



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 565

APPLICANT **DS Ltd**

RESPONDENT **I Ltd**

The Tribunal orders:

I Ltd is to pay the sum of \$14,000.97 to DS Ltd on or before 19 December 2023. The counterclaim is dismissed.

Reasons:

1. In July 2022, I Ltd (trading as [redacted]) asked DS Ltd for help in finding an assistant accountant. DS Ltd referred NI to I Ltd as a candidate, and I Ltd agreed to engage him indirectly as a temp worker from 26 July, during which time he would be employed by DS Ltd. The “Anticipated termination/completion date” was 30 September, but on 1 November, I Ltd signed an agreement extending the term to 23 December. However, I Ltd terminated NI at the end of November 2022 due to issues with his work.
2. I Ltd did not pay DS Ltd’s last five invoices, and DS Ltd now claims payment of the invoiced total of \$14,000.97. I Ltd counterclaims \$30,000.00 in damages for losses it says were suffered as a result of NI’s actions or omissions.
3. The issues to be determined are:
 - a) What were the terms of the contract?
 - b) Is DS Ltd liable for misrepresentation or misleading conduct?
 - c) Is I Ltd contractually obliged to pay DS Ltd’s invoices?
 - d) Is DS Ltd liable to pay damages for NI’s actions or omissions?

What were the terms of the contract?

4. Contracting parties are generally free to agree their own terms. A contract need not be in writing; an agreement can be formed verbally or inferred from the parties’ conduct. I Ltd negotiated some changes to DS Ltd’s standard terms, and although there was no signed contract until the later extension, the email trail provides sufficient evidence that both parties proceeded on the basis of the standard terms with those amendments.

Is DS Ltd liable for misrepresentation or misleading conduct?

5. Where someone is induced to enter into a contract by a misrepresentation made by or on behalf of another party to the contract, damages may be payable under s 35 of the Contract

and Commercial Law Act 2017. Also, a person can be liable under the Fair Trading Act 1986 for misleading conduct in trade that causes another person to suffer loss.

6. I Ltd submitted that NI's CV was misleading, and that DS Ltd misrepresented NI's abilities. However, misrepresentation or misleading conduct both require a false statement of past or present fact, whereas DS Ltd's recommendation of NI was a matter of opinion or prediction based on the CV he presented. I Ltd did not point to any specific misrepresentation by DS Ltd, and the expressly agreed terms do not leave room to infer any misrepresentation merely from DS Ltd's presentation of NI as a candidate.
7. Clause 3.2 provided, "DS Ltd does not warrant the suitability of Applicants". While clause 3.3 required DS Ltd to use reasonable endeavours to provide accurate details "based on information given to DS Ltd by [NI]", it also declared:

"The ultimate decision though as to whether or not to engage or accept an Applicant is yours [I Ltd's] and the commencement of an Engagement or Assignment by an Applicant will be deemed evidence of your satisfaction."
8. It is also notable that I Ltd chose to extend NI's contract on 1 November, even after some problems had already emerged. I am therefore unable to conclude that I Ltd was induced to engage NI by any misrepresentation or misleading conduct on the part of DS Ltd.

Is I Ltd contractually obliged to pay DS Ltd's invoices?

9. I Ltd submitted that NI did not do the work that was set for him, and that it seemed he may have been engaged in personal study rather than any work at all in his last two weeks at I Ltd.
10. However, given that NI was attending work, his failure to accomplish specified tasks does not excuse I Ltd from paying DS Ltd under the terms of their agreement, at least without supporting evidence that he was solely engaged in non-work activities for a particular time. The contract does not specify the work to be achieved, only the hours to be worked, and clause 5.3 provides, "All payments are to be made without deduction or set off." Moreover, clause 5.1(a) provides:

"You [I Ltd] are responsible for supervising, directing and controlling the manner, time and place in which the Contingent Worker carries out work for you during the Assignment (notwithstanding the fact that the Contingent Worker is not employed or contracted by you directly)."
11. I therefore conclude that the risk of work being slow or non-productive was contractually allocated to I Ltd, and that I Ltd is contractually obliged to pay DS Ltd's invoices totalling \$14,000.97 regardless of issues with the quality or efficiency of the work.

Is DS Ltd liable to pay damages for NI's actions or omissions?

12. I Ltd listed numerous issues with NI's work, for example, that he left many of I Ltd's accounts unpaid while duplicating payments on other accounts, made incorrect journal entries, entered into duplicate foreign exchange contracts that turned out to be unfavourable, and failed to complete bank reconciliations. I Ltd estimated that it suffered losses to a value exceeding \$30,000.00 from his actions and omissions.
13. However, besides the clauses already mentioned, clause 8.1 of I Ltd's contract with DS Ltd provided, "All warranties expressed or implied by law or custom are excluded." Clause 8.2 provided:

"...neither party shall be liable to the other for any consequential, incidental or special damages or losses arising from any claim or action, whether based on contract, tort or other legal theory, arising from, or in connection with the performance of this Agreement".
14. I conclude that DS Ltd is not liable in damages for any losses resulting from NI's actions or omissions. The counterclaim must therefore be dismissed.

Referee: E Paton-Simpson
Date: 28 November 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 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>.