EMPLOYMENT TRIBUNALS

Claimant: **Miss J Robson**

Respondents: **Brit-Sec Managed Services Limited (In voluntary Liquidation) (1)**
Brit-Sec Security Management Limited (In voluntary Liquidation) (2)

Heard at: **Nottingham** **On:** **Tuesday 3 April 2018**

Before: **Employment Judge Clark (sitting alone)**

Representatives

Claimant: **Mrs C Robson, the Claimant's Mother**
Respondents: **(R1) Did not attend and was not represented**
(R2) Did not attend and was not represented

JUDGMENT

1. The Claimant's claims against the second Respondent **succeed**. Remedy to be determined.

2. The claims against the first Respondent are **dismissed**.

REASONS

1. Introduction

1.1 The issues in this case were identified by Employment Judge Legard at the Preliminary Hearing held on 16 January of this year. The respondents also failed to attend that hearing. EJ Legard identified 3 matters for determination. They are:-

a. Whether the tribunal had jurisdiction to consider the validity and enforceability of the COT3 entered into between the Claimant and the first Respondent and, if so, whether it was valid or vitiated and therefore its effect on these proceedings.

b. Whether there was a relevant TUPE transfer of the Claimant's employment from the second Respondent to the first Respondent on

1 October 2017.

c. If the claims are otherwise able to proceed, whether the claimant met the definition of disabled by reference to the test set out in Section 6 of the Equality Act 2010.

1.2 There are no issues raised which go to the underlying substance or merits of the claimant's claim for the following reasons. Firstly, the first Respondent does not dispute the claim, save that it relies on the COT3 agreement to deny any jurisdiction of the Tribunal to give judgment against it on the dispute. Secondly, the second Respondent dispute's the claim only insofar as it avers there was a TUPE transfer of the claimant's employment from it to the first respondent. It raises no alternative defence going to the merits.

1.3 It follows that the determination of the relationship between the first two issues leads to this route map for the claim.

a. If I conclude there was not a relevant transfer, the Claimant remained employed by the second Respondent and it is liable for any claims that succeed, it not being a party to the COT 3 agreement.

b. If I conclude there was a relevant transfer, then the claimant's employment is with the first respondent and I have to consider the question of the status of the COT3 agreement.

c. If the COT3 is valid and enforceable, the Claimant is limited to enforcing that agreement as a contract of compromise against the first Respondent.

d. If I conclude that the COT3 agreement is vitiated or otherwise invalid so it can be set aside, the Claimant's claims proceed against the first respondent and it is liable as it otherwise does not contest the claim.

2. Preliminary Matters

2.4 The first issue is that, once again, neither Respondent has attended nor is it represented today. In his note of the hearing in January, Employment Judge Legard left them under no misunderstanding that they were required to attend. I am satisfied that they received that note of the hearing and subsequent correspondence from the tribunal. There has in the intervening period been correspondence between representatives of the Respondents and the Tribunal and the Claimant addressing various matters. In particular the first respondent has disclosed documents to be relied on at today's hearing. A Lauren Wallace, an Executive PA, sought the adjournment of the original listing of this hearing from 22 March to today's date in order for Mr Withers to be able to attend. I find it significant that Lauren Wallace has been corresponding in respect of both Respondents during the life of this claim. It is significant to note at this stage that whilst the Respondents are separate legal entities, they are clearly trading vehicles operating within the same business enterprise. They are extremely closely related. They operate from the same premises. They use the same telephone number. Officers and agents of both overlap significantly. In view of the history of this matter, I am therefore satisfied that each Respondent is aware of today's hearing and is aware of the issues to be determined. I am satisfied that their absence is deliberate, that further delay in this matter would defeat justice and that it is just to proceed in their absence.

2.5 The second issue is the current status of each respondent. It was known to the claimant that the first respondent had, at an extraordinary meeting of the members, resolved to voluntary wind up the company. Public records show that decision was reached on 13 October 2017 which is a date with substantial significance to the veracity of the evidence adduced by the respondents and considered below. Public records also show that the members of the second respondent have very recently also resolved to voluntarily wind up the company. That resolution was reached on 9 March 2018. No communication has been received by the Tribunal from the company or any insolvency practitioner to that effect. It is noted that a Brian Sidwell was the chair of the EGM meeting of members for both companies. Clearly that recent development has potential implications for the claimant. Neither respondents' status engages the moratorium on litigation.

3. Evidence

3.6 I have heard from the Claimant on oath. I have considered a short bundle running to 79 pages of documents submitted both by her and the Respondents. For the reasons already stated, I have not heard witness evidence from the Respondents. I have seen a written witness statement from a Mike Townson who does not explicitly identify which respondent he is employed by. I have considered what he would have said and the associated documentation produced although that has not been given on oath and his evidence has not been tested. More particularly, the documents that he adduces are, in large measure, without context such as an alleged subcontractor's agreement between the two Respondents which, without the benefit of evidence from the Respondent, it is difficult be sure of the relevance.

3.7 I also have the benefit of a witness statement from Mr Steve Vennai, the ACAS Conciliator who dealt with the apparent agreement between the first Respondent and the Claimant in May and June of last year. He has also produced relevant documentation. He gave his evidence on oath and was questioned.

4. Facts

4.8 I make the following findings of fact reached on the balance of probabilities so far as is necessary to reach a just resolution on the issues before me and to put them in their proper context.

4.9 The Claimant commenced employment with the second Respondent on 7 April 2016. Its business is in the provision of various forms of security guards and security services. The terms of the job offer were set out in writing. She was employed as a telesales adviser working Monday to Friday with working hours of 9:30 till 4:30 each day. That is a 35 hour working week. She was based at the Burton office. Her holidays were expressed as 28 days including Public Bank Holidays and the pay was described as a basic salary of £13,104 per annum. Her salary was said to be paid monthly on the fifteenth day after month end. The Claimant's work was office based. She was one of about twenty or so other office based staff undertaking a range of duties. As far as the Claimant is aware, those staff were all employed by the second Respondent and in the course of preparing for these proceedings, she has made further enquiries with ex-colleagues and has been told that continued to be the case. I accept her

enquiries must have been prior to the second respondent's EGM on 9 March 2018. The Respondent also engaged security guards to perform the work and satisfy the contracts it entered into. The Claimant is unable to say what employment status or terms they were engaged on other than to say that they numbered in the hundreds. It is not disputed that the claimant's employer was the second Respondent when she started, that is the Brit-Sec Security Management Limited. The contemporaneous documentation confirms that. It is significant that in the course of her duties, the Claimant represented herself to the outside world as an agent of that organisation. In particular, her e-mails contained automated signature footers which identified her as an agent of the second Respondent. I find that state of affairs remained throughout her employment. In other words, after the date of the alleged TUPE transfer, her e-mails continued to represent and hold her out to be an agent of the second Respondent and never as an agent of the first respondent. I find the nature of the Claimant's work also remained the same as did the nature of her contacts both internally and externally. There was no change in management structure or who she reported to. In fact, nothing changed as far as the claimant was concerned except for one aspect of her payslip.

4.10 Her payslips had originally identified the second Respondent. I accept the claimant's evidence that she was not in the habit of opening her wage slip promptly. I can see from the payslips before me that at some point the payslips began to show the first respondent. The format remained identical in every other respect. The earliest payslip I have seen bearing the name of the first respondent is dated December 2016. I find as a fact that sometime after it was issued on or around 15 December 2016, more likely than not a matter of weeks after, the claimant noticed the change of name on the pay slip. She made enquiries with Mr Steve Withers, who told her "not to worry about it; that it was just the fact that she was now being paid from a different account and it made no difference to her". I find Mr Withers was a senior employee or officer, but in any event an agent, of both respondents. I therefore find that the Respondent did not, at that obvious opportunity, make any mention of any TUPE transfer in explaining the reason for that change of identification in the pay slip. For reasons I will come onto, I find that to be a dishonest representation of the truth which must have been known to Mr Withers.

4.11 The claimant had originally been issued with a written contract of employment on 1 July 2016. There are two versions of this contract in the bundle, one submitted by the Claimant [page 46], the other submitted by either or both respondents [page 19]. They each bear the same date. They each have an identical final page on which the parties' signatures are shown, apparently indicating acceptance of the terms yet, in other significant respects, the two documents are fundamentally different. In the claimant's version, the rate of pay is expressed as a salary of £13,650 and hours of work as 9:30 to 4:30. In the respondent's version, the rate of pay is expressed as an hourly rate of pay of £7.20 per hour and the hours of work are said to be reduced to 9:30 to 1:30. Closer examination of the signature pages shows them to be identical save that the respondents version appears to be a photocopy of the claimant's. I accept the claimant's evidence that she had not seen the respondent's version of the contract until it was disclosed in the last few weeks for the purpose of this hearing. I find it was created to reflect a unilateral variation which her employer sought to impose in or around March 2017, to which I return later. She did not agree to it. She did not sign any documentation in relation to it. I find an agent of either or both respondents has created this document, attached a copy of the

original signature page and has represented it to this tribunal in an attempt to support a contention that the claimant accepted different contractual terms. Not only do I reject that but I find this to be a deliberate attempt to misrepresent the situation.

4.12 I note the arithmetic of the original salary offer of £13,650 equates to £7.50 per hour for 35 hours per week x 52. If and to the extent it was open to the respondent at any time to pay her by reference to an hourly rate, that is the rate the parties had contracted. Both versions of the contract identify the second Respondent as the employer.

4.13 In early 2017, the Claimant began to experience difficulties at work leading to a deterioration in managing her ill health. She has suffered with depression for approximately ten years but had always been able to manage it with various medication and medical supervision which had enabled her to hold down employment of one sort or another. Her health was, however, deteriorating and she was beginning to suffer with anxiety as well. The Claimant's GP prescribed a change in her medication. He advised her that, initially, the effect of the change was likely to result in a deterioration in her health before she saw an improvement. He advised she should take about 2 weeks off work to get through it. The Claimant did not take time off due to being fearful of the effect it would have on her relationship with her employer. That decision was to the detriment of her health. At a review with her GP 3 weeks later, he insisted that she take the time off. On this occasion, she did take two weeks off. When she returned she was subject to humiliating treatment from colleagues and managers directly related to her illness. She became the butt of jokes in the workplace and was repeatedly called by a derogatory nickname of "sick note" by her managers to her face and otherwise.

4.14 I find that, directly related to this period of absence, a decision was taken to reduce the claimant's hours of work. That was either Mr Townson or someone instructing him accordingly. He instigated a conversation with the claimant in March 2017 in which he asked her what difference it would make to her to reduce her hours to 4 hours per day. She said words to the effect that it would not be economically viable for her to continue working. In response to that, Mr Townson informed her that her hours were being reduced. All this added to the claimant's struggle with her anxiety and depression and her ill health deteriorated. She went off sick on 21 March 2017. In fact, she would remain off sick and never return to work.

4.15 A few days after going off sick, the claimant received a letter from her employer [11 & 12]. I accept the claimant's evidence that the letter enclosed two letters and that this was the first time she had seen either. The first is a letter dated 24 March 2017 from Mr Townson on headed paper from the first respondent. It is the first time that the claimant had written communication from the first respondent. It refers to the earlier discussion on 21 March and, amongst other things, the intention to reduce the claimant's hours. It purports that the full time hours she had been working were only ever temporary. The second letter enclosed was dated 13 October 2016, again on the first respondent's headed paper. It purports to notify her that as of 1 November 2016 she would be employed by the first respondent, a date that Mr Townson would have repeated in his had he attended. It states that she will not be issued with any new terms and conditions as her existing terms will be honoured. That letter does not refer to any TUPE transfer, it simply asserts a unilateral change of employer. The

dates in that letter concern me gravely. It is written on the same date that the first respondent resolved to wind up the company and suggests the claimant would become an employee of it not only at a later date when the company was no longer under the control of its directors, but not at the date that both respondents have pleaded in their ET.

4.16 This correspondence arises at a time after the Claimant has commenced a period of sickness absence from which she would in due course not return. In fact, it seems to me that these all tie in so closely with the circumstances of her earlier sickness absence that I draw an inference from the timing and circumstances that all these matters were brought together at this time in order to engineer a situation whereby the Claimant would leave the employment of the Brit-Sec organisation, whichever of its constituent entities actually employed her. I further find that this was a long standing state of affairs and that the decision that she be employed by the first respondent from 1 November 2016, whatever its actual legal effect, must have been made in the knowledge that company was being wound up.

4.17 Whilst I have not heard witnesses for the Respondents, I have considered so far as I am able to, the documentation that was submitted in order to understand as far as possible the evidence before me and how the respondents would put their case in the context of their assertions that there was a TUPE transfer. I start with their respective cases asserted in their extremely brief ET3 responses. Both assert a transfer took place on 1 October 2016. The inconsistency with the letter of 13 October 2016 which stated the claimant would be employed by the first respondent from 1 November is immediately apparent. It seems highly unlikely there could be errors about such a significant event. This is not a mistake, either the ET3 or the letter is an untrue statement of the facts.

4.18 I accept the Claimant's evidence that there was no discussion, no consultation and no information provided around the time, whether that's October or November or at any time in respect of any transfer of her employment under the auspices of the TUPE Regulations.

4.19 I then turn to the documentation relied on to evidence the TUPE transfer. That includes a subcontractor's contract. It is said to be an agreement between the two Respondents and is signed on 25 July 2016 by Mr Kane on behalf of the second respondent and a Brian Sidwell on behalf of the first Respondent. Heis the same person who chaired the members meetings for both companies resolving that they be wound up voluntarily. In the absence of witnesses or further evidence, it is difficult to see exactly how this alleged subcontractor's agreement fits into the issues in this case and what effect if any it has or could have had on the Claimant's employment. I presume it is intended to say the claimant was assigned to this outsourcing agreement but it doesn't say that. Firstly, the services covered by this agreement are set out as being "those set out in the order confirmation", which I have not seen and, therefore, have no idea of what nature of activity the subcontractor is said to perform for the principle. Secondly, it has been subject to various revisions, the earliest of which seems to be 4 April 2013 and it was signed around 15 or 16 months before the alleged transfer all of which leaves me with some doubt that this is a document which gave rise to any particular change to the claimant's employment in or around October or November 2016. If, as I presume, this is said to be the foundation of a first generation service provision change, it is odd that it does not appear to make reference to the transfer of staff employed by the outsourcing

company to the subcontractor.

4.20 The first respondent relies on various time sheets said to be completed by the Claimant which it says shows she was aware as early as 7 November 2016 that her employment was in fact with Brit-Sec Managed Services. Within the bundle of documents starting at page 64 there is a time sheet. It does bear the Claimant's name and it is headed with Brit-Sec Managed Services. I accept the Claimant's evidence that the system of recording times was for her to enter it on an excel spreadsheet. Other staff would use it. That one simply overwrote whatever was already there, leaves the possibility of others overwriting in a similar manner. On some occasions, the claimant had to overwrite the employer which was said to be Enterprise Limited, apparently another trading company within this business. She does not recall entering the name of the first respondent only ever the second respondent and I accept that.

4.21 I find the entities operating within this business enterprise operate so closely that the lines between them are extremely blurred. I am satisfied that the respondents and Enterprise Ltd, if that still exists, are unlikely to be the only entities operating or that have operated within this business and I find it more likely than not that those in control of these legal entities have little regard for the legal boundaries between them. As to the alleged transfer on October or November, I have been given no information on which I can determine what entity allegedly transferred, anything about its identity, whether that was retained after the alleged transfer and whether or not the claimant was assigned to that entity or grouping. On the contrary to the respondents' case, I find that what happened in or around November 2016 was merely a unilateral assertion by those in control of both respondents that the first respondent was now the claimant's employer. The fact this was done at a time when the first respondent was known to be being wound up leads me to infer that those in control were content to see the claimant's employment come to an end and in circumstances where she would have no prospect of redress for the manner in which it ended.

4.22 Returning to the chronology, on 13 April 2017 the Claimant contacted ACAS through the early conciliation process to raise a dispute with her employer about the events of early 2017. She did so naming the second Respondent as the employer. I find that the second Respondent engaged with that process, which one might think odd if there had in fact been a TUPE transfer the previous year. Mr Withers, on behalf of the second Respondent entered into a series of e-mails with the conciliator Mr Vennai. In the course of those e-mails, it can be seen that Mr Withers was holding himself out as an agent of the second Respondent. As a result of those e-mails going between all three parties, a settlement agreement was reached and it was originally reached in the name of the second Respondent.

4.23 It was only when Mr Vennai was drafting the final agreement that Mr Withers sought to change the name of the employer in the COT3 to that of the first Respondent. He did not mention a TUPE transfer or otherwise explain the reason for that. Instead, he simply asserted that the correct name of the employer was that of the first respondent. That happened on 17 May 2017 and appears in notes 21 and 22 of Mr Vennai's evidence. The ACAS officer did change the COT3 agreement but did not tell the Claimant. There was no explanation or discussion and I find that she did not notice that that change had occurred until after she had in fact signed the agreement. She had, before then, already indicated her agreement to the terms of the settlement and Mr Vennai

explained, correctly in law, that the agreement was formed and binding at the moment of that earlier verbal consent. Notwithstanding this change in the COT3, the early conciliation certificate that Mr Vennai was working under continued to record Brit-Sec Security Management Limited as the prospective Respondent. That was never changed and appears on when the EC certificate was ultimately issued on 27 May, by then about a week or so after the COT3, it continued to show the second respondent.

4.24 Had the agreement been honoured, I suspect that would have been the end of the matter. However, it was not. The agreed date for payment came and went. The claimant then realised that the name of the employer had been changed. She contacted the first respondent threatening enforcement. She commenced High Court enforcement against the named party to the agreement only to discover that it had been put into voluntary liquidation and was without any assets. She sought advice from ACAS and challenged why the name of the respondent had been changed. She was advised that all she could do was bring a claim against both and put the matter before an Employment Tribunal.

4.25 I turn now to the claimant's disability. It may be moot as to whether this is a live issue at all between the parties, having regard to the nature of the responses entered by each Respondent. Nevertheless, it is a matter that the Tribunal would need to have some understanding of in order to determine remedy.

4.26 Much of the evidence before me comes from the claimant herself. I have seen a letter from her GP setting out her recent medical history. I have already found that the claimant has been under treatment for depression for approximately 10 years. She has during that time been prescribed various forms of medication and at various doses. She has in the past experienced suicidal ideation and her GP medical supervision has been constant throughout that period. She had never previously been on medication for anxiety and, despite some acute episodes, her condition was well enough managed by medication and she has until recently been able to maintain employment of one sort or another. Since the events at work in early 2017, she is now on the highest dose of medication open to her and being treated for her anxiety by medication as well. The effect of the impairment of depression and anxiety is that she is constantly lethargic. In fact, today she explains that she has taken an entire day's worth of medications in order to bring herself to be able to attend the Tribunal building. She is about to embark on CBT counselling in the next week or so. Even looking back to the material time, her day to day activities were restricted even with the benefit of the medication. She didn't go out of the house unless she absolutely needed to. She was reluctant to engage in conversations unless she had to. She didn't undertake her own shopping. Her socialising was limited to visiting her mother who lives nearby. She had lengthy sleep patterns which interfere with her normal daily routine. That is how she describes her day to day activities with medication. Without medication, she describes her circumstances as being horrendous and that she would probably not be here today by which she means something far more serious than that she simply wouldn't have been able to attend this listed hearing. There is a history of suicidal ideation. The effect of the anxiety compounds her depression and when asked whether she had good days or bad days her description in response was that she has bad days and worse days. Her ability to care for her son in organising normal household activities would be seriously affected were it not for the assistance she obtains from her mother and cousin.

Discussion and Conclusions on the Issues

5. The TUPE Issue

5.27 In preparation for this hearing I reviewed the law on relevant transfers and service provision changes and the guidance contained in cases such as *Cheeseman v R Brewer Contracts Ltd [2001] IRLR 144*. In view of my findings of fact, the legal analysis usually required of a disputed TUPE transfer falls away for the following reasons.

5.28 I am satisfied beyond doubt that the claimant was initially employed by the second respondent. She believes that this continued until the employment ended It is the respondents that assert a relevant transfer took place between them on 1 October 2017 and the burden of showing that, evidentially if not legally, therefore necessarily rests with them. Neither has chosen to attend. That burden is therefore, one that they simply have not discharged, even taking into account the documentation that has been submitted. What little evidence there is before me is confused about the date of any transfer and does not identify the necessary facts from which either form of TUPE transfer could be found. There is no contemporaneous documentation supporting a transfer. What documentation there is does not refer to TUPE. There was no consultation or information given to the claimant. The fact that the first respondent's members were to resolve to wind up the company on 13 October 2016 casts grave doubt over the honesty of what has been averred by the respondents.

5.29 But even if it were not a case of the respondents failing to discharge a burden, I am satisfied that what actually happened was no more than a unilateral assertion of a new contract with a new employer. Such a unilateral assertion has no legal effect to transfer the employment. The other party must agree, there must be some prior or collateral agreement for novation, or the original contractual relationship be subject to some operation of law, such as occurs under TUPE. The claimant did not agree. There was no agreement and no operation of law. To the extent that it may be said that the claimant accepted by performing her duties after discovering the change in name on her payslip, any such agreement to be inferred would be vitiated by the misrepresentation by Mr Withers that this was merely a change of bank account. The reality is that this was all part of a deliberate attempt to put the claimant on a path that would remove the claimant from the business.

5.30 I therefore reject the contention that there was a TUPE transfer. The result of that conclusion is that the claimant was, at all times and only ever, an employee of the second respondent.

6. The COT3 Issue

6.31 As with the TUPE issue, the potential legal issues that could arise fall away on these findings. Whilst I am in no doubt that there is power for the tribunal to consider the common law implications of the validity of a COT3 agreement (see *Greenfield v Robinson 1996 EAT/811/95*) and, without concluding the matter, I have grave concerns about whether the actions of Mr Withers can be said to have been in good faith in respect of the manner in which the COT3 came to be formed between the two parties, the fact is I no longer have to resolve this matter. The COT3 is relied on by the first respondent. It is

an agreement between it and the claimant. The first respondent was not the employer. There is no agreement between the claimant and her actual employer, the second respondent. The COT3 therefore simply does not operate to prevent the claimant bringing this claim against the second respondent.

7. *The Disability Issue*.

7.32 I approach this having regard to s.6 and schedule 1 of the Equality Act 2010 as further informed by the 2011 guidance on the definition of disability and also the relevant authorities, in particular *Goodwin v The Patent Office [1999] IRLR 4*.

7.33 There is no doubt that the claimant has a mental impairment. The impairment itself has lasted substantially longer than 12 months and I am satisfied that the adverse effects of that impairment are equally long lasting. The nature of the effects of those impairments on her ability to carry out normal day to day activities is substantial, not only by reference to the interpretation of the statutory meaning of "substantial" but by any measure. I am satisfied that the effects would be substantially worse were it not for the treatment that he claimant has received by way of medication and support. The recurring suicidal ideation represents particularly low periods from time to time. In my judgment, the prospect of an intrusive thought process which considers taking one's own life cannot be described in any other way than a substantial adverse effect on the ability to carry out normal day to day activities.

7.34 I am therefore satisfied that the claimant was at all material times disabled within the meaning of the Equality Act 2010.

8. **Conclusions**

8.35 The consequence of these conclusions is that the claims brought against the first respondent must fall away.

8.36 Equally, the claims proceed against the second respondent. The question then is where that next takes the claim. There are two significant factors before me. The first is that the claims now do not face any pleaded defence on the underlying merits, the TUPE issue having now been determined against the second respondent. The second is that, in the particular circumstances of this case and the close practical relationship between the two entities, it seems to me it is relevant to take into account the fact that the first respondent did not dispute the claim on its merits. Notwithstanding the separate legal entities involved, the very specific facts of this case lead me to the conclusion that it is appropriate to enter judgment for the claimant and for remedy to be determined at a future hearing. All remedy and orders will be open to the Tribunal including consideration of its powers to impose civil penalties.

_____

Employment Judge Clark
Date 6 April 2018

JUDGMENT SENT TO THE PARTIES ON

09 April 2018

.....

.....
FOR THE TRIBUNAL OFFICE