(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2019] NZDT 1392**

APPLICANT **B Ltd**

RESPONDENT **IX**

The Tribunal orders:

1. IX is to pay to B Ltd the sum of $1,380.00 on or before 30 September 2019.

Reasons

1. IX contracted B Ltd (the company) to act for her in an employment dispute.

2. After the mediation, but before a hearing, IX withdrew from the case. The company filed a claim seeking a payment for its services of $3,680.00.

3. IX defended the claim on the grounds that she had instructed the company to act on a "*no win - no fee*" basis, that she had not succeeded in the claim, and that her withdrawal from the dispute did not trigger a fee under the terms of her contract.

4. The issues to be resolved are:

   (a) What were the terms of engagement for the company?

   (b) Did IX terminate the engagement against advice?

   (c) If she did, does this entitle the company to recover a fee for the work done?

What were the terms of engagement for the company?

5. IX signed a terms of engagement prior to the work commencing which set out the basis upon which she would be charged. The work was to be done on a contingency fee basis (i.e., "*no win-no fee*").

6. However, whilst the starting point in these contracts is "*no win-no fee*", there are circumstances in which a payment may have to be made even if the client is not successful. Companies that provide services on a contingency fee basis make an investment in a claim that is at risk from an unjustified withdrawal. To minimise this risk, the contract provides that IX would have to pay a "penalty fee" if "*without reasonable cause and/or against advice*" IX terminated the engagement or withdrew from the case before it has reached its conclusion.

7. The penalty fee is listed at $250.00 per hour plus GST, plus expenses, with no set number of hours hours specified.

Did IX terminate the engagement without reasonable cause and/or against advice?

8. After mediation, but before a hearing, IX decided not to proceed with her case.

9. There are many factors that go into deciding whether to proceed to a hearing. Of particular note in this case was the fact that IX is a solicitor who would be suing her boss, who is also a solicitor. This placed an added pressure for IX to consider in assessing her position, both in relation to the professional consequences of her proceeding with the claim, the likelihood of the need for a full hearing and her prospects of success.

10. Without a high degree of certainty of success, it would be rational to be cautious about pursuing a claim in this setting. The company described IX's claim as having merit, but this did not equate to any certainty of success. It is therefore not possible for a Tribunal to make a finding that IX withdrew "without reasonable cause".

11. However, IX did withdraw against advice. The company confirmed that IX had the makings of a meritorious claim, and it had not advised IX that she should withdraw. The company had in fact started preparations for a hearing.

Does this entitle the company to recover a fee for the work done?

12. The company determined that IX had withdrawn against advice and applied a penalty fee that took into account all work done for both the mediation and hearing preparation.

13. I find that the company is able to partially, but not fully, recover the fee charged. This is so for the following reasons:

    (a) A party to a contract is not entitled to recover a penalty for a breach. It can only ever seek compensation for actual loss arising from any breach.

    (b) The contract between the parties is also subject to the statutory warranties to provide services with reasonable care and skill set out in s28 of the Consumer Guarantees Act 1993. This requires the company to consider the reasonable interests of its client in the proceedings, and to avoid any conflict of interest in the advice it provides. The company stands to make a fee, or extract a "penalty", by taking further steps, and yet it may not be in the client's interests to pursue the litigation, whether for legal, professional or personal reasons.

    (c) The company acknowledged this balancing act and stated that it does not usually charge anything if a client walks away at mediation to avoid any such conflict. It usually considers that withdrawal at that point should be deemed as "reasonable", and that there would be a conflict of interest in advising otherwise. Whilst the contract states that the fee can be charged if there is no reasonable cause and/or against advice, once there is reasonable cause, there could be no advice to the contrary. The contract can therefore only be enforced on the basis of reasonable cause *or* against advice.

    (d) However, it is clear from reviewing the exchange of emails after the mediation that the company had indicated it would charge $2,000.00 + GST for its work at the mediation if IX did not proceed to a hearing. This left IX feeling that she had no choice but to proceed, despite her misgivings about taking the case further. The onus is then on the company to prove that its threat to charge was not a breach of its responsibilities, given that the client should have a right to withdraw for reasonable cause. Given the context of this dispute, I could see no reason why IX's case should be viewed any differently to the others, and her decision to withdraw after mediation should not in this case have been clouded by a threat of a penalty fee. If the company did seek to rely on an automatic right to charge a fee if a client withdraws at mediation for any reason, then this should be stated as a pre-negotiated compensation package, rather than as a penalty fee at the discretion of the company. In that case, the client would know where they stood before they started.

(e) However, IX failed to advise the company that she was only proceeding because of the $2000 + GST cost to her of withdrawing. There was no communication from IX to let the company know of her true concerns, and from all appearances, she wished to proceed to the next stage. In an email dated 13 September 2018, she stated that she was "*keen to proceed with the ERA*".

(f) On the strength of what appeared to be her desire to continue to a hearing, the company started to prepare for a hearing. The time and cost claimed for this was $1,380.00. It is reasonable in the circumstances that this fee be recoverable, as there was a clear representation that this work was sought, and no adequate communication of the real basis for IX's decision to continue. The company proceeded on the representation made and incurred the additional costs after the mediation that it seeks to recover.

(g) Consequently, an order has been made for IX to pay for the fees incurred after the mediation but before the hearing, up to the point at which she withdrew.

14. IX indicated at the hearing that she was not in a position to make full payment within a short space of time. If she is not in a position to do so, she should contact the company to make a mutually acceptable payment arrangement.

Referee: **J Robertshawe**

Date: **6 September 2019**

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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal
There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a $200 filing fee for an appeal. You can only appeal outside of 28 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, and 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.