PREPARING A PERFORMANCE REFERENCE FOR AN EMPLOYEE – WHAT IS EXPECTED OF AN EMPLOYER?

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It is not uncommon for employers to require potential employees to provide references from their former employers. Indeed, such references may have a significant bearing on their chances of obtaining employment with a new employer. Therefore, it is important that an employer prepares such a reference in a fair and accurate manner in order to avoid unfairly prejudicing a former employee's prospects of obtaining fresh employment. In this article we discuss the Singapore Court of Appeal's (**Singapore CA**) decision in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1125 (**Ramesh**) which sets out helpful guidelines for employers to follow when preparing a reference for a former or present employee.

The facts of Ramesh were fairly straightforward. The appellant, Ramesh s/o Krishnan, was employed as a senior financial services director in the respondent, AXA Life Insurance Singapore Pte Ltd (**AXA**) where he led a group of advisors known as the "Ramesh Organisation". The Respondent initially decided to terminate his services but allowed him to resign.

Ramesh then applied to join Prudential Assurance Company Singapore Pte Ltd (**Prudential**). As required under the regulatory framework of the financial advisory and insurance industry, Prudential sent a reference check request to AXA. Two weeks later, AXA provided a reference which suggested that the Ramesh Organisation had a low persistency ratio (i.e. its sales were of a poor quality because a high ratio indicated that many of the adviser's clients have continued to maintain their policies during the relevant period of time), that Ramesh and 14 other advisers in the Ramesh Organisation had been investigated for compliance issues, and disciplinary actions had been taken against five advisers with three cases referred to the police for investigations.

Prudential then asked for further information from AXA such as the details of the investigations and how persistency ratios were calculated, but AXA did not provide most of the information requested save for some brief details of the internal investigation concerning Ramesh. In the interim, Prudential made a conditional job offer to Ramesh and applied for a license from the Monetary Authority of Singapore (**MAS**). A few months later, AXA wrote to Prudential, copying MAS, highlighting the Ramesh Organisation's poor persistency ratio and possible ethical violations by advisers in the Ramesh Organisation. Two to three months later (which was longer than usual), MAS indicated that it was only prepared to issue a conditional licence. Prudential decided not to hire Ramesh. When Ramesh applied to join Tokio Marine Life Insurance (**Tokio Marine**), a similar reference was sent by AXA to Tokio Marine which subsequently led to a decision by Tokio Marine not to employ Ramesh.

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Ramesh commenced action against AXA. First, the Singapore CA endorsed the Singapore High Court's (**Singapore HC**) finding that employers do owe a duty of care to their employees (be it former or present) in the preparation of references. The Singapore CA added that it does not make a difference whether or not Ramesh was an agent rather than an employee as the factors that led to a finding that an employer owed its employee such a duty of care were also present in some principal-agent relationships such as in Ramesh.

Next, the Singapore CA defined the applicable standard of care, which is that an employer is obliged to exercise due care, when preparing a reference, to ensure that the facts stated therein are both true and accurate. This follows from the requirement that the reference, taken as a whole, must not be unfair or misleading. As the Singapore CA explained, an assertion consisting of facts that are true may not be accurate if it conveys a misleading impression because it fails to present the full picture. Therefore, although there is no requirement that an employer must disclose everything which it knows about the employee who is the subject of the reference, it is expected to disclose whatever is relevant and relates to information that has already been disclosed where withholding such information would render the disclosed information incomplete, inaccurate or unfair.

The Singapore CA distilled the following principles in formulating the applicable standard of care expected of an employer when writing a reference for its employee:

- The employer must exercise reasonable care to ensure that (i) the facts stated in the reference are true; and (ii) any opinions expressed are based on, and supported by verifiable facts.
- The employer must also exercise reasonable care to ensure that the reference does not give an unfair or misleading overall impression of the employee, even if the discrete pieces of information which it contains are factually correct. The information that is provided may be considered misleading or unfair where: (i) the information provided has gone through an unfair process of selection; or (ii) the manner in which the facts and opinions have been included gives rise to a false or mistaken impression in the mind of a reasonable recipient of the reference.
- The employer is required to exercise reasonable care to disclose any information that relates to information which has already been provided, where to withhold such further information would render the information that has been disclosed incomplete, inaccurate or unfair. This continues to be the case when the recipient of the reference seeks further information or clarification pertaining to what has been disclosed.
- Subject to the foregoing qualifications, the employer is not required to give a full and comprehensive reference or to include all material facts about the employee in the reference.
- In general, the employer should not include in the reference, whether explicitly or implicitly, complaints or other allegations against the employee where the employee had no knowledge of and had not been given an opportunity to explain or defend themselves against. In particular, complaints that were not conveyed to the employee because they were found to be baseless should not be disclosed unless the employer is, for some reason, obliged to do so. In such a case, the employer should make it explicit that (i) the complaint was dismissed as baseless; and (ii) the employee was not informed of it at that time. The employer should also inform the employee concurrently.
- In assessing what constitutes reasonable care, regard will be had to the gravity of any adverse suggestion or inference contained in the reference. The greater the gravity of any adverse suggestion or

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inference, the more closely will the employer's conduct be scrutinised to ascertain whether it has taken reasonable care to ensure that the suggestion or inference in question: (i) is based on facts which are true and accurate; and (ii) is, in view of those facts, fair and reasonable.

On the facts on Ramesh, the Singapore CA held that AXA had breached its duty of care because it had given incomplete, misleading and inaccurate information to Prudential in relation to the persistency ratios, compliance issues and possible ethical violations by Ramesh and the other advisers in the Ramesh Organisation which caused Prudential not to employ Ramesh. Ramesh was ultimately awarded S$4 million in damages at the assessment of damages hearing in the Singapore HC.

Therefore, while employers are generally not obliged to provide a reference, where a reference is provided it would be prudent to follow the Singapore CA's guidance on what constitutes a 'reasonable' reference.

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