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This is an author produced version of a paper published in

Industrial Law Journal (ISSN 0305-9332, eISSN 1464-3669)
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#### Citation Details

##### Citation for the version of the work held in 'OpenAIR@RGU':

MIDDLEMISS, S., 2004. The truth and nothing but the truth? The legal liability of employers for employee references. Available from <i>OpenAIR@RGU</i> . [online]. Available from: <a href="http://openair.rgu.ac.uk">http://openair.rgu.ac.uk</a>
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##### Citation for the publisher's version:

MIDDLEMISS, S., 2004. The truth and nothing but the truth? The legal liability of employers for employee references. <i>Industrial Law Journal</i> , 33 (1), pp. 59-67.
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This is a pre-copyedited, author-produced PDF of an article accepted for publication in [Industrial Law Journal] following peer review. The definitive publisher-authenticated version [MIDDLEMISS, S., 2004. The truth and nothing but the truth? The legal liability of employers for employee references. Industrial Law Journal, 33 (1), pp. 59-67.] is available online at: <http://dx.doi.org/10.1093/ilj/33.1.59>

# The Truth and Nothing but the Truth? The Legal Liability of Employers for Employee References

## 1. INTRODUCTION

...It is a reality of contemporary employment that the use of the reference in the workplace is so common that most employees take it for granted they will be granted one on request and even more significantly prospective employers expect that as a matter of course the employee would provide a reference or give his or her consent to one being obtained from the employer. <sup>1</sup>

It is now widely recognised notwithstanding this ‘contemporary reality’, that where the employer giving the reference fails to provide a fair or accurate reference, through malice, negligence or carelessness, he may face a legal action. This article will deal with all the legal aspects of the provision or non-provision of references for employees or ex-employees by employers. This is an area of concern for both employers (sender and recipient) and employees. The employer giving the reference wants to know the scope of their liability (which can include the issue of disclosure of a reference to employees). The recipient employer needs to know if they have the right to recompense for economic loss arising from reliance on the reference. The subject of the reference needs to know their legal rights in respect of unjust or unfair references and accessing the content of written references. This is undoubtedly an important issue for all the parties that merits detailed consideration. The present note will outline the relevant principles of law in the context of recent case law on the subject.

Until judicial recognition in *Spring v Guardian Assurance plc and others* <sup>2</sup> of the appropriateness of pursuing a negligence action in these circumstances, the only option for an employee subject to an unjustly poor reference was to pursue an action in tort for defamation against their employer. This option was unpopular because of the evidential obstacles facing the plaintiff in the case. The House of Lords in *Spring v Guardian Assurance plc and others* <sup>3</sup> held that where an employer makes the decision to provide a current or former employee with a reference he is under a duty to that person to take reasonable care in compiling or giving the reference and in verifying the information on which it is based. They also held that where an employer provides a reference to a prospective or future employer he owes a duty of care to that employer in respect of the preparation of the reference. Where a breach of these duties occurs by reason of a negligently prepared reference the reference provider can be liable in damages to that employee or that prospective or future employer for any economic loss suffered by them.

## 2. REQUIREMENT TO PROVIDE A REFERENCE?

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<sup>1</sup> Wallace-Bruce, N L ‘Employers Beware! The Perils of Providing an Employment Reference’ *Journal of Business Law*, September 1997 pp 456-464 at 462.

<sup>2</sup> [1994] IRLR 460, HL.

<sup>3</sup> [1994] IRLR 460, HL see Lord Woolf’s judgement pp 476-481.

It is unclear whether in all instances there is a legal obligation to provide a reference. Although many employers provide a reference as a matter of course and may regard themselves as under a moral obligation to do so, it seems that some large employers do not normally provide references.

<sup>4</sup> In *Spring* Lord Slynn and Lord Woolf were both of the opinion that it could 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. This might arise where there is custom within the workplace that references are given and failure to provide one will jeopardise the employee's future employment.

In *Spring* there was a duty on the employer to provide a reference under the LAUTRO rules which governed employment practice within the life insurance industry. Under the self-regulation scheme administered by LAUTRO<sup>5</sup> highlighted in *Spring* and subsequent cases<sup>6</sup> it is required that an employer covered by the rules must provide a written reference about employees to employers covered by the scheme.<sup>7</sup> Similarly under paragraphs 4 & 6 the Financial Services Authority guidelines, former employers are required to give references about employees intending to perform a customer function for a new employer where both the former and new employer are FSA regulated. Under these rules while the former employer must respond to a new employer's request there is no obligation on that new employer to make such a request although it could be seen as part of his duty to exercise due diligence.

The right of refusal to provide a reference was qualified in the case of *Coote v Granada Hospitality* (1999) IRLR 452. Here an employer that refused to provide a reference to his employee was found to be acting unlawfully. This non-cooperation was deemed to be victimisation against the employee under s 4(1) of the SDA 1975 because she had during her employment pursued an action against her employer for sex discrimination. What was significant here was that other employees that had asked their employer for references were not treated the same. Despite the fact that discrimination rights were not available after the end of the employment relationship the European Court of Justice ruled that the Sex Discrimination Act 1975 could provide protective rights after employment had ceased in this type of case. The application of the SDA to relationships which have come to an end is clarified by regulation 3 of the Sex Discrimination Act 1975 (Amendment) Regulations 2003.<sup>8</sup> Where a 'relevant relationship' has come to an end it will be unlawful for the 'relevant party' to discriminate so as to subject another party to a detriment or to harass such a party 'where the discrimination or harassment arises out of and is closely connected to that relationship.'

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<sup>4</sup> Consignia, one the UK's largest employers, does not give job references although it does provide a record of employment which confirms that a person worked for them for a certain period of time see Guardian, Guardian, Jobs and Money, May 11, 2002, p 22.

<sup>5</sup> Life Assurance and Unit Trust Regulatory Organisation; its functions are now performed by the Financial Services Authority.

<sup>6</sup> *Singh v Royal Life Insurance Ltd* Queen's Bench Division, 6 November 2000.

<sup>7</sup> Now called the Personal Investment Authority (PIA) Rules.

<sup>8</sup> Similar provisions are made under the Sexual Orientation Regulations (reg. 29) and Race Regulations (inserting section 27A into the Race Relations Act 1976).

### 3. NEGLIGENCE ACTIONS

In these actions it is necessary for the claimant to establish a duty of care exists between the parties through a proximity of relationship.

#### A. Duty of Care Owed to Subject

This will be easily satisfied in the case of an employee or ex-employee suing on the basis that the reference was negligently given by his employer under a contract of employment with the result that they suffered a loss arising out of their existing or former contractual tie. In *Kidd v Axa Equity and Law Life Assurance Society*<sup>9</sup> the High Court attempted to summarise the legal rules that apply in this area:

The duty owed by the giver of a reference to the subject of that reference, whether arising in tort or from contract, is a duty to take reasonable care not to give misleading information about him, whether as a result of the unfairly selective provision of information, or by the inclusion of facts and opinions in such a manner as to give rise to a false or mistaken inference in the mind of the reasonable recipient. The giver of the reference owes no additional duty to the subject to take reasonable care to give a full and comprehensive reference, or to include in a reference all material facts.

#### B. Duty of Care Owed to Recipient Employer

The duty of care owed by the employer providing the reference to the employer relying on it and consequently employing the subject of the reference (recipient employer) clearly does not arise under a contractual arrangement between the employers. It will only be established where, it is foreseeable that the recipient of the reference would rely on the information supplied, their decision to employ someone is materially influenced by the content of the reference and as a result of employing them they suffer an economic loss.

Liability could arise where, in an effort to get rid of a troublesome employee, an employer provides a reference about him that is misleadingly favourable.<sup>10</sup> In *Spring*, Lord Goff of Chieveley was doubtful whether an action would lie against the reference provider by the recipient unless causation can be shown between the provision of the reference and the decision to employ. It will be up to the reference provider to establish that factors other than the reference were relied upon in the recipient employer's decision to engage the services of the subject of the reference. He will find it difficult to maintain that the reference is unimportant where, as is often the case, completion of the selection process cannot be achieved until a satisfactory reference is received by the employer. Where it is an oral rather than a written reference that is given, the recipient employer will face evidential difficulties proving what was said to him about the employee and the recipient employer's success will

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<sup>9</sup> [2000] IRLR 301.

<sup>10</sup> Supra 1 pp 459-460 it is called an overblown reference see *Castledine v Rothwell Engineering Ltd* (1973) IRLR 99.

depend on his ability to convince the court that untrue or misleading statements were made. Where none of the exceptions identified above apply an employer may still feel morally obliged to provide a reference. Failing this he is in a position to refuse a reference, and may, in the light of recent judgements be inclined to do so.

#### 4. RECENT DECISIONS

In *Legal Assurance Ltd v Kirk*<sup>11</sup> it was decided that if an employer makes an informal statement about an employee that is not relied on by a third party, no liability for negligent misstatement will arise. In this case the employee tried to argue that his employer was liable for negligent misstatement (for asserting that he was indebted to his former employer) even where no reference had been given. This claim was rightly rejected by the Court of Appeal as it was based on conjecture about what the employer might say when asked for a reference.

In *Bartholomew v London Borough of Hackney*<sup>12</sup> an employer, in providing a reference for a former employee, had informed the Richmond-upon-Thames Social Services Department that at the time of leaving he “was suspended from work due to a charge of gross misconduct and disciplinary action had commenced.”<sup>13</sup> Mr Bartholomew brought a claim for breach of duty of care on the basis that although the reference was factually correct it was unfair. His appeal against this decision was unsuccessful however, the Court of Appeal took the opportunity to clarify the law in this area. Essentially employers must not only take care in preparing any statements about their employee in the reference they must also take care that the holistic impression of the employee from scrutiny of the reference is not unfair or misleading. Also it is acceptable in preparing a reference to err on the side of brevity:

An employer is under a duty of care to provide a reference which is in substance true, accurate and fair. The reference must not give an inaccurate or misleading impression overall, even if the discrete components are factually correct. However the duty of care ... does not mean that a reference must in every case be full and comprehensive.<sup>14</sup>

In *Cox v Sun Alliance Life Ltd*<sup>15</sup> Mr Cox was promoted by his employer to the position of manager of an office in Leeds which covered the whole of Yorkshire. Within six months of his appointment it became apparent that he had had a serious rift with his staff and he was suspended. After this it was reported to his employer by a

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<sup>11</sup> [2002] IRLR 124 CA.

<sup>12</sup> [1999] IRLR 246.

<sup>13</sup> at 246.

<sup>14</sup> at 246.

<sup>15</sup> [2001] IRLR 448.

tied agent that he had received improper payments. This allegation was not properly investigated or fully brought to the attention of Mr Cox. An audit investigation of his business dealings revealed no impropriety on his part. He agreed to resign subject to being given a reference mutually drafted in bland terms and which made no mention of the allegations against him. Mr Cox was then dismissed from two jobs he had obtained because his ex-employer had given each of his new employers a reference which stated that he had been suspended pending the outcome of investigations into allegations of dishonesty and that he would have been dismissed had he not chosen to resign. The Court of Appeal held that the employer was in breach of his duty of care and that this was an agreed settlement of termination rather than a dismissal by the employer:

Discharge of the duty to provide an accurate and fair reference will usually involve making reasonable inquiry into the factual basis of the statements in the reference... In order to take reasonable care to give a fair and accurate reference an employer should confine unfavourable statement about the employee to those matters into which they have made reasonable investigation and had reasonable grounds for believing to be true.

In *Chief Constable of West Yorkshire Police v Khan*<sup>16</sup> a police officer who had taken a case against his employer for racial discrimination because he had been refused promotion was successful in a claim for victimisation where his employer refused to provide him with a reference. He had treated him less favourably than other employees who normally received a reference on request.<sup>17</sup>

In *TSB Bank plc v Harris*<sup>18</sup> an employee, after discovering that the contents of a reference about him was misleading and unfair, claimed constructive dismissal on the basis of breach of the implied term of trust and confidence. The EAT found that the bank were in breach of the implied term because they failed to discuss the complaints included in the reference with Harris prior to their inclusion and they had presented a misleading picture of him which they should have anticipated would have a detrimental impact on his career prospects:

Using the implied term of trust and confidence the EAT approves in this case that employers should provide a fair and reasonable reference, a duty which goes beyond the obligation to take reasonable care to avoid inaccurate statements of fact.<sup>19</sup>

While none of these decisions have had the impact of *Spring* on this area of law they collectively provide further refinement of the expectations of an employer in preparing a reference (to provide a reference which is in substance true, accurate and fair), the legal standards (reasonable investigation required before inclusion of facts)

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<sup>16</sup> [2001] UKHL 48.

<sup>17</sup> He was awarded £1,500 as compensation for injury to feelings see Clement, R 'The art of comparison', *New Law Journal*, 25 January 2002.

<sup>18</sup> [2000] IRLR 157 in this case the EAT held that an accurate and truthful reference may not be a reasonable and fair reference.

<sup>19</sup> Collins, H Ewing, K D McColgan *Labour Law Texts and Materials* (2001) Hart Publishing p 126

that an employee can expect to operate in his or her favour, and the remedies which will be available to them

## **5. ACCESSING THE CONTENTS OF A REFERENCE**

There are practical difficulties for employees and ex-employees in accessing the contents of a reference where the reference giver refuses to divulge this information. Where an employee is given a testimonial at the point of his leaving his job he will normally be privy to its contents. With regard to the content of references however, employers are under no obligation to provide the information to the subject of the reference. Under schedule 7 of the Data Protection Act 1998 it is stated that employees are not entitled to access any reference given in confidence by the data controller for the purposes of education, training and employment. The employee can ask the new employer to give him a copy of the reference provided to him although he can refuse in a case where showing the reference given by a third party (e.g. the former employer) would identify that third party. It can be disclosed to the employee, however if the former employer consents or if it is reasonable to disclose without consent.

## **6. CODE OF PRACTICE COVERING RECRUITMENT AND SELECTION**

The Information Commissioner recently issued a code of practice which set out behaviour in respect of recruitment and selection (including giving references) which would be compliant with the Data Protection Act 1998. These recommended courses of action, which were largely drawn from relevant case law, are that employers should ensure that every reference is true, accurate and fair and not misleading. Moreover, they need not be comprehensive. It is also recommended that in order to limit their vicarious liability for managers giving personal references, employers should have clear policies on references, including specifying who is authorised to give references and who has access to them.<sup>20</sup>

## **7. HUMAN RIGHTS**

The issue of human rights has been invoked in complaints involving employee references (arguing a breach of convention rights, but so far without success. It seems that there is, firstly, little prospect of a successful challenge under the human rights legislation being brought by the subject of a reference against public authority employers that provide an unfair or inaccurate reference. In *Griffiths v Newport County Borough Council*<sup>21</sup> the applicant argued that by being the subject of a negligently provided reference by his employer which was inaccurate, misleading and unfair, his security of work and prospects of employment had been removed and that there had therefore been a breach of Article 5 of the European Convention of Human Rights (ECHR). This lays out the right to liberty and security of the person. The Court of Appeal was unconvinced that the applicant's argument was a correct application of Article 5, and went on to state that a breach of the Article could only be

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<sup>20</sup> [www.dataprotection.gov.uk](http://www.dataprotection.gov.uk)

<sup>21</sup> (2001) EWCA Civ 1860



established where negligence was proven on the part of employer. The applicant was unsuccessful because the negligence of his employer could not be established. This case therefore does not rule out the possibility that an action brought under Article 5 could be successful if the facts were different.

In *Legal and General Assurance Ltd. v Kirk*<sup>22</sup> the appellant claimed unsuccessfully that Article 1 of the Protocol 1 to the ECHR (which entitles every person to the peaceful enjoyment of his possessions) had been breached by his employer. His argument was that his employer had through provision of a negligently prepared reference about him deprived him of a right to trade as a company or appointed representative.

There are three Articles of the Convention that are untested in this context but in the view of this writer clearly have a bearing on this area of law, Article 6, Article 8 and Article 10. It is questionable whether an employer breaches Article 6 by making unfounded or unsubstantiated accusations against an employee or referring to proceedings of an internal dispute procedures that are incomplete in a reference. The question of whether this article covers an internal disputes procedure arose in *Darnell v UK Application*<sup>23</sup> and the Court stated that it must involve a claim or dispute that is genuine, of a serious nature, and includes the determination of civil rights and obligations. The provision of a reference to another that treats an employee in a prejudicial manner is unlikely without more to be contrary to Article 6, unless it arises in the context of disciplinary proceedings, the outcome of which, can affect the employee's right to continue in a profession, continued livelihood or ability to trade.<sup>24</sup>

Under Article 8 every person has the right to the protection of their private and family life, home and correspondence.<sup>25</sup> This right might apply where the employer, in giving a reference, provides personal details of his employee (the subject) to a person who was not an agreed recipient. Although in most instances the employee will give his permission for the use of a reference, it is not inconceivable that a reference could be provided without it, in particular where the giving of a reference is an established custom or a part of a self regulatory code operating between employers. The issue of privacy arises here and the following passage summarises the impact of Article 8 on domestic measures in the United Kingdom providing privacy rights for employees (including the subject of a reference):

Article 8 may inform common law duties such as breach of confidence and the implied term of trust and confidence. In the context of unfair dismissal a tribunal should no doubt approach the test of reasonableness in section 98 of the ERA 1996 in the light of Article 8. Most important of all the wide scope of the Data Protection Act 1998 and in particular the requirement ... that personal data must be processed fairly and lawfully provides a means by which domestic law can give effect to a right of privacy for workers.<sup>26</sup>

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<sup>22</sup> (2002) IRLR 124 CA

<sup>23</sup> No. 15058/89,

<sup>24</sup> *Tehrani v UK Council for Nursing Midwifery and Health Visiting* (2001) IRLR 208

<sup>25</sup> Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings; furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life" (see the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and the *Halford v. The United Kingdom* judgment of 25 June 1997, *Reports* 1997-III, pp. 1015-16, §§ 42-46).

<sup>26</sup> Ford M, Two Conceptions of Worker Privacy, *Industrial Law Journal*, June 2002

The grounds on which interference with this right can be justified under Article 8(2) are unlikely to protect employers who issue unfair references.

Under Article 10 there is a right to freedom of expression which might appear to offer employers some protection. This freedom consists of a right to hold opinions and to receive and impart information and ideas. These rights are subject to qualification and certain of these qualifications apply to freedom of expression in connection with providing references. Article 10(2) states that:

*the exercise of these freedoms ... may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society... for the protection of the reputation or rights of others, for preventing the disclosure of information disclosed in confidence ...*<sup>27</sup>

The following restriction on the freedom of expression could refer to the type of views often expressed by an employer about an employee in a written reference:

Where a person makes a factual assertion which is demonstrably false and damages someone it is reasonably easy to justify imposing a penalty or a duty to compensate the victim and refrain from repeating the falsehood, particularly if the speaker failed to take reasonable care to check his or her information.<sup>28</sup>

## **8. USE OF EXCLUSION OR LIMITATION CLAUSES**

Where an employer decides to give a reference, [he or it] may try to limit [his or its] liability by use of disclaimers or exclusion clauses in the contract of employment or in the reference itself.<sup>29</sup> These will only be upheld where they are deemed by the courts to comply with the standard of 'reasonableness' as defined in sections 1 and 2 of the Unfair Contract Terms Act 1977<sup>30</sup>

Under section 1(1) (b) of the Act negligence is defined as breach of any common law duty to take reasonable care and exercise reasonable skill and under section 2(2) it states that in the case of loss or damage a person cannot exclude or

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<sup>27</sup> The domestic laws to protect privacy mentioned above under Article 8 would apply here.  
<sup>28</sup> Feldman, D *Civil Liberties and Human Rights in England and Wales* 2<sup>nd</sup> ed. (2002) Oxford University Press pp 757 - 758

<sup>29</sup> Possible wording could be 'This reference is given in good faith but without any legal liability on the part of the company or the author of this reference. It is written and accepted on this basis.'

<sup>30</sup> Sections 16, 21 and Schedule 2 in Scotland.

restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. Exclusion clauses included in the written document that includes the reference passing between the sender and the recipient employers would be covered by the Act. The subject of the reference, as well as being protected from attempts by his employer to unreasonably exclude liability under the law of tort, will also be protected from such action under the terms of the contract of employment.<sup>31</sup>

Both the English and Scottish Law Commissions aim to replace two overlapping pieces of legislation, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations SI 1999/2083, with a single Act written in a much more accessible way and potentially wider in its application. The Commissions aim for a Bill to be put before Parliament in 2004.

## CONCLUSION

It is becoming increasingly difficult for employers to refuse to provide references to their former employees. It is important that the information provided is clearly given in confidence for reasons of privacy but also because it is a requirement in the Data Protection Act 1998 that before access to the reference for employees is restricted it must represent a communication between the employers given in confidence.

Employers may limit their liability through attaching qualifying statements to the description of their former employee's character and abilities and where these caveats are widely utilised within the reference it could lead to it becoming meaningless, since "those giving such references can make it clear what are the parameters within which the reference is given, such as stating their limited acquaintance with the individual as to time or as to situation."<sup>32</sup>

Employment law is therefore increasingly encroaching on the format of the reference to ensure that it does not create a false or misleading impression. This does not mean that employers cannot provide unfavourable references where it is reasonable and justifiable to do so. On the other hand they must not provide references which are excessively favourable.

Employers are likely to continue to provide references as a consequence of moral pressures, practice and expectations within particular workplaces (e.g. financial services) or professions.<sup>33</sup> The law looks set to continue to extend the protection of the law to current or former employees. This could arise as a result of developments in the common law (particularly contract and tort) and through enforcement of human rights.

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<sup>31</sup> In *Julian Bridgen v American Express Bank Ltd* (14 October 1999 QBD) the question of whether an employee was covered by the Act was considered and decided in the affirmative.

<sup>32</sup> Lord Slynn of Hadley in *Spring See Painter*, R.W. Holmes, A. Cases and Materials on Employment Law, 4<sup>th</sup> ed. Oxford University Press, 2002 p 162

<sup>33</sup> The Law Society of England leaves it up to its members to decide whether or not to provide references