EMPLOYMENT TRIBUNALS

Claimant | | **Respondents**

Mr M Atef Hossaini **v** **(1) EDS Recruitment T/A J&C Recruitment**
(2) TESAM Distribution Ltd

Heard at: Norwich **On:** 16, 17, 18 and 19 July 2018

Before: Employment Judge Postle

Members: Mr R Allan and Ms R Kilner.

Appearances
For the Claimant: In person.
For the First Respondent: Mr Johns, Counsel.
For the Second Respondent: Mr Heard, Counsel.

JUDGMENT

1. The Claimant's claim of Race Discrimination against both the First and Second Respondents are not well founded.

2. The Claimant's claim of Religion and Belief Discrimination against both the First and Second Respondents are not well founded.

3. The Claimant is ordered to pay a contribution towards both the First and Second Respondents' costs in the sum of £10,000 for each Respondent.

REASONS

1. The issues in this claim are set out at the case management hearing of 26 May 2017, these involve claims of harassment and victimisation, the protected characteristic being Race and Religion, s.26 and s.27 of the Equality Act 2010 (pages 42-44).

2. In this tribunal we heard evidence from the Claimant through a prepared witness statement. In breach of the Tribunal's Order for the exchange of witness statements, the Claimant attempted to tender a witness statement from a Mr Andrew Brookes dated 20 January 2018 at today's hearing (the actual date for exchange of witness statements had been mutually agreed and extended to 5 October 2017).

3. Both Respondents objected to this late disclosure of a witness statement which clearly was in breach of the Tribunal's Order for the date for the exchange of witness statements. The Tribunal concluded on balance this was prejudicial against both Respondents and refused submission of this very late witness statement.

4. The Claimant also wanted a witness summons to be issued to Mr Tony Ellingford his Trade Union representative who has now retired, unfortunately the Claimant was unable to provide an address for service. The Claimant called no further evidence.

5. For the First Respondent we heard evidence from; Mr John Ransom the former managing director, Mrs Teresa Mears the office manager, Miss Katarzyna Lesniak the assistant manager, all giving their evidence through prepared witness statements.

6. For the Second Respondent we heard evidence from; Mrs April Drewery, HR manager, Mr George Widger, Transport co-ordinator and Mr Andy Welch, operations director, again all giving their evidence through prepared witness statements.

7. The Tribunal also had the benefit of a bundle of documents consisting of 211 pages.

The law

8. That is helpfully and correctly set out in the Second Respondent's closing submissions at paragraphs 3, 4, 5, 6 and 7. The Tribunal confirm this is a correct analysis of the relevant Law.

9. The facts of this case show that the First Respondent is a temporary employment agency provider. The Second Respondent is in the business of operating warehousing and storage facilities for land transport activities.

10. The Claimant was engaged as an agency worker under contract for services by the First Respondent (pages 49-53) in May 2016. On 23 May 2016 the Claimant was assigned by the First Respondent to the Second Respondent to provide services as a shunter driver. The Claimant is of Muslim religion and south-Asian origin, and informed the Tribunal that he was Turkish/Iranian origin.

11. On 5 October 2016 there was an altercation between the Claimant and Mr Edgarus Kunigilis and Mr Vitalijus Seibutis. Mr Kunigilis was employed by the First Respondent and Mr Seibutis was employed by the Second Respondent. It would appear they felt the Claimant was not pulling his weight and the Claimant was called a 'babaji'. In retaliation the Claimant called them 'pideras'. Subsequent translation by Mrs Mears (page 82) by Global Translators UK suggested the meanings are:

> "One word is Russian and the other is Lithuanian – both words are offensive."
>
> "First translator: these words are quite offensive and as far as I know 'babaji' means something like scarecrow and 'pederasty' means homosexual."
>
> "Second translator: 'babai' is different, something European people say when they are angry but it is nothing bad when you do not know it's said, particularly to an Indian or a Pakistani man it is easy to say babai. Pideras is Lithuanian and pederasty is Russian all mean like fucking gay."

12. The Claimant complained to the Second Respondent's supervisor Mr Widger that he had been called names by Mr Kunigilis. Mr Widger together with his senior supervisor called them all together in an informal meeting at which they all admitted exchanging words of 'babaji' and 'pideras' (as confirmed by a statement Mr Widger made on 10 October – page 79). A further statement having been taken on 21 November 2016 from the Second Respondent's supervisor Mr Michael McLennan who said (page 113):

> "Ref = Driver Dispute – I heard half an argument between three drivers, didn't understand what was said, however when George called all three drivers together they all admitted both parties were to blame and all shook hands. Signed Mr McLennan."

13. At this stage there is no evidence the Claimant raised with Mr Widger he was called a "fucking Muslim". In particular, Mr Widger confirms in evidence the word "Muslim" was not raised. It would appear at this stage they all shook hands and agreed to continue working together. Mr Widger warned that if it continued disciplinary procedures would be invoked.

14. The Claimant later on 5 October 2016 reported the incident to Mrs Mears the office manager of the First Respondent. She informed him of the grievance procedure and asked for the allegations to be put in writing. The Claimant explained that Mr Kunigilis and Mr Seibutis had called him a "babaji" and he found the term offensive. Mrs Mears did not know the meaning of the word 'babaji' and that was her reason for obtaining the translation referred to above. At this stage the Claimant did not raise with her an allegation of being called a "fucking Muslim". Mrs Mears explained that she would speak to Mr Kunigilis and see what his response was, before considering what action to take. She would also raise the matter with Mrs Drewery, HR manager of the Second Respondent about Mr Seibutis as he was an employee of the Second Respondent.

15. On the 6 October 2016 Mrs Mears called Mr Kunigilis into a meeting and advised him of the allegations that had been made against him by the Claimant. Mr Kunigilis claimed that there had been an argument involving himself, Mr Seibutis and the Claimant because it was felt that the Claimant was not pulling his weight. Mr Kunigilis admitted calling the Claimant a “babaji” and advised that the Claimant had referred to him as a “pideras” in return. Mr Kunigilis admitted that the words were known to be offensive terms in his own country, but he was not aware they had religious or racial connotations. He appeared to be extremely apologetic. Mrs Mears advised that she would speak to the Claimant and see if he was interested in finding a resolution.

16. Shortly afterwards on the same day, Mrs Mears called the Claimant back into a separate room for a meeting. She advised him that she had spoken to Mr Kunigilis who was deeply upset about the argument and explained that Mr Kunigilis wanted to apologise for the comment that had been made, but it was entirely up to the Claimant how he wanted to proceed with his complaint. The Claimant advised that he was happy to meet Mr Kunigilis to resolve the problem. Again, no mention was made at this stage by the Claimant that he had been called a “fucking Muslim” by either Mr Kunigilis or Mr Seibutis.

17. Mrs Mears then held a meeting with the Claimant, Mr Smith operations manager for the Second Respondent and Mr Kunigilis. Both the Claimant and Mr Kunigilis agreed that the argument has escalated unnecessarily, Mr Kunigilis apologised for calling the Claimant a “babaji” and the Claimant apologised to Mr Kunigilis for calling him a “pideras”. Mr Kunigilis offered to buy the Claimant a coffee and they both shook hands and left the office.

18. However, the following morning on 7 October 2016 the Claimant approached Mrs Mears stating that he no longer accepted the apology of Mr Kunigilis, he then provided a copy of his report of racism at work in the form of a letter which are at pages 76-77. In that letter the Claimant stated for the first time that Mr Seibutis had called him a “fucking Muslim”. Mrs Mears advised him that a full investigation must now be carried out based on the seriousness of the new allegation.

19. Mrs Mears also explained that before the investigation was finalised she would need to speak to Mrs Drewery of the Second Respondent who would be investigating the behaviour of Mr Seibutis as he was an employee of the Second Respondent. Mrs Drewery was currently on short term sick leave and therefore advised that the meeting would be held to go over the findings of the investigation upon Mrs Drewery’s return. Mrs Mears in the meantime took a statement from Mr Kunigilis (page 80 of the bundle) to establish the factual background of the disagreement between the parties. In that statement Mr Kunigilis admits calling the Claimant a “babaji” and advised that the Claimant had referred to him as a “pideras” in return. Mr Kunigilis made it clear to Mrs Mears that he had not heard Mr Seibutis call the Claimant a “fucking Muslim” at any time.

20. The Claimant attended the First Respondent's offices on a number of occasions between 7 and 18 October 2016 requesting an update on the progress of the investigation. Mrs Mears advised that the investigation was underway although she was still waiting on Mrs Drewery to return from sick leave before a formal meeting could be held. The Claimant then wrote to Mrs Mears on 18 October 2016 (page 81) requesting a meeting to discuss his concerns. By this stage Mrs Drewery had returned to work and the Claimant was invited to a meeting to discuss the nature of his complaint on 19 October 2016. Mrs Drewery and Mr Smith were also in attendance.

21. At the beginning of the meeting Mrs Mears advised the Claimant that she had completed the investigation and asked whether he wanted to review a copy of the translation and the statements that had been provided. Apparently, the Claimant declined that offer. Mrs Mears explained to the Claimant that it appeared to both the First and Second Respondents the parties involved in the dispute were equally to blame, that the comments had been made from both sides in the heat of the argument, she explained that she had found no evidence that the words "fucking Muslim" had ever been used.

22. Mrs Mears advised that based on her discussions with Mr Kunigilis and Mrs Drewery's discussions with Mr Seibutis it appeared there had never been any intention to offend the Claimant. There were no religious or racial connotations to the word "babaji", moreover Mr Kunigilis and Mr Seibutis had felt that the "pideras" comment made by the Claimant was extremely offensive in its own right.

23. Mrs Mears advised the Claimant that the conclusion was that his grievance would not be upheld. The Claimant requested a further meeting with his Trade Union representative, Mrs Drewery advised that this should be put in writing and that would be accommodated. This was duly done by the Claimant's Trade Union at page 97.

24. On 20 October 2016 Mrs Mears was contacted by Mr Ellingford, regional officer of Unite requesting that a formal grievance meeting should be held, it was therefore agreed a grievance meeting would be held on 3 November 2016. At that meeting Mrs Drewery, Mrs Mears, Mr Smith, the Claimant and Mr Ellingford attended. It is clear that meeting was heated. There was an exchange of views. The minutes of that meeting although disputed by the Claimant and his Trade Union representative, now, there is no evidence before the Tribunal that there was any email or letter from the Trade Union disputing the contents of those minutes. It is also true that Mr Smith suggested calling someone a "Muslim" and another a "Christian" was stating fact not racist. As confirmed by Mrs Mears and Mrs Drewery, and the fact that Mr Smith did not use the word "fucking Muslim". The Claimant asserts that Mr Smith's specific reference example was to a "fucking Muslim" as was the Claimant's Trade Union representative. The Claimant explained that he wanted a full apology from both Mr Kunigilis and Mr Seibutis for calling him a "fucking Muslim".

Mrs Mears explained to the Claimant that we may have difficulty obtaining this apology, until now it has never been alleged that Mr Kunigilis had also used the words “fucking Muslim”. She had been advised by Mrs Drewery that Mr Seibutis had also denied making any comments relating to the Claimant’s race or religion.

25. As a result of Mrs Mears involvement in the investigation and the new allegation against Mr Kunigilis, all attendees at the meeting agreed at this stage it would be appropriate for an independent person to re-hear the Claimant’s grievance. Mrs Mears advised Mr Ellingford that Mr Ransom the managing director of the First Respondent would be able to conduct the re-hearing as Mr Ransom had not been involved in the original grievance investigation.

26. The peak season for the Second Respondent’s workload is between late August and early October each year. During this period the Second Respondent performs a great deal of work for Marks and Spencers bringing in the spring/summer collection for the following year. During these peak periods the First Respondent supplies an increased number of drivers and warehouse operatives to the Second Respondent to support this workload. However, in November, December January the Second Respondent’s requirement for drivers diminishes because the primary task of a shunter driver is to move stock trailers to a loading point which are collected by an external freight courier service. The Second Respondent’s intake and output falls and the requirement for drivers decreases accordingly.

27. During the month commencing 23 October 2016 to 19 November 2016 the total number of hours worked by the Second Respondent was 71,231.75 comprising of 68,611.5 basic hours and 2,620.25 overtime hours. In contrast during the month commencing 21 August to 24 September 2016 the total number of hours worked was 104,181 comprising of 96,005.25 basic hours and 8,175.75 overtime hours (pages 121a-n).

28. Prior to the 4 November 2016 there were three permanent employees engaged as shunter drivers, Mr Zeboutis left mid December and was not replaced, Mr Ian Fovargue a driver employed for many years and Maciej Wardak. Based on a number of other operational u-turns by the Second Respondent’s commercial decision and the seasonal peak and fall of stock movement Mr Welch the operations director of the Second Respondent informed the First Respondent that they no longer had a need for full time agency drivers. All the Second Respondent’s drivers were full time. There were no other drivers recruited as shunter drivers between November 2016 and 24 February 2017.

29. Accordingly, on 4 November 2016 the First Respondent received an email (page 104) from Mr Welch advising that the Second Respondent no longer had a requirement for agency shunter drivers at that time. The First Respondent was therefore asked to reduce the number of agency shunter drivers provided to the Second Respondent. The Claimant was the only

employee assigned to the Second Respondent to perform purely driving duties.

30. Apparently, Mr Hollins of the First Respondent was responsible for advising the Claimant that his assignment would be terminated and that his services for the Second Respondent would therefore be withdrawn. Mr Hollins is also said to have advised the Claimant that his contract with the First Respondent would continue pending a further placement being found.

31. On 5 November 2016 Mrs Mears of the First Respondent received a second grievance letter from the Claimant dated 4 November 2016 alleging that he had been victimised as a result of his grievance (page 105). This was in relation to the Second Respondent no longer requiring agency drivers.

32. The Claimant was offered around the 5 November an alternative vacancy as a warehouse operative at Gateway, which is the Second Respondent's warehouse. He said he was thinking about it and would get back. The First Respondent's state nothing further was heard.

33. Mrs Mears provided a statement as part of the investigation by Mr Ransom into his other grievance and she outlined the factual background of the dispute between the various parties. On 30 November 2016 Mr Ransom wrote to the Claimant advising him that the investigation into his second grievance had been concluded and inviting him to a further meeting to discuss both of his grievances. The Claimant was advised of his right to be accompanied by his Trade Union representative. The grievance meeting went ahead on 30 November 2016 and the minutes of that meeting are page 115. The Claimant attended with his Trade Union representative, Mr Patrick Brooks. Mrs Drewery's and Mr Ransom's view was that the Claimant, Mr Kunigilis and Mr Seibutis were equally to blame for the comments that had been made and this was confirmed by letter of 20 December 2016 at page 117 concluding that an altercation had taken place and that offensive and inappropriate language had been used by both sides, and there was no evidence of religion or racial terminology.

34. On 11 January 2017 the Claimant was written to (page 120) by the First Respondent offering him the position of a fork lift truck driver subject to the necessary qualifications. The First Respondent received no response and a further letter was sent to the Claimant on 17 February 2017 (page 121), again confirming the Claimant had not contacted the First Respondent and requesting that the Claimant make contact with the First Respondent. The Claimant did not make contact and it appears he had found alternative employment by this date in any event.

Conclusions

Harassment

35. In relation to the harassment allegations arising out of incidents on 14 September and 5 October 2016, it is the alleged comments made by Mr Kunigilis and the laughing by Mr Seibutis. Also, the alleged comments made by Mr Kunigilis and Mr Seibutis. The Claimant asserts that both on the 14 September and 5 October there was an altercation between the parties in which the Claimant was referred to as a "babaji". On several occasions the Claimant's pleaded case is that "babaji" is inherently a discriminatory word and he further alleges it is a slur against Muslims.

36. The best direct evidence available before this Tribunal for the definition of either "babaji" or "babai" suggests it apparently has nothing to do with race of religion whatsoever. There was arranged by Mrs Mears a translation as she was unaware of what it meant as it seemed at the relevant time the Claimant did not understand what "babaji" meant.

37. It is clear from page 82 of the bundle that Global Translations UK Ltd defined the word depending on how it is spelt, Russian or Lithuanian, they are offensive and "babaji" means something like scarecrow which explains comfortably why there was an altercation in the first place that Mr Kunigilis and Mr Seibutis felt the Claimant was not pulling his weight. "Pederasty" means homosexual. The second translation provided by another translator of the same company said that "babai" is different, normally European people say this when they are angry, but it is nothing bad.

38. There is clearly nothing in the word that had racial or religious connotations.

39. It was noted by the Claimant that he seeks to rely upon a document at pages 182-183 of the bundle as some form of translation. It is difficult to be certain as to the source of this document and it is clear in reading that document it was not written by a translator.

40. Furthermore, if the Tribunal had any doubt it seems inconceivable that if on the one hand the Claimant alleges that "babaji" or "babai" was so inherently discriminatory when the Claimant was first spoken to by Mr Widger on 5 October when all parties admitted using offensive language the Claimant simply did not turn round and say words to the effect 'hang on I'm being racially abused'. It ended with the parties shaking hands on 5 October. If that was not enough, when the Claimant reported the matter to Mrs Mears of the First Respondent late on 5 October again he did not say to her that he was being racially abused merely that offensive language and abuse was being used. Again, on 6 October when there was a meeting of Mr Kunigilis, Mr Smith, Mrs Mears and the Claimant at which the parties apologised and shook hands there was no suggestion by the Claimant at this stage that he had been racially abused. To the Tribunal's mind the above was simply inconsistent with

the Claimant's subsequent allegation he was being racially abused or on grounds of his religion.

41. Furthermore, up until 7 October the Claimant has not once informed any person, Mr Widger, Mrs Mears or Mr Smith that Mr Seibutis had called him a "fucking Muslim".

42. The first time the Claimant raises the allegation that he was called a "fucking Muslim" by Mr Seibutis is in his report on 7 October and then subsequently on the 3 November at a grievance meeting he makes the further allegation that now he is also accusing Mr Kunigilis, which had never been stated in October. It is simply unbelievable and lacks consistency.

43. The Tribunal therefore do not find that the allegations of harassment made in relation to the incidents on 14 September and 5 October 2016 are well founded. There is simply no credible evidence that the comments of "babaji" were made with racial or religious connotations. Furthermore, the Tribunal is satisfied on the balance of probabilities the Claimant is not credible in relation to his allegation that he was called a "fucking Muslim" firstly by Mr Seibutis and then a subsequent allegation on 3 November that he was also called the same by Mr Kunigilis.

44. The final allegation of harassment is made against Mr Tony Smith (now deceased) said to have been made on 3 November at a grievance meeting in which it is alleged by the Claimant that Mr Smith is said to have referred to Muslims at the meeting a number of times with the addition of the word "fucking".

45. Unfortunately, we do not have the benefit of seeing and hearing from Mr Smith as he has sadly died since the events. What we do have is the clear evidence of Mrs Mears and Mrs Drewery that what Mr Smith was doing at the meeting was giving an example in saying that if someone says you are a Muslim or a Christian, that is a fact and is not racist. Both Mrs Mears and Mrs Drewery were quite clear in their evidence the use of the word Muslim was not accompanied by the word "fucking". In contrast to that we have the Claimant's evidence and the witness statement of his Trade Union representative Mr Ellingford who attended that meeting. What is surprising is that if such a comment of "fucking Muslim" was ever made, then a regional officer of Unite would be so outraged that he would submit his outrage in writing to the First and Second Respondents. There is a distinct lack of any evidence from the Trade Union or Mr Ellingford in the bundle of any letters or emails complaining about Mr Smith's behaviour.

46. Furthermore, there is the minutes of the meeting that the Tribunal have had the benefit of and they simply do not refer to the use of the word "fucking" and again those minutes were sent to the Claimant's Trade Union representative and although he says he believed he challenged them in his witness statement there is no evidence in the bundle of any letter or email communication from Unite Trade Union, Mr Ellingford the

Trade Union representative saying they disagreed with the minutes of that meeting.

47. In the circumstances, and on the evidence before us, the Tribunal are not convinced that Mr Smith ever used the word "fucking" and was merely giving an example of someone stating a fact that you are a Muslim or a Christian. That in itself is not racist or discriminatory on the grounds of religion. That claim is therefore not well founded.

Victimisation

48. There are two claims of victimisation, firstly that the First Respondent subjected the Claimant to a detriment by withdrawing employment on the Second Respondent's instruction because the Claimant had done a protected act, namely raised a grievance.

49. Secondly, did the Second Respondent subject the Claimant to a detriment by refusing to offer him employment and instructing the First Respondent to terminate the Claimant's employment because the Claimant had done a protected act?

50. The Tribunal are firstly satisfied that the protected act relied upon by the Claimant does constitute a protected act, namely his two grievances. These being raised following an incident orally with Mr Widger on 6 October 2016, the Claimant's written grievance handed to Mrs Mears on 18 October 2016 (page 81) and the Claimant's written grievance made to Mrs Mears on 5 November 2016 (page 105).

51. The question then arises, did the Claimant suffer the detriments as alleged?

52. These claims of victimisation the Tribunal found straightforward to resolve. Mr Welch operations director of the Second Respondent gave evidence which the Tribunal accepts, that the busier times of the year for the Second Respondent and the need for shunter drivers is August to October. Thereafter, during November, December and January the work drops off and then slowly picks up. At the same time there was a sudden operational u-turn in the Second Respondent's commercial division to withdraw from lease negotiations with landlords of the site at Orton and further commercial decision not to take the Wainman Road site beyond its current short-term lease. As a result of those commercial decisions and the seasonal peak and fall of stock movement requirements they clearly had an effect on the business requirements and therefore a need to reduce the number of drivers in the warehouses. As a result of this, Mr Welch informed the First Respondent that there was no further need for full time agency drivers. The Second Respondent's shunter drivers were full time and were thus employees of the Second Respondent. He therefore emailed the First Respondent on 4 November 2016 (page 104) confirming the Second Respondent's decision.

53. Furthermore, it is quite clear that Mr Welch at the time had absolutely no idea of the dispute going on between the Claimant, Mr Kunigilis and Mr Seibutis and the grievance process. He was completely removed from that process and ignorant of the events. He could therefore not have victimised the Claimant. The claim is therefore not well founded.

54. It was simply a business decision, no more, no less.

55. It therefore follows given the above facts the claim against the First Respondent is dismissed as they clearly have no control over commercial decisions of the Second Respondent, and the Claimant was the only shunter driver the First Respondent had with the Second Respondent. The claim against the First Respondent is therefore not well founded.

The Respondents' application for costs

56. At the conclusion of the Tribunal's judgment, the First and Second Respondent made an application for costs. Mr Heard for the Second Respondent informed the Tribunal the application was made on two grounds:

    56.1 The Claimant had been unreasonable in the way that the proceedings had been conducted; and

    56.2 The claim in reality had no reasonable prospect of success.

57. Counsel supports this with the following reasons:

    57.1 On the first ground that the parties had entered into negotiations mid last year, around the 19 July 2017 at a time when the Claimant was represented by Thompson's Solicitors. There was an offer from the First and Second Respondents of £1,400 to settle the claims.

    57.2 That offer on 29 August 2017 was rejected by Thompson's. They made a counter offer of £6,600. That seemingly was rejected and further negotiations took place, and a new offer from Thompson's to settle was £4,400.

    57.3 On 1 September 2017 both Respondents wrote to Thompson's and would offer £4,000. It looked at that stage as though the parties would be able to settle. Completely out of the blue and to the amazement of both Respondents Thompson's wrote to both Respondents saying that the offer to settle now on their claim on their client's instructions was £42,000.

    57.4 Unsurprisingly, the First and Second Respondents rejected this by letter of 8 September 2017.

57.5 The Respondents increased their offer to £4,500 with warning that should the matter proceed to hearing and if the Claimant either was unsuccessful in his claim or received less than the sum offered, then a costs application would be made.

57.6 Apparently on 14 September 2017 Thompson's Solicitors came off the record. The Respondents again wrote to the Claimant giving him further time to consider the offer and repeating the costs warning.

57.7 Counsel submit on that basis it was wholly unreasonable to pursue the claim when they were near to settlement and increase the sum to settle to £42,000. In a nutshell that is unreasonable conduct taking account of the merits of the claim.

57.8 Counsel advanced for the second ground of their application that the claim had no reasonable prospects of success, given the findings of the Tribunal it had no prospect of succeeding.

58. Counsel informs the Tribunal that the costs from 8 September, which is all the First and Second Respondent are pursuing amounts to £4,765.60 being the solicitor's fees. Then there are counsel fees for the abortive hearing in 12 February 2018 in the sum of £2,495 and this hearing a brief fee in the sum of £2,550 and two refresher fees of £750 per day.

59. Mr Johns for the First Respondent confirms that it is a joint application and he would endorse everything that counsel for the Second Respondent has advanced including identical solicitors' costs and counsel's fees.

60. The Tribunal then gave the Claimant an opportunity to address the Tribunal. The Claimant tells us he had issues with his solicitors, he did not trust his solicitors and wanted to go to court, that is why he sacked his solicitors.

61. It would appear the Claimant and his solicitors fell out and he ultimately dismissed his solicitor in the middle of September.

62. The Claimant says he has not pursued this claim for money but simply wanted justice, despite requesting a settlement of some £42,000.

63. Enquiries of the Claimant's means showed that he was now in employment and indeed had been employed shortly after 4 November 2016. In fact, within two weeks. The Claimant tells the Tribunal he takes home £340 per week. He owns his own house which is valued at about £130,000 with a mortgage of about £80,000. He says it is in joint names. He has savings of £2,000 and no other assets.

The Tribunals conclusion on costs

64. The power to award costs is contained in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, particularly rule 76 which states:

> "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"

65. The Tribunal reminds itself that a costs order can be made not exceeding £20,000 in the event of a higher sum it would be subject to a detailed assessment carried out either in the County Court in accordance with the civil procedure rules or an Employment Judge applying the same principles.

66. In deciding whether to make a costs order, the Tribunal may have regard to the Claimant's means.

67. The Tribunal reminds itself it is a two-stage process, particularly have any of the circumstances arisen under rule 76(1)(a) or (b), and if so should the Tribunal exercise its discretion.

68. The Tribunal concluded that without the background negotiation history in September last year it might have been difficult to persuade a Tribunal that a costs order fell within the provisions.

69. However, the Tribunal was surprised at the time when the Claimant was represented by the Trade Union's solicitors Thompson's there were clearly meaningful negotiations going on in July, August and early September which were moving towards a settlement, then quite out of the blue and the Tribunal suspects contrary to Thompson's advice the Claimant certainly upped the ante so to speak and demanded £42,000. That is not the way to negotiate a settlement, it is wholly unreasonable and furthermore it is an unreasonable manner in which to pursue proceedings and conduct sensible negotiations towards a settlement.

70. The Tribunal also noted that even at this hearing the Claimant's schedule of loss is some £19,915.06.

71. The Tribunal are unanimously in the view that the Claimant's conduct in upping the negotiation from £4,000 to £42,000 was wholly unreasonable. The Tribunal were also unanimous in their view this is a case where they should therefore exercise their discretion and make an award for costs.

72. The Tribunal noted that both the First and Second Respondents are only looking for their costs from 8 September. The solicitors' costs are clearly reasonable given the amount of work involved in this case as are counsel's fees.

73. The Tribunal have had regard to the Claimant's means and are satisfied that over a period of time together with the equity in his house the costs award the Tribunal will now make can be met. The Claimant is therefore ordered to pay a contribution towards the First Respondent's costs in the total sum of £10,000, and a like sum of £10,000 in contribution towards the Second Respondent's costs. There be no VAT added to that sum as both the First and Second Respondents are VAT Registered and can recover any VAT in any event.

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Employment Judge Postle

Date: 24 August 2018………………..

Sent to the parties on: 24 August 2018..

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For the Tribunal Office