Case Nos: 2202172/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms A. Bailey
Respondent: (1) Stonewall Equality Ltd
(2) Garden Court Chambers Ltd.
(3) Rajiv Menon KC and Stephanie Harrison KC sued as representatives of all members of Garden Court Chambers except the claimant.

London Central by CVP

Hearing 29 June 2023
Panel Discussion 30 June 2023

Employment Judge Goodman
Mr M. Reuby
Ms Z. Darmas

Representation:
Claimant: Ben Cooper KC
Respondent: Jane Russell, counsel

COSTS HEARING
RESERVED JUDGMENT

1. The second and third respondents are ordered to pay the claimant £20,000 in costs

2. No order on the second and third respondent's application for costs.

REASONS

1. This hearing was to determine:
   (a) An application by the claimant that the second and third respondents ("Garden Court") pay her costs for "the way in which it conducted the preparation of the trial bundle".
   (b) An application by the second and third respondents that the claimant pay their costs of defending her unsuccessful claims in respect of detriments one and three.
2. The claims were heard by this tribunal over 25 days in May 2022. The

judgment was sent to the parties on 27th July 2022. The claimant had mixed success. Her claim against the first respondent, Stonewall, was dismissed; there is a pending appeal. She succeeded in a claim against Garden Court that she had been discriminated against or victimised in two out of five alleged detriments, and was awarded £22,000 compensation for injury to feelings. Claims of discrimination or victimisation for the three other detriments were dismissed, as was a claim of indirect discrimination.

3. For this costs hearing the tribunal had:
    - original trial bundle, 6,431 pages
    - A bundle for this hearing (259 pages) containing the two applications, Garden Court's response, a 100 page chronology of inter partes correspondence between January and March 2022, the "V18" index to the hearing bundle, and the chronology cross-referenced to documents prepared after the hearing by Stonewall's junior counsel.
    - Costs hearing bundle volume 1 – 1369 pages (occasional overlap with the above)
    - Costs hearing bundle volume 2 – 444 pages. The costs schedules are in this bundle
    - Skeleton argument for the claimant
    - Skeleton argument for the respondents, with annexes A- G
    - Bundle of Authorities, 285 pages
4. Counsel for the claimant and Garden Court then developed their arguments orally and judgment was reserved.

5. In our discussions of the applications, the panel paid careful attention to the chronologies and correspondence that counsel took us to in the hearing materials, even if we do not recite all the detail in this decision.

Relevant Law

6. In the employment tribunal, unlike the courts, costs do not follow the event, but in special circumstances an order can be made under the Employment Tribunal Rules of Procedure 2013. Rule 76 sets out the circumstances when a costs order may or shall be made:

> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

7. The employment tribunal may order the paying party to pay a specified amount, not exceeding £20,000, for the costs of the receiving party. Alternatively, it may

make an order for payment of the whole, or a specified part, of the costs of the receiving party, the amount to be determined following detailed assessment, whether in the County Court or by an employment judge.

8. With regard to rule 76(1)(a), "or otherwise unreasonably" does not mean that unreasonable must be construed as being of the same kind of conduct as vexatious and abusive. **Dyer v Secretary of State for Employment UKEAT183/83 states** that "unreasonable" in this section has its ordinary meaning, and should not be taken to be the equivalent of "vexatious".

9. Costs are compensatory, so the tribunal must consider what costs were incurred because of the unreasonable claim or conduct. In **McPherson v BNP Paribas (London Branch) (no.1) (2004) ICR 1398**, it was held that the tribunal need not identify a direct causal link between the unreasonable conduct and the costs claimed. Discussing this case in **Barnsley Metropolitan Borough Council v Yerrakalva (2012) IRLR 78**, the Court of Appeal gave guidance that while there must be some causal link, "the vital point in exercising the discretion to order costs is to look at the whole picture of what happened and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effect it had".

10. When the tribunal is considering an order under rule 76(1)(b), (no reasonable prospect of success), the guidance offered in **Radia v Jefferies International Ltd (2020) IRLR 431**, **Opalkova v Acquire Care Ltd EA – 2020 – 000345 – RN**, is that where there is an overlap between unreasonable bringing of or conduct of the claim under rule 76 (1) (a) and no reasonable prospect of success under (b), the key issues for consideration by the tribunal are in either case likely to be the same: did the complaints in fact have no reasonable prospect of success, did the complainant in fact know or appreciate that, and finally, ought they, reasonably, to have known or appreciated that. **Radia** notes that tribunals should focus on what the parties knew about their cases at the time, not what the tribunal knows after hearing the evidence.

11. The wording of rule 76 makes it clear that the decision process is to be taken in two stages. First, the tribunal must decide whether the conduct was unreasonable (et cetera), second, if one of the grounds is made out, should the tribunal exercise its discretion to make an order to pay costs.

12. Last but not least, discretion must be exercised so as to give effect to the overriding objective (rule 2) to deal with cases justly and fairly, having regard to:

    (a) ensuring that the parties are on an equal footing;

    (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

    (c) avoiding unnecessary formality and seeking flexibility in the proceedings;

    (d) avoiding delay, so far as compatible with proper consideration of the issues; and

    (e)saving expense.

The Respondent's Application

Detriment One

13. The first part of the respondent's application is for the costs of defending detriment one, that the claimant's fee income fell because she had objected to Garden Court becoming a Stonewall Diversity Champion. In this claim, the tribunal found that she had not proved facts from which we could conclude in the absence of explanation that the prohibited reason played any part in what happened. Garden Court submits that the claimant argued that 19 people, whether members of chambers or the clerks, directed by the senior clerk, in effect conspired to deprive her of good work, only for her to abandon her case against 13 of them by the end of the hearing. It is complained that even after doing that, she still maintained a case of unconscious effect of her gender critical views on clerks' allocation of work. They point to the distress caused to the clerks in particular at having these allegations made against them. They also criticise the fact that her initial schedule of loss put this detriment at £145,000, that she did not update her schedule of loss, as ordered, 2 weeks for the hearing, then at the hearing reduced the loss to £63,441, less than half of the original claim. They say the claimant relied on an argument that correlation equalled causation; the claim should certainly never have been continued once disclosure took place; even at trial she made no concession when it was put to her that in the relevant period she had a good brief, or that a junior clerk had continued to clerk her. The claimant's case was a theory – a conspiracy of 19 people- for big money.

14. The claimant responded that the respondent's case on detriment one was not properly set out until the amended response, and that disclosure on the fall in fees claim was late and incomplete. In any case, claims of discrimination often rely on inferences to be drawn from primary fact. There would never have been a document to show that. As for naming individuals, clerks in particular, the claimant had been required by Employment Judge Stout to name them in her further information, on the basis of **Reynolds v CLFIS**, although (it was said) that case concerns findings, not pleadings.

15. Did the claimant act unreasonably in bringing this claim from the outset? We considered her belief that a fall in income was because of her December 2018 email was a genuine belief, though in our finding, after hearing the evidence, she was reading back the hostility she experienced in the autumn of 2019 to earlier events. We were unimpressed that she did not compare like with like (billing as against payments) when computing the fall in earnings. Even so, there was an unanticipated fall in earnings and in the absence of explanation and against the background (in late 2019) of some strident discussion of the issues, it cannot be said it was unreasonable to believe that this was a claim with the prospect of success. It is also the case that bias in allocation of work can exist, and there had been a recent finding on a chambers investigation that experienced women juniors were not getting as much complex work as men, which might hinder their hopes of a successful application for silk, a finding which had led to some training for the clerks. It was not fanciful to consider that there might be a similar unacknowledged bias against members of chambers who were unpopular for opposing Stonewall's support for trans inclusion. We do not find that it was entirely speculative, brought in the hope of finding some documents and evidence to prove it.

16. Should she have reconsidered, once she did have documents and evidence and details of the respondents case why there was a fall? The respondents' reply to her detriment one claim was not spelled out to her in any detail until the re-amended response reached her at the very end of November 2021. We could see that there was then extensive discussion about disclosure of relevant material, such as the clerking diaries, in the correspondence between the parties' solicitors in January and February 2022. While it might be said that the claimant and her solicitors should be keeping the claim under review as the material came in, we considered that given the difficulty in February and March in getting a hearing bundle together, there was no chance to take stock.

17. It was also important that, as far as we can see, the claimant was unable to make the comparison with the earnings of others in her cohort that is set out in the witness statement of Rajiv Menon. We do not know precisely when this was disclosed. The original date for exchange of witness statements had been October 2021. At the hearing in January 2022, it was moved to February 2022. The delayed hearing bundle (see on) led to delay exchanging witness statements. Many Garden Court statements were sent on 14 April 2022. Mr Menon's is dated 20th April 2022. That is five days before the first hearing day. Even if she were sent an unsigned copy a little before, it was still late in the day for making a reasoned assessment of the prospects of success. Thus, although we concluded that the claimant had not proved facts from which we could infer that holding gender critical beliefs, or opposing links with Stonewall, was responsible for a fall in income, we could not conclude that bringing the claim was unreasonable, having no prospect of success, from the outset. Nor could we conclude that there was any realistic opportunity to take stock of the evidence, realise the comparison error on her figures, reassess her prospects of establishing the necessary inferences, and withdraw in time to save the costs of Garden Court defending this claim. It is not established that the rule 76 threshold is crossed.

Detriment Three

18. The second part of Garden Court's application concerns the claimant's failure to establish that Michelle Brewer procured complaints about the claimant and her views. The tribunal held that her group, TWG, was but one loose association within Chambers, and not its agent. The tribunal had also interpreted Michelle Brewer's exchange with a concerned Stonewall associate as her pointing out that there was a complaints procedure, rather than building a case against the claimant.

19. The claimant submits that this was not a hopeless claim. There was evidence suggesting TWG had been endorsed by chambers, and Stonewall documents showing communication with Michelle Brewer and what they understood her to have said. The tribunal analysed the evidence and reached a different conclusion. Nor was it necessary to establish agency about coordinating complaints related to a protected characteristic.

20. Having considered the arguments we concluded that the costs application in this respect did not reach the rule 76 threshold of unreasonableness either. There was documentary evidence showing contact between Ms Brewer and complainants. It was not speculative, even if it the evidence was not robust, and even though not successful.

The claimant's application

21. Paragraph 19 of our reasoned judgement in this case was strongly critical of the main hearing bundle. Tribunals often have to work with imperfect bundles, perhaps because litigants in person have been uncooperative or do not understand the process, perhaps because representatives, qualified or unqualified, have forgotten the practice directions or were never aware of them in the first place. Looking at the specific criticisms we made, of course sideways pages can be rotated, and this is manageable if there are not too many of them. By itself, if only a few pages, it is the easiest to manage. On the other criticisms, sometimes, parties forget to OCR their documents, but the tribunal panel can do this for themselves if they can find time (though one of this size would take a long time), but none of the panel had ever come across a bundle where large parts could simply not be made OCR readable. We learned in the costs hearing that this was probably because of repeated copying and scanning. Email chains are often problematic - it is best to eliminate duplication, but this cannot always be achieved where it is necessary to show who is sending an email in reply to what, and in what sequence, especially where there are branching emails, and not everyone has sight of other replies. Pragmatic solutions have to be found.

22. An important difficulty in this case was the omission from the main index of very large numbers of documents, which led to the sub-indexes we mentioned. Another was the late addition of substantial numbers of documents. The tribunal did briefly consider putting back the start date in the hope of getting a better bundle, but decided it was better not to lose more time. All of these imperfections occur from time to time, but rarely together or in such quantity. It was unfortunate that this bundle contained so many imperfections, and was needed for a complicated claim with a long hearing.

23. That said, we have to bear in mind that an order for costs is not intended to punish a party for making the task of the tribunal difficult. Its purpose is to compensate another party for the additional work caused by unreasonable conduct. We must decide the costs application without ill will on our part because we found the bundle so difficult to use.

24. We also observe, based on experience, that the process of putting together a bundle can be frustrating to one or both sides. The close examination of which documents should go in can lead to requests for further disclosure, or argument about relevance, which can get heated, particularly as the hearing date approaches and pressure builds up. Small lapses at this stage might be overlooked. What matters is that the tribunal and the parties end up with a workable bundle in time to prepare for trial.

25. In an uncomplicated case it is manageable, though not ideal, if the bundle is late, as the parties are already aware of most of the contents. In a complex case like this one, involving a number of different complaints, and more than two parties, it matters much more.

26. The claimant submits that because of late delivery of the bundle, still with substantial imperfections, the claimant was deprived of the opportunity to get written advice from counsel about the merits of the case, and counsel had to spend an enormous amount of time, even when on a pre-booked holiday, round which the hearing timetable had been set, because he was not to return until four days before the hearing start, resorting and re-preparing witness statements and cross-examination. In addition it was submitted that her solicitors, also had to invest substantial additional time in trying, over most of three months, to cooperate with the respondent's solicitor who was unhelpful and uncooperative, occasionally abusive, would not pay attention to the difficulties identified, continually modified the index, and supplied draft bundles not matching the current index.

27. The case management orders made in April 2021 provided for a hearing bundle by 10 September 2021 and an exchange of witness statements on 1 October, a deliberately long lead time before the final hearing set for May 2022. That timetable was set back because of the claimant's successful application to amend to add a claim of direct discrimination and victimisation because of protected belief. She had not made such a claim before because she was deterred by the first instance decision in **Forstater** in December 2019 that a belief in gender critical views was not protected; she changed her mind about making such a claim when it was overturned on appeal in July 2021, though she was still not prompt in applying to amend (see discussion of time limits in the liability judgement). The timetable was reset in October 2021, providing for a trial bundle by 17 January 2022, and an exchange of witness statements on 21 February 2022.

28. Carriage of the bundle lay with Garden Court: this is a conventional direction in the employment tribunal, where claimants often lack the knowledge or resources for the task. In a case like this where the claimant was represented, an order could equally have been made that her solicitors should put the bundle together. In such cases respondents sometimes ask that the claimant manage the bundle on grounds that they are bringing the claim and should bear the expense.

29. In December 2021 there was concern about the completeness and adequacy of disclosure by the second respondent, and the claimant made an application which was heard by Employment Judge Stout in January 2022. She ordered disclosure statements, and further disclosure, as soon as possible.

30. Garden Court's solicitor began work assembling a trial bundle on 12 January 2022. The claimant says this was not enough time given the size and complexity, when the list had to complete and agreed by 17 January.

31. The claimant was sent a draft index to trial bundle, but the correspondence during January 2022 shows that they could not work out from this index whether all the documents were included. As early as 13 January the claimant's solicitors said they needed to include some email threads, rather than individual emails, and that they were marking up in their response to the draft list the

names of these, and sending PDFs of them. On 18 January (when the respondent proposed postponing work on the bundle because of the recent disclosure order against the second respondent) the claimant said that they were not just replacing documents already in, but adding documents omitted. The following week they were renaming them to suit the ~~claimant's~~ respondents' convention.

32. On 25th January Garden Court's solicitor wrote that she did not agree about the ordering of emails: "I will not be replacing single emails with your threads. That would result in a complete rewrite of most of the bundle". The claimant's solicitor proposed as a solution duplicating only where the email thread diverged, and went about separating them to do that. The respondent only allowed limited time (to the end of January) for that. She also again required renaming the claimant's documents to fit the respondent's convention.

33. At the same time there were problems with the first respondent (Stonewall) having disclosed 1,600 pages pursuant to a recent order, wanting to redact copies of their documents being placed in the public bundle, and only allowing a few days, to the end of January, for claimant access to the documents on their server.

34. There were also two extensions agreed for Garden Court to serve a disclosure statement for the second respondent, with more documents being sent. A last batch was sent on 9 February.

35. Much later it became clear that much of the puzzle over missing emails was because Garden Court had severed ("chopped up") strings of emails to show separate emails in chronological order, and then pasted them in a single thousand page PDF. It was only when this was uploaded to a shared drive on 16 March that the claimant was able to see that, and that it did not include what was, in their view, relevant material.

36. Another difficulty was the parties' different naming conventions. The claimant's team had registered her documents in its own programme with titles and dates that could then be ordered chronologically by computer. The respondent had a different system. Initially cordial correspondence shows the respondent asking the claimant to rename their documents and the claimant attempting to comply, but finding this extremely laborious as it had to be done manually – this started 1 February 2022.

37. From this point on 2 February we can see that relations deteriorate. Despite courteous exchanges about particular points, and the need for Stonewall redactions holding up work on the joint bundle, the respondent's solicitor wrote complaining that the claimant solicitors were not cooperating constructively:

> "your input has been slapdash and lacking in proper care and thought as to the relevance or irrelevance of many of documents that should be included in the bundle. This has wasted my time many hours I've spent/wasted nine hours on 2 February just sorting through your second tranche documents and updating the bundle which also

included documents are duplicated, mislabelled, emails wrongly timed, relevance unclear and all corrupted".

38. The process was interrupted by some tough correspondence from the respondent about disclosure by the claimant of her earnings, and a query from the claimant's solicitor (7 February) about the further disclosure ordered from Garden Court. On 8 February the respondent complained that the claimant was going back on what had been discussed five days earlier. She said: "you twist and manipulate words after the conversation. You change emphasis on meaning and don't explain the proper context. I am particularly concerned that your litigation style or tactic and a constant quest to turn email and further conversations into applications or point scoring for you and/or your client". Lengthy correspondence about the claimant's earnings and the schedule of loss followed.

39. By 14 February respondent was back to the task of completing the index to the bundle. By 24 February the claimant asked to see the bundle itself, not just the index, because of the difficulty marrying it up between their documents and what was on the index, because of naming conventions and single emails. The respondent promised a copy bundle: "early next week". She took up the claimant's offer to insert missing materials themselves and commented it was "extremely regrettable that Garden Court were somehow tasked with putting this bundle together because it has been a monumental and disproportionate task". (On 14 March there is similar complaint, adding that her having carriage of the bundle was presumably made at the insistence of the claimant to save her costs.)

40. On 1 March the respondent sent a draft bundle but said that her assistant, Ella, was still adding documents to the bundle and it was better that the claimant's team sent the documents that they wanted included, so they could be added.

41. Having seen the draft bundle as well as the index, and identified the difficulties, particularly with insertions to earlier pagination, given the current naming convention, the claimant proposed a shared drive, so they could see what was there, so that when the content was agreed it could be merged into a bundle.

42. On 2 March we can see discussion over the 1000 page PDF – the respondent objecting to the claimant wanting to add these emails separately, complaining that the claimant had not "done the groundwork" in renaming documents and inviting the claimant to add material. On 3 March the claimant's solicitor queried omissions particularly items in the index but not in the bundle, suggesting Garden Court sent them any more documents and they would do an index. Then they wrote saying they had set up a shared drive, but Garden Court was concerned about confidentiality and did not want to use it. On 9 March, after a short and irritable reply to a long and careful email from the claimant's team offering to include material, with a renewed plea to see the bundle itself, Garden Court stated they would prepare the bundle with what they had, and any additions by the claimant must go in a supplemental bundle. The claimant should have renamed her documents so Garden Court could

see if they were duplicates. The claimant's team renewed their offer, pointing out that Garden Court had only Ms McGuigan and Ella, while they had more resource, and renewed their point about singe emails and threads. On 10th March Garden Court's solicitor accused her opponent of "non-cooperation and deliberate stalling", complaining she had not had promised additions. It seems they had been on the shared drive for a week. On 11th March the respondent solicitor said that she had not been able to go through the previous day's emails about the bundle and she did not have time, so the bundle in the respondent's current form was paginated and distributed. Any other documents would have to go to supplementary bundle. We see that on 10 March there was folder marked "renamed" on the drive (by this point Stonewall's solicitors, CMS, had set up a neutral share drive to overcome objection to using the claimant's drive). We can also see that the claimant's team recognised that as it was difficult to recognise that bundles from the index, it would help to see the draft bundle itself, so they can actually see what was in it. By the end of 15 March the claimant's solicitor sent a clear request to "see the bundle as it stands" with an offer to "collate the documents into a single coherent, bookmarked and indexed pdf bundle", and a suggestion that they should focus on getting a bundle prepared rather than disputing what went in it.

43. There are a number of such requests, on 15 March, when the correspondence became extremely acrimonious. Neither included documents provided by the claimant at the respondent's request. The claimant's solicitors renewed their offer to step in and help. This was rejected. A later email said : "It's a bit late in the day for you to be taking objection. You have been missing in action for a month and now pipe up with demands. No!" The response was another request to see the bundle so they could see what could be done.

44. A bundle in version 17 was uploaded on 16 March, mainly unindexed, with the single 1000 page PDF with ne line in the index, and another 650 pages without an index. By 21 March Garden Court 's solicitor said they were still part way through completing the bundle, they should contact Ella about it. On 22 March the claimant's solicitors are complaining of the difficulty of checking a 5,000 page bundle when the index did not match and 1,000 pages were not indexed. The respondent sent the index on 17 March which did not cover the 1000 pages, the respondent then uploaded version 16, not the version 17 that was being reviewed. The claimant's solicitor decided they should take over carriage of the bundle and wrote saying they would be asking the tribunal to order this. They had had to prepare their own bundle for the purpose of finalising witness statements and for counsel.

45. Ms McGuigan for the respondent solicitor objected that this was "ludicrous". On ~~21~~ 22 March she said his conduct over the bundle ~~merited~~ had been "utterly unacceptable. In my view it warrants an application for wasted costs against the solicitor personally". The context was the respondent having applied to the tribunal to decide a despite about what should be included, and the claimant having responded applying for the claimant to take over the bundle.

46. Doyle Cayton (for the claimant) stated in their application to the court to take over the bundle, that 167 pages have been left out, for unknown reason. A section of 2,980 pages was not in the index, and was not bookmarked. The incomplete index made it difficult to identify precisely what was left out, strings of emails had to be included so as to see who was writing to what – at present they had been severed and included as single pages. Page numbers on the index did not match the pdf documents, which mattered now this was to be an online hearing. Insisting on putting a date at the end of the main modern beginning made it difficult to sort documents into the bundle chronologically. Documents are sometimes arranged by theme, but at times by chronology. Section H appeared to have no order at all.

47. There was an correspondence to the tribunal on the rights and wrongs of what each was doing. The respondent accused the claimant of "wilful failure to cooperate". At this point the claimant's solicitors sent an open letter, marked costs warning, asserting the respondent's solicitor had been unreasonable in its ~~to~~ approach to putting the bundle together. There were unilateral refusals to solve the strings of emails, manually renaming every document in a less useful formula than the claimant was already using, refusing to access the shared drive, though another party had been able to offer a drive, making false statements to the tribunal, using rude and intemperate language, and not expressing the clear and subtle position, so they constantly had to "recalibrate" what they were being asked to do. It had to increase the number of fee earners devoted to the project.

48. In further acrimonious exchanges Peter Daly for the claimant told Ms Guigan she should cease flogging the dead horse of their "failed bundle" and let them move ahead with theirs. In another, after setting out some of the problems and proposed solutions she he said "this is not a "bundle wars" and it is not a personal criticism. I absolutely understand you have put a huge amount of effort into this, and I also understand your unwillingness to give up on what has been done. But the work you're going to have to do to get this ready cannot be done on our trial timetable". He later explained that searching the unindexed sections to see what was there were hard because it was not OCRd.

49. On 24th of March (the day Mr Daly said he had to send the bundle to counsel ~~you are a~~) Ms McGuigan (Garden Court) said that she had uploaded a new bundle, adding some documents, disputing others, and she invited the claimant to find a solution to the 1200 page PDF. They could only suggest a separate manual index, with manual pagination. There is a great deal of correspondence from 24 March which makes sorry reading. It is largely unacrimonious, but the respondent seems unwilling or unable to recognise the problem.

50. At the hearing on 28 March and Employment Judge Stout made decisions on disputes about what should go in the bundle and where they should be placed. On the question of who should continue to deal with the bundle she ruled:

> "the Garden Court correspondents are to retain carriage of the bundle <u>provided that</u> they are able to prepare it in compliance with

paragraph 7.2 my order 19 April 2021 and in compliance with the presidential guidance on remote and in-person hearings (14th of September 2020), in particular that the bundle is OCR readable and the electronic PDF page numbers match the printed page numbers. If that is not possible then respondent should hand responsibility for preparation bundle to the claimant".

She then directed the whoever prepared the bundle, documents should be in chronological order not by issue, only one copy of each email should be included, and it should be possible to see who sent which emails, where they are in chains. Nevertheless, parties may have to accept imperfections. The bundle had to be finalised by 1 April. Witness statement would be exchanged by 8 April.

51. It was suggested to us that this order indicated that Garden Court were not be criticised for their conduct, as they were not told to hand over carriage of the bundle. It seems to us that the "provided that" was a stern indication that so far it was not good enough, and might yet have to be handed over. We can also observe that in several respects the final bundle did not comply with Presidential guidance or Judge Stout's orders.

52. Although we do not have the detail, we are told that the bundle sent on 1 April still incomplete. Presumably that is why there was a second bundle which was still being added to during the hearing.

53. The details set out above is but partial – the correspondence covers about 950 pages.

54. We concluded that the process started well, but that the respondent for whatever reason did not recognise the difficulty of some of the points the claimant was pointing out, for example the £1000 page PDF, the naming conventions, and more particularly, that they need to see the draft bundle so as to be able to recognise what was in and out as the index was so difficult. We were not clear why the respondent was so slow to use a shared drive, even when provided by Stonewall's solicitors. It was obviously unhelpful to provide indexes and bundles that did not match up, and on different dates. The respondent's solicitor may not have been responsible for some of the difficulties (for example, using different naming conventions) but that they were too often unhelpful in not looking for constructive solutions, insisting simply going on doing it their way, seeing all suggestions as unwarranted interference.

55. During this time the solicitors were not always engaged in discussion about putting the bundle together. A lot of the correspondence was about whether more documents should be disclosed (particularly on detriment one) and about the relevance and inclusion of other material, which are ultimately led to the applications to the tribunal heard on 28 March. If we decide to make an award for costs, these costs should be discounted.

56. We also considered that at several stages the respondent's accusations and attitude to the claimant's solicitor was unmerited and unhelpful, though for a

time the claimant's team kept going with stoic goodwill. We could allow that tempers may run high in the frustrations of working under pressure, but at any rate until the third week in March we considered the claimant was sinned against than sinning. We were invited to find that he patronised the respondent solicitor by accusing her of having a tantrum. We did not consider that this was insulting to women, rather than men, and moreover was the only example of a failure of courtesy of which she was repeatedly guilty. Some derogatory language under pressure, though deplorable, is not of itself unreasonable conduct, but it tends to underline what was (not) going on, which in our view was unreasonable conduct. There were some real problems in how the bundle was being put together. The respondent's solicitor was not prepared to address them in a constructive way, sometimes not at all. We can only speculate as to whether this is caused by a lack of resources (and she probably was without staff), or personality. The latter comment is prompted by her complaints that she should not have to be putting the bundle together followed by stubborn refusal to allow the claimant to take over. She may not have appreciated the difficulty ~~if~~ of the unindexed parts or the 1000 page pdf at first, but the problem was explained to her more than once. When confronted with difficulties which required solution she insisted on continuing in her own way, even when solutions were proposed. She did not adopt one straightforward solution which would be to send a bundle (that) matched her index. As we have said, difficulties in putting a bundle together are not unusual. What was important in this case is that it was extremely complex, there was a very long trial coming up, the constant delay made it very difficult for the claimant (and possibly respondent too) to make adequate preparation for trial, and the respondents solicitor's response to constructive suggestions and courteous requests was to plough on until (as it proved) it was too late to achieve a usable bundle or for much of the witness statements to be cross referenced to it.

57. Stepping back from the detail, we considered whether there was unreasonable conduct in the preparation of the bundle. We concluded that there was. As set out, in several respects it went well beyond normal disagreement.

58. We then considered whether we should exercise discretion to make an award of costs. We concluded that the serious impact, on the claimant's team at any rate, of late preparation for hearing meant that it would be just to make an order.

Amount of Award

59. The claimant's schedule makes the following claims (in summary):

January 2022- £6,552
February 2022 -£4,440
March 2022 £29,502
April 2022 £23,813.

Some discount has been applied for advising on a witness statement. The total for the solicitors costs in this period, January to April 2022, amounts to £ 76,057 45. To that is added the claim for duplicated work by counsel reading and rereading documents and developing his cross-referencing, chronology. That claim is £46,560 including VAT, calculated as 42 hours wasted reading-in time, and 20% of the brief fee (which was £110,000). The total claim is £122,617.45.

60. Also claimed are the cost of the costs hearing at £65,000 plus VAT counsel's brief, plus solicitor's costs, unquantified.

61. To put this in context, we note that the total costs of the claimant for the liability hearing were £765,665. The total costs of the Garden Court respondents were £675,673 (but including costs draftsman's fee of £5,000, no VAT, and so it may include the costs of this hearing).

62. Even if we were to discount the figures for the costs in January to April 2022, for example by a percentage to reflect other work, or by limiting the period, these would require a detailed assessment. The panel discussed the various ways in which this we could set parameters for a detailed assessment. Our conclusion was that the best order was one that on summary assessment, the respondent pay the claimant's costs in the sum of £20,000.

63. There are several reasons why we reached this conclusion. One of them was that this litigation has gone a long time, has been very expensive, and stressful for those concerned. Detailed assessment can be a long drawn out process. Drawing a bill, even for a limited period, is expensive. Summary assessment will provide a clean break and an end to litigation, at any rate for Garden Court. Another factor in our decision was that the claimant had not succeeded in a large part of her claim against Garden Court; and that judging by the publicity surrounding the claim, her particular target in this litigation was Stonewall, a claim which had not succeeded, either in the instructing claim (though that is subject to appeal), or the PCP in the indirect discrimination claim. The task of preparing the bundle was complicated by the number of different claims and extra parties, not all of which have been successful. Had the bundle been smaller, it would have been less difficult to find a solution in time. Because of this we considered it was disproportionate to hold that all the extra costs of putting the bundle together should be paid by Garden Court. We also took into account the fact that it was the claimant's late amendment, adding the claim of direct discrimination because of religion and belief, that set back the timetable that had deliberately provided a long interval between bundle and witness statements at one end, and the start of the hearing at the other, so as to give all parties with an adequate opportunity to take stock of their arguments, and would have meant less pressure and perhaps more scope for cooperation. As held in the decision on time limits, it was just and equitable that this claim proceeded, but had the claimant made a claim at the outset, or made it promptly after the EAT decision in **Forstater**, the intended timetable could have been kept. We are all wise with hindsight, but we considered it just that this causative factor should be reflected in the summary assessment costs order.

Sarah Goodman

Employment Judge Goodman
Dated 5 July 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

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. 10/07/2023

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FOR THE TRIBUNAL OFFICE