EMPLOYMENT TRIBUNALS

Claimant: **Mr D Beaumont**

Respondent: **Kemin UK Ltd**

Heard at: **Nottingham** **On:** **18 January 2019**

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

Representation
Claimant: **In person**
Respondents: **Mr J Lewis, Counsel**

RESERVED JUDGMENT

1. The following companies and individuals will not be added as respondents to this claim:-
    a. Kemin Europa NV
    b. Kemin Industries Inc
    c. Kemin Nutrisurance Europe srl
    d. D Abrate
    e. S Morais
    f. D Beltrami
    g. A Yersin
    h. J May
    i. Mr Bertuzzo

2. Mr Eric Creemers will be removed as a respondent to this claim.

3. The claimant shall be permitted to amend his claim to include new protected disclosures

4. There shall be no deposit orders made.

5. There shall be a further preliminary hearing for case management purposes which will take place by telephone at **3pm** on **6th March 2019** with a time estimate of 90 minutes.

REASONS

Background and Issues

1. The claimant was employed as a Sales Manager from 4 April 2016 until 20 March 2018 on a contract of employment which lists Kemin UK Ltd as the employer.

2. By claim form presented on 18 June 2018 the claimant brought complaints of automatic unfair dismissal under section 103A of the Employment Rights Act 1996, for whistleblowing detriments and for wrongful dismissal. The claim form named the following as respondents:-

- **a.** Kemin (UK) Ltd;
- **b.** Kemin Europa NV (a company apparently based in Belgium); and
- **c.** Kemin Industries Inc (a company apparently based in the USA).

3. The claims are resisted by the respondents. In a response presented on 14 August 2018 on behalf of all 3 respondents, it was submitted that the correct respondent to this claim is Kemin UK Limited as that was the company that employed the claimant. It was further submitted that Kemin Europa NV and Kemin Industries Inc should be removed as respondents.

4. A closed preliminary hearing took place by telephone on 18th October. At that hearing the claimant agreed that Kemin Europa NV and Kemin Industries Inc were not appropriate parties to the proceedings. The claimant withdrew his claims against those companies.

5. The claimant indicated during the preliminary hearing that he wanted to add Mr Eric Creemers (a director of Kemin UK Ltd) as a second respondent, as the claimant alleges that Mr Creemers was personally responsible for the whistleblowing detriments. It was agreed that Mr Creemers would be served with an ET1.

6. On 5 December a response was presented on behalf of Mr Creemers. In that response it was submitted that Mr Creemers should be removed as a respondent to these proceedings, that the claim against Mr Creemers was out of time, and that Mr Creemers has no liability to the claimant.

7. Following further correspondence between the parties and the Tribunal, the case was subsequently listed for an attended preliminary hearing on 18 January 2019 to consider the following issues:-

- **a.** An application by the claimant made on 23 October 2018 to reinstate the claim against Kemin Europa NV and Kemin Industries Inc, and add the following new respondents:-
  - **i.** Kemin Nutrisurance Europe srl;
  - **ii.** Mr D Abrate (who the claimant says is employed by Kemin Europa NV);
  - **iii.** Mrs S Morais (who the claimant says is employed by Kemin Europa NV);
  - **iv.** Mr D Beltrami (employer unknown);

v. Dr A Yersin (who the claimant says is employed by Kemin Industries Inc);

vi. Mr J May (who the claimant says is employed by Kemin Industries Inc); and

vii. M Bertuzzo (employer unknown)

b. An application by the respondent on 20 November 2018 to set aside the joining of Mr Creemers as a respondent;

c. An application made by the respondent on 19 December 2018 for a deposit order; and

d. Case management orders – the previous case management orders having been stayed.

Proceedings at the preliminary hearing

8. The preliminary hearing was listed in person for 3 hours, starting at 10am. Unfortunately both the respondents' instructing solicitor and counsel misread the Notice of Hearing and thought that the hearing was due to start at 2pm (the time originally proposed, but subsequently changed).

9. The claimant arrived in good time for a 10 am start, but the respondent did not. The Tribunal staff telephoned the respondent's solicitor and suggested that the preliminary hearing take place by telephone. The respondent's solicitor objected to this, and indicated that both she and counsel would immediately leave for the Tribunal, so as to arrive as soon as possible.

10. I spoke to the claimant, in the presence of two members of Tribunal staff. The claimant's strong preference was for the hearing to go ahead at 10am, as he was concerned in particular about the impact on his health of delaying matters. He said that he would need to eat and that it was unfair on him to have to wait.

11. Having considered the views of both parties, I decided that the interests of justice and the overriding objective required that the hearing should be postponed until such time as the respondent's representatives arrived. I explained to the claimant that if at any point during the hearing he needed an adjournment, whether to eat or for any other reason, he should let me know and I would grant one.

12. The hearing started at 12.15pm, following the arrival of the respondents' representatives. Mr Lewis apologised for the confusion over the start time. I asked the claimant whether he felt well enough to proceed with the hearing, and he told me that he did, and that he was happy to go ahead. I asked him to let me know if he needed an adjournment at any time.

13. Mr Lewis indicated that he was instructed to represent both Kemin (UK) Ltd and Mr Eric Creemers at this hearing. He was not instructed at this stage to represent the other parties that the claimant sought to have added as respondents, although did make representations as to why they should not be added.

14. The respondent produced a bundle of documents running to 192 pages. The claimant indicated that he had a copy of the bundle but had not had chance to look at it properly. I asked the claimant twice whether he would like an adjournment to consider the documents, and on both occasions he replied 'no'. Additional documents were subsequently added to the bundle by consent, at the claimant's request.

15. At the outset of the preliminary hearing the claimant made an application to amend his claim to include 3 new protected disclosures, namely:-

a. a disclosure that the claimant said he made over the telephone on 6 December 2017 to Sophie Morais in which the claimant alleges he discussed an incorrect legal address, unapproved premises, and shipping documents having been declared incorrectly as animal fed additives rather than pre-mixtures - in breach of EU Regulations;

b. a further disclosure relating to the same issues that the claimant alleges he made to Sophie Morais by telephone on the 7th December; and

c. a third disclosure about the same issues that the claimant says was made on 14 December 2017 during a sales meeting in Italy at which Mr Abrate, Ms Morais and the whole sales team were present.

16. It was agreed that the application to amend would be added to the list of issues set out at paragraph 6 above, and considered at the preliminary hearing.

17. I then heard submissions from both parties. The claimant's preference was that the respondent should go first, and this was agreed. Mr Lewis had produced a chronology and written skeleton submissions, for which I am grateful.

The Law

Respondents to a whistleblowing claim

18. Section 47B (1) of the Employment Rights Act 1996 ("the ERA") provides that "*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*"

19. Section 47B (1A) of the ERA states that:-

"*A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done –*

(a) By another worker of W's employer in the course of that other worker's employment, or
(b) By an agent of W's employer with the employer's authority

On the ground that W has made a protected disclosure."

20. Section 47 (1B) then provides that "*Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also being done by the worker's employer";* and Section 47 (1C) is "*For the purposes of subsection (1B) it is immaterial whether the thing is done with the knowledge or approval of the worker's employer."*

Applications to amend

21. Guidance Note 1 of the Presidential Guidance – General Case Management (2018) contains guidance for employment tribunals considering amendments of claims and responses, including on the addition and removal of parties. Paragraph 17 states that: "*Asking to add a party is an application to amend the claim. The Tribunal will have to consider the type of amendment sought. The amendment may deal with a clerical error, add factual details to existing allegations, or add new labels to facts already set out in the claim. The amendment may, if allowed, make new factual allegations which change or add to an existing claim. The considerations set out above in relation to amendments generally apply to these applications.*

22. Paragraph 4 of the Guidance Note provides that "*In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.*"

23. Relevant factors are set out in paragraph 5 of the Guidance Note and include: the nature of the amendment, time limits, and the timing and manner of the application.

Addition, substitution and removal of parties

24. Rule 34 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules") provides as follows:-

"*The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings, and may remove any party wrongly included.*

Deposit Orders

25. Rule 39 of the Rules gives the Tribunal the power to order a party to pay a deposit of up to £1,000 as a condition of continuing to advance an allegation or argument, where, at a preliminary hearing, "*the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success.".* Rule 39(2) obliges the Tribunal to make "*reasonable enquiries into the paying party's ability to*

pay the deposit and have regard to any such information when decind the amount of the deposit."

Submissions

Respondent's submissions

Application to re-instate the claims against Kemin Europa NV and Kemin Industries Inc and to add new respondents

26. Mr Lewis submitted that there was no basis for any claim against either of these entities, as liability under section 47B (1A) of the ERA could only attach to the claimant's employer or a worker or agent of the claimant's employer.

27. He argued that if the Order dismissing the proceedings against those entities were revoked, the effect would only be to remove the bar on commencing a further claim raising the same or substantially the same complaint, and would not mean that the claim was automatically restored against either company. Rather they would only be made parties to the litigation again if the Tribunal allowed an application to amend to include them.

28. In relation to the application to add seven new respondents, Mr Lewis submitted that all bar one of the proposed new respondents are individuals and that no particulars had been given of the claims against them other than "*detriments and dismissal*" or "*dismissal"*. He suggested that the claimant had taken a 'scattergun' approach to identifying potential respondents. The claims against the seven new proposed respondents are, he argued, out of time, and no real explanation has been provided for the timing of the application

29. Mr Lewis pointed out that the claimant had been asked by letter dated 30 November 2018 from the respondents' solicitors to particularise the allegations against each of the individual proposed respondents, but had declined to do so.

30. He argued that allowing an amendment to the claim to include other companies within the same group as Kemin UK Limited, and employees of those companies, would add significantly to the complexity, length and expense of the proceedings and cause very substantial prejudice to the respondents.

31. Mr Lewis also submitted that the claims against the individuals could have been brought earlier, and that no explanation has been provided for the delay.

Should Mr Creemers remain a party to the claim?

32. Mr Lewis told me that Mr Creemers is a director of Kemin (UK) Limited. He submitted that the Order made at the preliminary hearing on 18th October had, rather than joining Mr Creemers as a party, put in place a

process for Mr Creemers to raise issues as to whether he should be joined as a party.

33. Mr Lewis pointed out that rule 29 of the ET Rules allows the Tribunal to set aside or vary a case management order where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made. Mr Creemers had not had the opportunity to make representations at the previous preliminary hearing, as the respondent's representatives had only received notice of the application to join him as a party during the preliminary hearing itself.

Application to amend the claim

34. Mr Lewis referred me to the guidance in *Selkent Bus Co. Ltd v Moore* [1996] ICR 836 and to the Presidential Guidance on case management. He argued that the starting point is that any claims should have been brought at the outset and that the ET1 is "*not something just to set the ball rolling" (Kuznetsov v Royal Bank of Scotland* [2017] IRLR 350) He suggested that the nature of the amendments the claimant was seeking to make were significant, and involved making new claims against new respondents, rather than merely rectifying an error in the identification of the correct respondent.

35. Mr Lewis argued that the applicability of time limits remains an important factor in the exercise of discretion. He referred me to the case of *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 as authority for the proposition that the doctrine of 'relation back' does not apply, so that amendments take effect from the date permission to amend is granted for the purposes of considering limitation.

36. I was also referred to a contrary line of authority (including *Gillick v BP Chemicals Ltd* [1993] IRLR 437) to the effect that granting an amendment may have the effect of depriving a party of a limitation defence.

Deposit order

37. Mr Lewis invited the Tribunal to make a deposit order on the basis that, whether or not the Tribunal allows the amendments to the claim, the dismissal claim has little reasonable prospect of success. The decision to dismiss the claimant was taken prior to the protected disclosures referred to in the Claim Form. He referred me to the case of *Tree v South East Coastal Ambulance Service NHS Foundation Trust* UKEAT/0043/17/LA in which it was held that a deposit order is a legitimate course to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage.

Claimant's submissions

Application to re-instate the claims against Kemin Europa NV and Kemin Industries Inc and to add new respondents

38. The claimant told the Tribunal that the reason he wished to include Kemin Europa NV and Kemin Industries Inc as respondents to the claim was because his contract of employment stated that HR policy is under the control of Kemin Europra NV. He also argued that Kemin Industries Inc is responsible for the contractual bonus scheme and set the rules of the bonus scheme. The claimant is claiming loss of bonus as part of his Schedule of Loss.

39. The claimant believes that there are distinct contractual obligations that Kemin Europa NV and Kemin Industries Inc have towards him. He said he had only withdrawn the claim against those two companies at the previous preliminary hearing on the basis that he was not employed by either of them. He disputed the contents of the case management summary produced following that preliminary hearing.

40. He argued that he had not had the opportunity to apply at the hearing on 18 October for other respondents to be added because the hearing was 'suspended' after the decision to serve an ET1 on Mr Creemers.

41. The claimant also submitted that the Tribunal must consider the question of fairness to the claimant.

42. He argued that all he wanted to amend in the particulars of claim (page 13) was one word – namely he wanted to remove 'was employed' and add 'worked'. He said his application had been made on 23 October, 5 days after the hearing on 18 October, and was originally due to be heard at a preliminary hearing listed for 13 December, which had subsequently been postponed to today.

43. In Mr Beaumont's view, Mr Creemers had already been added as a respondent in relation to the claim for detriment.

44. Mr Beaumont also argued that Kemin (UK) Limited had never managed his performance, nor had they dismissed him.

45. He urged the Tribunal to reconsiders its decision and allow the amendments. He referred also to *Selkent v Moore* and argued that the Tribunal has a broad discretion to allow amendments. He submitted that the paramount consideration was the relative hardship to the parties of allowing or refusing an amendment.

46. The claimant submitted that there was no need for an Early Conciliation Certificate to include the new cause of action, and that there was no need for an EC Certificate to include a new cause of action.

47. The claimant referred me to the case of *Mist v Derby Community Health Services NHS Trust* 2016 (UKEAT/0170/15/MC) in which the EAT held that a mistake in the naming of a prospective respondent does not mean that ACAS has to reject the notification. In the claimant's submission, there is no requirement to go through the EC procedure to add additional respondents. The decision to allow an amendment falls within the ET's general case management powers in Rule 29 of the ET Rules of Procedure.

48. The claimant also referred to *Drake International Systems Ltd and others v Blue Arrow Ltd* (UKEAT/0282/15/DM) as authority for the proposition that no further EC certificate is required if a claimant seeks to add a respondent. In that case four subsidiaries of a parent company were added as respondents to a claim despite not being name on the EC certificate.

49. The claimant submitted that he was employed by Kemin UK Ltd which owned by Kemin Europa NV. He said that HR in Kemin Europa NV is responsible for expenses, and failed to reply to his grievance. In relation to Kemin Industries Inc, the claimant submitted that that company made all the decisions to 'hire and fire', set the rules of the bonus scheme and are 'responsible for' the covenants in the claimant's contract.

50. The claimant told me that he worked for Kemin Nutrisurance Europe srl on a 'day to day' basis and that this company 'connects all the parties'.

51. The claimant submitted that Mr Creemers is a director of Kemin UK Limited and should therefore remain as a party to the proceedings.

52. The claimant argued that Mr Abrate should be a party to the proceedings because he wrote the letter of dismissal and made the decision to dismiss. Ms Morais, who the claimant says reports to Mr Abrate, should be a party because she failed to act on the protected disclosures that the claimant says he made on 6th and 7th December.

53. The claimant wishes to add Mr Beltrami as a party in relation to both the dismissal and detriment claims, because he was at the dismissal meeting on 20 March and was also aware of the protected disclosures allegedly made on 6th and 7th December. Dr Yersin should be a party, according to the claimant, because he was tasked by Mr Abrate on 13th March to 'action' the shipping.

54. Mr May, the claimant says, is the Vice President of Kemin Nutrisurance Europe srl and employed by Kemin Industries Inc. The claimant alleges that Mr May told the claimant he would look into the allegations.

Deposit Order

55. The claimant resisted the application for a deposit order and submitted that there clearly are disputed facts in this case.

Conclusions

Application to re-instate the claims against Kemin Europa NV and Kemin Industries Inc and to add new respondents

56. I accept that the application to add new respondents to this claim amounts to an application to amend the claim. I have considered the relevant factors. The amendments which the claimant seeks to make are, in my view, not merely a relabeling of the existing claim, but rather new claims against new respondents.

57. The claims against the new respondents are significantly out of time, and the claimant has provided no explanation as to why they were not brought in time.

58. The claimant voluntarily withdrew his claims against Kemin Europa NV and Kemin Industries Inc at the preliminary hearing on 18 October. There is no evidence to suggest that he was put under undue pressure to do so. The fact that the claimant has subsequently changed his mind is not, in my view, sufficient ground to justify adding those two companies as respondents to this claim.

59. The interests of justice are not, in my view, in favour of adding the additional respondents. 6 of the proposed additional respondents are individuals who appear to be based abroad. The others appear to be foreign registered companies.

60. It is not clear to me precisely what the allegations against any of the proposed additional respondents are. I accept that there is a potential for any of those seven to be liable for any detriments suffered by the claimant under section 47B of the ERA, as it could be argued that they were acting as agents of Kemin (UK). Adding them as respondents however would significantly increase the length, cost and complexity of these proceedings. It would require the service of the Claim Form out of jurisdiction, and could lead to a much longer hearing.

61. The claimant is not deprived of any remedy if they are not added as respondents. He still has a remedy against his employer, Kemin (UK) Limited, and it remains open to him to argue that the proposed additional respondents subjected him to a detriment for which Kemin (UK) Limited is liable pursuant to section 47B of the ERA.

62. For these reasons, none of the companies and individuals named at paragraph 7 of this Judgment will be added as respondents to this claim.

Addition of Mr Eric Creemers as a respondent to the claim.

63. Mr Creemers was not present or represented at the preliminary hearing on 18th October at which a decision was taken to serve him with a copy of the ET1. He had not had the opportunity to make representations as to whether he should be joined as a party to the claim.

64. The application to join him as a respondent was made in October 2018, some 7 months after the claimant was dismissed, and 4 months after the claimant presented his claim form. The claim against Mr Creemers is significantly out of time and the claimant has not, in my view, provided a valid explanation for the delay.

65. Whilst I recognise that the claimant is not legally represented in these proceedings, he is clearly an intelligent man who gave thought, at the time he issued his claim, to the question of who should be a respondent. His original claim form contains 3 different respondents, and 3 different Early Conciliation Certificate numbers. It therefore seems to me that the claimant did consider who to join as a party to this claim back in June of this year, and he chose not to add Mr Creemers.

66. Weighing up the factors that I have to consider, I am satisfied that on balance, the interests of justice are in favour of removing Mr Creemers as a party to these proceedings. Doing so would not deny the claimant a potential remedy, as his claim will proceed against Kemin (UK) Limited.

Application to amend the claim to include additional protected disclosures

67. In reaching my decision on this issue, I have considered the relevant factors identified at paragraphs 21 – 23 above.

68. Turning first to the nature of the application to amend, the claimant is not seeking to bring new claims, but rather to add additional protected disclosures to his existing whistleblowing claim. He is, in effect, adding factual details to his claim.

69. The application is made at a relatively early stage in the proceedings, and the respondent has had the opportunity to consider and made representations in relation to the application.

70. Allowing the application to amend would not, in my view, significantly lengthen the proceedings or cause undue hardship to the respondent.

71. On balance, therefore, the interests of justice in my view weigh in favour of allowing the amendment to the claim.

Deposit Order

72.. In a letter dated 19 December 2018 and sent to the Employment Tribunal the respondent's representative applied for a deposit order on the ground that the claimant had little reasonable prospect of success on the issues of whether his dismissal was by reason of any protected disclosures. In essence, the respondent's position is that the decision to dismiss the claimant was taken before any of the protected disclosures referred to in the original claim were made.

73. In light of my decision to allow the claimant's application to amend the claim to include the additional protected disclosures, it would not in my view be appropriate to issue a deposit order in this case. The new protected disclosures relied upon by the claimant were made some 3 months prior to his dismissal and, in my view, it cannot be said at this stage, that the claimant has little reasonable prospect of establishing that his dismissal was linked to the alleged protected disclosures.

74. Moreover, there are in my view clearly disputed fact which the Tribunal will need to hear evidence on in order to resolve.

75. In the circumstances therefore, I make no deposit order.

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Employment Judge **Ayre**

Date 4 March 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS