



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MARTIN  
Members Ms J Knight  
Mr M Walton

**BETWEEN:** Mr Naveed Bari Claimant  
  
and  
Fusion Lifestyle Ltd Respondent

**ON:** 7-10 February 2017

**APPEARANCES:**

**For the Claimant:** In person

**For the Respondent:** Ms Ford – HR Manager

**RESERVED JUDGMENT**

The unanimous decision of the Tribunal is that the Claimant's claims of race discrimination are dismissed.

**RESERVED REASONS**

1. By a claim presented to the Tribunal on 12 June 2015 the Claimant made claims of unfair dismissal and race discrimination. The Claimant withdrew the unfair dismissal claim so the only claim for the Tribunal to consider was that of race discrimination (victimisation) which was defended by the Respondent.

**The hearing**

2. The Tribunal heard from the Claimant. The Claimant brought three short statements for other witnesses, however the makers of these statements were not in attendance and the statements were not signed. Therefore, the

Tribunal did not consider them.

3. The Tribunal heard from the following witnesses for the Respondent: Ms Abigail Malcolm (HR Manager), Mr Paul Bew (General Manager) and Mr Steven Parker (Asset Manager).
4. The Tribunal had before it three full lever arch files numbered to 951. In addition, there was a cast list, a schedule of detriments and a chronology.
5. The Tribunal assisted the Claimant when he was cross examining the Respondent witnesses. The Claimant gave the Tribunal a copy of his proposed questions and the Tribunal assisted him in putting those questions to the witnesses.

### **The issues**

6. The issues were agreed by the parties at a case management hearing on 25 August 2015 as follows:
  - i. This is a claim for unlawful victimisation pursuant to the Equality Act 2010 section 27.
  - ii. The Claimant relied on his grievance of 17 February 2015 and his appeal of 8 March 2015 as protected acts. He states that they were protected acts as there were complaints of unlawful discrimination on the grounds of race made by him against his employer.
  - iii. The Claimant asserts that he was subject of a number of detriments as set out below because of the protected acts: -
  - iv. The Respondent judged him to have failed his probation/dissmissed him from work on 5 June 2015;
  - v. The Respondent instructed the Claimant to undertake a return to work interview with an employee on 3 March 2015 when this had already been undertaken by Paul Bew;
  - vi. On 6 March 2015 Paul Bew asked intrusive questions about what the Claimant did in his time off;
  - vii. The Claimant received unjustified criticism of his work from Paul Bew from about 23 March 2015 until his dismissal;
  - viii. Unreasonable expectations were placed on the Claimant to pass NPLQ at the end of March 2015;
  - ix. The Claimant was allocated disproportionate amounts of work from about the end of March 2015 to the beginning of April 2015; and

- x. The Claimant was not assisted by the Respondent in gathering the evidence that he required for his probation review.
  - xi. The Claimant also alleges he was also the subject of post termination victimisation in that on 16 June 2015 he was refused membership of the Seven Island Leisure Centre and that this was on the grounds that he had previously made a complaint and also issued an appeal which were protected acts in the circumstances set out above.
7. The Claimant was given the opportunity to comment on the issues as he did not agree with them at the hearing. Following the hearing there was correspondence and other issues were added. These are set out in the conclusions below.

### The relevant law

8. Section 27 of the Equality Act 2010 ("EqA") provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule." In **St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540**, HL Baroness Hale endorsed the three step approach set out in **Chief Constable of West Yorkshire Police –v- Khan [2001] IRLR 830, HL** with regard to the RRA, which equally applies to the EqA:

*“There are three relevant questions under the 1975 Act. First, did the employer discriminate against the woman in any of the ways prohibited by the Act? In this particular case, the alleged discrimination was by 'subjecting her to any other detriment' (contrary to s.6(2)(b) of the 1975 Act). Secondly, in doing so, did the employer treat her 'less favourably than ... he treats or would treat other persons'? Thirdly, did he do so 'by reason that' she had asserted or intended to assert her equal pay or discrimination claims or done any of the other protected acts set out in s.4(1) of the Act?*

### **The Tribunals findings of fact and conclusions**

9. The Tribunal has found the following findings of fact and probabilities having heard the evidence and considering the documents. It was taken to in the bundle. All evidence was heard and considered, even if it is not specifically referred to in these written reasons. These findings are confined to those which are relevant to the issues and necessary to explain the decision reached.
10. The Respondent runs leisure centres at various sites (over 80) and employs approximately 3,000 staff with 30 at the place that the Claimant worked. The Claimant was employed by the Respondent from 27 May 2014 to 5 June 2015 as a Wet Operations Manager responsible for the swimming pool operations at the Seven Islands Leisure Centre in Southwark. The Claimant puts his racial group as Asian. The Claimant's contract of employment provided for a six-month probationary period and notice of one week within the probationary period. The Claimant's probationary period was extended as set out below and he was ultimately dismissed without his employment being confirmed.
11. When the Claimant joined the Respondent, his manager was Mr Russell Day. Mr Day left on 8 August 2014 and was replaced by Mr Bew who was new to the organisation. The Claimant described Mr Bew's management style as being very different to Mr Day's and said he preferred Mr Day's style.
12. It was an essential requirement of his job that the Claimant had a valid National Pool Lifeguard Qualification (NPLQ). The Claimant's qualification had run out and he needed to gain this qualification during his probationary period.
13. On 1 December 2014, the Claimant attended a probationary review with Mr Bew, the result being that his probationary period was extended by three months. Two days later the Claimant sent an email to Mr Bew saying he was not happy working at the Respondent. On 21 December, the Claimant said he was seriously considering another offer of employment. These emails demonstrate that the Claimant was not happy working for the Respondent.
14. On 8 January 2015 there was a mystery shopper's report. This report highlighted various failings at the leisure centre and the Claimant along with other members of staff was named. The Claimant says he was not at work on that day and accused the Respondent of tampering with the report. There was no evidence to show it was tampered with and the Respondent denied

this allegation.

15. On 16 January 2015, the Claimant sent another email saying he was looking for other positions and on 2 February asked for clarity about the length of his notice period and who would provide a reference for him.
16. The Claimant had been booked on a NPLQ course however on 30 January 2015, he had an asthma attack in the swimming pool and the medical evidence was that he was not fit to do this training. Because of this Mr Parker decided to remove the Claimant from the course for his own safety. The Claimant accepted in cross examination that it was reasonable for Mr Parker to do this.
17. Throughout the time the Claimant was managed by Mr Bew, Mr Bew supervised him and told him either face to face or by email where he was falling short. The Claimant complains that there was no performance management process, however the Respondent has explained the training offered and how it manages performance in a probationary period which is by dealing with issues as they arise. Examples are where the Claimant made a maintenance request which was not specific enough and the recall of an email sent to an employee which Mr Bew considered to be in appropriate.
18. On 13 February 2015, the Claimant sent various text messages to Mr Bew threatening to resign and saying *"Been in the industry a long time & in many companies Fusion is without a doubt the worst & the way they treat their staff"*.
19. There is then a letter from the Respondent inviting the Claimant to a probation review meeting on 16 February 2015. This was to review his probationary period in the light of the Claimant's performance and attitude. The Claimant suggested that the invitation to this review was because he said he was going to bring a grievance. He said he told Mr Bew he was going to bring a grievance in a conversation on 16 February 2015. Mr Bew says there was no such conversation. Mr Bew said that on that day, he told the Claimant that there would be a probation review, completed a template letter and then handed the letter to the Claimant at the end of his shift at about 5 pm on 16 February 2015.
20. The Claimant wrote a letter of grievance on 17 February 2017. This is what he relies on as his protected act. He accepts that at no time prior to this date did he raise any issues relating to race discrimination. This four page letter is headed ***"Formal Written Grievance ..... Race & Victimisation – Discrimination – Protected Act"***. In this letter there is only one reference to race. This is in the context of a conversation between the Claimant and another member of staff as follows:

*"Member of Management at Seven Islands Leisure Centre: 4/2/15 – 16.03"*

*"Paul has been on the cctv for past 2 hour checking everyone's timesheets can you believe him"*

Naveed Replied: 04/02/16 – 16:12

*“Petty! Creating a culture of suspicion, bad feeling, loss of trust & respect, hatred, intimidation. He does not fit into SILC. He is trying to make a case for himself also I guess on other grounds on the sly”.*

“Member of Management at Seven Islands Leisure Centre: 4/2/15 – 16.14

*“That what I was thinking”*

*Notwithstanding, that this conversation was between the only two coloured members of the Management team at Seven Islands Leisure Centre, one of which is now being moved to another site.*

*Further, after having put in the complaint about Paul Bew, I have felt that I have been treated differently in comparisons to other members of staff; I have e raised my concerns with other members of staff, which is well documented. – it clearly states “I feel like I am being treated differently”.*

21. The Respondent suspended the probation review process because of the Claimant’s grievance. The grievance hearing was held on 19 February 2015 by Ms Julie Gamble (General Manager). During this hearing, the Claimant did not mention race until asked by Ms Gamble as he had not raised it himself. This is despite Ms Gamble inviting him to do so by asking for example “*what are you implying*”. This opened the door for the Claimant to say he was talking about race discrimination but he did not mention it. Ultimately Ms Gamble asked “*can you substantiate the race discrimination?*” The Claimant then discussed the NPLQ (which he accepts his removal from the course was health related) but does not relate this to him being treated in the way because of race save for saying that he was told he was not doing the course only shortly before it was due to start.
22. The outcome of the grievance was sent to the Claimant on 3 March 2015. The outcome was that the grievance was not upheld. There was an offer of mediation between the Claimant and Mr Bew which the Claimant declined.
23. On the same date Mr Bew asked the Claimant to conduct a return to work interview. This was within the Claimant’s management duties. It transpired that the interview had already been done and that it was not necessary as the leave in question was compassionate.
24. On 6 March 2015, the Claimant emailed his staff to say that he would not be available for the next four weekends as he was doing a course. Mr Bew was concerned because the Claimant was saying he was not available even in emergencies and Mr Bew was going on holiday so he would not be able to cover. The Claimant said he normally worked every third weekend. Mr Bew asked the Claimant what the course was and whether it was work related. The Claimant said it was work related. The Claimant said he found the question intrusive as it related to what he did in his spare time.

25. The Claimant appealed the grievance outcome by letter dated 8 March 2015 with the hearing taking place on 23 March 2015. The appeal was heard by Nigel Court (Divisional Business Manager). As with the grievance hearing, the Claimant was accompanied. The Claimant's concern about race discrimination was not upheld. The Claimant's appeal also related to being removed from the NPLQ – the appeal outcome was that it was right to remove him from this due to his medical issues but that the communication surrounding it could have been better. Similarly, the other concern (being invited to a probationary review) was not upheld in relation to the actual calling of a review, but again the communication surrounding this was criticised by Mr Court.
26. As the grievance process was exhausted, the Respondent rescheduled the probationary review. Given the issues between the Claimant and Mr Bew, Mr Parker was to conduct this review. Normally it is the line manager (in this case Mr Bew) who would conduct a probationary review.
27. Unlike a formal disciplinary hearing, evidence is not normally sent in advance of the review which is intended to be a discussion around a table with a line manager. The Claimant asked for Ms Malcolm from HR to be in attendance as she had been part of the grievance process, and that Mr Bew be there. The Claimant complains that he was not given evidence in advance of the hearing or at the hearing. However, the matters relating to his performance and how this impacted on his probationary period were discussed orally and Mr Bew was there to give his oral evidence. After the meeting the Claimant was sent all documentary evidence, was given special leave to enable him to consider that evidence and had the opportunity to respond which he did in writing on 21 May 2015.
28. The Claimant had referred to ACAS early conciliation in advance of the probationary review. Mr Parker said he did not know that this was a requirement before a Tribunal claim was brought and had understood it to be the Claimant seeking advice about how to ensure the probationary review was carried out fairly.
29. The outcome of the probationary review was that the Claimant's employment was terminated. Full reasons were given orally and in a letter dated 5 June 2017. This is a four and half page close typed letter which went through each of the issues discussed at the probationary review giving reasons for the decision reached. The summary says "*I was specifically concerned with the way that you have referred to the company and your role in Fusion, this was evident that you felt disengaged with the company from December 2014 and this has continued and escalated to a level whereby I feel it is impossible for your employment to continue*". The Claimant was paid in lieu of notice.
30. The Claimant disputed the pay he received and retained the keys to the leisure centre for about 10 days refusing to return them when asked to. This

caused concern for the Respondent as the premises are owned by Southwark Council and they have a responsibility to keep them safe and secure.

31. The Claimant sent an email to the Respondent saying *“Should there be any costs to me or my final pay, which I expect my payslip to be posted to my home address; I will be requesting it from the council and the Tribunal. In any case, I am sure the company will be seeing me around as a member as I have a lot of friends at ILC including all the staff”*. This was forwarded to Mr Parker who took this email to be a threat. He responded saying *“Due to the threat of Tribunal and holding reasonable belief that your intentions of joining the centre are not honourable, we feel that it is not appropriate for you to join or use Seven Island Leisure Centre, however you are more than welcome to join and use any other site other than Seven Islands and Surrey Docks”*. Mr Parker gave instructions that the Claimant should not be allowed access to the leisure centre. Southwark Council later reversed this decision and the Claimant was able use the Seven Island Leisure Centre.

### **The Tribunal’s conclusions**

32. The Tribunal finds that the grievance letter of 17 February 2015 was a protected act. The provisions of s27(2) c *“doing any other thing for the purposes of or in connection with this Act”* are satisfied. The Claimant made it very clear in the heading to this grievance that is done in connection with the Act.
33. The Tribunal then looked to see if the detriments as set out in the agreed issues occurred, whether they were detriments and whether they were causally connected to the protected act. Any detriment before 17 February 2015 would not be done because of the protected act.

### Dismissal

34. The Tribunal is satisfied that the reason for the termination of the Claimant’s employment was not because of the protected act. The Tribunal finds that the decision to hold a probationary review was made before the Respondent received the Claimant’s grievance of 17 February 2015 and find on balance that the Claimant did not tell Mr Bew that he would be making a grievance. Even on the Claimant’s evidence, what he says he told Mr Bew was just that he would be putting a grievance. He did not say what the grievance was about and particularly did not say it was related to race discrimination. Therefore even if the Claimant’s evidence were accepted there was nothing done at that stage for the purposes or in connection with the Equality Act 2010.
35. The Tribunal finds that the reason for the termination of the Claimant’s employment was as set out by Mr Parker in his letter which is quoted above.

### Instruction to complete RTW interview on 3/3/15

36. The Tribunal does not find this to be a detriment. Conducting a Return to Work Interview is a normal part of a manager’s responsibility. The Tribunal



accepts the Respondent's submission that Mr Bew's evidence was that he was missing paperwork for several absences including that of Kate Jerome and asked for the paperwork to be completed. The fact that it transpired not to be necessary is immaterial. Even if it were a detriment there is no evidence to link it to the protected act.

Intrusive questions from Paul Bew on 6 March 2015

37. The Tribunal does not find this to be a detriment. Even if it had, there is no causal connection to the protected act. The Claimant had informed his team and his manager that he would not be available any weekends in a particular month because he was attending training. The Tribunal accepts that he is required to work some weekends and had not sought permission for this absence. The reason for the question was because of the email the Claimant sent regarding his non-availability. Whilst the Tribunal considers that it would have been better to ask the question personally and not in writing, it does not find it to be related to the protected act.

Criticism of work from 23/3/15

38. The Tribunal is unsure why the Claimant has used the date 23 March 2015. However, before this date and before the protected act there were issues with the Claimant's performance and attitude. These were all set out in the probation review outcome letter written by Mr Parker. The Tribunal finds that Mr Bew raised matters with the Claimant on a legitimate work basis.

39. During the hearing the Claimant complained that there was no performance management process and therefore he did not know there were areas where his performance was unsatisfactory. The Claimant stated that comments from Mr Bew were not '*guidance*' they were '*telling him what needs to be done*'. This is much the same thing. The Tribunal is satisfied that the Claimant was aware, or should have been aware that there were areas of performance that the Respondent required improving and in any event the Claimant has failed to show a causal link to his protected act.

Expectations to pass NPLQ by 31/3/15

40. It was a requirement of the role that the NPLQ qualification would be gained during the initial 6-month probation period. The Claimant accepts the reason for not being put on the course was related to his medical issues and that it was reasonable that he not put on the course. This issue was raised from commencement of employment and the Claimant's probation had been extended already on 2 December 2014 by three months as he had not attained the qualification. The Claimant agreed to a new deadline of 31 March 2015. The Tribunal accepts the Respondent's submission that a requirement for an essential qualification is not a detriment. In any event the Tribunal does not find any causal connection to the protected act.

Disproportionate workload from March to April 2015

41. The Claimant has not provided evidence as to how his work load was disproportionate. He accepted in cross examination that his workload, even before the protected act, was high. The Tribunal was taken to an email he sent on 19 February, which, whilst the date of the email is after the protected act, relates to his workload from before the protected act. When questioned on this alleged detriment, the Claimant gave clear evidence that his workload had always been high. On 19 February 2015 for example he sent an email about his work load from when Sue Ayres, an administrator left which meant he had to do some of her work. She left on 6 January 2015 before the protected act. Even if the Claimant's workload was high, there is nothing to suggest this was related to the protected act.

Failure to provide evidence he says was required for his probation review

42. As set out in the findings of fact above, the probationary review to which this detriment relates, was not a formal disciplinary hearing where all evidence should be provided in advance. The Tribunal has found that the Claimant was given the chance to discuss matters (with Mr Bew present) at the probationary review hearing, was sent all documentation and given special leave so he could consider it. The Tribunal has found that he was given the opportunity to respond to the matters raised in this meeting and did respond in writing. The Tribunal does not find a detriment, and even if it had, does not find that it was casually related to the grievance, this being how the Respondent deals with probationary review meetings generally.

Post-termination (membership of SILC)

43. The Claimant was refused entry to the Seven Island and Surrey Docks Leisure Centres. The question is whether the reason related to the protected act. There is only one protected act relied on that being the grievance of 17 February 2015. Even had the threat of Tribunal proceedings been an issue before the Tribunal, given the context in which the Respondent refused entry to the Claimant the Tribunal would not have found it to be a protected act. The threat of Tribunal proceedings only relates to pay and not to race or any other protected characteristic. The Tribunal finds that the reason for the refusal of entry to the centres was because Mr Parker believed that the Claimant was making threats which is a possible interpretation of the email set out above.

44. The Tribunal finds that the reason for the refusal of entry to these two centres was not because of the protected act but because the Claimant had withheld keys to the premises and was viewed as behaving in a threatening manner.

Only employee issued with Bradford scores

45. This detriment was withdrawn and therefore not considered.

Retrialled knowingly on grounds of grievance appeal already upheld

46. During his evidence, it was apparent that the Claimant mistakenly believed his grievance to have been upheld. As set out in the facts it was only upheld in relation to the Respondent's communication style. The Claimant raised matters in his grievance which crossed over into the performance review as often happens where there are parallel sets of procedures going on, especially when the focus of the meetings was so different: the grievance was to explore the Claimant's concerns and the probationary review to explore the Respondent's concerns.
47. The Tribunal does not find that the fact that the same issues cropped up in both sets of procedures to be a detriment, or a detriment related to the protected act. Had the probation review taken place in February as originally planned without a protected act being made the same issues would have been discussed then.
48. In all the circumstances the Claimant's claim is dismissed.

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Employment Judge Martin  
Date: 28 March 2017