



Provision and Receipt of Employee References

Types of reference

The receipt and provision of References is a common part of any recruitment process and references may be provided either in a personal capacity or on behalf of the employer (E.g. the company) as a corporate reference. Because confusion can arise regarding the status of a reference it is vital that all parties involved are able to distinguish between different types of reference.

The employer will be legally responsible for the contents of a corporate reference because it is provided on behalf of the employer. It is therefore advisable for employers to have a clear, easily accessible policy in place setting out which members of staff are authorised to give a reference, in what format (verbal and/or written) and what it can include.

A personal reference is one given by an individual in a personal capacity (usually a manager or former manager who has personal knowledge of the employee who is the subject of the reference). It may refer to work done for a particular employer, but it is not given on behalf of the employer.

The legal position will be the same whether the reference is given in writing or over the telephone.

Does an employer or former employer have a duty to provide a reference?

Generally there is no legal obligation on an employer to provide a reference for an employee or ex-employee unless there is an express contractual duty (set out in the employment contract or other document).

However, unless an employer provides references on a consistent basis it risks allegations of discrimination or breach of the implied term of trust and confidence.

If an employer **does** provide a reference, then it has duties towards both the subject and the recipient to take reasonable care to ensure the information it contains is true, accurate and fair.

There is no obligation to provide any detail in the reference or for it to be comprehensive (as long as it doesn't give a misleading impression through omission).



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Exceptions to the general rule that there is no duty to provide a reference

It is possible (but rare) for employers to be bound by a contractual obligation to provide a reference in the contract of employment, and such an obligation may also be implied into the contract if it is the employer's standard practice to provide references.

In these circumstances, a failure to provide a reference could amount to a breach of contract.

Liability to the subject of the reference

Employers giving references are potentially at risk of claims of Discrimination, Defamation, Malicious Falsehood and Negligent misstatement when providing anything other than a factual reference.

Liability to the recipient of the reference

The referee also owes a common law duty of care to the **recipient** when providing a reference. If the employer provides a reference in breach of this duty could be liable for negligent misstatement or a claim for the tort of deceit.

Data protection issues

The provision of a reference will almost certainly involve an employer disclosing information that would be defined as "personal data" under the Data Protection Act 1998 (DPA 1998). This legislation will therefore usually apply, as will the Information Commissioner's Employment Practices Code.

Practical tips for anyone thinking of providing a reference

The important issue for any employer who intends to provide a reference is to try and balance the duty owed to the employee against the duty owed to the prospective employer. Most employers opt for one of two popular strategies:

1. State brief factual details of the start and finish dates of employment and the role(s) performed and no more; or
2. Give more details, but accompany them with a disclaimer.



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Besides the dates of employment and the role undertaken by the employee, other details that could be contained in a reference are: performance in the job; disciplinary record; honesty; absence record; time-keeping; reason for leaving; and any other relevant personal matters.

Where the new position (which the employee will be undertaking) is similar to the role they performed for the referee, then the employer may be prepared to give an opinion as to whether the employee is suitable for the job.

However, where the new job is significantly different, the referee may prefer to decline to speculate and instead to simply limit their comments to offering an account of the employee's duties and performance in their previous role.

If an employee has been dismissed then the contents of a reference should be consistent with any reason for a dismissal. That is because a positive reference may undermine the case of an employer seeking to defend an unfair dismissal claim by justifying a dismissal for misconduct or incompetence.

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