



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Xiao

Respondents: 1. Kate Boddy
2. University of Exeter

Heard at: Exeter, in person On: 21 June 2022

Before: Employment Judge Smail

Representation

Claimant: In Person

Respondents: 1 In Person
2 Mrs K Johnson, Solicitor

PRELIMINARY HEARING JUDGMENT

1. The Claimant's applications to amend are refused.
2. The Claimant's claims are struck because they have no reasonable prospects of success.
3. The Respondents have intimated applications for costs. Any such application must be emailed to the Claimant and the Tribunal within 14 days from the date this Judgment is sent to the parties, setting out the basis of the application and the calculation of the amount claimed.
4. The Claimant's grounds of opposition to any applications must be emailed to the Respondent(s) and the Tribunal within a further 14 days. He should include evidence of his means.
5. Employment Judge Smail will decide any application for costs on the papers.

REASONS

1. This Preliminary Hearing was set up by Employment Judge Self in a Case Management Order dated 24 February 2022. The Preliminary Hearing was ordered to be in public and the issues, subject to further consideration by the Judge dealing with the matter, were:
 - (a) Whether any amendment to the claim should be permitted.
 - (b) Whether any of the acts or omissions alleged by the claimant against either respondent were within the jurisdictional ambit of the Employment Tribunal including whether any of the alleged acts were done in the course of employment.
 - (c) Whether claims had been brought within time and if not whether time should be extended.
 - (d) Whether any or all of the claims should be struck out pursuant to Rule 37 or a deposit order made under Rule 39 of the Employment Tribunal Rules of Procedure Regulations 2013.
 - (e) Whether any Rule 50 orders are required.
 - (f) Any further case management directions as appropriate.
2. It seemed to me that we were less assisted in terms of getting to the heart of the matter today in terms of time limits than we were to look at the other issues listed to be considered.
3. The claimant tendered his resignation on 28 May 2021 with an effective date of termination on 1 September 2021. He was employed from 1 September 2018. ACAS early conciliation was entered on 7 September 2021 to 21 September 2021 so far as the first respondent Ms Boddy was concerned and in relation to the University from 5 October 2021 – 1 November 2021. The claimant lodged his claim against Ms Boddy on 13 October 2021 and against the University on 7 November 2021.

THE ISSUES IN THE CASE

4. The issues were also discussed at the Preliminary Hearing. The claims set out for consideration going forward were as follows:
 - (1) Did Ms Boddy, with the University been legally responsible between 31 March and 15 July 2021, interfere with the claimant's family life by:
 - (a) kidnapping the claimant's children or taking them away from the claimant;
 - (b) manipulating the claimant's wife against him;

- (c) shouting at the claimant in Belmont park on 21 April 2021;
- (d) visiting the claimant's home without his permission;
- (e) commenting on the way the claimant was dressed in front of the claimant's children.

Matters (d) and (e), on investigation today, probably happened prior to 31 March 2021.

- (2) Did the University on 8 June 2021 invite speakers onto campus who assumed that males were the primary perpetrators of domestic violence? Was any of this less favourable treatment on the grounds of race on the grounds of sex? The claimant is a Chinese national of Chinese ethnic origin. He is a male. He relies upon those protected characteristics.

AMENDMENT TO ADD CLAIMS OF VICTIMISATION AND CONSTRUCTIVE UNFAIR DISMISSAL

- 5. An application to amend was envisaged by the order and indeed an application to amend has been brought by the claimant in terms of fresh distinct matters rather than expansions on the existing matters. The claimant applies to amend to add a claim of victimisation, said to be contained in Ms Boddy's solicitors' letter of 16 December 2021. It is a without prejudice save as to costs letter. I am assuming for present purposes that it is admissible, but I have not decided whether it would be admissible at any final hearing. The letter is in terms as one would expect any without prejudice save as to costs letter to be. No complaint is made about a similar letter from the University. The difference is that in this letter from Stephens Scown Solicitors there is a reference to the claimant's children, and he objects to that and suggests that is an act of victimisation. The relevant paragraph reads as follows:

"Unlike the family courts, cases heard in the Employment Tribunal are not private. When your claims come to trial, it will be open to the public and press to be in attendance. This means the public and press can be present during the hearing so that they can listen to the evidence presented, e.g. witness evidence, legal submissions, judgment etc. The paperwork put before the Tribunal must also be available to the public and press and so for this purpose an extra copy of the trial bundle will be required to be made available so that any members of the public and press can read the documents being relied upon. Any Judgment made by the Employment Judge will also be a matter of public record. Therefore, in pursuing these claims against our client, Ms Boddy, you need to keep in mind that in the Employment Tribunal you will not benefit from the privacy that you have had in the family courts. We encourage you to keep this in mind as it serves no-one,

especially if the claimant's children are mentioned, for these issues to become a matter of public record."

6. The claimant objects to his children being brought into that letter and suggests that the solicitor is acting in a victimising fashion subjecting him to a detriment with reference to them.
7. Also, in the application to amend is a claim for constructive unfair dismissal.
8. Other paragraphs contain generalised unspecific allegations about the way in which the University deals with complaints from white students on the one hand, and Chinese students on the other. There is no specific reference to the claimant himself being subject to any discrimination personally; instead he is making general points. There are other paragraphs similarly making general unspecific points and there are other paragraphs expanding upon what was already alleged against Ms Boddy.
9. In terms of discreet new allegations upon my assessment it is the allegation of victimisation relating to the Stephens Scown letter and the allegation of constructive unfair dismissal.

EVIDENCE HEARD

10. Given the scope of the Preliminary Hearing, evidence was ordered to be prepared. There is a bundle of documents and witness statements have been prepared and served. The witnesses have been cross-examined. I have heard evidence from the claimant. I have heard evidence from the first respondent Katherine Elizabeth Boddy, and I have also heard evidence from the claimant's line manager, Alexandra Jane Allen.
11. I am uncertain whether there would be additional evidence at a final merits hearing. Perhaps there would be some further disclosure. For example, what has happened in the family proceedings; but it seems to me I have got sufficient evidence as to the matters and issues in this case so that I can form a clear view on the merits of the case.

STRIKE OUT APPLICATION AND AMENDMENT APPLICATION– the Law

12. The respondent in effect makes an application under Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 that I should strike the matter out. That provision provides that at any stage of the proceedings either on its own initiative or on the application of a party a Tribunal may strike out all or part of the claim or response on any of the following grounds: that it is scandalous or vexatious or has no reasonable prospects of success.
13. It is only in an exceptional case that claims will be struck out in this way; see for example, North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330

14. Similarly, in the alternative the respondents make an application under Rule 39 that if there are little reasonable prospects of success the claimant should be ordered to pay a deposit not exceeding £1,000 in respect of the claims he makes. This is put as an alternative to the primary submission that the claim should be struck out.
15. As regards the amendment: I of course have a broad discretion on the question of amendments following the line of cases from Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT through to Vaughan v Modality Partnership UKEAT/0147/20/BA (November 2020). It is a matter of discretion: the issue is the balance of prejudice but within that I also take into account whether the claims the subject of the amendments have themselves any reasonable prospects of success.

DISCUSSION

'Kidnapping' of the children

16. In his witness statement the claimant says that in 2021 he decided to separate from his wife. As I understand it they are not divorced yet and are going through that process. He goes on to say "the seemingly amicable separation and family issue resulted from structural violence such as systemic racism, poverty unlawful discrimination and work-related stress. Ms Boddy and her husband interfered with his family life, not only did they not have any proper conversation with me but Ms Boddy also made degrading comments on how I dress and her husband visited my home often when I was away between 2019 and 2021. They complained about a gift my children and I sent to her daughter on Chinese new year and complained about the way I parked. They would not do the same to a white male".
17. There was some allegation made by the claimant that Ms Boddy's husband had been in his house during the period his estranged wife was still living with him. It is common ground that Mr and Ms Boddy's daughter is close friends with the claimant's daughter and prior to March 2021 the families would come across one another regularly in the context of the daughters being friendly and at the same school.
18. On 30 April 2021 the claimant alleges that his children were 'kidnapped' by Ms Boddy and her husband. He first saw his daughter in Belmont Park in Exeter after he says they were uprooted from their home on 31 March 2021. On that occasion the claimant says "her husband who works for the police in some capacity was abusive to him. He shouted 'go away you know what I do'. The Claimant continues – "Later Ms Boddy and my estranged wife came to the park. The verbal abuse from Ms Boddy and her husband made me feel they wanted to kick me, but I was determined to spend more time and concentrate on playing with my daughter. It was also my daughter's wish to spend more time with me. In the park, my ex-wife said I could see the children after school each day. She said she could not think for herself. I did not intend to take my daughter away from her mother's care but after the incident they manipulated through extensive conversations my ex-wife further by

asking her to cut off all the contacts. Their unlawful discrimination caused the trauma both my children and I suffered and still have to endure this day. My children were kidnapped at their home until at least 15 July 2021”.

19. It seems that upon the request of the claimant’s estranged wife, Ms Boddy and her husband took the children and the estranged wife into their home between 31 March 2021 and 25 July 2021. Ms Boddy addresses this in her witness statement. She met the claimant (and reminds me that his correct title is Dr Xiao) through his wife H. “I met H on the day our daughter started school in September 2018. The first day was a settling in day and the parents stayed with the children. Our daughters gravitated towards each other and became friends and as a result I spent a lot of time talking to H. Through these conversations I became aware that Dr Xiao also worked in the University at St Luke’s Campus. Dr Xiao was a lecturer in the school of education which is included in the St Luke’s Campus of the University. Ms Boddy explains that St Luke’s campus is relatively small with one communal meeting and dining area. On occasions she would see the claimant in the café in passing and they sometimes acknowledge each other with a nod or a smile. They never worked together in any capacity. She had not had any work-related contact with Dr Xiao either on or off Campus.
20. The Claimant’s line manager, Dr Alexandra Allen, describes the claimant’s role. Dr Xiao was a lecturer in Education and Research. He was in his probation period. Academic staff who start at the University as an E&R Lecturer have a three-year probation period. If they successfully complete their probation period, they can then make progress towards applying to become a senior lecturer. This takes between five and six years. The claimant’s field is working with ‘big data’ with particular expertise in quantity research methodology. He played an active role in the centre for research in professional learning which is jointly run between Graduate School of Education and the College of Medicine and Health. He had responsibility for the involvement of PHD students. However, to the best of her knowledge, he did not have any involvement with the Peninsula Applied Research Collaboration known as PENARC and did not work with the first respondent in any capacity.
21. Ms Boddy tells me she has worked for the second respondent, the University, since October 2002 initially as Library Supervisor and more recently as Associate Research Fellow. Since 2011 she was a Research Fellow for patient and public involvement with the Peninsula Applied Research Collaboration in the University College of Medicine. She goes on to say that “during lockdown she saw very little of H, the claimant’s estranged wife, other than for a few outside play dates in summer 2020. When the children returned to school in March 2021, she went for a walk with H after the school drop off. She noticed immediately that something was wrong and after a while H said that things were difficult at home and she did not want to go home on her own. She also disclosed that she had been seeking support from ‘Splitz’ a support service for people who have experienced separation divorce or domestic abuse since December 2021. During March 2021, H spent several days at her house whilst the children were at school. Ms Boddy was working from home in another room and believes H spent some of this time speaking to the Council and Splitz. She became aware that H was at

high risk and that the Council had urgently advised her to leave her home with the children and go to a refuge. H did not want to do this due to the disruption to the children's school and loss of her job.

22. There was a suggestion that a house would be available for her in two weeks, so Ms Boddy suggested that she and the children could stay at her house until then. This was nothing more than an offer of support from one friend to another, says Ms Boddy; in the end H and the children stayed at her house for around four months. That was her choice.
23. There was an incident at Belmont Park which happened in April 2021. Ms Boddy says the claimant had threatened to take the children from H. 'We were scared he would take his daughter which we knew H did not want to happen and therefore we told the claimant we would call the police.' In fact the claimant did take his daughter a few days later. She said she did not advise H to leave Dr Xiao it was not her place to do so. She was receiving professional help.
24. I have to consider whether the allegations the claimant makes in this regard are reasonably arguable under the legislation which governs proceedings before the Employment Tribunal. It should come as little surprise that those provisions relate principally to an employment context. The claims other than the amended claim of constructive unfair dismissal are brought under the Equality Act 2010. Section 39 of the Equality Act 2010 relates to employees and applicants.

(1) An employer A must not discriminate against a person B.

- (a) in the arrangements A decides who to offer employment.
- (b) as to the terms on which A offers B employment.
- (c) By not offering B employment.

(2) An employer A must not discriminate against an employee of A's.

- (a) A as to B's terms of employment.
- (b) In the way A affords B access or by not affording B access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service.
- (c) By dismissing B.
- (d) By subjecting B to any other detriment.

(3) An employer:

- (a) Must not victimise a person B in the arrangements A makes for deciding to whom to offer employment.
- (b) As to the terms on which A offers B employment.

- (c) By not offering B employment.
- (4) An employer:
 - (a) Must not victimise an employee of A's B. As to B's term of employment.
 - (b) In the way A affords B access or by not affording B access to opportunities for promotion, transfer or training or for any other benefit facility or service.
 - (c) By dismissing B.
 - (d) By subjecting B to any other detriment.
- 25. The only way the claimant would seek to come within any of this would be by making reference to 'any other detriment'.
- 26. We then have Section 109 which relates to liability of employers and principles. By subsection
 - (1) anything done by a person
 - (a) in the course of A's employment must be treated as also done by the employer.
- 27. That is how the claimant would hope to argue that anything done by Ms Boddy could result in the vicarious liability of the University. For the University to be liable anything she did would have to be done in the course of her employment. Similarly, under Section 110
 - (1) a person A contravenes this section if:
 - (a) A is an employee or agent.
 - (b) A does something which by virtue of Section 109 (1) or (2) is treated as having been done by A's employer or principal, as the case may be.
 - (c) The doing of that thing by A amounts to a contravention of this act by the employer or principal as the case may be.

'In the course of employment'

- 28. For Ms Boddy or the University to be liable under the Equality Act 2010, Ms Boddy would have had to have been acting, in respect of the allegations made by the claimant, in the course of her employment. She was not acting in the course of her employment, however. If the Claimant contends otherwise, such contention is not in my judgement reasonably arguable. She was not his line manager; she had no role with any responsibility in relation

to the claimant. Coincidentally, she happened also to be employed by the University but that is as high as the claimant can put it. She was acting in her private capacity not her employed capacity when she chose to take the claimant's wife in.

29. I do not know whether the Claimant's wife is to be regarded as a victim of domestic abuse. It is common ground for present purposes that the claimant is subject to a non-molestation injunction. Ms Boddy accepts she took a photograph in June 2021 of the claimant's car. That was not a criticism of the manner of his parking, it was simply that he had parked in the exclusion zone, she contended, that was defined by the non molestation clause. She communicated that to the claimant's estranged wife who in turn communicated that to her solicitor and it seems that the claimant was challenged by the solicitors, possibly by the police also, in respect of having parked where he did. Alleged degrading comments on how he was dressed were made long before the children were taken into Ms Boddy's home.
30. The University has chosen to represent itself separately from Ms Boddy, although they did put her in touch with solicitors. The University was preserving for itself its submission that any liable conduct, anything done by Ms Boddy, was not done in the course of employment. It seems to me, based on the allegations that the claimant makes, there is no prima facie arguable case that what Ms Boddy did was done in the course of her employment. This was done in the course of her private family life, impacting as the claimant has made clear on several occasions, on his private family life. His contention that she is liable under employment statutes is to my mind misconceived; it is not reasonably arguable. The vicarious liability for anything Ms Boddy did was not done in the course of employment.
31. There is a stand-alone claim against the University in relation to a seminar or a conference it held on the subject of domestic abuse. Judge Self has recorded the issue thus - did the second respondent on 8 June 2021 invite speakers onto campus who assume that males were the primary perpetrators of domestic violence. The claimant tells me he attended the conference only for thirty minutes before having to go and collect his children. The subject of the conference was 'Tackling gender-based violence, what each of us can do'. There were a lot of high profiles speakers: Jess Phillips MP Shadow Minister for Domestic Violence and Safeguarding; Jim Gale, Head of Vulnerabilities, Devon and Cornwall Police, and lead for the portfolio violence against women and girls; Professor Janice Kay University of Exeter, Dr Rachel Fenton, Academic Expert; Dawn Grub, Employer's initiative on domestic abuse; Caroline Voden, Devon and Cornwall Rape Crisis and Sexual Abuse Services; Mina Patel, Southall Black Sister; Rahida Islam Moore, Ops Coordinator and Senior Psychotherapist; Student representative Student Union Cornwall Women's officer.
32. The claimant appears to be absolutely right that the theme of this conference was domestic violence against women. He claims that this subjected him to direct sex discrimination. I simply do not understand that contention; it is a matter for the University to hold a conference on whatever topic it likes. It

does not arguably amount to any sort of discrimination against the claimant. That allegation made by him also has no reasonable prospects of success.

CONCLUSION ON PROSPECTS OF THE ORIGINAL CLAIMS

33. The original claims have no reasonable prospects of success for the reasons set out above.

CONCLUSION ON THE AMENDMENT APPLICATIONS

Victimisation

34. Does the Stephens Scown letter amount to arguable victimisation by Ms Boddy with her solicitors acting on her behalf? In my judgement it does not give rise to a prima facie argument of victimisation.
35. It is right that Stephens Scown do not say in their letter 'by the way there is Rule 50 in the procedural Rules and it would be a matter of debate as to who is going to be anonymous in the public record of the Employment Tribunal'. It can safely be assumed that the names of the children would not be revealed by the Employment Tribunal. It would be a matter of debate and could not be assumed whether the claimant's name would not go on the public record. Stephens Scown were correct that the claimant would not benefit from the privacy of the family courts and there could be no guarantee that the claimant's name would not go on the public record; and insofar as they say we encourage you to keep that in mind it serves no-one especially the children for these issues to become a matter of public record, that is a rhetorical flourish pointing out that in the fullness of time, it might not benefit the children to have their father's name on the internet in respect of such a claim. Whilst a rhetorical flourish it cannot sensibly be said to be an act of victimisation. The claimant knows - he has made application himself - that we have Rule 50 and we can regulate the reporting of the matter. We have agreed the children will not be named.
36. In respect of that allegation, I do not, in the exercise of my discretion, allow the claim to be amended to add that claim because it has no realistic prospects of success. It is arguable whether this letter is admissible at all. There is no application to join Stephens Scown as respondent; it is all put at the door of the first respondent Ms Boddy, who would be prejudiced if she had evidentially to deal with that matter appearing before me as she does, representing herself. For all of those reasons, I do not exercise discretion to allow that claim to be amended in.

Constructive unfair dismissal

37. What however, about the claim of constructive unfair dismissal? A key component of the claim for constructive unfair dismissal is that the matters complained about need to be an effective reason for resignation - that the

claimant resigned because of the matters he alleged. We know, with respect, why the claimant resigned because it is all documented in the bundle.

38. In the knowledge that his relationship with his wife was ending, and that they were separating, on 18 March 2021 the claimant applied for a senior lecturer role at the University of Essex. He applied to Essex before the children were taken into Ms Boddy's home. On 6 May 2021, he informed his line manager that he had applied to Essex. He wrote to Alexandra Allen -

"To keep it brief my two children were taken away from me without my consent in March. I did not even know where they were. I still have no access to them and I am desperately seeking legal support for a series of court hearings ahead. I attended the first one on Tuesday this week and the next one will take place on May 28. As you can imagine it cost me a lot, I am paying nearly £300 per hour. I wanted a higher salary and applied for a new job at Essex. I was offered a senior lecturer associate post there a few days ago. I think I have to take up that post the pay is nearly £53,000 a year on the 2019 scale. I would like to resign from this post although I feel very painful at the moment. I will miss many of my great colleagues and students here and what the South West has to offer. I enjoyed working with many colleagues who are my very close friends. I know that the official notice is three months. I wonder if you would be happy for me to start there on 1 August? I should have written to you earlier but there were so many things on my mind at the moment. Essex is very keen for me to start as soon as possible. I am supervising many dissertations online ME and A module. I have not told any colleague about this yet. I would really like to talk to you, but I feel I am not ready. I am however completing all the essential tasks I am supposed to complete".

39. He was advised to sign a letter of resignation on 12 May and he emailed Alexandra Allen -

"I wonder if I need to do anything else in order to resign from my post. I would like to know if I should leave on 1 August or 1 September as Essex is asking me for the official start dates so they can send me a contract as soon as possible. They are also keen for me to start but I think I should give three months notice here. I started on 1 September 2018 and the University's website says if I leave in the third year of my post, I should pay twenty-five percent of the relocation cost. It would be better for me to start on 1 September to avoid that penalty but I would like to hear your view on this".

40. In the event, he started in July 2021. He gave notice of resignation on 28 May 2021.

"I am writing to formally inform you of my resignation for my post as lecturer in Education at the Graduate School of Education, GSE University of Exeter. In accordance with the period of notice agreed within my contract, my last day will be 1 September 2021. I would like to take this opportunity to thank you all for the opportunities presented to me over the past three years. I have enjoyed my time working in

the GSE and the wider University. However, in the best interests of my career, I feel that the time is right for me to move on”.

41. There has been produced in evidence what at the very least is a draft goodbye letter to his colleagues dated 13 August 2021. It is a very friendly humorous letter making the point how often Exeter and Essex are confused with one another and he was making a point that he will now suffer that confusion in reverse when he is at Essex University. The Claimant complains as to how this has come into evidence. He suggests someone from the Respondents has hacked his Chinese social media account which also has banking facilities. He did, however, write a draft letter in those terms. Neither in his dealings with Alexandra Allen, nor his letter of resignation nor his draft goodbye letter does he contend that the reason for his resignation was any breach of contract by the second respondent in the context of any of the allegations he otherwise seeks to make. This suggests that those allegations are engineered for the purposes of bringing a claim rather than genuine reasons for the resignation.
42. He further complains of the fact that he received no response from the University to his letter of 23 September 2021 when he did alert them to the fact that he was bringing a claim to an Employment Tribunal concerning their employee Ms Boddy in the college of Medicine and Health. That was addressed to Professor Ballard. The likely reason he did not get a response was because they probably knew already and it was sub-judice. The proceedings are going on in a court of law; that's not a matter for Professor Ballard unless any other procedure is being invoked by the claimant for the University to take up.
43. As to regards this application for an amendment to add a claim of constructive unfair dismissal: I refuse it because the case he seeks to bring is wholly at odds with the contemporaneous documentation that there is. It has no reasonable prospects of success. There is no identifiable breach of contract by the University. The Claimant resigned for other reasons.

OVERALL CONCLUSION

44. I have no doubt that the claimant has been under considerable pressure surrounding the events of the breakup of his marriage and the custody and contact issues concerning his children. Those matters have been litigated, and as I understand it continue to be litigated, in the family courts. That is the appropriate place for them. The attempt to bring the law of employment into that matter in my judgement fails. There is no reasonably arguable claim in the original claims and there is no basis upon which I should exercise my discretion to amend those claims to bring fresh matters in.
45. Accordingly, that represents the end of the Employment Tribunal proceedings.

Employment Judge Smail
Date: 8 July 2022

REASONS SENT TO THE PARTIES ON
14 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE