Case Number: 2303146/2017

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Ms P Todd	**BUPA Care Homes (CFHCare) Limited**

OPEN PRELIMINARY HEARING

By CVP

Heard at: **London South Employment Tribunal**

On: **9 October 2020**

Before: **EJ Webster**

Appearances
For the Claimant: **Did not attend**
For the Respondent: **Ms C Musgrave (Counsel)**

JUDGMENT

1. The Claimant was not employed by the respondent for two years and does not have sufficient service to pursue an unfair dismissal claim under s 94 Employment Rights Act 1996.

RESERVED WRITTEN REASONS

The Hearing

2. The claimant has brought claims for unfair dismissal and disability discrimination This hearing was listed by EJ Morton on 22 November 2018 following a case management discussion. The Tribunal was to determine:

(i) Whether the Claimant has the required qualifying service to bring a claim of unfair dismissal under section 108(a) Employment Rights Act 1996;

(ii) Whether at the time of the matters the Claimant complains of she was a disabled person for the purposes of s 6 Equality Act 2010; and

(iii) Whether a fair hearing was still possible.

3. The last issue (iii above) was added following application by the respondent.

4. This hearing was held by way of Cloud Video platform. The parties had been notified in advance of the hearing. The claimant wrote to state that she would not be able to attend the hearing as a digital hearing was not sufficient. She has not said why it was not sufficient and why she could not attend.

5. The claimant lives in New Zealand and would not have been able to attend the hearing in person. She appeared to suggest in correspondence that she would like it to be by telephone. I explain now that as the matter had to be heard by way of an open public hearing, a telephone hearing is not possible in these circumstances. I appreciate that the claimant may not have been aware of this.

6. I considered that it was in the interests of justice and the Overriding Objective to proceed with today's hearing. I have the power to proceed with a case where a party is not in attendance under Rule 47 Employment Tribunal (Rules and Procedure) Regulations.

7. I reached this conclusion on the following grounds:

(i) The claimant has not indicated that she will be able to return to the UK to attend an in person hearing at any stage of the proceedings.

(ii) The claimant has not explained why she cannot attend by way of the video conference and was told yesterday by the administration that she ought to attend the hearing.

(iii) The claimant has submitted several written documents and submissions addressing the points that the hearing has to deal with.

(iv) In an email dated 8 October 2020 the claimant stated that she felt that the tribunal had all the documents and information it needed to make the decisions on the papers and felt that the Judge ought to make a decision on that basis without the need for a hearing.

(v) This case was first issued in 2017 and has not progressed beyond one preliminary hearing in November 2017 when EJ Morton and the parties were unable to ascertain the basis for the claimant's claims and listed the Open Preliminary Hearing that I am hearing today. Since then the hearing has been postponed on a number of occasions. Given the length of delays in progressing this matter it is important that the case is progressed insofar as is possible.

8. I therefore agreed to hear the respondent's submissions on the 3 areas which the hearing was listed to decide:

(i) Whether the claimant has two years service.
(ii) Whether the claimant was disabled at the relevant time.
(iii) Whether it is still possible to have a fair trial.

9. Having heard the respondent's submissions and read the documents provided by the claimant I have determined that I have sufficient evidence to determine whether the claimant has the requisite length of service and set out that decision below. This was essentially a factual exercise for which both parties had prepared documents and could be determined by considering those papers.

10. I have made separate orders regarding the question of whether the claimant id disabled and whether a fair hearing can proceed.

The Law

11. S.108(1) Employment Rights Act 1996 ("ERA")

Qualifying period of employment

(1) Section 94 [the right not to be unfairly dismissed] does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

s.211 Period of continuous employment.

(1) An employee's period of continuous employment for the purposes of any provision of this Act—

(a) (subject to subsection (3)) begins with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

The "day on which an employee starts work" is a question of fact to be answered by considering when the employee first worked under the contract of employment which has been entered into (Koenig v The Mind GYM Ltd UKEAT/0201/12/RN.

Facts

12. The claimant was employed by the respondent as a nurse. She was dismissed, the respondent asserts, by reason of capability. The claimant's claim is that this dismissal was unfair and related to her health (specifically a bad back).

13. The parties agree that the claimant's termination date was 25 August 2017. What is in dispute is when she commenced employment. In order to have the 2 year's requisite service the claimant would have to have been employed on or before 24 August 2015. The claimant asserts that she commenced employment in June 2015. The respondent asserts that in fact her employment did not commence until 8 February 2016.

14. The claimant's assertion relies upon a document (page 32) which is ostensibly dated 11 June 2015. The letter is an offer of employment to the claimant from the respondent. The letter does not provide a start date of employment but asks the claimant to sign her acceptance and states that any employment is conditional on them receiving references, the claimant's eligibility to work in the UK and their receipt of a satisfactory DBS check.

15. However, there are subsequently numerous documents that demonstrate that the date on this letter was an error. Most importantly, there is an email from the claimant to a Ms Emery at the respondent dated 12 September 2015 (pg 45) which commences:

"*I received your job offer today and noticed it was dated June. Was this a typing error? Also the other listed items were not enclosed.*

If I had received it as dated I could have submitted it as planned for my visa by September 1 as I informed you was necessary."

16. The claimant's application for the role (p39-41) is dated 8 August 2015 indicating that she had not even applied for the job or made contact with the respondent prior to this date making the start date of June 2015 improbable.

17. The bundle then included multiple versions of the offer letter to the claimant with a series of dates – 11 September 2015, 6 October 2015, 8 December 2015 and 8 February 2016. It appears that these kept on being reissued in order to facilitate the application for a Tier 2 visa for the claimant who is a New Zealand national.

18. From the documents I have before me there appear to be two Certificates of Sponsorship, one dated 15 October 2015 for a Unit Manager and a second one dated 17 December 2015 for a Registered Nurse. There appeared to have been problems with using the job title of Unit Manager hence the second certificate being lodged. This latter one was successful and I was taken to an email dated 17 December 2015 confirming that the application had been successful and could start between the dates of 17 December 2015 and 18 March 2016.

19. A Home Office letter dated 12 January 2016 confirms that the claimant's application for a Tier 2 Visa had been successful. The visa application is finally granted in January 2017 and the Certificate of Sponsorship is issued by the Home Office. This document states that any visa can commence in January 2017.

20. There were then several documents which indicate that the claimant's start date was in February 2016. The Starter Form at page 107 states that the start date was 8 February 2016 and the Statement of Terms and Conditions of Employment (p108) also states that the start date was 8 February 2016. This latter document was signed by the claimant on 17 February 2016. Subsequently a reference for the claimant by the respondent states that the claimant's start date was also 8 February 2016 and the claimant did not dispute this at the time.

21. Finally, the claimant confirms that her start date for employment was 8 February 2016 in paragraph 7 of her Disability Statement (pg 152):

"They finally said I could start work on 1 February 2016 on Duncan House"

Conclusion

22. I accept that it is clear that the respondent made an offer of employment to the claimant in September 2015 and that conversations were continuing between the parties from September 2015 regarding the claimant's visa applications. It is also clear that the claimant undertook some induction training in October 2015 in the anticipation that her visa would be granted swiftly. However, this was not to be the case and I conclude, based on the considerable documentary evidence before me that the actual contract of employment did not start until 8 February 2016.

23. There is no evidence, apart from the offer letter dated June 2015 that suggests her employment could have possibly started before September 2015. It is not probable that her employment started before she applied for the role. Her email on 12 September 2015 stating that there is an error in the date of the document on page 32 confirms that it is inaccurate and confirms that this document was in fact dated September 2015. This therefore is the earliest conceivable date an employment relationship could have commenced (though I do not accept it does). With this as a starting point the claimant would still not have two year's continuous employment.

24. Although the claimant undertook some induction training in October 2015 as it was anticipated that she would have permission to work earlier, I do not accept that this constituted an employment relationship and even if it was (which I do not accept), it would not ensure that she had 2 years' continuous employment.

25. All the other documents, including the claimant's own disability statement, confirm that the employment did not start until February 2016.

26. This means that the claimant did not have the requisite two years of continuous employment necessary under s 108 ERA 1996 to bring a claim under s94 ERA 1996 and the tribunal does not have jurisdiction to hear the claimant's claim for unfair dismissal.

27. I deal with the two remaining issues before the tribunal in my Orders dated 9 October 2020.

Employment Judge Webster

Date: 9 October 2020