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Blacklisting –
the battle for justice

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The Consulting Association – a case of conspiracy

"We live in an age in which conspiracy theories abound - but the blacklisting of building workers by big construction companies via the Consulting Association (the CA) was no theory, it actually was a real live conspiracy."

House of Commons Scottish Affairs Committee,
Interim Report on Blacklisting in Employment, April 2013.

The history of blacklisting can be traced back nearly a century through the Consulting Association (CA) to its forerunner, the Economic League, which was formed in 1919 to combat 'subversion' and wound up in 1993 following a scandal about its activities.

The CA was founded by a former employee of the Economic League, Ian Kerr, with £20,000 from Sir Robert McAlpine Ltd for set up costs and the purchase of the blacklist from its predecessor.

According to evidence given to the Scottish Affairs Committee (SAC) by Kerr, the CA started with 19 construction companies – many of them household names – each of which paid an annual subscription (initially £3,500) and an additional charge for every name they submitted for checking.

Kerr, who ran the CA until its demise, told the SAC that it was 'a secret organisation' which operated the blacklist as 'a secure or a secret system'.

Communication with each member company was through a designated 'main contact' and only by telephone. Members could provide information on people to be added to the blacklist and check the names of people they were considering employing.

Kerr explained to the SAC how the CA handled lists of potential recruits from members. He said:

"Most of the time we would go back by telephone, identify the list and say to the HR department girl or man, 'All clear'. If there was a name that we had information on, we would say to them, 'All clear, except a certain name'."

Details on the 'certain name' would then be read out from the card and the company would use the information to make a decision on whether or not to employ that individual. At the end of the process, the initial fax request would be shredded.

The Consulting Association – the members

Nineteen construction firms were involved in establishing the CA. They include:

- Amey
- Balfour Beatty Civil Engineering
- Balfour Beatty Construction
- Ballast Wiltshier
- Bovis
- Edmund Nuttall
- G. Percy Trentham
- Higgs and Hill
- John Laing
- John Mowlem
- Kier Group
- Morrison Construction
- Norwest Holst
- Sir Robert McAlpine Ltd
- Tarmac
- Taylor Woodrow
- Trafalgar House
- Walter Llewellyn
- Willmott Dixon

The CA was chaired during its existence successively by representatives from Sir Robert McAlpine, Laing O'Rouke Ltd, Kier UK Ltd, Skanska Ltd, Balfour Beatty plc and McAlpine.

Other companies that participated in the CA include: Carillion, Vinci, Costain and Crown House Technologies.

Victory for blacklisted Unite the Union workers

The names and personal details of 3,213 workers were held covertly on the CA's blacklist. The blacklist was used to make sure that union activists could not get work in the construction industry.

In May 2016, Unite Legal Services were victorious in winning compensation and important non-financial terms in the biggest blacklisting scandal in UK construction industry history. 256 Unite the Union members received more than £10 million in compensation as a result.

Unite, working with Thompsons Solicitors, waged a five-year fight against Sir Robert McAlpine Ltd and Balfour Beatty Engineering Services as well as more than 30 other firms, which were part of a blacklisting conspiracy that saw hundreds of workers lose those jobs and have had their lives ruined for carrying out legitimate trade union activities, such as health and safety.

Unite developed legal principles from the phone hacking litigation, mounting claims of defamation, the violation of privacy, confidence and data protection rights. Unite also claimed that the CA activities amounted to an unlawful conspiracy. Although the companies made the admissions and limited apologies in October 2016, Unite refused to accept that these apologies were sincere.

Unlike other teams, the Unite legal team agreed to settlement only after increases to compensation, paid for fully by the companies had been agreed, and on the basis that the apologies were not sincere and the matter was not closed.

Howard Beckett, Unite Executive Director for Legal said:
"Whilst no amount of money can bring justice for a life wrecked by blacklisting, this is a landmark victory for the victims and their families. Unite's persistence in extracting the best financial and non-financial terms is vindicated. Thompsons Solicitors and the team led by Richard Arthur can be proud of the role they played in fighting for Unite members."

Ethical procurement

European Law

The EU rules on how public bodies award contracts for services, supplies or works are set out in the Public Sector Directive 2014/24. Article 57 (4) (C) of the Public Sector Directive provides for an exclusion of economic operators on the grounds of "grave professional misconduct" which would apply where a company has blacklisted workers.

UK Law

In the UK, the Public Sector Directive is implemented through the Public Contracts Regulations 2015 and so there is now domestic legislation that implements this most recent Directive. Regulation 57 (8) (C) of the Public Contracts Regulations implements Article 57 (4) (C) and states:

"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… (the operator) is guilty of grave misconduct which renders its integrity questionable."

However Regulation 57 (8) (C) is subject to the contractor's ability to "self-clean" under Regulations 57 (13) to (17) (see below).

Defining and proving "grave misconduct"

Regulation 57 is silent as to what is covered by the term "grave misconduct".

However there is no doubt that anything unlawful under domestic legislation would count as "grave misconduct". It is also very likely that anything that contravened international law, such as the ILO conventions and the ECHR would be considered grounds for grave misconduct. In that regard the ILO's Freedom of Association Committee has already found that blacklisting is outlawed by ILO Convention No. 98.

In respect of the level of proof required, Regulation 57 provides that the contracting authority must "demonstrate by appropriate means" that grave misconduct has occurred. This also would suggest that court or employment tribunal decisions are not required (although they could be used where they existed) and that other evidence – like the findings of the Scottish Affairs Committee or the admissions by construction companies in the blacklisting litigation – could meet the standard of proof required.

Self-Cleaning

The discretionary exclusion under Regulation 57 (8) (C) is subject to a contractor's ability to self-clean under Regulations 57 (13) to (17).

In European competition law, self-cleaning refers to the possibility that a firm may have taken all necessary measures to ensure past wrongdoing will not be repeated. If this is the case, exclusion from tendering may be regarded as disproportionate.

Whether the self-cleaning measures are adequate to prevent a re-occurrence of the wrongful conduct in question will depend on the circumstances of the particular case. This includes the seriousness of the wrong-doing – including its duration, recurrence and financial impact – and the adequacy of the measures employed by the affected company to render further occurrences of wrongdoing as difficult as possible.

In making a decision on whether or not to exclude a potential supplier from a procurement process for "grave professional misconduct", the tendering organisation would need to:

1. clarify the relevant facts and circumstances of the misconduct;
2. take account of action to repair the damage caused (such as payment of compensation or an offer of employment), and;
3. assess the measures taken to prevent re-occurrence (such as the implementation of personnel systems or organisational changes).

Unite's position, further to the High Court litigation against the companies who blacklisted workers, is as follows:

1. The companies have refused to call the practice they adopted "blacklisting".
2. Those who facilitated the process of blacklisting workers in these construction companies have never been appropriately disciplined.
3. The apologies made in the High Court were not genuine in nature.
4. The companies have refused to support calls for a Public Inquiry into the practice of blacklisting.

Given all of this, Unite does not believe the companies who were the Defendants in the High Court blacklisting litigation have yet done enough to self-clean in accordance with Regulations 57 (13) to (17).

Blacklisting timeline

1993	Consulting Association begins compiling illegal database on thousands of construction workers
2009	Consulting Association investigated for blacklisting
2011	Unite the Union starts campaign for justice for blacklisted workers
2012	Rumours of collusion between the police and Consulting Association are denied
2015	Unite Legal Services brings group case to court – construction firms plead guilty of blacklisting
2016	256 Unite the Union workers compensated more than £10m

Looking to the future

The fight goes on. Further Unite Claimants continue to come forward and their claims will be pursued through the courts. Unite continues to campaign for a full inquiry into blacklisting in the construction industry.

Unite Legal Services Blacklisting Hotline: 0800 587 7539

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0800 709 007

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