

How can an employer give an opinionated reference?

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The High Court has clarified the scope of an employer's duty when giving a reference in respect of a former employee.

The law provides that an employer must exercise reasonable skill and care to provide a reference which is true, accurate and fair. If it fails to do so, then the former employee may have a claim against the ex-employer for negligent misstatement. The High Court has ruled on how far the employer's duty extends.

This case concerned Mr Hincks, an independent financial advisor, who was employed by CIFS but had authority to conduct FCA-regulated activities as the appointed representative for Sense Network. Following Sense Network's internal investigation into alleged breaches of its pre-approval processes, it terminated Mr Hincks' authority on the basis that he had committed repeat breaches and had been "malicious" in doing so. Mr Hincks' conduct meant that Sense Network had to offer over £12,000 in compensation to its clients. Mr Hincks later sought a reference from Sense Network. The reference provided referred to the allegations, the investigation, the compensation paid to clients, and Sense Network's conclusion that he had "knowingly and deliberately circumvented" the pre-approval process.

Mr Hincks brought a claim for negligent misstatement, arguing that Sense Network's reference had not been true and accurate. He said that the investigation had been an "inadequate sham", and that it had been negligent of Sense Network to report its opinions arising from the investigation without having checked that it had been procedurally fair.

The High Court held that a reference-giver relying on the findings of a previous investigation is not required to review the procedural fairness of that investigation. Instead, the inquiry should be into whether the investigation had a proper and legitimate basis; if it did, reliance upon it was reasonable. A more stringent review may only be appropriate if there was some 'red flag' suggesting that something had been amiss with the investigation.

Many employers tend to give factual references, but for those who do not, this case helps to demonstrate what is included within the duty of care they are under. Additionally, where the employer is under regulatory duties to provide particular information to a prospective employer, then it must do so by reference to all information and documentation available to it.

Hincks v Sense Network Ltd [2018] EWHC 533 (QB)

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