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Unique position of employers when dealing with employee references (part 1 of 2)



The workplace shifts and changes over time; new faces are introduced and familiar faces disappear. When a company advertises a new position and applications trickle in, interviews are arranged and background checks are conducted to separate the wheat from the chaff.

Here, a reliable reference from a previous employer can go a long way. However, it is a double-edged sword: it could be a great advantage when an employer praises an employee for their ethics and abilities, or it can be the final nail in the coffin for an employee who had parted ways with the previous employer on bad terms.

Reliable employee references are worth their weight in gold for employers; they can assist companies in welcoming excellent employees into their fold or reveal the applicant's attempt to hoodwink the company with an overembellished curriculum vitae.

In the first of this two part blog series we aim to explain the importance of employee references in line with the Basic Conditions of Employment Act and some caselaw examples.

Reliable employee references and trust relationships

A reliable reference can make or break the trust already established by the parties. The importance of trust in the workplace cannot be overstated as it is paramount to a healthy employment relationship. When employees are accepted into the workplace, they are entrusted by the employer to comply with their contractual obligations, to promote the interest of the business, etc. In turn, employees trust that the employer will remunerate them for their work and treat them fairly.

When an employee resigns or is no longer employed, an employee reference might be sought, either from the ex-employee or the new prospective employer. Here employers find themselves in a unique position. They must decide what the reference will entail and if they are even willing to provide one. This does not give the employer carte blanche regarding the contents or the way the reference is given; in fact, the employer might not even be allowed to provide a reference in certain circumstances.

Basic Conditions of Employment and employee references

In South Africa, the question is whether there is an obligation on employers to provide references to employees. A Bill has also been published recently which, if it becomes law, would compel employers to check at SAQA and other institutions any tertiary qualifications claimed by employment applications.

No framework or code exist in South Africa that specifically regulates references from employers. However, section 42 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) provides that employees are entitled to receive a certificate of service upon termination of employment. Although an employee reference may be in the same format or contain the same information as a certificate of service, it is not synonymous as the contents and style of a certificate of service is limited to the provisions of the BCEA. An employee reference does not have to be written in a letter but can also take other forms such as an oral reference.

So, does this mean an employer's discretion is unlimited? Are employees left to the whims of their employers? Woe to the unmindful employer for they might incur liability with their spontaneous references. The importance of the message conveyed in the reference must be addressed because it can impact the success of the employee in attaining the position. While references that praise the employee for all their accomplishments or code of ethics will improve their chances, there are also cases where a reference conveys a negative message about an employee. Employers must provide only the relevant facts pertaining to the employee's employment and accurate information.

They should avoid information of statements that infringe upon the employee's constitutional rights, e.g. the right to human dignity. It is a common misconception that employers are not allowed to give a bad reference; however, this does not absolve the employer from liability if their own opinions amount to-

- *crimen injuria*, which entails the unlawful, intentional and serious impairment to the dignity of another.
- defamation, where an unlawful publication of a statement is made by the employer about the employee.
- other forms of damages, such as prospective patrimonial loss due to being refused employment.

Caselaw: *Foodworld Stores Distribution Centre (Pty) Ltd and Others v Allie (2002)*

In the case of ***Foodworld Stores Distribution Centre (Pty) Ltd and Others v Allie (2002) 3 ALL SA 200 (C)***, the court held that an employer could be held liable in a claim for damages if the employee can successfully prove that the employer disclosed defamatory information to a third party, if a reasonable person would objectively accept that the good name of the employee was harmed, and the defamatory statement was made deliberately with the intention of causing harm. In the case of ***Van Niekerk v Minister of Labour & Others (1996) 17 ILJ 525 (C)***, the court also noted that an individual has the right to a professional reputation and that fair procedure is required for any decision that affects the individual.

An employee may even institute a common law claim for prospective damages against a previous employer in the form of loss of income due to non-employment, in which case the onus will be on the employee to prove that the previous employer's reference directly resulted in them losing the position. It is therefore important for any employer who is contemplating giving a less-than-favourable reference to tread lightly to avoid liability.

In the second part of this 2-part piece, prepare for the curveball. See how the *Protection of Personal Information Act POPIA 4 of 2013* affects the distribution, access, control and protection of the information contained in employee references which, by their very nature, contain opinions defined as "personal information" in terms of POPIA.

In conclusion, at **SERR Synergy**, *we assist employers with drafting workplace policies, contracts of employment or any amendments thereto, while ensuring that contracts of employment remain compliant with the relevant labour legislation (BCEA, LRA, NMWA, sectoral determinations, and collective agreements) to*

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