



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2023] NZDT 204**

**APPLICANT      GF Ltd**

**RESPONDENT    D Ltd**

**The Tribunal orders:**

The claim for a declaration of non-liability is denied, so GF Ltd is to pay \$4219.79 to D Ltd on or before 24 May 2023; and

The balance of the claim is dismissed.

**Reasons**

1. In August 2018, IU Ltd, a company for which Mr T, now the director of GF Ltd, was director at the time, entered into a contract for employment advice and advocacy services with D Ltd on a three-year fixed term, with a monthly fee of \$657 payable.
2. In December 2020, Mr T requested of D Ltd that they transfer the fixed term contract from IU Ltd to GF Ltd, as GF Ltd was taking over the business of IU Ltd including taking over the employment agreements for all existing employees. On 14 December 2020 D Ltd confirmed by email to GF Ltd that the contract had been transferred to D Ltd.
3. GF Ltd claims \$20,000.00, being a refund of fees paid for D Ltd's services in relation to a case that was heard by the ERA in 2021, based on an alleged breach of contract by D Ltd. The case concerned an employment issue for which IU Ltd had first sought advice from D Ltd in late 2019.
4. GF Ltd also seeks a declaration of non-liability for \$4219.79, being the balance of an 'early termination' charge invoiced by D Ltd upon GF Ltd's cancellation, in early 2022, of a 3-year fixed term contract.
5. As this dispute concerns a contract that was entered into by IU Ltd, then transferred and continued by agreement with GF Ltd and D Ltd, the issues in dispute will be addressed in terms of G Ltd having essentially stepped into IU Ltd's shoes with respect to all relevant matters, because this seems to be what had happened in practice, with GF apparently paying the fees for IU Ltd's employment case (even though IU Ltd was the named party before the ERA, IU Ltd having been the employer at the time the employment issue arose) because by that time GF Ltd had taken over the business. Mr T clarified that although monthly payments continued to be made from IU Ltd's bank account, GF Ltd is not claiming repayment of those fees.

6. The issues to be determined are:

- Did D Ltd breach its contract with GF Ltd/IU Ltd by providing poor or incompetent advice in relation to the ERA matter and/or by providing inadequate representation before the ERA?
- If so, is D Ltd liable to pay a refund of all or part of the fees paid for the ERA case?
- Is GF Ltd liable to pay damages in the form of an 'early termination' fee for GF's cancellation, in early 2022, of the fixed term contract?

*Did D Ltd breach its contract with GF Ltd/IU Ltd by providing poor or incompetent advice in relation to the ERA matter and/or by providing inadequate representation before the ERA?*

7. GF Ltd has provided insufficient evidence to prove that D Ltd provided poor or incompetent advice in relation to the employment dispute that IU Ltd first consulted D Ltd about in November 2019. GF Ltd gave no details about specifically what advice IU Ltd was given early on that was poor or inadequate, let alone written evidence that would substantiate such a claim.

8. In relation to GF Ltd's claims of inadequate representation before the ERA, Mr T stated that:

- he and a witness became aware on the day of the ERA hearing that it was only the first or second time their representative from D Ltd had appeared before the ERA
- The representative was visibly nervous, didn't ask many questions or the right questions at the hearing and, in her answers to the ERA, didn't go into the amount of detail Mr T had requested
- The representative was handling multiple cases at one time.

9. Mr T's witness, Ms S, formerly of IU Ltd, also outlined the above list via telephone at the Tribunal hearing, and added that the representative had also advised Mr T to be quiet in the hearing and to answer questions briefly with not too many details – Ms S questioned that approach in the break because she thought Mr T would have had a lot of useful things to say to defend IU Ltd.

10. A relatively inexperienced representative, even a nervous one, does not necessarily provide poor representation and her decision about how to conduct the hearing may have been quite appropriate (in terms of numbers of questions, level of detail etc). I would say it is not at all unusual for a representative to be handling multiple cases at one time.

11. D Ltd says Mr T never made them aware of dissatisfaction with any aspect of the representation they provided for the ERA hearing, not even at the time he asked to cancel the contract. I note that the ERA hearing was held in April 2021, the ERA decision was released in about September 2021 and Mr T contacted D Ltd wishing to cancel the contract in January 2022.

12. D Ltd also points out that the ERA determination itself gives clear reasons for the determination, one of the outcomes of which was that IU Ltd was to pay a significant sum to its former employee. They say that IU Ltd had already taken many if not all of the steps that gave rise to the grievance and the ERA's award, before it consulted D Ltd for advice (about restructuring/redundancy) and the timelines in the email evidence D Ltd provided of Mr T's requests for advice in November 2019, compared to the dates given in the ERA determination of when the events with the employee occurred, support D Ltd's position in this regard.

13. Perceptions of representation are inherently subjective, and are often influenced (retrospectively) by the outcome of a case. I note that GF Ltd did not raise cancellation of the contract with D Ltd until January 2022, some 9 months after the ERA hearing and 4 months after the ERA's decision was released. Mr T himself said he raised cancellation after he checked when the fixed term contract was due to expire and found out that it already had (before automatically renewing as per the terms).

14. For all the reasons above, I find that no breach of contract by D Ltd has been established. It follows that no refund of fees paid to D Ltd for the ERA case are refundable.

*Is GF liable to pay damages in the form of an 'early termination' fee for GF Ltd's cancellation, in early 2022, of the fixed term contract?*

15. Mr T contends that he was not aware that the fixed term 'rolled over' into a new three-year fixed term in August 2021, rather he thought that the contract came to an end in August 2021. However the contract clearly states (under 'terms' on the first page) "At the end of the initial contract period, the contract will automatically renew for the same period at the initial contract period". On the same page, the timeframes for written notice are stated, being 3 months' notice for a contract with a 3-year term.
16. Mr T for GF Ltd attempted to cancel the contract only months into the new term. He argued that the contract had never actually been transferred to GF Ltd because, as director of GF Ltd, he was never given a copy of the contract by D Ltd. However I do not accept that argument because it was Mr T himself who signed the original contract, albeit for IU Ltd at that time. If he had needed to re-familiarise himself with its contents and could not locate his/IU Ltd's copy, he could simply have asked for a copy from D Ltd. D Ltd had no particular obligation to furnish GF Ltd with a new copy of the written contract — given that Mr T had initiated the transfer of the contract and had been the original signatory, it was reasonable for D Ltd to assume he was aware of its contents, and D Ltd confirmed in writing to Mr T that it had transferred the contract to GF Ltd as requested.
17. Both parties acknowledge that there was no 'early termination fee' provided for by the contract. In fact, the contract specifically says that there is no provision for early termination. That means that GF Ltd was not free to cancel the contract before its second-term expiry date of August 2024 and would have been liable to continue paying \$657 per month to D Ltd.
18. D Ltd says, rather than insist on ongoing monthly payments of \$657 per month from early 2022 to August 2024, it proposed that it would accept cancellation in early 2022 if GF Ltd paid what it designated an 'early termination fee' of \$4217.79 (the invoiced amount was around \$4800 but it was part-paid by the final monthly payment made by GF Ltd).
19. There was apparently no agreement to this charge by GF Ltd, although GF Ltd did cease its monthly payments to D Ltd shortly after it told them it wished to cancel, and it seems that the use of the term 'early termination fee' has muddied the waters somewhat as such a fee would usually be provided for in the contract, and this contract does not have such a term. As I understand it, D Ltd was proposing a figure to GF Ltd, that represented D Ltd's liquidated damages, in exchange for accepting GF Ltd's requested termination. As that figure is significantly less than GF Ltd would otherwise have been paying to the end of the fixed term, and in the absence of any other cost information, I accept it as an appropriate sum to set as damages for GF Ltd's cancellation before the end of the fixed term (being approximately a quarter of fees that would have become due under the contract over its remaining term).
20. As GF Ltd has requested a declaration of liability for \$4217.79 and I have found that the charge was justified, I order that that amount is to be paid to D Ltd.

**Referee Perfect**  
**Date: 26 April 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>.