



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2023] NZDT 246**

**APPLICANT      AX and KX**

**RESPONDENT    WB**

**The Tribunal orders:**

1. WB is to pay to AX and KX the sum of \$637.23 on or before 12 May 2023.

**Reasons**

1. AX and KX undertook fence repairs on their boundary with WB. They filed a claim seeking to be compensated for the cost of the repairs, and collection costs. The claim totalled \$775.23.
2. WB considered that the damage did not result from her actions or property, and to the extent that it did, that she had not been notified of the intended repairs, in breach of the consultation requirements in the Fencing Act 1978.
3. The issues to be resolved are:
  - (a) Was the fence damaged in circumstances for which WB is liable?
  - (b) If so, did the damage occur by a sudden cause that required immediate work?
  - (c) If so, how much is recoverable in compensation for the work?

**Was the fence damaged in circumstances for which WB is liable?**

4. A neighbour owes a duty of care to ensure their property, including their trees, is maintained in such a way that it does not cause loss to neighbours.
5. Having reviewed the photographs provided by both parties of the fence, I have concluded that it is probable that the fence was damaged by WB's trees either falling over in a storm, or from being removed by a contractor. KX supplied compelling photos in this regard. WB provided statements from others, and her own recollection that the damage was not as presented, but these were insufficient to displace the direct evidence of the photographs.
6. The trees were growing close the boundary, and without more evidence to establish this was nothing more than an unforeseeable accident, it appeared probable that they were creating a risk of damage that needed to be addressed.

7. WB's contractor, who removed some of the trees, recalled in a statement that there was no fence damage from his work, and a photo supplied showed a clean fence line along a row of stumps. It is not clear when that photo was taken, but it is noted that the damage in this claim attributed to contractor's work was minor, and that most damage occurred from the storm. KX gave specific evidence of the minor damage that occurred during the tree removal, and I accept it is probable, given the size of the trees and their proximity to the boundary, that this also occurred.

#### **Did the damage occur by a sudden cause that required immediate work?**

8. The scheme of the Act encourages consultation on any work to be done on the fence. Where a fence has become inadequate, the starting point is that costs are shared (s9). However, a notice must be sent detailing the work, and the suggested contributions (s10). Where damage is caused by one party, the contribution of that party is 100% (s17). However, it is not clear that this removes the need for a notice first under s10. If this is correct, then, as no notices was sent prior, no contribution can be recovered unless an exception applies.

9. By virtue of s16, no notice is required if there is a sudden event which gives rise to the need for immediate work.

10. As the fence is on a working farm, it needs to be stock proof at all times. I am therefore satisfied that the damage needed to be repaired immediately. I have had regard to WB's view that the work was not urgent, as cattle would not push through this type of damage. However, the test is not one of "urgency", but of the need for immediate repair. Had notice been required, the process for a notice and cross notice can take many weeks. The fence repair was important and needed to be done forthwith. In these circumstances, I have concluded that no notice was required.

#### **How much is recoverable in compensation for the work?**

11. Three invoices were supplied for fencing work, all of which are reasonable, and recoverable. These total \$637.23.

12. It is noted that the first invoice included repair to a water pipe. Whilst this was not part of the fence, it was damaged by WB's trees, so is recoverable as damage to general property.

13. A further invoice was provided for debt collection fees of \$138.00. The claim is based in tort, and in such claims, damages that can be claimed are those arising from the incident that are directly foreseeable as liable to result, and closely linked to the breach of duty. Losses should also be mitigated. The hiring of a debt collector was an option, but it was an election, for which there were alternative, and in this case, cheaper, solutions (such as filing directly in the Disputes Tribunal). This sum has therefore not been awarded.

#### **Conclusion**

14. For these reasons, I have concluded on the balance of probabilities that WB is to pay to AX and BX the sum of \$637.23.

#### **Referee:**

**J Robertshawe**

**Date: 20 April 2023**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

### Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

### Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

### Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.