



SmartHR - People Management Feature

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REFERENCES – things to consider when giving and receiving them

There are many things to consider when dealing with references. Firstly, as an employer you are under no obligation to provide a reference – unless there is an express or implied contractual term to do so. If you do provide a reference, you have a duty of care to ensure that the substance of the reference is **true, accurate and fair**. Ideally it should be addressed to a named person rather than “To whom it may concern”. The reference should not be misleading or contain defamatory or false comments. Concealing something serious which causes a loss to a future employer could potentially lead to a negligence claim.

In a recent UK case (McKie v Swindon College), McKie’s former employer had made factually incorrect comments in an email to McKie’s new employer. This ultimately resulted in his dismissal. The email was not intended to be a reference but the High Court interpreted it as such. As the comments were factually incorrect and the college had not taken sufficient steps to verify them, it was held accountable for the consequences. The court confirmed that employers have a duty to take reasonable care in preparing references (or similar statements) concerning an employee, and that in failing to fulfil this duty it will be liable for any loss the individual suffers.

Companies may take a particular stance on references, such as providing ‘bare minimum’ information e.g. confirming employment dates and the person’s job title. Others may provide additional information such as comments or opinions on the person’s performance in their job role e.g. attendance / timekeeping, conduct, client service, team-working etc. Whatever stance you take, you should ensure that it is applied consistently when providing references and that references are carefully managed.

Employers regulated by the Financial Services and Markets Act 2000 are bound to supply specific information which exceeds the ‘bare minimum’.

Remember too that under Data Protection legislation, a worker can request to be provided with any personal data held by an ex-employer, although the ex-employer does not have to provide references given in confidence which it has written relating to training, education or employment. This exemption doesn’t apply to the reference when it is received by another company. If the new company files the document in a way that is covered under Data Protection legislation then it is likely to have to supply a copy to the employee if a data subject access request is made. Although the employee can request to have access to any personal data held about them, which includes references, they may not necessarily have access to information about other people – which could include an opinion provided in confidence by an ex-employer regarding a person’s suitability for a particular job role.

Information that is already known to the person such as employment dates and job title can be provided. However, if an employer cannot be certain that the person concerned knows the information already then the ex-employer should be asked if they object to the reference being provided – and if so, what their reasons for objecting are. Unless a compelling reason is given why the reference should not be disclosed, then the new employer would normally release this from the individual’s personnel file.

You may wish to withhold some of the information e.g. removing the name and address of the person providing the reference. The final decision will come down to what is reasonable, taking into consideration the ex-employer’s need for confidentiality and the employee’s interest in seeing the content of the reference.

Here are some general tips for providing references:

- Ensure that people who provide references are trained, knowledgeable and authorised to deal with them
- Ensure that the contents are factually true, accurate and *not* misleading

- If a 'bare minimum' reference is provided, it should not be used as a means of concealing something serious (this could expose the company to a potential claim from a subsequent employer)
- If you choose to provide opinions in references, as opposed to facts, review the contents carefully to ensure that they are not discriminatory
- Avoid including any comments on spent criminal convictions
- Ensure that disclosure of any personal data does not breach Data Protection legislation
- Consider adding in a disclaimer regarding liability – this must be 'reasonable' e.g. relating to the suitability of the individual for the position the reference is being obtained for, rather than disclaiming a mis-statement of fact

If references are being obtained as part of your pre-employment checks, ensure you state in your employment offer documentation that the reference received must be **satisfactory to the company**; rather than the company just *receiving* a reference (which may be unsatisfactory).

Where you receive a reference that is considered unsatisfactory, you have a number of different options:

- Firstly, you should assess the content of the reference in relation to the person's proposed job role – is it really unsuitable? Could it be from someone who is disgruntled? Have you received other suitable references?
- You may want to obtain details of other referee(s) to be contacted to see whether the unsuitable reference was a 'one-off'
- If your employment documentation allows for the offer of employment to be withdrawn if the reference received isn't satisfactory to the company, and the employee has not commenced work for you, then you may make a decision to withdraw the job offer
- If your employment documentation does not contain a clause regarding the receipt of references that are satisfactory to the company, and/or the employee has commenced employment, then you will need to ensure that you do not breach the employee's contract if you choose to terminate their employment – *always obtain advice if you are unsure*

In the UK, under the provisions of the Equality Act 2010 that was introduced in 1 October 2010, it is unlawful for employers to ask job applicants questions about their sickness or health **before** they have been offered a job role (subject to some exceptions for specific job roles). Employers should ensure that any reference response creates an overall *fair impression* of the situation and be mindful of disability discrimination in relation to any absence information requests.

There are also provisions in the Equality Act 2010 regarding post-employment discrimination. This can cover the discriminatory content of references and a refusal to provide a reference at all. *Direct discrimination* could occur where providing a reference was refused on the grounds of a discriminatory reason i.e. a protected characteristic such as sex, sexual orientation or race. *Indirect discrimination* could potentially arise where a company has a policy of providing references stating length of service and number of days absence from work (regardless of the reason) – if the reasons for the absence were related to a protected characteristic e.g. a disability, and the employer couldn't objectively justify their policy.

Dealing with references can be a minefield...if in any doubt, you should seek appropriate advice and guidance.