EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Willis-Dwyer	v	**Healthcare at Home Ltd**

PRELIMINARY HEARING

Heard at: **London South** **On: 21 February 2017**

Before: Employment Judge Elliott

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr J Chambers, solicitor**

JUDGMENT

The claim for unfair dismissal is struck out as the claimant does not have sufficient continuous service to bring the claim.

REASONS

1. This decision was delivered orally on 21 February 2017.

2. By a claim form presented on 9 August 2016 the claimant Ms Debbie Willis-Dwyer claims unfair dismissal and unlawful deductions from wages.

3. The claimant worked for the respondent as a specialist community nurse primarily in South London. The claimant said her employment commenced on 8 March 2014. The respondent said it commenced on 28 April 2014.

4. The claimant said her employment ended on 11 March 2016. The respondent said it ended on 10 March 2016.

5. The respondent is a company providing health care services in England, Scotland and Wales principally as an outsourced facility for the NHS. The respondent employs approximately 1,500 people of whom 700 are qualified nursing and medical staff. The remainder are support staff, office, administration and customer service.

The issues

6. The issue for this hearing was to decide whether the tribunal has the jurisdiction to consider the claim of unfair dismissal taking account of the length of service of the claimant under section 108 Employment Rights Act 1996.

7. Prior to this hearing the tribunal also raised with the parties the question of the time limit and whether the claimant complied with the ACAS Early Conciliation procedure. By an email dated 11 January 2017 the respondent, having seen the ACAS Certificate, conceded that the claimant appeared to have complied with the procedure. This was therefore no longer in issue.

Witnesses and documents

8. The tribunal heard from the claimant. There was no witness for the respondent.

9. There was a bundle of documents from the respondent of 54 pages and a written submission from the respondent plus two authorities. The respondent had sent the authorities and bundle to the claimant about a week before the hearing. The claimant said she had received it electronically but not in hard copy.

Findings of fact

<u>The commencement of employment</u>

10. The claimant was interviewed in January 2014 by a company called MediHome Ltd, a competitor of the respondent. Her offer letter was at page 1 of the bundle. It was an offer of employment subject to receipt employment checks including references, DBS and occupational health clearance satisfactory to MediHome.

11. The offer letter also said that the claimant would be required to attend a Corporate induction as part of a 2 week Orientation programme. There was nothing in the letter to say that attendance at the Corporate induction would be paid.

12. The claimant attended a three-day induction training in the middle of March 2014. The claimant relied in her ET1 on 8 March 2014 which was a Saturday. In evidence she said it midweek so I find that it was from about 11-13 March 2014. Uniform and equipment was provided on that training.

13. The claimant made further submissions about this after the evidence and submissions had concluded and I took this into account having also given the respondent an opportunity to make a further submission. The claimant contended after the conclusion of evidence and submissions that she was referred to in correspondence as a member of staff and that she was offered payment of expenses for attending the training.

14. I saw new starter information at page 4, giving a start date of 28 April 2014. It was signed by the claimant on 29 January 2014. I accept that the claimant did not see the date of 28 April written on the document at that time because it was not processed by HR for the respondent until 29 April 2014, the day after the claimant started her work duties in the field.

15. It is not in dispute that the claimant attended the induction course in March 2014. She performed none of her contractual nursing duties on those dates. The claimant fully accepts that her offer of employment was conditional upon the normal pre-employment checks, such as references and suitable health clearance.

16. The claimant's contract of employment with MediHome was at page 5 of the bundle. It said in relation to the date of continuous employment that this was "*to be confirmed*". I find that this was because MediHome could not confirm the start date until the conditions of employment had been fulfilled.

17. On 1 April 2014 the respondent took over the contract previously serviced by MediHome Ltd. The claimant understandably was not party to or aware of that corporate transaction. Although she had attended an induction course, she had not yet started her duties in the field, her conditions of employment had not yet been fulfilled and neither MediHome nor the respondent had any reason to keep her in the picture about the respondent taking over that contract.

18. The pre-employment checks took longer than either party would have wished. I saw some of the respondent's internal emails in relation to this. The respondent chose to continue with the pre-employment process and take on the claimant. In an internal email (page 34) dated 16 April 2014 it refers to the claimant "*waiting daily*" to start work. The claimant said she was waiting to start and it was understandably a frustrating time for her.

19. The claimant also accepts that health clearance was not obtained until 22 April 2014. This was at page 29 of the bundle. The claimant started her duties in the field on 28 April 2014 after the OH clearance had been obtained.

20. As a result of some reorganisation the respondent issued a new contract to the claimant in about September 2015. The contract was at page 43-53 of the bundle. It said in relation to the date of continuous employment that this commenced for statutory purposes on 28/04/2014. The claimant signed this contract on 2 October 2015. She accepts that she signed it.

21. There was a dispute of fact as to whether the claimant was paid for attending the training in March. She says she was. The respondent says she was not and refers to a payslip at page 39 of the bundle which the respondent says was for 28-30 April 2014, and for May and June. It was for a large sum of £5,511.12 and was clearly for more than one months' pay as the starting salary as expressed at £31,000 gross per annum (page 1).

22. I saw a timesheet submitted by the claimant for the training days in March (page 35-36). I had no evidence other than the claimant's oral evidence that she was paid for these days in March and in the absence of any payslip which evidenced payment for March, I find on a balance of probabilities that she was not paid for those days.

23. After the conclusion of evidence and submission the claimant said she wished to rely on a document on her phone inviting her to the training in March 2014 and saying that she would be paid travel expenses. The claimant accepts that the respondent asked her prior to this hearing if she had any documents that she wished to rely upon and that she did not put any forward. I asked Mr Chambers for the respondent if he wished to view the document on the claimant's phone; he did not, but wished to make a further submission and I gave him this opportunity.

<u>The effective date of termination</u>

24. For the purposes of the issue for this preliminary hearing it is not necessary for findings to be made on the merits or otherwise of the alleged breakdown in the relationship between the parties.

25. It is not in dispute that the claimant was invited to a meeting on 2 March 2016 to discuss concerns about her working relationships. She was informed that a potential outcome of the meeting could be termination of employment.

26. The claimant sought a postponement so that she could secure union representation. The meeting was postponed to 10 March 2016. On 9 March the claimant sought a further postponement on grounds that she was unwell. The claimant was given the opportunity to answer a series of 12 questions in writing. She was told that the meeting would go ahead in any event.

27. The meeting went ahead and the claimant was dismissed with pay in lieu of notice, by letter dated 10 March 2016. The claimant's case is that she received a telephone call from her union representative at 16:30 hours on 10 March 2016 informing her that she had been dismissed. I therefore find that the dismissal was communicated to her on 10 March 2016 via her representative and that this was the effective date of termination.

28. The claimant exercised a right of appeal which was unsuccessful.

The law

29. Section 108 of the Employment Rights Act 1996 (ERA) provides as follows:

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.

30. Section 97(2) ERA, in relation to the effective date of termination, provides as follows:

2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),
for the purposes of sections 108(1)…….the later date is the effective date of termination.

31. Section 230(1) provides that an "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

32. Two EAT authorities were relied upon by the respondent. The first was ***Stella v Regard Partnership EAT/0614/06*** (Birtles J) and the second was ***Smith v The International Development Co Plc EAT/1422/01.*** In ***Stella*** the claimant attended a training day on 8 April 2005 for which she was not paid and by 21 April she as on the employer's payroll but did not work any hours or receive pay until 8 May 2005 when her vetting process was complete. She submitted that her employment commenced on the training day. The tribunal found that her employment started on 8 May and she did not have sufficient continuous service to claim unfair dismissal. This was upheld by the EAT who found no error of law.

33. The ***Smith*** case held that unfair dismissal could only be claimed by an employee and that to be an employee an individual had to have entered into or worked under a contract of employment pursuant to section 230(1) ERA. The start date in work could not be earlier than the beginning of the contract of employment and to do acts merely consistent with a contract of employment would not amount to doing acts under or by virtue of the contract. In that case the employee could not have commenced work for the employer before the contract of employment began. The EAT said that the tribunal had been entitled to find that the employee did not have sufficient continuity of employment to claim unfair dismissal.

Conclusions

34. The respondent's case is that in March 2014 there was no binding contract of employment between the parties.

35. The claimant accepts that the conditional elements of her contract of employment were not fulfilled until 22 April 2014 when she received OH clearance. The claimant signed a contract on 2 October 2015 which records the date of commencement of her service as 28 April 2014. The contemporaneous new starter information was completed by HR on 29 April 2014 stating the start date in employment as 28 April 2014. The claimant said she did not appreciate the significance of signing her acceptance of 28 April 2014 as her start date, but nevertheless she signed it and did not challenge it.

36. I find that prior to 22 April 2014 there could be no binding contract of employment because the conditions for that contract had not been fulfilled. Even if I had found that the claimant had been paid for attending the March training, which I find she was not, this could not have been pursuant to the contract of employment because the contract had not yet come into existence as a binding agreement between the parties. The claimant had not entered into and was not working under a binding contract of employment in March

2014. The binding contract did not come into place until the conditions of employment were fulfilled in April 2014.

37. The respondent submitted that payment of travel expenses is not the same as pay. I agree with this submission that reimbursement of travel expenses is not the same as remuneration under a contract of employment and it does not alter my finding in this respect.

38. The ***Stella*** and ***Smith*** cases are on point with the facts of this case and I am bound by those authorities.

39. The length of notice to which the claimant was entitled under section 86 ERA is a week. This is the amount of notice which can be added on to her service under section 97(2) ERA (set out above).

40. I find that the claimant's period of continuous employment started on 28 April 2014 and ended on 10 March 2016. Even taking account of the week which could be added under section 97(2) the claimant has less than 2 years' service and accordingly she does not have the right to claim unfair dismissal.

41. The claim for unfair dismissal is therefore struck out as the tribunal does not have jurisdiction to hear that claim.

42. The claim for unlawful deductions from wages proceeds to a full merits hearing.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. With the agreement of the parties having consulted their availability, it was agreed that the full merits hearing of the unlawful deductions claim will take place on Wednesday **3 May 2017** for 3 hours commencing at 10:00am. The issues are as follows:

2. **Unlawful deductions from wages – section 13 ERA 1996**

    2.1. The claim is for payment for extra duties worked between January 2016 and March 2016 and mileage. Has the respondent failed to pay the claimant in respect of these duties and related mileage?

    2.2. The claimant said she had not yet put in a claim to the respondent for these amounts. I have therefore ordered below that the claimant give full particulars of her claim so that the respondent can consider whether the sums are due, and if so, to pay the claimant.

3. I made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Further information**

1.1. On or before **21 March 2017** the claimant is to set out and send to the respondent details of the amount claimed for extra duties between December 2015 to March 2016 and mileage claims. The claimant is to do this as a claim for expenses to the respondent. For the mileage claims the claimant shall to the best of her ability specify the journey made.

1.2. On or before **11 April 2017** the respondent shall inform the claimant as to whether all or any part of the claim is accepted and shall give reasons for any part of the claim that is denied.

2. **Disclosure of documents**

2.1. The claimant said she does not have any documents to disclose to evidence these claims. If any come to light she is to disclose them forthwith to the respondent. The tribunal may refuse to accept documents which are only disclosed on the day of the hearing.

3. **Witness statements**

3.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

3.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. The claimant shall set out in a statement the basis for any claim for extra duties or mileage which is not admitted by the respondent.

3.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

3.4. It is ordered that witness statements are exchanged so as to arrive on or before **26 April 2017**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Elliott

21 February 2017