



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1317

APPLICANT **ET Limited**

RESPONDENT **[redacted] District Council**

The Tribunal orders:

[Redacted] District Council is to pay \$5,681.85 to ET Ltd on or before 9 February 2021.

REASONS

Brief details of claim

1. ET Ltd (ETL) had a Licence to Occupy a site on the south east corner of [redacted] (Site 2) for a cart selling [redacted]. The Licence commenced on 1 September 2019 and was for a 6 month trial period, expiring on 26 February 2020.
2. In November 2019, Ms I (Sole Director/Shareholder, ETL) became aware that the Licence-holder of another site in [redacted] (Site 1) intended to leave the site. Ms I made enquiries of [redacted] District Council's NU about moving to Site 1.
3. After a telephone discussion and email exchange, Ms U said that the Team Leader of Council Road Assets and her own Property Services immediate Team Leader were happy for Ms I to take over Site 1 provided that [redacted] was added to ETL's menu. Ms U advised that the previous Licensee was leaving on Friday, 13 December 2019 and that the rental for Site 1 would be the same as ETL was currently paying at Site 2, being \$255.67 rent, plus \$75 for electricity, both inclusive of GST.
4. Ms U asked that Ms I deliver a letter indicating she would like to shift sites, would acquire an [redacted] and would serve [redacted], and that water and electrical supply and connections would be sufficient and legal for the added service. Ms I delivered such a letter on 20 November 2019.
5. On 21 November 2019, Ms U advised that some elected Council members had asked about the handling of Site 1 and that the decision for ETL to shift to Site 1 was on pause. Ms I contacted several Councillors. On 27 November 2019, Councillor EU replied advising that, to allay criticism about a lack of transparency, staff had decided to seek expressions of interest for Site 1.
6. In the 17 January 2020 edition of District Council's [redacted], expressions of interest were invited by a deadline of 11 February 2020. A decision was to be made by 18 February 2020 with the site available after 2 March 2020. Ms I was invited to submit an expression of interest but did not do so.

7. Ms I communicated with various people within District Council on the basis that Site 1 had already been allocated to her, and she felt she had been treated unfairly. However, Ms I's pleas were not successful.
8. As it turned out there was only one expression of interest from another person wishing to run a [redacted]. The Licence to Occupy Site 1 was issued to that person.
9. ETL lodged a claim with the Disputes Tribunal seeking \$15,000 (now increased to \$30,000) for loss of income from Site 1.
10. District Council defends the claim on the basis that a contract had not been formed with ETL because a fresh Licence or a variation of ETL's existing Licence had not been processed for ETL to occupy Site 1 instead of Site 2. District Council argued that even if a contract had been formed, District Council disputes the amount ETL claims for loss of future earnings for the following reasons. Firstly, ETL's existing Licence to Occupy was for a trial period due to expire on 29 February 2020. In addition the Licence was terminable by either party giving 30 days notice. Therefore there can be no expectation that ETL's Licence to Occupy would be ongoing in nature. Secondly, ETL had a duty to mitigate its loss by submitting an expression of interest for the site but did not do so. Thirdly, District Council challenged the accuracy of the financial forecast provided by ETL for a [redacted] at Site 1.

Issues

11. The issues for the Tribunal to determine are:
 - (a) Whether there was a contract formed between ETL and District Council for ETL to transfer to Site 1;
 - (b) If so, whether District Council repudiated the contract;
 - (c) If so, whether ETL is entitled to some relief and if so, how much.
 - (d) Whether the Fair Trading Act applies;
 - (e) If so, whether District Council has engaged in misleading or deceptive conduct or conduct likely to mislead or deceive;
 - (f) Whether ETL is entitled to damages in compensation and if so, how much.

Was a contract formed between ETL and District Council for ETL to transfer to Site 1?

12. For a contract to come into existence the elements of a simple contract must exist. The relevant elements are offer, acceptance, consideration (an exchange of values), and an intention to create a legal relationship. There must be sufficient certainty of terms.
13. I find that a contract was formed for ETL to transfer to Site 1 for the following reasons:
 - (a) There was a request from ETL to transfer to Site 1. After consulting with the Team Leader of Council Road Assets and her own Property Services immediate Team Leader, Ms U confirmed that District Council was happy for Ms I to take over Site 1 provided that [redacted] was added to ETL's menu which ETL agreed to. I am satisfied that there was offer and acceptance.
 - (b) "Consideration" is an exchange of values, or a promise to exchange values (usually it is the price to be paid). In this case, Ms U advised ETL in email dated 18/11/19 that the price to be paid was \$255.67 for rent and \$75 for electricity. On behalf of ETL, Ms I, indicated acceptance of the price by delivering a letter to District Council as requested on 20 November 2019. I am satisfied that there was to be an exchange of values that the amount had been agreed by both parties.
 - (c) I am satisfied that the parties intended to create a legal relationship. ETL already had a formal Licence to Occupy Site 2 which clearly illustrates an intention to form a legal relationship. Evidence at the hearing is that both parties expected the same general terms to apply to Site 1.
 - (d) I am satisfied that there was certainty of terms. The date Site 1 was to be vacated was known. The price to be paid was known. The general terms of the Licence to Occupy were known. The conditions relating particularly to Site 1 in respect of the sale of [redacted] were known.
 - (e) NK (Property Services Manager) who attended the hearing for District Council argued that a contract had not been formed, because a formal Licence to Occupy Site 1 had not been drawn up and signed. However, a contract can be formed without it being formalised in writing. All that is required is that the elements of a simple contract exist, and they do.

Has District Council repudiated the contract?

14. If a contract exists and one party repudiates the contract by indicating it does not intend to fulfil its part of the contract, the other party is entitled to cancel the contract. (S.36 Contract and Commercial Law Act).
15. I find that District Council has repudiated the contract. District Council's actions in advising ETL that District Council intended to seek expressions of interest from others for Site 1 (and subsequently advertising for expressions of interest) are a repudiation of the contract that already existed with ETL. District Council's actions clearly indicated it intended to disregard the contract it had with ETL.

Is ETL entitled to relief and if so, how much?

16. When a contract has been repudiated by one party, the other party is entitled to cancel the contract and seek relief (S.36 CCLA).
17. When a contract is cancelled by a party entitled to do so, the Tribunal may make an order granting relief (compensation) to the cancelling party. The Tribunal may make an order that one party to the contract pay another party (S.43 CCLA).
18. In deciding whether to make such an order the Tribunal is obliged to consider such things as: the terms of the contract; the extent to which any party has performed the contract or would have been able to perform it; any expenditure incurred by a party in, or for the purpose of, performing the contract; any benefit or advantage obtained by a party because of anything done by another party in, or for the purpose of, performing the contract; and any other matters that the Tribunal thinks proper (S.45 CCLA).
19. I find that lodging a Disputes Tribunal claim against District Council on 20 February 2020 is sufficient notice of ETL's intention to cancel the contract.
20. I find that an order granting relief to ETL is appropriate. That is because ETL lost the opportunity to establish a [redacted] cart on Site 1 and to benefit from what had previously been a site popular with members of the [redacted] public.
21. I find that compensation of \$5,681.85 is appropriate for the following reasons:
- (a) I am satisfied that ETL's existing Licence to Occupy would have been varied or a new Licence to occupy would have been completed. Mr K said that had a new Licence to Occupy been completed, the general terms would have been the same as ETL's existing Licence. ETL's existing Licence to Occupy Site 2 was for a six month trial period due to end on 19 February 2019. At the hearing, Mr K agreed with Ms I that at the end of that period, the Licence would have continued indefinitely on a month to month basis in accordance with Clause 9.1 of the Licence. Therefore, even if the existing Licence to Occupy had been varied only in relation to the location of the Site, the Licence would not have ended on 19 February 2019. It would have continued on a month to month basis. Mr K agreed with Ms I that District Council would not have exercised a right under Clause 7.2 of the contract to terminate the contract with 30 days notice unless there had been a significant breach of the terms of the contract or for a public safety issue. I am satisfied that had ETL occupied Site 1 from 14 December 2019 as it was entitled to do under the contract with District Council for that site, ETL would have continued to occupy the site on a month to month basis indefinitely.
 - (b) I have limited the period for which relief by way of compensation is granted to the period from 14 December 2019 (when Site 1 would ordinarily have become vacant for ETL to occupy) and 16 March 2020 (the date the operator appointed by District Council commenced business, after expressions of interest had been called for). That period is 13 weeks. I have limited compensation to this period because ETL had a duty to mitigate its loss. ETL could have mitigated its loss by submitting an expression of interest. Ms I explained that she did not do so because she considered that would indicate she had accepted District Council's actions in relation to her contract with District Council for Site 1. However, I am satisfied that ETL could have protected its position by submitting an expression of interest, noting within it ETL's position in respect of the contract. As it turned out, there was only one expression of interest submitted to District Council and the Licence to Occupy Site 1 was awarded to that person, who

was new to the [redacted] business. There is a very reasonable possibility that, had ETL submitted an expression of interest for Site 1, it would have been successful.

- (c) As a starting point in assessing the amount of compensation, I have used the forecast Profit & Loss account completed by EI, an accountant, for ETL. The figures in the forecast are exclusive of GST. I have heard evidence from Mr I and I am satisfied that the figures contained within the forecast are reasonable. The forecast income is based upon the sale of an average of 50 [units] a day over 5 days/week for 52 weeks at a price of \$3.91 exclusive of GST (which would be \$4.50 inclusive of GST). The sale of 50 [units] a day did not seem unreasonable, acknowledging that some days would be more, or less, busy. The figures were based on 5 days/week, when it is likely the [redacted] cart would be open 6 days/week. Mr I did not have his workings with him at the hearing as to how he calculated the Cost of Sales and the Operating Expenses. However, from my analysis of the forecast of the potential income, I formed the view that the forecast was likely to be reasonable in all aspects.
- (d) Based on the figures in the forecast, ETL's loss of income after expenditure excluding GST for a 12 month period was forecast as \$28,409.25. This amounts to \$7,102.31 for the 13 week period between 14 December 2019 and 16 March 2020. I have decided to reduce this figure by 20%, to \$5,681.85, for two reasons. Firstly to take into account any uncertainty about income from sales in the initial period as ETL established itself as a [redacted]-vendor and secondly to take into account the cost of relief staff. In respect of income from sales, I have taken into account that ETL was new to the [redacted]-vending business and, in addition, that customers previously loyal to the site may have decided to go elsewhere. In respect of staff, the forecast Profit & Loss Account does not include the cost of any relief staff and it is reasonable to expect that relief staff would be required at some time over a 12 month period. Factoring in the cost of relief staff at some time in the 12 month period would reduce the forecast figure of \$28,409.25 that I have based my initial calculation on.
- (e) During the 13 week period, ETL continued to operate on Site 2 selling [redacted], using the cart that ETL would have modified and used on Site 1. I am satisfied from the Profit and Loss Account for the period 1 April 2020 – 31 July 2020 that business was unlikely to have been profitable during that period and therefore no further off-set in mitigation of loss is warranted.
- (f) At the hearing, Ms I was quite clear that she was only claiming loss of income, and did not want the Tribunal to consider any costs she had incurred in starting to adapt her cart to sell [redacted].

Does the Fair Trading Act apply? If so, has District Council engaged in misleading or deceptive conduct or conduct likely to mislead or deceive and if so, is ETL entitled to damages in compensation?

- 22. Because ETL is entitled to a remedy under the law of contract and the Contract and Commercial Law Act, it is not necessary to also consider the above issues.
- 23. In any event, if District Council had been found in breach of the provisions of the Fair Trading Act, ETL would have been entitled to either relief under the Contract and Commercial Law Act or damages under the Fair Trading Act, but not both. The Tribunal would have assessed damages under the FTA in the same way as has been assessed in Clause 21 above, so the outcome either way would have been the same.

Referee: J.F. Tunnicliffe
Date: 20 January 2021



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 28 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 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, 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>.