Cases Number: 3312559/2021
3322469/2021
3306263/2021
3301380/2022

EMPLOYMENT TRIBUNALS

Claimant:	**(1) Mr Anthony Lawson** **(2) Mr Alimamy Kabba**
Respondent:	**Tri-Fit Gym Limited**
Heard at:	**Watford Employment Tribunal Hearing Centre**
On:	**1 June 2022**
Before:	**Employment Judge Tobin (sitting alone)**

Appearances
Claimants: in person
Respondent: Mr L Varnam (counsel)

RESERVED JUDGMENT

The Employment Tribunal determines as follows:

1. The respondent did not make the unauthorised deduction from the first claimant's and second claimant's wages.

2. The first claimant's and second claimant's claims for wrongful dismissal, i.e. breach of contract for their notice period fails.

3. The first claimant and second claimant are not owed payment from the respondent in respect of their accrued and untaken holiday pay pursuant to regulation 30 of the Working Time Regulations 1998.

4. The respondent breached the claimants' contract by not paying them their appropriate pension contributions.

5. The employer's contract claim succeeds. The first claimant and second claimant owe the respondent the balance of sums outstanding arising from their Agreements dated June 2020 and June respectively <u>less</u> their pension contributions. The first claimant owes the respondent a balance of £3,803.01 arising from the agreement dated 30 June 2020. The second claimant owes the

respondent a balance of £1,207.90 arising from the agreement dated 28 June 2020.

REASONS

The claims

1. The claims are summarised as follows.

2. The first claimant, who I shall refer to as Mr Lawson hereinafter for ease of clarity, issued proceedings on 23 April 2021. Mr Lawson said was employed by the respondent as a general manager from 1 March 2020 to 31 January 2021. He claimed arrears of pay, holiday pay and notice pay. The details of complaint contend that on 20 March 2020 gyms in England were required to close due to the coronavirus pandemic and the ensuing government regulations. Mr Lawson contended that due to the respondent's error he was not eligible for the government's Coronavirus Job Retention Scheme ["the furlough scheme"]. He contended that because he was not eligible for this pay protection, James Palfrey (on behalf of the respondent business) offered him cash advances of bonuses that he would earn during his employment. Full salary was paid for March 2020, April 2020 and May 2020. Mr Pelfrey offered an Advance of Bonus Payments Agreement [the "Agreement"] and Mr Lawson signed this on 1 July 2020. He contends that this arrangement was never a loan. He was placed on the furlough scheme in November 2020. Mr Lawson contends that there were discussions in relation to the termination of his employment from December 2020 onwards. On 15 January 2021 Mr Palfrey emailed Mr Lawson stating that his employment would terminate on 31 March 2021 and that he (i.e. Mr Lawson) would be put on the furlough scheme until then, so that the respondent could take the furlough payments in order to repay Mr Lawson's debt under the Agreement. Mr Lawson refused to accept this arrangement. On 31 January 2021 Mr Pelfrey terminated Mr Lawson's employment. On 7 March 2021 Mr Palfrey emailed Ms Lawson stating that he had withheld his January 2021 furlough payments of £1,482 and his outstanding holiday entitlement and notice period.

3. The second claimant, Mr Kabba, issued proceedings on 30 June 2021. Mr Kabba was employed by the respondent as a studio manager 1 April 2020 to 31 March 2021. Mr Kabba's details of complaint contend that he signed an Agreement substantially the same as Mr Lawson in June 2020. Again, Mr Kabba said that the Agreement was not a loan. From November 2020 Mr Kabba was enrolled in the furlough scheme. On 12 March 2021 the respondent terminated Mr Kabba employment and suggested that he keep the claimant on the furlough scheme until September 2021, but that during that time the claimant work for another employer. The respondent suggested that from June to August 2021 the furlough payments made in Mr Kabba's name could be kept by the respondent to repay Mr Kabba's debt under the Agreement. Mr Kabba rejected this proposal and refused the respondent permission to keep him on furlough until September 2021. On 19 March 2021 the respondent stated that Mr Kabba's employment termination date will be 31 March 2021. The respondent stated that the claimant will be entitled to 7 days' notice and 7 days of annual leave. Mr Kabba contends that he was entitled to 18

days accrued holiday. On 28 March 2021 the respondent stated that it was retaining the claimant's final wage payment of £1,751.49 in order to pay off some of the outstanding debt under the Agreement.

4. Both claimants claim unlawful deduction of wages under s13 Employment Rights Act 1996 ("ERA)". Mr Lawson for his January 2021 salary and Mr Kabba for his March 2021 salary. Both claim non-payment of unused holiday entitlement in breach of contract and under regulation 30 Working Time Regulations 1998. Both claimants contended that the respondent failed to enrol them onto an auto-enrolment pension scheme and to make contributions in breach of their contracts of employment. They also claim breach of contract in respect of their notice pay.

5. Notwithstanding there is an employer's contract claim, I will refer to Tri-Fit Gym Limited as the respondent throughout this document. The respondent contend that the claimants were not eligible for the furlough scheme and that the claimants and the respondent agreed that the claimant would receive monies equal to their normal net monthly income but that this would be lent to them by the respondent and that it would be deducted from their wages once there employment recommenced. The terms of the Agreements were confirmed in writing to both claimants on 28 June 2020. Mr Lawson's employment was terminated on 31 January 2021 and the respondent contends that he was informed that he was required to repay the balance of the money advanced under the Agreement. Mr Kabba was notified on 12 March 2021 that his employment was to be terminated and that he had to repay the money lent to him as he had not achieved any of the targets required for the bonus payment. On 19 March 2021 claimant was informed as employment was to terminate on 31 March 2021 and he was directed to take his annual leave entitlement of 7 days at specified times.

6. The respondent contended it was entitled to make the appropriate deductions from the claimants outstanding wages and pursued outstanding balances by way of an employee's contract claim. In response to the employer's contract claim the claimant's contended that their employment was never suspended, and the employees contended that they undertook work in the expectation that they will be paid.

The hearing

7. This has been a remote hearing which has been agreed to by the parties. The form of remote hearing from was by video hearing through HMCTS Cloud Video Platform (in which all participants except the judge were remote). A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

8. At the outset of the hearing I was provided with a joint hearing bundle of documents which ran to 286 pages. I was also provided with a bundle of witness statements at 142 pages. Mr Lawson, Mr Kabba and Mr Palfrey all provided 2 witness statements in this bundle, and much of the witness evidence was duplicated. I paid scant regard the statements of Ms Amanda Gardner and Mr John Armstrong, and no reliance upon their evidence, because these witnesses did not attend the hearing and were not able to confirm their electronic signatures nor were they available to answer questions from the claimants or the Tribunal.

6. At the commencement of the hearing I sought agreement on quantification of the relevant claims. The parties were able to agree figures for all element of the claims and counter-claim. The claimant and Mr Varnam (on behalf of the respondent) were able to agree quantum on the wages claims, the annual leave claims, the notice pay claims and the pension claims. Mr Varnum also accepted Mr Lawson's pension claim at £350.77 and Mr Kadda's pension claim at £424.07, which he said he had reflected in his figures. I said that I would give Judgment for the pension claim as that was one of the matters to be determined, although the respondent now accepted that this money was owed. The parties were thereupon able to agree quantum on the employer's contract claim. We discussed and agreed figures for the various permutations; amongst the figures agreed during these discussions, the parties agreed that if the claimants were not successful and if I found a valid employer's contract claim then the first claimant owed the respondent a balance of £3,803.01 and the second claimant owed the respondent a balance of £1,207.90.

9. Both claimants gave evidence in which they confirmed their statements, and they were cross-examined by Mr Varnam. I ask questions for clarification. A similar process was undertaken with Mr Palfrey, who was an investor for the respondent business and, on behalf of the respondent, had dealt with the claimants throughout. Mr Palfrey's evidence was also challenged, by the claimants. Again, I asked him various questions for clarification.

10. The claimants have made reference to claims that do not appear on the claim form, for example claims under the national minimum wage and in respect of itemised pay statements. For the avoidance of doubt, I have restricted my determination to claims raised on the claim form and I make no determination in respect of any other claims as there were no successful applications made to the Tribunal to amend the complaints.

The law

The Coronavirus Job Retention Scheme

11. At the end of March 2020, the UK went into a "lockdown" as a result of the coronavirus pandemic and the measures introduced by the UK Government to halt the spread of the contagion. On 20 March 2020, in response to the realisation of the full economic impact of the pandemic, and in order to avoid mass redundancies, the Government announced the introduction of the Coronavirus Job Retention Scheme whereby employers could retain staff on their books, but place them on paid temporary leave of absence (furloughing), where the Government agreed to pay a proportion of their salary for that period. The scheme was backdated to 1 March 2020 and opened to applications on 20 April 2020. The scheme covered all UK employers who had created and started a PAYE payroll scheme on or before 19 March 2020 (originally 28 February 2020), enrolled for PAYE online and had a UK bank account. The scheme was originally due to run from 1 March 2020 to 31 May 2020. On 17 April 2020, it was announced at the initial period of 3 months would be extended to 4 months, until the end of June 2020, for those on the employers PAYE on or before 19 March 2020.

12. Under the scheme, employers were able to claim a grant covering 80% of the

wages for a furloughed employee, subject to a cap of £2,500 per month, and the Government also agreed to cover the employer's national insurance and minimum auto enrolment pension scheme contributions. Detailed arrangements were also put in place to cover the taking and payment of holidays and sick pay for staff who were furloughed. Furloughing was voluntary and had to be agreed between an employer and an employee in writing. Until the end of June 2020 employees had to be furloughed for a minimum period of 3 weeks to be eligible for the scheme.

13. On 29 May 2020 the Government announced the extension of the scheme until 31 October 2020, when it was originally due to close. Further detailed guidance and changes to the scheme was published on 12 June 2020.

<u>Protection of wages</u>

14. Under s13 Employment Rights Act 1996 ("ERA") a "worker" (which is a wider definition than "employee") has the right not to suffer an unauthorised deduction from his pay:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

15. The non-payment of wages, or the non-payment of holiday pay (in full or in part), could amount to an unauthorised or unlawful deduction of wages.

16. A deduction is defined in s13(3) ERA as follows:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated… as a deduction…

17. An employer may make a deduction to recover overpayments of wages or expenses previously paid by mistake to the worker: s14(1) ERA. For clarity this provision for recovery does not apply in these circumstances as such overpayments are recoverable unless the employer has led the worker to believe the money was his and the worker had changed his position, for example, spends the money, and the overpayment was not the worker's fault: *Klienworth Benson Limited v Lincoln City Council and Others Appeals [1999] 2 AC 349*.

18. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to s23 ERA. Where a Tribunal finds a complaint under s23 ERA is well founded, it shall make a declaration to that effect but s25 ERA provides that an employer shall not be ordered by a Tribunal to pay or repay a worker any amount in respect of a deduction or payment in so far as it appears to the Tribunal that the he has already paid or repaid any such amount to the worker.

<u>Breach of contract</u>

19. The contractual jurisdiction of the Employment Tribunal is governed by s3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. The Employment

Tribunal may hear a contract claim brought by an employee if the claim can be one that a court in England would have jurisdiction to hear and determine, and must arise or be outstanding on the termination of the employment of the employee, who seeks damages for breach of a contract of employment or any other contract connected with employment. Damages for breach of contract is capped at £25,000 in the Employment Tribunal: Article 10 of the aforementioned Order.

20. As confirmed by the Supreme Court in *Autoclenz Limited v Belcher [2011] UKSC 41*, the fundamental question when construing an employment contract is "*what was the agreement between the parties?*". If the evidence showed that the written contractual terms did not reflect parties' true agreement, then it can to that extent be disregarded. The parties are free to agree anything they wish, subject to certain statutory limitations. In determining the terms of a contract, where there is a written contract, it is necessary that the Tribunal consider all of the circumstances as it is open to the parties to agree some terms in writing and others orally, see *Carmichael v National Power plc [1999] 4 All ER 897*. If an Employment Tribunal is called upon to interpret the terms of a contract, it must apply the same principles as an ordinary court. This means, for example, words used must be interpreted in the context which existed and was known to both parties at the time when the contract was made: *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98*. The parties subsequent conduct is not admissible in construing their original written agreement: *Hooper v British Railway Board [1998] IRLR 517*. Where the terms of a written contract are truly ambiguous it may be permissible to construe what the parties meant by drawing upon external evidence, such as custom and practise and I am permitted to take into account the nature of the relationship, the power imbalance often inherent in an employment relationship and I can consider the wider context: see *Daniels v Lloyds Bank PLC [2018] IRLR 813.*

My findings of fact

21. In making my findings of fact, I placed particular emphasis upon contemporaneous and near contemporaneous correspondence and documents. Where there is an absence of contemporaneous exchanges or documents in circumstances where I would have expected such to exist then I can draw appropriate inferences. In drawing inferences, I should exercise care and I cannot make up evidence to bridge gaps. I remind myself that there must be an evidential basis for drawing any such inference. Witness statements all, of course, very important but witness statements are written sometime after the events in question so recollections may be hazy or unreliable. Furthermore, the parties' witness statements are written through the prism of advancing and defending the various claims, so I regard them with some degree of caution.

22. The respondent's gym schedule to open on 1 April 2020. Mr Lawson was recruited as a general manager, with his role starting on 1 March 2020. Mr Kabba was recruited as a studio manager, and he was due to begin working on 1 April 2020.

23. Mr Lawson said in his witness statement that he received his employment contract on 13 February 2025, but there does not appear to be any signed contract of employment and no unsigned version was provided in the hearing bundle. There were certainly discussions between Mr Lawson and Mr Palfrey in respect of bonuses and rotas, as evidenced by contemporaneous documents included in the

hearing bundle .

24. Neither of the claimants had been entered on the respondent payroll as of the appropriate date so as to qualify for furlough payment in the first lockdown.

25. I am satisfied that the claimants continue to work for the respondent during the lockdown period. Mr Palfrey contended that both claimants were suspended, and I do not believe him. He did not confirm the position writing as required by the furlough scheme. The claimants said in evidence that they were not asked to give up their contractual right to payment nor did they do so. Mr Lawson described planning and co-ordinating the respondent's response to the covid-19 re-opening measures and installing anti-infection screens, etc. Both claimants described work to be undertaken, such as marketing, recruitment preparation, preparing rotors, taking delivery of gym equipment and installing this. In work included working from home. Both claimants described this additional work is being significant but below their contracted hours. Neither was able to quantify what hours were worked.

26. On 27 March 2020 Mr Palfrey texted both Mr Lawson and Mr Kabba as follows [HB156]:

> Hi Guy
> I have some bad news.
> Firstly, I'm not going to leave you out in the lurch – just wanted to discuss how to proceed.
> The government help isn't available for TriFit as it's payroll wasn't established prior to the cut-off point.
> Without support it means that your wages are coming out of the company's finances – but without any income.
> I have been thinking of a couple of ways of dealing with it, but the simplest and fairest seems to be pay you both as normal, but offset wages against bonuses going forward.
> I know it's not ideal – it seems the fairest thing I can do in the circumstances.
> I'm open to suggestions…

27. Mr Lawson responded a few minutes later [HB157]:

> So normal pay going.m forward and just take it back through the bonus scheme?

28. Mr Palfrey responded:

> Yes
> I know it's not perfect
> but I'm trying to protect you guys

29. Mr Lawson then replied [HB 158]:

> I believe the brand and I'm happy with this going forward , it shows trust in us by still paying us and we will return that with paying it back through bonus
> …
> It's not ideal but it a compromise to help all of us

30. On 1 April 2020 Mr Kabba signed a contract of employment with the respondent back-dated to 1 November 2019. Under the section "Notice to be given by the employer to the employee" the contract stated:

> The Company has a right to serve notice of termination of your employment at any time in accordance with the notice provisions below…

From the satisfactory completion of your probationary period: 1 week in your first two years, increasing a week per years' service to a maximum of 12 weeks written notice.

31. Under the section entitled "Pension scheme" the contract read:

The Company does not operate a pension scheme, but you will be enrolled into an 'auto-enrolment' pension scheme if there is a legal requirement to do so under the current pension's legislation. If you are not automatically enrolled into the scheme you may still be entitled to join. Further details will be provided separately.

32. The contract of Employment refers to an Employee Handbook. Both claimants contended they never received an Employee Handbook despite making various requests. I accept their evidence on this point.

33. On 28 June 2020 Mr Palfrey sent Mr Kabba a copy of a document entitled Advance of bonus payments [HB186, 187-188]. The document quoted figures identical to that subsequently agreed by Mr Lawson [see HB194]. Mr Kabba queried these figures with Mr Palfrey [HB189]. Mr Kabba said in evidence that he went through the agreement and the amounts quoted were obviously wrong. Mr Palfrey provided an amended version promptly [HB190]. Mr Kabba subsequently signed and returned the amended version later that day [HB190].

34. The signed document [HB190-191] read as follows:

Dear Ali
<u>Re: Wage advances April – May 2020</u>
We write to confirm the status of payments made from Try-Fit Gym Ltd to you during the period covering April 2020 to May 2020 inclusive.
As you are aware you commenced employment as general manager [sic] on 1st April 2020. Unfortunately, as you are aware, on 20th March the Covid-19 pandemic made the opening of this business impossible, and at this time the government has still not announced a date when the indoor leisure sector can reopen.
In these difficult circumstances the business was faced with a difficult choice of how to proceed with regard to your role. The choice was of redundancy, due to economic uncertainty about when to reopen, or finding some alternative way to assist you through these difficult times.
It was agreed between yourself and the business that you would receive remuneration equivalent to your normal net monthly income, but that that payment would come in the form of a cash advance of bonuses that you would earn during your employment.
These payments are interest free advances on monies yet to be earned in the form of bonuses, and that <u>should you leave your position before these monies are repaid you will be liable to repay them to the Tri–Fit Gym Limited</u> [*my emphasis*].
Your normal employment is due to recommence on 1 July 2020.
<u>Calculation of advance</u>
We calculate the date of your employment was suspended to run from 1st April 2020 to 30th May 2020.

April		£1663.33
May		£1663.33
	Total	£3327.26

It is agreed by the business that you will not be charged interest on this money. Tri-Fit Gym Ltd will not seek repayment, other than by deductions from bonuses, while you are in its employ. However, in the event of you leaving your position, you agree to the business having the right to deduct any remaining cash advances from your final wage payments owed by Tri-Fit Gym Ltd.
Please confirm by return.

Yours sincerely,
John Armstrong
Director

35. Prior to signing the agreement Mr Kabba said that he discussed the terms with Mr Palfrey. Notwithstanding that he said that he regarded the terms as being clear, Mr Kabba said that he discussed the terms of this agreement and understood the agreement not to be a loan. Mr Kabba thereupon signed below the confirmation request and returned the signed Agreement to Mr Palfrey [HB190].

36. On 28 June 2020 Mr Palfrey sent Mr Lawson a letter substantially in the same terms as that of Mr Kabba's and this time requesting his signature and return [HB192]. Mr Lawson subsequently signed the agreement electronically and returned the Agreement unamended 3 days later [HB193]. This agreement read as follows:

Dear Tony
<u>Re: Wage advances March link of rewrite confounders - June 2020</u>
We write to confirm the status of payments made from Try-Fit Gym Ltd to you during the period covering March 2020 – June inclusive. As you are aware you commenced employment as General Manager on 1st March 2020. Your role was to run a pre-sale for the gym prior to opening on 1 April 2020, and then undertake sales once open. Unfortunately, as you are aware, from 20th March the Covid-19 pandemic made the opening of this business impossible, and as of this time the government has still not announced a date when the indoor leisure sector can reopen.
In these challenging circumstances the business was faced with a difficult choice of how to proceed with regard to your role. The choice was of redundancy, due to economic uncertainty about when to reopen, or finding some alternative way to assist you through these difficult times.
It was agreed between yourself and the business that you would receive remuneration equivalent to your normal net monthly income, but that payment would come in the form of a cash advance of bonuses you would earn during your employment.
Please confirm my receipt you agreed that these payments are interest free advances on monies yet to be earned in the form of bonuses, and that <u>should you leave your position before these monies are repaid you will be liable to repay them to Tri–Fit Gym Limited</u> [*my emphasis*].
Your normal employment is due to recommence on 29th June 2020.
<u>Calculation of advance</u>
We recognise that prior to the decision by the government that you were unable to work, but for the sake of simplicity we will calculate the date of your employment was suspended to run from 20th March 2020 to 28th June 2020 inclusive. As such we calculate the bonus advancements as follows:

March 7 days pro rata £700	
April	£1776.67
May	£1776.67
June Less 2 days pro-rata	£1,576.67
Total	£5,830 .01

It is agreed by the business that you will not be charged interest on this money. TriFit Gym Ltd will not seek repayment, other than by deductions from bonuses, while you are in its employ. However, in the event of you leaving your position, you agree to the business having the right to deduct any remaining cash advances from your final wage payments owed by TriFit Gym Ltd.
Please confirm by return. Signed: Tony Lawson. Date: 30/06/2020

Yours sincerely,
John Armstrong
Director
TriFit Gym Ltd

37. In his evidence, Mr Lawson said that he signed the agreement because it had been reassured and trusted Mr Palfrey that this was not a loan, and it was merely a cash advance from bonus payments. Mr Lawson said that it was due to Mr Palfrey's error that he had missed out on furlough payments and that they had a good

working relationship and he trusted Mr Palfrey to have his best interests at heart. He said that he was aware that Mr Palfrey was a barrister therefore he was very persuasive.

38. Relationship started to break down and on 28 December 2020 Mr Palfrey wrote to the claimant. This email is not clear. Mr Palfrey seems either to suggest the claimant resign his employment or he attempted to orchestrate such an outcome. He contended that Mr Lawson owed a debt to the respondent and raise issues about repayment, notwithstanding that this had been dealt with in the original Agreement [See HB231].

39. Mr Lawson responded saying that he took this to being given one week's notice with his employment ending on 4 January 2021. Mr Lawson specifically rejected the apparent proposal for him to be employed as a paper exercise until 1 April 2021 with the respondent withholding the purported furlough salary.

40. On 29 December 2020 Mr Palfrey sent a WhatsApp message to Mr Lawson [HB239-241]:

> Tony,
> Let me make this abundantly clear.
> You are furloughed until 1st April.
> During that period you are entitled to work. The period will effectively be your notice period.
> Any payment from the furlough scheme will go towards repayment of your outstanding debt. If there is any excess that will go to you.
> At the conclusion of that period you will not be required to repay any discrepancy in the debt if your wages do not cover it…

41. Mr Palfrey wrote to Mr Lawson by email on 15 January 2021 [HB245-247]. He referred to a breakdown in communications and then stated:

> **Your employment**
> I thought I had made the position clear to you in our previous communications: Tri-Fit Gym Limited will not terminate my employment until 31st March 2021, and you are employed until 1st April 2021.
> … you have been furloughed, and continue to be.
> You have been notified that your contract will be terminated on 31st March 2021, but that may be extended if the furlough scheme continues.
> …
> Looking through our correspondence you appear to have unilaterally decided that Tri-Fit Gym Ltd terminated your employment as of 28th December 2020, with the effect of your notice coming into effect on 4th January 2021. For the avoidance of any doubt – these were dates that you determined to be effective termination – not dates that you were provided by Tri-Fit Gym Ltd as dates of effective termination.
> It is only for the party giving notice to decide the date on which they are doing so, it is not for any other party (in this case you) to decide the date on which Tri-Fit Gym Ltd terminate on their behalf the date on which date terminate a contract which they are party.
> **Holiday**
> During your furlough January 1st 2021 until March 31st 2021 (furlough ending 1st April 2021), you will acquire 7 days holiday.
> You be required to take any holiday entitlement prior to the 1st April 2021, and should you not designate dates which you prefer, any entitlement will be applied final months wages.

42. Mr Palfrey asserted that Mr Lawson had sought to avoid repayment of £5,830.01 owed to the respondent. He proceeded to threaten Mr Lawson with legal costs, bailiffs, bankruptcy and adversely affecting his credit rating.

43. Mr Lawson said that he responded to Mr Palfrey's email making it clear that he had no intention to resign and that he specifically informed Mr Palfrey not to make any disputed debt deductions from his furlough money [see HB249].

44. According to Mr Lawson's evidence, which I accept, on 31 January 2021 Mr Pelfrey emailed him to terminate his employment with 7 days' notice to run from 1 February 2021.

45. Mr Kabba's statement said on 12 March 2021 Mr Pelfrey sent him an email terminating his employment.

Determination

46. I accept the claimants' evidence that both Mr Lawson and Mr Kabba worked hard installing equipment, devising classes, marketing and preparing all the logistical things required for the belated opening of the gym. I am sure that both claimants went above and beyond their contractual obligations because at the time they were grateful to Mr Palfrey for the financial support and I wanted to see the new venture opened successfully particularly after the pandemic crisis. The claimants did not keep any record of the amount of work they undertook, and they were not able to quantify the amount work undertaken. It is, therefore, not possible for me to attribute a value for this work undertaken.

47. Both sides were considerably invested in the new gym and both sides wanted to make the arrangements work. The claimants did not qualify for the furlough scheme and Mr Palfrey offered the claimants the "lifeline" of paying amounts equivalent to the furlough scheme notwithstanding that neither claimant was eligible. The benefit was obvious for the claimant, it provided income at a difficult time. For the respondent, this avoided redundancy dismissals and the respondent retained good and committed staff.

48. The terms of the agreement were clear. Money was to be advanced, and it was to be repaid from future bonuses that were earned. Relationship became strained when Mr Palfrey changed the bonus calculations, but I do not need to address that point in detail because it did not affect the calculation of moneys owed by the claimants to the respondent.

49. The agreement did address what would happen if the claimants stopped working for the respondent before the money advanced was repaid. In evidence both Mr Lawson and Mr Kabba said that they raised the point of whether the agreement was a loan, and they were told that it was not. I do not accept this because this is a highly significant matter and a fundamental aspect of the agreement, particularly in the context of hugh economic uncertainty. If this factor had been discussed then I am sure that ether the 2 claimants or Mr Palfrey would have referred to that actual, separate verbal agreement – or coming to an agreement on this point – either in the contemporaneous correspondence or near contemporaneous correspondence, which they did not. The claimants were keen to make the arrangement work and make the gym successful, so they did not want to risk a falling out. I'm also satisfied that they did not want to consider the consequences of what would happen if their employment came to an end.

50. Mr Palfrey was equally adamant that that the advance was discussed, and that he made it clear that the money provided was a "loan". Having considered his evidence, I'm not satisfied with his account either. Mr Palfrey appeared to attempt to recover money that the respondent was owed through the furlough scheme, and he was not entitled to do this. This was not a proper use of the furlough scheme, and this employer was, or should be, aware of that, which is why Mr Palfrey backed down so quickly from the claimants' resistance. Mr Palfrey's behaviour in this regard invariably raises doubt about his version of events.

51. I am equally convinced that Mr Palfrey did not want to grapple that thorny issue. He had the provision in writing dealing with the eventuality of the claimant's leaving the business, upon which he believed he could rely. Significantly, he does not refer to the advances being specifically "a loan" or "loans" until much later. So I am not satisfied that the meaning of what would happen if the claimant's "leave" the business was ever discussed.

52. Mr Palfrey drafted the Agreements, and he believed that he had made provision for the eventualities of the claimants departing from the respondent's business. So, there was no need for him to discuss the issue, but if he did discuss the departure and repayment issue then, I am convinced, he also would have ensured that such conversations were addressed or reflected in the contemporaneous documents, not least because of his legal training but more because the employer was in a far stronger position.

53. So, I determine that the eventuality of one or both of the claimants leaving the respondents business was not discussed between the parties. I do not make this determination on the basis that one side says one thing, the other side says something else, so the truth must be somewhere in the middle. I make this determination on a different basis, specifically if such discussions or agreements occurred then it was on a matter of such importance that, I determined, it would have been corroborated at the relevant time.

54. Given that the provision *"… should you leave your position before these monies are repaid you will be liable to repay them to the Tri-Fit Gym Ltd*" was accepted by the claimants without variation, I must now determine whether that creates an obligation to pay the outstanding balance in the circumstances.

55. "Leave" as in "… should you leave your position…" should be given its ordinary interpretation. The dictionary defines "leave" as "go away from", "exit", "depart", "withdraw" and "cease attending". The claimants argue that leave denotes a voluntary act as opposed to an expulsion. So, they argue that leave means something like "resign" or "abscond". I reject the claimant's argument, limiting "leave" to a voluntary act.

56. My role is to give a legal interpretation in respect of the Agreement signed. If a party does not read an agreement or does not understand it or misinterprets it, it does not mean that the agreement is not contractually enforceable. using a combination of a subjective test and an objective test i.e., what the parties thought they were sign in and what I interpret as reasonable to believe in the circumstances I reject the claimants' argument.

57. To restricted the definition of “leave” to a voluntary departure is to read something else into the ordinary definition of the words used. I note the claimant’s say they genuinely believed that the repayment provision only operated if they chose to leave the respondent’s employment. However, that is to revise or change the agreement, by amending “voluntarily leave” for the word “leave”, which was used. Mr Varnam called that a “gloss” on the agreement. The point is that “leave” means exit or deport and that does not denote either voluntary or involuntary, it merely denotes not longer working for the respondent.

58. The claimants genuinely perceived this as an advance on their bonus. They did not regard this as a loan. However, that is not the agreement that they signed, the Agreement effectively provided for a loan repayable on departure.

59. Under the Agreement, the respondent was entitled to seek repayment of £5,830.01 from Mr Lawson less any money previously paid and the balance of £3,327.26 from Mr Kabba

60. S13(1) ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract or the worker has previously signified in writing his agreement or consent to the making of a deduction. Final paragraph of the letters signed Mr Lawton on 30 June 2020 and by Mr Kabba on 28 June 2020 the requisite consent to making the deductions from the claimants’ final wage payments.

61. At the hearing, the respondent accepted that the claimants were owed accrued and unpaid annual leave and credit was given for this and the amounts were agreed as the commencement of the hearing. As the value of this part of the claim has been taken into account, the claim fails.

62. The claimants were entitled to 1 week’s notice under the contract and/or s86 ERA. There is no basis to assert that the notice period was 1 month, so I reject that claim. The claimant’s were given appropriate notice prior to dismissal.

63. The claimants claim a breach of contract for the non-provision of their statutory entitlement to the pension arrangements, i.e., auto-enrolment and minimum employer’s pension contribution was accepted by the respondent. The valuation was agreed, and credit was given in respect of the employer’s contract claim.

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Employment Judge Tobin

Date: 12 October 2022

JUDGMENT SENT TO THE PARTIES ON

12 October 2022

FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.