



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 746

APPLICANT **DE**

RESPONDENT **FJ**

The Tribunal orders:

1. FJ is to pay DE \$26,810.19 on or before 5 January 2024.
2. The counterclaim is dismissed.

Reasons

1. The parties entered into a Contract Milking Agreement from 1 June 2020 to 31 May 2021. A Variable Order Sharemilking Agreement was used because FJ could not access a Contract Milking template at the time. The terms written in the unsigned Variable Order Sharemilking Agreement are correct, with the exception of the clause requiring DE to pay for 20% of the feed brought in. Both parties agree that FJ agreed to pay for 100% of the feed brought in.
2. The contract was terminated in January 2021 by FJ. DE claims \$26,810.19 for losses suffered as a result of the unlawful termination of the contract.
3. FJ submits that the termination of the contract was valid because DE had failed to remedy breaches of contract that that been brought to her attention. FJ counterclaims \$30,000.00 for losses suffered as a result of 250 cows being incorrectly dried off out of season in March 2020.
4. The issues to be resolved for the claim and counterclaim are:

Claim

- a) Did DE breach the contract by failing to carry out her obligations under the contract? If so, was FJ entitled to terminate the contract?
- b) If FJ was not entitled to terminate the contract, is DE entitled to claim \$26,810.19? Is this the loss she has suffered as a result of the termination of the contract?

Counterclaim

- c) If DE breached the contract by failing to carry out the dry cow process properly for 250 cows, is FJ entitled to counterclaim \$30,000.00 as a result of this breach? Is this the loss he has suffered as a result of this alleged breach?

Claim

Did DE breach the contract by failing to carry out her obligations under the contract? If so, was FJ entitled to terminate the contract?

5. I find that DE did not breach the contract by failing to carry out the dry cow process properly. I make this finding for the following reasons:
 - a) FJ submits that it is the responsibility of the contract milker to decide when to dry off cows. He says that DE failed to give dry cow therapy to about 120 cows that she dried off.
 - b) However, I accept DE's submission that it is the responsibility of the farm owner to decide when to dry cows off. This is backed up by FJ's witness (SN) and DE's witness (KU).
 - c) I find the evidence of Farm Consultant, SN to be credible and reliable. SN is an elected representative on [farmer's organisation] and has over 16 years' experience as a Variable Order Sharemilker and Sharemilker owning his own herd. SN gave evidence that the Farm Owner is responsible for setting the Farm Management Plan and updating it regularly. It may include information about when cows should be dried off. The Farm Owner has the ultimate responsibility about when to dry off cows. The contract milker is responsible for day-to-day operations and gives information to the Farm Owner.
 - d) I find the evidence of Farm Consultant, KU to be credible and reliable. KU holds a Bachelor of Agriculture, is an agricultural tutor, has been farming since 1987 and has been a farm consultant since 2007. KU confirmed that the decision about when to dry cows off rests with the farm owner. The decision is usually made in consultation with the contract milker and takes into account milk production, cow body condition, grass cover and supplement levels.
 - e) I accept DE's evidence that FJ did not instruct her to dry off any cows and therefore she did not dry off any cows. There is no evidence to persuade me that FJ instructed DE to dry off any cows. Numerous WhatsApp messages between the parties were produced in evidence, but they did not contain any instructions from FJ to dry off cows. In any event there is no evidence to support FJ's submission that DE incorrectly dried off 120 cows.
6. FJ states that DE breached her obligations under the contract by failing to carry out her duties properly. He says that he gave verbal notice to DE about the issues and followed up with a written warning letter dated 5 January 2021 stating her "performance had been unsatisfactory" and asking for seven separate issues to be rectified. These included:
 - a) Flowering Ragwort to be removed and ragwort plants due to flower are to be sprayed.
 - b) Daily WhatsApp communication including photos of work achieved.
 - c) Daily WhatsApp communication of pasture covers pre and post grazing.
 - d) Daily WhatsApp communication of grazing area 24 hours in advance of the grazing.
 - e) Daily WhatsApp communication including photos of effluent use.
 - f) When XX will be back and the farm will be back to the two required staff.
 - g) A 3 month plan on how you will improve the poor cow condition score and poor pasture cover and the pre-calving management of Autumn calvers. Published on WhatsApp.
7. Following this notice, FJ gave DE 10 days to rectify the issues.
8. DE responded by issuing FJ a 'Notice of Breach and Notice of Remedies' on 13 January 2021 stating that FJ had breached the agreement by:
 - a) Removing 30 hectares from the 100 hectares identified as being available for the Contract Milker to use, by putting it into maize (clause 4).
 - b) Failing to provide tractors that fit for purpose (clause 8).
 - c) Failing to provide the minimum of 301 cows for milking (clause 42). The maximum number of cows available for milking at any time has been 265.

- d) Failing to supply adequate equipment in order to spread effluent on the property (clauses 68 & 72).
 - e) Failing to supply nitrogen at 100 kilo/ha as required by clause 107. This has had a major impact on grass cover and farm production.
 - f) Failing to provide adequate fencing, with two areas totalling approximately 20 hectares being unfenced (clause 135).
9. Following the notice FJ was given 10 days to meet with DE and her representative to discuss the breaches. It was also noted that the written warning received by DE on 5 January 2021 was more in the nature of a warning that would be given to an employee. Given that DE was not an employee the notice was considered to be inappropriate.
10. A meeting was held between the parties on 20 January 2021 and a plan was agreed in relation to some of the issues. In his written submission FJ says that DE failed to turn up to perform her duties and he was forced to start managing the farm and that DE moved out on 13 February 2021.
11. However, DE says that her contract was unlawfully terminated on 21 January 2021. She was in middle of moving some cows when FJ yelled at her to get off the farm. He disconnected her water and power and threatened to kill her dog if she didn't leave. FJ disputes that this is what happened.
12. DE provided responses to the alleged breaches that FJ raised. In particular, she states that FJ failed to carry out his obligations as the Farm Owner and this had a negative impact on the grass cover, the feed supply, the body condition score of the cows, and the stress levels of the cows. Firstly, the 30 hectares put into maize production reduced the grass available. Secondly, the grass ran out and when DE asked for supplementary feed, rotten chicory was supplied, and the cows wouldn't eat it. Even when it was mixed with palm kernel, they picked through the feed and tried not to eat the chicory. Thirdly, the bulls were out with the cows for long periods of time, and it was not possible to predict calving with any certainty, apart from those in calf via artificial insemination. Fourthly, FJ did not give permission for cows to be dried off at appropriate times, especially before calving, and therefore they continued to be milked, which put them under considerable stress. Some cows even started calving in the milking shed. Due to her serious concerns, DE asked to switch to once a day milking, but FJ refused this request.
13. DE says that she did spray the thistles and ragwort with the spray provided by FJ. However, it was in an unmarked container and was ineffective. DE did cut the flowers off the Ragwort. She provided a photo of the farm taken on 5 January 2021 showing no flowering Ragwort.
14. DE says she was asked to put hotwires over the gates leading to the maize but did not agree to do this because new fences were not her responsibility under the contract. She says that FJ removed all gates leading into the maize and it was his responsibility as the Farm Owner to replace them with hotwires. As a result of the lack of gates, the cows often got into the maize, and this required her to drive through the maize to get them back.
15. DE says that she had ongoing meetings on the farm and drove around the farm with FJ. There was regular ongoing communication at these meetings. In addition, there were many written communications via WhatsApp.
16. I have carefully considered all evidence and submissions and evidence presented at hearings by the parties. It is clear that a Contract Milking agreement requires a considerable amount of co-operation, communication and goodwill between the Farm Owner and Contract milker. There has been a serious breakdown in trust and goodwill between the parties. Many of the concerns raises by both parties are intertwined.
17. However, in general the evidence presented by DE persuades me that FJ failed in his obligations as a Farm Owner and this in turn had a serious impact on DE's ability to manage the stock appropriately. I am satisfied that the lack of grass and supplementary feed would have had an

impact on the body condition score of the cows. The [veterinary clinic] report confirms that there was “a wide range of calving dates in the herd” and that 53 cows did not have confirmed calving dates. The vet noted that 6 cows had a body condition score of less than 3 and they needed to be dried off or preferentially fed. The vet states that faster progress could be made by offering “high quality supplement above maintenance”. However, DE points out that this was a misunderstanding on the part of the vet because they couldn’t be dried off as they were empty cows. DE says that FJ instructed her to keep milking the 6 skinny cows so they could be in calf for the next calving season.

18. I am satisfied that DE did draft the 17 cows FJ had identified for culling that were to be trucked by [trucking company] on 21 December 2020. This was confirmed on the WhatsApp messages.
19. I am satisfied that DE did have a considerable amount of communication with FJ, verbally on the farm, and also in the written form. There are numerous WhatsApp messages, many of which were accompanied by photos.
20. FJ did not provide sufficient evidence to persuade me that DE was responsible for any breaches of the contract that would have justified termination of the contract. FJ did not provide any evidence to persuade me that DE abandoned her duties on 21 January 2021. I prefer the evidence of DE that her contract was unlawfully terminated by FJ, and she was forced to leave the farm at short notice.

Is DE entitled to claim \$26,810.19? Is this the loss she has suffered as a result of the termination of the contract?

21. DE is entitled to claim compensation for losses suffered as a result of the unlawful cancellation of the contract. I must consider a range of factors including; the terms of the contract, the extent to which any party would have been able to perform the contract in whole or in part, any expenditure incurred by a party for the purpose of performing the contract, the value of work performed under the contract, any benefit obtained because of work completed under the contract and any other matters I considers appropriate.¹
22. DE’s accountant presented some calculations outlining the income DE expected to receive to the end of the contract on 31 May 2021. This was based on [dairying company] statements from 1 June 2020 to 31 January 2021 and data supplied by MF via email to DE until the end of the season (these notifications were not cancelled when the contract ended). Production was estimated from 23 January 2021 to 22 February 2021 because no actual data was available. Demerits were deducted. I am satisfied that the figures supplied by [accountant] are reliable and show that DE suffered a loss of income of \$26,810.19 as a result of the cancellation of the contract. I am satisfied that the estimates were reasonable based on previous data.
23. Following questioning of DE, I am satisfied that she would have incurred expenses of approximately \$5,440.00 to the end of the contract and that this should be deducted from the expected income. However, this should be balanced against the hardship DE experienced as a result of the sudden cancellation of the contract. DE was effectively homeless for a period of time and was then living in a tent. She had to pay for storage for her belongings. She eventually found a rental that would take pets and then incurred the unexpected expense of paying for a rental. DE had to seek government assistance for daily expenses and to help cover her car payments. She was then required to pay the hardship grant back. DE was not able to get a new milking contract until the start of the next milking season on 1 June 2022. This is not surprising given the seasonable nature of milking contracts.
24. Having regard to all of these factors, I am satisfied that the consequential losses suffered by DE would most probably been more than \$5,440.00. In addition, the resolution of this claim has been extremely lengthy and as a result DE has not had the benefit of this compensation for over 18

¹ Section 45 Contract and Commercial Law Act 2017

months. Therefore, I find that the compensation of \$26,810.19 claimed is reasonable, and the claim is proved in full.

Counterclaim

If DE breached the contract by failing to carry out the dry cow process properly for 250 cows, is FJ entitled to counterclaim \$30,000.00 as a result of this breach? Is this the loss he has suffered as a result of this alleged breach?

25. FJ did not attend the final hearing and therefore did not present his submissions and evidence in support of the counterclaim.

26. DE denies liability for the counterclaim.

27. The Disputes Tribunal does not decide claims on the papers. Parties must attend a hearing to present their submissions and evidence and to be available to answer questions about their claim. FJ's non-attendance at the final hearing where the counterclaim was due to be considered leaves me with no option but to dismiss the counterclaim.

Referee: Sara Grayson
Date: 15 December 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>.