

## Is an Employer under a duty to give a Reference?

References are expected by potential employers. They form a key part of the recruitment process. With the expense of the selection and recruitment process and the future of the company riding on new recruits the importance of a reference has never been more important.

### Do I have to provide a reference?

It is expected that employers provide a reference by both departing employees and prospective employers however there is no statutory obligation to do so.

Employers will have to give a reference if:

- a) There is a term in the employee's contract requiring the employer to provide a reference or there is a term implied by previous custom or practice;
- b) The employment is governed by a regulatory body which compels members to provide references; or
- c) The employee has previously brought a claim for age, sex, religion, race or disability discrimination.

### What if I do want to provide a reference?

You are obliged to make sure any reference given is true, accurate and fair and does not give a misleading impression of the individual concerned. If an employer fails to exercise reasonable care in the preparation of a reference they may be liable in negligence.

The leading case on the provision of a reference is *Spring v. Guardian Assurance*. In this case the reference that was given implied dishonesty without any proper information. The House of Lords based their decision on the law of negligent misstatement and breach of an implied contractual term. They stated that because an employer has special knowledge of the employee's skills they must use reasonable care and skill in the communication to any third party of information from which they might form an adverse opinion. Further, the employer's

duty to act with reasonable care could be expressed as an implied term of the contract of employment.

### Can good references be given for poor workers?

A duty of care is owed to prospective employers and employers must ensure that a reference is not unrealistically complimentary. The prospective employer could potentially sue the author of the reference for negligent misstatement if the individual bears no resemblance to what was described in the reference.



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An employer will be guilty of fraudulent misstatement if they knowingly give false information intending for it to be acted upon and as a result another party relies on it and suffers loss. It is irrelevant that there was no intention for the recipient to suffer any loss. In this situation even unforeseeable losses may be recoverable by the new employer.

It is often the case that employers are reluctant to give departing employees an unfavourable reference, including those who did not perform particularly well. An employee who has a satisfactory reference can then enter into a severance deal. This is because an employee would not likely sign a compromise agreement that includes an unfavourable reference as this would make it difficult to gain new employment. Employers

would be advised to carefully consider the content of a reference to avoid potential liability.

### **What can be omitted from a reference?**

Although references have to be true, accurate and fair they do not necessarily have to be comprehensive. To avoid the risk of negligent misstatement an employer would be advised to be selective about what to include in the reference. If an employee has poor time management but has an excellent attitude to work, an employer could simply say that the employee is "a dedicated employee" and omit their punctuality problems from the reference.

However if an omission gives a misleading impression of the employee an employer cannot choose to remain silent on the employee's abilities. If an employee has been guilty of gross misconduct such as theft which was omitted from the reference, and the new employer suffered loss as a result, they could issue a claim against the original employer.

Negative comments in a reference must be put in context to avoid from becoming unfair. If an employee's behaviour was a result of personal problems this should be mentioned, providing they have given their consent.

The key feature of a reference is the overall impression it gives of the employee. Facts that are included in isolation are not sufficient.

Prospective employers should be prepared to read between the lines as many employers are unwilling to provide unfavourable references for departing employees. Therefore a selective reference will be given rather than a critical one.

### **Are references confidential?**

Information which is kept in any "relevant filing system" is covered by the Data Protection Act 1998. Any reference that is kept in any organised file will be covered by the Act.

Individuals are usually entitled to observe information about themselves that is covered by the Act. However an exemption exists under the Act stating that an employer is not obliged to provide a copy of a confidential

reference when the employee requests. It would usually be reasonable to disclose the reference on the basis to promote good employee relations, unless a particular reason for withholding the information is given.

Appraisals normally make employees aware of any inadequacies they may have, so they should not be surprised by an unfavourable reference.

Individuals have the right to see what information is being held about them and if necessary correct any mistakes. However they are not normally entitled to access information about other people as this could reveal the identity and opinion of the author. Information about other people could be deleted before it is disclosed but small organisations need to be wary as an employee could deduce who provided the reference even though the reference has been edited.

References that are said to be "in confidence" must be studied to ascertain whether the information contained is actually confidential. Information that is already known cannot reasonably be withheld. If some information is not known, the author must give their consent to it being passed on. If they object reasons should be given and the person holding the reference must use their judgement. A balance must be struck between the referee's interest in keeping their comments confidential and the individual's interest in seeing them.

### **Moving Forward**

Striking this balance is essential. The "easy option" of giving a favourable reference to an employee who was not efficient should be avoided. Although it may seem like a harmless gesture, expensive and time-consuming Court proceedings will soon be regretted. By the same token, refusing to give a reference or a "warts and all" portrait could involve in the unhappy former employee bringing a claim against the employer. The proposed reference needs to be considered objectively as the employee may eventually see it. This will be crucial in striking that balance.