Article by **Dominic Crossley, privacy and media law partner and Clarissa Ferguson, trainee solicitor, in the Dispute Resolution department at Payne Hicks Beach** first published in HR Review, online on 29 September 2014 (http://www.hrreview.co.uk/analysis/analysis-employment-law/privacy-criminal-records-and-recruitment/53765)

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Dominic Crossley: Privacy, criminal records and recruitment

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It is now standard practice for employers to carry out pre-employment checks prior to making an offer of employment to an individual. The level of 'vetting' required will depend upon the type of employment being offered and the potential risks attached to that role. However, a balance needs to be struck between sufficient 'vetting' of prospective employees thereby ensuring the employee is suitable for the position, and preventing excessive intrusion into private life.

The recent Supreme Court judgment in *R (on the application of T and another) v Secretary of State for the Home Department and another [2014]* provides important guidance regarding the scope of private information, the criminal record checking system and what will be considered in accordance with the law. This case is the most recent development in the long running saga concerning criminal record checks and an individual's right to seek future employment without prejudice to past misdemeanours.

Under the Rehabilitation of Offenders Act 1974, where an individual is asked about his criminal record he will not be obliged to disclose any convictions (or warnings, cautions, reprimands) that are "spent" (i.e. in that a specific period of time has elapsed from the date of the conviction). Furthermore, an employer may not make any decision prejudicial to that individual by reference to the spent conviction. The Rehabilitation of Offenders Act (Exemptions) Order 1975 and Police Act 1997 created certain exemptions to the 1974 Act insofar as the offences (or even "soft information" gathered by the police in their investigations) related to specified jobs and working with children or vulnerable adults. Consequently, the obligation for disclosure was substantially extended as was the scope for making an adverse employment decision following the disclosure.

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A person's right to private life is protected by Article 8 of the European Convention of Human Rights and any interference with this right must be both justifiable and proportionate. Article 8 specifically provides that:-

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The facts of the case of T and JB

The respondents to the appeal by the Secretary of State for the Home Department were T and JB (their real names being anonymised). The facts of their cases were as follows:

- In 2002, when T was 11 years old he received two warnings from the police for the theft of two bicycles. The warnings were disclosed when, as an adult, he applied for a position that required an enhanced criminal record certificate (ECRC) due to potential contact with children. This led to his application being rejected.
- In 2001, the police issued a caution to JB, a 41 year-old woman for the theft of a packet of false fingernails from a shop. In 2009 she completed a training course for employment in the care sector and was required to obtain an ECRC, which disclosed the caution. The training provider subsequently told JB that it felt unable to put her forward for employment in the care sector.

Neither respondent had any other criminal record. Both respondents, T and JB, asserted that the references in the enhanced criminal record certificates to their cautions violated their right to respect for private life under Article 8 of the ECHR. T also claimed that his obligation to disclose the warnings violated the same right.

The Supreme Court upheld the Court of Appeal's decision that the statutory criminal record checking scheme breached an individual's Article 8 rights. The Supreme Court recognised that the disclosures in ECRCs constituted interference into a person's privacy and held that such interferences could not be said to meet the requirement of being necessary in a democratic society.

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The Court agreed that the relevant provisions in the 1997 Police Act could not satisfy the requirement that interferences must be "in accordance with law". Furthermore, it was unanimously held that interferences with an individual's Article 8 rights under both the 1997 Act and 1975 Order could not meet the test of necessity.

There was no rational connection between the disclosure required and any assessment of risk. In his judgment, Lord Wilson stressed that T's childhood mistake, since which he had never offended, bore no rational link to whether he may have posed a threat to children as an adult. It was also held that the impact on JB's private life of the disclosure of her caution for minor dishonesty was disproportionate to the potential benefit in achieving the objective of protecting the people she would have cared for.

Lord Wilson's judgment quotes from a substantial body of case law that concerns the retention and use by the state of personal data. The case law makes it clear that the requirements of Article 8 are unlikely to be met in the absence of proper safeguards upon the circumstances by which a state can collect, store and use data relating to criminal records.

Whilst there is clearly a public interest in ensuring the suitability of applicants to employment positions, examination of old minor convictions should not interfere with an individual's right to put the past behind them. The disclosure of such information may represent a "killer blow" to a person's hopes of obtaining employment where such a disclosure is neither necessary nor proportionate to the protection of children and vulnerable people.

Whilst the law still recognises that in certain circumstances there may be a need to disclose all convictions, cautions, warnings and reprimands, the current framework does not provide sufficient safeguards to ensure that disclosure of this private information will only be made when strictly necessary.

Employers will need to be mindful that unless they are working with the vulnerable it may not be considered proportionate to examine old minor convictions and even then, there is a need to balance the right to 'vet' with Article 8 rights. The law is seeking to redress these perceived imbalances and there are likely to be further developments effecting pre-employment checks and recruitment screening.

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