EMPLOYMENT TRIBUNALS

claimant: **C Hedland**

Respondent: **NHS England**

Heard at: **North Shields** **On: 18 November 2019**

Before: Employment Judge O'Dempsey

Representation
claimant: Self
Respondent: Mr B Williams of counsel

RESERVED JUDGMENT

The claimant's claim for breach of employment contract is dismissed.

REASONS

1. These are the reserved reasons in this case heard on 18 November 2019 in the claimant's claim for breach of her employment contract under the tribunal's jurisdiction in this regard.

2. The judgment was reserved as it was not possible to complete the hearing within the one day allocated, although the parties managed to get through the evidence and submissions within the allocated day. There was a bundle of over 500 pages, which I was told was a result of the inclusion of subject access request material. I am grateful to counsel for the Respondent and to the claimant who was representing herself for their submissions.

3. During the course of the hearing it was necessary to have a short adjournment so that the claimant could read and if necessary object to Mr Williams handing in a note of his written submissions which he handed to her just before seeking to make them. I was concerned that any person representing themselves might feel disadvantaged by this, and so I asked the claimant if she would like time. She said she would and when she

returned she indicated initially that she would like to object to them being handed in. Mr Williams assured her and myself that they were simply a note of what he was going to say in any event and in those circumstances I allowed them to be handed in.

4. In the final analysis I do not think that the claimant was disadvantaged by this procedure. She had sent her submissions to the tribunal and to the respondent well before the hearing, and is to be commended for having done so.

The law

5. In what follows I will refer to the person making the offer as the “offeror” and the person who receives the offer as the “offeree”.

6. If an offeree purports to accept an offer but his acceptance does not match the terms of the offer (disregarding trivial variations) then no contract is formed at that point. Rather than accepting the original offer, the offeree makes a counter-offer. A counter-offer amounts to a rejection of the original offer so that no contract exists (**Hyde v Wrench** (1840) 3 Beav 334) and it amounts to a new offer from the offeree that the original offeror can choose to accept.

7. I note that a counter-offer is to be distinguished from an offeree's request for further information (on receipt of an offer). This does not amount to a counter-offer (**Stevenson v McLean** (1880) 5 QBD 346). Suggesting a higher level of pay is appropriate will not constitute a simple request for further information. It is, in my view, a counter offer.

8. Acceptance must be communicated. An acceptance has no effect until it is communicated to the offeror. This is the point at which the contract comes into being.

9. If an offer does not specify the method of communication for acceptance, then the offeree may communicate its acceptance in any way it chooses. If the offeror prescribes a method then the offeree must use that method to accept. Any attempt to accept in another way will amount to a counter-offer (see e.g. **Western Electric Ltd v Welsh Development Agency** [1983] QB 796). Such prescription must be clear and unambiguous to be effective however in my view. I am reinforced in this view by considering the (albeit commercial) case of **A Ltd v B Ltd** [2015] EWHC 137 (Comm), 2 February 2015. The judge held that the presence of the word "accepted" above the space for signature in a contract, combined with a reference to a signed copy needing to be returned, did not amount to a prescribed mode of acceptance, as there was neither "prescription" nor "conditionality".

10. A binding contract comes into existence once an unconditional offer of employment has been accepted. If the employer seeks to withdraw the offer, the employee may have a claim for breach of contract. However the claimant will have to be able to show loss.

11. An offer of employment can be withdrawn at any time before it has been accepted by the employee. The employer will need clear evidence that it withdrew the offer before the employee had purported to accept it.

Facts

12. These are my findings of fact in this case, which are largely a matter of agreement between the parties save in one respect. The real question between them was whether what happened resulted in a concluded contract, let alone a contract of employment giving rise to jurisdiction for this tribunal to make an award of damages for breach of contract on the termination of that relationship. Where it is necessary to comment on my interpretation of a document I have included this under my findings of fact simply for convenience and so that the parties can understand my conclusions in the factual context which give rise to them.

13. The case concerns whether or not the respondent and claimant ever reached a contractual agreement concerning the employment of the claimant in the role of Site Delivery Officer.

14. On 6th July 2018 the claimant was interviewed for role of site delivery lead by the respondent. However she was not offered that job. Instead it seems the respondent offered her a role as a consultant and on 9th July 2018 she accepted that job in a telephone call.

15. On 20th July 2018 she received a further call and she says was offered a fixed-term role of site delivery lead (telephone) which she says she accepted. On 26th July 2018 she received an email asking her for her preference for a start date, and she replied that she would like to start on 6th August.

16. On 31st July 2018 she received terms, the document at p224 of the bundle which offered pay at the bottom of the pay band. There then appears to have been a set of discussions around agreeing pay. What appears to have happened is that the pay band of this role which was governed by Agenda for Change pay banding was agreed. However the actual pay for the role was not agreed at this point.

17. On 10th August the claimant discussed the post with Sarah Seaholme in a telephone call. She says that she was given a firm initial uplift to £61,105 per year. I do not accept that this was a firm offer of a specific salary.

18. I do accept that the claimant did discuss her previous salary which was banded at 8C and it is clear to me that she was negotiating for an offer of pay which would put her at the top of the band.

19. On 15th August 2018 the claimant sent an email to the respondent which was clearly negotiating on the salary point. It emphasised her previous salary on the same band in another, essentially NHS, role, and she argued in favour of recognising her completed years of service, referring to the way in which she says that these matters should be dealt with in the Agenda for Change regime. I heard no evidence concerning that point however. Essentially she was arguing for recognition of her previous roles.

20. It is plain to me that she was still negotiating at this point, and that nothing had been concluded by way of a contract.

21. On 16th August 2018 the claimant says that she received an email from Sarah Seaholme indicating agreement to pay £63,996 in recognition of

previous roles. This is an important document for both parties. The document was in the following terms.

"I am responding to your email regarding the Site Delivery Lead role and the associated salary.
As discussed it is a Band C role and an offer of £61,105 was made. After considering your contracting and previous roles, I am able to offer a higher offer of £63,966.
Please note this offer is still subject to HR checks and approval of the uplift as you are not starting at the start of the Band 8C scale.
Please can you confirm if you accept this offer and I will proceed with the necessary business case to HR regarding the starting salary."

22. Subject to one argument which the claimant advanced on this point, the terms of this document appear to me to very clear: (1) There had been an offer of £61,105 (2) After considering the negotiation material the claimant had presented to Ms Seaholme, she felt able to offer a higher offer of £63,966 subject to HR approval of the uplift; (3) if the claimant wanted to accept the higher offer, the writer would proceed with the business case to HR in relation to the starting salary.

23. On an objective reading of that communication it was a conditional offer, as the writer was making it clear that she could not bind the respondent without making the business case to HR. I should record that it was conceded by the respondent before me that all the other pre-employment checks were completed in the claimant's favour at the time the conditional offer was withdrawn. So it was only the conditional nature of the offer – approval of the salary – which remained outstanding in effect.

24. On 16th August 2018 at 14.16 the claimant purported to accept the offer of the higher salary on the basis that it was a short term position. It should be noted that even on her own case she was accepting the salary for which a business case had to be made before it could be something the respondent agreed. She was accepting a conditional offer to the effect of "if the respondent can get approval of this salary will you accept the job at this rate?"

25. On 20th August the claimant sent email to try to agree a start date of 27th August and on 21st August 2018 the respondent sent to the claimant a letter stating "I am delighted to be able to confirm our offer of appointment to the above post with NHS England with effect from a date to be agreed following full completion of satisfactory pre-employment checks. We will contact you to confirm your start date in due course."

26. To anyone reading this document it would have seemed, I have no doubt that this was confirming an offer of appointment to a post, in which the only matter outstanding was completion of satisfactory pre-employment checks and the fixing of a start date. No one would have thought on reading that letter that it was a conditional offer. However the email to which it was attached had as its heading "conditional offer of appointment". What were those conditions? The claimant says it was simply the matters set out in the letter, namely the pre-employment checks and start date. However there was other material sent at the same time to which I should have regard in construing what offer if any was being made at this point.

27. The letter came with a document which claimed to be a summary offer and "other useful information". However the salary that was being offered in that document was even lower than the salary of some £61,105 that the claimant thought was secured; it can be doubted how useful that information was. The summary offer went on to state that London weighting would be applied to the role and it misstated the base of the job. It did not set out what the claimant thought she had agreed.

28. It contained the following statement upon which the claimant placed some emphasis:
"This offer is made subject to the following pre-employment checks: proof of identity; proof of right to work in the UK; proof of qualifications (if applicable); proof of professional registration (if applicable); receipt of satisfactory references; DBS (formerly CRB) clearance (if applicable) and satisfactory medical clearance.
This offer will be withdrawn if any of the above conditions are not satisfied."

29. The claimant indicated that she thought this should be read as saying that the **only** conditions on the offer already made on 16 August 2018 were those mentioned. I read this differently. I think it means that the offer is made subject to those conditions and if any of those are not met the offer is or will be withdrawn. I do not accept that the document should be read as restricting the respondent's ability to say that no agreement had been concluded because there had not been agreement on a vital aspect of the contract, especially pay.

30. The document also contains the following passage upon which Mr Williams placed reliance:
"Please confirm in writing, as soon as possible, your acceptance of this offer of employment on the terms stated above. Please confirm acceptance by reply e-mail.
This is a conditional offer and we recommend that you do not hand in your notice on your current job until we have notified you that your checks are complete. Once all the pre-employment checks have been completed your new line manager will be in contact to agree your start date."

31. Mr Williams sought to suggest that this stipulated confirmation in writing as the only method of acceptance. However it does not appear to say that on any ordinary reading of the text. If one seeks to introduce a restrictive requirement into a contractual agreement it needs to be spelled out clearly. I see nothing in that document restricting the ordinary methods of acceptance of an offer, which might accordingly be in any form. What the letter did require however was that such acceptance should be confirmed in writing. So acceptance could be either orally (in which case a follow up confirmatory email would be required as part of the agreement reached) or in writing (which would therefore provide the written confirmation of the acceptance and the acceptance at the same time). Either way it does not seem to me that it was a necessary condition of agreement that it should be written agreement. If the claimant had accepted the offer effectively it would not avoid the agreement if she then did not comply with a different requirement of the contract (namely to confirm it in writing). It is well known that the contract of employment can be oral, partly in writing, or all in writing (amongst other means of agreement by which one person says that they

will do work for another in return for consideration). I therefore reject the narrow reading which Mr Williams urges on me. It is unnecessary for there to be an agreement in this case that it be in writing or accepted in writing.

32. However there must be agreement on the essential terms. At this point there was no agreement on the essential term of wages, although it appears that there was agreement on banding.

33. On 21st August 2018 the claimant received an email from Sarah Seaholme. In the claimant's evidence she stated that the offer she accepted was the one of 21 August, the letter at p 67. She said that this was an offer because it was an expression of willgness to contract on terms. The document however makes it clear that any offer was a conditional offer and that the salary uplift which the claimant had negotiated apparently convincingly with Ms Seaholme was not yet agreed. This was because the claimant was not starting at the "start" of Band 8C. Viewed objectively the claimant had not yet reached agreement on pay. I note that on the same day Sarah Seaholme was seeking approval of the claimant's uplift. However that was a document of which the claimant was unaware. I find that the claimant genuinely believed that she had an agreement which was not conditional. However objectively there was a condition: approval of the salary. In cross examination the claimant accepted that the salary for the post was unclear at this stage.

34. On 21st August there was an email exchange concerning the summary offer. This highlighted the incorrect salary and the incorrect base. The claimant relies on this document as showing that there was clear acceptance of an offer. On 22nd August 2018 the claimant wrote to Sarah Seaholme page 78 in the bundle. She stated

    "Everything is now done, and references have been sent, as just confirmed by … just now, so it's just sorting out the contract pay and then I can sign the contract. Spoken to someone in HR and they said this could be done today, so hopefully can agree the start day for Monday, which according to HR can also be agreed even though it is a BH"

35. It is clear from this communication that the claimant realised that it was necessary to agree the contract pay before she could sign the contract. I do not accept that this was simply a question of form. Viewed objectively it was necessary to reach agreement on this fundamental term.

36. The same day NHSBSA HR Shared Services had written to the claimant making it clear that it was necessary for them to "wait for proof of salary approval before this recruitment can be passed to the contracts team." From that email the claimant appears to have thought that it was no longer a question of salary approval being given. I am not quite sure why she reached that conclusion, which the documents do not appear to support. I accept that she genuinely did, but again, viewed objectively it remained a question of reaching agreement on the fundamental term of salary.

37. On 22 August 2018 the respondent's Director of National Elective Care Transformation Programme indicated that the uplift had not been approved. She did so using the phrase "however not sure about…" the claimant's uplift. It appears that she had approved someone else's request earlier in

the sentence, so the meaning is clear. The claimant's uplift had not been approved.

38. By this stage the claimant had not accepted the lower salary offers of either £61 105 odd or the second and lower apparent offer of around £59,000 (in the summary offer).

39. On the same day HR Shared Services wrote to the claimant stating "We were unaware throughout this process that an offer had been made above the bottom of the band, hence why it was issued as such. We are unable to re-issue the offer letter stating £63,966 as this salary has not yet been approved by Regional HR."

40. The claimant could not be in any doubt that the salary had not been agreed. Moreover she could not have been in doubt that the offer of £59,000 had been issued for this reason. There is no mention of the offer of around £61,105. It is not clear whether approval was sought at any stage for that salary. In any event the claimant never accepted any such offer.

41. Sarah Seaholme was not available to give evidence although the respondent tendered her witness statement. She could not be cross examined and I place very little weight therefore on the statements she makes in that witness statement which are not supported by the documentation. I do not, for example, accept the implication of her statement at paragraph 21 that there was any "failure" in any moral sense by the claimant to accept the offer of around £61,000. However it is clear that the claimant negotiated in favour of a higher salary after that offer had been made that much is clear from the documents. She made a counter offer of where the salary should be. She was indicating that she did not accept the lower offer. If she had accepted the lower offer she could have done so, and then sought to negotiate for a higher rate of pay, but there is no evidence before me that she ever did accept the lower offer save for one phone call to which I now turn.

42. It appears that on 23rd August 2018 the recruitment team emailed Sarah Seaholme asking for confirmation of the withdrawal of the post. This document formed page 321 of the bundle. On the same day, at about 3.10pm, the claimant received a call from Sarah Seaholme and she made notes of the call at the time by putting the phone on speaker and transcribing. The claimant refers to page 103 of the bundle. The claimant noted at the time:
'*Hello its Sarah Seaholme, I wanted to speak to you directly, sorry to say it's bad news, the salary has not been approved* ' I then questioned who had not approved it given the email I had received on the 16th August highlighting the offer, but then required HR approval. I also asked it this was HR that had not approved it?? I then received a very vague and woolly response' *Finance and the Director had not approved it*' However, the Director had been copied into the offer email, so I expressed my confusion... I then said that if the regional head had not approved it, then I would have to accept that with the rationale provided, and given it was a 6 month post and was really keen on the position and what I could bring to the post..indicating my disappointment but was keen to get in post."

43. Reading that note it is clear to me that Sarah Seaholme did not tell the claimant that she had a further offer to make, nor renew the earlier (above bottom of band) offer. Neither did the claimant indicate that she was accepting any previous offer (to which she had made a counter offer by proposing a higher salary than the bottom of the band salary).

44. I also note that the claimant, on 28th August 2018 (page 93) recorded the conversations she had had around these issues thus: "9 days later as of the Aug at 3pm I was then notified by telephone call (I have not received this in writing) that the pay band had not been approved. (Note Regional HR have not at any point been contacted about this) Note, the email I was sent highlighting the uplift was also cc'd into the Director Linda Charles-Ozuzu with the understanding on my part that this was by way of highlighting the decision upwards to the Director. I was then informed on the phone (see document) and as highlighted above, I was informed this had not been approved".

45. It seems to me that this account is odd if during that conversation she had been offered and accepted a particular salary rate. Instead it seems to me that both the claimant's accounts near the time of these events show that she was saying during the telephone conversation that if HR had said something she would have to accept that, with the rationale she had been given. She went on to say that she was keen to get into the post. However there is no evidence that she concluded a contract, and clear contra indications.

46. When the claimant was cross examined on the question of why she did not write confirming her acceptance of the document on page 69 of the bundle, she said that it was because the base and the salary were wrong. She accepted that at the time the question of salary was going to HR to see whether they would agree the uplift. She claimed that she had verbally accepted the offer on the telephone on 23rd. In the light of the contemporaneous evidence, including the record she herself made of the telephone call, I do not accept that this is likely. I do not find her explanation of why she did not confirm her acceptance in writing likely. She said she was waiting for confirmation from the respondent of her oral acceptance of the offer. I cannot understand why this would have prevented her from confirming her acceptance of whatever offer she had accepted on that occasion in writing. I find that she did not accept any offer during that telephone call nor was any offer made to her during it.

47. I think that it is more likely that Ms Seaholme was attempting to follow the procedure (of which p197 is a flow chart) and had made it clear that there was only a conditional offer. The salary had to be approved because the offer she wanted to make was (in both the case of £61,105 and in the case of the higher salary she thought she could justify) above the bottom of the pay Band. It therefore needed approval before it could be accepted. I find that Ms Seaholme made this clear and she did not have, or purport to have, any authority to bind the respondent until approval had been given.

48. On 29th August 2018 the Director of National Elective Care Transformation Programme emailed Sarah Seaholme telling her that the "offer" was 'erroneous' and indicating that the process would be put on hold and would need review. It is not clear which "offer" this letter refers to. It appears to

me that it can only refer to the offer letter which the claimant did not accept and which had attached to it the summary offer indicating the bottom of the Band salary. It might of course have been referring to the conditional offer which was made, but if that was the case it was not erroneous. I think it is more likely that it was referring to the obviously erroneous offer that had been made of 21 August, but which was not accepted by the claimant. Of course the claimant did not know about this 29th August email at the time.

49. The claimant was informed on 29th August by email [page 119] that the Respondent had put the recruitment on hold. She was told that the Respondent would not be able to proceed with the recruitment process until the review had been carried out. It was clear to her that the offer of employment was being withdrawn at that point. I do not accept that she was not informed that the process had come to an end as far as the negotiations with her were concerned at that point.

50. It appears that the regional HR did not support the withdrawal of the offer, as can be seen on 30th August 2018 [page 214]. However it seems to me from the evidence before me, which was not challenged, that regional HR perform only an advisory role in this respect. They could not bind the respondent so as to prevent it withdrawing the offer that had been made. The only unconditional offer that was made was not accepted by the claimant. She never accepted the rate of pay at the bottom of the band.

51. On 30th August the claimant sent an email to Sarah Seaholme. In this she stated that she was disappointed that the salary offer had been revoked via phone call on Thursday 23 August at 15.03. She recorded the fact that the offer in question had, she was told by Ms Seaholme, not been approved. She went on to say that "consequentially offer then made at the lowest point on the pay band". I do not accept, if this is what this remark was supposed to convey, that as a result there was an automatic offer on the lowest point on the pay band. However even if that was the consequence, the claimant never accepted it. It is again odd that the claimant does not, if she had accepted any offer during the phone call make any record to that effect anywhere near the time of the phone call.

52. The email also complains that the respondent was rescinding the offer of employment made. She refers, in an elliptical style, to "a firm contract as forwarded from NHSA BSA (dated 21st August)". However the only contract that was of that date was never accepted by the claimant.

53. It is not clear to me why the offer was withdrawn. It is not relevant to the question I have to determine. However the claimant's evidence was that the post was readvertised on 13th September 2018 with the same pay banding and terms. The claimant also complains that she did not receive a rejection letter. Again this is not relevant to the issues before me. It is not my place to determine whether the respondent has covered itself in glory in its handling of the negotiations with the claimant.

54. However I should note that on 13th September 2018 Ms Seaholme emailed the claimant to say 'we have now re-advertised the role to give everyone previously interviewed the same opportunity to apply'.

Submissions and discussion.

55. Both parties have provided detailed written submissions and it is no discourtesy to those that I do not set them out in full.

The claimant's submissions

56. The claimant's submissions, which, as noted above, were received on around 8 November 2019 by the tribunal, and served on the respondent, were to the following effect:
    1. A contract of employment existed because an offer had been made and accepted. It does not matter that a start date or salary were yet to be agreed. That offer was withdrawn by the respondent after it had been accepted. A revised offer was then made by NHSE in terms of the salary increment within the 8C AFC banding. Finally there was a verbal offer and acceptance on 23rd August, after the claimant had been told that the post could only be aligned to the bottom of the band.
    2. She was never told about the withdrawal of the post. On 29th August she was told a review of the post was underway and I could apply again.
    3. She helpfully identifies the elements needed for a contract in law. She submits that the offer on page 67 of the bundle was one which was made with the intention that it is to be binding once accepted by the offeree.
    4. The offer on page 68, she submits makes clear that it was only if the pre-conditions set out there were not met that the offer could be withdrawn. It does not matter if the offer was made in error by someone with authority to make the offer. She prays in aid the advice given by regional HR that the offer should not be withdrawn.
    5. There must be an objective manifestation of acceptance. She submits there is plenty of evidence of her acceptance. She evinced an intention to bound by the terms of the contract. There was no requirement for acceptance to be in any particular form or by any particular date. She says she accepted on 16th August and on 29th August (when she says she accepted the role at the bottom of the scale and this was done before she received an email stating that a recruitment review was taking place. She refers to p 552 of the bundle. A signature is not necessary to evidence acceptance. She refers to an employment tribunal decision in support of these propositions.
    6. She says that she should have been notified of the withdrawal in a prescribed way. Since she was not so notified, no withdrawal took place.
    7. She argues that the lack of agreement of a salary point within the Band makes no difference because, as with all NHS posts under AFC terms and conditions a salary is never specific but is positioned within the agreed band depending on experience and skills.
    8. She argues that she provided consideration for the agreement. Plainly the offer to start working at some point would fulfil this criterion.
    9. She says that there were intentions to create legal relations, and for the agreement to be legally binding. There is plenty of evidence of this.
    10. She makes submissions on misrepresentation. I do not record these here because they do not seem to me to be relevant to the issues between the parties. Either there was a contract formed or there was not.

The respondent's submissions

57. As noted above, these submissions were given to the claimant at the start of counsel's closing speech. The claimant did have a short opportunity to consider them, but I in considering the submissions made, I am astute to

whether the claimant had a fair opportunity to consider any individual point. However I have taken the view that the central points were ones which were canvassed in his oral submissions and were ones on which the claimant had a fair opportunity to respond.

a. Mr. Williams submits that the key question is whether a contract of employment came into existence at all. He submits that p63 was a conditional offer. This is the email dated 16th August 2018. He says that Ms Seaholme had no authority to make an offer. That is a point I do not accept she had authority to make a conditional offer. The offer was made subject to approval of something more than the pre-employment checks. It was subject to the approval of the higher salary. Salary was fundamental to the contract, and it was never agreed.
b. Mr Williams says the claimant was well aware (or ought to have been) that the 'offer' was subject to higher approval. He refers to the way in which the correspondence refers to this fact (email of 16th p 63; email of 21st August p 72 "this offer is still subject to HR checks and approval of the uplift.."; email on 22nd August [79] "..as well as wait for salary approval".).
c. He submits that regional HR approval was a necessary element.
d. The claimant cannot rely on the document that was sent to her: it was incorrect and she asked for a document representing the correct terms to be sent to her. He submits that in any event the respondent required acceptance in writing.
e. The salary was an essential element which was never agreed.
f. Mr Williams addresses in his closing submission as he did in cross examination the conversation of 23 August. He suggests there was no verbal acceptance during the phone call of 23rd August relying on the following:

a. I should reject the claimant's claim states in her statement (para 14) that she got a 'woolly response' as to why the salary was not approved. She just did not accept that response. She was unlikely to suddenly therefore back down and verbally agree a lower salary. I do not set very much store by this point. The claimant explained that she was in difficult circumstances in which she needed work.

b. Mr Seaholme does not recall any such dialogue. Again, I place very little weight on this because this witness did not attend and could not be cross examined on the question. She states in any event that she cannot remember the conversation rather than asserting that the conversation never took place or that the words attributed to her were never spoken.

c. More tellingly he relies on the fact that the claimant's email on page 87 soon after the events makes no reference to her acceptance and if anything points in the other direction because it refers to a "final check on the salary situation following on from our phone call.." He argues that this is inconsistent with a verbal acceptance. I do not accept that submission, but I do accept it renders it less probable that the claimant had previously had such a conversation.

d. The claimant, says Mr Williams does not refer to the alleged verbal acceptance in her email of 28th August at page 87 chasing a response. I take the overall point, but the email is consistent with both cases as she stated that she was keen to get things in place. However it seems to me that the lack of reference to any verbal agreement reduces the likelihood of the conversation having gone as the claimant now claims.

e. The email at p 93 refers only to "an offer of employment" and provides more detail as to her account of the phone call. There is no mention of having verbally agreed a lower offer. The email challenges the salary position. This is inconsistent with there having been verbal acceptance. She was not, for example, chasing written confirmation of that verbal agreement. Again this is a point which although it is not, in my view, inconsistent with the claimant's case, does render it less likely.

f. Mr Williams submits that had the claimant accepted verbally, she could, and ought, simply to have signed and returned the original offer letter that she had asked be reissued simply with a higher salary figure. However of course that document showed the wrong base.

g. He claims that the reference to a 'transcript' at page 102 is a misdescription. In the light of the evidence that emerged before me, I do not think anything turns on whether the document at p 102-3 can properly be described as a transcript. I accept that she wrote down what happened contemporaneously. I also asked her to recount what happened in the course of her oral evidence. Tellingly at that point and in the record, there was no mention of having agreed to anything relevant.

58. Mr Williams submits that verbal acceptance was insufficient. He relies on the statements in the summary offer, and Lisa Barclay's evidence; the fact that there was a written acceptance document included. He seeks to rely on the claimant's understanding the importance of written offer and acceptance. Finally he makes the point that the claimant could have signed and returned the summary offer had a verbal acceptance taken place during the phone call. It seems to me that only the first two of these points could support the proposition that verbal acceptance was in sufficient. Mr Williams cannot rely on the state of mind of the claimant or actions that she could have taken. The point is one of the correct interpretation of the document before me, and as I have indicated above, I do not accept this submission. Verbal acceptance, had it occurred at any point, of a clear and precise offer, would have been sufficient.

59. Mr Williams submits in any event that the claimant did not accept any offer within a reasonable time.

Discussion

60. In essence the question is a simple one. Was there acceptance of an offer constituting a contractual agreement? The answer, in my view, is that there was no such acceptance on the findings of fact I have made above. The claimant cannot show that she accepted any concrete offer. I have found that she did not accept the offer she says was made during the phone call referred to above. She did not accept the conditional offer of the higher pay, nor the offer of the lower pay, nor the offer of the lowest pay. I understand entirely her reasons for not accepting them, and I do not think she can be criticised for not accepting them. However I have to determine whether there was ever a contract here on which she can bring a claim. I have set out above why I consider that there was no such contract.

61. I must address a submission which the claimant makes, namely that she had a generic contract. She submits that it is possible for a contract of employment to be formed where not every detail is agreed upon. To an

extent this submission must be correct, as no one would (in most cases) realistically consider that there was no contract of employment simply because a specific start date has not been agreed upon. However where there is a fundamental term of the contract, such as how much pay the job will attract, that is not something which can be left vague. Failure to agree the salary for a job, where a range of salaries may be paid for it, leaves the contract too uncertain. In some employments there may be an agreement to employ a particular method for choosing a salary point. On the facts of this case the parties were not in agreement that a particular method of determining the exact salary would be employed. It was open to the claimant to reject the salary offered by the respondent, either expressly or by making a counter-offer. She did the latter by seeking to negotiate the pay upwards. So this was not a situation in which a seemingly generic pay band has a rigid mechanism by which, after certain factors which are given precise weight are taken into account, the precise salary would be ascertained. I have been shown no evidence of such a mechanism or how it operates to determine the salary. Therefore the concept of the generic contract relied upon by the claimant amounts to no more than saying that it is possible to leave a fundamental term of the contract vague. I do not think that this is a correct statement of the law.

62. In those circumstances her claim for breach of contract must be dismissed as there was no contract.

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Employment Judge O'Dempsey

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Date 10/12/2019