



# EMPLOYMENT TRIBUNALS

**Claimant**

Mrs S Rowe

v

**Respondent**

Hutchison 3G UK Limited

**Heard at:** Bury St Edmunds

**On:** 9 December 2019

**Before:** Employment Judge M Warren

**Members:** Mr TM Doyle and Mrs S Allen

**Appearances:**

**For the Claimant:** In person.

**For the Respondent:** Ms T Burton, Counsel.

**JUDGMENT** having been sent to the parties on 7 January 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Background

1. Mrs Rowe brings complaints of sex and race discrimination. The issues were identified by Employment Judge Laidler at a preliminary hearing on 17 June 2019, a copy of which appears at page 41 of the bundle. There are a series of allegations of sexual and racial harassment and discrimination made against a work colleague called Mr Cook. That alleged perpetrator is no longer employed by the respondent.
2. Today we are due to start a 4-day hearing on the merits of Mrs Rowe's claims. The hearing began with an application by the respondent to strike out the claim on the grounds that the claimant's conduct has been scandalous and/or vexatious. The application is set out in a letter dated 9 October 2019 copied at pages 240-241, which sets out the basis of the application:

“On 15 June 2019 the claimant and her husband confronted Mr Cook in the shopping centre in which he works. That confrontation involved the claimant following Mr Cook into a Shoe Doctor store, calling her husband into the store and then blocking the exit to prevent Mr Cook from leaving and culminating in

the claimant's husband going into Mr Cook's place of work and making the threat, "If you speak to her again, I will kill you, your bitch and your kids, understood?"

Mr Cook was extremely distressed by this threat, particularly as it was made by a member of the US Air Force who will have received training and have access to weapons that make him a greater risk to carry out that threat. The threat was witnessed by a colleague of Mr Cook, who reported the matter to the Police, and was recorded on the stores CCTV.

As a result of this threat, in particular, his concerns with regard to the safety of his wife and children, Mr Cook has informed the respondent that he is no longer prepared to give evidence at the Employment Tribunal."

### **Evidence**

3. In support of the application we had evidence before us in the form of:
  - 3.1 A witness statement from a Mr Spencer, a person who worked in the store called Shoe Doctor.
  - 3.2 A statement from Mr Pease, who was a work colleague of Mr Cook in the O2 store and previously had been a colleague with Mr Cook at the respondent.
  - 3.3 A witness statement from Mr Cook himself.
  - 3.4 A witness statement from Mr Rowe.
  - 3.5 A paginated bundle of documents for use in the trial, which ran to page 285. We did not have to add any further documents to the bundle.
4. We read the statements and the documents referred to therein before the hearing commenced.
5. We viewed a cctv recording and an Instagram posting by the claimant.
6. Mr Cook did not attend the hearing, he wrote that he is not prepared to come to the hearing at all because he is in fear as a consequence of the threats made against him and his family by Mr Rowe.
7. Mr Spencer did not attend, we were told because of his work commitments.
8. We did hear evidence from Mr Pease.
9. We also heard evidence from Mr Rowe and although she had not prepared a witness statement on the point, with encouragement from me, we also heard oral evidence from Mrs Rowe. I received evidence in chief from her to begin with in response to questions from me and then Ms Burton was able to cross examine.

### The Law

10. I turn briefly to the Law. Rule 37 (b) of the Employment Tribunal's 2013 Rules of Procedure provides that a Tribunal may strike out a claim if the way that it has been conducted has been scandalous, unreasonable or vexatious, and further at (e) where a fair hearing is not possible.
11. The key question is whether a fair trial is possible, the authority for that is **De Keyser Ltd v Wilson [2001] IRLR 324**.
12. In the case of **Bolch v Chapman [2014] IRLR 140** the Employment Appeal Tribunal set out a 3-stage test when considering a strike out application:
  - 12.1 Firstly, whether the party has behaved scandalously, unreasonably or vexatiously in conducting the proceedings.
  - 12.2 Secondly, if so, the Tribunal must consider whether a fair trial is still possible; if a fair trial is possible, the case should proceed, and
  - 12.3 Thirdly, even if a fair trial is unachievable, the Tribunal should consider what appropriate remedy there ought to be and whether a lesser penalty is possible, rather than a strike out.
13. That 3-stage test was endorsed by the then President of Employment Appeal Tribunal, Mr Justice Elias as he then was, in the case of **Force 1 Utilities Limited v Hatfield [2009] IRLR 45**. As well as re-stating and approving the 3-stage test referred to above, Elias J emphasised that on a strike out application on these grounds, the Tribunal is not concerned with a balancing exercise to decide whether a strike-out would be a proportionate response. The key question is, has the proscribed conduct taken place and whether a fair hearing is still possible?

### Findings of Fact

14. These events took place on 15 June 2019, just 2 days before the preliminary hearing before Employment Judge Laidler.
15. Mr Cook and Mr & Mrs Rowe encountered each other in a small shop in Newmarket called Shoe Doctor. How they came to be there is a matter of conflicting evidence that we do not need to resolve in reaching our decision. Within the confines of that small shop, there was an exchange of words between Mr Rowe and Mr Cook, along the lines of Mr Rowe telling Mr Cook not to talk to his wife after he had said something to Mrs Rowe along the lines of, "You all right?". A little later, Mr Cook went back to his place of work, the O2 store in Newmarket. A little after that, Mr Rowe himself went into the O2 store. He was in his wife's company as he did so, we can see that from the photographs at pages 250-251 and he acknowledged that was so in his evidence. It is not credible for Mrs Rowe to assert that she was not aware that her husband was going into the O2 shop, nor is it credible for her to assert that she would not have known that he was likely to encounter Mr Cook in the shop. Mr Rowe went into the

shop to confront Mr Cook and Mrs Rowe knew it.

16. Mr Rowe spoke to Mr Cook in the O2 shop. We have seen the CCTV recording of their encounter. There is no sound.
17. We found Mr Pease a credible witness. He is a friend of Mr Cook; he used to work with him at the respondent and Mr Cook helped him procure his job at O2. We were very much alert to the fact that Mr Pease is not an entirely independent witness but even so, bearing that in mind, we found him to be credible. His evidence was, (paragraphs 9 and 10 of his witness statement) that Mr Rowe spoke very aggressively towards Mr Cook, pointing his finger and talking quietly through what sounded like gritted teeth. He says he heard him say "If you speak to her again I will kill you, your bitch and your kids, understood?".
18. From the CCTV footage we could see Mr Rowe jabbing his fingers at Mr Cook, leaning forward over the counter and at the end of conversation, flick a credit card machine off the counter. All of this indicated that he was angry and that it was a heated conversation.
19. In his evidence, Mr Rowe admitted swearing, along the lines of "don't fucking talk to my wife".
20. We find that Mr Rowe used the words as alleged by Mr Pease. His demeanor was aggressive and threatening.
21. Mr Pease, (not Mr Cook) reported this to the Police, who subsequently spoke to Mr and Mrs Rowe.
22. On 24 September 2019, Mr Cook told lawyers acting for the respondent that he was not prepared to give evidence and explained that the reason was the threats that had been made against him, his wife and children, by Mr Rowe.
23. In response to the application, on 9 October 2019, (page 238) Mrs Rowe wrote to the tribunal:

"I would like to say that this event is not true, the Police have it on record and it is also on the Shoe Doctor cameras that Daniel Cook approached myself and my children, and tried to speak to me. I almost had panic attack and opened the door for my husband to come in to be by my side. There was no exchange of words between my husband and Mr Cook, and I do have a witness for this."

24. That email, we find, contains three lies:
  - 24.1 The incident was not on the Shoe Doctor cameras;
  - 24.2 There was an exchange of words between Mr Rowe and Mr Cook, and
  - 24.3 Mrs Rowe did not have a witness.

Those are lies told by Mrs Rowe to the Employment Tribunal.

**Conclusions**

- 25. It is entirely credible that Mr Cook feels intimidated by what was said to him by Mr Rowe in the O2 store on 15 June 2019 and we find that he is intimidated. The fact of the matter is I am afraid, Mr Rowe should not have gone into the O2 store that day. Mrs Rowe was aware he was going in and that he was going in there to confront Mr Cook. The threats made and the lies in the email to the tribunal, each amount to unreasonable, vexatious and scandalous conduct.
- 26. Is a fair trial possible? Are there alternative measures that we can take place to allow this case to proceed?
- 27. Mr Cook is the respondent's key witness. All of the allegations in the list of issues are against him. The respondent cannot defend itself without him. Regretfully therefore, a fair trial is not possible and we can think of no alternative solution.
- 28. Just to emphasise, this is not a finding that Mrs Rowe was not subject to the abuse that she complains of. I am afraid she and her husband only have themselves to blame that her case cannot now be heard. I am afraid it is struck out.

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Employment Judge M Warren

Date: 13 January 2020

Judgment sent to the parties on

.....23 January 2020.....

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For the Tribunal office