EMPLOYMENT TRIBUNALS

Claimant: **Ms A. Bailey**

Respondents: **(1) Stonewall Equality Limited**
(2) Garden Court Chambers Ltd
(3) Rajiv Menon QC and Stephanie Harrison QC, sued as representatives of all members of Garden Court chambers except the claimant

London Central **13 October 2023**

Employment Judge Goodman
Ms Z. Darmas
Mr M. Reuby

JUDGMENT

No order on the second and third respondents' application of 13 July 2023.

REASONS

1. This is a decision on an application by the second and third respondents that the claimant pay their costs of the costs hearing on 29 June 2023.

2. In these reasons we call the second and third respondents "Garden Court", and sometimes when we refer to "the claimant" or "Garden Court" this means in practice the solicitors for those parties.

3. The parties were sent the reserved judgment on their costs applications ("the costs judgment") on 5 July 2023. Garden Court was ordered to pay the claimant £20,000. The claimant was not ordered to pay anything to Garden Court.

4. Garden Court applied on 13 July 2023 for an order that the claimant pay their costs of preparing for and attending the costs hearing. These costs are stated

to be £28,380, including VAT. Net of VAT, £8,300 is claimed for their solicitor, £10,900 for counsel, and £5,600 for a costs draftsman to prepare the costs statement.

5. It was argued that the claimant acted unreasonably when she did not accept an offer to settle the costs applications in the sum of £25,000. In the alternative the tribunal was invited to reconsider its costs judgment.

6. The tribunal was provided with a 16 page bundle of correspondence between the parties about the costs.

7. The claimant responded on 17 July 2023. The tribunal was referred to the sequence of correspondence and invited to find that the claimant had not acted unreasonably, because she would have accepted £25,000 if in addition Garden Court would have put on their website a short statement about accepting the tribunal's findings in the original judgment.

8. Garden Court replied briefly pointing out that the tribunal had no power to order publication of any statement, so the condition was not reasonable.

9. These are brief summaries of the arguments. The application and response were drafted by Jane Russell and by Ben Cooper KC, who had represented Garden Court and the claimant respectively at the costs hearing.

10. Both sides asked the tribunal to consider the application on the papers, so as to avoid more costs being incurred. The panel met on 13 October 2023 to consider the representations.

Relevant Law

11. We reminded ourselves of the relevant law on when and why an employment tribunal can make an order for costs, as set out in paragraphs 6-12 of the costs judgment. We also read the judgment in **Anderson v Cheltenham and Gloucester Building Society UKEAT/0221/13** and noted the authorities discussed – **Monaghan v Close Thornton EAT/3/01 20 February 2002, Koppel v Safeway Stores 2003 IRLR 753, and Raggett v John Lewis plc, UKEAT 0082/12.** Failing to beat an offer to settle which is made without prejudice save as the costs can be a factor in a decision that a party's conduct was unreasonable but is not by itself unreasonable.

The Negotiation

12. The correspondence begins in January 2023. At that stage the parties had made their applications for costs but the tribunal had not yet set a date for a hearing. The claimant had appealed that part of the liability and remedy judgment dismissing her claim against Stonewall. Garden Court had not appealed the findings against them.

13. On 27 January 2023 Garden Court wrote to say that they were considering a cross appeal in the Employment Appeal Tribunal. They enclosed their detailed reply to the claimant's costs application. They proposed that each side withdraw their costs application, that Garden Court agree not to cross appeal, and that in addition they would make a payment of £15,000.

14. The claimant replied on 10 February 2023 rejecting the offer. There was comment on the hearing bundle issues, including that some of the statements made to the employment tribunal in the respondents' submission were misleading. It was suggested that the prospects of success in a late cross-appeal were poor. The claimant then complained that she had had no contact from any member of chambers since the "aggressive" cross examination in the 2022 hearing. Garden Court had not acknowledged the findings of unlawful victimisation and discrimination and had instead placed a statement on their website which attempted to paint their loss as a win. (The tribunal does not have the text of this statement). In the circumstances she could not accept the offer.

15. Garden Court replied increasing the offer to £25,000. If accepted, they would not seek to enforce the costs order made by Employment Judge Stout (costs of amending and reamending the response) which they anticipated would be assessed at £6,000.

16. After an initial refusal, the claimant returned on the 23 March 2023 stating that she would accept the offer if in addition Garden Court removed from its website all public statements about LGB Alliance, removed the post-judgment statement, and then substituted "a brief statement... expressing that it accepts the tribunal judgement in these proceedings and regrets any impression it may previously have given to the contrary".

17. Garden Court replied that there was no reference to LGB Alliance on the website. They had removed the post-judgement statement on receipt of the claimant's letter of 10 February 2023, and would not re-post it. However, they did not propose to make any further statement. They intended to draw a line under the litigation. They would make a payment of £25,000 in exchange for both sides withdrawing their costs applications and undertaking to make no further costs application.

18. The claimant replied on the 28 March 2023 that Garden Court's post judgement statement had been tweeted out immediately following on the judgement and in the claimants reasonable view had undermined the judgement. It had also "previewed an appeal, which was never forthcoming and is now out of time". That contributed to inaccurate and damaging commentary against the claimant and the judgement. Removing the statement from the internet many months later without commentary reinforced the damage. Refusing to countenance a "short and neutral statement" was unreasonable in this context and demonstrated underlying hostility to the

claimant. Nor was it reasonable to agree to make no further application for costs when Garden Court remained a party to a live appeal which might be remitted back to the employment tribunal. An additional point was made that the cost order made by Employment Judge Stout had no meaningful financial value. The tribunal understands that the claimant offered £445 soon after the order was made but Garden Court did not reply.

19. Garden Court replied conceding the point about future costs applications, but not the claimant's proposal for a website message. In a further e-mail on the 5 April 2023, Garden Court reinstated the offer to settle for £25,000 in settlement of both sides costs applications, but no message, pointing out that the tribunal had no power to order such a message. The offer was open until 17 April. Garden Court pointed out that the cost of the hearing was likely to be considerable, and if, following a cost hearing, the tribunal considered the claimant to have acted unreasonably in not accepting the offer, they would seek to recover the costs of bringing and defending the costs applications.

Discussion and Conclusion

20. The tribunal considered whether the claimant had acted unreasonably in failing to accept the offer of £25,000 when, following the hearing, she recovered only £20,000.

21. We took heed of the sums at stake (see paragraphs 59-61 of the costs judgment). The claimant was seeking £122,617. Garden Court's offer was one fifth of that. The additional costs of the application and hearing were stated at £65,000. Saving some of those costs will have been an incentive to settle.

22. We also noted that had we not decided to order summary assessment (at the maximum allowed under the rules) she could well have recovered more than £25,000 – perhaps much more. Neither side may have anticipated the tribunal's clean break reasoning. It was however a feature they themselves contemplated when negotiating.

23. We also considered that the claimant had succeeded in the claim that she had suffered detriment by the damage to her reputation of saying she was under investigation. Her professional reputation was important to her. She had not succeeded in other parts of her claim against Garden Court; perhaps their original website statement reflected this. In the request for a website statement she wanted some gesture of acceptance or reconciliation. It was a modest request.

24. The tribunal understands that this could not have been included in any order we could make on the costs application. It is not however uncommon in litigation in the employment tribunal, or in the courts, for parties to agree settlement terms that could not have been ordered. It is often seen as one of the benefits of settling rather than going to a hearing. In employment tribunal

negotiations it is common to include clauses about references, non-disparagement, public statements, or training of managers. In clinical negligence claims, commercial healthcare providers or pharmaceutical firms will insist on no publicity, sometimes in return for a specified additional payment – "gagging clauses". We therefore concluded that we could take account of the website statement as a term of any settlement when we were considering whether her conduct over the settlement offer was unreasonable, even though the tribunal could not have made that order.

25. We decided the claimant did not act unreasonably in rejecting the offer to settle costs at £25,000 unless Garden Court would publish a short statement. The costs she had to pay had been increased by the way the bundle was prepared. Even if not all the work was allowed on a detailed assessment, the costs she might have recovered were very substantial. She was prepared to contemplate settlement and make a counter- proposal. She was not given any reason why what she saw as a short written acknowledgement of the findings – never in fact appealed – could not be published. This is not to say that Garden Court were unreasonable in refusing to agree to publish such a statement if (for example) they felt strongly that the decision was unfair but not worth appealing, or that a statement at this stage would stir up more trouble, internally or externally, or that they resented the claimant having brought claims against them that had been dismissed. Our focus is on whether the claimant was unreasonable to ask for it. Taken in the round, we did not consider it unreasonable. The threshold condition in rule 76 has not been met.

26. If we had concluded that the claimant did act unreasonably in asking for the extra term about a website statement as a condition of accepting the offer, probably we would not have exercised discretion to make an order, for the same reasons that we decided to limit the award of costs to a summary assessment. An end to the litigation between these parties is desirable.

Reconsideration

27. As an alternative to making an order for the costs of the costs hearing, Garden Court invited the tribunal to reconsider its costs judgment under rule 71. No reasons were given why this was in the interest of justice.

28. The claimant has replied that as all the relevant correspondence was without prejudice save as to the costs, it was not correspondence we could consider when deciding the applications for costs and for the same reason we cannot take it into account in any reconsideration of that judgment.

29. The tribunal agrees. Making an offer as to costs and deciding not to accept a counter proposal is part of conduct of the proceedings, which may be reasonable or unreasonable, and relates to whether we should make an order for the costs of the costs proceedings. Settlement discussions are privileged for policy reasons. As the correspondence was without prejudice, we could

not take it into account when reconsidering the costs judgment any more than we could when considering it.

Employment Judge Goodman
13 October 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

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. 13/10/2023

FOR THE TRIBUNAL OFFICE