

**BETWEEN**

**FA**  
APPLICANT

**AND**

**FAA**  
APPLICANT

**AND**

**TZ as TZ1**  
RESPONDENT

**AND**

**TZZ**  
RESPONDENT

Date of Order:

18/07/2017

Referee:

Referee Paton-Simpson

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the name of the first respondent is changed to TZ trading as TZ1, FA is to pay the sum of \$32.69 to TZ trading as TZ1 on or before 1 August 2017 and FAA is to pay the sum of \$31.50 to TZ trading as TZ1 on or before 1 August 2017.**

## **Facts**

[1] In February 2015, FAA signed up for a gym membership with TZ trading as TZ1 at the student price of \$69 per month. In October that year, his father FA also signed up for a gym membership, at the regular price of \$75 per month. FA stopped paying his monthly fees in October 2016, and FAA stopped paying in November 2016.

[2] Since payments stopped, TZ1 has invoiced a total of \$352.00 to FAA and \$376 to FA in membership fees and late fees. The applicants now seek a declaration that they are not liable to pay TZ1 the invoiced sums.

## **Issues**

- (a) What are the terms of the contracts regarding cancellation?
- (b) Was TZ1 entitled to suspend access to the gym?
- (c) What amount, if any, is payable to TZ1?

*What are the terms of the contracts regarding cancellation?*

[4] The relevant law is the common law of contract, under which parties can enter into legally binding agreements. There are also relevant provisions in the Contractual Remedies Act 1979 (CRA) concerning cancellation for breach.

[5] Generally contracting parties are free to agree on their own terms. However, the courts have held that parties are not bound by unusual or onerous terms in an unsigned document unless they have been given reasonable notice of those terms. The more unusual or onerous the term, the greater the notice required. The courts have also held that penalty clauses are unenforceable. A provision in a contract will constitute a penalty clause if it is punitive, imposing a penalty for breach that is extravagant or unconscionable having regard to the innocent party's interest in the contract being performed.

[6] The Membership Agreement for each applicant provides for a minimum term of twelve months. Clause 4 states:

“The membership will continue on a monthly basis (“extended period”), after the completion of the initial agreed term, until terminated by completing a resignation form at the Club thereby giving 30 days’ notice. Failure to use the Club does not release the Member from his or her obligations under this agreement.”

[7] FA claimed that he was told it was a twelve-month contract that could be extended if he wished. However, I accept that TZ1 took sufficient measures to draw the applicants’ attention to the extended period by getting them to initial a clear acknowledgement of the provision regarding the extended period.

[8] On the other hand, I do not accept that an additional provision in the Membership Guidelines booklet was adequately drawn to the applicants’ attention. On a page of the booklet headed “About Your Membership” it states, “Memberships may not be cancelled nor may we accept a request to terminate if arrears are on the account.” This term is not included in the signed Agreement. I find that the provision in the Agreement that members must “abide by and be bound by the New Member Guidelines Booklet” is insufficient notice of such an onerous term. The effect of the provision would be that members in financial difficulty struggling to pay their arrears would be forced to continue an unwanted gym membership beyond the minimum period. If this term had been part of the signed Agreement, I would have had to consider whether it was a penalty clause, and therefore unenforceable. Alternatively, I would have been inclined to order under s19(1)(e) of the Disputes Tribunal Act 1988 that the contract be varied to exclude this term, on the basis that it is harsh and unconscionable. However, I find that this term never became part of the contract in the first place due to a lack of reasonable notice.

[9] Therefore, the applicants were entitled to terminate their membership on thirty days’ notice after the twelve-month period despite being in arrears. There was some discussion at the hearing as to whether written notice or a specific resignation form was essential. However, even if clear verbal notice would have sufficed, I find insufficient evidence that either applicant had given thirty days’ notice to terminate his membership before the emails they sent in January 2017. It is not necessary for me to decide whether those emails were sufficient to provide thirty days’ notice of termination due to my finding on the next issue.

*Was TZ1 entitled to suspend access to the gym?*

[10] TZ1 gave evidence that its policy was to deactivate a member's access card once any payment was ten days in arrears, and then to reactivate the card for another ten days at the beginning of the following month while it attempted the direct debit again. However, TZ1 was unable to point to any provision in the contract supporting this policy.

[11] Clause 4.3 allows TZ1 to suspend or withdraw the Members' entitlements or rights to access or use the gym where the Member is "in breach of the new Member Guidelines Booklet". If clause 4.3 were to be read broadly, it is arguable that non-payment could be a breach of the booklet, since the booklet mentions that memberships are required to be on direct debit and states, "Please ensure you have sufficient funds in your account each month."

[12] However, the courts have held that any ambiguity in a written contract is generally construed against the party who drafted the contract, since that party had the opportunity to express the wording more clearly. If TZ1 wished to have the right to suspend its services for non-payment, it could have allowed suspension for breach of any term of the Agreement, but instead it specified the new Member Guidelines Booklet.

[13] The first page of the Membership Guidelines booklet is headed "Membership Guidelines" and sets out various rules relating to use of the gym. The other two pages of the booklet contain information and advice, most of which could not be described as rules or guidelines. For example, there is advice on fitness and information about the membership rewards programme. The reference to payments is found in a section on the second page headed "About Your Membership", alongside information about how the direct debit will appear on the member's bank statement, and an explanation as to why TZ1 uses direct debit. It would not make sense to refer to a "breach" of this information. I therefore find that the reference in clause 4.3 to a breach of the booklet means a breach of the Membership Guidelines on the first page of the booklet. It does not mean a breach of an obligation under the Agreement that happens to be referenced or summarised in the sections of the booklet containing information and advice.

[14] Since the contract did not allow for suspension in the event of non-payment, TZ1 was in breach of the contract when it deactivated the applicants' access cards ten days after the first missed payment. By the time each applicant missed his second payment, he had been denied access for over two weeks, which I find constituted a serious breach of the contract by TZ1, giving a right to cancellation under CRA s7(4)(b)(i).

[15] Unlike termination by giving thirty days' written notice under the terms of the contract, cancellation for breach does not require any particular form of notice, so long as the intention to cancel is made known to the other party by words or conduct (CRA s8(2)). It is arguable that the second missed payment by each applicant showed an intention to cancel the contract, but if not, the contracts were cancelled with immediate effect by the emails in January 2017.

*What amount, if any, is payable to TZ1?*

[16] Under CRA s8(3), payments that were due before cancellation remain due after cancellation, but the Tribunal has discretion to grant relief under CRA s9. Also, the parties are entitled to damages at common law for any breaches before cancellation. Taking into account the missed payments by the applicants and the wrongful suspension by TZ1, I find that each applicant must pay fees for the ten days until his card was deactivated together with one \$8.50 late payment fee as specified in clause 9 of the Agreement. For FA, the total payable is \$32.69; for FAA the total payable is \$31.50.