

# Young Lawyers

YOUNG LAWYERS' DIVISION / DIVISION DES JEUNES AVOCAT(E)S

**Volume 14, No. 2**  
**December/Décembre**  
**2006**

**In this Issue:**

Aggravated and Punitive  
Damages at Arbitration: The  
Debate Continues

Message from the Chair  
(Central Region)

Message from the Chair  
(Eastern Region)

References: Reducing the Stress

Punitive Damages Revisited

The Effect of Procedural and  
Substantive Changes in the Law

Casino Night

Section Executive 2006-2007



OBA • ABO

---

# References: Reducing the Stress

Thomas J. Gorsky\*



Invariably discussions about the *stress of termination of employment* tend to focus on the plight of the employee. While this is understandable, the result is that the stress on the employer is often unduly marginalized or even completely ignored. One of the

most common types of employer stress arises when an employer is asked to give a reference for a former employee. Employers are often reluctant to offer a reference for fear of being held responsible for the information the reference contains.

However, employers can reduce their stress by educating themselves about the practical and legal consequences of giving a reference.

## The Neutral Reference

Many employers prefer the “neutral” reference (i.e. a description of the position held and the employee’s timelines with your organization). After all, we remember being taught as a child - if you can’t say something nice, don’t say anything at all.

Unfortunately, in certain circumstances, a neutral reference may cause the employer more stress than was bargained for. First, a neutral reference may be seen as contrary to the employer’s obligation to act in good faith when terminating employment. Second, the lack of a positive reference may damage the employee’s ability to find a new job quickly (i.e. mitigate) - the result of which could be a larger claim for wrongful dismissal.

Weighing one stress against the other, an employer may decide that the policy of neutral references is the best policy for its workplace. Certainly, a great many employers have adopted this approach. Alternatively, the employer may conclude that the best approach is to provide a positive reference, at least where the employee warrants one. In a world where corporate responsibility is increasingly being raised as an aspiration in the contemporary business environment, this may be a motivating factor.

## The “Not So Neutral” Reference

Another source of stress for employers arises when someone hires the former employee, and concludes that the letter of reference unduly trumpeted his or her positive qualities. In this situation, employers are typically concerned that they will face a lawsuit because of such a letter.

By the exercise of common sense, the chances of a lawsuit can be minimized. Lawsuits arising from a disputed reference have been rare and chiefly the result of recommendations given for employees who are known to have committed fraudulent acts. Obviously, any employee who was terminated for fraud or misconduct or gross incompetence, should not be recommended out of expediency or sympathy. So long as the employer does not misstate objective facts, a third party’s complaint about an employer’s subjective assessment, is not a basis for a legitimate lawsuit.

An employer that finds it is conscientiously unable to give a generally positive reference, is best advised to give only a neutral reference. There is little point in providing a negative reference: the former employee will not utilize the negative reference in any event, and the employer may find itself in litigation over its negative content.

## Best Practice

At the end of the day, best practice seems to suggest the following reference giving protocol. Whenever possible:

1. References should be in writing.
2. References should be reviewed by a member of senior management (which may include a senior human resources manager).
3. If there is concern about potential liability issues arising from a reference letter, then legal counsel should be asked to vet the reference letter.
4. The content of a reference letter should be accurate, and neither under- nor over-state an employee’s performance.

---

5. The departing employee should “sign off” on the reference, ideally within the context of an overall settlement and release.

6. Any verbal reference (i.e. a phone reference) should be directed to the person who signed, and consistent with, the written reference.

7. A reference giving protocol should be published within the workplace together with a warning that the failure to following the protocol may result in discipline up to and including termination.

*\* Thomas J. Gorsky is a member of the law firm of Sherrard Kuzz LLP in Toronto. The firm specializes in advising and representing management in all matters of employment and labour law. Tom can be reached at (416) 603-0700 or by visiting [www.sherrardkuzz.com](http://www.sherrardkuzz.com).*