EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Noel	**v**	**Lyreco UK Ltd**

Heard at: Watford **On**: 30 November 2020

Before: Employment Judge Alliott

Appearances

For the Claimant:
For the Respondent:

JUDGMENT

1. Upon the claimant's application to amend his claim to add the matters set out in italics at paragraphs 5.3 and 5.4 of the Order of EJ Heal made on 27 April 2020:

   1.1 The application to amend is granted.

2. Upon the respondent's application to exclude evidence on grounds of privilege or s.111A ERA 1996:

   2.1 No order is made. The issue is to be determined at the full merits hearing.

3. Upon consideration of the issue that the claims were presented out of time or prematurely:

   4.1 No order is made. The issue is to be determined at the full merits hearing.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The preliminary hearing listed for 4 January 2021 is vacated.

2. The time limit for the respondent to present a draft amended response to the tribunal and the claimant in paragraph 1.8 of the Order of EJ Heal dated 27 April 2020 is extended to **4pm on 31 December 2020**.

REASONS

1. Following a telephone preliminary hearing on 27 April 2020, Employment Judge Heal directed as follows:-

> "There will be a preliminary hearing listed for one day on 4 January 2021. If necessary, this will be used to determine the claimant's application to amend the claim form, the respondent's application to exclude evidence on grounds of privilege or s.111A, and/or any issue that claims were presented out of time or prematurely."

2. Provision was made within the Case Management Orders for both parties to submit written submissions on their applications and in response to each other's applications. I record here that I have read all these documents.

3. The Case Management Order went on to state:-

> "Unless the parties notify the tribunal otherwise on or before 19 June 2020 the tribunal will rule on both the applications on paper."

4. No such notification has taken place. In an email dated 6 November 2020 the respondent's representatives confirmed that the parties were awaiting a determination on paper. Accordingly, I have determined these matters on the papers.

Amendment

5. The proposed amendment is as follows:-

> "5.3 Was the respondent in fundamental breach of contract in that:
>
> 5.3.1 The respondent purported to dismiss him on 6 February 2019? The respondent told the claimant that there was no place for him in the respondent company.
>
> 5.3.2 The respondent convened a disciplinary process.
>
> 5.3.3 The respondent's purported attempt to reinstate the claimant in the respondent company was a sham.
>
> 5.4 Did the claimant resign in response to such breach as he may prove? The respondent says that the claimant was dismissed before his resignation.
>
> 5.5 Did the claimant waive such breach as he may prove?"

6. In paragraph 8 of the claim form the claimant has pleaded that he was dismissed at the meeting on 6 February 2019. In paragraph 11 the claimant

has pleaded that he had been informed that he was no longer to be involved with the business. In my judgment the facts asserted in the proposed amendment 5.3.1 have already been pleaded. The inclusion of the word purported does not present a new factual allegation in that it is the respondent's case that the claimant was not dismissed on 6 February 2019.

7. In paragraph 14 of the claim form the claimant has pleaded the respondent's proposition that the claimant remained in employment. In my judgment the claimant does not need permission to amend his claim to include this factual allegation.

8. In paragraph 17 of the claim form the claimant has pleaded:-

> "17. For the avoidance of any doubt the claimant stands dismissed and if for any reason the tribunal, contrary to that position, concludes that he remains an employee the claimant maintains that the respondent's conduct as a whole has destroyed the trust and confidence between them and the claimant entitling the claimant to resign claiming constructive dismissal (which is hereby communicated to them herein)."

9. It is accepted that the phrase "the respondent's conduct as a whole" is very general and that the whole purpose of a preliminary hearing is to deal with such generality and define the issues. That would appear to be what happened in this case.

10. Be that as it may in paragraph 16 of the claim form the claimant has pleaded as follows:-

> "16. The claimant suffered from ill health following his dismissal and the respondent has sought to invite the claimant to attend occupational health appointments and/or suggested that he is now on unauthorised absence."

11. As set out in the respondent's response, the referral to occupational health, the fact that he refused to attend the appointment and the alleged unauthorised absence all form part of the disciplinary process. Thus, whilst there is no express referral to the respondent convening a disciplinary process, elements of that factual allegation are already pleaded. Further, as set out above, the claimant has pleaded that the respondent was maintaining that the claimant remained an employee. That is consistent with the allegation that the respondent purported to reinstate the claimant. Referring to this as a sham is no more than a labelling exercise.

12. Hence, considering the proposed amendment, in my judgment the allegation of constructive unfair dismissal is plainly made, it is reliant on the implied term of mutual trust and confidence, the claimant's pleaded complaint with the respondent's conduct as a whole and elements of the proposed amendment are already pleaded. In my judgment these proposed amendments are relatively minor clarification of a claim that has already been made.

13. I have a discretion as to whether or not to allow the amendments. In exercising that discretion I should seek to do justice between the parties having regard to the circumstances of the case. I first consider the nature of

the amendment, which I have already characterised as minor clarification. I do not consider that the new pleading is likely to involve substantially different areas of enquiry than the old. There is marginal difference between the factual issues raised by the new claim and the existing.

14. Given that in my judgment the essentials of this head of claim have already been pleaded, then issues relating to time limits and the timing and manner of the application are of little materiality.

15. I now consider the balance of hardship and injustice. It is noticeable that despite putting in five pages of submissions on the application to amend the respondent does not point to any prejudice other than being put to costs. I have no breakdown of these alleged costs, but I suspect they were run up by the respondent objecting to the minor clarification of an existing claim. There would be a clear injustice to the claimant to refuse the minor amendments.

16. Accordingly, I grant permission to amend.

The exclusion of evidence on grounds of privilege or s.111(a) ERA 1996.

17. A central issue in this case is what exactly went on at the meeting on 6 February 2019. That inevitably will be highly fact sensitive. Whether or not aspects of that meeting were "without prejudice" and/or represented pre-termination negotiations will have to be a matter determined following an examination of the evidence. That has not occurred and accordingly I am not in the position to determine the matter.

18. I accept that ordinarily questions as to the admissibility of evidence should be determined as a preliminary matter so that the issue is finalised in advance so that those trying the issue do not see material that may later be deemed inadmissible. However, in this case, in my judgment, it would not be proportionate to have a preliminary matter dealing with evidence that is central to the full merits hearing. Accordingly, the matter will be put over to the full merits hearing and the parties will have to rely on the professionalism of the tribunal to put any matters from their mind that may be inadmissible.

Time issues

19. Whether or not there was a dismissal or a resignation and the timing thereof is a matter in issue between the parties and is again fact sensitive. It is only once those factual issues have been determined that the time issue can be dealt with. Accordingly, that will be put over to the full merits hearing as well.

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Employment Judge Alliott

Date: ……15/12/2020…..

Sent to the parties on: ...15/12/2020.....

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For the Tribunal Office