

Avoid These Pitfalls When Writing A Reference For A Dismissed Employee



Many employers worry that if they fail to provide a dismissed employee with a deserved reference, additional damages could follow. That concern is not without warrant, but careful thought should go into writing that reference.

If the lack of a reference leads to longer unemployment, the courts often compensate the employee for that. As well, courts, either expressly or otherwise, sometimes punish employers for refusing to provide a reference to an employee deserving of one. Quite practically, employers also realize, if the reference results in quicker re-employment, there will be less potential damages for the former employee to sue for.

For all of these reasons – some well-intentioned, others less so – employers often dash off letters of reference to employees, deserving or not, with little thought, hesitancy or foresight.

But the rise of negligent referencing and defamation claims in the United States and Britain in recent years is causing some to readjust their way of thinking.

Canadian employers need to be beware of the some of the pitfalls. If, for example, you deliberately make a false statement about a dismissed employee that negatively affects his or her reputation or re-employability, you may have defamed the employee and be liable for damages. However, proving your comment was deliberate can be difficult. Unlike their U.S. counterparts, Canadian employers are protected from defamation arising from references and employee evaluations if they honestly believe their statement to be true.

That may be why, while some employers are too quick to dash off references, others are too reluctant. This is particularly the case with U.S. subsidiaries whose practises are informed by those south of the border.

The larger risk for Canadian employers is negligent misrepresentation. If a prospective new employer relies upon a favourable letter of reference that was negligently drafted and inaccurate, they may look to recover damages. Employers should never provide a reference for employees fired for cause. Similarly, although not liable for defamation, if an employer's reference is provided negligently, with little forethought or care, and the employee loses a job as result, they may have a suit against the former employer.

If you have fired an employee for cause, beware of receiving reference calls from purported new employers seeking positive references. Such calls are generally not for the purpose of a job, but to make it difficult for the employer to later maintain, even justified, allegations of cause based on incompetence or misconduct. Your goodwill should never entrap your reason or skepticism.

Employers providing references for a dismissed employee would be wise to heed the following:

- Be honest in drafting reference letters and do not act with malice or the intent of interfering with the employee's ability to find a new job. This will protect you from a defamation suit.
- Obtain consent from the former employee to provide a letter of reference and to answer reference related questions from a prospective employer. Establish the boundaries and don't go beyond them.
- Generally avoid negative comments although there is no legal liability if what you say is accurate, balanced and representative.
- Do not endorse (and enact a policy ensuring management does not endorse) employees through social media sites or otherwise when a former employee is dismissed for cause.
- Have a policy prohibiting references being provided by anyone except a designated individual who will review the file and consult, as necessary before doing so.

Last Updated: July 7 2014

Article by Howard Levitt

Levitt & Grosman LLP