



Employment Law Alert October 2011

Welcome to our October 2011 edition of the Employment Law Alert, in which we consider several recent employment law developments in Hong Kong covering a wide range of regular issues for human resources practitioners and in-house lawyers.

The Problem with Reference Letters

Employers need to be aware of their rights and obligations when providing employees with references. It is common practice for employers to provide reference letters in Hong Kong. Many employers furnish employees with reference letters on completion of employment, or because of subsequent requests made by former employees.

At first glance, the practice of providing reference letters seems harmless enough. Potential employers are looking for any insight before hiring new employees and employees are hoping to put their best foot forward when navigating the job market.

Yet, what if the practice of providing reference letters exposed your company to potential legal liability?

Reference Letters Examined

As a preliminary point, employers in Hong Kong are under no legal obligation to provide reference letters; though as common sense dictates - any refusal to provide a reference letter should never be made upon any discriminatory grounds. Employers should not refuse to provide a reference because of an employee's sex, disability, family status, or race.

Moreover, there are no legal requirements as to what should be included in a reference letter. For the most part, the contents of a reference letter are left to the discretion of the employer.

Unfortunately for employers, they cannot choose how the Courts will interpret the words they include in reference letters. Employers providing reference letters will ordinarily owe a duty of care to the employees in respect of preparation of references. This is because employers are possessed of special knowledge and employees clearly rely upon their employers to exercise "*due care and skill*" in the preparation of reference letters before they are communicated to any third parties (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465).

Decision - Employers' duties when providing reference letters

The position was established in the House of Lords decision of *Spring v Guardian Assurance plc & others* [1994] 3 All ER 129, a UK case in which an employee brought a claim against his former employer in respect of a reference letter which was negligently provided. The House of Lords held that an employer owes a duty of care



to an employee regarding the preparation of a reference, and may be liable in damages for any economic loss suffered by the employee as a result of a negligent misstatement.

In *Spring v Guardian*, an employee selling life assurance policies unsuccessfully attempted to obtain employment with other companies in the same industry. The industry's self-regulatory body requires members to make '*full and frank disclosure*' of all material facts which are believed to be true. The defendant made a number of damaging false assertions which put into question the integrity and honesty of the plaintiff.

As a result, the plaintiff was unable to gain alternative employment and suffered economic loss. The trial judge found that the assertions were not made maliciously, but were made without exercising reasonable care in investigating their correctness.

In holding this position, the House of Lords ruled that the damage which might be suffered as a result of a carelessly prepared reference is clearly foreseeable and that there is adequate proximity of relationship. Accordingly, employers may be found liable for economic losses suffered by employees as a result of negligently provided reference letters.

Scope of Employer's duty

There was some concern regarding the obligation owed to potential employers when providing references for former employees (i.e. in making full disclosure of all material facts). This concern was considered in *Bartholomew v Hackney LBC* [1999] I.R.L.R. 246, a case in which the Court qualified an employer's duty in respect of references, when it held that, in substance, a reference should be true, accurate and fair, and must not give a misleading impression - although it does not always have to be full and comprehensive.

This position was also followed in *Kidd v Axa Equity and Law Assurance Society plc* [2000] I.R.L.R. 301, which held that whilst a reference must not mislead, there is no further obligation on an employer to make the reference full and comprehensive.

In *TSB Bank plc v Harris* [2000] IRLR 157, a reference provided to a potential employer for an existing employee which disclosed customer complaints unknown to the employee, was found to be a breach of the employer's duty and was held to be a breach of trust and confidence to disclose complaints to others, if the employee was not given an opportunity to answer them.

As it stands, the current position under English law when providing reference letters is that a reference should i) be true ii) be fair and accurate iii) not mislead or give a misleading impression iv) need not be full and comprehensive and lastly, v) be made with reasonable care.



The position in Hong Kong

The position on reference letters in Hong Kong has not yet been explored by local courts. However, it is very likely that Hong Kong will adopt a similar approach of imposing a duty of care for employers providing reference letters.

The natural extension of applying these established legal principles in relation to reference letters is in line with the development that is the common law system in Hong Kong. Hong Kong courts would likely be inclined to follow the position as developed by the English courts.

It would therefore be prudent for employers to take heed when preparing reference letters for employees.

Personal Data (Privacy) Ordinance - Practical Implications

Another important point to note is that under the Personal Data (Privacy) Ordinance ("PD(P)O"), an employee could make a data access request for a copy of such a reference. There is a limited exemption from the requirement to furnish a copy of the reference under the PD(P)O.

This exemption only applies to personal references provided by an individual outside the ordinary course of his/her occupation and relevant to another individual's suitability or otherwise to fill any position of employment or office which is, or may, become vacant. What that means in practice is that once a candidate has been accepted or rejected for a job with your company; the position under the PD(P)O, should allow the individual to make a data access request for a copy of any personal reference related to the individual, which were supplied to you.

A reference letter provided by an individual, on the company's behalf, should not fall within the ambit of the exception and should be disclosed to the employee.

In situations of senior employees leaving the company, it would be considered good practice to agree on the content of the reference, as part of the exit strategy- thereby avoiding any future misunderstandings.

Take Away Points for Employers

In order to ensure that your company's employment practices are up-to-date, it is important to be aware that an employer's duty to a former employee does not end upon cessation of employment.

Although the position has not been fully established in Hong Kong, prudent employers should consider the potential added liability of improperly providing employee references without taking reasonable care.



In order to avoid any liability related to the furnishing of reference letters we suggest the following procedures for handling reference requests:

1. *Employment Records* - Maintain proper employment records (including commencement dates, employment contracts and payroll records) to ensure that the facts stated in the references are true and accurate.
2. *Internal Procedures* - Consider implementing a reference policy for consistently handling references (including the contents of the reference and who will have authority to sign).
3. *Reference Filtering* - Put in place a filtering mechanism whereby the contents of references can be verified to ensure they are both true and accurate.
4. *Internal Communications* - Ensure that all members of staff are made fully aware that if they provide any references in their personal capacity, such a reference should make it clear that it does not represent the views of the company and are not printed on company letterhead.
5. *Ex-Employee consent* - When providing a reference to a potential employer, employers should ensure that they have obtained the prescribed consent of the ex-employee. More specifically, you should ascertain what can or cannot be disclosed to the potential employer in the reference. A written record of this would be recommended.

SEMINARS

In addition to our Alert, we will be holding two complimentary lunchtime seminars. The contents of the two seminars will be the same and the following issue will be covered:-

Personal Data (Privacy) Ordinance – What Employers should know

DATES

25 November 2011

2 December 2011

TIME

12:45 p.m. – 1:00 p.m.

Registration / Light Lunch

1:00 p.m. – 2:00 p.m.

Presentation



LOCATION

20th Floor, Alexandra House, 18 Chater Road, Central, Hong Kong

CPD

1 CPD point will be accredited for attendance.

For further information or to register to attend one of our seminars, please e-mail Catherine Leung at ckyleung@rsrbhk.com. We look forward to meeting you. Due to limited space, the seminars will be restricted to 2 representatives per company.

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Disclaimer: The information contained in this article is intended to be a general guide only and is not intended to provide legal advice



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