Employment rights bill

Unlock is a national independent advocacy charity that supports, speaks up and campaigns for people facing stigma, prejudice and discrimination because of their criminal record. Our mission is to advocate for people with criminal records to be able to move on positively in their lives.

There are over 12.5 million people in the UK with a criminal record. For people with criminal records, employment can be a fundamental stepping stone towards a more fulfilling life. Yet many people lose out on employment opportunities because of a criminal record. This happens where employers intentionally or inadvertently exclude people during recruitment, or once they are employed.

Rights of people with criminal records

The Rehabilitation of Offenders Act (ROA) supports the rehabilitation into employment of people with a criminal record. It does so by allowing cautions or convictions to become spent after a specified period of time (called a rehabilitation or spending period). Once something is spent, the person is treated as rehabilitated and is not required to disclose the caution or conviction when applying for most jobs. Exceptions are for certain regulated roles, which are specified in the ROA Exceptions Order 1975. This requires people to disclose even spent cautions or convictions until they are protected (also called 'filtered'). Certain sentences and offence types are never protected, for example any prison sentence. These will show up on elevated (Standard or Enhanced) checks that can be requested for roles including becoming a solicitor, social worker or teacher. For all other situations, including most jobs, once something is spent, the person should be treated as if they have no cautions or convictions.

The ROA reinforces this by providing that a spent caution or conviction shall not be a proper ground for dismissing someone or excluding them from employment (e.g. by refusing to recruit), unless for a role listed in the Exceptions Order. However, in our experience these protections are insufficient.

Employers often have poor processes in place governing collection or use of information about spent cautions or convictions. This is often because the complexity of the criminal record system makes it hard for employers to understand. This means that employers inadvertently contravene the rights set out in the ROA which protect people with criminal records. **We are calling for these rights to be explicitly referenced in employment law, so that they are protected in practice**. This will also help provide clarity and certainty for employers in a complex system.

We have three recommendations for how to make things fairer, more proportionate, and up-to-date with existing legislation.

1. Remedies for unfair dismissal should include spent criminal records

The ROA provides a legal right for people with spent criminal records to not disclose these if asked on job applications (unless the role is listed in the Exceptions Order). Yet we hear from people on our helpline who have exercised this right, but face dismissal when the employer 'finds out' at a later date.

In this position, dismissed workers have to rely on existing unfair dismissal rights. Having a spent criminal record is not listed as an automatic basis for an unfair dismissal claim. We know courts have looked favourably on claims brought by people who are dismissed due to a spent criminal record. However, this requires people to have the time and resource to take an employer to tribunal.

The proposal to ensure protections from unfair dismissal from day one of employment is very positive. This will provide additional protection for people with a spent criminal record. It will reduce the burden of needing to accumulate two years' employment before being able to bring an unfair dismissal claim.

We propose that having a spent criminal record should be listed in the Employment Rights Act 1996 as an automatic basis for an unfair dismissal claim. The list therein has grown since the ROA was brought in nearly 50 years ago. We argue that by making dismissal for a spent criminal record automatically unfair, the rights set out in the ROA can be fully realised.

For roles covered by the ROA, dismissing employees on the basis of spent criminal record data should be automatic grounds for unfair dismissal.

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2. People should not be dismissed due to unspent criminal record data not asked for during recruitment

In addition to clarifying existing rights, additional rights should be provided so that people with criminal records are treated fairly once employed.

Issues can arise where people are not asked about their criminal record during recruitment. People with unspent criminal records are only required to disclose them if they are asked. Yet we know that some people are dismissed at a later point, when their employer finds out about their unspent caution or conviction.

The ROA does allow discrimination against people on the basis of unspent convictions. However, once a person is employed, there is no conceivable argument that their record becomes more relevant.

Unlock's position is that it is inherently unfair to dismiss someone because of an unspent criminal record once they have started working. At that point the employer has either decided not to ask about criminal records in recruitment, or has decided the criminal record disclosed is not relevant. Having reached that point it should be specifically unfair for an employer to change their mind.

It should constitute unfair dismissal if someone is dismissed on the basis of an unspent caution or conviction where either:

- **they disclosed during the recruitment process**
- **they were not asked about their criminal record**

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3. It should be an offence to make decisions using spent criminal record data

The protections offered by the ROA are also undermined when employers find out about spent criminal records during recruitment. There are numerous ways that employers may access this data. One common way is by asking inaccurate or misleading questions about criminal records. Questions of this kind do not make it clear that applicants only have to disclose an *unspent* caution or conviction. These questions can lead applicants to disclose more than they are legally required to. The criminal record system's complexity can exacerbate this risk of over-disclosure, where rules on what needs disclosing are hard for employers and applicants to understand.

Another way that employers 'discover' spent criminal record data is by carrying out online searches on candidates. For example, looking at their social media account or at news stories about them. In this way, they may find out about previous cautions or convictions which are spent. Some employers will use this to make decisions about applicants, for roles for which they are not legally entitled to collect this data (i.e. roles not set out in the Exceptions Order).

Employers may not be aware that data collected this way relates to spent cautions or convictions. They usually do not have sufficient processes in place to ensure they have a legal right to such data. Use of spent criminal record data in all circumstances not set out in legislation should be an offence. Until it is, employers will continue to undermine the rights set out in the ROA.

It should be an offence for an employer to take account of spent criminal record data when recruiting for posts covered by the ROA.

Conclusion

The above proposals have the potential to make a significant difference to the labour rights and opportunities of people with criminal records.

Yet these are just one part of the necessary steps to make the criminal record disclosure system fair, proportionate and up-to-date. Find out more about our proposals for wider reform of the ROA and our policy manifesto.

If you are interested in Unlock or the recommendations in this briefing, contact us at policy@unlock.org.uk