



EMPLOYMENT TRIBUNALS

Claimant: Mr C Avialiotis

Respondent: Sales Drivers Ltd t/a Anytime Fitness Ltd

Heard at: London South Employment Tribunal

On: 15 August 2019

Before:

Representation

Claimant: In person

Respondent: Mr Cator - Advocate

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim fails and is dismissed.

RESERVED REASONS

1. The Claimant presented a claim to the Tribunal on 1 March 2019 for unauthorised deductions from wages. The Respondent defended the claim by way of its response presented on 8 May 2019.
2. The Respondent is a gym and the Claimant had two types of contract with the Respondent. One was a self-employed contract for his work as a personal trainer which is not the subject of these proceedings, the second was a contract of employment for 15 hours paid work per week. It is this contract which is the subject of this claim.
3. The Claimant gave evidence on his own behalf and the Tribunal heard from Mr Thomas Norbury of the Respondent. The issue before the Tribunal is whether the Claimant's contract of employment was terminated at the end of June 2018. The Claimant is claiming his wages under this contract after this date. The Claimant adopted his claim form as his witness statement as he did not have a separate written statement - one was not ordered. The Claimant had not provided any documentation in advance, but he did bring documentation to the Tribunal which the Tribunal permitted him to give in evidence.
4. Essentially, the question as to whether the Claimant resigned or not was the

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Claimant's oral evidence versus the Respondents. The difficulty is that the people the Respondent say the Claimant spoke to about resigning were not at the Tribunal to give evidence. Mr Leavey has left the company and is not available and Mr Ives is on sick leave. There was no documentary evidence save for a P45 in relation to the termination of this contract. Essentially the Claimant's case is that he did not resign and he should have been paid after the end of June 2018 the Respondent's case is that the Claimant advised them that he wanted to resign from his employed role to concentrate on his self-employed personal training work. Their cases that his employment was terminated in accordance with his request on 30 June 2018. P 45 was prepared at the end of June showing the date of termination as 30 June 2018 but there was a dispute as to whether this was given to the Claimant or not at that time.

5. The Claimant was not paid under the terms of his employment contract after the end of June 2018. The Respondent's case is that the Claimant did not complain about this which would be expected had in fact been employed and not been paid. Their evidence was that he was employed under this contract to deal with membership issues such as chasing leads and converting them into clients but also did other sundry work as required round the gym. Their evidence is that after the end of June 2018 the numbers of phone calls dropped substantially which the Respondent says support their contention that his employment did end at the end of June 2018 and he ceased working under that contract.
6. The Claimant says he spoke to Mr Ives and Mr Leavey about not being paid but there is no written communication from him whatsoever despite on his case not being paid for several months demanding payment. It is not until he was suspended in January 2019 (and subsequently dismissed) that any question relating to his contract of employment was raised by him. Even then, he did not say that he had spoken to the two senior managers about this previously, but they had not resolved the issue, which one would have expected him to do.
7. The Claimant relies on the letter suspending him, the disciplinary hearing and the termination of his contract is evidence that the Respondent considered him to be an employee at that time and not self-employed. The Respondent's position is that it did not accept the Claimant was an employee at that time but wanted to be fair to the Claimant and have him put his side of the story. They therefore utilise the disciplinary procedures which they use for employees.
8. The Claimant maintained that his contract stated that his employment could only be terminated in writing and therefore it must have continued. On closer examination of the documentation, but in fact it says is any amendment to the agreement had to be in writing. The actual provisions relating to termination of employment do not state that it must be in writing.
9. The Claimant's evidence was at times contradictory and confusing. However, the Tribunal is satisfied on the balance of probabilities that the Claimant did resign in June 2018 and that his employment ended on 30 June 2018. The Tribunal comes to this conclusion because there is no evidence of the Claimant complaining about the lack of payment apart from his somewhat vague assertions that he spoke to Mr Leavey and Mr Ives. He says his spoke to Mr Norbury. Mr Norbury was adamant that he did not speak to the Claimant about these payments.
10. What the Tribunal finds particularly telling however is that it was not until the Claimant is suspended that anything is put in writing. This was some six months after he was last paid under the terms of that contract and it would be extraordinary if the Claimant are carried on working under that contract without being paid for such a long period.

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11. The Tribunal also notes that as at May 2018 the amount the Claimant was working from his self-employed personal training work was at its peak. This is therefore consistent with the Respondent's case that the Claimant told them that his personal training work was doing well, and he therefore wanted to concentrate on this rather than carrying out his duties under his contract of employment. The fact that subsequently his personal training work seems to have declined does not affect this part of the decision.
12. In all the circumstances on the balance of probabilities the Tribunal prefers the Respondents evidence and finds that the Claimant's contract of employment terminated on 30 June 2018 and thereafter no payment was due under the terms of that contract therefore the Claimant's claim fails and is dismissed.
13. The Claimant brought proceedings against Mr Ives. He accepted this was the wrong was Respondent and the name of the Respondent is therefore changed in the proceedings as set out in the header to this judgement.

Employment Judge Martin

Dated: 16 August 2019