

Client Alert

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The Singapore Court of Appeal Clarifies the Standard of Care Owed by Employers to Former Employees When Providing References

It is fairly common for employers to be asked to provide references in respect of former employees. It is trite law that, in such a situation, employers owe a duty of care to their former employees in providing these references to the prospective employer. However, the *standard* of care to be exercised by the employer had not previously been considered by the Singapore Court of Appeal.

In a recent decision¹, the Singapore Court of Appeal (the “CA”) clarified the test for determining the standard of care owed by employers when providing such references in respect of a former employee. This client alert provides a summary of the CA’s decision and explores the implications of the judgment for employers.

Facts

The Appellant (“**Ramesh**”) was engaged by the Respondent (“**AXA**”) as an adviser and financial services associate manager in July 2005. Subsequently, he started leading a group of advisers under his own “agency organisation” known as the Ramesh Organisation (the “**Organisation**”). However, from late 2010, the parties’ relationship began to deteriorate. Ramesh eventually resigned from AXA and applied to join Prudential Assurance Company Singapore Pte Ltd (“**Prudential**”).

Pursuant to certain regulatory requirements, Prudential sought to obtain a Representative Notification Framework licence (“**RNF Licence**”) from the Monetary Authority of Singapore (“**MAS**”) and conduct reference checks on Ramesh including with AXA through the use of a standard form (the “**Reference Check Form**”), in response to which AXA was to furnish certain information on Ramesh. AXA provided the information on Ramesh to Prudential by completion of the Reference Check Form, including information relating on Ramesh’s persistency rates² and certain compliance issues relating to investigations into the Organisation’s advisers (including Ramesh). Further correspondence ensued between Prudential and AXA, including with MAS, in which AXA provided further information relating to Ramesh. Eventually, Prudential decided not to proceed with the RNF Licence application.

Ramesh then applied to join Tokio Marine Life Insurance Singapore Limited (“**Tokio Marine**”). Upon request, AXA sent Tokio Marine a completed Reference Check Form, the contents of which were materially similar to what AXA had earlier sent to Prudential. When Tokio Marine sought further clarification, AXA provided information which tended to portray Ramesh

¹ *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] SGCA 47

² Persistency rates track the number of insurance policies sold by an adviser that are still in force over a period of time. AXA provided Ramesh’s persistency rates in relation to his 19-month single premium persistency rate and 13-month regular premium persistency rate.

adversely. Tokio Marine eventually decided not to proceed with Ramesh's application.

Ramesh commenced a suit against AXA for defamation, malicious falsehood and negligence. At first instance, the High Court dismissed all three claims. On the negligence claim (which was the only claim subject of the appeal before the CA), the trial judge found that AXA had not breached its duty of care as the statements on the persistency rates and the compliance issues were accurate. The judge further observed that Ramesh's claim would likely have failed because causation appeared not to have been established; it was questionable whether AXA's conduct had caused Ramesh to fail to be employed by Prudential and Tokio Marine.

Issues

On appeal to the CA, the following issues were considered³, namely:

- (a) the standard of care expected of an employer when preparing a reference in respect of a former employee;
- (b) whether AXA breached its duty of care to Ramesh; and
- (c) if so, whether causation had been made out.

Decision of the Court of Appeal

The Standard of Care

Agreeing with the English approach, the CA opined as follows in respect of the standard of care in Singapore for an employer preparing a reference in respect of a former employee⁴:

- (a) reasonable care must be exercised to ensure that any facts and opinions in the reference are true;
- (b) reasonable care must be exercised to ensure that the reference is not only true, but also accurate in the sense of not being unfair or misleading;
- (c) 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;
- (d) 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;
- (e) in general, the employer should not include in the reference, whether explicitly or implicitly, complaints or other allegations against the employee that the latter had no knowledge of and had not been given an opportunity to explain or defend himself 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; and

³ Ramesh would not have been able to obtain damages for his claims regarding both Prudential Assurance and Tokio Marine, given that he could only have been employed by either company but not by both firms. As such, if the CA ruled against Ramesh on his claim relating to his application to join Prudential, then given the overlapping facts of his two claims in negligence, it is likely that his claim in respect of his application to join Tokio Marine would fail as well. Accordingly, the CA did not address the claim pertaining to Tokio Marine in its analysis.

⁴ At [102] of the CA's decision

- (f) 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 inference, the more closely the employer's conduct will 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.

The CA also noted that it was just to impose such a standard of care because of the following factors:

- (a) the potential harm that may be inflicted on a former employee through a negligently prepared reference;
- (b) the often inevitable inclination that an employer may have to damage the prospects of a former employee who might be about to join a competitor or who has already done so; and
- (c) the inability of a former employee to safeguard his own position adequately⁵.

Breach of Duty of Care

Regarding the information on persistency ratios, the CA found that the use of the 13-month measure for regular premium policies was misleading and unfair as the measure was never used by AXA to assess Ramesh while he was employed. The 13-month measure was also much lower than the 19-month persistency ratio, which was the measure used by AXA to evaluate Ramesh. Furthermore, the CA found that AXA had withheld relevant information in subsequent correspondence by failing to respond to Prudential's repeated attempts to ask for information on how AXA calculated the persistency ratios.

In relation to the compliance issues, the CA held that by omitting to provide further details of the issues, AXA would have left a reasonable recipient of the information unclear as to the gravity of the alleged misconduct, the outcome of the investigations, and what the investigation against Ramesh pertained to. This unfairly gave rise to the inference that Ramesh had been involved in some serious misconduct and had been investigated for that reason. During subsequent correspondence, AXA also failed to respond to Prudential's attempts to obtain further information on the compliance issues.

Regarding the information on possible ethical violations, the CA observed that there was no basis for, or any attempt to substantiate, those views. AXA was clearly attempting to paint Ramesh in as bad a light as possible. The contents and tone of the correspondence from AXA suggested that it did not provide the information in an objective manner⁶.

Causation

On the issue of causation, the CA disagreed with the High Court and held that AXA's breach of its duty to Ramesh led to inordinate delays which eventually caused Prudential not to hire him.

The CA opined that AXA was not forthcoming with the information that was necessary to enable Prudential to properly assess Ramesh's fitness and propriety and decide whether it was willing to apply for the RNF Licence for him. AXA either gave limited information in response, or worse, replied to Prudential after long delays. Even then, it did not provide most of the specific information that Prudential had sought. As a result, the internal processing of Ramesh's application to join Prudential stalled. Likewise, the information

⁵ At [103]

⁶ At [111] - [141]

provided by AXA to MAS would have caused MAS to have serious concerns about Ramesh's fitness and propriety and caused delays to MAS in granting a conditional RNF Licence⁷.

Comments

This case provides valuable guidance to employers in respect of the exercise of adequate care when providing references in respect of former employees, and demonstrates the stringent standard of care against which employers will be held.

Notably, employers have a positive obligation to supply information without which the reference would be incomplete and misleading. In this regard, employers must be cognisant of the fact that it is not enough to provide discrete pieces of information which, while true, do not present a complete and accurate picture.

Employers should also take note that their obligations do not end upon the provision of the reference. On the contrary, the duty to provide true and accurate information is a *continuing* duty which extends to subsequent requests for information from prospective employers.

Furthermore, it is important to keep in mind that the standard of care is elevated in cases where adverse suggestions are made. Employers should thus refrain from making baseless allegations against former employees, which would otherwise be subjected to a higher degree of scrutiny.

Finally, the CA's remarks justifying the imposition of a strict standard of care are also apposite as they reveal the CA's protective stance in favour of employees. In this regard, it is all the more important for employers to ensure that they are mindful of the standard of care imposed upon them, to mitigate risks of liability.

⁷ At [142] - [157]