

# Fact Sheet

## Taking Up References



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[www.greatwithtalent.com](http://www.greatwithtalent.com) ▫ [info@greatwithtalent.com](mailto:info@greatwithtalent.com) ▫ +44 (0) 870 760 6598

The law surrounding the giving and taking of references has changed in recent years, increasing the responsibility of the referee to provide honest and accurate information to a prospective employer about an applicant, whilst still protecting the applicant whose livelihood may be at risk through a former employer giving a careless, factually incorrect or malicious reference.

## When should I take up references?

Ideally, you should take up references before a job offer is made to avoid problems in withdrawing an offer if an unsatisfactory reference is subsequently received. In reality, many applicants will not want you to approach their current employer until you have made a job offer, as they will not wish their current employer to know that they are looking for a new position. It is therefore advisable to seek references from previous employers only before you make any offer of employment, and then to make the job offer subject to receipt of a satisfactory reference from their current employer. You should never seek references without the applicant's consent. This can be covered by a note on the application form to the effect that signing the form allows you (the prospective employer) to approach any or all of the applicant's previous employers for a reference at an appropriate time in the recruitment process. Detailed guidance on confidentiality when giving and receiving references may be found in the Employment Records section of 'Employment Practices Data Protection Code' available on the website of the Information Commissioner at [www.ico.gov.uk](http://www.ico.gov.uk).

## How can I make a job offer subject to receipt of satisfactory references?

If you intend a job offer to be dependent on receipt of satisfactory reference(s), you should advise the applicant of this, preferably in writing, when you make the offer. If you have not advised an applicant that the offer is made subject to receipt of satisfactory references and you then receive an unsatisfactory reference, you may be liable to pay damages for breach of contract if you then withdraw the offer.

An issue could arise surrounding the meaning of 'satisfactory' and the law is unclear as to whether the withdrawal of an offer has to be objectively or subjectively justified by the employer. It is therefore advisable to specify in an offer of employment that the offer is made 'subject to receipt of references that are satisfactory to us/which we find satisfactory', thus removing the need for the withdrawal of the offer to be objectively justified. Written references can take a long time to arrive. For practical purposes, you may want to allow the employee to start work before you have received their references, but only on the condition that his or her employment would be terminated if the references

prove to be unsatisfactory. In such situations, a term could usefully be included in the contract of employment that allows you to terminate it, without being in breach of contract, should you receive such unsatisfactory references. If an employee is taken on but later dismissed because of unsatisfactory references, s/he could make a claim to an Employment Tribunal for unfair dismissal, assuming that s/he has the requisite qualifying service (currently two year's continuous service). To succeed, it must be shown that the employer was acting unreasonably in dismissing the employee, which would depend largely on the seriousness of the matters disclosed by the reference.

## Who should I approach?

Simply checking the two or three referees supplied by applicants is not enough, as there is an obvious tendency for them to put forward people who are likely to give a favourable reference and to avoid those who might be more critical. We advise you to obtain references from each of the candidate's previous employers, going back over a period of time depending on the length of their job history. However, do not expect to get much more than confirmation of dates of employment and position held from employers where the employee has left a long time ago, as their personnel records may be scant. Ideally, you should approach the person who is in the best position to comment on the applicant and their abilities which, in most cases, would be their immediate line manager with that employer. However, it is the policy of many larger employers to channel all reference requests through their Human Resources /Personnel Department. As a result, the referee may have little or no personal knowledge of the applicant and will be able to do little more than confirm factual details and pass on other second-hand opinions of the applicant. Focus your attention on obtaining work references, especially from the most recent employer. Personal referees are usually selected on the basis that they will only make positive comments on the applicant's character and they are unlikely to have much knowledge about the individual's work abilities and performance. Accordingly, they add little or no value to the selection process.

## What information should I be looking for about a potential employee?

Use references to verify information given by the applicant on factual issues, such as dates of employment and capacity in which employed, attendance/health record, salary and whether the applicant actually has the experience which s/he is claiming. You may also ask for an evaluation of the applicant's personality and abilities, but in doing so, you should remember that the response will be a subjective one, especially if the person providing the reference does not know the applicant personally. You may find it helpful to provide some background information about the job for

which the applicant is being considered (for example, in the form of an outline job description) so that the referee is better positioned to comment on the applicant's suitability for the role. However, you should not place too much weight on a referee's views about an applicant's suitability for a role in your organisation. They are unlikely to know enough about your organisation to make a sound judgement. Some employers argue that the only worthwhile information to ask for in a reference is the applicant's dates of employment, attendance, health record and the referee's response to the questions, 'would you re-employ this person?'

The best way to verify qualifications is to make a direct approach to the institution concerned, ie, the university, college or professional body, giving the person's name and date on which s/he states that the qualification was obtained. Whilst a qualification may not always be an essential requirement for the job in question, falsification of such information should give cause for concern over the applicant's integrity and honesty. Recruitment consultants estimate that nearly 15% of job applicants either falsify or exaggerate their qualifications.

## Can I trust what they say?

You should be careful to attach only limited value to the content of a reference. It is not unknown, for example, for an employer to give a favourable reference for an employee whom they have dismissed on the grounds that their performance or conduct was unsatisfactory. They might do so out of desire not to adversely affect the employee's future career. Alternatively, a settlement resulting from a claim to an Employment Tribunal may include the former employer agreeing to give a 'reasonable' reference. Similarly, an employer may give a poor reference to a satisfactory employee to prevent him or her from leaving their employment.

## What should I do if I receive a 'poor' reference for a potential employee?

If it is a written reference, you should follow it up with a telephone call to clarify the content and obtain further information. If the adverse content of the reference is material to the job under consideration, you should consider withdrawing any offer of employment. As mentioned above, you should make a job offer subject to receipt of satisfactory references, where references cannot be obtained before the offer is made.

## How should I treat the 'to whom it may concern' reference?

Open references addressed 'to whom it may concern' are generally of very little value. An employer may feel obliged to provide an overly positive view of an employee in the knowledge that s/he will have sight of it. In the worst case, the reference might even be forged using the company's headed notepaper. The best response is to note the contents of the general reference and follow it up with a direct enquiry to the employer concerned, preferably by telephone.

## Should I show the reference to the potential employee?

References are generally provided in confidence and should therefore not be shown to the applicant, unless a settlement reached on termination stipulates otherwise. Revealing an applicant's references can cause problems if you subsequently decide to withdraw an offer from a job applicant for whom unsatisfactory references have been received. The identity of the previous employer providing the poor reference can be protected if you take up references from a number of sources on the applicant's CV and refuse to disclose the name of the referee and exactly what was said. However, the applicant could apply to the courts for an order to disclose both the identity of the referee and the content of the reference, in order to ascertain whether any act of defamation or malicious falsehood had been committed.

## Should I retain references on the employee's file?

Under the Data Protection Act 1998, an employer is responsible for ensuring that personal data about employees is accurate and up to date. An employee (past or present) has a right of access to any information on file about him or her. It is obviously difficult for you to check the accuracy of information provided in a reference. However, by recording the source of the information and that it is the opinion of the person providing the reference, you will demonstrate that the information is accurate in the sense that it correctly states that it is the opinion of the referee. The Data Protection Act 1998 extended the rules laid down by the 1984 Act to certain manual filing systems, including personnel files. However, employees do not have access to the contents of confidential references on their personnel file that have been obtained for employment purposes, although you do need to inform them that a reference has been obtained from a third party. In addition, you must make sure that

confidential references are stored in a secure environment and are not held for longer than is necessary. It may therefore be advisable to destroy reference information at the end of the employee's probationary period or after their first annual appraisal or performance review. It is also important to check that disclosure of personal data about a past or present employee is specified in the authorised list of disclosures in your data user registration, to avoid being in breach of the principle of unauthorised disclosure of personal data.