SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *360 Fit Personal Training Ltd. v. A.B.*, 2024 NSSM 40

Date: 20240426
Docket: 528754
Registry: Halifax

Between:

360 Fit Personal Training Ltd.

v.

AB

Adjudicator:	Dale Darling, KC
Heard:	March 6, 2024 in Halifax, Nova Scotia
Decision:	April 30, 2024
Counsel:	Both Parties were self represented

Introduction:

[1] This matter was heard by way of telephone conference call on March 6th, 2024. The Claimant, 360 Personal Fitness Training Ltd., was represented by Mr. Vincent Neary of Keltic Collections. Ms. Elizabeth Gray Hamilton, who works as a manager for 360 Fit appeared, and Ms. AB appeared on her own behalf.

[2] The Claimant seeks payment of the balance of a contract entered into for a year's purchase of personal training, with two sessions a week, with payments every two weeks. Ms. AB made twelve payments of the twenty-six required for a total of $3683.88, and so the Claimant is seeking the remaining balance of the one-year commitment they say she made, a total of $4507.87.

[3] I am dismissing this claim, as I find that the requirement that the Claimant pay for sessions they could not attend, despite evidence of a disability, is void. The contract is illegal, and the repayment is voided as it requires the consumer to waive their rights under the *Nova Scotia Human Rights Act*. My reasons follow.

Background:

[4] The dispute arises out of a "contract" (I use quotation marks because the documents which gave rise to the arrangement are not called a "contract") that was signed by Ms. AB on February 8th, 2023, for the provision of two personal one hour training sessions per week for a year, requiring payments of $279.99 plus tax biweekly ($321.99).

[5] There is in evidence a document signed by Ms. AB titled "Waiver and Release of Liability". It contains the following relevant statements:

i. All sales are final at time of sale. No returns, no refunds.

ii. "In signing I have agreed to all 360Fit policies, which are on the 360fit mind/body app. To cancel any service, I have agreed to do so at 360fit Dartmouth location. Any dispute will be settled by referring to 360fit policies."

iii. Under "Cancellation Policy", the document states "Cancellation of any service for any reason means the client will lose all unused sessions and passes. There is no refund for unused sessions, nor can the sessions be used for any other service at a future date".

iv. Under General Policies, the document states:

> "If delinquent more than 60 days, the facility may cancel the members membership and begin collection proceedings to satisfy the members total membership obligations under this agreement.
>
> Any NSF occurrence will result in a $25 charge per occurrence.
>
> All memberships are one-year contracts unless otherwise stated.
>
> Cancellation requires members to come into the studio to cancel or to do adjustments.
>
> All membership contracts can only be canceled with a complete payout of the remainder of the contract.

> All contracts, including personal training, FST and memberships, become month to month contracts on the date of renewal.

[6] In evidence there is also a document titled "360fit policies, on the 360fit Mind/Body app". That document was, by the evidence, not provided in hard copy but available online.

[7] That document has a "Freeze Policy", which states "There is a $50.00 charge to "Freeze" Personal Training Packages. This charge will be incurred EACH TIME a freeze request is put on a Personal Training Package. A Personal Training Package can be frozen for up to 2 months (with a doctor's note). All personal training packages can be frozen for up to two months for a fee of $75.00 for medical reasons (a doctor's note must be provided)"

[8] It also has a "Personal Training Cancellation" section, which states "Cancellation of any personal training package or service for any reason means the client will lose all unused sessions. There is no refund for unused sessions, nor can the sessions be used for any other service at a future date. All EFT clients accept they have bought personal training for a year and are responsible for the purchase of all sessions in the service. The service may be bought out for the remainder owing on the package or can be transferred to another person for a $75 cancellation fee."

[9] Under the hearing “Delinquency Policy” that document states “If delinquent more than 60 days, the facility may cancel the members membership and begin collection proceedings to satisfy the members total membership obligations under this agreement”. Despite the transfer provisions outlined above, it then continues “Personal training sessions are nontransferable”.

[10] It then continues “All personal training sessions will expire one year from date of signing period. All personal training sessions last for one year from the date of purchase. Personal training clients are responsible to rebook sessions that they have missed or cancelled within their contract date”.

[11] Ms. Hamilton, the Manager for 360Fit, testified on behalf of the Claimant. Her evidence was that in accordance with the documents and policies outlined above, Ms. AB had signed up for a one-year personal training “package”, which she distinguished from a “membership”.

[12] She says that she explained the package’s obligations clearly to Ms. AB. Ms. AB signed and made twelve payments of the twenty-six required for a total of $3683.88, and so the Claimant is seeking the remaining balance of the one-year commitment made by agreement, a total of $4507.87.

[13] She testified that Ms. AB first became ill on a trip in July of 2023 and "we allowed her to".

[14] She said that Ms. AB had been a member for a long time with 360Fit and had what she described as a "platinum membership".

[15] She says that her understanding is that "all sales are final", and with respect to the medical exemption in the documentation, she had "never seen a full cancellation".

[16] She says that Ms. AB's Doctor's note of October 3, 2023 (which was received) was "too late" because the matter had already gone to collections.

[17] Ms. AB in her evidence explained that her discontinuation of her personal training was not by choice, but due to the development of an autoimmune disorder. She has been on different antibiotics and currently is changing drugs again. While she says she wishes she could be still in her sessions, she is not yet well enough to attend. She says she never missed a session prior to her illness, and was expecting some "empathy or compassion".

[18] She further stated that the Claimant has continued to attempt to take payments from her credit card on multiple occasions after the matter was sent to collections.

[19] Emails between Ms. AB and Ms. Hamilton, show Ms. AB disclosing the following health concerns:

1. June 12, 2023 – Ms. AB tells Ms. Hamilton she has a “skin bacterial problem” from her trip and that she “needs medical clearance”. Ms. Hamilton asks how long she will be “out of commission”. Ms. AB responds with details, saying its “debilitating”, and that she is waiting on a second opinion. Ms. Hamilton responds “That sounds horrible. Are you on pain meds as well?”.

2. June 20, 2023 – Ms. Hamilton asks Ms. AB “How are you doing? Would you like to set up some training sessions”?

3. July 26, 2023 – (there had been some back and forth on scheduling) with Ms. AB stating “I'm away from July 31st to August 6 for a family trip. I'm curious as to how we make up for the missed sessions for last week. And for the sessions I missed when I was sick, but still paid for, but didn't receive. I had cellulitis, pink eye and the antibiotic gave me thrush. I've been down and out, but still paid for sessions with little to no compassion or empathy from 360Fit. I'm under the impression that the sessions I paid for and didn't receive will be added to the end of this contract. I would assume it would be the same for the missed payment period. I'm assuming that will be added to the end of this contract, which by the way, I can't wait to be over.”

4. Ms. Hamilton responded by confirming that a trainer would be available for 4:00 PM that day and would be available for 4:00 PM sessions going forward.

5. October 16, 2024: Ms. Hamilton in an e-mail to Ms., AB stated “We have not received any information from you regarding payment of your contract. If we do not receive a reply by tomorrow, October 17th, 2023, we will send your account to collections”.

6. October 24th, 2023 at 12:44 pm: Ms. AB responded “I have had some serious skin and joint problems in switching my medication eight weeks ago. As per my doctor's note (which was dated October

> 3rd, 2023), please cancel my remaining sessions and membership. I'm unable to work out as I have ulcers around my thighs and armpits that have become very painful and have had to be and continue to be treated in hospital. Sorry for the late response. I've been extremely sick and my mental health is also suffering due to this."
>
> 7. Ms. Hamilton responded the same day at 2:49 pm "Hi, Ashley, your delinquent account has been sent to collections".

[20] This claim was filed with the Court November 28, 2023.

Decision:

[21] The "contract" between the parties is far from what should be drafted in circumstances where consumers find themselves locked into a one year non-refundable obligation. The main document itself is described as a "Waiver", and full understanding of the obligations of the consumer requires reference to on-line policies that are not part of the signed document.

[22] However, the refund and cancellation obligations in the main document, which was signed by Ms. AB, made it as clear as possible that no refunds are possible, and that delinquent accounts will be sent to collections after 60 days. Parties are expected to read the agreements they enter into, and this much Ms. AB would be expected to have understood.

[23] The issue with this agreement is the clause regarding illness of a client. The evidence in this case confirms that that the contract between the parties was frustrated by Ms. AB's illness. She could not continue to attend personal training sessions. I do not find that Ms. AB was attempting to avoid payment – she had been a member of 360Fit at a platinum level, which I take to mean that there had been no payment issues in the past.

[24] Section 3(l) of the Nova Scotia *Human Rights Act*, RSNS 1989, c. 214 (the "HRA") states that "physical disability or mental disability" means an actual or perceived (i) loss or abnormality of psychological, physiological or anatomical structure or function, (ii) restriction or lack of ability to perform an activity.

[25] I find that Ms. AB illness as described, and its effects, meets this definition, and therefore triggered the requirement for further inquiry on the part of Claimant in this case.

[26] The HRA says in section 4 that "a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds

or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society".

[27] Section 5(1) of the HRA states that "No person shall in respect of (a) the provision of or access to services or facilities;… discriminate against an individual or class of individuals on account of …(o) physical or mental disability".

[28] In *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, 1996 CanLII 190 (SCC), [1996] 2 SCR 3, at para 26, Justice Major stated that "Human rights legislation sets out a floor beneath which the parties cannot contract out". He was, in that circumstance referring to a collective agreement, but given the above excerpt from the *Nova Scotia Human Rights Act*, I find that there is every reason to conclude that the same guardrails exist for contracts for the provision of services.

[29] So, what is the "floor" in this case? The creation of a restrictive two month window under which Ms. AB was "permitted" to be ill clearly fails to take into account the requirement to enter into an analysis of reasonable accommodation of Ms. AB's disability, to determine if a) if it was possible to determine a time at which Ms. AB would be able to complete her personal training package and b) if it

constituted undue hardship for the Claimant to hold the package pending her recovery.

[30] The policy also failed to address what would occur in the case of a client whose disability prevented them from participating in the personal training. Contrary to the Act, this created a significant disadvantage in provision of services over participants who do not have a disability.

[31] Even after Ms. AB had provided medical documentation, the Claimant forged ahead with collections. Her status as a person with a disability, and the requirements to contract within the provisions of the law, was ignored.

[32] A contract which contains elements of illegality, may or may not be upheld by the Court. Adjudicator Pink in *Sheehan v. Samuelson*, 2023 NSSM 27 (Canlii) recently explored this concept. The case dealt with the question whether a contract for sexual services was arguably illegal and therefore unenforceable.

[33] Adjudicator Pink, in finding for the Claimant seeking payment, referred to *Still* v. *Minister of National Revenue*, 1997 CanLII 6779 (QC CQ), 1997CanLII 6779 (FCA), saying:

[48] …"the Court notes historically the law evolved from an approach where flexibility was applied to illegal contracts in the 18th century to a more rigid or doctrinal approach in the 19th and early 20th centuries.

[49] In *Still*, Robertson J.A., writing for a unanimous court, rejected the doctrinal and rigid approach when he stated at paragraph 21:

> Generally, it is not difficult to make a finding that a contract is either expressly or impliedly prohibited by statute. Nonetheless, there are instances where it is improper to imply such a prohibition. In 1957, Lord Devlin cautioned that: "the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear." This advice was proffered in *St. John Shipping Corp*. v. *Joseph Rank Ltd* [1956]3 ALL E.R. 683 (Q.B), a high point in English law. For the first time a clear distinction is drawn between contracts illegal in their formation and those illegal as performed.

[50] At paragraph 24, Robertson, J.A. notes when parties may be relieved of the consequences of illegality and when it is appropriate. He lists three circumstances where that might occur, including "when the client has an independent right to recover (for example, a situation where recovery in Tort might be possible despite an illegal contract)". The Court then looks at the "classical model of illegality which states that illegal contracts are void *ab initio*, and the "modern approach" to illegal contracts. Following a review of the relevant cases, the Federal Court of Appeal states "**the classical model has long since lost its persuasive force and is no longer being applied consistently.**" (Para 42). There is jurisdiction to refuse relief, to "**those in breach of a statutory prohibition, the grounds of refusal being on a principled and not arbitrary basis".** (Emphasis added)

[51] In *Still*, the Court was addressing an employment contract, ostensibly illegal because the employee did not have a work permit. The Court reflects on the permutations that would apply in various provinces to an analysis of legality when provincial statutes, such as the Employment Standards legislation, and common law might be considered. In paragraph 46, the Court concludes:

> As the doctrine of illegality is not a creature of statute but of judicial creation, **it is incumbent on the present judiciary to ensure that its premises accord with contemporary values**. One need only look at the Supreme Court's now infamous decision in *Christie* v. *York Corp.* (1939), 1939 CanLII 39 (SCC), [1940] SCR 139 to appreciate the significance of this observation. In that

> case, the classical principles of contract supported the right of a merchant to refuse to accept an offer from a person of colour. Even without human rights legislation we know that the case would not be decided the same today". (Emphasis added)

[52] Applying a principled approach to recovery in tort, as it respects the implications of illegal conduct has been considered by the Supreme Court of Canada in *Hall v. Herbert* [1993] SCR 159. At page 169, Justice McLaughlin noted the duty of the courts to preserve the integrity of the legal system so that only in limited circumstances should recovery be barred in the face of illegality.

[53] In *Still*, in paragraph 48, the Court concludes:

> …the doctrine of statutory illegality in the federal context is better served by the following principle (not rule): **where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all the circumstances of the case, including regarding the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claim, to do so**. (Emphasis added)

[34] Adjudicator Pink found that there were strong public policy reasons to enforce this contract, if not on the grounds of contract, alternatively on the grounds of unjust enrichment.

Conclusion:

[35] I agree with Adjudicator Pink's analysis. I use the reasoning of the Court he reviewed to find that in this case, it is contrary to public policy to uphold a contract in which the Claimant can only succeed if I require the Defendant to waive her rights under the *Human Rights Act*, and ignore the Defendant's entitlement to

consideration of her entitlement to accommodation and consideration of her disability.

[36] I therefore find that the repayment obligations inherent in this claim are void as requiring enforcement of an illegal contract for repayment. The claim for repayment of the balance of the monies owing, are therefore dismissed, and an order will issue accordingly.

Dale Darling, KC, Small Claims Court Adjudicator