

Live up to verbal contract agreements or risk ending up in court

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A \$100,000-plus damages payout is a wake-up call for employers who fail to keep records of pre-employment discussions, according to Deacons partner Sally Woodward.

Woodward's comments follow a judge's acceptance that a worker's handwritten notes were reliable evidence of what was discussed at her pre-employment negotiations and rejected the employer's contention that the promises weren't binding.

Woodward told *HR Daily* that while such cases are rare, employers should understand that verbal representations *can* be contractually binding.

She says that *all* clauses and benefits offered to prospective employees should be encapsulated in the written contract, and employers must keep detailed file notes from pre-employment meetings or discussions where benefits and conditions are discussed.

Employers should also ensure that executives, HR managers or recruiters involved in negotiations with potential employees are briefed on what benefits and conditions they are authorised to offer, she says.

"Meticulous" worker believed

The case involved a superannuation consultant who accepted a role at Watson Wyatt Australia Pty Ltd in 2000.

During pre-employment negotiations, she expressed a concern about the absence of a redundancy clause in her letter of offer, and contacted Watson Wyatt's then managing director by telephone.

The MD assured her during the call that although the company did not include redundancy clauses in its employment contracts, its staff were "well looked after" and, in the "unlikely event" that the worker's position was made redundant, she could expect to receive three weeks' salary for every year of service.

Watson Wyatt made the worker redundant in August 2007, however it denied that such arrangements had been made, and offered her only one month's severance pay.

She brought an action in the Federal Magistrates Court, where she presented handwritten notes that she claimed to have made during the alleged phone call.

Federal Magistrate Kenneth Raphael found the worker was a "meticulous person" and "cogent" witness, and dismissed the employer's contention that she could have doctored the notes to enhance her claim.

Such an allegation was "very serious", he said, and required "the most convincing evidence".

The former MD, he said, was a witness who "appeared to suffer from a genuine inability to recollect matters".

Promises more than "puffery"

The employer also argued that even if the telephone conversation had taken place, the former MD's promises were "mere puffery", and could not be considered binding.

Federal Magistrate Raphael rejected this, saying the MD was the "guiding mind" of the organisation and the worker had every right to have faith in the assurances he made after she expressed her concerns.

While the individual components of what the manager said were "imprecise or vague", the Federal Magistrate **noted** that, taken together, they constituted a concrete term of the employment contract.

Onus of proof on worker

Woodward told *HR Daily* there was no precedent whereby the onus of proof was on the employer to refute the validity of, for instance, a worker's handwritten notes (as opposed to the worker having to prove their legitimacy).

In this case, the Federal Magistrate clearly felt that the worker was the more credible witness, she said.