EMPLOYMENT TRIBUNALS

Claimant: **Mr Edward Patel**

Respondent: **The Gym Limited**

Heard at: **Leicester**

On: **19 October 2017**
7 November 2017 (in chambers)

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimant: Mr Stefan Liberadzki of Counsel
Respondent: Ms Heather Platt of Counsel

RESERVED JUDGMENT

1. The Claimant's application to amend his claim to include a new claim for an unlawful deduction of wages is refused.

2. The Claimant has leave to amend his Claim to add factual allegations in the terms of the draft lodged earlier.

3. The Respondent has leave to amend its Response, if so advised, within 21 days of the receipt of this judgment.

4. The Claimant was in employment within the meaning of section 83(2) of the Equality Act 2010 and has a right to bring a claim under the Equality Act 2010.

REASONS

1. This Preliminary Hearing was convened to determine the following two issues:-

1.1 Whether the Claimant should be permitted to amend his claim to (1) add various additional factual allegations as set out in the draft amended statement of case in the terms (which it is unnecessary to set out here) lodged with the Tribunal on 21 February 2017 and (2) to add a claim for an unlawful deduction of wages.

1.2 To determine whether the Claimant was in employment for the purposes of the Equality Act 2010 ("EA 2010") and therefore whether he has the right to bring a claim in the Employment Tribunal under the EA 2010. The Claimant has brought proceedings of disability discrimination.

2. At this Preliminary Hearing, Ms Platt who represents the Respondent did not oppose the amendment as to additional factual allegations provided the Respondent has permission to file an amended response (which it does) but she opposed the application to add a complaint of an unlawful deduction of wages. After hearing submissions on that issue, I announced my decision in open Tribunal, which was to refuse the application. The reasons are set out below.

3. The more substantive issue, on which I reserved judgment, was whether the Claimant was 'in employment' within the meaning of the relevant provisions of EA 2010 (the 'employment issue'). This judgment and reasons sets out the decision on that issue. I should add that there are other preliminary issues and to avoid unnecessary delay a further Preliminary Hearing has been already been listed for 25 January 2018 to determine (if necessary) whether the Claimant was at the material times a disabled person and if so whether the Tribunal should order the Claimant to pay a deposit as a condition of him continuing his claim.

4. The facts of the matter so far as they are relevant to the employment issue are relatively straightforward and unless otherwise indicated are not in dispute. Mr Patel was engaged by the Respondent as a 'Personal Trainer' from 1 September 2015 until 20 September 2016 when the contract was unilaterally terminated by the Respondent. I should add that it is now agreed that the correct Respondent in this case should be 'The Gym Ltd' and not the holding company through which various subsidiary companies provide their services to customers. The name of the Respondent is therefore amended accordingly.

5. The Gym Ltd is a highly successful business providing low cost, high quality gym facilities to members of the public. It was founded in 2007 and now operates at approximately 87 sites in the UK. It has more than 450,000 members. Members pay a monthly fee for its services which include an induction and free training sessions on certain aspects of health and fitness. Each site or branch of the Respondent has considerable autonomy in the way it runs its affairs but at most sites, including Leicester, there is an employed Manager and Assistant Manager. The Manager then engages (to use a neutral term) a number of Personal Trainers who have direct one to one dealings with members.

6. All members are required to undergo an induction process by Personal Trainers. If members require assistance in using the equipment that is given by one of the Personal Trainers who are present and available in the gym. Members can also sign up for one to one personal training contracts with Personal Trainers but they are not obliged to do so. If they do, the Personal Trainer will contract directly with them and the member will pay the Personal Trainer a fee for each session. The sessions typically last 45 - 60 minutes and can take place several times a week. It is between the Personal Trainer and the member to agree a fee for the cost of and the frequency of the sessions. The cost is typically between £25 - £40 an hour. There is no minimum fee set by the Respondent. Mr Patel's standard charge was £20 per session. Members can pick which Personal Trainer they choose to have their private sessions with.

7. Mr Patel entered into a written agreement with the Respondent dated 12 February 2016, the key terms of which are set out below. His primary purpose was to build up a client base from which he would derive an income. The

price of gaining clients is to provide services to the Respondent for which he receives no payment from the Respondent. This includes a commitment to spend a set number of hours per week at the gym. Personal Trainers are expected to be physically present at the Gym for the agreed numbers of hours unless they arrange a substitute at their own expense. Mr Patel regularly worked at least 13 hours a week.

8. Personal Trainers hope that new and existing members will sign up with them for personal sessions. That is their primary incentive in the relationship other than perhaps the free use of the equipment whilst at the gym. There is no guarantee however that Personal Trainers will secure any private sessions and no assurance given by The Gym in that respect. The Respondent does not take any commission and so it makes no difference to them whether Personal Trainers have acquired any members for private sessions or not. It is not inconceivable that a Personal Trainer may have no private clients at all.

9. In return for the possibility of attracting private training sessions, Personal Trainers are required by The Gym to undertake a number of activities regardless of whether or not they have been able to secure any private fee paying sessions. These activities include:-

9.1 Undertaking member inductions;

9.2 Cleaning and maintaining gym equipment, including clearing the floor of any objects that may be in an unsafe place, re-racking weights and re-stacking exercise mats;

9.3 Greeting prospective members by providing them with a tour of the facilities if requested and assisting them in the joining process;

9.4 Offering support, advice and assistance to existing members;

9.5 Assisting the Respondent in interactions with members;

9.6 Providing free classes for members.

10. Although the events which led to these present proceedings are not directly relevant to the employment issue, it may be helpful to set out a little of the background. On 31 March 2016, Mr Patel was working at the Leicester branch of the Respondent gym when a large metal air vent fell from the ceiling, a distance of approximately 12 feet, and landed on the Claimant's head. Mr Patel was immediately rushed to hospital. He suffered personal injury. He maintains that he continues to suffer from concussion and is still recovering from the injuries. He was unable to undertake his usual working hours with the Respondent in the weeks and months following the accident. In August 2016 he was still unable to undertake his regular hours. His GP suggested that he should return on reduced hours otherwise his condition would deteriorate. When he relayed this information to the site's Manager and Assistant Manager he was told that in the event of an inability to perform his agreed service hours his contract with the Respondent would be terminated without further notice. A few days later he spoke to the Manager or Assistant Manager and said that he felt obliged to tell them that his health was deteriorating and that his doctor had told him to avoid such things as heavy lifting, to refrain from boxercise and to work reduced hours.

11. On 20 September 2016 Mr Phillip Ravenscroft, the General Manager of the Respondent, wrote to the Claimant to terminate the agreement forthwith. The

reason given was the Claimant's absence which it was said had led to a failure to on the Claimant's part to attend the allocated hours or arrange appropriate cover.

12. On 15 December 2016, following ACAS early conciliation, Mr Patel issued proceedings in the Employment Tribunal for disability discrimination.

13. The written agreement between the Claimant and the Respondent contained the following relevant provisions:

"(1) This Agreement permits the Trainer access to the gym area specified by The Gym to enable the Trainer to market and render his/her business services as a freelance personal trainer, subject to the terms of this Agreement. This Agreement does not constitute a contract of employment between the Trainer and The Gym, nor is the Trainer deemed to be a worker undertaking a contract for services to The Gym. The Trainer is entirely responsible for his/her own tax and National Insurance arrangements.

This Agreement may be terminated at any time by either party giving to the other 30 days prior notice in writing. The Gym may terminate this agreement immediately at any time without notice if the Trainer is in breach of any of his/her obligations under this Agreement or commits any act of dishonesty, negligence or misconduct.

(4) The Trainer agrees:-

(i) to be punctual and present for the agreed induction slots

(ii) if approached by a member, when either on or off shift, endeavour to assist the member, take ownership to resolve the issue or pass them onto the relevant 'on shift' PT or Manager

(iii) to arrange substitute cover, with a personal trainer of The Gym, should the Trainer not be able to be present for the agreed Induction Activities. The Trainer will be wholly responsible for the arrangements with that substitute to provide the cover

The Gym does not guarantee to offer the Trainer any Induction Activities slots, whether now or in the future. The Gym agrees with the Trainer:

i. To maintain The Gym premises and equipment in a good state of repair and reasonable decorative condition;

ii. To allow the Trainer free control over the content of each training session and how and when each training session is carried out, subject only to the terms of this Agreement.

Nothing in this agreement shall render the Trainer an employee, worker, agent or partner of The Gym and the Trainer shall not hold himself out as such."

14. At this Preliminary Hearing the Claimant and Ms Jacqueline Regan, a Director of the Respondent, gave oral evidence. I make the following findings of fact in relation to the working arrangements of the Claimant:-

14.1 That the Claimant worked on average at least 13 hours a week;

14.2 That the Claimant did not undertake work for any other gym. He was at the material time a student at Loughborough University.

14.3 That the Claimant undertook induction procedures for members of The Gym. In particular there is an internal brochure headed *"Moments of Truth"* which was used for the purposes of undertaking inductions and gives detailed instructions and guidance as to how the induction process was to be undertaken.

14.4 That the Claimant was subject to the rules, policies and procedures of The Gym.

14.5 That Mr Patel was required to be available during set hours. If he was unable to undertake his "shift" personally he would be required to provide a substitute at his own expense. His substitute would however have to be someone who was "approved" by the Respondent and invariably such substitute would be someone previously inducted by The Gym.

14.6 That whilst he was at The Gym the Claimant wore, and would be required to wear, a set uniform.

14.7 That there was no remuneration passing between the Respondent and the Claimant. The Claimant's only source of income was from members who signed up to personal training sessions.

14.8 That it was necessary for the Claimant and any substitute to have suitable professional indemnity insurance for any claims by a member.

14.9 That the Claimant was obliged to run free classes for members whether or not he attracted any private clients from it.

14.10 That the Respondent's operated and applied an informal, disciplinary procedure to Personal Trainers. On 18 February 2016 there are notes of a "performance review" as a result of which the Claimant was warned about his conduct and told to improve his performance and "failure to do so may result in termination of agreement".

15. Section 83(2) EA 2010 (so far as is applicable) in relation to status states:

"Employment" means:-

a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;"

16. I will deal firstly with the amendment issue, the outcome of which was announced orally at the hearing but for the sake of completeness I set out my reasons here. There is no objection to the addition of factual allegation and thus leave is granted for the claim to be amended in the terms of the draft lodged with the Tribunal.

17. In respect of the application to amend to include a claim for an unlawful deduction of wages, that application is refused. In coming to my decision I have taken into account the guidance in **Selkent Bus Company v Moore** [1996] IRLR 661. The amendment application relates to the potential loss of fees by reason of the termination of the agreement. Leaving aside the question of whether such a claim is in any event a claim that is properly arguable as an unlawful deduction of wages, leave to amend is refused for the following reasons:-

17.1 The amendment is the addition of an entirely new complaint. It cannot be described as a 'minor' matter or a correction of a clerical error. It would cause substantial hardship to the Respondent in terms of fresh and entirely new on a complaint wholly unrelated to the existing complaints.

17.2 The proposed claim would now be out of time. It was reasonably practicable for the claim to have been brought in time. The Claimant was legally represented at the time he submitted his ET1 claim and there is no reason why the allegation or complaint could not have been included in the original ET1.

17.3 There has been delay in making the application. There is no explanation, let alone any reasonable explanation, as to why the application to amend was

made as late as 21 February 2017 some 5 months after the claim was originally submitted.

18. In those circumstances the application for an amendment to include a claim for an unlawful deduction of wages is refused.

19. I now turn to the employment issue and begin with some of the authorities cited. Ms Platt refers me to **Jivraj v Hashwani** [2011] IRLR 827. In that case the Supreme Court held that an Arbitrator was not a person employed under a contract personally to do work within the meaning of the then Employment Equality (Religion and Belief) Regulations 2003. It was held it was significant that the relevant definition does not simply refer to "a contract personally to do work" but refers to "employment under" such a contract. Ms Platt submits that the essential questions to ask are whether (a) a person provides services for and under the direction of another person in return for which they receive remuneration and/or (2) the person is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Ms Platt points out that the above reasoning was followed in **Halawi v WDFG UK Limited (trading as World Duty Free)** [2014] EWCA Civ 1387 that subordination and personal service were key ingredients of an employment relationship under the EU law on discrimination. Section 83(2) of EA 2010 of course has its origins in EU law. Ms Platt submits that this was not a case where the Claimant was in a relationship of subordination or of personal service not least because he could offer a substitute. Mr Liberadzki for the Claimant attacks the substitution clause on the grounds that not only was it a highly limited substitution arrangement and that on the basis of various dicta in **McFarlane v Glasgow City Council** [2001] IRLR 7 and **James v Redcats (Brands) Ltd** [2007] ICR 1006, which I need not set out here, such substitution clauses have been found to be consistent with a contract of personal service.

CONCLUSIONS

20. It is common ground that the definition of employee under the EA 2010 is to be treated the same as that of 'workers', which is a description found in other legislation. I accept Mr Liberadzki's submission that in order to establish worker status (and therefore employee status under Section 83(2) EA 2010 the Claimant must establish the following:-

20.1 there must be a contract;

20.2 the contract must require the Claimant to do or perform personally the work or services required under the contract;

20.3 the Respondent must not be a client or customer of any profession or business undertaking carried on by the Claimant.

The contract

21. There is no dispute that there is in existence a contract between the parties. The written agreement is dated 12 February 2016.

22. Equally, there is no dispute that this was an arm's length transaction where there was consideration on both sides. The Claimant agreed to undertake a range of duties for the benefit of the Respondent and its customers and the Respondent agreed to provide the Claimant with premises, equipment and a pool of potential clients. The absence of any direct remuneration from the Respondent does not prevent the existence of a contract.

Personal service

23. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1967] 2QB 497, McKenna J said (at page 515e):

"The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

24. The question of personal service leads naturally to the question of whether the substitution clause in this contract (found at clause 4(iii) is inconsistent with the requirement of personal service.

25. Whilst it is not suggested in this case that the substitution clause was a sham, substitution is subject to a number of very important qualifications. The first is that the substitution is only applicable where the Claimant is unable (rather than simply unwilling) to attend work. Secondly, the substitute cover must be someone already engaged by the Respondent, that is to say he or she must already be one of *their* Personal Trainers not anyone who is engaged as a Trainer at any organisation. Thirdly, the Personal Trainer must have a policy of insurance which presumably is of a type acceptable to the Respondent. Fourthly, the Personal Trainer must also wear The Gym's branded uniform at all times and not one belonging to any other Gym for example.

26. I accept Mr Liberadzki's submission this is therefore a highly limited substitution clause. I agree with his submission on the authorities that similar limited substitution clauses have been found to be consistent with a contract of personal service. I am therefore satisfied that the substitution clause does not in this case preclude the Claimant from being an employee as defined.

Relationship not in the nature of a profession or business

27. Under this rubric I have considered matters such as the degree of control, the extent of integration of the claimant in the Respondent's business and the dominant feature of the contract.

28. In relation to control I am satisfied that there was a significant degree of control by the Respondent over the Claimant in the way in which the tasks were carried out or expected to be carried out, what was done and when it was done. Mr Patel was directed to the place of work where he was to perform his services (the Respondent's premises), directed as to his working days once they were agreed and as to the minimum number of hours he was to perform. It was ultimately a failure or inability on the part of the Claimant (which he says was due to his disability) to work those hours, or find someone to do them for him, which wholly or substantially led to the termination of the Claimant's contract by the Respondent. Mr Patel was expected to obey the day to day directions of managers, the Gym's rules, policies and procedures. He was required to offer at least 13 hours a week in what is euphemistically referred to as induction work which actually involves very little 'induction' but more accurately a significant degree of the type of routine tasks which a conventional employee might be expected to do such as cleaning gym equipment, re-stacking weights, greeting members and offering them such assistance as they might require.

29. There was significant control as to when Mr Patel came in and what he did. Mr Patel was not free to simply come to The Gym and work with his own personal customers unless he also undertook all the routine matters that are necessary for a gym to operate. Indeed it would be impossible for The Gym at

the location where the Claimant worked for the Manager and Assistant Manager to undertake all that was necessary without the personal trainer's work.

30. In relation to integration I am satisfied that Mr Patel would be seen as part of the business. The so called induction activities involved him in meeting, greeting and showing round new members. Mr Patel was required to wear the Respondent's prescribed uniform whilst at The Gym. He was introduced as one of their Personal Trainers. He was required to attend staff meetings and training events. There was therefore a very high level of integration of the Claimant into the Respondent's business. To a member using the gym, Mr Patel and other Personal Trainers would be the face of the business and it highly doubtful that members would see them as anything other than part of the business.

31. In relation to the dominant feature of the contract, it is clear that the Claimant was expected to provide personal services to the Respondent at such times and in such manner as the Respondent directed. The Claimant had very little discretion as to how he undertook those responsibilities.

32. In addition, I also take into account the following factors:-

32.1 That there was significant economic dependence on this arrangement on the part of the Claimant. Although there was no remuneration passing from the Respondent to the Claimant, this was the Claimant's principal if not only source of income.

32.2 That the Claimant paid no rent or commission in return for the use of the premises, equipment or access to potential clients which might be the case if he was truly engaged in a profession or business undertaking.

32.3 That the Claimant had no overheads or expenses of his own. Ms Platt referred to the potential business risk that the Claimant took of a client not paying him and thus losing time and money. However the risk of the Claimant being out of pocket was extremely small and in fact never happened. The business 'risk' was therefore only a theoretical rather than a practical reality.

33. I derive very little assistance from **Jivraj** and it is of little or no relevance to the present case. That involved Arbitrators whose position is factually is very different. By the nature of their work Arbitrators must have considerable independence in carrying out their role. The Claimant had very little independence.

34. I was also referred by Ms Platt to the Court of Appeal decision in **Quashie v Stringfellows Restaurants [2013] IRLR 99.** That was a case where the question was whether lap dancers were employed under a contract of employment. That case is also of little or no relevance. It was an unfair dismissal case as opposed to disability discrimination and as such it concerns an entirely different definition, namely the definition of employment under section 230(2) Employment Rights Act 1996 rather than section 82(3) EA 2010.

35. Insofar as it is necessary for me to comment on the mutuality of obligations, I am satisfied that there was a degree of mutuality sufficient for the test of employment to be satisfied. The Claimant worked regular hours when he was required to be at work. The expectation was that he would be there and there was a justifiable expectation that there was work to do. The state of affairs existed every week except when the Claimant was on holiday or off sick. The Claimant was contractually required to attend his set hours and indeed not only

was it a contractual obligation but it was also sufficiently important to be the sole or main reason why the relationship was terminated.

36. In coming to my decision I recognise that such cases invariably involve a balancing exercise. There are nearly always factors which point in one direction and some which point in the other. No single factor is conclusive or determinative. However, for the reasons given, I am satisfied that the Claimant was an "employee" within the meaning of section 83(2) EA 2010 and is thus entitled to pursue this claim subject to any other preliminary issue.

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Employment Judge Ahmed

Date: 30 November 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

07 December 2017

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FOR EMPLOYMENT TRIBUNALS