

BETWEEN

ACE

APPLICANT

AND

ZXZ

RESPONDENT

Date of Order:

19 December 2012

Referee:

Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Respondent, ZXZ Ltd, is to pay the sum of \$253.00 directly ACE Ltd within ten days of the date of this order.

Facts

[1] In January 2010, ZXZ Ltd sent a fax to some 900 New Zealand pharmacies, including ACE Ltd and RH Ltd (which was owned by CY of ACE Ltd at the time), giving details and instructions for the recall of suspected faulty medication. ACE claims that it is entitled to charge ZXZ for its time and costs spent effecting the recall (across both pharmacies), in contract, or alternatively, on the basis of *quantum meruit*.

[2] The same recall and claim (between another pharmacy and ZXZ) was the subject of a District Court decision in September 2011: *Ian Johnson Pharmacy Ltd v GlaxoSmithKline NZ Ltd* DC Manukau, CIV-2010-092-1947, 26 September 2011 (“*Ian Johnson Pharmacy Ltd*”). Both parties referred to this decision at the Disputes Tribunal hearing and its status as a precedent is addressed in the issues and findings below.

Issues

[3] The issues to be decided are as follows:

- (i) Are the facts in the case of *Ian Johnson Pharmacy Ltd* sufficiently different from this claim that the District Court decision is distinguishable?
- (ii) Is ACE entitled to payment for its services?
- (iii) What is a reasonable quantum for the services provided by ACE?

Decision

Are the facts in the District Court case named above sufficiently different from this claim that the District Court decision is distinguishable?

[4] ACE is relying on the precedent value of *Ian Johnson Pharmacy Ltd* in bringing this claim.

[5] ZXZ argues that the facts are different in the *Ian Johnson Pharmacy Ltd* case and that therefore no precedent exists. ZXZ says that the District Court based its decision on the fact that a representative from Ian Johnson Pharmacy rang the Pharmacy Guild of New Zealand on receipt of the January 2010 fax, and that the Pharmacy Guild on behalf of Ian Johnson Pharmacy and a number of others (not including ACE) had a conversation with ZXZ as to compensation for work carried out under the recall. It was established that ZXZ's representative confirmed that the issue of compensation would be discussed once the work surrounding the recall had been carried out.

[6] While this was found to be an oral term of what the Judge deemed to be a contract in that case, the finding that a contract had been formed by the pharmacy acting on the faxed instructions did not rely on the addition of the oral term.

[7] The Tribunal therefore finds that the District Court decision of September 2011 acts as a precedent for this claim.

Is ACE entitled to payment for its services?

[8] I find that ACE is entitled to payment for its services in contract, or alternatively, on a *quantum meruit* basis. The facsimile sent by ZXZ to ACE constituted a contract between the parties even without any further oral enquiry on the part of ACE as to payment.

[9] Services were requested which were over and above the normal services provided by ACE as part of its DHB contract and these services were provided. In the absence of any agreement as to price, ACE is entitled to reasonable payment for its services.

What is a reasonable quantum for the services provided by ACE?

[10] Following the decision in the District Court, I set the reasonable hourly rate based on the industry average rate of \$40 plus GST per hour.

[11] Accordingly I have awarded \$253.00 (including GST), being 3 hours time spent contacting patients and 2.5 hours administration time (across two pharmacies) at the rate of \$40 per hour plus GST (reduced from the claimed rate of \$80 per hour plus GST).

[12] I am unable to consider the costs involved in filing the claim, and preparing for and attending the Disputes Tribunal hearing under s 43 of the Disputes Tribunals Act 1988.