

# If You Can't Say Anything Nice... Should You Say Anything At All?



Many employers are hesitant about giving a less than glowing reference, even about a former employee that left on bad terms. Concerned about privacy issues or defamation lawsuits, they limit their responses to dates of employment and job duties without elaborating on performance or conduct. But is this necessary?

Not in every case. From a privacy perspective, an employer in BC ought to obtain consent before providing a reference. The consent need not be limited to a positive reference. The scope of the reference should only cover information such as the employee's job performance, conduct at work, and qualifications for the prospective position. A reference, good or bad, given without consent, could form the basis of a privacy complaint and, perhaps a civil action if there are damages arising from the reference.

Employers are also concerned about liability for defamation if they are seen as "bad-mouthing" former employees. Generally, courts have found that references given by employers are protected by qualified privilege: if, during a reference check, an employer makes negative remarks that may otherwise be defamatory, the employer is protected as long as the remarks are made in the reasonable and honest belief that they are true. However, if remarks are made maliciously or without regard to whether they are accurate or true, this privilege may be lost.

In an Ontario case, *Miller v. Bank of Nova Scotia*, [2002] O.J. No. 4765, the Court found that comments made by a manager that a former employee had an attitude, was uncooperative, complained a lot and that she "would not recommend her" were covered by qualified privilege because they were spoken without malice. The Court found that the manager had a legitimate basis for making negative comments about the former employee and expressed them frankly.

Some things to keep in mind when giving employee references include:

- **Confirm consent.** If possible, confirm with an employee at the time of termination whether they consent to providing a reference to a prospective employer if contacted. If you don't know whether the former employee consents to a reference and you receive a call, it is good practice to confirm that your former employee has listed you as a reference.
- **Ensure accuracy.** Make sure any information shared is correct. If you are not sure, it may be worth getting the opinion of another manager to make sure you

have been completely fair and accurate.

- **Have a policy and follow it.** Having a clear policy on employee references that is consistently followed can help eliminate guesswork and manage expectations from former employees. Some organizations find it valuable to limit references or only have them go through the human resources department.

### **New Rules for Human Rights Tribunal in Effect**

Effective July 15, 2014 the BC Human Rights Tribunal has issued amended Rules.