

# Employee References

Are references obligatory? What should they say?

*Expert knowledge means success*

## Contents

1. Introduction
1. Key Points
1. The Law
3. Release Clause
3. Legal Entitlement to a Reference
4. Concluding Comments
4. Further Information



Note: This publication has not been updated since it was last published. Some of the hyperlinks may have changed and may need updating. In addition, some of the information in this publication may be out of date.

## Introduction

Many people seeking new jobs misrepresent their backgrounds and credentials whilst others simply omit important information. No matter how honest your job applicant might be, you can still learn a great deal from other people who know them well – such as by obtaining character references or employment references from previous employers.

## Key Points

The first rule to be aware of is that an employer is not obliged to provide a reference for an employee but if one is provided, the following should be included in a reference:

- Length of service and position held.
- Competence on the job.
- Comments on honesty.
- Time-keeping.
- Reasons for leaving.
- Any other comments pertaining to the employee such as any lengthy period of absence.
- Any other remarks of a more personal nature.

In providing a reference, employers should note the following key points:

- If the employer believes the reference to be correct and if it is provided without malice, the reference is protected by what is known as 'qualified privilege'. This means that the employer will have a defence to any defamation claim brought by the employee if the information turns out to be untrue.
- The defence of qualified privilege is lost forever if the statement falls into the hands of a third person who does not have a valid interest in the matter. Such statements should thus be clearly marked 'Private and Confidential'.
- An employer owes a duty of care to the employee about whom the reference is given. The employer must take reasonable care in the preparation of a reference, as he will be held liable in negligence if he fails to do so and the employee suffers damage as a result.

- The employer's obligation is to provide a true and fair reference to the best of his knowledge and any statement must not be misleading.

Bad references are becoming a growth area of litigation. If employees are dismissed after several weeks in a new job because of a poor reference from an ex-employer, they will rightly feel angry and frustrated. They may suffer a substantial loss of earnings and will, if the reference is unjustified, wish to recover that loss from the ex-employer.

Until the late 1980s, it was settled law that there was no legal obligation to provide references and, if one was provided, the employee's only remedy was bringing a claim for defamation (where the defence of qualified privilege applies). This is no longer the case.

### Is there an obligation to give a reference?

An employer has the right to refuse giving a reference, but if a reference is given, the employer has a duty of care to:

- the inquiring employer who may "rely" on the reference in selecting the employee.
- the (ex-)employee. The employer has an implied duty to take reasonable care in preparing/composing the reference. An employee may suffer damage from an inaccurate reference and may make a claim for negligence and loss due to the inaccuracy.

In the UK, if an employee is dismissed, he/she is entitled to receive in writing the reasons for the dismissal.



### The Servant's Character Act

The use of employment references dates back over 200 years to the time when it became custom and practice for employers to seek references for domestic employees.

In fact, the Servants' Character Act 1792 is still in force to prosecute employers who deliberately provide a false testimonial and employees who alter or forge an employer's reference. Its deterrent effect is limited, however, by the fines applicable, just £50 for either offence.

Source: ICAEW  
<http://www.icaew.com/en/members/advisory-helplines-and-services/-/media/Files/Helplines/practice/employment-references.ashx>

## The Law<sup>1</sup>

### Obligation to provide a reference

Lord Slynn described the provision of references<sup>2</sup> as a "moral obligation" but there now seem to be three situations when an employer is legally obliged to provide a reference.

The first situation was set out by Lord Woolf<sup>3</sup> who said that it would be necessary to imply a term requiring an employer to furnish a reference within a reasonable time if three conditions were satisfied, namely:

1. there was a contract of employment or for services;
2. the contract relates to an engagement of a class where it is the normal practice to require a reference from a previous employer before employment is offered; and

- the employee cannot be expected to enter into that class of employment except on the basis that the previous employer will, within a reasonable time, provide a full and frank reference.

This may encompass a very large category of workers and it remains to be seen how this test will be interpreted.

The second situation is set in a controversial decision of the European Court of Justice<sup>4</sup>, which established that a refusal to grant a reference to an employee because she had complained of sex discrimination whilst employed was unlawful victimisation under the *Sex Discrimination Act 1975*. The policy argument for extending the provisions of that Act to acts occurring *after* employment (i.e. the refusal to provide a reference) was that a failure to declare such conduct to be victimisation would inhibit workers from claiming under the Act whilst in employment.

The third situation is where a contract of employment actually provides that a reference will be given. Any contractual obligation to provide a reference (as in the first and third situations above) might arguably cease to have effect if an employee is in repudiatory breach of contract. This will most frequently occur, as is common when changing jobs, when the employee resigns without giving the full contractual notice.

### The Duty to Give a Fair Reference

It has been held<sup>5</sup> that employers owe a duty to take reasonable care to ensure that the opinions contained in a reference were honestly held and based on accurate facts. The House of Lords confirmed this<sup>6</sup> when 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.*" However, the Court of Appeal<sup>7</sup> has now gone further and set out three points of general principle. The facts were as described.

Hackney Borough Council had suspended Mr Bartholomew whilst investigating alleged financial irregularities. As a result, Mr Bartholomew lodged a claim alleging racial discrimination with the employment tribunal. After negotiations, the parties agreed that Mr Bartholomew would take '*voluntary severance*', withdraw his discrimination claim, and that the disciplinary procedure against him would lapse automatically once his employment had come to

an end. Some 15 months later, Mr Bartholomew obtained an offer of employment from Richmond-upon-Thames Borough Council. Richmond sought a reference from Hackney. The reference provided mentioned that Mr Bartholomew had taken voluntary severance, and stated: "*At the time of his departure Mr Bartholomew was suspended from work due to a charge of gross misconduct, and disciplinary action had commenced. This disciplinary action lapsed automatically on his departure from the authority.*" Unsurprisingly, Richmond withdrew the job offer. Mr Bartholomew brought a claim against Hackney, alleging that although their reference was factually correct, it was unfair.

After considering various authorities, and drawing analogies between the law of negligence and the law of defamation, the Court of Appeal made three statements of general principle in connection with references. These were:

- there is a duty on employers 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.

However, on the facts of the above case, the Court of Appeal found that the reference provided to Mr Bartholomew was not unfair, inaccurate or false and, accordingly, Hackney was not in breach of its duty to him and his appeal (and claim) was dismissed.

### The Implications

If (and when) a pre-action protocol is introduced for breach of contract or negligence claims, it is likely to contain a requirement to exchange documents prior to issue of proceedings. There is a risk, therefore, that employees may be able to obtain copies of references simply by threatening litigation. This may inhibit employers from making adverse comments, even if fully justified, in references.

Employers could consider inserting a disclaimer into a reference. This, however, would only provide a defence against a *Hedley Byrne* claim brought by the new employer - not a claim brought by the ex-employee.

Alternatively, employers could insist that they will only provide a reference if the employee accepts that it is provided on a 'no-liability' basis<sup>8</sup>. However, it is by no means clear

whether this would be effective, or whether such a condition or disclaimer would be void under the *Unfair Contract Terms Act 1977*.

Since the early 1990s there has been an increasing tendency to refuse to provide substantive references at all, particularly in the larger accountancy and management consultancy firms. The human resource department will simply write a letter setting out an ex-employee's period of employment and job title, and stating that it is the firm's policy not to provide substantive references. This practice may well become more commonplace in the future.

## Release Clause

The following draft clauses might be useful in certain and appropriate circumstances.

### Draft Release Clause: Holding the Employer Harmless

I, [*insert employee's name here*], hereby authorise [*insert name of the employer here*] ("the Firm") to release information to prospective employers regarding my employment with this company, including but not limited to, dates of employment, salary history, employment history, disciplinary actions, attendance record, performance, and employment related documents.

I hereby release my former and prospective employers, their employees, agents, officers, directors and affiliates from any and all liability for damages of whatever kind, which may at any time result to me, my family or associates, because of compliance with this authorisation and request to release information or any attempt to comply with it.

I authorise the Firm to release any and all references and records related to my past employment and work history to (prospective employer). I release and forever discharge the above named former employer and prospective employer of any and all claims related to this Employee Reference Request and any related exchange of records or other communications related to my past employment. This release is executed with full knowledge and understanding that the information to be provided is for the sole purpose of gaining employment, and shall remain in effect until such time as I withdraw said release in writing to the Firm.

I hereby agree to hold harmless and indemnify the Firm for any claims arising from any information provided hereunder.

Signed:

Date:

### Draft Clause for Contract of Employment: Limiting the Content and Provision of References

It is our policy to provide prospective employers with references regarding former employees only for those who have worked for us within the past three years.

When references are provided, it is our policy to provide prospective employers only with the dates of employment, final job position and final salary of a former employee. All references are to be given by [the personnel department] only.

## Legal Entitlement to a Reference

There are five exceptions where employees may be legally entitled to a reference<sup>9</sup>:

- The first, which is uncommon, is where the employment contract has an express term stating that the employee is entitled to a reference.
- The second possibility arises where a term is implied in the contract, for example because the employer has traditionally given references in the past for employees of a similar level.
- The third is where a manager, or someone with authority, has assured the employee that a reference will be provided.
- The fourth is the fairly common situation where an employee leaving after an internal dispute gets a reference as part of a compromise agreement.
- Finally, there may be a regulatory requirement (for example, in a regulated area such as financial services) on the employer to provide a reference and this may require specific information.

## Concluding Comments

Although most UK employers ask for (in the case of job applicants) and give (for ex-employees) references, there is evidence<sup>10</sup> that the validity of such references is doubtful.

Obtaining references is a security device for employers - to verify employee honesty and integrity. It is naive to always assume that the person is who they say they are, have done what they say they have done and are fully open about their background. But allowing applicants to nominate family friends as referees is likely to be of negligible value.

The information and commentary in this publication does not, and is not intended to, amount to legal advice to any person on a specific case or matter. Employers are strongly advised to obtain specific, personal advice from a specialist employment lawyer about your case or matter and not to rely on the information or comments in this document.

## Further Information

There's a useful checklist to use when providing an employee reference at: [www.lawdepartment.co.uk/site/useful\\_legal\\_checklist/providing\\_a\\_reference/](http://www.lawdepartment.co.uk/site/useful_legal_checklist/providing_a_reference/)

This guide is for general interest - it is always essential to take advice on specific issues.

We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

### Acknowledgement and References:

<sup>1</sup> In this section, we acknowledge text from Daniel Barnett, a Barrister whose principal area of practice is employment law. He publishes an excellent employment newsletter – for details, go to [www.danielbarnett.co.uk](http://www.danielbarnett.co.uk).

<sup>2</sup> In *Spring v Guardian Assurance* [1994] IRLR 460.

<sup>3</sup> In Lord Woolf's speech in *Spring v Guardian Assurance* at para. 148. This part of Lord Woolf's speech was obiter and was not expressly adopted by any other members of the court.

<sup>4</sup> *Coote v Granada Hospitality Ltd.* [1998] IRLR 656.

<sup>5</sup> In *Lawton v BOC Transshield* [1987] IRLR 404, by Tudor-Evans J.

<sup>6</sup> In *Spring v Guardian Assurance*.

<sup>7</sup> In *Bartholomew v London Borough of Hackney* [1999] IRLR 246.

<sup>8</sup> This approach was touched upon by Tudor-Evans J. in *Lawton v BOC Transshield* (supra.) at paragraph 29 and by Lord Slynn in *Spring v Guardian Assurance* at paragraph 92.

<sup>9</sup> Source: <http://www.out-law.com/page-5851>

<sup>10</sup> Cooper and Robertson's study of references in selection (Cooper D and Robertson I, *The Psychology of Personnel Selection*, International Thomson, 1996) raises substantial questions about their validity of use. They find validity measures are low, averaging 0.14 and seldom more than 0.20.

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