EMPLOYMENT TRIBUNALS

Claimant:	Mr S T Anajemba
Respondent:	(1) Brit Sec Limited
	(2) Sidwell Regenerations Limited (formerly Brit Sec Staff Services Limited) (In Liquidation)
Heard at:	Reading **On: 31 July 2020**
Before:	Employment Judge Gumbiti-Zimuto
Appearances	
For the Claimant:	Considering the papers, the parties did not attend
For the Respondent:	Considering the papers, the parties did not attend

JUDGMENT

The respondent, Brit Sec Limited, is ordered to pay the sum of £16,191.47 to the claimant.

REASONS

Background

1. In a claim form presented on the 16 October 2018, after a period early conciliation from 21 August 2018 to 5 October 2018, the claimant complained of unfair dismissal and race discrimination against the respondent described as "Brit Sec Security Limited". The claimant had been employed as a security guard from 16 February 2016 until 19 July 2018.

2. In section 8.2 of the ET1 that claimant stated:

> *"I am making a claim against unfairly dismissed (sic) I was dismissed from my job on Thursday 19 July 2018 with immediate effect.*
>
> *I was dismissed from my job in a harsh manner. My employer refused the CCTV recording evidence that could have saved my job despite working over 2 years my contract was terminated without notice.*

My employer did not follow the company's formal disciplinary process. No warning was give (sic) but a(sic) immediate dismissal.

I was discriminated against on the grounds of my race. I believed that I was discriminated against due to my dread lock hair."

3. In a response received on 4 January 2019 Brit Sec Limited stated that the claimant was not employed by Brit Sec Limited. In section 6.1 of the response form it was stated: "Mr Sam Anajemba is not, or has never been employed by Brit Sec Limited, we ask for his claim to be removed. It is our belief that Mr Anajemba is/was employed by Brit Sec Staff Services prior to his dismissal."

4. This response was presented outside the time allowed by rule 16 of the Employment Tribunals Rules of Procedure, in accordance with rule 18 the response was rejected because it was presented late. Following email correspondence between the Lauren Wallace and employment tribunal a hearing to consider an application for a reconsideration took place on the 15 August 2019.

5. Mr David Kane attended the hearing and identified himself as a Director of Brit Sec Limited and confirmed the address for service of documents on Brit Sec Limited Kane as Granary Wharf Business Park, Wetmore Road, Burton-On-Trent, England, DE14 1DU.

6. The application for a reconsideration was postponed to be considered on the papers, I gave directions and made orders which included the following:

"3.*By no later than 4pm on the **12 September 2019**, the first respondent is to send to the Tribunal and copy to the claimant a statement, containing a statement of truth from the maker of the statement, setting out the facts or circumstances on which the first respondent relies in support of its application to set aside the decision to reject the response. The statement must explain the basis for concluding that the decision to reject the response was wrong.*

*4.By no later than 4pm on **12 September 2019**, the first respondent is to send to the tribunal a draft of the grounds on which the claimant will rely in defence of the substance of the claimant's claim.*

5.Unless the first respondent complies with paragraphs 3 and 4 above the first respondent's application for a reconsideration of the decision to reject the response will be dismissed.

6.Upon the first respondent complying with paragraphs 3 and 4 above the Employment Judge will give a determination on the respondent's application for reconsideration."

7. I also made an order that Sidwell Regenerations Limited is added as a second respondent and directed that the claim for is sent to Sidwell Regenerations Limited at its registered office also to an address c/o of Brain Anthony Sidwell.

8. There has been no response from Sidwell Regenerations Limited now in liquidation.

9. The case was listed for a full merit hearing on 27 and 28 May 2020, further orders dealing with disclosure, the preparation of a trial bundle and the exchange of witness statements were made.

10. I gave written reasons for making the said orders and directions. In paragraphs 34-38. I stated as follows:-

> *"34.First Mr David Kane was during the relevant part of the claimant's employment a director of both companies. The draft response presented by the first respondent was sent to the Tribunal by Lauren Wallace who describes herself as "Personal Assistant to David Kane". Mr David Kane told me that Lauren Wallace was in fact employed by both Brit Sec Limited and Brit Sec Staff Services Limited. I have seen copies of correspondence and emails which show Lauren Wallace also described as "Head of Human Resources" on an email from an email address "lauren.wallace@brit-sec.co.uk" and as "Executive PA" in correspondence from the "Brit Sec Staff Services Ltd." Mr David Kane described Brit Sec Staff Services as a company that was "set up to subcontract work to multiple security companies" and that Brit Sec Limited "subcontract all work we had to Brit Sec Staff Services".*
>
> *35.In the circumstances it appears to me that Brit Sec Staff Services Limited, if it is truly an independent and separate entity to Brit Sec Limited, is an entity which may be liable to the claimant arising from his dismissal. I am satisfied that they are associated companies for the purposes of Employment Rights Act 1996 in that* ***both companies are controlled by the same (or substantially the same) individuals****. In circumstances where for the reasons I set out below it is not clear who the claimant's employer is I am satisfied that the appropriate course is to join both companies as respondents in these proceedings as the first respondent (Brit Sec Limited) and second respondent (Brit Sec Staff Services Limited).*
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> *36.In its proposed response the first respondent stated that the claimant "is not or has ever been employed" by the first respondent. Mr David Kane explained that the claimant was first employed by a Ocean Securities (UK) Limited (the claimant showed me a contract of employment with Ocean Securities (UK) Limited). The claimant and Mr David Kane agree that the claimant was transferred from the employment of Ocean Security Limited to either, Brit Sec Limited, according to the claimant, or Brit Sec Staff Services Limited, according to Mr David Kane.*
>
> *37.Mr David Kane's position appears at first sight difficult to maintain as there is correspondence which on my interpretation makes clear that Mr David Kane wrote to the claimant on the 26 September 2017*

> *confirming that the claimant's employment had transferred pursuant to TUPE. Mysteriously, Mr David Kane suggests that there is no indication to whom the claimant's employment transferred. In fact, while there is no reference to Brit Sec Staff Services Limited, there is reference to "Brit Sec Limited" and "Brit Sec". The letter includes the following: that Brit Sec Limited have acquired the business of Ocean Securities (UK) Limited; welcomes the claimant "on board"; informs the claimant that "within the next few weeks you will see some of the management team of Brit Sec; it welcomes the claimant to Brit Sec.*
>
> *38.On the other hand, Mr David Kane says that the business obtained from Ocean Securities (UK) Limited was subcontracted to Brit Staff Services Limited. It was not clear to me what this means to the claimant's employment. It was clear Mr David Kane considers that the claimant's employment transferred to Brit Staff Services Limited. The claimant produced pay slips which refer to Brit Staff Services Limited and not Brit Sec Limited. However, the claimant says that he was never told by anyone that his employment transferred from Brit Sec Limited to Brit Staff Services Limited. I am satisfied that there is a serious issue to be decided as to who the claimant's employer was."*

11. Regrettably the judgment is not clear as to the identity of the second respondent which is referred to as Brit Sec Staff Services Limited in the title of the claim and as Sidwell Regenerations Limited in paragraph 8 of the case management summary and orders. Clarification can however be found in list of issues which explains that on 18 June 2018 Brit Sec Staff Services Limited was renamed Sidwell Regenerations Limited.

12. Mr David Kane is or was a director of Sidwell Regenerations Limited, Brit Sec Staff Services Limited and Brit Sec Limited.

13. In a judgment sent to the parties on the 7 October 2019 Brit Sec Limited's application for a reconsideration of the decision to reject the response was dismissed. At the time of making my decision on the reconsideration application I did not have before me an email and attachments sent to the Tribunal by Lauren Wallace, Head of Human Resources, on behalf of Brit Sec Limited by email sent at 11.07 on the 12 September 2019.

14. The 12 September 2019 email contained a draft response and various documents relating to the events surrounding the dismissal of the claimant.

15. Having had the opportunity to consider the documents provided I informed the parties that my decision to refuse the application for a reconsideration was not going to be reopened for the following reasons:

> "*The information provided by the respondent does not show, so that I can be satisfied, that there was any timely action taken but the respondent to defend the claim. The computer screen print does not show that anything was posted on 7 December 2018. The response*

form received with the email of the 12 September 2019 is not the same as the response form sent to the Tribunal on 28 January 2019. The position put forward in the new response is inconsistent with the account given by Mr Kane at the reconsideration hearing. At the reconsideration hearing Mr Kane stated that the respondent was unaware of the circumstances or background to the claimant's dismissal because he was employed by another the legal entity."

16. The final hearing listed to take place on the 27 and 28 May 2020 did not take place due to the Covi-19 pandemic. A preliminary hearing took place by telephone on 27 May 2020. The claimant attended the respondents did not. The claimant was ready to proceed and wanted to proceed. I explained to the claimant that I could not make any final determination in his claim on that day because the final merits hearing had been postponed and the hearing was taking place to consider how the case could be dealt with.

17. The claimant agreed that he was content that the proceedings could take place without his attendance at a hearing. With the agreement of the claimant, and in the respondents' absence I made the following orders:

"2. Relisting

*The hearing of this matter is re-listed to take place at the **Reading Employment Tribunal** on the **22 July 2020**. The parties… must not attend at the hearing. The hearing will take place by way of consideration of the Employment Tribunal file and any further documents provided to the Employment Judge in accordance with this order. The parties may apply for the hearing to take place by telephone or CVP (a HMCTS digital platform similar to skype).*

3. Case management orders

*3.1 By no later than the **10 June 2020** the claimant is to send to the respondent and the to the Employment Tribunal a witness statement on remedy. The statement must include a schedule of loss and set out the basis upon which the claimant seeks an award for injury to feelings.*

*3.2 By no later than the **24 June 2020** the respondents have permission to send any written submissions they wish to make in reply to the claimant's witness statement on remedy, including any application that the hearing on the 22 July 2020 take place by way of a remote hearing on the telephone or CVP.*

…

4.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible."

18. There has been no application made by the parties for a hearing by telephone or to take place remotely or in person with the parties attending at the

employment tribunal. The second respondent has not been in contact with the employment tribunal since the 12 September 2019.

19. The issues in this case were set out in the case management summary, sent to the parties on 18 September 2019, following the reconsideration hearing on the 15 August 2019.

Employment status

20. It was accepted on the 15 August 2019 that the claimant was employed from 16 February 2016 until dismissal on 16 July 2018. On the 18 June 2019 Brit Sec Staff Services Limited was renamed by resolution to Sidwell Regenerations Limited. On 23 July 2019 Sidwell Regenerations Limited went into voluntary liquidation. It was also accepted that at the time of the claimant's dismissal he was either employed by Brit Sec Staff Services or Brit Sec Limited. The dispute was which of the two entities was the claimant's employer.

21. In determining this issue I have regard to the information provided by the respondent in the rejected response received on the 4 June 2019, in the information given to me by Mr David Kane at the hearing on the 15 August 2019, in the documents provided by the respondent attached to the email of the 12 September 2019, and in the claimant's statement dated 19 July 2019 and documents provided to the employment tribunal by the claimant on 29 July 2019.

22. The claimant states that he was initially employed by Ocean Security and then his employment transferred to Brit Sec Security. The claimant also produced a letter from David Kane to the claimant dated 26 September 2017. The letter states that "*Brit Sec Limited*" have acquired the business of Ocean Securities (UK) limited. The only written contract provided to the claimant had been provided to him by Ocean Security The letter includes the following: *"I would like to take this opportunity to welcome you on board, and I hope we have a long and mutually beneficial relationship… Your employment is protected under an act of parliament which was brought into statute for exactly reason. You are protected under TUPE."* The claimant understood from this letter, and it is in my view a reasonable interpretation of the letter, that his employment had transferred to Brit Sec Limited. The claimant was never given any written or oral notification that his employer was to be Brit Sec Staff Service Limited rather than Brit Sec Limited.

23. The claimant produced correspondence relating to his disciplinary process. The correspondence is a letter from Lauren Wallace to the claimant inviting him to attend a disciplinary hearing on 12 July 2019, the letter is on Brit Sec Staff Services Limited headed paper and Lauren Wallace signs of as Executive PA; there is also a letter of dismissal from Phillip Scattergood, Quality and Compliance Director - this is also on Brit Sec Services Limited headed paper, the letter informs the claimant that any appeal should be made

to Mr David Kane; a letter of appeal against the dismissal from the claimant to Mr David Kane addressed to "Brit Sec Staff Services" (dated 24 July 2018).

24. In the rejected response of the 4 January 2019 Brit Sec Limited stated that the claimant *"is not or has ever been employed by Brit Sec Limited."* At the hearing on the 15 August 2019 Mr David Kane stated that Brit Sec Staff Services Limited was a separate entity from Brit Sec Limited. Mr Kane stated that *"we* [Brit Sec Limited] *subcontract all work we had to Brit Sec Staff Services Limited*". The pay slips provided to the claimant were from Brit Sec Staff Services Limited.

25. It is of note that the rejected response of 4 January 2019 was sent to the employment tribunal attached to an email from Lauren Wallace. Lauren Wallace describes herself as "Head of Human Resources" in the email which comes from "Brit Sec". In corresponding with the claimant about his dismissal Lauren Wallace described herself as "Executive PA". The Address for Brit Sec Limited and Brit Sec Staff Services Limited was the same address at Granary Wharf Business Park. Mr David Kane was a director of both companies. Lauren Wallace carried out work on behalf of both companies.

26. Together with the draft response sent on the 12 September 2019 the Brit Sec Limited produced documents which relate to the disciplinary process which resulted in the claimant's dismissal. This included a complaint made by Matthew Bloom, email from Steve Austin (who I believe was the claimant's line manager) to Lauren Wallace, copy of an incident log dated 23 May 2018, notes of disciplinary investigation hearing on 19 July 2018 and the claimant's dismissal letter.

27. The evidence before me leads me to conclude the following: (i) the claimant's employment transferred from Ocean Securities (UK) Limited to Brit Sec Limited; (ii) Brit Sec Staff Services Limited was set up to "subcontract work to multiple security companies" and Brit Sec Limited "subcontract all work Brit Sec Staff Services Limited"; (iii) there is no evidence of the claimant's employment transferring from Brit Sec Limited to Brit Sec Staff Services Limited; (iv) the management of the claimant's employment was carried out by Brit Sec Staff Service Limited including pay roll and disciplinary process; (v) the relevant people behind Brit Sec Limited and Brit Sec Staff Services Limited were the same in particular Lauren Wallace and David Kane; (vi) the claimant was employed by Brit Sec Limited at the time of his dismissal.

Unfair dismissal claim

28. Before making an award for unfair dismissal I have to be satisfied that a determination can properly be made on the claimant's claim of unfair dismissal. The claimant's account of reasons for his dismissal is found in paragraph 3 of his short statement:

> "*I was on duty one day when one of the resident (sic) in my place of work asked to use the phone, I asked him the nature of the call*

(emergency or calls to benefits office). The resident informed me that he wanted to call his girlfriend of which I informed him that under the house policy no such call is allowed. He started to call me names, threaten to have done away with and then suddenly became very aggressive towards me. I was left with no option but to call the police. Police arrived and escorted the resident out of the premises. I left a report for my manager about the incident. The next thing I know I was fired."

29. The claimant in his appeal letter referred to the failure of the respondent to consider a 25 Minute video of the incident for which he was disciplined; that the complainant threatened to kill the claimant and used racially abusive language towards the claimant; that the video would have shown the claimant trying to calm the complainant down; that the police attended and excluded the complainant from the building. The respondent did not allow the claimant to have an appeal.

30. What was the reason for the dismissal? The reason stated by the respondent was that the reason for dismissal was the claimant's misconduct. That is a potentially fair reason for dismissal under section 98(2) Employment Rights Act 1996.

31. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer? The claimant's account of the incident is credible, and he had evidence to support his account in the form of a video of the recording of the incident- I have not seen the video recording. The claimant's account of what the video would have shown is set out above. In those circumstances I am of the view that dismissal was not within the range of responses of a reasonable employer. The dismissal of the claimant was unfair.

32. Did the claimant contribute to the dismissal by culpable conduct? The evidence that the claimant would have produced does not justify dismissal and does not indicate that the claimant's conduct was culpable in the incident. There would be no basis for reducing the award of compensation.

Section 13 Equality Act 2010: Direct discrimination because of race

33. I also have to be satisfied that a determination can properly be made on the claim for direct discrimination because of race. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely by dismissing the claimant. It is accepted that the claimant was dismissed.

34. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has identified evidence to show that the dismissal was unfair. The claimant has not identified evidence to show that he was treated less favourably than a comparator. The claimant's evidence, in my view, amounts to an assertion

that he was not believed in circumstances where had proper enquiries been made, he would have been believed. A like for like comparator that allows a comparison to be made on racial grounds has not been provided. Race does not appear to be an obvious factor in the circumstance, the events are not race specific. The claimant has not shown less favourable treatment.

35. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? Section 136 (2) Equality Act 2020 provides that If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. This does not apply where A shows that he did not contravene the provision. In this case I am not satisfied that the claimant has shown that there are facts from which the Tribunal could properly and fairly conclude that any difference in treatment was on the grounds of race.

36. The claimant on the information provided has not shown that he was dismissed because of his race.

Failure to comply with code

37. By section 207A Trade Union & Labour Relations (Consolidation) Act 1992 a failure on the part of a person to observe any provision of a Code of Practice which applies to the proceedings the Tribunal may increase of decrease an award of compensation by up to 25% if it considers it just and equitable in all the circumstances. In this case the claimant appealed the claimant's appeal was not considered by David Banks. There is no explanation given for the failure. In its initial reply to the claim the respondent stated that it did not employ the claimant and while it was well aware of the circumstances involved in the claimant's case failed to provide any explanation for it conduct in dismissing the claimant. This is a case where there is the aggravating feature of the respondent hiding behind supposedly different corporate identities with what is, in my view, a desire to defeat the claimant's claim by obscuring part of the picture. The respondent could have presented a defence to the claimant's claim setting out the facts on which it relied to support the contention, in my view wrong but arguable, that the claimant was employed by the Brit Sec Staff Services Limited and not Brit Sec Limited. While there is a distinct legal difference between the entities, in human terms, that is in terms of the people who operate the companies on a day to day level and who was aware of what was happening on the ground at the relevant time, there was no difference between them. I consider that an uplift of 25% would be justified in this case.

38. Does the code of practise apply? The code of practise applies to disciplinary proceedings for conduct. The claimant was dismissed for alleged misconduct. He was entitled to an appeal. There was no appeal. This a breach of the provision of the code of practice on disciplinary and grievance procedures at

paragraph 26-29 which requires an employer to give an employee an opportunity to appeal.

Failure to give statement of employment particulars

39. Section 38 of the Employment Act 2002 provides that an award of compensation shall be increased by the higher amount or the lower amount where the employer has failed to provide particulars of employment in accordance with section 1 and 4 of the Employment Rights Act 1996. The higher amount is four weeks' pay the lower amount is two week's pay. This is a case where in my view there are aggravating features and therefore, I consider that an award of compensation of 4 weeks is appropriate.

Basic award

40. The claimant's was paid £2067.60 before tax a month (taken from the claim form). The claimant's gross weekly pay is £477.14. The claimant was 38 years old at the date of his dismissal. The claimant's employment lasted two complete years the claimant is therefore entitled to a basic award of £954.28.

Compensatory award

41. The claimant was out of work for 6 months. His net monthly earnings, i.e. after deductions was £1650.21 (taken from the claim form). His loss of earnings in that period is therefore £9,901.26.

42. The claimant claims holiday pay in the sum of £2321.40, in his schedule of loss. However, this is not a loss at all. The claimant is setting out the amount that he would have been paid in holiday pay in the period of twelve months from 1 April to 31 March. The claimant is entitled to claim in respect of a loss. The claimant would have been entitled to claim in respect of any holiday accrued and not paid on termination of his employment but his is not claimed. I therefore do no make any award in respect of holiday pay.

43. The claimant is entitled to two weeks' notice pursuant to section 86 of the Employment Rights Act 1996. I therefore make an award of £761.64 in respect of notice pay.

Race discrimination

44. I am not satisfied that the claimant has shown that he has suffered any loss as a result of discrimination on the grounds of his race as the claimant in my view has not been able to show that he was discriminated against on the grounds of race for the reasons explained above. I make no award in respect of injury to feelings.

Award for unfair dismissal

Basic award: £954.28

Compensatory award:

Loss of earnings	£9,901.26
Notice pay	£761.64
Section 207A Award	£2,665.73
Section 38 Employment Act 2002	£1,908.56
Total award:	£16,191.40

Employment Judge Gumbiti-Zimuto

Date: 31 July 2020

Sent to the parties on:7/9/2020

For the Tribunals Office

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