

## “To Whom It May Concern” - Consider Carefully Your Former Employee’s Performance

**Employers have traditionally provided references for former employees. The reference is usually given to these employees in the hope that it will aid them in the search for employment and assist a prospective employer in their search for a suitable employee. However, a recent English court decision may produce doubt in the minds of employers who were previously keen to assist their former employees.**

### **Employer owes a duty of care**

The House of Lords (*Spring v Guardian Assurance*, House of Lords, 7 July 1994) decided that an employer who provides a negligently prepared reference for a former employee may be liable for damages to the employee for loss suffered as a result of the reference. The court said an employer owes a duty of care to its employee - this is due to the special knowledge that the employer has obtained about the employee, who relies on the employer to exercise care in the use of that knowledge. Interestingly, the duty is owed not only to employees, but also to contractors and the principles apply to both written and oral references.

### **Is a duty owed to a prospective employer?**

The result distinguishes between the duty owed to the employee and the duty owed to the third party recipient of the reference (that is, a prospective employer). However, the court made no ruling on the duty to the recipient but suggested that the principles derived from the *Hedley Byrne (Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 3 WLR 101) case are applicable. There it was decided that the author of a reference does owe a duty of care to the recipient of the reference.

### **Care with references benefits all**

This decision does not mean that references should not be given at all or only given favourably. It does mean that care and thought in providing references could improve their quality and value. Employers, managers and supervisors preparing references should consider the following points:

- State the parameters within which the reference is given: for example, that the referee has limited/ extensive knowledge of the person over time or in various situations.
- Accurately investigate and assess the qualities and performance of the employee before writing the reference.
- Consider including a disclaimer that the information is given in good faith and to the best of the referee’s knowledge, but that it is not guaranteed.

Obviously a former employee and prospective employer benefit from a careful prepared reference. But a former employer should also derive a reputation as a person willing to assist former employees and other employers in their search for the best employee/employer match.

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