

BETWEEN

AR
APPLICANT

AND

ZI
FIRST RESPONDENT

AND

ZIZ Ltd
SECOND RESPONDENT

Date of Order:

26 May 2014

Referee:

Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the first respondent (ZI) is to pay the sum of \$1,500 directly to the applicants (AR) on or before Tuesday 10 June 2014; and the claim against the second respondent (ZIZ Ltd) is dismissed.

Facts

[1] AR (the applicants) engaged ZI (the first respondent) to represent them in a personal grievance claim against ZI's former employer in about mid 2012. Payment of \$287.50 was made by AR to ZI/ZIZ Ltd (the second respondent) and a statement of problem was lodged in the Employment Relations Authority against the company that had been the applicant's employer.

[2] That company went into liquidation on 25 September 2012 and a further Statement of Problem against AA (the former company director) was lodged in the ERA on 23 November 2012.

[3] The ERA gave AR and their representative, ZI, until 27 June 2013 to file an amended Statement of Problem and the associated legal submissions and evidence in relation to their attempt to "lift the corporate veil" in the case.

[4] ZI did not file further documents with the ERA until after that date had passed and the ERA dismissed the matter on the grounds that it was frivolous and vexatious. AR subsequently paid \$1,500 in costs to AA.

[5] AR claim a refund of the \$287.50 paid, \$1,500 for the costs they had to pay and shortly before the hearing of this matter, they increased their claim by a further \$5,000 as damages. I note that the respondents did not receive the required notification of this increase, but because no part of that amount has been awarded, I will address that issue no further.

Issues

[6] The issues to determine are:

- (a) Who were the contracting parties?
- (b) What were the terms of the original contract?
- (c) Was there a second contract formed after the applicant's former employer went into liquidation?

(d) Did ZI provide his service with reasonable care and skill, that is, did he meet the statutory guarantees provided for in the Consumer Guarantees Act 1993?

(e) What remedies, if any, are available to AR?

Law and Decision

Who were the contracting parties?

[7] I find that the parties to the contract were AR and ZI. ZI argues both that it was ZIZ Ltd that was a party to the contract and also that the contract was formed solely with the applicant.

[8] There was no written contract and therefore little evidence available as to the nature of the original contract. AR say that they found ZI through a web search and looked at his website. I note that the website makes no mention of a limited liability company and ZI returned their phone message and met with them personally.

[9] I therefore find that the doctrine of undisclosed principal applies because, at least at the time AR met with ZI, it appeared that they were dealing with him personally and there was no information to suggest anything to the contrary. AR is therefore entitled to claim against ZI personally.

[10] I am also satisfied from the parties' verbal submissions at the hearing that AR were dealing with this matter from the beginning as a couple and were both involved in the initial conversation and meeting with ZI. I find that AR were both parties to the contract.

What were the terms of the original contract?

[11] The parties agree that ZI was to lodge a Statement of Problem with the ERA and this was done. The parties also agree that \$287.50 was paid by AR. AR say their understanding was that this was all that was due although the applicant says that ZI mentioned that he may be able to recover his (ZI's) costs in the event that AR were awarded money in the ERA.

[12] ZI says that he was essentially doing this work for AR pro bono because they had said they were suffering financial hardship and that the \$287.50 merely covered the costs of filing in the ERA. He pointed out the terms on the website that state that he/the company do not take a portion of any award (though possibly costs can be recovered).

[13] What has been established is what the parties agree on which is that \$287.50 was paid and for that ZI was to file a Statement of Problem with the ERA which he did.

Was there a second contract formed after the applicant's former employer went into liquidation?

[14] I find that the first contract came to an end with the liquidation of the former employer. The liquidation changed what the agreement between AR and ZI had been so substantially that any subsequent action must have been the subject of a new arrangement.

[15] However, AR have not established that a new contract was formed. There is no evidence of agreement for payment of any kind to ZI, either at the time or at some future time, even on a contingency basis. There was therefore no consideration and no contract was formed.

[16] However, I accept that ZI agreed to continue to represent AR, for no payment, and because of that the provisions of the Consumer Guarantees Act 1993 apply (as the definition of "supplier" in that Act includes anyone who supplies services 'in trade' whether or not there is a contract between the parties).

Did ZI meet the statutory guarantees provided for in the Consumer Guarantees Act 1993, that is, did he provide the service with reasonable care and skill?

[17] No, I find that in failing to file submissions in accordance with a deadline set by the ERA, ZI has failed to provide the service he agreed to with reasonable care and skill. ZI argues that there was nothing to file because AR had provided him with little that could be used to argue their case. I note that the parties disagree as to who was to provide the required evidence, with ZI saying AR were to find the evidence and AR saying that ZI had agreed to follow up and obtain some evidence. ZI denies that he was to obtain any evidence and as there is nothing in writing to prove that he had agreed to do this, there is no failure proven in this regard.

[18] Regardless of what was available, ZI, as AR's advocate was obliged to file something. The ERA ruling makes it clear that it is the failure to meet the filing timeframe that resulted in the claim being dismissed on the grounds that it was frivolous and vexatious, instead of being dismissed (or not) on its merits.

What remedies, if any, are available to AR?

[19] Section 32(b)(ii) of the Consumer Guarantees Act 1993 provides that, where a failure cannot be remedied (as is the case here), the consumer may obtain damages in compensation for any reduction in value of the service below the charge paid. As I have found that the \$287.50 related to a contract which was agreed and performed, that charge

does not relate to this work and in fact there was no charge for this work. There is therefore no damage for reduction in value payable.

[20] Section 32(c) provides that the consumer may obtain damages for any loss that was reasonably foreseeable as liable to result from the failure. I find that an award of costs against AR given ZI's failure to file anything by the deadline was entirely predictable. I accept, based on statements made by the ERA member in his ruling, that it is unlikely that AR would have succeeded in any event, and may have been subject to costs anyway, but I am nevertheless satisfied that the costs paid resulted from the failure of ZI to file and that these were a direct loss to AR.

[21] I note that the parties (to the ERA proceedings) reached agreement on the amount of costs, but it is my understanding that the ERA would have awarded costs (and likely at a higher amount) if they had not, so I accept that the \$1,500 was an unavoidable minimum (not a voluntary) payment on the part of AR.

[22] Due to the uncertainty over the likelihood of success of AR's ERA case, even if the available evidence had been filed, and the ERA ruling's flagging of its dubious merits and potential costs, I award no further damages to AR.