Morgan Cole

briefing

Health and Social Care - October 2008

Enhanced criminal record certificate - disclosure of “soft” information

Judicial review

The case of R (on the application of Pinnington) v Chief Constable of Thames Valley Police [2008] EWHC 1870 (Admin). The Claimant, a teacher, applied for judicial review of the Chief Constable of Thames Valley Police’s decision to disclose details of unproven allegations made against him in an enhanced criminal record certificate pursuant to section 115 of the Police Act 1997.

The background

The Claimant was employed as a deputy principal of a college for young autistic adults and was due to be transferred elsewhere, subject to a requirement that he possessed a clean enhanced criminal record certificate. The Claimant accordingly applied to the Criminal Records Bureau whereupon the Assistant Chief Constable of the Thames Valley Police decided to include on the certificate details of allegations of serious sexual abuse made against the Claimant by three autistic young adult males who were in his care. Each allegation was sufficiently strong to warrant police investigation and referral to the Crown Prosecution Service. However, none of the complaints resulted in criminal charges being brought against the Claimant. Following disclosure of the certificate, the Claimant was dismissed from his employment. The Claimant applied for judicial review.

The Claimant contended, inter alia, that none of the allegations should have been disclosed at all on the basis that they were not relevant because they lacked cogency and credibility and, on a properly objective and informed assessment, no-one could reasonably have believed that any of them might be true. In particular, the claimant pointed to the fact that the relevant allegations had been made, to a large extent, by way of 'facilitated communication'.

The ruling

The High Court dismissed his application. The Court ruled that in circumstances where the information disclosed by the police under an enhanced criminal record certificate was in dispute, the question for the court, in the exercise of its supervisory jurisdiction, was to decide whether the opinion formed by the police officer who had disclosed that information had been reasonably open to him. The Court agreed that the accusations had serious weakness and could not be substantiated, however none of that meant that they could not be true. The Judge stated that in forming an opinion on relevance, the chief constable had to ask himself whether the information might be true and this had to be assessed by reference to all the circumstances. The Court ruled that in relation to employment with children or vulnerable adults, it was information about which an employer should be aware. It was then for the employer to decide whether the employment of the person conceded involved an unacceptable risk.

Disclosing information

This case illustrates that the Police, when assessing what information is relevant for the purpose of disclosure, have only to satisfy themselves that the information might be true. That assessment will involve careful consideration of the available evidence but will not require any additional legal test. This means that even when information is unsubstantiated and suffers from serious weakness, if the Police can satisfy themselves that it might be true, its disclosure on a criminal record certificate will be lawful.

The judge commented that he was troubled that the Claimant’s employer operated a blanket policy of insisting on a “clean” certificate. The judge stated that the legislation imposes a relatively low threshold for disclosure in the certificate in order to enable employers to make properly informed decisions.

It is important therefore that employers understand how low that threshold is and the responsibility that it places upon them in practice. A properly informed decision by employers therefore requires consideration, not only of the information disclosed in the certificate, but also of any additional information or explanation that the employee may provide.

Similarly, some professional regulatory bodies have regard to the content of enhanced criminal records certificate in connection with assessing suitability for registration. Whilst the content of an enhanced certificate may give rise to an issue which calls suitability into question, this could be a substitute for a careful consideration of any relevant evidence, including information or explanation from the applicant for registration.

More information

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