

Employment news: References — still a risky business

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A recent case has confirmed that if an employer gives a negative reference for an employee who has raised a complaint of discrimination against it, that employer will be liable for compensating the employee fully. The fact that third parties may have also acted unlawfully in refusing to employ the person will not limit the amount that the original employer has to pay.

Current case law shows that if an employer provides a reference, it must be prepared with reasonable care and be fair, accurate and not misleading. This essentially means that an employer can prepare a positive or a negative reference, providing its decision to do so is justified.

To avoid disagreements or protracted discussions with employees about the content of a reference, employers often have a policy which is consistently applied to all staff of providing a basic factual reference. This might, for example, simply give the dates of employment and the employee's position on leaving. Such a policy (if applied uniformly to all staff) is also useful for avoiding potential claims from the ex-employee or prospective employer if the reference is misleading in any way.

If there is no such policy in place, an employer must be careful not to refuse to provide a reference if it would otherwise do so, or provide a negative reference, on the grounds that the employee has alleged (or brought a claim for, or given evidence or information in connection with a claim for) unlawful discrimination, or has blown the whistle on its employer's unlawful actions. Action of this kind by the employer is likely to amount to victimisation as shown by the recent decision in *Bullimore v Potheary Witham Weld Solicitors*.

Miss Bullimore's employer provided a negative reference to her prospective employer, referring to the fact she had brought a sex discrimination claim against her employer and suggesting she had a poor relationship with them and that her opinions could be inflexible. As a consequence, the prospective employer withdrew its job offer to Miss Bullimore.

The tribunal found that the ex-employer's actions in supplying information that Miss Bullimore had brought a sex discrimination claim, and the prospective employer's withdrawal of its offer due to the receipt of this information, constituted unlawful victimisation by both the ex-employer and the prospective employer. It held that the unlawful actions of the prospective employer meant that the ex-employer was not liable to compensate the employee for her future loss of earnings caused by the withdrawal of the offer.

Miss Bullimore appealed. The EAT held that it was foreseeable that the prospective employer would react to the reference as it did, and that such reaction was a close and direct consequence of the supply of information, despite the fact that the prospective employer's reaction was unlawful. The EAT therefore considered it only fair that the ex-employer should be fully liable for the direct consequences of its actions – Miss Bullimore had after all lost the opportunity of employment as a direct result of the ex-employer providing the reference and would not always have a remedy against the recipient of the reference when this form of victimisation arose.

This is not the only case this year in which the courts have decided that an employer will be liable for all the losses flowing from its unlawful act of victimisation. The Court of Appeal reached a similar conclusion in *Chagger v Abbey National plc*, saying that Mr Chagger could recover damages for the fact that he was stigmatised by having taken legal proceedings against Abbey. The fact that the decision by prospective employers not to employ him was unlawful did not reduce Abbey's liability.

Practical tips

- Whilst it may be tempting for employers to 'tell all' in a reference, or to make overly negative comments, whether in writing or verbally, these cases demonstrate the need for restraint and the consideration of giving only a purely factual reference with dates of employment and leaving date.
- It is also important to have a clear policy about who is entitled to give references to avoid potentially damaging comments being made by employees who do not understand the implications of negative references or who may have a grudge against an outgoing employee.

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