Civil Resolution Tribunal

Date Issued: October 8, 2019

File: SC-2019-002501

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Ellis et al v. 0957358 B.C. Ltd.,* 2019 BCCRT 1172

B E T W E E N :

PATRICK ELLIS and DOROTHEA ELLIS

APPLICANTS

A N D :

0957358 B.C. LTD.

RESPONDENT

A N D :

PATRICK ELLIS and DOROTHEA ELLIS

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. This is a dispute about a gym membership.

2. The applicants, Patrick Ellis and Dorothea Ellis, (the clients), had a monthly membership to the Crossfit gym owned by the respondent, 0957358 B.C. Ltd. (the gym). The clients say the gym should not have charged fees during their illnesses and absences and claim $630 in reimbursement of gym fees.

3. The gym denies the clients are entitled to any reimbursement. The gym says the clients quit without notice and by counterclaim, the gym asks for $210 in unpaid fees. The gym also claims $258 in staff wages for participating in the dispute process.

4. Mr. Ellis represents the clients. An employee, Robert Milligan, represents the gym.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal) process. The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the tribunal's mandate of proportional and speedy dispute resolution, I decided I could fairly to hear this dispute through written submissions.

7. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Under section 61 of the CRTA, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. The clients say the gym failed to produce "an email" the clients had sent it. The clients do not state its date or contents but say they do not have a copy and the gym should produce it. I infer the clients are asking for an order that the gym produce this unspecified email.

9. The gym says it does not have any relevant emails apart from those disclosed in this proceeding. The gym says it searched its website communications and emails, including its inbox, spam, archives and folders and found no additional emails from the clients. I am satisfied the gym looked for any additional email and found none. As the clients have not established an additional email exists or that the gym has it, I decline to order its production.

10. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:

    a. order a party to do or stop doing something;

    b. order a party to pay money;

    c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

11. The issues in this dispute are:

    a. To what extent, if any, the clients are entitled to reimbursement of $630 in membership fees.

b. To what extent, if any, the gym is entitled to $210 in unpaid fees and $258 in dispute-related expenses for staff wages.

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the clients bear the burden of proving their claims on a balance of probabilities. The gym carries the same burden on the counterclaim. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

13. The clients had been gym members for several years. The parties had no written contract. It is undisputed that the clients paid a monthly family membership of $210 and paid it until the end of October 2018. The gym cancelled the clients' membership on about November 6, 2018.

14. According to the gym's policy on its website, it had a 30-day notice period for cancellation and an option to "freeze" an account for up to 1 month per year. The clients do not specifically dispute that the policy applied, though they say the gym never directed them to the website to review it. I find the policy applied here.

15. The gym's fee structure shows it offers different membership fee options based on frequency of attendance. These options include, monthly, 3 times a week, and drop-in. In purchasing a monthly membership, the gym's clients can save money, if they attend the gym with regular frequency. As mentioned the clients' purchased the monthly option.

16. In about May 2018, the clients discussed the potential of suspending their monthly membership with gym staff. The gym says there was no final decision to suspend. Following that discussion, it is undisputed the clients continued to attend the gym, though intermittently, until mid-September 2018. The clients describe missing days each month due to a combination of out-of-town work and serious illness. The clients say in about July 2018, they asked the gym through its software, 'Wodify' for "two months financial relief" for missed classes but received no response. The gym

denies receiving notification through Wodify for financial relief. The gym says it received no email from the clients through Wodify or otherwise, in July 2018. As discussed above, a search of its files found no emails other than those disclosed in this dispute, which includes no July email.

17. In about September 2018, the clients changed their payment type in Wodify from automated credit card to cash. It is undisputed that the clients did not attend the gym at all in October 2018.

18. The parties disagree about who owes money. The clients say they are entitled to reimbursement of $630 as 3-month "financial relief". Based on its 1-month notice policy, the gym claims the clients owe $210 in unpaid November fees.

19. The parties' emails show that in October and November, the clients informed the gym about their ongoing health issues and attempted to negotiate refunds of past fees and accommodation going forward. The clients say that in previous years the gym provided financial relief by retroactively adjusting their fees, and they came to rely on that practice. The clients say therefore, the gym should again allow financial relief by refunding $630 in fees. The gym specifically disputes that it has any obligation to retroactively suspend their membership or remit fees. I find no evidence that the gym expressly agreed to refund fees on an ongoing basis and insufficient evidence of an established past practice of financial relief. The courts have found a presumption against adding unexpressed terms into a contract (see *Athwal v. Black Top Cabs,* 2012 BCCA 107). I find in the circumstances here, the clients have not established an implied term of financial relief in the parties' contract for retroactive fee remittance.

20. The clients say that any reasonable person would believe that in September, when they changed their payment method to cash, they meant to cancel their monthly payment obligations. However, I find they just changed the form of payment but did not cancel it. I find that switching to cash did not remove the clients' obligation to pay and there is insufficient evidence that the clients asked to cancel their monthly membership in September. I find that the clients accepted the risk in purchasing a

monthly membership that they would attend enough times to make it worthwhile. Despite their illness, I find the gym is not required to reimburse fees for infrequent or non-attendance. Therefore, I dismiss the clients' claim.

21. As for the gym's counterclaim, I find the gym decided to end the clients' contract by email dated November 5, 2018. The gym stated that their "memberships were done" and asked them to "move on." The gym told the clients it would not charge November fees. Since the gym ended the membership and agreed to not charge November's fees, I find it is not now entitled to rely on the cancellation policy. I dismiss the gym's claim for $210 in November membership fees.

22. The gym claims $258 in employee time to respond to this dispute. However, the gym provided no evidence to establish the value of its employee time, such as payroll records. Further, parties are not generally entitled to reimbursement of their time for participating in the dispute process and I find the gym has not established any extraordinary circumstances to award them here. I dismiss the gym's claim for employee time.

23. Under section 49 of the CRTA and tribunal rules, the tribunal will generally only order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As neither party was successful, I dismiss their claims for reimbursement of tribunal fees and dispute-related expenses.

ORDER

24. The clients' claims, the gym's counterclaims and this dispute are dismissed.

Trisha Apland, Tribunal Member