

## Tips for executives negotiating contracts of employment...



### Know thyself (and others)

- The best deals are usually offered to those who have the nerve to ask for them. How highly do you value yourself?
- Do you really know what you are worth to your new employer? Or are you just taking an educated guess? Be sure you can answer this. If you can't answer it by reference to some hard facts, find out from someone independent how much you could really command in the open market.
- What is your negotiation style? What does it tell the person you are dealing with about you as a deal maker, an employee, a leader and an adversary?
- What is the other person's negotiation strategy telling you about them?

### Know your current contract

- Do you have a current signed copy of your contract?
- What other documents govern your relationship with your employer and, in particular, your remuneration? Are there any bonus scheme rules, share or incentive plans or policies and procedures that affect you? Do you have copies of those that are currently in force?
- What do your contract and ancillary documents permit you to do and what can they prevent you from doing, before and after employment? Could they prevent you from: competing with your current employer; or soliciting or employing its staff, clients or suppliers?
- Check if you will be deprived of any deferred compensation, or if there is a claw-back arrangement in respect of money or shares already received. If so, scrutinise for enforceability and/or negotiate a buy-out with your future employer.

### Know the market

- The market is increasingly subject to attempts by governments, national and international, to regulate and limit remuneration. If your employers claim to have no room for manoeuvre, are they right? Have they made exceptions elsewhere?
- If they are right, what ideas will you have for restructuring your package so that you get what you want and they stay within the rules?

### Moving on

#### The devil you know?

- How is your current employer going to react to your departure?
- If they don't want you to leave for another six months, can they stop you?

- If they don't want you to take your team with you, can they stop you? Consider carefully whether your employer can allege that any unlawful conduct might amount to a conspiracy. Although it may be counterintuitive, think about your current employer's ability to service clients after your departure.
- If they don't want you to take your clients, your contacts, your knowhow and your state of the art market intelligence with you, can they stop you?
- Think about whether you are a senior employee (with duties of fidelity to your current employer). Are you also a director (with fiduciary duties to your current employer)? If you have fiduciary duties, you are obliged *inter alia* not to put yourself in a position of conflict with your current employer and you are required to put your current employer's interests ahead of your own.
- Contracts are not mere formalities; the Courts are increasingly willing to enforce them, particularly where an individual employee is highly paid and legally advised. Before you act, make sure you understand the potential consequences.
- Remember:
  - That merely talking to your team about a move can put you in breach of contract;
  - That phone calls at work are routinely recorded;
  - That all activity on your computer can be reconstructed by a forensic expert;
  - That any information that is of real interest to your future employer about your current employer is likely to be confidential;
  - That breaching your contract may jeopardise the majority of your remuneration package and may put you out of the market at a critical time in your career.

### The devil you don't

- How well do you know your potential future employer? Have you met the key players? Do you know anyone who has recently joined or left? What influenced their decisions?
- What can you learn about it as a potential employer from the way it approaches you, deals with you and negotiates with you?
- Will you be offered an indemnity to assist you in extricating yourself from your current employer? Do you need one?
- What employment documentation have you been shown? Ask for all bonus scheme rules, share or incentive plans and relevant policies and procedures as well as a draft contract.
- Does this documentation deliver what you thought you were being offered? Check in particular that:
  - If you are joining an organisation that is partially or wholly state-owned, it has the relevant authority to enter into the contract or whether such contract could be *ultra vires*;
  - Salary and benefits are what you were led to expect during preliminary discussion and negotiation. Consider building in RPI increases or other benchmarking;
  - The wording of any guaranteed bonus provision is legally compliant and covers every possible exit scenario and time;
  - There is adequate provision for you and your dependants if you are required to be mobile or relocate (particularly overseas);
  - Your reporting lines are clear and what you were told they would be;
  - Job title and the scope of the role is defined and does not omit anything that was discussed and agreed during preliminary discussion and negotiation (and does not contain anything that wasn't). Try to avoid any power to make the role a 'joint role' (usually a recipe for disaster);
  - The wording of any guaranteed bonus provision is as far as possible watertight;
  - You have identified any pitfalls in bonus or long term incentive plans, such as good leaver/bad leaver clauses, clawback or wide discretionary terms and are clear about how these will operate in practice;

- You are protected if there is a change of control of the employer;
- You are adequately covered in the event of illness. How long would you be paid contractual sick pay? Is there any gap between this period and permanent health insurance (if any) taking effect?

Carefully consider what will happen if things do not work out, or when you wish to move on from your future employer.

- Think about notice period, and exit provisions such as garden leave and payment in lieu of notice. There is no such thing as employment 'at will' in the UK. What would you be paid during garden leave? How would payment in lieu be calculated? Often your only entitlement will be base salary and contractual benefits;
  - Do you need to define circumstances in which there should be a pre-agreed exit payment (a 'liquidated damages clause'), for example, change of boss, takeover, dramatic change of scope of duties? If your new boss is crucial to your success in your new role, and he or she leaves, can you leave with an agreed exit figure?
  - Ensure that any post-termination restrictions will be compatible with your future plans. If you are bringing clients with you from your current employer, will you be able to take them with you when you leave your future employer?
- Separate the issues that are of fundamental importance to you from those on which you would be prepared to make concessions.
  - Do you appreciate that tax consequences of the package you are being offered? Can the package be restructured in any way to mitigate your tax liabilities?

### Know where to find it

- Keep a full set of documentation in a secure place. When you are given new documents (such as current year bonus scheme rules) keep these with the originals.
- If you are or become a director of your employer, know how to find out how this affects your legal relationship with your employer. How will it influence what you are and are not permitted to do and, in the event of a dispute, how your contract will be interpreted by the Courts?

### To find out more:

Meriel Schindler	<a href="mailto:meriel.schindler@withersworldwide.com">meriel.schindler@withersworldwide.com</a>	+44 (0)20 7597 6010
Websites	<a href="http://www.withersworldwide.com">www.withersworldwide.com</a>	<a href="http://www.employmentrights.co.uk">www.employmentrights.co.uk</a>

## withersworldwide

London New York Geneva Greenwich CT Hong Kong Milan New Haven BVI

16 Old Bailey, London, EC4M 7EG, tel +44 (0)20 7597 6000, fax +44 (0)20 7597 6543

London New York Geneva Greenwich CT Hong Kong Milan New Haven

© 2008 Withersworldwide is the trading name for Withers LLP, Withers and Withers Bergman LLP .

[www.withersworldwide.com](http://www.withersworldwide.com)

The information and comments contained herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.