EMPLOYMENT TRIBUNALS (ENGLAND & WALES)

Case Number: 2200224/2019

Claimant	**V**	Respondents
Mr A Engel		The Society Incorporated By the Lloyds Act 1971 By The Name of Lloyds And 30 others

HELD AT: London Central ON: 11/9/2019
Employment Judge: Mr J Burns

Appearances
For Claimant: in person
For Respondent Ms J Coyne (Counsel)

JUDGMENT FOLLOWING AN OPEN PH

1. The claims against Respondents 8, 22, 24, 25, 28 and 30 are dismissed under Rule 52.

2. The claims against Respondents 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 18, 23, and 26 are struck out under Rule 37(1)(a) and (b).

3. The Respondents' application/s to strike out the claims against the remainder of the Respondents (other than Respondent 1) is dismissed.

4. Therefore the claims shall continue against the following Respondents : The Society Incorporated By the Lloyds Act 1971 By The Name of Lloyds; Jeffrey Barrat; John Neil; Michael Green; Alistair Evans; John Wingrove; Julie Drew; Anita Walters and Bruce Carnegie Brown.

5. The Claimant's application for witness summons to be issued against Jeffrey Barrat; John Neil; Michael Green; Alistair Evans; John Wingrove; Julie Drew; Anita Walters; Bruce Carnegie Brown; Amy Anstey and Anita Walters is dismissed.

6. The Claimants application to amend his claim to remove stray question marks is allowed by consent

7. The Claimant's application to add an indirect discrimination claim, is allowed, (not by consent) on condition that by 25/9/2019 he pays £500 to the Baker McKenzie LLP on behalf on the continuing Respondents as a contribution to

their costs occasioned by the amendment. The Claimant on paying the said sum shall serve on Baker Mackenzie LLP and on the Tribunal also by 25/9/2019 an amended pleading setting out his original claim as amended to include the indirect discrimination claim (in the form produced in draft at the Tribunal today). The Respondents if so advised shall have leave to serve and file an Amended ET3 by 23/10/2019.

8. The claims remain in the list to be tried over ten days starting on 3/2/2020.

Reasons

For Order 1 above. The claims against Respondents 8, 22, 24, 25, 28 and 30 were withdrawn by the Claimant at a previous case management hearing on 25/6/2019 before Judge Brown, who at that stage decided that it would not be proper to issue a judgment dismissing these claims under Rule 52(a) or (b). She however set up an open preliminary hearing today for the purpose of considering whether "*to dismiss the Claimant's claims against all the Respondents, other than Lloyds itself, on the grounds that the Claimants conduct in pursuing his claims against such a large number of individuals is both vexatious and unreasonable*". It was plainly the intention that the question today whether claims should be dismissed should be directed against the withdrawn claims as well as those not withdrawn on 25/6/2019. In relation to the withdrawn claims, the Respondents' application to strike out should be properly construed as an application that the Tribunal reconsider, on the basis of the evidence and submissions which were not previously available, whether a judgment should be issued dismissing these claims under Rule 52. I explained this to the parties and conducted the hearing on this basis in relation to these claims.

The reason the Claimant withdrew against these Respondents in June is because he recognised that they had a very tenuous or no relevant involvement in the matters complained about. We discussed this point again today. Respondent 8 is a Council member who, as the Claimant accepts, recused himself from the vote (against the Claimant) and cannot on any view be liable. Respondents 22, 24, and 25 were Pension Trustees but not on the recommendation panel (which did not recommend the Claimant). Respondents 28 and 30 were administrative employees of Lloyds who were not on either the panel or the Council. The Claimant has not put forward any reasonable basis for concluding that any of these Respondents could be liable for his claims.

I find that there is no legitimate reason for not dismissing the claims against these Respondents and that issuing such a judgment is in the interest of justice. It would be wholly inappropriate for the Claimant, having agreed to withdraw these claims, and having proceeded to trial against other Respondents, to then be allowed to resurrect these claims at a later date.

Reasons for Order 2 above

Respondents 2, 3,4,6,7,9,10,11,12,13,14,15 and 16 were all committee members on the Council which voted against the Claimant's appointment. Respondent 18 is the Council itself.

Respondent 23 was a Pension Trustee but not on the recommendation panel.

Respondent 26 is "*The Trustees of the Lloyds closed pension scheme"* as a whole. This is not a legal entity but a group of individuals who have each been sued as separate Respondents.

The First Respondent has agreed (both in writing and through its Counsel today) that it will accept vicarious liability for the activities of the Council and its members and the Pension Trustees and panel in relation to the Claimant, and that it does not take the statutory defence.

The Claimant submitted that as a matter of law the First Respondent is not vicariously liable for the Council, because the Council and its members and the Pension Trustees are neither the employee nor the agent of the First Respondent (as contemplated by section 109 EA 2010). I do not accept that submission and find that the Council, albeit created by statute (section 3 of the Lloyds Act 1982) is part of the First Respondent and, as such, its acts are the acts of the First Respondent itself, and the Pension Trustees are agents of the First Respondent, albeit that they also owe duties to Pension beneficiaries. In any event, even if my conclusion about this is incorrect, the First Respondent has formally accepted in advance responsibility for any liability of its Council and the Pension Trustees and the recommendation panel. That is not something which the ET or the EAT would be willing to go behind or permit to be changed.

Hence keeping these Respondents in the case is unnecessary for the Claimant's financial protection; and the inconvenience and possible expense to them which keeping them in would cause them, is disproportionate to any satisfaction which the Claimant may derive from the contrary decision.

I find that keeping these Respondents in the case is vexatious and unreasonable. Therefore, these claims should be struck out under Rule 37(1).

<u>Reasons for Orders 3 and 4 above</u>
The same arguments about vicarious liability and the futility of their joinder were also made on behalf of Respondents Jeffrey Barrat; John Neil; Michael Green; Alistair Evans; John Wingrove; Julie Drew; Anita Walters and Bruce Carnegie Brown. These persons however include important persons on the Council which voted not to appoint the Claimant, namely the Council lawyer Mr Barrat, the CEO Mr Neal and the Chairman Mr Carnegie Brown. Messrs Green, Evans and Wingrove are the panel members who did not recommend the Claimant to the Council, and the Claimant believes that Julie Drew and Anita Walters were also involved significantly in the panel activities.

It seems to me that having dismissed or struck out claims against numerous other Respondents, who do not appear to have played any significant or relevant part, a reasonable balance is struck by allowing the Claimant to keep in this residual category of individuals, who appear to have played a more central role, and who in all probability, the First Respondent would want to call as witnesses in any event.

The bringing of discrimination claims is not just about money, and the Claimant feels strongly that he wishes to have an opportunity to try to establish liability against these

individuals. In these circumstances I do not think it is unreasonable or vexatious for him to continue against them.

Reasons For Order 5 above

The Claimant clearly wishes to bring these witnesses to the Tribunal so he can cross examine them. This is not a permissible reason as a party is not allowed to cross examine his own witness. The Tribunal declines of its own volition to summon these witnesses as the Tribunal process is adversarial and not inquisitorial. Most of these proposed witnesses continue as Respondents and will probably give evidence in any event on their own behalf. Furthermore, the application is premature because witness statements have not yet been exchanged.

Reasons For Order 7 above

The Claimant issued his ET1 on 23/1/2019, filling in section 8.2 so as to state that the decision of the panel not to recommend him and the decision of the Council not to appoint him "*was age discrimination and/or victimisation*". The term "*age discrimination*" is potentially wide enough to encompass a number of different types of claim, for example indirect discrimination as well as direct, which was recognised by the Respondent in its ET3 grounds of resistance paragraph 12 thus "*The Claimant claims …age discrimination and/or victimisation…the claim is wholly unparticularised…The Respondents will seek particulars of the precise claims pursued…"* However, no particulars were formally requested.

Instead the Respondent generated an agenda for the CMH on 25th June 2019 which suggested that only direct discrimination and victimisation was claimed. The Claimant is a barrister and previous judge but not an expert in employment law or procedure. He did not take issue with the Respondent's formulation of his claims but did raise on that occasion that he was considering applying to add an indirect discrimination claim, if indeed any application was necessary, which he did not accept.

Judge Brown ruled (paragraph 13-16 of the CM summary signed on 15/7/2019) that the Claimant would have to apply formally to amend, and any such application should be made before 30/9/2019 and that any time expiring after 25 June 2019 would not be counted against him in relation to any such application, and that he had acted appropriately by waiting for disclosure before deciding whether to apply.

It now appears that the Claimant was aware from November 2018 that both the successful candidates appointed to the pension Trustees were employees of Lloyds. That was the essential information he needed to bring his indirect discrimination claim, (the claimed PCP is that appointees must be employees) and not the extra small fact he learned on recent disclosure (namely that Ian had been appointed). Furthermore, the Claimant in his previous claim against Lloyds and others had claimed indirect discrimination so he was aware of the possibility when he issued his current claim in January 2019. These are points against the Claimant's application.

However, I accept that the Claimant thought, with some justification, that his original ET1 was wide enough to include indirect as well as direct discrimination. When that was ruled not to the case in June 2019, he flagged up immediately the need to make an amendment application.

The indirect claim he wishes to make may have merit and, if so, preventing the Claimant bringing it will cause him hardship and injustice. I cannot see what forensic or other hardship or injustice it will cause the Respondents. The time-estimate for the trial will not be affected either way. There is still plenty of time before trial for the Respondents to defend this new limb of the claim, and in all probability, it can be defended by the same witnesses who will have to be called to deal with the direct and victimisation claims.
The new claim is out of time but I would have regarded it as just and equitable in the circumstances to allow time to have been extended in any event if this indirect discrimination claim had been presented as a fresh ET1 on 25 June 2019. Judge Brown has already ruled that time after that should not count against the Claimant.

I think the main legitimate criticism which can be levelled against the Claimant in this regard is that as an experienced lawyer he should have been aware of the necessity of pleading his case clearly and fully in the first place and had he done so then the Respondents would not be put to the trouble of having to re-plead their defence as they will now have to do. The Claimant said he was willing to tender payment of costs capped at £500 as a contribution to the Respondents' costs in this regard. Support is given in the Presidential guidance to granting leave to amend conditional on costs in some cases, and I find that it is appropriate in this case.

Employment Judge - Burns

11/9/2019 London Central
Date and place of Order

Date sent to the Parties
29/10/2019

For Secretary of the Tribunals