

How Well Do You Know Your Employee?



In this update we examine the steps that can be taken to vet potential employees prior to employment with a particular focus on criminal record checks. We also look at what an employer can do if faced with an existing employee who is charged with, or convicted of, a criminal offence.

Following the Soham murders, the government commissioned the Richard Enquiry to review the vetting practices used in respect of individuals who work with children and vulnerable adults. As a result of this enquiry tighter controls were introduced from April 2006 which allow employers in these fields greater rights of access to criminal conviction information. Even tighter controls are expected to be introduced in autumn 2008. This begs the question, what about employers in other fields? How much information can they gather on their prospective or current employees?

Many employers are now enlisting the services of specialist security screening companies to carry out detailed background checks on prospective employees on their behalf. These companies can investigate an employee's financial background by checking their credit history. They can verify that references are genuine and they can

also deal with criminal records checks. Employers justify the use of these intrusive checks on the need to protect their business interests. This must however be balanced against the human right of all individuals to privacy and the stringent requirements of the Data Protection Act 1998 ("DPA").

Criminal Record Checks and Disclosure Scotland

Most employers are in the habit of including a criminal record declaration in their standard application form. This asks applicants to declare any criminal convictions that they may have. This is a sensible step to take. It should be noted however that details of "spent" convictions should not be sought, unless the applicant is applying for work in a particular exempted field of employment, such as childcare. The Rehabilitation of Offenders Act 1974 provides that criminal convictions will become "spent" after 5-10 years, depending on the offence, although some convictions never spend. Once a conviction has become spent the individual is considered to be "rehabilitated" and therefore they do not require to disclose details of spent convictions.

It is all very well requesting a declaration, but how does an employer know that their prospective employee has been truthful? Formal criminal record checks can be obtained from the government agency Disclosure Scotland. (In England the relevant body is the Criminal Records Bureau.)

Disclosure Scotland provides 3 types of Disclosure:- Basic Disclosure, Standard Disclosure and Enhanced Disclosure.

Receipt of a Standard or Enhanced Disclosure is an absolute requirement before an individual can begin work in certain fields of employment, namely: caring for children or vulnerable adults, health professionals, those involved in the administration of law or banking and financial services. A Standard Disclosure will contain information on spent and unspent convictions, and an Enhanced Disclosure will also contain any information which the Chief Constable may choose to disclose. This can be anything including cautions or instances where an individual has been brought in for questioning.

Unless employers are involved in one of the relevant fields above, they cannot obtain a Standard or Enhanced Disclosure. Some employers have been in the practice of obtaining this information through, what is referred to as, "enforced subject access". Prospective employees are forced, as a condition of employment, to make an application directly

to the relevant police authority for sight of their own records and these are then provided to the employer by the prospective employee. This practice is a criminal offence under the DPA, although the relevant section is not yet in force.

A Basic Disclosure is available to anyone. This contains details of unspent convictions only. This type of Disclosure can act as a check that the information given by the individual in their criminal declaration is full and accurate. A Basic Disclosure can only be obtained directly by the individual themselves and a small fee is payable, currently £20. The application can be made on line through the Disclosure Scotland website. A company could choose to make it a condition of employment that a satisfactory Basic Disclosure is provided. This will involve additional administration and there may be a delay in obtaining the Disclosure. Employers may also find that prospective employees are discouraged from applying for jobs within their organisation simply because of the high level of intrusion into their personal information. This may be the case whether they have a criminal record or not.

Employers must therefore consider whether there is a real need for this information and whether this need outweighs the negative impacts of seeking it. For example, employers in the oil and gas sector may feel that they have a legitimate health and safety reason for ensuring that prospective employees who will be working in the close confines of the offshore environment do not have convictions for violent crimes. Staff dealing with accounts, or working in a cash room, ideally ought not to have any previous convictions for fraud or dishonesty.

Data Protection Considerations

The DPA places certain duties upon employers in respect of the personal information they are entitled to gather and retain about their employees and prospective employees. The Information Commissioner has produced a very helpful Code of Practice to guide employers in this area. The Employment Practices Code, Supplementary Guidance deals specifically with criminal record information and is available from the Information Commissioners website.

Information relating to an individual's criminal record is defined by the DPA as "Sensitive Personal Data" and as such certain conditions must be met by an employer before such information can be obtained. Tighter controls attach to Sensitive Personal Data than to ordinary Personal Data. The individual's prior consent is always required before sensitive information can be gathered or processed. Careful consideration must be given to what information is genuinely required. Once the information is obtained, it must be processed and retained in accordance with the eight Data Protection Principles which are set out in the Act. These provide that, data must be: fairly and lawfully processed; obtained and processed only for specified and lawful purposes; adequate, relevant and not excessive; accurate and updated; not kept longer than necessary; processed in accordance with

the data subject's rights; kept secure and kept within the EEA.

It is unlikely, for example, that employers will be able to justify the need to obtain criminal conviction information from all job applicants or indeed in relation to all posts. A blanket policy should not be adopted without due consideration of the requirements for each particular post. Such information should only be sought from the shortlist of applicants who will be interviewed. Best practice would dictate that a Disclosure should be obtained from the successful candidate only, with a satisfactory Disclosure being a condition of employment.

Once the information has been obtained, employers should consider how they will retain this information and for how long. It is recommended that this sensitive information is kept under lock and key, perhaps even kept separately from the employees personnel file. Criminal record checks for unsuccessful applicants should not be retained at all. Personal information should never be passed to third parties without the prior consent of the individual concerned.

Where employers choose to enlist the services of a security screening company it is vital that they ensure that the company complies with the DPA.

Dealing with Current Employees

What can an employer do if they did not vet a current employee and subsequently discover that he or she has a previous criminal conviction? What can be done if a current employee is charged with and/or convicted of a criminal offence during their employment?

Very often a rumour will surface that an employee has a conviction that the employer was previously unaware of. This can be a difficult situation to deal with especially if the employee does not admit that the rumour is true. The employee could be asked to provide a Basic Disclosure at this stage but they could not be forced to and a dismissal for this reason would likely be unfair.

It can, in some situations, be fair to dismiss an employee, by reason of their dishonesty, if they failed to disclose a conviction in the criminal declaration they signed at the commencement of employment. Otherwise it can be very difficult to justify a dismissal on the basis of a previous conviction. It should be noted, that it is automatically unfair to dismiss an employee in connection with a spent conviction. An employee does however require to have at least one years service prior to gaining the right to claim automatically unfair dismissal on this basis.

In most cases it will also be extremely difficult to justify the dismissal of an employee because they have been charged with, or convicted of

a criminal offence not related to their work. Indeed, the ACAS Code of Practice on Disciplinary and Grievance Procedures states that this will not in itself even justify taking disciplinary action. The facts in each case must be carefully looked at and consideration must be given to whether or not the matter is serious enough to warrant dismissal. The main consideration should be whether the offence, or alleged offence, is one that makes the employee unsuitable for their type of work. For example, it was held to be fair to dismiss a manager at a retail store by reason of his conviction for shoplifting at another store. It was also held to be fair to dismiss a dental technician for possession of cannabis. The fact that other employees refuse to work with the employee can also be a fair reason for dismissal.

An employee should not be dismissed simply because they are absent from work due to being remanded in custody. On the other hand, the fact that an employee is remanded in custody or is serving a prison sentence, and as such will be absent from the workplace for a considerable period of time, can in certain situations be a substantial reason justifying dismissal.

It will always be unfair to dismiss an employee purely on the basis of criminal charges. The employer must carry out its own investigations. This is often difficult prior to the conclusion of the criminal trial, for various reasons including the employees right to silence and the mere fact that all the evidence may be in the hands of the police or procurator fiscal. Case law does suggest however that, if the employee refuses to cooperate with an internal investigation, the employer is entitled to draw appropriate inferences from that refusal.

Obtaining information about a prospective employees background, particularly information about criminal convictions, can be a valuable tool in protecting the interests of the employer and can reduce the likelihood of issues arising during employment. Where difficulties do arise, employers must be careful not to act too quickly in dismissing an employee purely on the basis of a criminal conviction or charge obtained out with the workplace. As always, it is vitally important to carry out a thorough investigation prior to considering any disciplinary action and to seek legal advice when uncertain.

If you would like to discuss any aspect of this Update further, please contact one of our Team members being:-

Sean Saluja (SASaluja@paul-williamsons.co.uk)

Margaret Gibson (MMGibson@paul-williamsons.co.uk)

Geoff Clark (GXClark@paul-williamsons.co.uk)

Jennifer Gardner (JAGardner@paul-williamsons.co.uk)

Linda Beedie (LAJBeedie@paul-williamsons.co.uk)