

Employee references



Catherine Daw
Head of Employment Law
01622 655291
catherinedaw@brachers.co.uk

Employee references – tread delicately

Employers may wish to be helpful to staff by providing them with references once they choose to move on from their employment. However care must be taken where references are provided.

The legal obligation to provide a reference

There is no legal obligation to provide a reference unless the employee works in some specified occupations e.g. the financial services sector (due to certification needs). Therefore, generally employers are entitled to refuse to provide a reference (*Lawton v BOC Transshield Ltd* [1987]) although in practice most employers do provide a reference to an employee upon their leaving.

Whether the choice is to provide a reference or refuse, the employer's policy on references must be consistent or it could lead to allegations of discrimination because of any of the nine protected characteristics under the Equality Act 2010, namely:

- Age;
- Disability;
- Gender Reassignment;
- Marriage and civil partnership;
- Pregnancy and maternity;
- Religion or belief;
- Sex; and
- Sexual Orientation.

Failure to provide a reference because of one of the protected characteristics will entitle an employee to bring a claim for discrimination.

Employer's liability

If an employer does provide references, then they are subject to a duty to take reasonable care to ensure information is true, accurate and fair and that it does not give a misleading impression of the employee. However, there is no obligation to provide any detail or for it to be comprehensive.

Employers are legally responsible for the contents of any reference given and potentially liable to the employee and prospective new employer. It is therefore a necessity to make sure that the information is correct.

References must not be discriminatory. Particular care should be given to comments about performance, attendance or sickness absence where there could be a risk of discrimination on the grounds of disability. Discrimination is just one claim amongst others that can be brought, others include:

- Victimisation – a risk if the employee has previously complained of discrimination;
- Defamation – where untrue statements that disparage the reputation of a person are used;
- Malicious falsehood – where untrue words were published maliciously;
- Negligent misstatement for inaccurate references;
- Breach of contract – by breaching the implied duty to take reasonable care; and
- Constructive Dismissal – could lead on from breaching the implied duty.

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References – what can be said?

As indicated, references must be true, accurate and fair. They can either be presented in short form or in a more elongated explanatory form. Basic references need only contain the dates of employment, job title and salary on leaving whilst a full reference would normally look to cover more of the following:

- Performance in the job;
- Disciplinary record;
- Honesty;
- Absence record;
- Time-keeping;
- Reason for leaving; and
- Any other relevant personal matters.

Whilst it is important to provide a good reference, employers must remember their duty to comply with the Data Protection Act 1998 when providing personal data and sensitive personal data.

If there is any reason to include an employee's medical records for instance, they should only be included where it has been discussed with the employee and Specific consent to disclosure obtained.

Reference policies

It may be helpful to have a clear policy detailing the organisation's stance on references. Points to consider when implementing policies include but are not limited to:

- Whether references are provided or not;
- If so, whether they are full or basic;
- Who can provide references;
- What type of references are permitted: verbal/personal;
- What should be included in references;

Whatever is included in the final policy, there must be consistency in its application to avoid unwanted claims by the employee.

Some practical tips on providing a reference
Finally, we have compiled a few practical tips below to supplement the knowledge above:

- Ensure references are consistent with the real reason for any dismissal (if applicable);
- Make sure inaccurate statements are avoided;
- The reference gives a balanced overview of the employee's work (if a full reference is provided);
- Employee consent must be obtained where Data Protection issues may arise;
- The overall picture the reference gives is not misleading; and
- The reference is marked 'Private and confidential for the addressee only'.
- Employers are likely to want to include a disclaimer in relation to the content of the reference.

The information contained in this document provides background information only. The document may be misleading if relied upon as an exhaustive list of the legal issues involved. If any matter referred to in this document is sought to be relied upon, further information should be sought.