

## **Slug: Legal Speak**

Hed: Providing References

Dek: Know your risks regarding dismissed employees



By Andrea McCrae

Employers are not legally required to provide references for departing employees but in certain circumstances, failure to do so may be considered an act of bad faith within the dismissal process. Ever since *Wallace v. Grain Growers*, 1997, “Wallace” damages have become par for the course in employment litigation. In that landmark case, the Supreme Court of Canada determined that acts of bad faith that occur during the dismissal process can result in an extension of the notice period. For Canadian employers, this has resulted in a focus on the dismissal process itself because virtually every action taken by an employer during that process is subject to scrutiny by the courts.

### **Extended Notice Periods**

References and reference letters form part of the dismissal process, and, as such, employers should be cautious about providing or refusing to provide them for departing employees.

Generally speaking, if a departing employee suffers damages because his former employer refused to provide a reference, the former employer can be held accountable. In *Gillman v. Saan Stores Ltd.*, the court extended the notice period by two months because the employer provided a poor reference for a former employee following his dismissal.

### **Vitiating of a Good Cause Defence**

If you provide a positive reference or offer to provide one in circumstances where you intend to allege cause or may allege cause, the provision of a reference will work against you.

In *Andrews v. Wabush Mines*, the company dismissed an employee who had 19 years of service. The termination and reference letters both stipulated the reason for dismissal was a reduction in staff due to lower production rates. The employee sued for wrongful dismissal and the company defended on the basis of cause alleging, among other things, unsatisfactory job performance. Since the company's defence was inconsistent with the letters of termination and reference, the court held that the employer had failed to meet the burden of proof on the issue of cause.

### **General Damages**

In some cases, the courts simply award damages for failure to provide references. In *Brown v. Fidinam (Can.) Ltd.*, the superintendent of an apartment building was dismissed for cause after the former employee had collected a number of rent cheques from tenants and was subsequently robbed of them. The employer advised the employee that she was under suspicion for the robbery and dismissed her for cause. The employer did not provide any references and the court awarded damages in the arbitrary amount of \$1,000 for the employer's failure to provide suitable references.

### **Claims for Misrepresentation**

Employers must also be cautious about providing inaccurate references to prospective employers. If a former employer provides an inaccurate reference, which results in a hire, the new employer may have a cause of action against the former employer. This can happen if the new employer can prove that the information was inaccurate, the referrer knew it was inaccurate, the inaccurate information motivated the new employer to hire the employee and the new employer suffered damages as a result. Simply put, an inaccurate reference can constitute a misrepresentation.

### **To provide or not to provide**

Generally, unless you have alleged cause for termination, it is in your best interest to provide a positive reference for departing employees where the circumstances warrant it. Positive references not only assist departing employees in finding new employment thereby mitigating their damages and liability, but also cast the employer in a good light if the employer finds itself before the courts or the Ministry of Labour.

Having said that, employers should be cautious about providing positive references or offering to provide them for former employees whose employment was terminated for cause or in circumstances where cause may be alleged if the matter proceeds to litigation. Positive references or offers thereof can mitigate a good cause defence in a wrongful termination action. One approach is to designate one manager, supervisor or HR specialist to be responsible for providing all references. This ensures consistency and avoids the risk of conflicting references and conflicting stories. At the very least, every line manager should be made aware of these issues. The reference process should form part of company policy and should be strictly enforced.

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