Criminal records checks and minor convictions

The High Court has ruled that an aspect of the current criminal records disclosure scheme in England and Wales is 'arbitrary', unlawful and incompatible with article 8 of the European Convention on Human Rights.

Under the Rehabilitation of Offenders Act, most convictions (with the exception of the most serious) will be treated as spent provided that the individual hasn't re-offended within a particular time frame. They therefore don't need to be disclosed, even on request from a prospective employer. Individuals are entitled to consider themselves as having a clean record in these circumstances.

However for certain roles (particularly work with children or vulnerable adults), full disclosure of a criminal record - including spent convictions - is required. This means that all previous convictions of any nature, whenever committed, need to be disclosed. Given the limits of voluntary disclosure (in that a prospective employer would be relying on the prospective employee to give honest disclosure) the employer will usually obtain such information by a criminal records check through the Disclosure and Barring Service (DBS).

In England and Wales, the DBS provides details of a job applicant's previous convictions. (Scotland and Northern Ireland run similar but separate schemes.) The standard or enhanced DBS certificates used to list all the job applicant's previous convictions. However in 2013 the scheme was amended to introduce a filtering process whereby job applicants need not disclose certain old and minor convictions. Basically the effect of this is that single convictions for non-violent, non-sexual offences that did not lead to a suspended or custodial sentence would not be disclosed after 11 years or five and a half years if the person was under 18 at the time of the offence. But the amended scheme *doesn't* apply if someone has more than one conviction - regardless of the minor nature of the offences or the person's circumstances at the time.

The case (P and AR v Secretary of State for Justice) concerned two people whose professional lives had been blighted after they'd been forced to disclose minor criminal convictions committed many years previously to potential employers.

P had been charged in August 1999 with shoplifting a 99p book. She had been bailed to appear before a magistrates' court 18 days later, but failed to attend and was therefore convicted of a second offence under the Bail Act. In November 1999, she was given a conditional discharge in respect of both offences. P's offences related to a very limited time in her life when she was suffering from an acute and undiagnosed mental illness. She now wishes to work as a teaching assistant and has sought voluntary positions in schools. However with each application she was required to disclose her two convictions. Another claimant, A, was convicted of two minor thefts in 1981 and 1982 when he was 17 and 18. Although he has worked as an accountant, company finance director and a project manager, he often needs to supply a criminal record certificate through the DBS.

Both A and P challenged the amended filtering scheme arguing that to set the bar at one single conviction is arbitrary and not proportionate. The High Court agreed. Without getting into the pretty complicated legal arguments, the High Court is essence held that it simply isn't justifiable or necessary for any individual to have minor offences disclosed indefinitely simply because there is more than one minor offence on their records.

The High Court has asked the government to get back to it with proposals for addressing this fault in the filtering schema before making its final order. It's important to note that this legal challenge

related only to minor convictions. No challenge was made to the rules requiring disclosure for those who have been convicted of violent or sexual crimes.

Where does this leave employers and recruiters?

Marian Bloodworth, Employment Partner at Kemp Little, comments: '*This case highlights the potential injustices – either real or perceived - that can result from a general rule requiring disclosure of spent criminal convictions. Although historical and relatively minor in nature, the convictions here had to be disclosed because the applicants were applying for roles where full disclosure of criminal convictions is required, even convictions which would otherwise be treated as spent under the Rehabilitation of Offenders Act. Although the rule is designed to protect the public, as with all rules, there are occasionally situations - as the High Court found here - where they have a disproportionate impact.*

The Home Office has indicated that it is considering whether to appeal the case, and at present the DBS scheme continues to operate. This puts employees, employers and recruiters in a difficult position whilst we await clarity on the position. In the meantime, employers and recruiters should bear in mind the following:

- *Full DBS checks should still only be requested for those roles for which they are required and not all roles.*
- *Whilst in some cases, industry guidelines will prevent employers hiring those with criminal records in other cases it is for the employer to exercise its discretion.*
- *Recruiters and employers should still operate other methods of vetting candidates for roles, including detailed interview and assessment processes and taking up references from previous employers.*
- *Any information received regarding spent convictions should be carefully considered before any recruitment decision is taken, for example:*
    - *Is the conviction relevant to the role in question?*
    - *How serious was the offence?*
    - *How long ago was the offence committed?*
    - *Is there a pattern of offending?*
    - *Have the applicant's circumstances changed since the conviction?*
- *The employment contract can be used to monitor performance and suitability during employment, for example probationary periods and on-going contractual obligations to disclose criminal offences*'.