

An occupational hazard

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Helen Crossland navigates the risks surrounding employment references

It is a common misconception that employers are obliged, if asked by a departing employee's new company, to provide a job reference. Although this is a matter of discretion, businesses are normally quick to do so, often due to being unaware that they have a choice, or owing to their wish to be professional and support workers in their chosen career path.

Notwithstanding this, references historically have proved to be hazardous for employers, with the potential for claims both from the individuals on whose behalf they are provided, to those relying on their contents, being ever possible.

Golden rules

Employers ordinarily are under no legal requirement to accommodate a reference request, but it is customary and indeed good practice to do so in respect of good leavers or where the reason for the employee's departure is uncontroversial.

When providing a reference, however, a duty of care is triggered whereby reasonable care must be taken to ensure the content:

- is true
- is accurate and fair
- does not give a misleading impression, which may include omitting something of pertinence.

References should also be administered in line with company policy. This should stipulate the form of reference the business is prepared to give, the position regarding 'bad leavers', and the personnel assigned to processing them, which could include HR, the finance or managing director. Any company policy should ideally be in writing, be fair and consistent in its approach and have the protection of the business at its forefront.

Adopting some core principles will vastly curtail the risks attributed to giving references.

Content

There is no law prescribing the content or comprehensiveness of references, but typically there are two types ? standard or detailed.

A standard reference will cover the bare essentials including the subject's dates of employment and job title. While this form of wording may have raised alarm in the past, it is now the most prevalent type of reference and employers are best advised to agree to provide references on this basis only.

A detailed reference may offer substantially more, including observations of the person's performance in their role, reasons for leaving, pay, absence record, time-keeping and suitability for the position applied for. It goes without saying that this type of offering is riskier owing to the element of subjectivity and wider content.

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In addition to, or instead of a company reference, it is not uncommon for employers to be asked to complete a pro- forma containing a series of questions about the individual. Since volunteering such information would attract risks akin to that of a detailed reference, businesses should ideally decline such requests, particularly where it is company policy to provide standard references only. Any refusal can be communicated on this basis; that the company has a policy concerning references from which it does not deviate.

The same principles apply to telephone references. Verbal references should be avoided owing to the natural platform they offer to over-elaborate, for information to get lost in translation and lack of any record to verify what was said, or how information was presented.

With any reference, a disclaimer should be added stating it is given in good faith, in confidence and without liability on behalf of the writer and employer.

Bad leavers

Occasions will arise where an employer is asked to give a reference on behalf of an individual who was dismissed, or who departed in the midst of formal disciplinary or capability proceedings.

In such scenarios the employer is advised to make one of two decisions:

1. decline to provide a reference
2. provide a reference ensuring it is true, accurate and fair, but which contains brief details of anything of pertinence. This may involve including a short statement confirming the subject was terminated pursuant to a formal capability process, or that the individual resigned in the course of formal disciplinary proceedings which may have resulted in their dismissal. Disciplinary proceedings ought only be referred to where the employer has a genuine belief in the employee's guilt following a reasonable investigation.

The first option is passive (and hence often more appealing) but will still likely alert the prospective employer to the fact all is not well. The downside is it could invite more questions from the enquiring party and leave open the chance it could arrive at its own, incorrect conclusions which could be passed on to the reference subject.

The second is the safer and recommended course. The reference provider will be guaranteeing compliance with its legal duty of care both to the recipient and individual and

leaving an accurate paper trail of what was disclosed.

Clearly, there are consequences with both approaches, including the prospect of a job offer being withdrawn by the prospective employer, and the subject seeking retribution from the reference provider. That said, provided the information disclosed in the reference is accurate, option 2 will most effectively safeguard the business from legal challenges.

Risks

In respect of individuals, employers should firstly note any person has a right to see a reference provided on their behalf provided they make a valid application under the [Data Protection Act](#) . Hence, it is paramount the employer ensures its contents are true and made without malice.

Most challenges from individuals originate from when a reference leads to the removal of a job offer. Potential claims against the reference provider could be brought for:

- defamation: if an untrue statement in a reference disparages the subject's reputation
- malicious falsehood: if the reference states untruths that are malicious or reckless
- negligent misstatement: if a reference contains inaccuracies.

An individual may also claim breach of contract where the employer fails to produce a reference contrary to the terms of a settlement agreement or the person's contract of employment.

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Regarding recipients, the main risk is for negligent misstatement ? where a prospective employer puts faith in a reference that is misleading. This most commonly arises where the beneficiary relies on an employer's overstatements about an individual's capabilities or potential, which they then fail to produce for the new employer, or due to an employer's failure to disclose key information that the recipient takes assurances from (such as the subject was dismissed for gross misconduct or poor performance), only for the person to repeat their behaviour causing the new employer to suffer loss.

Conclusion

Provided an employer maintains an honest, objective and minimalist approach to references, and controls who is authorised to process them on their behalf, its ability to fend off any resulting claims will be much boosted. Consistency is vital because this will also dilute an individual's prospects of claiming a decision to refuse a reference, or that including unfavourable content was an act of discrimination or victimisation. The protection of the business should ultimately always take centre stage, and this, rather than loyalty to an employee or the desire to 'over warn' a recipient, should serve to avoid the factors most likely to land an employer in hot water when it comes to references.

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