



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109098/2021 (V)

Held on 28 April 2022

Employment Judge N M Hosie

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Miss K McKee

**Claimant
In Person**

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Plus Fitness Ltd t/a Anytime Fitness

**Respondent
No Appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

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1. the claimant was unfairly dismissed by the respondent and the respondent shall pay to her compensation of Five Hundred Pounds (£500);

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2. the claim under Regulation 30(1)(b) of the Working Time Regulations 1998 is well-founded and the respondent shall pay to the claimant the sum of Five Hundred and Six Pounds and Eighty-Five Pounds (£506.85), as a payment in lieu of annual leave;

3. the respondent shall pay to the claimant the sum of Three Hundred and Sixty-Two Pounds and Seventy Pence (£362.70) as damages for breach of contract (failure to give notice of termination of employment); and

E.T. Z4 (WR)

4. the respondent shall pay to the claimant the sum of One Thousand, Four Hundred and Fifty Pounds and Eighty Pence (£1,450.80), in respect of the respondent's failure to provide the claimant with a written statement of particulars of employment.

REASONS

1. The claimant, Ms Kercia McKee, brought various claims following her summary dismissal by the respondent Company on 15 March 2021. The respondent submitted an ET3 response form intimating an intention to defend the claim. It also maintained that the claimant was not an employee. However, at a preliminary hearing on 8 February 2022, I decided that she was and issued a Judgment, to that effect.

2. Thereafter, the case proceeded in the normal manner and a final hearing was fixed for 28 April, to be conducted by video conference, using the Cloud Video Platform ("CVP"). However, by e-mail on 20 March 2022 the respondent's Director, Christopher McIntyre, sent an e-mail to the Tribunal to advise as follows:-

"The business is no longer trading and insolvent. Because of this I have applied to have the company struck off Companies House.

Since receiving your e-mail (in relation to fixing a date for a final hearing) I have taken legal advice. I have been advised there is no benefit defending the claim as the business is insolvent.

Therefore, I will not be attending the court hearing."

3. Accordingly, when the case proceeded to the final hearing on 28 April, there was only the claimant and her witness, Kieran O'Donnell, in attendance. There was no appearance by or on behalf of the respondent Company.

The facts

4. Both the claimant and Mr O'Donnell gave their evidence in a measured, consistent and convincing manner and presented as credible and reliable. Prior to the hearing, helpfully, the claimant had submitted a bundle of documentary productions ("C") and a Schedule of Loss

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5. Having heard the evidence and considered the documentary productions, and also the respondent's response form, I was able to make the following findings in fact. The respondent operated a gym in Elgin. The claimant commenced her employment with the respondent as a "Membership Consultant" on 15 December 2020. She was engaged by Lisa Clarkson, the Manager at the gym. Prior to that, she had been employed by a Care Home for over 2 years. It was only with some reluctance that she gave up her previous employment. However, she was persuaded by Ms Clarkson that the position of Membership Consultant was a more attractive one. Ms Clarkson interviewed the claimant at the end of November 2020. Shortly thereafter, she went to the claimant's home and offered her the position. She advised that her salary would be in the range of £14-£15,000 per annum and she would work a 39 hour week.

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20 **Contract of employment**

6. The claimant asked Ms Clarkson repeatedly for a written contract of employment. Ms Clarkson advised the claimant that she would speak to Christopher McIntyre, the Director and owner of the respondent Company, about a contract but none was ever provided, despite the claimant's repeated requests.

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7. After a period of induction, the claimant only worked at the gym for a short period as the gym closed on 26 December 2020 due to the Covid-19 Pandemic lockdown.

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8. Unfortunately, the claimant did not qualify for furlough payments from the respondent Company.

9. The claimant did work from time to time thereafter, primarily attending to gym memberships. Every time she saw Ms Clarkson she asked about her contract. She also sent text messages to her on 27 February 2020, and 3
5 March 2021 in which she requested a contract (C 8, 9 and 10).
10. The claimant was so frustrated with the situation in which she found herself that she decided to raise her concerns with her local M.P. One of the concerns she raised was the fact that she had not been provided with a written contract
10 of employment. She advised Ms Clarkson that she was going to contact her "local M.P.", by text message on 4 March 2021 (C12). She then advised Ms Clarkson that she had done so, by text message on 13 March and Ms Clarkson replied as follows (C16):-
- "Thanks for the message. It's not Head Office that do the contracts it's a franchise business so it's Chris as he is the owner.*
- And I have already spoke with him many times for you for weeks. He said he won't give a contract until we are back and that's his final answer. And I know he won't budge. **He said also if you are unhappy about this then he advised me to let you go.**" (my emphasis).*
11. Ms Clarkson invited the claimant to a meeting on 15 March. On the same day, she had a meeting with the claimant's partner Kieran O'Donnell. At the
25 meeting with the claimant, which Mr O'Donnell attended, Ms Clarkson advised the claimant that she was to be dismissed as Mr McIntyre was unhappy that she had gone to her M.P. and he did not want to have to deal with the M.P.
- 30 12. The gym never reopened after 26 December 2020. Mr McIntyre advised in correspondence that the respondent Company was insolvent, that it had ceased trading on 19 March 2021, and that he had applied for the Company to be struck off from the Register of Companies.

Discussion and conclusions

The claims

Unfair dismissal

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13. The claimant did not have the required two years' continuous service to bring a "standard" unfair dismissal complaint. However, she maintained that her dismissal was "automatically unfair", as she had been dismissed for asserting a statutory right, namely for a written statement of employment particulars.

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14. S.104 of the Employment Rights Act 1996 is in the following terms:-

"104 Assertion of Statutory Right

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(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

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(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right."

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15. S.104 does not apply to all statutory rights but only to the "relevant" statutory rights referred to in s.104(4). These include a right to receive a written statement of employment particulars, a statement of changes to particulars or an itemised pay statement – Ss 1,4 and 8 of the 1996 Act.

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16. The claimant asked Ms Clarkson repeatedly for a written statement of particulars of employment, only to be advised that Ms Clarkson had raised the matter with Mr McIntyre. However, none was ever forthcoming. This was one of the concerns which the claimant raised with her M.P. She advised Ms Clarkson of this and in her response by text message on 13 March (C16), Ms Clarkson advised that she had spoken to Mr McIntyre about providing the claimant with "a contract" but he had told her that he was not prepared to

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provide her with one and that if she was unhappy about this then, *“he advised me to let you go”*. Only two days later, the claimant was summoned to a meeting by Ms Clarkson and summarily dismissed.

- 5 17. In these circumstances, I am persuaded that the reason the claimant was dismissed was because she had requested repeatedly a written statement of her employment particulars. This was an assertion of a statutory right. Accordingly, her dismissal was automatically unfair.

10 Compensation

18. Unfortunately, the gym never re-opened after it closed on 26 December 2020 and the respondent Company ceased trading on 19 March 2021. The claimant was paid for the occasions when she was called in to assist with membership issues at the gym. However, she was not entitled to any furlough payments. I arrived at the view, therefore, that the claimant had not incurred any financial loss and that it would not be “just and equitable” to make a compensatory award, other than an award for so-called “loss of statutory rights”. The claimant had given up secure employment based on assurances given by Ms Clarkson about her employment by the respondent Company. I decided, in all the circumstances, that an award of **£500** would be appropriate in respect of loss of statutory rights.

Holiday pay

- 25 19. The claimant was employed from 15 December 2020 to 15 March 2021. Her weekly wage based on the “living wage” of £9.30 per hour and a 39 hour week was £362.70. The claimant did not take any holidays when employed by the respondent. Accordingly, she was entitled to payment in respect of accrued annual leave of 54.5 hours, a total of **£506.85**.

Notice

20. The claimant was summarily dismissed. She should have received one week's statutory notice. Accordingly, she is entitled to a payment of **£362.70** as damages for breach of contract, in respect of the respondent's failure to give her notice of dismissal.

Employment particulars

21. The respondent failed to provide the claimant with a written statement of her employment particulars, which he should have done when the claimant commenced employment on 15 December 2020, and continued to fail to do so despite repeated requests by the claimant.

22. S.38 of the Employment Act 2002 states that Tribunals *must* award compensation to an employee where, if upon a successful claim being made under any of the Tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of his duty to provide full and accurate written particulars. The claimant brought successful claims in respect of some of these jurisdictions.

23. The Tribunal must award the "*minimum amount of two weeks' pay*" and may, if it considers it just and equitable in the circumstances, award the "*higher*

5 *amount of 4 weeks' pay*". The respondent Company has been in business for a number of years and has had a number of employees. The claimant made repeated requests for a written statement of her employment particulars. Mr McIntyre refused to provide her with one. He must, or at least should have been aware of his legal duty to do so. In all these circumstances, I decided that it would be just and equitable to award the "*higher amount*" of four weeks' pay which amounts to **£1,450.80**.

10 Employment Judge Hosie

 Date of Judgement 13th May 2022

 Date Sent to Parties 13th May 2022