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Employee References

Local authorities, like most employers, are often asked to give references in respect of employees who are moving to new jobs. Whilst most still partake in this practice care needs to be taken. Bad references are becoming a growth area of litigation. Options for an aggrieved employee, if economic loss results from a damaging reference, include a claim for defamation, malicious falsehood, discrimination or harassment.

Whilst it may be good employment practice, contrary to popular belief, there is no legal obligation on employers to supply references in respect of employees. The only successful cases based on a failure to give references have been where refusal was ancillary to allegations of racial or sexual discrimination e.g. in *Coote v Granada Hospitality Ltd.* (1998)

However what is clear is that once an employer decides to give a reference then it owes a duty to the employee in respect of the contents of the reference. Caselaw in the last few years has confirmed this. In *Spring v Guardian Assurance* [1994] Lord Woolf stated that references should be "based on facts revealed after making those reasonably careful enquiries which, in the circumstances, a reasonably careful employer would make." In *Bartholomew v London Borough of Hackney* [1999] the Court of Appeal made three statements of general principle in connection with references:

- There is a duty to ensure that references are true, accurate and fair in substance.
- However, there is no duty on employers to be "full and comprehensive". This is imposing too high a burden.
- Employers cannot break references down into individual sentences and state that each individual sentence was factually correct. References must be looked at in the whole.

In the recent case of *Cox v Sun Alliance Life Ltd* (2001) it was held that Sun Alliance had provided an unfair reference for Mr Cox. It implied he was sacked for taking bribes when he had in fact resigned with compensation. The company had agreed to provide a neutral reference. But a quiet word in the ear of his new employers ended Mr Cox's career. The Court of Appeal was unimpressed and made it clear that when this happens, there is no such thing as an "off-the-record chat".

But how would an aggrieved employee get hold of his reference to ascertain whether his employer has breached the above duties. Enter the Data Protection Act 1998. This strengthens the rights of individuals to gain access to personal data held on them by organisations, even where such data is held in paper files rather than automated form. However the Act recognises that such rights will be inappropriate in certain situations where the need for confidentiality is paramount. As a result Schedule 7 provides an exception for confidential references given by a Data Controller in connection with, amongst other things, the employment or prospective employment of the data subject.

As a result an employer who has provided such a reference will have no obligation to respond to a request for access to that reference by the subject and to that extent confidentiality will be preserved.

By contrast there is no parallel exception for the party who receives the reference. This means that the person or individual to whom the reference is sent will, in principle, have to disclose the contents of the reference if a request is made by the data subject. The only limitation on this right is found in section 7(4) of the 1998 Act. The effect of this section is to ensure that all passages identifying the author of the reference or any other individual mentioned in the reference have to be deleted before a copy is provided (unless the author or the individual in question consents to the disclosure or in certain other limited circumstances).

The possibility of an individual being able to obtain access to confidential references will be a matter of concern for employers, particularly as any inaccuracies in the reference could give rise to proceedings in defamation or negligence. Local authorities should consider issuing guidance to managers and personnel officers on the giving of references. This should emphasise the need for references to be drafted with extreme care taking into account the above caselaw to minimise the risk of liability. As everywhere there is any cause for concern legal advice should be sought.

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