



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 668

APPLICANT **BV**

RESPONDENT **JU**

The Tribunal orders:

The Applicant's claim is dismissed.

Reasons:

1. JU did not attend the hearing and did not provide any defence to the claim. The absence of a party does not prevent the hearing from proceeding. Section 42 of the Disputes Tribunal Act provides that where the case of any party is not presented to the Tribunal after a reasonable opportunity has been given to that party to do so, the matter may be resolved by the Tribunal on such evidence or information as is before it.
2. On 22 June BV contacted JU, advertising on [online] under the trading name 'QT'. JU visited BV on the afternoon of the 22nd to see the house and provide a quotation for house and roof painting. Later that day JU sent through a quote to BV for \$21,084.10.
3. JU requested a 50% deposit of the quoted price by the next day, in order to secure a booking for painting to commence the following day, as she told BV they had other people waiting for services and would operate on a first come first served basis.
4. BV made payment of the 50% deposit on 23 June. JU had agreed to bring BV some paint charts at 4.00pm on that day but when she had not arrived by 5:30pm, BV became concerned and called and messaged JU. JU replied to her at 5:53 pm to say she was at the hospital with a sick child, and that her husband would drop off the samples.

5. Meanwhile, according to JU's evidence, she had her own family emergency to deal with, and due to JU not turning up at 4pm, and not answering her calls until 5:53pm, she felt that 'something didn't feel right about the situation.' BV then decided to cancel the agreement and request her deposit back from JU.
6. JU declined to refund the entire amount on the basis that there was no written or other agreement around the circumstances under which a deposit would be refunded, and also that she and her husband had already purchased paint for the job (which was to begin the next day) and had turned away another job due to BV's booking. She agreed to refund BV \$5,000.00 of the \$10,542.05 deposit paid and transferred that sum to BV's account. BV seeks to have the full amount of the deposit refunded.
7. The hearing was held by teleconference. I rang JU two times, but the number provided was inactive. The hearing went ahead without JU.
8. The law that applies is the law of contract. There was a contract between BV and JU. BV cancelled the contract and the issue to be resolved is whether she is entitled to a refund of the deposit she paid.
9. Whether a deposit is refundable or not will depend on the terms of the contract between the parties. If there is no written provision for a deposit to be non-refundable, it will depend on what the parties agreed. In this case there was no discussion or agreement between the parties as to what would happen to the deposit if either party cancelled the contract.
10. BV cancelled the agreement because she said she was concerned that JU was going to breach the contract and keep her deposit. She based this on the fact that JU did not make the 4pm appointment, and contacted her at 5.53pm, citing a family emergency. A party who has entered into a contract with another party, may cancel the agreement if the other party makes it clear that it does not intend to perform or complete the performance of obligations under the contract (section 33, Contract and Commercial Law Act 2017 (CCLA)).
11. I do not consider that there were clear signs that JU was going to breach the contract, as would be required under the law. She explained the reason for her delayed response and told BV that her husband would bring the colour samples as she was with her daughter in hospital. However, BV had made up her mind to cancel the contract and request a refund of the deposit. Generally, when a deposit is retained, it is either by way of a liquidated damages (in other words an agreed sum to be paid upon a breach of contract) or as a penalty to punish a party

who does not complete the contract. A deposit (or part of it) may also be retained where it can be proven that there was loss occurring as a result of a party breaching a contract.

12. In this instance, I find that BV was not entitled to cancel the contract on the grounds that she was pre-empting a potential breach of contract by JU. There was no clear evidence provided to show that JU was going to breach the contract and I find that BV was not entitled to cancel this contract and subsequently claim for a full refund of the deposit. While JU did not attend the hearing, the evidence provided by BV shows that she claimed to have suffered losses because she had turned away other business.

13. JU has, outside of this hearing process, refunded BV \$5,000.00, almost 50% of the deposit and I am satisfied that this was a fair outcome under the circumstances.

Referee: Kaho

Date: 27 October 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>.