Employment References: Beware the Two-Headed Monster

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Introduction

When employees are let go, employers are almost certain to receive requests for an employment reference. Given the current economic climate, and in particular the recent news that Canada lost nearly 46,000 jobs in December 2013 alone, now more than ever employers must be aware of the legal risks involved with giving an employment reference.

References present a double-edged sword for employers. On the one hand, employers have an interest in helping former employees find new jobs as doing so will get them off the company's severance payroll. On the other hand, in giving a reference employers may expose themselves to dual-pronged liability in negligence and/or defamation.

Head #1 – Liability for Negligent Referencing

While a fact of life in the United Kingdom ("UK") for over twenty years, in Canada negligent referencing has merely lurked in the shadows as a hypothetical claim which has yet to be tested by our courts.

In the UK, negligent referencing has reared its head in two ways:

1. Claims by employees that their former employers failed to take reasonable care in preparing/giving their reference, which as a result of inaccurate or misleading statements caused harm or loss; or

2. Claims by the employee's new employer, who in reliance on a positive reference from the former employer which was inaccurate or misleading suffered harm or loss.

Negligent referencing has its roots in a House of Lords decision from 1994, *Spring v. Guardian Assurance* ("*Spring*").[1] In that case, the employer provided a strongly-worded and unfavourable reference letter that touched on the employee's character and performance. The letter destroyed his chances of securing employment with three other companies, and also turned out to be inaccurate. As a result, the Law Lords ruled that employers must take reasonable care to avoid giving inaccurate or misleading references, since such references can be damaging to the "future prosperity and happiness" of former employees.

In the years that followed, employers in the UK have learned not to jump the gun by making negative references unsupported by concrete and verifiable facts, as was the case in *Spring*.

[1] [1994] IRLR 460 (HL).

The same holds true for positive references as well. UK law now provides that a former employer which gives a shining yet carelessly drafted reference can be sued by a new employer in negligence. If it can be showed the reference was knowingly misleading, there may also be a claim in deceit.

Similarly, the UK courts have extended *Spring* to cover even the most informal of references and reference requests. For example, an informal "chat" or e-mail sent on one's own volition about a former employee may lead to liability.

The status of *Spring* in Canada is somewhat of a legal wrinkle. While the Supreme Court of Canada took note of *Spring* in a decision from 2006,[2] that case had nothing to do with employment references. Nonetheless, employee-side lawyers frequently rely on this wrinkle to launch negligent referencing claims. These cases inevitably settle out of court, however.

In this way, *Spring* may already be with us in the sense that it promotes a proactive and precautionary approach to employment references. Certainly no Canadian employer wants to be the case that imports *Spring*'s principles and high price tag of damages into Canadian employment law.

Head #2 – Liability in Defamation

Unlike negligent referencing which remains a hypothetical (though likely) risk, defamation claims pose a very real danger to employers who give employment references. After all, defamation law exists to protect one's reputation from injury.

Defamation involves harm to an individual's reputation by way of a false statement to a third party.

Generally speaking, there is a defence of "qualified privilege" that applies when an employer gives a reference about a former employee. The law provides this defence because there is both a public interest and a common interest in allowing the free-flow of such information among employers.

To overcome this defence and be successful, an employee must show that the former employer was motivated by "malice" when giving the defamatory reference. Indicia of malice include:

- a dominant and improper motive to injure the employee;
- intentional dishonesty;
- reckless disregard for the truth; or
- an ulterior motive that conflicts with the interests involved in providing the reference.

Although malice is difficult to prove, if substantiated an employer can be liable for a wide range of losses that the employee has suffered as a result. Further, if the defamation claim

[2] See *Young v. Bella*, 2006 SCC 3 at para. 56.

accompanies a claim for wrongful dismissal, it can also be used to ground additional damages for aggravated or punitive damages.

Best Practices and Practical Considerations

Given potential claims in negligence and defamation, employees essentially get two kicks at the can when claiming against their former employer for an inaccurate reference.

Compared to defamation, negligence presents a much lower threshold, and by extension, more risk to employers. While an employer may not have been motivated by ill-will or spite, if the inaccurate reference was carelessly given and caused a loss, this may be sufficient for an employee to succeed in his or her claim, if *Spring* is accepted.

It is therefore unsurprising that many employers refuse to give any sort of reference at all. However this comes with a slew of its own risks and complications, such as allegations of bad faith and/or impeding mitigation efforts.

If references are given, it is crucial to remember that "negative" does not necessarily mean "negligent", or even "nasty". An employer can be honest provided that it is acting in good faith and has the support of a solid factual foundation for any statements made. Indeed, as put by the House of Lords in *Spring*, an employer is not required "to warrant absolutely the accuracy of the facts or incontrovertible validity of opinions". Rather, employers must simply take reasonable care when putting together a reference and verifying the factual basis from which it came.

Reference Dos and Don'ts

Do:

1. Develop a robust reference policy that employees are aware of and apply it consistently

2. Document the contents of any telephone references with a note to file immediately thereafter

3. Delegate a referee responsible for providing references

4. State only that which is relevant, accurate and verifiable, i.e. assume the reference will always be the subject of litigation

5. If a reference letter has been provided, ensure that all inquiries are answered in a manner consistent with the contents of the letter

Do Not:

1. Permit an individual to act as a referee who had a personal conflict or close relationship with the former employee

2. Engage in any discussion relating to protected grounds of discrimination under human rights legislation, i.e. "Jane was always leaving early to pick up her kids…"

3. Refuse to give a reference if there is a policy or practice of giving references

4. Refer to any circumstances that were not fully or properly investigated

5. Permit managers or supervisors to give "side references" if he or she is not a designated referee under the policy

This list is just a start. Employers should partner with their employment counsel to develop and implement a company-wide policy which addresses the multitude of legal landmines associated with the ever-present reference request.

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