



**Amanda Badley**

## Newsletter

News update for  
HR Specialists



**Kim Abbott**

### **Criminal Records and Recruitment (Part One)**

#### **Rehabilitation of Offenders Act 1974 ("ROA")**

Excluding driving offences, one in three adult males under the age of 30 has a criminal record, and 20% of the UK's working population falls into the category of 'ex-offender.'

What should be asked of job applicants and how should the information supplied be handled? What action might lawfully be taken upon discovering that an employee has concealed a previous conviction?

The ROA was introduced with the aim of preventing ex offenders, who have not reoffended for a significant period of time, from being denied access to jobs purely on the basis of their past criminal convictions. An ex offender, who has not reoffended for a specific length of time, (determined by the ROA according to the length of the sentence given and the age of the offender at the time of conviction,) will be considered 'rehabilitated' and the ex offender will be entitled to present him/herself as if they had never been convicted in the first place, i.e. the conviction will become 'spent.'

There are significant restrictions on the application of the ROA. As indicated below,

convictions for which a custodial sentence of 2.5 years or more is ordered can never become spent. Even more significantly, the provisions of the ROA do not apply to an ever increasing list of professions, offices, employments and types of work specified in Schedule 1 to the ROA. These include medical practitioners, barristers, solicitors, dentists and other health professionals. The list is amended periodically, so it is always worth checking Schedule 1 to the ROA.

#### ***Rehabilitation periods***

- Imprisonment/detention in Young Offender Institution for more than 6 months, but not more than 2.5 years: **10 years.** (5 years if under 18 at the date of conviction.)
- Imprisonment/detention in Young Offender Institution for up to 6 months: **7 years.** (3.5 years if under 18 at the date of conviction.)
- Fines, probation and community orders: **5 years.** (2.5 years if under 18 at the date of conviction.)
- Absolute discharge: **6 months,** (whether under or over 18 at the date.)
- Convictions leading to prison sentences in excess of 2.5 years never become spent.

Where an ex offender's conviction is 'spent,' he or she is not obliged to disclose that conviction in a job application or during any interview process, even if asked directly. The

person is treated as having committed no offence at all. Any questions on an application form are taken as not referring to a spent conviction. Failure to disclose a spent conviction is not a proper ground for dismissing an employee or prejudicing him or her in any way.

However, no specific remedy is available to the employee at the job application stage. Instead, where an employer asks direct questions about spent convictions, the applicant must lie during the selection process, and claim unfair dismissal if or when the conviction is discovered and dismissal ensues, (assuming that the employee has the requisite service.) This state of affairs does not sit easily with the objective of rehabilitating offenders, especially where those convicted of dishonesty offences are considered. Further, unscrupulous employers, who ask the question and receive an honest answer, may discriminate against honest applicants with impunity.

Dismissal for having a spent conviction or failing to disclose one is not one of the automatically unfair reasons for dismissal, listed in the Employment Rights Act 1996. However, where an employee conceals convictions that are not spent, he or she forfeits the employer's trust on discovery of this deception, and may be fairly dismissed, despite exemplary service.

### **The Police Act 1997**

The Police Act 1997 enables organisations which are recruiting for posts exempted from the terms of the ROA to obtain information on prospective employees' criminal records from a centralised source: the Criminal Records Bureau, (the "CRB.") There are three types of disclosure.

*Criminal Conviction Certificate:* this can be issued to any person who makes an application in the prescribed form and pays the applicable fee. It refers only to those convictions which are not spent. The Certificate will not contain any details about spent convictions.

*Criminal Records Certificate:* only a 'registered person' may apply. An employer who regularly recruits for posts which are exempted from the ROA, and is, therefore,

likely to ask 'exempted questions' of job applicants, may apply for registration with the Secretary of State. The application is technically made by the individual job applicant and a copy of the CRC is issued, by the CRB, to both the registered person and the job applicant.

*Enhanced Criminal Records Certificate ("ECRC"):* a registered person may ask the individual to apply for an ECRC, for a 'prescribed purpose,' which may include, for example, an applicant's suitability for a position involving caring for, training, supervising or being solely in charge of under 18s. The ECRC provides details of every conviction and caution relating to the job applicant and any further information which 'might be relevant.' This may include, for example, details of offences where the job applicant was charged but subsequently acquitted, or even allegations made against the individual, but were never pursued by the police. Such additional information might be a decisive factor in the withdrawal of a job offer. The aggrieved applicant may challenge the Chief Constable's decision to disclose that additional information. This would mean seeking a judicial review, and it would have to be shown that the decision to disclose the additional information was so unreasonable that no reasonable Chief Constable would have disclosed it.

To be continued next month....

*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.*

Spearing Waite  
41 Friar Lane, Leicester  
0116 2624 225  
[www.spearingwaite.co.uk](http://www.spearingwaite.co.uk)

Amanda Badley:  
[amanda.b@spearingwaite.co.uk](mailto:amanda.b@spearingwaite.co.uk)  
0116 242 1238

Kim Abbott:  
[kim.a@spearingwaite.co.uk](mailto:kim.a@spearingwaite.co.uk)  
0116 242 1294