

**RHEOLIADAU DRAFFT I
WAHARDD RHESTRAU
GWAHARDD UNDEBWYR LLAFUR
—
DOGFEN YMGYNGHORI**

Cynnwys

Tudalen

Nodyn Esboniadol a Chwestiynau i'r Ymatebwyr

t3

Y rheoliadau drafft

t10

Asesiad o Effaith y Rheoliadau

t24

dti

Department of Trade and Industry

YMGYNGHORI AR REOLIADAU DRAFFT I WAHARDD
RHESTRAU GWAHARDD AELODAU UNDEBAU LLAFUR

Nodyn Esboniadol a Chwestiynau i'r Ymatebwyr

Mae adran 3 o Ddeddf Cysylltiadau Cyflogaeth 1999 yn cynnwys pwr i'r Ysgrifennydd Gwladol gyflwyno rheoliadau sy'n gwahardd llunio, lledaenu a defnyddio rhestrau gwahardd undebau llafur. Mae'r ddogfen hon yn cynnwys rheoliadau drafft at ddibenion ymgynghori. **Mae'r Llywodraeth yn gwahodd sylwadau arnynt.**

Mae'r rheoliadau wedi'u modelu ar y gyfraith bresennol sy'n llywodraethu'r amddiffyniadau tebyg yn erbyn diswyddo ac andwyo ar sail aelodaeth a gweithgareddau undeb llafur. Mae'r darpariaethau hyn ar gael ers blynyddoedd lawer ac maent wedi ennill eu plwyf fel un o nodweddion y gyfraith ar gyflogaeth. Cyn belled ag y gellir, mae'r un geiriad, neu eiriad tebyg, yn cael ei ddefnyddio yn y rheoliadau hyn er mwyn osgoi creu anghysondebau posibl.

Bydd y Llywodraeth yn diwygio'r rheoliadau yn dilyn yr ymarfer ymgynghori hwn, ond ni chânt eu gosod gerbron y Senedd i'w cymeradwyo na'u rhoi ar waith hyd nes y ceir tystiolaeth bod unigolion neu gyrff wrthi'n cynllunio i lunio rhestrau gwahardd o'r fath, neu y ceir tystiolaeth bod galw amdanynt ymhlith cyflogwyr.

Mae Asesiad o Effaith y Rheoliadau (RIA) wedi'i ychwanegu ar ddiwedd y ddogfen hon. **Mae'r Llywodraeth yn gwahodd sylwadau ar y dadansoddiad yn yr RIA.**

Dylai ymatebion i'r rheoliadau drafft hyn, wedi' seilio ar yr holiadur isod, gael eu hanfon erbyn 22 Mai 2003 at:

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Crynodeb o'r Rheoliadau a'r Holiadur

Rheoliad 1

Mae hwn yn enwi teitl y rheoliadau. Mae'r dyddiad "2003" wedi'i gynnwys at ddibenion darlunio yn unig. Fel yr esboniwyd uchod, ni chaiff y rheoliadau eu cyflwyno hyd nes y ceir tystiolaeth bod rhestrau gwahardd yn digwydd neu y gallent ddigwydd.

Rheoliad 2

Yn hwn ceir yr union ddiffiniadau ar gyfer y termau a ddefnyddir mewn manau eraill yn y rheoliadau.

Rheoliad 3

Mae *paragraff (2)* yn diffinio rhestr waharddedig (hynny yw "rhestr wahardd"). Mae'r diffiniad yr un fath yn union â'r un a ddefnyddir yn adran 3 o Ddeddf 1999.

Mae *paragraffau (1), (3) a (4)* yn datgan ei bod yn anghyfreithlon llunio, gwerthu neu gyflenwi, neu ddefnyddio rhestrau gwaharddedig. Unwaith eto, mae'r geiriad yr un fath neu yn debyg iawn i'r geiriad a ddefnyddir yn adran 3 o Ddeddf 1999. Er hynny, mae geiriau wedi'u hychwanegu ym *mharagraff (4)* er mwyn sicrhau nad yw'r Post Brenhinol na dosbarthwyr eraill sy'n gweithredu'n ddiwyll yn cyflawni gweithred anghyfreithlon os byddant yn dosbarthu rhestrau yn ddjarwybod neu'n ddamweiniol.

C1. Oes angen amddiffyn cyrff sy'n dosbarthu rhestrau gwaharddedig yn ddjarwybod ac a yw'r amddiffyniad wedi'i fynegi'n gywir?

Mae'r Llywodraeth yn ymwybodol bod amgylchiadau eraill yn bodoli lle na ddylai'r rheoliadau fod yn gymwys am y byddai hynny'n peri anhwylostod difrifol ar gyfer ymddygiad priodol ac angenrheidiol cyflogwyr neu eraill. Mae *paragraffau 5 – 6* felly yn diffinio'r amgylchiadau hynny lle nad yw'n anghyfreithlon llunio, cyflenwi neu ddefnyddio rhestrau gwahardd.

Mae *paragraff (5)* yn ymdrin â'r amgylchiadau lle bydd unigolyn (er enghraifft, newyddiadurwr) yn defnyddio rhestr wahardd er mwyn datgelu bodolaeth y rhestr. Am mai gweithgarwch cudd yw defnyddio rhestrau gwahardd, mae newyddiaduraeth ymchwiliol yn debyg o fod yn ffordd bwysig o ddatguddio achosion. Mae newyddiadurwyr felly yn debyg o ddefnyddio rhestrau gwaharddedig a dyfynnu ohonynt wrth ddatgelu camymddwyn posibl. Oherwydd hyn, mae'r Llywodraeth o'r farn ei bod yn bwysig esemptio gweithredu o'r fath.

C2. A yw'r esemptiad hwn i newyddiadurwyr yn angenrheidiol ac wedi'i lunio mewn modd priodol? A yw'n cynnig unrhyw le i ddefnyddwyr rhestrau gwahardd osgoi'r gwaharddiad?

Mae *paragraff (6)* yn datgan na fyddai'r gwaharddiad ar lunio neu ddefnyddio rhestr wahardd yn gymwys pan fyddai angen profiad neu wybodaeth arwyddocaol o undebau llafur ar gyfer swydd neu safle. Nid oes modd pennu pob swydd lle mae

angen profiad o'r fath. Er hynny fe allai'r enghreifftiau gynnwys swyddi penodol mewn undeb llafur (swyddog undeb amser-llawn, ond nid, dyweder, rheolwr arlwyio undeb), swyddog cysylltiadau diwydiannol sy'n cynrychioli cyflogwr mewn cyd-fargeinio neu weithwyr a benodir i gorff cyhoeddus fel y Gwasanaeth Ymgynghori, Cymodi a Chymrodeddu (Acas).

C3. A yw'r esemptiad hwn yn angenrheidiol? A oes unrhyw anfanteision posibl gydag ef, a fyddai'n caniatáu i ddefnyddwyr rhestrau gwahardd osgoi'r gwaharddiad? A ddylid cael esemptiad pendant hefyd ar gyfer undebau llafur?

Mae *paragraff* (7) yn hepgor o'r Rheoliadau y rhai y mae'r gyfraith yn eu gorfodi i lunio rhestr waharddedig, ei defnyddio, ei gwerthu neu ei chyflenwi.

Mae Rheoliad 3 yn pennu'r fframwaith cyffredinol ar gyfer diffinio'r hyn sy'n gyfreithlon a'r hyn sy'n anghyfreithlon yn y maes hwn.

C4. A yw'r fframwaith yn briodol? A oes enghreifftiau eraill lle dylid peri ei bod yn gyfreithlon defnyddio rhestr a fyddai fel arall yn rhestr waharddedig?

Rheoliadau 4 a 5

Mae Rheoliad 4 yn ei gwneud yn anghyfreithlon i gyflogwr wrthod cyflogi unigolyn am fod enw'r person hwnnw ar restr waharddedig neu am nad yw ei enw arni. Mewn geiriau eraill, mae'n anghyfreithlon defnyddio rhestr waharddedig i wahaniaethu yn erbyn undebwr llafur, neu o'i blaid, mewn cysylltiad â recriwtio. Mae'r geiriad wedi'i seilio'n agos ar adran 137 o Ddeddf Undebau Llafur a Chysylltiadau Llafur (Cydygyfnerthu) 1992, sy'n ei gwneud yn anghyfreithlon gwrthod cyflogi ar sail aelodaeth undeb (neu ddiffyg aelodaeth). Er hynny, mae *paragraff* (4) yn gosod baich y prawf ar y cyflogwr, i ddangos nad oes cysylltiad rhwng y penderfyniad i wrthod cyflogi a rhestr waharddedig, os oes rheswm dros gredu bod gan y cyflogwr restr o'r fath yn cynnwys enw'r person neu ei fod wedi gweld rhestr felly.

Mae Rheoliad 5, sydd wedi'i seilio yn yr un modd ar adran 138 o Ddeddf 1992, yn cynnig yr amddiffyniad cyfatebol er mwyn i unigolion gael defnyddio gwasanaethau asiantaeth gyflogaeth.

C5. A yw'r rheoliadau hyn am wahaniaethu wrth y pwynt cyflogi wedi'u geirio mewn modd priodol?

Rheoliad 6

Mae'r Rheoliad hwn yn cynnig amddiffyniadau rhag gweithredoedd andwyol gan gyflogwyr yn erbyn eu gweithwyr presennol am fod eu henwau wedi ymddangos, neu heb ymddangos, ar restr waharddedig. Gallai gweithredoedd andwyol o'r fath gynnwys, dyweder, methu â dyrchafu, neu roi dyletswyddau llai boddhaus neu lai dymunol i weithiwr neu ddiswyddo yn achos gweithiwr nad yw'n weithiwr cyflogedig. Mae *paragraff* (4) yn gosod baich y prawf ar y cyflogwr, i ddangos nad oedd y weithred andwyol yn gysylltiedig â defnyddio rhestr waharddedig, os oes rheswm dros gredu bod gan y cyflogwr restr o'r fath yn cynnwys enw'r person neu ei fod wedi gweld rhestr felly.

C6. A yw'r rheoliad hwn am driniaeth andwyol yn y gwaith wedi'i eirio mewn modd priodol?

Rheoliadau 7 ac 8

Mae'r rhain yn rhoi awdurdodaeth i dribiwnlysoedd wrando cwynion am honiadau bod Rheoliadau 4 – 6 wedi'u torri o fewn y terfynau amser safonol ar gyfer dod â cheisiadau gerbron tribiwnlysoedd. Mae gan y tribiwnlysoedd bwer eisoes i wrando cwynion am y gyfraith bresennol, a thebyg, sy'n amddiffyn unigolion ar sail aelodaeth a gweithgareddau undeb llafur.

C7. Ai'r tribiwnlys cyflogaeth yw'r corff priodol i wrando'r cwynion hyn ac a yw'r terfynau amser ar gyfer dod â chwynion yn briodol?

Rheoliadau 9 a 10

Mae'r rheoliadau hyn yn darparu'r rhwymedïau y caiff tribiwnlysoedd eu dyfarnu ar ôl penderfynu bod rheoliadau 4 – 6 wedi'u torri. Mae'r rhwymedïau wedi'u seilio ar y rhai y caiff y tribiwnlysoedd eu dyfarnu ar hyn o bryd os caiff y gyfraith bresennol ar aelodaeth undebau llafur ei thorri.

Mae rheoliad 10 yn darparu y bydd gan weithiwr sydd wedi'i ddiswyddo ac nad yw'n weithiwr cyflogedig yr un hawl i iawndal â gweithiwr cyflogedig.

C8. A yw'r rhwymedïau hyn yn briodol?

Rheoliad 11

Mae hwn yn ymdrin â'r amgylchiadau penodol lle gallai cwynion o dan reoliadau 4 a 5 gael eu gwneud yn erbyn cyflogwr ac asiantaeth cyflogaeth ar sail yr un ffeithiau. Mae wedi'i seilio'n agos ar adran 141 o Ddeddf 1992.

C9. A yw'r rheoliad hwn yn angenrheidiol ac wedi'i eirio mewn modd priodol?

Rheoliad 12

Mae'r rheoliad hwn yn cynnig amddiffyniad i weithwyr rhag cael eu diswyddo ar y sail bod eu henwau wedi ymddangos, neu heb ymddangos, ar restr waharddedig.

Caiff cwynion o dan yr awdurdodaeth hon eu gwranddo gan dribiwnlysoedd cyflogaeth a'u gweinyddu ganddynt yn yr un ffordd yn fras ag achosion eraill diswyddo annheg honedig. Er hynny, mae *paragraff* (3) yn gosod baich y prawf ar y cyflogwr, i ddangos nad oedd cysylltiad rhwng y diswyddo a defnyddio rhestr waharddedig, os oes rheswm dros gredu bod gan y cyflogwr restr o'r fath yn cynnwys enw'r person neu ei fod wedi gweld rhestr felly.

C10. A yw'r amddiffyniad hwn yn erbyn diswyddo wedi'i lunio mewn modd priodol?

Rheoliad 13

Mae'r rheoliad hwn yn caniatáu i'r achwynydd neu'r atebydd ofyn i'r tribiwnlys cyflogaeth gyfarwyddo bod trydydd parti yn cael ei uno ag achos neu ei wysio i achos o dan Reoliadau 4, 5, 6 a 12, gyda rhai cyfyngiadau o ran yr amseru. Bydd hyn yn sicrhau bod achosion yn erbyn defnyddiwr rhestr waharddedig (cyflogwr neu asiantaeth gyflogaeth) yn gallu cael eu hehangu i gynnwys lluniwr neu ledaenwr y rhestr. Drwy wneud hyn, gellir gorchymyn i'r lluniwr neu'r ledaenwr dalu rhan neu'r cyfan o'r iawndal a ddyfernir am dorri'r rheoliadau. Mae hefyd yn caniatáu i'r tribiwnlys orchymyn bod y lluniwr neu'r ledaenwr yn cymryd camau priodol eraill (dyweder atal cynhyrchu neu gyflenwi rhestrau gwaharddedig) a fyddai'n lleihau'r perygl o niwed pellach i'r achwynydd.

C11. A ddylid cael cyfleuster ar gyfer uno llunwyr neu ledaenwyr â chwynion i dribiwnlysoedd? Os felly, a yw'r cyfleuster wedi'i eirio mewn modd priodol?

Rheoliad 14

Mae adran 288 o Ddeddf 1992 yn cyfyngu gallu gweithiwr i contractio allan o'r hawliau statudol a gyflwynwyd gan y Ddeddf honno, gan gynnwys yr hawliau sy'n ymwneud ag aelodaeth a gweithgareddau undeb llafur. Mae'r rheoliad hwn yn estyn y cyfyngiad hwnnw i'r hawliau a gyflwynir gan y rheoliadau hyn ar restrau gwahardd.

C12. A yw'r cyfyngiad hwn ar contractio allan yn briodol?

Rheoliadau 15 ac 16

Mae rheoliad 15 yn galluogi person sydd wedi dioddef neu a allai ddioddef colled oherwydd rhestr wahardd ddwyn achos sifil gerbron llys sirol ynghylch honiadau bod Rheoliad 3 wedi'i dorri. Byddai'r hawl hon yn gymwys yn bennaf i unigolion y byddai eu henwau'n ymddangos ar restrau gwahardd. Er hynny, fe allai fod yn gymwys hefyd i undeb llafur mewn achosion lle gellid dangos ei fod wedi cael colled (er enghraifft, colli tanysgrifiadau aelodau) am fod aelodau neu ddarpar aelodau wedi'u cynnwys ar restr wahardd.

Gallai'r Llys ddyfarnu iawndal a chaniatáu rhyddhad dros dro er mwyn atal niwed pellach rhag digwydd. Gan hynny, fe allai'r rhyddhad fod ar ffurf gorchymyn interim gan y llys fod lluniwr rhestr wahardd yn rhoi'r gorau i weithgareddau o'r fath. Mae'r Llywodraeth yn disgwyl y byddai'r mwyafrif o geiswyr wedyn yn chwilio am iawndal yn y tribiwnlys cyflogaeth yn hytrach na'r Llys. Er hynny, ar hyn o bryd nid yw'r tribiwnlys yn gallu cynnig rhyddhad dros dro er mwyn rhwystro neu atal unrhyw ymddygiad gan y diffynnydd, ac nid yw'r Llywodraeth yn bwriadu rhoi pwerau o'r fath i'r tribiwnlysoedd.

Mae Rheoliad 16 yn ymdrin â'r amgylchiadau lle bydd person yn dwyn achos, neu lle y gallai ddwyn achos, o dan y Rheoliadau yn erbyn cyflogwr neu berson arall yn y tribiwnlys cyflogaeth a'r Llys. Mae'r Rheoliad yn sicrhau nad yw'r achosion yn cael

eu dyblygu, er ei fod yn caniatáu i rywun wneud cais am ryddhad interim yn y Llys a mynd ar drywydd y rhwymedi sylweddol yn y Tribiwnlys.

C13. A oes angen darparu rhyddhad dros dro ar gyfer honiadau bod Rheoliad 3 wedi'i dorri? A ddylai cwynion bod Rheoliad 3 wedi'i dorri gael eu cyfeirio at y Llys? Os a ddylent, pa gorff arall a ddylai wrando'r cwynion hyn? A yw Rheoliadau 15 ac 16 wedi'u dehongli'n gywir?

Rheoliad 17 a'r Atodlen

Mae'r rheoliadau hyn yn gofyn am nifer o newidiadau canlyniadol mewn deddfwriaeth arall. Er enghraifft, dylai dyletswydd Acas i gymodi ceisiadau i dribiwnlysoedd gael ei hestyn i'r awdurdodaethau tribiwnlys newydd a gyflwynir gan Rheoliadau 4, 5, 6 a 12. Rhestrir y newidiadau canlyniadol hyn mewn Atodlen, y mae Rheoliad 17 yn dod â hi i rym.

Mae'r Atodlen hefyd yn darparu y bydd dewis gweithiwr i'w wneud yn afreidiol ar y sail bod enw'r gweithiwr ar restr waharddedig yn ddiswyddo annheg. Mae hefyd yn darparu y caiff gweithwyr wedi'u diswyddo wneud cais am ryddhad interim.

C14. A yw'r Atodlen yn enwi'r holl newidiadau canlyniadol a fydd yn angenrheidiol mewn darnau eraill o ddeddfwriaeth?

Cwestiynau Eraill

Fetio at Ddibenion Diogelwch y Wlad

Polisi'r Llywodraeth yw y dylai unigolion gael eu fetio at ddibenion diogelwch y wlad cyn cael eu cyflogi mewn swyddi sensitif penodol. Nid yw fetio at ddibenion diogelwch y wlad yn golygu defnyddio rhestrau gwahardd undebau llafur, ond mae'n bosibl y gallai'r wybodaeth a ddefnyddir yng nghyd-destun fetio o safbwynt diogelwch y wlad gyfeirio weithiau at y ffaith bod unigolyn yn aelod neu yn weithgar mewn undeb. Mae'r Llywodraeth am sicrhau nad yw hyn ynddo'i hun yn dod â'r broses fetio o fewn maes y Rheoliadau, na fwriedir iddynt dorri ar draws y broses na'i hatal mewn unrhyw fodd. Ar hyn o bryd nid yw'r Rheoliadau'n darparu unrhyw esemptiadau neu hepgoriadau penodol sy'n ymdrin â'r mater hwn. Serch hynny, mae'r Llywodraeth yn meddwl cynnwys darpariaeth benodol o'r fath yn fersiwn terfynol y rheoliadau hyn. Mae angen i unrhyw ddarpariaeth gael ei drafftio â gofal er mwyn sicrhau ei bod yn targedu'r gweithgarwch hwn yn unig, ac nad yw'n cynnig bwllch ar gyfer mathau niweidiol o weithgareddau gyda rhestrau gwahardd.

C15. Pa ffurf y dylai'r ddarpariaeth bendant hon ei chymryd?

Maes y Rheoliadau

Gall rhestrau gwahardd effeithio ar amrediad eang o bersonau. Oherwydd hynny, mae'r rhan fwyaf o'r Rheoliadau hyn yn gymwys i weithwyr. Rhoddir diffiniad "gweithiwr" yn adran 13 o Ddeddf Cysylltiadau Cyflogaeth 1999. Serch hynny, mae

Rheoliad 9 wedi'i gyfyngu i weithwyr cyflogedig yn unig, ar y cyd â'r ddeddfwriaeth arall sy'n ymwneud â diswyddo annheg.

C16. Ydych chi'n credu bod y maes hwn yn briodol?

Asesiad o Effaith y Rheoliadau (RIA)

C17. Ydych chi'n cytuno â'r asesiad o gostau a manteision y rheoliadau a geir yn yr RIA sydd ynghlwm wrth y rheoliadau hyn? Oes gennych chi unrhyw wybodaeth ychwanegol y dylid ei defnyddio wrth wneud yr asesiad?

Cyffredinol

C18. A oes unrhyw sylwadau yr hoffech eu cyflwyno ynghylch y rheoliadau?

2003 No.....

TERMS AND CONDITIONS OF EMPLOYMENT

Prohibition of Blacklists Regulations 2003

Made [] 2003

Coming into force [] 2003

Whereas a draft of the following Regulations was laid before Parliament in accordance with section 42 of the Employment Relations Act 1999 (a) and approved by resolution of each House of Parliament:

Now, therefore, the Secretary of State, in exercise of the powers conferred on him by section 3 of the Employment Relations Act 1999, hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Prohibition of Blacklists Regulations 2003 and shall come into force on .

Interpretation

2. In these Regulations -

“the 1992 Act” means the Trade Union and Labour Relations (Consolidation) Act 1992 (2);

(a) 1999 c.26.

(b) 1992 c.52

“the 1996 Act” means the Employment Rights Act 1996 (c).

“the 1999 Act” means the Employment Relations Act 1999;

“employment” in relation to an employee, means employment under a contract of service or apprenticeship, and related expressions shall be construed accordingly;

“employment” in relation to a worker, means employment under his contract;

“the Court” means the High Court, the Court of Session, county court or sheriff court.

Prohibition of blacklists

3. (1) It is unlawful for any person to compile a prohibited list.
- (2) In these regulations, prohibited list means a list which
 - (a) contains details of members of trade unions or persons who 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 purpose of discrimination in relation to recruitment or in relation to the treatment of workers.
- (3) It is unlawful for any person to use a prohibited list.
- (4) It is unlawful for any person knowingly or recklessly to sell or supply a prohibited list.
- (5) It is not unlawful under this regulation for a person to compile, sell, supply or use a blacklist where that person can show that in the particular circumstances the compiling, selling, supplying or using was justified in the public interest because that person’s sole or principal purpose was to expose a breach or potential breach in these regulations.
- (6) It is not unlawful under this regulation for a person to compile or use a prohibited list for the purpose of employing a person or appointing to an office a person where it is reasonable to believe that significant trade union experience or significant knowledge of trade unions is a necessary requirement of employment or appointment.
- (7) It is not unlawful under this regulation to compile, use, sell or supply a prohibited list where required or authorised under an enactment, or by any rule of law or order of the court.

(c) 1996 c.18.

Refusal of Employment

4. (1) Subject to paragraph (3), it is unlawful to refuse a person employment because that person's name is, or is not, on a prohibited list.

(2) A person who is thus unlawfully refused employment has a right of complaint to an employment tribunal.

(3) A person does not act unlawfully under paragraph (1) in refusing another person employment if he does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) or (7) of regulation 3, not unlawful under that regulation.

(4) Where a person is refused employment by another person that refusal shall be taken to be unlawful under paragraph (1) if -

(a) there is reason to suppose that, at the time of the refusal that other person had in his possession or had seen a prohibited list on which the name of the applicant appeared (or the name of the applicant did not appear in circumstances where it is alleged that the person was refused employment on the basis that person's name was not on the list), and

(b) that other person fails to show that the reason for the refusal, or if more than one the principal reason, was unrelated to use of the list.

(5) A person shall be taken to be refused employment if he seeks employment of any description with a person and that person -

(a) refuses or deliberately omits to entertain and process his application or enquiry, or

(b) causes him to withdraw or cease to pursue his application or enquiry, or

(c) refuses or deliberately omits to offer him employment of that description, or

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

(6) Where there is an arrangement or practice under which employment is offered only to persons appearing on a prohibited list, a person who does not appear on a prohibited list and who is refused employment in pursuance of this arrangement

or practice shall be taken to have been refused employment because he does not appear on a prohibited list.

Refusal of Service of Employment Agency

5. (1) Subject to paragraph (3) it is unlawful for an employment agency to refuse a person any of its services because that person's name is, or is not, on a prohibited list.

(2) A person who is thus unlawfully refused any service of an employment agency has a right of complaint to an employment tribunal.

(3) An employment agency does not act unlawfully under paragraph (1) in refusing a person any of its services if the employment agency does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) or (7) of regulation 3, not unlawful under that regulation.

(4) A person shall be taken to be refused a service if he seeks to avail himself of it and the agency -

(a) refuses or deliberately omits to make the service available to him, or

(b) causes him not to avail himself of the service or to cease to avail himself of it, or

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

(5) An employment agency shall be taken to have unlawfully refused contrary to paragraph (1) if

(a) there is reason to suppose that, at the time of the refusal the employment agency had in his possession or had seen a prohibited list on which the name of the applicant appeared, and

(b) the employment agency fails to show that the reason for the refusal, or if more than one the principal reason, was unrelated to use of the list.

(6) For the purposes of this regulation, "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.

(7) For the purposes of this regulation as it applies to employment agencies

(a) services other than those mentioned in the definition of employment agency in paragraph (6) shall be disregarded, and

(b) a trade union shall not be regarded as an employment agency by reason of services provided by it only for, and in relation to, its members.

Detriment

6. (1) Subject to paragraph (3) a worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, of his employer for a reason related to that name being, or not being, on a prohibited list.

(2) A worker who thus suffers detriment has a right of complaint to an employment tribunal.

(3) An employer does not act unlawfully under paragraph (1) by subjecting a worker to any detriment by any act, or any deliberate failure to act, if the employer does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) and (7) of regulation 3, not unlawful under that regulation.

(4) A worker shall be taken to have been unlawfully subject to detriment by an act, or a failure to act, contrary to paragraph (1) if

(a) there is reason to suppose that at the time the act, or failure to act, took place his employer had in his possession or had seen a prohibited list on which the name of the applicant appeared; and

(b) his employer fails to show that the reason, or if more than one the principal reason, for the act, or failure to act, was unrelated to use of the list.

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

Time Limits for Proceedings under regulations 4 and 5

7. (1) An employment tribunal shall not consider a complaint under regulations 4 or 5 unless it is presented to the tribunal -

(a) before the end of the period of three months beginning with the date of the conduct to which the complaint relates, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as the tribunal considers reasonable.

(2) The date of the conduct to which a complaint under regulation 4 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 the complainant's application or enquiry, or
 - (ii) to offer employment,

the end of the period within which it was reasonable to expect the employer to act;

- (c) in the case of conduct causing the complainant to withdraw or cease to pursue his application or enquiry, the date of that conduct;
- (d) in a case where an offer was made but withdrawn, the date when it was withdrawn;
- (e) in any other case where an offer was made but not accepted, the date on which it was made.

(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 to make a service available, the end of the period within which it was reasonable to expect the employment agency to act;
- (c) in the case of conduct causing the complainant not to avail himself of a service or to cease to avail himself 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 provided was provided.

Time limit for proceedings under regulation 6

8. (1) An employment tribunal shall not consider a complaint under regulation 6 unless it is presented -

- (a) 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, or
- (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

- (2) 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 that period;
 - (b) a failure to act shall be treated as done when it was decided on.
- (3) For the purposes of paragraph (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act -
 - (a) when he does an act inconsistent with doing the failed act, or
 - (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Remedies for refusal of employment and refusal of service of an employment agency before an employment tribunal

9. (1) Where the employment tribunal finds that a complaint under regulation 4 or 5 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) If the respondent 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.

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

(4) The total amount of compensation shall not exceed the limit for the time being imposed by section 124(1) of the 1996 Act.

Remedy for Detriment before an employment tribunal

10. (1) Where the employment tribunal finds that a complaint under regulation 6 is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure complained of.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the act or failure which infringed his right.

(3) The loss shall be taken to include -

(a) any expenses reasonably incurred by the complainant in consequence of the act or failure complained of, and

(b) loss of any benefit which he 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) In determining the amount of compensation to be awarded no account shall be taken of any pressure which was exercised on the employer 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.

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

(7) Where the detriment to which a worker is subjected is the termination of his worker's contract, but that contract is not a contract of employment, any compensation awarded under this regulation must not exceed the limit specified in paragraph (8) below.

(8) The limit mentioned in paragraph (7) above is the total of -

(a) the sum which would be the basic award for unfair dismissal, calculated in accordance with section 119 of the 1996 Act, if the worker had been an employee and the contract terminated had been a contract of employment; and

(b) the sum for the time being specified in section 124(1) of the 1996 Act which is the limit for a compensatory award to a person calculated with section 123 of the 1996 Act.

Complaint against Employer and Employment Agency

11. (1) Where a person has a right of complaint under regulations 4 and 5 against a prospective employer and employment agency arising out of the same facts under these regulations he may present a complaint against either of them or against them jointly.

(2) If a complaint is brought against one only, he or the complainant may request the tribunal to join or assist the other as a party to the proceedings and 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.

(3) Where a complaint is brought against an employer and an employment agency jointly, or where it is brought against one 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 the employer and the agency, and

(b) makes an award of compensation,

it may order that the compensation shall be paid by the one or the other, or partly by one and partly by the other, as the tribunal may consider just and equitable in the circumstances.

Dismissal

12. (1) Subject to paragraph (2) an employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part X of the 1996 Act if the reason for the dismissal, or if more than one, the principal reason, is that the employee's name is on, or is not on, a prohibited list.

(2) An employer does not dismiss unfairly under paragraph (1) in dismissing a person if the employer does so as a result of using a prohibited list in circumstances in which the use of the list is, by virtue of paragraphs (5), (6) or (7) of regulation 3, not unlawful under that regulation.

(3) An employer shall be taken to have dismissed an employee for the reason specified in paragraph (1) if -

(a) there is reason to suppose that, at the time of the dismissal the employer had in his possession or had seen a prohibited list on which the name of the applicant appeared, and

(b) the employer fails to show that the reason for the dismissal, or if more than one the principal reason, was unrelated to use of the list.

Award against third parties

13. (1) If in proceedings on a complaint under regulation 4, 5, 6 or 12 either the respondent or complainant claims that the prohibited list to which the complaint relates was unlawfully compiled, sold or supplied by another person the complainant or respondent may request the employment 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) makes an award of compensation, and
- (c) also finds the claim in paragraph (1) above is well founded

it shall make a declaration to that effect and may make such of the following as it considers just and equitable,

- (i) an order that compensation shall be paid by the person joined instead of by the respondent, or partly by that person and partly by the respondent;
- (ii) a recommendation that the person joined or sisted 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.

(4) If the person joined 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.

(5) Where by virtue of regulation 10 there is more than one respondent, the above provisions apply to either or both of them.

Restrictions on contracting out

14. Section 288 of the 1992 Act (restrictions on contracting out) shall apply in relation to Regulations 4, 5, 6 or 12 as if they were contained in that Act.

Civil Remedy - Application to the Court

15. (1) An actual or apprehended breach under regulation 3 may be the subject of a claim in civil proceedings by the person who has suffered or may suffer loss due to the course of conduct in question.

(2) Without prejudice to any other power of the Court the Court may on an application under this regulation -

- (a) award damages, for (among other things) any financial loss resulting from any conduct in breach of regulation 3 by the defendant including compensation for injured feelings; and

- (b) grant such interlocutory relief (in Scotland, such interim order) as it considers appropriate for the purpose of restraining or preventing the defendant from pursuing any conduct in breach of Regulation 3.

Applications to both the Court and the Employment Tribunal

16. (1) A person who applies to the employment tribunal under these Regulations, or under Part X of the 1996 Act as it applies by virtue of these regulations, in relation to an alleged use of a prohibited list which consists of

- (a) a refusal of employment under regulation 4;
- (b) a refusal of service of employment agency under regulation 5;
- (c) being subjected to a detriment under regulation 6; or
- (d) an unfair dismissal under Part X of the 1996 Act as it applies by virtue of regulation 10;

can, in relation to that use of the prohibited list, only apply to the Court for interlocutory relief (in Scotland such interim order) for the purposes of restraining or preventing any conduct by the defendant to the application.

(2) Subject to paragraph 3, if

- (a) a person applies to the Court in relation to an alleged use of a prohibited list and
- (b) the use of the prohibited list consists of
 - (i) a refusal of employment under regulation 4;
 - (ii) a refusal of service of employment agency under regulation 5;
 - (iii) being subjected to a detriment under regulation 6; or
 - (iv) an unfair dismissal under Part X of the 1996 Act as it applies by virtue of regulation 12;

he may not apply to the Employment Tribunal in relation to that use of the prohibited list.

(3) Paragraph (2) shall not prevent an application to the employment tribunal where the application to the Court is only for interlocutory relief (in Scotland such interim order) for the purposes of restraining or preventing any conduct by the defendant to the application.

Amendments to primary legislation

17. The amendments in the Schedule to these regulations shall have effect.

Schedule

Amendments to primary legislation

1. The Employment Tribunals Act 1996(a) shall be amended as follows -
 - (a) In section 10(1) (National security) (b) -
 - (i) at the end of paragraph (a), the word “or” shall be omitted, and
 - (ii) after paragraph (b) shall be inserted -
“or

(b) regulation 6 of the Prohibition of Blacklists Regulations 2003.”.
 - (b) In section 16(1) (power to provide for recoupment of benefits)
 - (i) at the end of paragraph (c), the word “or” shall be omitted, and
 - (ii) after paragraph (d) shall be inserted -
“ or

(e) payments by employers to employees under regulation 4, 5 or 6 of the Prohibition of Blacklists Regulations 2003.”.
 - (c) In section 18(1) (cases where conciliation provisions apply) (c)
 - (i) at the end of paragraph (g), the word “or” shall be omitted, and
 - (ii) after paragraph (h) there shall be inserted -
“or

(i) arising out of a contravention of regulation 4, 5 or 6 of the Prohibition of Blacklists Regulations 2003.”.

(a) 1996 c.17.

(b) Section 10 was substituted by the Employment Relations Act 1999, section 41 and paragraph 3 of Schedule 8.

(c) Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(d) In section 21 (jurisdiction of the Employment Appeal Tribunal), in subsection (1) (which specifies the proceedings and claims to which the section applies)(d) -

(a) at the end of paragraph (fg) the word “or” shall be omitted; and

(b) after paragraph (i) there shall be inserted -

“;

(j) or the Prohibition of Blacklists Regulations 2003.”.

2. (1) In section 105 of the 1996 Act (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed)(e) after “(7E)” there shall be inserted “or (7F)” and after subsection (7E) there shall be inserted -

“(7F) This subsection applies if the reason (or, if more than one reason the principle reason) for which the employee was selected for dismissal was the one specified in paragraph(1) of regulation 12 of the Prohibition of Blacklists Regulations 2003 (read with paragraphs 2 and 3 of that regulation).”.

(2) In section 108 of the 1996 Act (exclusion of right; qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)(f) the word “or” at the end of paragraph (hh) shall be omitted and after paragraph (i) there shall be inserted -

“or

(k) paragraph(1) of regulation 12 of the Prohibition of Blacklists Regulations 2003 applies.”.

(3) In section 109 of the 1996 Act (exclusion of right; upper age limit) in subsection (2) (cases where upper age limit does not apply)(g) the word “or” at the end of paragraph (hh) shall be omitted and after paragraph (i) there shall be inserted -

“or

(k) paragraph (1) of regulation 12 of the Prohibition of Blacklists Regulations 2003 applies.”.

(d) Section 21 has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(e) Section 105 has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(f) Section 108(3) was amended by S.I. 1999/1436, Article 3 and S.I. 2000/1551, Regulation 10.

(g) Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

3. (1) In section 161 of the 1992 Act (application for interim relief) in subsection (1) (which provides for a right to apply for interim relief when alleging dismissal by virtue of section 152) after “section 152” there shall be inserted - “or Regulation 12 of the Prohibition of Blacklists Regulations 2003”.

(2) In section 162 of the 1992 Act (application to be promptly determined) in subsection (3) (requests under section 160 (awards against third parties)) after “section 160” there shall be inserted - “ or Regulation 13 of the Prohibition of Blacklists Regulations 2003”.

(3) In section 163 of the 1992 Act (procedure on hearing of application and making of order) in subsection (1) (tribunals to determine if it is likely that the complainant has been unfairly dismissed) after “section 152” there shall be inserted “or Regulation 12 of the Prohibition of Blacklists Regulations 2003”.