

I am writing on behalf of UCU with respect to current exercises in data collection for strike participation that management appear to be engaging in which we feel may create a legal liability under blacklisting laws.

As you know we have written to you and shared members' concerns about the use of the new app, particularly in reference to data protection. We have also been made aware of a new practice which asks dissertation students to complete a form if their supervisor undertook strike action. Additionally Associate Executive Deans are asking for striking colleagues to write to the with a detailed list of affected teaching. Obviously, a form such as this, collated by a dissertation coordinator (or similar) then creates a list of those undertaking strike action.

It is our considered view that despite our best efforts thus far, there is a misunderstanding of the law in this area. Staff are being asked to provide information in an uncontrolled way, and this continues to create significant legal problems for management, as well as unnecessary anxiety for staff.

The purpose of this letter therefore is to set out the relevant law, and to make some practical recommendations in the spirit of good employment relations.

In the meantime we would be grateful if you would ask Deans and Heads of Departments from desisting from such practices until we have consulted.

The legal liabilities primarily exist under three areas of legislation: the General Data Protection Regulations 2018 (GDPR), the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) and the Employment Relations Act 1999 (Blacklists) Regulations 2010, commonly known as 'the Blacklist Regulations.'

Information regarding strike participation for an individual is classed as sensitive personal data (special category data) under GDPR, which means that its collection must be carefully regulated, collected for a specific purpose, stored securely, and disposed of when that purpose has ended.

TULR(C)A 1992 prohibits, *inter alia*, detriments for trade union membership and activity. The principle is that the only detriment an employee should suffer is one day of pay for every day of strike action that they participate in (calculated pro-rata for part time employees). A 'detriment' is usually financial, such as loss of pay or bonus or promotion. But it might also be a loss of opportunities which have a potential financial benefit.

The Blacklist Regulations are not as well known, but they are extremely strict. A list of individuals who participate in a strike (whether complete or accurate) is of an additional special

category, termed a 'blacklist', if the intention in collecting that data is to cause any individual on it a detriment. See Blacklist Regulation 3.¹

These further strengthen protections in TULR(C)A. As Pinsent Masons' partner Jon Fisher says,

'if you drew up a list of people on strike with a view to penalising them in some way, such as withholding a bonus, the trade unions will argue that that is a blacklist. You created a list of trade union members who are on strike with a view to penalising them for striking, which is effectively a product of their membership. That is the argument that they will run... and that argument is probably going to succeed.'²

Even if there is no intention to cause detriment at the time of collection, were any individual to be caused subsequent detriment, *and* it transpired that they had appeared on such a list, then that detriment would likely be deemed unlawful. The employer is expected to act responsibly, and should reasonably foresee that unless this data was very carefully handled (see above), any data of this kind runs the risk of creating a detriment.

To take a simple example, suppose a course leader or dissertation supervisor participated in a lawful strike, but were replaced against their will next year. This colleague could argue that they were caused an unlawful detriment due to their strike participation, and cite their appearance on a list as evidence of a blacklisting practice.

It might be thought that as long as staff names and/or user identifiers were not stored in such a list, that this list would not be a blacklist. However, that is not how the law approaches the question. The legal test under GDPR is solely whether staff may be identified from data stored in a list. Regulation 3 refers only to 'details of persons,' which has the same meaning as 'personal data' under GDPR Article 4:

'Personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.³

Thus a list of affected dissertations, lectures or tutorials, even if it included no express reference to the individual staff who taught them on that occasion, would still fall under Regulation 3 if it were possible to identify staff by subsequently cross-referring that list to course timetables. Indeed many of the cases that gave rise to the Regulations consisted of coded lists.

¹ <https://www.legislation.gov.uk/ukxi/2010/493/regulation/3/made>

² See the video briefing on Mercer at 4:30-5:00

<https://www.pinsentmasons.com/out-law/news/supreme-court-mercer-appeal-strike-protection>

³ See <https://gdpr-info.eu/art-4-gdpr> and

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/what-is-personal-data>

As Mr Fisher observes, this provision is stronger than the general prohibition on causing detriment over and above pay deductions for participation in industrial action.

When HWU created a app app for collecting names for the lawful practice of making pay deductions, we have discussed the design of this database with Human Resources at some length. Crucially, HR assured our committee members that data would be (a) securely collected and stored, and (b) destroyed once the deduction was processed.

However it has come to our attention that this care is not being applied at the present time. Lists are being created at department level, and are being retained beyond any short-term lawful purpose (the lawful purpose being the deduction of wages for participation in strike action). It is clear from correspondence with departmental colleagues that local managers simply do not know about the law.

This is a serious problem for both HWU and HWUCU.

We are obliged to point out that HWU could approach the question of collecting evidence to address student complaints in a different way, and alternative methods would be far less likely to cause these legal liabilities.

First of all, we agree that a manager is entitled to ask a member of staff whether they were on strike on a particular day *in response to a particular query from a student*. We see this as concomitant to the obligation to respond truthfully when asked.

Our objection is to the collection of data *prospectively* where no complaint is made, and the storage of this data long-term and insecurely. This is because a prospective data collection has no proportionate purpose, nor no end point.

We make the following recommendations:

1. In processing a complaint from a student, staff must be instructed that the legal liability under the Blacklist Regulations begins from the point that data collection commences.
2. Any information on strike participation that could identify individuals must be securely retained for the minimum necessary time, and destroyed once used.
3. The data should be held securely and centrally, and not copied locally.
4. Managers dealing with student complaints should not be the same managers dealing with decisions about e.g. course staffing.
5. HWU must not collect lists of missed classes or affected dissertations in anticipation of a possible complaint, or retain data once a complaint has been concluded. Strike reporting should not become a parallel practice within HWU.
6. All managers must be instructed not to keep unofficial lists of striking staff, as these create significant risks for the employer.

Although these recommendations would not eliminate the risks of unlawful detriments being caused to staff, they would clearly curtail them substantially. They would also show that HWU is taking the rights of its staff seriously, and taking steps to ensure that any data collection was proportionate and necessary.

We are happy to meet with you, and with representatives of our fellow campus trade unions, to discuss this matter further.

Yours sincerely

HWUCU Committee