EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Ms A Bailey		(1) Stonewall Equality Limited (2) Garden Court Chambers Limited (3) Rajiv Menon QC and Stephanie Harrison QC, sued as Representatives of all members of Garden Court Chambers (except the Claimant)

JUDGMENT ON RESPONDENT'S COSTS APPLICATION

The Claimant must pay the Second and Third Respondents 10% of their costs of re-amending their response on 27 July 2021 and re-re-amending their response on 26 November 2021, to be subject to detailed assessment on the standard basis if not agreed.

REASONS

1. With the consent of the parties, this judgment is given on the papers without a hearing.

2. At a hearing on 12 October 2021 I permitted the Claimant to amend her claim so as to include a claim of direct discrimination because of philosophical belief. Written reasons were sent to the parties on 12 November 2021.

3. As recorded at [33] of my written reasons, the Garden Court Respondents had indicated at that hearing an intention to make an application for costs in respect of the amendment application, and I indicated that if the parties were in agreement, it would be in accordance with the over-riding objective

of avoiding delay and saving expense, for me to deal with the application on the papers.

4. The Garden Court Respondents duly made an application for costs on 26 November 2021. The Claimant responded on 10 December 2021, the Respondents replied on 16 December 2021 and there was then further email correspondence between solicitors on 21 and 22 December 2021 and 7 January 2022.

5. I have considered carefully all of those documents and correspondence and I intend no disservice to the counsel or solicitors concerned in not setting out their arguments in full or dealing with every point that has been made. The intention in dealing with this on the papers was to take a proportionate approach and to save the parties' the expense of a hearing. I am sorry to see that, given the volume of correspondence generated, very little expense may have been saved in dealing with the matter in this way. I shall nonetheless endeavour to keep my reasons short.

6. Rule 76(1) provides, so far as relevant, that the Tribunal may make a costs 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 (b) any claim or response had no reasonable prospect of success. Rule 78 sets out the powers of the Tribunal in relation to the amount of a costs order. In this case, the Respondents invite me to make an order that the Claimant pay the costs of and occasioned by the amendment application, to be assessed if not agreed. This would be an order under Rule 78(1)(b). In the alternative, I have power under Rule 78(1)(b) to order the paying party to pay the receiving party a specified amount, not exceeding £20,000.

7. Rule 84 provides that the Tribunal may, in deciding whether to make a costs order and in what amount take account, of a party's ability to pay. I am not invited by the Claimant to do so in this case and I therefore do not.

8. The first question for me is whether or not there has been unreasonable conduct by the Claimant or her representatives in relation to the amendment application. Contrary to the assertion in the Respondents' reply submissions ([9]), the Claimant has not conceded that there has been unreasonable conduct. The paragraphs that the Respondents refer to in their reply submissions are paragraphs in which the Claimant accepts, as indeed I held in my decision on the amendment application, that the amendment application has increased costs for the Respondents. It does not, however, follow that because the Respondents costs have been increased the Claimant has acted unreasonably. All sorts of reasonable actions increase the other party's costs. Parties, even competently represented ones, frequently do not think of everything at the outset, or make judgment calls about what to include and what not to include in a claim that they later regret. In the ordinary courts, the costs of amendments to fix

these sort of issues follow the event. In the Tribunal they do not, unless the decisions have been unreasonable.

9. I have found the question of whether there has been unreasonable conduct here difficult. The Claimant was aware from long before commencing her claim (see her email to Sam Mercer of 25 October 2019) of the possibility of bringing a philosophical belief discrimination claim prior to commencing proceedings. There was thus a deliberate decision by the Claimant (with the benefit of advice from leading counsel) not to bring such a claim at the outset. My view as set out at [20] of my written reasons remains that the claim could have been pleaded at the outset and that the Claimant's reasons for not doing so are not very good reasons.

10. However, I have to ask myself whether the decision not to include the claim at the outset was unreasonable, i.e. not whether it is one with which I agree, but whether it was not one of the reasonable courses open to the Claimant in her circumstances. Given the reasons advanced by the Claimant for the delay in making the application to amend (summarised at [19] of my written reasons), I am not satisfied that it was unreasonable for the claim to have been pleaded in the way it was at the outset or that, having not been so pleaded, it was unreasonable for the Claimant to wait until the outcome of the *Forstater* case before applying to amend. Indeed, given the decision that was made by her (on advice) at the start of the proceedings, it would have been odd to have made the amendment application prior to the EAT's decision in *Forstater*. The decision made at the outset not to include a philosophical belief discrimination claim may not have been the most sensible decision since not including a viable claim at the outset (especially a claim that may be *more* viable than the one that is actually brought) always risks the possibility that permission to amend to include it will be refused and thus the claim lost when perhaps it would not have been, but I cannot go so far as to say that it was outwith the range of reasonable decisions that could have been taken. Seeking to avoid a lengthy preliminary hearing on the question of whether her belief was a 'philosophical belief' (and potentially other pitfalls encountered by Ms Forstater in pursuing her claim) was a reasonable course that was in my judgment open to the Claimant.

11. Further, if the Claimant *had* pleaded a claim of philosophical belief discrimination at the outset, the likelihood is that (as the Claimant feared) there would at an early stage have been an preliminary hearing on the question of whether her philosophical belief qualified as such. By waiting until after the *Forstater* decision to make the application to amend, the Claimant thus likely *saved* both parties the significant cost and expense of dealing with a preliminary hearing on that issue. I put this only as a matter of likelihood because I recognise that there is a possibility that the parties might have sought, and the Tribunal granted, a stay on the belief discrimination claim pending the EAT appeal in *Forstater*. However, on balance I consider it unlikely that a stay would have been granted. Prior to the EAT's decision in *Forstater,* I do not think it would necessarily have been

anticipated that the EAT's decision in that case would be expressed in terms that would make it applicable to the Claimant's case. The argument would likely have been that the Claimant's beliefs would need to be considered on their particular facts, that they differed to those of Ms Forstater and that (given that the final hearing in this matter was originally supposed to have taken place in June 2021) it would have been unreasonable to delay that.

12. I do not therefore consider that it was unreasonable for the Claimant to wait until after the *Forstater* decision to make the amendment application.

13. That leaves the question of the Claimant's delay between judgment being handed down in *Forstater* in June 2021 and making the amendment application on 30 September 2021. I identified at [22] of my written reasons that this delay did mean that the Respondents were not able to deal with the amendment application in their Re-Amended Response and that this was prejudicial to the Respondents. Given that counsel for the Claimant was instructed in *Forstater*, and given that the Claimant and her advisors ought (given her reasons for not including a belief discrimination claim at the outset) to have been following the progress of the *Forstater* case closely, I do consider that it was unreasonable for the Claimant to delay by nearly three months before applying to amend. This is especially so given that the Claimant was aware that the Respondents were in the process of re-amending their response and that any application by the Claimant to amend would have a bearing on the work that they were doing in that regard. In that respect, therefore, I am satisfied that there was unreasonable conduct by the Claimant or her representatives in waiting three months to make the amendment application.

14. The Respondents' original cost application sought also to argue that the Claimant had acted unreasonably either in bringing the original indirect discrimination claim as it stood prior to the amendment or in bringing the amended claim on the basis that either or both stand no reasonable prospect of success. However, I infer from the Respondents' reply that this part of the application is not pursued, and rightly so: the merits of the original claim were the subject of consideration at the strike-out hearing on 12 February 2021 and the merits of the amended claim were considered by me in permitting the amendment on 12 October 2021. I found both to meet the reasonable prospects test and I cannot revisit my views on either now.

15. I then have to consider whether or not it would be appropriate to make a costs order and, if so, in what amount, given the unreasonable conduct that I have found.

16. Given that the Claimant is herself lawyer, and that she has been represented solicitors and leading counsel throughout, I consider that, having found unreasonable conduct, it would be appropriate for that in principle to be sanctioned by an award of costs. I do not consider that the fact that the Respondents may have (also) acted unreasonably as the Claimant contends means it is inappropriate to make a costs award against

the Claimant. To the extent that the Claimant wishes to pursue a costs application against the Respondents, in my judgment she must do that on another occasion. I did not indicate that I could deal with such a costs application on the papers and if I am being asked by the Claimant to do so (that is not my understanding, but it appears to be the Respondents') I decline to do so.

17. As to the amount of costs, I recognise that in this jurisdiction I am not bound to award only the costs of and occasioned by the unreasonable conduct, but in this case I consider that it is appropriate in principle to limit the costs award in this way. This is because I have made a very specific and limited finding of unreasonable conduct and in my judgment it would not be fair to order the Claimant to pay any more of the Respondent's costs than have been occasioned by the unreasonable conduct.

18. The difficulty is ascertaining what that amount might be. In this respect, I consider that there is force in the Claimant's argument that the Respondents would have resisted the amendment application whenever it was made and that there would therefore have needed to be a hearing come what may. The amendment application was hard-fought and I consider it highly unlikely that the Respondents would have conceded it if the Claimant had made the application earlier.

19. What the Respondents did lose by the Claimant's delay was an opportunity to delay re-amending their response until after the amendment application had been determined. Had they made an application to that effect, it is likely it would have been granted as the potential economies of time in dealing with all re-amendments at once rather than in two tranches are obvious in principle. While they may be obvious in principle, determining what they might have been in practice is very difficult. It is not something that can be ascertained from the Statement of Costs provided, nor could it be revealed by detailed assessment. I have to decide, on a broad-brush basis, roughly what proportion of the costs incurred by the Respondents in re-amending their response on 27 July 2021 and re-re-amending their response on 26 November 2021 would have been saved if they had dealt with the necessary amendments on one occasion rather than two. Doing the best I can, I estimate that there would overall have been a 10% saving in the costs preparing and drafting both those documents.

20. I anticipate that it might have been possible to make a summary assessment of those costs but the Statement of Costs provided by the Respondents (understandably) does not deal with the costs of re-amending their response on 27 July 2021. I do hope, however, that the parties will be able to reach agreement as to what the amount of costs should be in the light of my judgment. Lest it assists, I add that I do not consider that the fact that a party makes an error in preparing a Statement of Costs (which they correct and affirm with a new statement of truth) prevents them recovering their costs.

21. I therefore order the Claimant to pay the Second and Third Respondents 10% of their costs of re-amending their response on 27 July 2021 and re-re-amending their response on 26 November 2021, to be subject to detailed assessment on the standard basis if not agreed.

Employment Judge Stout

13 January 2022

SENT TO THE PARTIES ON

14/01/2022.

…….....

FOR THE TRIBUNAL OFFICE