regulations—

“employment agency” means a person who, for profit or not, provides services for the purposes of finding employment for workers or supplying employers with workers, and does not include a trade union by reason only of the services a trade union provides only for and in relation to its members;

“office”, in relation to a trade union, means any position—

- (a) by virtue of which the holder is an official of the trade union, or
- (b) to which Chapter 4 of Part 1 of the Trade Union and Labour Relations (Consolidation) Act 1992(b) (duty to hold elections) applies,

and “official” has the meaning given by section 119 of that Act;

“prohibited list” has the meaning given by regulation 3(2);

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(a) 1999 c. 26; to which there are amendments not relevant to these Regulations.

(b) 1992 c. 52; section 46 was amended by sections 52, 57(2) and Schedule 2 of the Employment Relations Act 2004 (c. 24.); section 119, to which there are amendments not relevant to these Regulations; section 140 was amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8), and by section 240 and paragraph 56(1) and (6) of Schedule 1 to the Employment Rights Act 1996 (c.18); section 149 was amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8), and by section 2 and Schedule 2 of the Employment Relations Act 1999 (c.26); section 207A was inserted by section 3(1) and (2) of the Employment Act 2008 (c. 24); section 288 was amended by sections 1(2)(a) and (c), 8(3), 9(1) and (2)(c), 10(1) and (2)(c), 15 and paragraph 9(1), (2) and (3) of Schedule 1 to the Employment Rights (Dispute Resolution) Act 1998 (c. 8), by section 57, paragraph 19 of Schedule 1, and Schedule 2 of the Employment Relations Act 2004 (c. 24), by section 43 and paragraph 8(a) and (b) of Schedule 1 of the Employment Tribunals Act 1996 (c. 17), by section 39(2) and paragraph 4(a) and (b) of Schedule 6 of the Trade Union Reform and Employment Rights Act 1993 (c.19), and by section 208(1) and Schedule 21 of the Legal Services Act 2007 (c. 29); Schedule A2 was inserted by section 3(1) and (3) of the Employment Act 2008 (c. 24) and is amended by paragraph 3 of the Schedule to these Regulations; there are other amendments not relevant to these Regulations.

“services”, in relation to an employment agency, means services for the purposes of finding employment for workers or supplying employers with workers;

“use”, in relation to a prohibited list, includes use of information contained in the list.

(2) References in these regulations to information supplied by a person who contravenes regulation 3 include information supplied by a person who would contravene that regulation if that person’s actions took place in Great Britain.

### *General prohibition*

#### **General prohibition**

3.—(1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.

(2) A “prohibited list” is a list which—

- (a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and
- (b) is 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.

(3) “Discrimination” means treating a person less favourably than another on grounds of trade union membership or trade union activities.

(4) In these Regulations references to membership of a trade union include references to—

- (a) membership of a particular branch or section of a trade union, and
- (b) membership of one of a number of particular branches or sections of a trade union;

and references to taking part in the activities of a trade union have a corresponding meaning.

#### **Exceptions to general prohibition**

4.—(1) A person does not contravene regulation 3 in the following cases.

(2) The first case is where a person supplies a prohibited list, but—

- (a) does not know they are supplying a prohibited list, and
- (b) could not reasonably be expected to know they are supplying a prohibited list.

(3) The second case is where a person compiles, uses or supplies a prohibited list, but—

- (a) in doing so, that person’s sole or principal purpose is to make known a contravention of regulation 3 or the possibility of such a contravention,
- (b) no information in relation to a person whose details are included in the prohibited list is published without the consent of that person, and
- (c) in all the circumstances compiling, using or supplying the prohibited list is justified in the public interest.

(4) The third case is where a person compiles, uses, sells or supplies a prohibited list, but in doing so that person’s sole or principal purpose is to apply a requirement either—

- (a) that a person may not be considered for appointment to an office or for employment unless that person has experience or knowledge of trade union matters, and in all the circumstances it is reasonable to apply such a requirement, or
- (b) that a person may not be considered for appointment or election to an office in a trade union unless he is a member of the union.

(5) The fourth case is where a person compiles, uses, sells or supplies a prohibited list, but the compilation, use, sale or supply of the prohibited list is required or authorised—

- (a) under an enactment,
- (b) by any rule of law, or

(c) by an order of the court.

(6) The fifth case is where a person uses or supplies a prohibited list—

(a) for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings), or

(b) for the purpose of giving or obtaining legal advice,

where the use or supply is necessary in order to determine whether these regulations have been, are being or will be complied with.

### *Refusal of employment or employment agency services*

#### **Refusal of employment**

**5.**—(1) A person (P) has a right of complaint to an employment tribunal against another (R) if R refuses to employ P for a reason which relates to a prohibited list, and either—

(a) R contravenes regulation 3 in relation to that list, or

(b) R—

(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and

(ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.

(2) R shall be taken to refuse to employ P if P seeks employment of any description with R and R—

(a) refuses or deliberately omits to entertain and process P's application or enquiry;

(b) causes P to withdraw or cease to pursue P's application or enquiry;

(c) refuses or deliberately omits to offer P employment of that description;

(d) makes P an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted; or

(e) makes P an offer of such employment but withdraws it or causes P not to accept it.

(3) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that R contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless R shows that it did not.

#### **Refusal of employment agency services**

**6.**—(1) A person (P) has a right of complaint to an employment tribunal against an employment agency (E) if E refuses P any of its services for a reason which relates to a prohibited list, and either—

(a) E contravenes regulation 3 in relation to that list, or

(b) E—

(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and

(ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.

(2) E shall be taken to refuse P a service if P seeks to make use of the service and E—

(a) refuses or deliberately omits to make the service available to P;

(b) causes P not to make use of the service or to cease to make use of it; or

(c) does not provide P the same service, on the same terms, as is provided to others.

(3) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that E contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless E shows that it did not.

#### **Time limit for proceedings under regulation 5 or 6**

7.—(1) Subject to paragraph (2), an employment tribunal shall not consider a complaint under regulation 5 or 6 unless it is presented to the tribunal before the end of the period of three months beginning with the date of the conduct to which the complaint relates.

(2) An employment tribunal may consider a complaint under regulation 5 or 6 that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(3) The date of the conduct to which a complaint under regulation 5 relates shall be taken to be—

- (a) in the case of an actual refusal, the date of the refusal;
- (b) in the case of a deliberate omission—
  - (i) to entertain and process P's application or enquiry, or
  - (ii) to offer employment,the end of the period within which it was reasonable to expect R to act;
- (c) in the case of conduct causing P to withdraw or cease to pursue P's application or enquiry, the date of that conduct;
- (d) in a case where R made but withdrew an offer, the date R withdrew the offer;
- (e) in any other case where R made an offer which was not accepted, the date on which R made the offer.

(4) The date of the conduct to which a complaint under regulation 6 relates shall be taken to be—

- (a) in the case of an actual refusal, the date of the refusal;
- (b) in the case of a deliberate omission to make a service available, the end of the period within which it was reasonable to expect E to act;
- (c) in the case of conduct causing P not make use of a service or to cease to make use of it, the date of that conduct;
- (d) in the case of failure to provide the same service, on the same terms, as is provided to others, the date or last date on which the service in fact was provided.

#### **Remedies in proceedings under regulation 5 or 6**

8.—(1) Where an employment tribunal finds that a complaint under regulation 5 or 6 is well-founded, it shall make a declaration to that effect and may make such of the following as it considers just and equitable—

- (a) an order requiring the respondent to pay compensation;
- (b) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates.

(2) Compensation shall be assessed on the same basis as damages for breach of statutory duty and may include compensation for injury to feelings.

(3) Where an award of compensation is made, the amount of compensation before any increase or reduction is made under paragraph (4), (5) or (6) shall not be less than £5,000.

(4) If the respondent fails without reasonable justification to comply with a recommendation under paragraph (1)(b), the tribunal may increase its award of compensation or, if it has not made such an award, make one.

(5) Where the tribunal considers that any conduct of the complainant before the refusal to which the complaint under regulation 5 or 6 relates was such that it would be just and equitable to reduce the award of compensation, the tribunal shall reduce that amount accordingly.

(6) The amount of compensation shall be reduced or further reduced by the amount of any compensation awarded by the tribunal under section 140 of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the same refusal.

(7) The total amount of compensation shall not exceed £65,300.

### *Detriment*

#### **Detriment**

**9.**—(1) A person (P) has a right of complaint to an employment tribunal against P's employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either—

- (a) D contravenes regulation 3 in relation to that list, or
- (b) D—
  - (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
  - (ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.

(2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless D shows that it did not.

(3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning in Part 10 of the Employment Rights Act 1996.

#### **Time limit for proceedings under regulation 9**

**10.**—(1) Subject to paragraph (2), an employment tribunal shall not consider a complaint under regulation 9 unless it is presented before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them.

(2) An employment tribunal may consider a complaint under regulation 9 that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(3) For the purposes of paragraph (1)—

- (a) where an act extends over a period, the reference to the date of the act is a reference to the last day of the period;
- (b) a failure to act shall be treated as done when it was decided on.

(4) For the purposes of paragraph (3), in the absence of evidence establishing the contrary D shall be taken to decide on a failure to act—

- (a) when D does an act which is inconsistent with doing the failed act, or
- (b) if D has done no such inconsistent act, when the period expires within which D might reasonably have been expected to do the failed act if it was done.

#### **Remedies in proceedings under regulation 9**

**11.**—(1) Where the employment tribunal finds that a complaint under regulation 9 is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by D to P in respect of the act or failure complained of.

(2) Subject to the following paragraphs, the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the act or failure complained of and to any loss sustained by P which is attributable to D's act or failure.

(3) The loss shall be taken to include—

- (a) any expenses P reasonably incurred in consequence of the act or failure complained of; and
- (b) loss of any benefit which P might reasonably be expected to have had but for that act or failure.

(4) In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or Scotland.

(5) Where an award of compensation is made, the amount of compensation before any increase or reduction is made under paragraphs (6), (7) and (8) of this regulation and section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 shall not be less than £5,000.

(6) Where the conduct of P before the act or failure complained of was such that it would be just and equitable to reduce the amount of compensation, the tribunal shall reduce that amount accordingly.

(7) Where the tribunal finds that the act or failure complained of was to any extent caused or contributed to by action of P, it shall reduce or further reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(8) The amount of compensation shall be reduced or further reduced by the amount of any compensation awarded by the tribunal under section 149 of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the same act or failure.

(9) In determining the amount of compensation to be awarded no account shall be taken of any pressure exercised on D by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(10) Where P is a worker and the detriment to which P is subjected is the termination of P's contract, and that contract is not a contract of employment, the compensation awarded to P under this regulation shall not exceed £65,300.



## **Unfair dismissal**

**12.**—(1) Part 10 of the Employment Rights Act 1996(a) (unfair dismissal) is amended as follows.

(2) After section 104D insert—

### **“Blacklists**

**104E.**—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal relates to a prohibited list, and either—

- (a) the employer contravenes regulation 3 of the 2010 Regulations in relation to that prohibited list, or
- (b) the employer—
  - (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
  - (ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.

(2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that the employer—

- (a) contravened regulation 3 of the 2010 Regulations, or
- (b) relied on information supplied in contravention of that regulation,

the tribunal must find that such a contravention or reliance on information occurred, unless the employer shows that it did not.

(3) In this section—

“the 2010 Regulations” means the Employment Relations Act 1999 (Blacklists) Regulations 2010, and

“prohibited list” has the meaning given in those Regulations (see regulation 3(2)).”

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(a) 1996 c. 18; section 95 was amended by section 57, paragraph 29 of Schedule 1, and Schedule 2 to the Employment Relations Act 2004 (c. 24), by regulation 11 and paragraph 3(1) and (7) of Schedule 2 to the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034; section 97 was amended by regulation 11, and paragraph 3(1) and (8) of Schedule 2 to the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034, by sections 9 and 44, and paragraphs 1, 5, and 14 of Part III Schedule 4, and Schedule 9(2) to the Employment Relations Act 1999 (c. 26); section 98 was amended by section 57(1) and paragraph 30 of Schedule 1 to the Employment Relations Act 2004 (c. 24) and other amendments not relevant to these Regulations; section 104E is inserted by regulation 12(1) and (2) of these Regulations; section 105 was amended by regulation 32(1)(a) of the European Cooperative Society (Involvement of Employees) Regulations SI 2006/2059, by regulation 48(1)(a) of the Companies (Cross-Border Mergers) Regulations 2007 SI 2007/2974, section 9 and Schedule 4 and 9(2) to the Employment Relations Act 1999 (c.26), by section 40(5) of the Employment Relations Act 2004 (c. 17), by section 16 and paragraph 5 of Schedule 5 to the Employment Relations Act 1999 (c. 26), by regulation 12(1) and (3) of these Regulations, and by other amendments not relevant to these Regulations; section 106 was amended by section 53 and paragraphs 24 and 35 of Schedule 7 to the Employment Act 2002 (c. 22), and by section 11(1) and paragraph 42 of Schedule 1 to the Work and Families Act 2006 (c. 18); section 108 was amended by articles 3 to 5 of the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999 SI 1999/1436, by regulation 12(1) and (4) of these Regulations, and by other amendments not relevant to these Regulations; section 111 was amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8) and by regulation 12(1) and (5) of these Regulations; section 120 was amended by sections 36(1)(a) and 44 and Schedule 9(10) to the Employment Relations Act 1999 (c. 26), by regulation 12(1) and (6) of the Schedule to these Regulations and by other amendments not relevant to these Regulations; section 122 was amended by section 15 and paragraph 22 of Schedule 1 to the Employment Rights (Dispute Resolution) Act 1998 (c. 8) and by other amendments not relevant to these Regulations; section 127C was inserted by regulation 12(1) and (7) of these Regulations; section 128 was amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8), by section 6 of the Employment Relations Act 1999 (c. 26), by regulation 12(1) and (8) of these Regulations and by other amendments not relevant to these Regulations; section 129 was amended by regulation 2(1) and 32(5) of the Working Time Regulations 1998 SI 1998/1833, by section 9 of the Public Interest Disclosure Act 1998 (c.23), by section 6 of the Employment Relations Act 1999 (c. 26) and by regulation 12(1) and (9) of these Regulations; there are other amendments not relevant to these Regulations.



- (3) In section 105 (selection for redundancy)—
- (a) in subsection (1)(c) for “(7L)” substitute “(7M)”;
  - (b) after subsection (7L) insert—
    - “(7M) This subsection applies if—
      - (a) the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104E(1), and
      - (b) the condition in paragraph (a) or (b) of that subsection was met.”.
- (4) In section 108(3) (qualifying period of employment: cases where no qualifying period required), after paragraph (gj) (which is not yet in force) insert—
- “(gk) subsection (1) of section 104E (read with subsection (2) of that section) applies.”.
- (5) In section 111 (complaint to employment tribunal)—
- (a) in subsection (2) (general requirement to present complaint within three months beginning with effective date of termination), for “Subject to subsection (3)” substitute “Subject to the following provisions of this section”; and
  - (b) after subsection (4) insert—
    - “(5) Where the dismissal is alleged to be unfair by virtue of section 104E (blacklists),
      - (a) subsection (2)(b) does not apply, and
      - (b) an employment tribunal may consider a complaint that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”
- (6) In section 120 (minimum basic award in certain cases), after subsection (1B) insert—
- “(1C) Where an employee is regarded as unfairly dismissed by virtue of section 104E (blacklists) (whether or not the dismissal is unfair or regarded as unfair for any other reason), the amount of the basic award of compensation (before any reduction is made under section 122) shall not be less than £5,000.”.
- (7) In section 122 (reduction of basic award), after subsection (4) insert—
- “(5) Where a dismissal is regarded as unfair by virtue of section 104E (blacklists), the amount of the basic award shall be reduced or further reduced by the amount of any basic award in respect of the same dismissal under section 156 of the Trade Union and Labour Relations (Consolidation) Act 1992 (minimum basic award in case of dismissal on grounds related to trade union membership or activities).”.
- (8) In section 128 (interim relief pending determination of complaint), for subsection (1) substitute—
- “(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—
- (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
    - (i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
    - (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
  - (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104E(1) and the condition in paragraph (a) or (b) of that subsection was met,
- may apply to the tribunal for interim relief.”.
- (9) In section 129 (procedure on hearing of application for interim relief), for subsection (1) substitute—

“(1) This section applies where, on hearing an employee’s application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

- (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
  - (i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
  - (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
- (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104E(1) and the condition in paragraph (a) or (b) of that subsection was met.”.

#### *Action for breach of statutory duty*

### **Action for breach of statutory duty**

13.—(1) A contravention of regulation 3 is actionable as a breach of statutory duty.

(2) If there are facts from which the court could conclude, in the absence of any other explanation, that the defendant has contravened, or is likely to contravene, regulation 3, the court must find that such a contravention occurred, or is likely to occur, unless the defendant shows that it did not, or is not likely to, occur.

(3) In proceedings brought by virtue of this regulation, the court may (without prejudice to any of its other powers)—

- (a) make such order as it considers appropriate for the purpose of restraining or preventing the defendant from contravening regulation 3; and
- (b) award damages, which may include compensation for injured feelings.

(4) A person may complain to an employment tribunal under regulation 5, 6 or 9, or under Part 10 of the Employment Rights Act 1996 (unfair dismissal) as it applies by virtue of these Regulations and bring an action for breach of statutory duty in respect of the same conduct for the purpose of restraining or preventing the defendant from contravening regulation 3.

(5) Except as mentioned in paragraph (4), a person may not bring an action for breach of statutory duty and complain to an employment tribunal under regulation 5, 6 or 9, or under Part 10 of the Employment Rights Act 1996 (unfair dismissal) as it applies by virtue of these Regulations, in respect of the same conduct.

#### *Supplementary provisions*

### **Complaint against employer and employment agency**

14.—(1) Where P has a right of complaint under regulation 5 or 6 against R and E arising out of the same facts, P may present a complaint against either R or E or against R and E jointly.

(2) If P presents a complaint against only one party, that party or P may request the tribunal to join or sist the other as a party to the proceedings.

(3) The request shall be granted if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made after the tribunal has made its decision as to whether the complaint is well-founded.

(4) Where P brings a complaint against R and E jointly, or where P brings a complaint against one of them and the other is joined or sisted as a party to the proceedings, and the tribunal—

- (a) finds that the complaint is well-founded as against R and E, and
- (b) awards compensation,

the tribunal may order that the compensation shall be paid by R, by E, or partly by R and partly by E, as the tribunal may consider just and equitable in all the circumstances.

### **Awards against third parties in tribunal proceedings**

**15.**—(1) If in proceedings on a complaint under regulation 5, 6 or 9, or under Part 10 of the Employment Rights Act 1996 as it applies by virtue of these regulations, either the respondent or complainant claims that another person contravened regulation 3 in respect of the prohibited list to which the complaint relates, the complainant or respondent may request the tribunal to direct that other person be joined or sisted as a party to the proceedings.

(2) The request shall be granted if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made if it is made after the tribunal has made a decision as to whether the complaint is well-founded.

(3) Where a person has been so joined or sisted as a party to the proceedings and the tribunal-

- (a) finds that the complaint is well-founded,
- (b) awards compensation, and
- (c) finds the claim in paragraph (1) is well-founded,

the tribunal shall make a declaration to that effect and may award such of the remedies mentioned in paragraph (4) as it considers just and equitable.

(4) The remedies the tribunal may award are—

- (a) an order that compensation shall be paid by the person joined (or sisted) instead of by the respondent, or partly by that person and partly by the respondent;
- (b) a recommendation that within a specified period the person joined (or sisted) takes action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates.

(5) If the person joined (or sisted) fails without reasonable justification to comply with a recommendation to take action, the tribunal may increase its award of compensation or, if it has not made such an award, make one.

(6) Where by virtue of regulation 14 (complaint against employer and employment agency) there is more than one respondent, the above provisions apply to either or both of them.

### **Restrictions on contracting out**

**16.** Section 288 of the Trade Union and Labour Relations (Consolidation) Act 1992 (restrictions on contracting out) applies in relation to regulations 5, 6 and 9 as if they were contained in that Act.

### **Consequential amendments**

**17.**—(1) The Employment Tribunals Act 1996(a) is amended as follows.

(2) In section 10(1) (dismissal of complaint where action taken for purpose of safeguarding national security)—

- (a) omit the word “or” at the end of paragraph (a); and

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(a) 1996 c. 17; section 10 was amended by section 41 and paragraph 3 of Schedule 8 to the Employment Relations Act 1999 (c. 26), by sections 36 and 57(1) and paragraph 24 of Schedule 1 to the Employment Relations Act 2004 (c. 17) and by regulation 17(1) and (2) of these Regulations; section 16 was amended by section 1(2)(a) and (b) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8), by section 28 and Schedule 3 to the Welfare Reform Act 2007 (c. 5), by section 86 and Schedule 7 to the Social Security Act 1998 (c. 14), and regulation 17(1) and (3) of these Regulations; section 18 was amended by section 1(2)(a) and (b) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8), by section 5(1), (2) and (3) of the Employment Act 2008 (c. 24), by regulation 17(1) and (4) of these Regulations, and by other amendments not relevant to these Regulations; section 21 was amended by section 1(2)(a), section 15 and paragraph 17(1) and (3) of Schedule 1 to the Employment Rights (Dispute Resolution) Act 1998 (c. 8), by regulation 34(b) of the Working Time Regulations 1998 SI 1998/1833, by regulation 17(1) and (5) of these Regulations, and by other amendments not relevant to these Regulations; there are other amendments not relevant to these Regulations.

- (b) after paragraph (b) insert—
- “, or
- (c) regulation 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (detriment connected with prohibited list).”.
- (3) In section 16(1) (recoupment of benefits: payments in relation to which power exercisable)—
- (a) omit the word “or” at the end of paragraph (c); and
- (b) after paragraph (d) insert—
- “or
- (e) payments by employers to employees under regulation 5, 6 or 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010.”.
- (4) In section 18(1) (conciliation: proceedings and claims to which section applies)—
- (a) omit the word “or” at the end of paragraph (u);
- (b) after the paragraph inserted by regulation 33 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 insert—
- “, or
- (w) under regulation 5, 6 or 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010.”.
- (5) In section 21(1) (jurisdiction of Appeal Tribunal)—
- (a) omit the word “or” at the end of paragraph (v); and
- (b) after paragraph (w), insert-
- “, or
- (x) the Employment Relations Act 1999 (Blacklists) Regulations 2010.”.
- (6) In the list in Schedule A2 to the Trade Union and Labour Relations (Consolidation) Act 1992 (tribunal jurisdictions to which provisions apply requiring adjustment of award in case of failure to comply with code of practice), after the entry relating to regulation 17 of the Cross-Border Railway Services (Working Time) Regulations 2008 insert—
- “Regulation 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/xxxx) (detriment connected with prohibited list).”.

[ ]  
Title

Date Department for Business, Innovation and Skills

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations generally prohibit the compilation, use, sale or supply of blacklists containing details of trade union members and activists whose purpose is to discriminate against workers on grounds of trade union membership or trade union activities (regulation 3). The Regulations give rights to persons to complain to the employment tribunal in certain circumstances. These rights arise where a person has been refused employment (regulation 5) or employment agency services (regulation 6) or been subjected to a detriment (regulation 9) for a reason related to a blacklist. The Regulations make amendments to the Employment Rights Act 1996 to also give a right of complaint to the employment tribunal where a person has been unfairly dismissed for a reason relating to a blacklist. The Regulations provide for minimum and maximum compensation available from the employment tribunal in specified cases. Persons who have suffered or will suffer a loss due to the use or apprehended use of a blacklist may apply to the Court for damages, including damages for injury to feelings, and for orders restraining or preventing the compilation, use, sale or supply of the blacklist (regulation 13). A person cannot claim compensation from the employment tribunal and damages from the Court in respect of the same conduct (regulation 13(5)). Where a person is pursuing a complaint before the employment tribunal, that person is permitted to apply to the Court for orders restraining or preventing the compilation, use, sale or supply of the blacklist in question (regulation 13(4)).

A full impact assessment of the effect that this instrument will have on the costs of business is available at <http://www.berr.gov.uk/files/file54074.pdf> and from the Employment Relations Directorate of the Department for Business, Innovation and Skills, 1 Victoria Street, London, SW1H 0ET.

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*Draft Regulations laid before Parliament under section 3 of the Employment Relations Act 1999,  
for approval by resolution of each House of Parliament.*

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DRAFT STATUTORY INSTRUMENTS

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**2010 No. 0000**

**TERMS AND CONDITIONS OF EMPLOYMENT**

The Employment Relations Act 1999 (Blacklists) Regulations  
2010

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