

Spearing | Waite

Employment Law

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Newsletter

News update for
HR Specialists



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Criminal Records and Recruitment (Part Two)

Data Protection Act 1998

When an employer holds information about its employees, particularly information obtained through the Police Act disclosure procedure, which we looked at last month, questions arise as to how that information should be managed, and to what extent that information can be disclosed to third parties.

A Code of Practice was issued by the Information Commissioner in 2005, giving guidance on the application of the Data Protection Act 1998, in the employment field. Part 1, 'Recruitment and Selection,' of The Employment Practice Data Protection Code deals with the process of appointing employees, beginning with application forms and unsolicited CVs. It advises that the employer should only request information about an applicant's criminal convictions to the extent that the information can be justified in terms of the role offered. Spent convictions do not have to be declared unless the job is exempted from the ROA.

The Code also specifies what further information the prospective employer might seek from third parties. In relation to criminal records, this would involve notifying the applicant of the need to conduct CRB checks. The Code also advises employers that they should confine the obtaining of a CRB

disclosure to the applicant whom it is intended to appoint. Such disclosure should not be requested in relation to all, or even short listed applicants.

Importantly, the Code instructs that such disclosure should not be shared with other employers. Information about employees which has been obtained via a CRB check must not be disclosed to a new or potential employer, when a reference is requested. It is a criminal offence for any registered body to disclose such information other than within the organisation or to the ex offender who made the application. An employer should not fear any liability in negligence for failure to disclose this information to another employer. There should not be any breach of a duty of care towards a party seeking a reference. The new or potential employer could discover the same information by conducting its own CRB check.

Disability Discrimination Act 1995, ("DDA")

Where a conviction becomes apparent during the recruitment process, even where that conviction is not spent, employers should consider whether it is related to a disability. Diabetics, for example, may be convicted of offences committed while in a hyper- or hypoglycaemic state. Prosecutions are not always successful in these situations, so non-conviction information is likely to be of interest to prospective employers.

Certain conditions are specifically excluded from the scope of the DDA including alcohol addiction, a tendency to steal, a tendency to physical or sexual abuse of others and so on. However, it is not necessary, under the DDA, to consider how an impairment was caused, so people with impairments caused by an addiction, e.g. cirrhosis of the liver caused by alcoholism, will be protected.

Where someone suffers from both a legitimate impairment and an excluded condition, he or she will be protected by the DDA, where the legitimate impairment is the reason for the less favourable treatment.

In an EAT case, *Nuttall Ltd v Butterfield 2005*, (this case involved a longer standing employee than an applicant, although the same principle applies,) an employee with a tendency to exhibitionism was dismissed after his employer learned of his conviction for indecent exposure. The EAT had to decide whether the employee, whose tendency resulted from an underlying depressive illness was disabled for the purposes of the DDA. What was the reason for the less favourable treatment, i.e. the dismissal? The EAT concluded that the employee's depressive illness was not the reason for his dismissal. When the employer had learned of the depressive illness, it was content for the employee to continue working, subject to reasonable adjustments being made. It was only when the employer heard of the indecent exposure conviction that the decision was taken to dismiss. There was, therefore, no finding of disability discrimination.

Another case, *Murray v Newham Citizens Advice Bureau 2003*, provides useful guidance on the kinds of enquiries employers should make of job applicants who claim that their disability caused them to commit a crime. Where a disclosure is made as to a previous conviction that is claimed to have been the result of a recognised condition bringing the applicant within the DDA's definition of disability and the applicant suggests and/or would agree to enquiries being made of his or her GP, the employer is under an obligation to follow that course. If it does not, it will have discriminated.

There is clearly much for the employer who is in the process of recruiting to consider, where there are live or spent convictions to assess.

If the above or June's newsletter has raised any concerns, please don't hesitate to contact us.

Acas Advice

Acas has published, for consultation, a draft 'Code of practice on discipline and grievance,' which revises and updates the current code to take account of the proposed repeal of the statutory dispute resolutions procedures in April 2009, by the Employment Bill, currently going through Parliament. It is proposed that the revised code will come into force at the same time.

The Bill will remove from the Employment Act 2002, the statutory disciplinary, dismissal and grievance procedures that apply to the majority of workplace disputes, capable of giving rise to Tribunal proceedings. According to Acas, the draft code is 'concise and principles based.'

Commenting on the draft changes, Minister for Employment Relations and Postal Affairs, Pat McFadden said, "The new code is a key element in the Government's plans to streamline and simplify the dispute resolution system to the benefit of employer and employees."

We say, "Amen to that!"

This newsletter does not contain legal advice. Whilst every effort is made to ensure its accuracy, Spearing Waite and the authors of this newsletter do not assume for, and cannot be held liable in respect of, the correctness of its contents, or for any reliance placed upon them.

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