

BETWEEN

ADV Ltd

APPLICANT

AND

ZWF Ltd trading as ZWE

FIRST RESPONDENT

AND

ZWD

SECOND RESPONDENT

Date of Order:

18 June 2013

Referee:

Referee Eyre

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZWF Ltd trading as ZWE pay ADV Ltd the sum of \$18,229.79. The claim against ZWD is dismissed.

Facts

[1] In July 2012, ZWF Ltd trading as ZWE, completed work on an engine cylinder head for an engine that ADV Ltd was rebuilding for RJ at [a mine]. The engine went into service at the mine on 20 August 2012 and failed three days later on 23 August 2012. ADV Ltd repaired the engine for RJ. The cost of the repair work, including urgent attendance underground at the mine site, was \$18,229.79. ADV Ltd considers that the engine failure was caused by ZWE's work.

[2] This claim has been filed by ADV Ltd for the cost of repairs to the engine which was \$18,229.79. ZWE and ADV Ltd agreed, in accordance with the requirements of the Disputes Tribunals Act 1988, to extend the financial limit of the Tribunal to this amount.

[3] The Notice of Claim incorrectly recorded ZWD as the Respondent; however, ADV Ltd indicated at the hearing that the claim was only against ZWE, not against ZWD personally.

Issues

[4] The issues I am required to determine are:

- (i) Was it a term of the contract that ZWE carries out its work properly?
- (ii) If so, did ZWE breach the contract by not fitting the valve collet correctly?
- (iii) If so, what is the appropriate remedy?

Decision

Was it a term of the contract that ZWE carries out its work properly?

[5] The law of contract recognises and enforces verbal contracts, where the terms of that contract are clear.

[6] The representative for ZWE, ZWD, and the representatives for ADV Ltd, KI and DB, all agreed that the contract for work to be carried out was a verbal agreement based on an ongoing working relationship between the companies. It was also agreed by both parties that while they did not specifically discuss that it was a term of the contract that ZWE would carry out its work properly, it was understood by both parties that this was expected. ZWD agreed that this was certainly his understanding of what was expected of him.

[7] As it was agreed by both parties that this was an implied term of the contract, and as it is also logical in a contract of this nature that this would be a term of the contract, I find that it was a term of the contract that ZWE would carry out its work properly.

If so, did ZWE breach the contract by not fitting the valve collet correctly?

[8] The law of contract requires parties to a contract to adhere to the terms of that contract, unless there is a legal reason not to.

[9] ADV Ltd state that ZWE breached its contract by not fitting the valve collet correctly, which resulted in the engine failing and significant costs in repair work being incurred. ADV Ltd has presented an expert report by QT, Technical Services Manager at UF [a diesel engine company], in support of its position. QT was instructed to consider the failed parts of the engine and determine the primary cause of failure. QT did this and determined that “the primary cause of failure was an improperly positioned valve collet during assembly of the cylinder head”.

[10] ZWE accepts that the engine failed and that the engine failure was related to the cylinder head. ZWD also acknowledged the repair work that resulted from the engine failure. However, ZWE maintains that it did fit the valve collet correctly and therefore did not breach the contract by failing to carry out the work, namely the fitting of the valve collet correctly. ZWE relies on a report by GV of MU [a mechanical engineering company] to support its

position. GV was instructed to determine the cause of failure of the submitted valve. GV considered the parts and assessed the metal that the parts were made of. GV determined that there were no problems with the metal that could have caused the valve to fail. He also concluded regarding the valve collet that “the contact marks on the tongue of both collets shows that the collets have been seating in the valve groove correctly”.

[11] I have considered the evidence of both ADV Ltd and ZWE and the respective experts. I am required to determine this claim on the balance of probabilities and having regard to this standard, I find that the evidence establishes it is more probable than not that ZWE breached the contract by not fitting the valve collet correctly. The reason I find that this is more probable to have been the case, is because the expert evidence I have from UF is more detailed and more specific than the report by MU. The evidence from UF states clearly what the primary cause of failure was, which was the improperly positioned valve collet. This is a clearer conclusion reached than the suggestion by GV that the markings on the tongue of both collets indicate they were correctly seated. Furthermore, both parties agreed that as the collets were not replaced, those markings could have been caused previously rather than when used in this particular cylinder head.

[12] I also note that it is clear from the two reports that while the MU report is written by a specialist in metals, the UF report is written by a specialist in these particular diesel engines.

[13] For these reasons I find that ZWE did breach the contract by not fitting the valve collet correctly.

If so, what is the appropriate remedy?

[14] The law of contract requires a party who suffers a loss as a result of a breach of contract, to as far as possible be put back in the position they would have been in had the contract not been breached.

[15] ADV Ltd has presented an invoice for the sum of \$18,229.79 which includes all the parts used and time incurred in repairing the engine that failed. ADV Ltd claims that ZWE

is required to pay the full amount of this invoice, as ZWE's breach of contract caused all of these costs.

[16] ZWD acknowledged that apart from a couple of concerns he had about particular items on the invoice, which are discussed later, the repairs set out could have arisen from the failure of the engine.

[17] I have considered the invoice and the evidence of both parties on the issue of costs. I have had regard to the fact that the repair costs are significantly more than the work undertaken by ZWE initially. However, I accept ADV Ltd's evidence that, as the engine failed while the truck was working in the mine, the work required to access and repair the engine was significant. It involved ADV Ltd staff urgently being required to attend the truck in the mine, which necessitates significant travel costs and extra wages (as part of the employees' terms of employment were working in the mine environment).

[18] Furthermore, ZWD has not disputed that generally speaking the failure of the engine could have caused this level of damage and repair costs.

[19] I record that in the hearing, I considered ZWD's comments about hourly rate and particular travel costs. I also discussed the reason for the travel costs, the number of trips to and from the mine site and the hourly rates of the staff involved with ADV Ltd. I am satisfied with its explanations and reasons for charging those matters. In particular, I accept the argument that if these men were not working on this job, they would have been working elsewhere and been charged at their usual rate. I also accept that it is reasonable for staff to be paid a higher rate for working in the mine, given the additional risk involved in working in that environment. I find that the costs charged are reasonable for the actual time incurred in the circumstances.

[20] With regard to the parts, I expressed concern that if the parts were being charged at full commercial rates, then it could be said that ADV Ltd was making a margin on the parts, when the law of contract requires a mitigation of losses where possible and does not require a profit margin on any costs incurred. While being mindful of commercial sensitivities, ADV

Ltd acknowledged that, generally speaking, the overall profit on parts would be approximately 8%. I considered reducing the amount claimed for parts accordingly, however, having further considered the matter and the argument by ADV Ltd that if these men were working on another similar job, they would be entitled to charge the commercial rate for parts used on that job, I accept this argument and find that the cost to ADV Ltd caused by this breach of contract by ZWE is the full amount claimed.

[21] I find that ZWE is therefore required to pay ADV Ltd the full amount claimed of \$18,229.79.