Damned by faint praise: The law on employment references

“It is a relevant circumstance that, in many cases an employee will stand no chance of getting another job, let alone a better job, unless he has been given a reference.”

Per Lord Slynn in Spring v Guardian Assurance1.

This article attempts to address some of the legal questions that flow from the issue of employment references including –

Is there a general legal obligation on employers to provide an employee with a reference? If such an obligation exists, what information should a reference contain? What are the potential legal consequences of a breach of this obligation, should it exist? To whom might an employer owe a legally enforceable obligation in relation to the provision, and the contents, of an employment reference? Does the increasingly common practice of providing brief factual statements of employment meet an employer’s obligations?

Developments in UK Case Law

While one used to be able to say with a reasonable degree of confidence that there was no absolute obligation on employers to provide an employee with a reference, case law in the UK has developed a number of exceptions to the proposition. It would now appear that, in certain circumstances, an employee can require an employer to give a reference. UK case law suggests that it may be appropriate in some cases to imply a term into a contract of employment that the employer will provide the employee with a reference at the request of a prospective employer. We would suggest that the body of UK case law that has developed over the last number of years would most likely find favour in the Irish courts.

The leading UK case is that of Spring v Guardian Assurance2.

The Plaintiff was dismissed from his position of sales director (designate) and office manager by the Defendant. He subsequently sought to sell the insurance products of another company. Under the rules of the regulatory body LAUTRO, the other company was required to seek, and the Defendant to supply, a reference before they could appoint the Plaintiff as one of their representatives. In consequence of the unfavourable reference supplied (described by the trial judge, Judge Lever QC, with very little understatement, as the “kiss of death”), the other company declined to appoint the Plaintiff. The Plaintiff brought an action against his former employers on several grounds including negligent misstatement, malicious falsehood and breach of contract. The Plaintiff would presumably have included a claim of defamation but for the fact that there is no legal aid in the UK for such claims. The House of Lords observed that the Defendant may have had a good defence to any such claim on the basis of qualified privilege but that this line of defence would not avail the Defendant to a claim based on the tort of negligence.

1 [1995] 2 AC 296 at 335
2 [1995] 2 AC 296
The House of Lords held that an employer who gives a reference in respect of a former employee owed that employee a duty to take reasonable care in its preparation and would be liable to him in negligence if he failed to do so and the employee thereby suffered economic damage. Interestingly, the House of Lords did not draw a material distinction as to whether the plaintiff had been an employee of the Defendant or acting under a contract for services.

The House of Lords also held that an implied term of the contract existed between the Plaintiff and the Defendant to ensure that reasonable care was taken in the compiling and giving of the reference, and that the Defendant was in breach of that implied term.

Lord Slynn in the House of Lords commented, albeit obiter, that, even if there is no universal duty on an employer to give a reference, it would seem that contracts may exist when it is necessary to imply such a duty.

Furthermore, Lord Woolf (as he then was) attempted to specify the circumstances which would enable such a term to be implied. Those circumstances are:

the existence of the contract of employment or of services;
the fact that the contract relates to an engagement of a class where it is normal practice to require a reference from a previous employer before employment is offered; and
the fact that the employee cannot be expected to enter into a class of employment, except on the basis that the employer will on the request of another employer, made not less than a reasonable time after the termination of the previous employment, provide a full and frank reference to the employer.

In Spring there was a duty on the employer to provide a reference under the LAUTRO rules. However, not every industry has guidelines as comprehensive as the LAUTRO rules and the issue of whether there is a custom in a particular industry to provide references will more often than not be a question of fact. We would, however, suggest that the tests laid out by Lord Justice Woolf could be readily applied to a wide variety of industry sectors in Ireland.

The existence of an obligation to provide a reference was approved by subsequent UK cases, also in the insurance industry: Kidd v Axa Equity & Life Assurance Society plc3 and Cox & Cross v Sun Alliance Life Limited4.

The duty of care set out in Spring was extended in Bartholomew v Hackney London Borough and Another5. In Bartholomew, the Court of Appeal held that on giving a reference to a former employee, a former employer owed a duty of care to the former employee to provide a reference which was true, fair and accurate. It stated that in order to determine the fairness of the reference it was necessary to have regard to the whole of the reference and the surrounding context, as a number of discrete statements, though factually accurate in themselves, could nevertheless read as a whole give an unfair or potentially unfair impression to a recipient of the reference. Significantly, it was held that it is not necessary that a reference in every case be full and comprehensive.

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3 [2000] IRLR 301
4 [2001] IRLR 448
5 [1999] IRLR 246
Employee Remedies

The possible remedies available to an employee for failure to provide a reference or for provision of an inaccurate reference could include:

- breach of contract;
- negligence;
- unfair/constructive dismissal;
- defamation;
- malicious falsehood;
- discrimination;
- European Convention on Human Rights Act, 2003;
- Constitutional right to earn a livelihood;
- Data Protection rights.

If an employer undertakes, or a duty is imposed on it, to provide a reference and it fails to do so this may be a breach of contract. The employee may be able to claim a breach of the employer/employee mutual duty of trust and confidence.

Employers should be aware that a reference given on termination may subsequently reappear in any dispute arising from the termination. Accordingly, a reference should not be embellished to assist an employee in gaining future employment, as it may restrict an employer's defence in any such claim. It could also expose an employer to a claim from a third party recipient of the reference, of which more below.

Employers should also be wary of including details of investigations, complaints or allegations in a reference, of which an employee is unaware, (see TSB Bank v Harris6).

The UK case of Coote v Granada Hospitality7 suggests that a refusal by an employer to provide a reference may be found to constitute discrimination under equality legislation.

Alleged breaches of various provisions of the European Convention on Human Rights have been unsuccessfully advanced in recent UK cases in the area of references, Griffith v Newport County Borough Council8 and Legal and General Assurance v Kirk9. There is, however, potential for the rights recognised by the Convention to have application in this area.

Under the Data Protection Acts, 1988 and 2003, an individual has the right to obtain a copy, clearly explained, of any information relating to him/her kept on computer or in a structured manual filing system, including personnel records.

The Acts also provide that personal data containing expressions of opinion about the data subject may be given to the data subject without the permission of the person who expressed that opinion. This does not apply if the expression of opinion was given in confidence or on the understanding that it would be treated as confidential.

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6 [2000] IRLR 157
7 [1999] IRLR 452
8 [2001] EWCA Civ 1860
9 [2002] IRLR 124 CA
Accordingly, an employer may restrict itself to giving only confidential expressions of opinion as references, in order to prevent former employees gaining access to references under Data Protection legislation.

However, the Data Protection Commissioner states that there is a high threshold of confidentiality to be met and simply placing the word ‘confidential’ at the top of a page will not automatically render the data confidential.

Employers should, therefore, express clearly in the text of the reference their wish for the content to be kept confidential, perhaps outlining any special reasons for the request. An acknowledgement of the confidential character of the reference from the recipient may also be advisable. Expressions of opinion should also be clearly distinguished from matters of fact about the employment.

**Duty of care to future employers?**

We would suggest that it has long been the case that an employer who provides an employment reference owes not only a duty of care to the employee but also to the third party recipient of that reference. The fact that the third party and the employee will rely on the reference is clearly foreseeable. This creates a duty of care, on the basis of the accepted principles set out in the famous case of *Hedley Byrne & Co. Limited v Heller & Partners Limited*.

The duty arises because the employer has special knowledge derived from experience of the employee’s character, skill and diligence while working for the employer. When the employer provides a reference to a third party he does so not only for the assistance of the third party, but also for the assistance of the employee.

**What form should a reference take?**

What emerges from the UK case law is that there is still no *absolute* obligation to provide a reference and no requirement, where it is given, that it must be full and accurate in every respect. However, where a reference is given it must be true, accurate and fair. Overall the reference must not give a misleading impression.

Recent case law has contributed to the increasing practice of employers adopting a formal policy regarding the provision of references. It is now relatively commonplace for employers to only provide references in the form of a brief “statement of employment”, containing only very basic factual information concerning the employee.

However, in light of the *Bartholomew* case, there is a question as to whether or not the non-disclosure of a material fact on a “statement of employment” would meet the duty of care to both employee and, perhaps in this context more particularly, a third party recipient, developed by case law. In addition, any prospective employer who is in receipt of such a bland reference may consider the employee to be damned by faint praise.

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10 [1964] AC 465
An increase in the attempted use of disclaimers in relation to references has also been noted. Where a disclaimer is used it should pass the "reasonableness" test. It is questionable if any disclaimer of liability would be held to be operative as against the employee. It is also extremely doubtful if a disclaimer could exclude liability for any misstatement of facts which would normally be expected to be within the employer’s knowledge. These would include matters such as performance or disciplinary record. A disclaimer may be reasonable in relation to an opinion on the employee’s suitability for a particular position or job.

It goes without saying that it would be unwise for employers to divulge their true feelings about an employee over the phone to a prospective employer where they have not been divulged in a written reference. How could an employer be certain that what is said would never come back to haunt them?

**Conclusion**

It is becoming increasingly difficult for employers to refuse to give references and to avoid liability for their contents although it does remain to be seen whether the Irish Courts will adopt the jurisprudence of the UK Courts outlined above. Consequently, significant care must be taken by an employer when preparing an employment reference. The practice of providing “statements of employment” is likely to increase but employers should be wary of omitting material facts relating to the employee’s employment that could result in a breach of the duty of care imposed by case law.

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