



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 308

APPLICANT EU

RESPONDENT O Ltd

The Tribunal orders:

O Ltd is to pay EU the total sum of \$1680.00 on or before Tuesday 29 August 2023.

Reasons:

1. By written contract dated 22 August 2019, EU was engaged by O Ltd as head coach. She was required to obtain a work visa to perform her duties under the contract. The contract was a contract for services and the contract term was for a period of two years but was able to be terminated by either party providing a minimum of six weeks' notice of termination within the two year contract period. The contract commenced on 14 October 2019, so subject to the termination rights of either party was intended to last until 14 October 2021. EU was required to work an average 25 hours per week comprising 15 hours of training time and 10 hours of club administration time and provide the specified services set out in clause 4 of the contract. These revolved around coaching [swimming] and developing new programmes and assisting with promotion of the sport in the [region]. In return, O Ltd agreed to pay \$721.50 per week for each week of the contract term and also to look for opportunities to subcontract EU in order to supplement her income, at not less than \$28.85 an hour, with any profit generated by O Ltd passed onto EU (clause 6). All such private coaching was required to have the prior approval of O Ltd (clause 13). The contract also had a dispute resolution clause (clause 15) that if a dispute arose, the parties would meet in good faith to try and resolve the dispute using O Ltd's policy
2. Difficulties quickly arose after EU commenced working. Also in March 2020, NZ entered its first Covid lockdown, which meant that the pools used for training were closed. On 24 March 2020, O Ltd emailed EU giving notice that from Monday 30 March 2020 it was invoking the 6 weeks' notice period so that the contract would terminate on 8 May 2020 (the first termination). O Ltd explained that as a result of the pool closure all training had been suspended, so O Ltd's income from fees would be severely impacted, which affected O Ltd's financial position. However, over the next few weeks, EU's work status changed.
3. On 31 March 2020, O Ltd reinstated the contract after becoming aware of the availability of the Government work subsidy. Then on 10 April, O Ltd informed EU that she had been suspended. On 13 April, O Ltd wrote summarising its position as follows:

Here is a summary of where we are at with you.

- (1) Your contract was terminated and 6 weeks' notice were given

- (2) Your contract was reinstated so you can apply for government subsidy
- (3) You received government subsidy of \$585.80 a week for 12 weeks from this week
- (4) We agreed to top up \$135.70 per week to match your weekly payment of \$721.50 for 12 weeks, the payment will be made as a lump sum to your account this week.
- (5) You received suspension notice to disengage you from any club work and communications

Here is what will happen from here:

- (1) You will receive contract termination again at the end of week 12
 - (2) You will receive 6 weeks' notice payment as a lump sum
 - (3) We will report to Immigration NZ about your contract termination.
4. EU then engaged a lawyer and sought to invoke the contracts dispute resolution clause. O Ltd refused to engage on the basis that it was entitled to terminate the contract and there was little more it could do other than the support it had already provided. EU also sought assistance from [sporting body] and the Sports Tribunal of NZ. Both organisations considered the matter to be contractual and did not accept her complaint.
 5. On 8 June 2020, O Ltd gave formal notification of the termination of the contract and then paid EU \$4,329.00 representing six weeks' in lieu of notice under the contract.
 6. EU then filed a claim in the Disputes Tribunal, and after the finding she appealed to the District Court, which determined the matter should be reheard on the limited issues identified below. The summary above reflects the background set out by the District Court.
 7. EU claims \$22,672.01 comprising: the \$180.00 Disputes Tribunal fee, the \$200.00 Appeal fee; \$2109.00 for holiday pay, \$4865.00 for a shortfall in income, \$13,000 for loss of potential income, \$2,137.91 for flights and visa.
 8. The sole issues to be determined as directed by the District Court are:
 - a. Was the contract able to be terminated by O Ltd in the manner that it was?
 - b. Are there any financial claims which have not been met by O Ltd, following termination?

Was the contract able to be terminated by O Ltd in the manner that it was?

9. The common law of contract applies. For a contract to be enforceable there must be agreed terms. In this case, neither party raised that this contract was anything other than a contract for service and I accept the District Court's finding that it was and that the terms of the agreement were outlined in the written contract dated 22 August 2019 as set out in paragraph 1, with the particular services to be provided contained in clause 4 of the contract.
10. There was no dispute that clause 12 sets out the provisions around termination. This clause provides in part: Either party may terminate this contract by giving six weeks' notice of termination in writing, before the end of the fixed term. There was also provision for termination by notice with immediate effect in the event of the contractor's serious offending or by the contractor for any deliberate breach, but this provision was not relied on.
11. EU's position is that O Ltd was not entitled to terminate her with 6 weeks' notice and instead her primary argument was that she had an expectation that she would be engaged for 2 years and so O Ltd was not entitled to terminate her prior to this period without good cause, that it did not have good cause to do so, and that it did not first follow the disputes resolution process contained in clause 15 which she says was specifically included to mitigate against early termination, when she was making a significant move from [Country] to NZ and so she was seeking employment security.

12. On balance, I find that O Ltd was entitled to terminate EU's contract with 6 weeks' notice, commencing at the end of the 12 weeks of Government subsidy in the manner that it was. I say this for reasons which include:
- a. A contract for service differs from an employment agreement. Whereas an employee has certain rights, including the obligation to engage in good faith, and for the contract not to be terminated without good cause and following recognised principles, the terms of service for an independent contractor are solely contained in the contract between the parties. "The principles of freedom of contract have meant that the parties are free to determine the content of their own bargain, and the law requires no more than that they must cooperate in the doing of things which are necessary to perform the obligations under the contract."¹
 - b. I preferred O Ltd's position that the dispute resolution clause did not prevent either party from terminating the contract provided 6 weeks' notice was given. I say that for reasons which include:
 - i. I saw no ambiguity in the termination clause, and nor is it unusual in an independent contractor contract that either party can terminate without cause;
 - ii. Consequently I do not give any weight to EU's position that O Ltd was able to financially pay her when it had already received fees for the term when the pool was closed, because this is not a relevant consideration when I accept that the either party was entitled to terminate without cause;
 - iii. While I accept that the dispute resolution clause may also have been her attempt to mitigate against the blunt instrument of the termination clause, at the hearing EU acknowledged that the contract could be terminated without cause, and so she had negotiated an extended notice period from the initial 4 weeks proposed to the 6 weeks agreed;
 - iv. Looking at the contract as a whole, I find that this clause provided a mechanism by which the parties agreed to try to resolve disputes generally, but it did not override the ability to terminate on notice; and
 - v. In any case, on balance, in the circumstances of the case, I find that efforts were made to try to resolve the dispute using Ms T from [sporting body] (who had been instrumental in the contract negotiations). I also gave some weight to the overarching context of the Covid lockdown and the voluntary nature of O Ltd's committee members.
 - c. On balance, while the suspension slightly muddied the waters, I accept that the letter of 13 April was sufficiently clear to notify EU that at the end of the 12 weeks, the 6 weeks' notice to terminate would commence and that she received formal notification of this 6 weeks termination on 8 June 2023.

Are there any financial claims which have not been met by O Ltd, following termination?

13. EU's position is that she was entitled to Holiday pay, \$4865.00 for a shortfall in income, \$13,000 for loss of potential income, \$2,137.91 for flights and visa, and she also sought to recover the Disputes Tribunal fee and the Appeal fee.

Holiday Pay

14. As stated above, there was no dispute that EU was engaged as an independent contractor under a contract of service, and so was not employee as defined in the Employment Relations Act 2000. Consequently I find that the holiday and leave entitlements under the Holidays Act 2003 do not apply, as section 7 provides that this Act only applies to employers and employees, which have the same meaning as in the ERA. In addition, I accept that there was no term in the contract providing for payment for any holidays, and so I find that EU had no such entitlement.

¹ Burrows, Finn and Todd on the Law of Contract in New Zealand (6th ed) at p 213, reflecting J. Burrow "Contractual Cooperation and the Implied Term" (1968) 31 MLR 90 and *Mana Oil Equipment Co and Rhodesia Railways Ltd* [1949] 2 ALL ER 1014 at 1018 per Devlin J: "I can think of no term that can properly be implied other than one based on the necessity for cooperation ... the law can enforce cooperation only in a limited degree – to the extent that it is necessary to make the contract workable."

Shortfall in income and loss of income

15. The parties acknowledged and I accept that EU's terminal date was 19 July, 6 weeks after the second notice of termination of 8 June 2020, although in lieu of notice she was paid a lump sum of \$4,329.00. There was also no dispute that this reflected 6 weeks of income from O Ltd at her contracted 25 hours per week of \$721.50 a week.
16. However, EU's position is that she did not agree to limit O Ltd's top-up to the amount to bring it up to the 25 hours contracted, and that it should have included a top up to reflect a shortfall in payment for her private classes of \$4865.00 and that she was prevented by O Ltd from obtaining additional income because she could have conducted training online even when the pool was closed. She also claimed \$13,000.00 for future lost income but at the hearing acknowledged that this sum was exaggerated.
17. On balance, I accept that the contract provided for O Ltd to look for opportunities for EU to supplement her income over and above the contracted hours, and I find this was likely an important factor in obtaining her services given the cost of living in [city]. But on balance, I do not accept that this obliged O Ltd to top up any shortfall in her private client fees. I say this for reasons which include:
 - a. I accept that O Ltd was only required to look for opportunities and not to guarantee or ensure private classes;
 - b. While I accept that the clients would pay O Ltd directly, I preferred O Ltd's position that the sub-contracting arrangement was largely facilitative, reliant on the arrangements reached between EU and the private clients, with EU invoicing O Ltd for those private clients and receiving all the profits;
 - c. I preferred the evidence from Ms T that the agreement reached concerning the top-up was limited to O Ltd's contracted weekly rate, and this is consistent with O Ltd's principal obligations.
 - d. I also preferred Ms H's evidence that the pool was closed so no private classes were conducted, and nor did O Ltd receive any requests for private online classes over the lock down period.
18. But, on balance, I do accept that the effect of O Ltd's suspension on 10 April prior to the termination notice on 8 June, and the lump sum payment in lieu of 6 weeks' notice which would have meant a terminal date of 19 July may well have impacted on EU's ability to supplement her income with any online training or pool training once the pools opened. This was further aggravated by the notification to [pool provider] that she was no longer authorised to make bookings.
19. Quantifying this loss is not easy, when I preferred O Ltd's position that there was no guarantee of uptake of clients, or hours, and I accept that [swimming] is a niche limited market, which might also have been adversely impacted by Covid. Also, it is unclear exactly what if any amount EU may have received from the Government subsidy for private lessons. However, on balance, I preferred EU's evidence that the lane bookings for 6, 8 and 9 July at [pool provider] were declined as O Ltd had notified that no bookings were to be made from 5 July. So, on balance, I accept her assessment supported by her monthly invoices that for July she would likely have received about \$1667.75. As O Ltd's legal obligations ceased on 19 July, I have discounted this sum claimed to \$1500.00, which I find is reasonable in the circumstances.
20. Also, Ms H for O Ltd acknowledged that there was an outstanding sum owed from a private client from private classes taken, and so this sum of \$180.00 not been passed onto EU. As payments are made to O Ltd, I find that the burden is on O Ltd to pursue this sum and EU is entitled to recover this sum of \$180.00.

Damages for future income, recovery of flights and Immigration

21. As I found that O Ltd was entitled to terminate the contract in the manner that it did, I saw no basis for any expectation damages to be paid for loss of future income, other than the loss specified in paragraph 19. Nor in the absence of any contractual arrangement do I accept that EU is entitled to recover the costs of her flights to New Zealand or any immigration costs.

Disputes Tribunal Fee/Appeal Fee

22. Under section 43 of the Disputes Tribunal Act 1988 costs such as the Disputes Tribunal fee and any appeal fee are only recoverable in the exceptional circumstances prescribed, which do not apply in this case.

Conclusion

23. O Ltd is to pay EU the total sum of \$1680.00 on or before Tuesday 29 August 2023.

Referee: G.M. Taylor

Date: 8 August 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>.