



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 656

APPLICANT **H Ltd**

RESPONDENT **MN**

SECOND **KN**
RESPONDENT

The Tribunal orders:

MN and KN are to pay H Ltd \$19,898.95 by 29 November 2023.

Background

1. H Ltd (Mr X) managed Mr & Mrs N's farm under a sharemilking agreement.
2. The agreement began on 8 June 2022, and was to run for one year.
3. Mr & Mrs N used an agricultural consultant, Mr C (I Ltd). Most of Mr X's dealings were with Mr C. Mr C carried out regular farm visits.
4. On 2 February 2023, Mr C sent Mr X a letter identifying "a number of issues that need to be addressed that are considered to be a breach of the contract". The letter stated "you have 10 working days from 7th of February 23 to have these issues addressed or completed".
5. Mr C instigated a meeting with Mr X and Mr & Mrs N on 14 March 2023. The breach issues were discussed at that meeting.
6. Mr X understood that he had been given an 'extension' to 1 May to address / complete the issues.
7. On 10 April, Mr & Mrs N gave Mr X notice to terminate the sharemilking contract. He was required to leave the premises by 26 April.
8. Mr X's claim seeks compensation for loss of earnings from the date of cancellation to the end of the contract period, which Mr X has calculated at \$24,980.65. Mr X is also seeking:
 - a. \$500.00 for storage of his belongings while he found a new place to live; and
 - b. \$900.00 for calf milk powder used by Mr & Mrs N; and
 - c. \$300.00 for power for a water pump that Mr & Mrs N shared the use of.

9. The hearings took place by phone on 1 August, 3 October, and 24 October 2023.

Law

10. Mr C provided Mr X with a written Contract Milking Agreement.

11. The written agreement was not signed by either party, but both parties understood that its terms governed their arrangement.

12. There were other matters discussed and agreed between Mr C and Mr X that are not detailed in the agreement, but were understood to be part of “the deal”, including:

- a. That Mr X would carry out regular “farm walks”; and
- b. That the minimum staffing level was two.

13. The contract includes specific provisions about breach and cancellation, as follows:

If either party is in breach of any of its obligations under this Agreement, and either:

- a. that breach has not been remedied within 10 working days after the party not in breach gives written notice to the party in breach to remedy that breach; or
- b. that breach is incapable of remedy

the party not in breach may terminate this Agreement with immediate effect by notice in writing to the party in breach.

If the Agreement is terminated under this clause by:

- c. The owner, the Contract shall be entitled only to money actually due to the contractor at the time of termination, but without prejudice to the rights of the Owner to recover damages for breach of this Agreement

14. The Contract and Commercial Law Act 2018 (“CCLA”) sets out the law relating to cancellation of contracts.

15. The CCLA states if a contract has specific terms about cancellation, then those terms apply.

16. The CCLA states that a party is not entitled to cancel a contract if that party has full knowledge of a breach by the other party and has “affirmed the contract”¹.

17. Mr X’s claim for loss of earnings is based on an argument that Mr & Mrs N did not have a legal right to cancel the contract as at 10 April 2023.

Findings

18. In terms of the loss earnings claim, the issues to determine are:

- a. Did Mr X breach a term of the contract?
- b. If so, did Mr & Mrs N have the right to cancel the contract in February 2023?
- c. If so, did Mr & Mrs N “affirm the contract”?

¹ Section 338, CCLA

- d. If so, was the termination on 10 April lawful?
- e. If the termination was not lawful, what losses can Mr X recover?

Did Mr X breach a term of the contract?

19. The breach letter dated 2 February 2023 alleged the following breaches:

- a. Weeds: "There is currently flowering Ragwort on the farm which require(s) spraying and are at a stage of a TRC abatement notice and fine".
- b. Failing to carry out regular farm walks.
- c. Cows missing from milking.
- d. Cows left in paddocks.
- e. Plant and vat washes not hitting the required temperature.
- f. Insufficient record keeping on wash, grazing, and other records.
- g. Failing to have two persons working on the farm.

20. Mr X disputed some of the alleged breaches. Mr X submitted that:

- a. The terrain of the farm and the state of the fencing meant that it was extremely difficult to ensure that all of the cows were collected for milking.
- b. At the beginning he had an employee, but he had to fire that person in January 2023. He worked the farm on his own for a relatively brief period, then his partner quit her job and joined him.

21. Mr X did not dispute that the weeds had gotten somewhat out of control. He arranged for a contractor to spray the weeds, and the work was done on or around 10 March 2023.

22. In respect of weeds, the contract states:

The Contractor must at appropriate times of the year eradicate all noxious weeds and weeds of economic importance from the land and maintain the Farm in accordance with the Weed Standard specified in the Specific Conditions

23. The Specific Conditions state:

No flowering weeds and no weeds higher than 30cm

24. Mr & Mrs N provided photographs showing flowering weeds on the farm, and many of the weeds shown in the photographs appear to be higher than 30cm.

25. Therefore, I find that there is a proven breach of the contract in respect of weed control.

Did Mr & Mrs N have the right to cancel the contract in February 2023?

26. The contract allows either party to terminate the agreement if:

- a. The other party is in breach of any of its obligations; and

- b. The breach is not capable of being remedied; or
- c. If the breach is capable of being remedied:
 - i. The party not in breach has given notice of the breach; and
 - ii. The breach is not remedied within 10 working days of the date of the notice.

27. In this instance:

- a. Mr X was in breach of his obligations in respect of weed control.
- b. It is arguable whether the breach is capable of being remedied. The contractual requirement is that the contractor must not allow flowering weeds or weeds above 30cm. Once the weeds have flowered, or grown above 30cm, the breach has occurred and, in a sense, it cannot be undone.

However, even if it could be argued that the breach is capable of being remedied, Mr X did not remedy it within 10 working days of the date of the notice. The weedspraying work was carried out on or around 10 March 2023.

28. Therefore I find that Mr & Mrs N had the right to terminate the agreement as at 20 February 2023 (ten working days after the date of the notice).

Did Mr & Mrs N “affirm the contract” and thereby lose the right to cancel?

29. As noted above:

- a. The Contract and Commercial Law Act 2017 (“CCLA”) sets out the general ‘rules’ relating to cancellation of contracts.
- b. The CCLA states that if a particular contract includes provisions about cancellation, then the terms of the contract (not the CCLA) apply.
- c. Applying that principle, I have made a finding that Mr & Mrs N had a right to cancel the sharemilking contract as at 20 February 2023, having regard to the provisions in the contract about breach and termination.

30. Section 38 CCLA states:

A party is not entitled to cancel the contract if with full knowledge of the [...] breach, the party has affirmed the contract

31. The agreement does not contain any specific provision relating to affirmation of the contract, or extinguishment of the right to terminate. Therefore, section 38 applies.

32. Having a right to cancel a contract is not the same thing as cancelling it. A person who has the right to cancel a contract may elect to not cancel it. This is called “affirming” the contract.

33. If a person affirms a contract, or is deemed by a Court to have affirmed it, then that person cannot cancel the contract at a later point for that same breach².

34. The question is whether Mr & Mrs N affirmed the contract after the right to terminate arose in February 2023.

² *Crump v Wala* [1994] 2 NZLR 331

35. The following principles are relevant:

- a. Affirmation is a “firm and settled choice” to continue with the contract despite having the right to cancel³.
- b. A party does not lose their right to cancel simply by not taking immediate steps to cancel when the right arises. Delay does not amount to affirmation, but delay can be relevant when considered in combination with other factors.
- c. Determination of whether a party has made a choice to affirm involves an objective assessment of their words and actions, not their state of mind. Therefore, a party may be deemed to have chosen “irrespective of actual intention or subsequent rationalisation”⁴.

36. Mr X submitted that:

- a. After the period of the breach notice expired, he continued to communicate with Mr C and there was no indication that Mr & Mrs N intended to cancel the agreement. He arranged and paid for the weedspraying contractors. Mr C seemed satisfied with the progress he was making.
- b. At the meeting, there was discussion about the issues but also about plans for the remainder of the contract period.
- c. At the meeting Mr C talked about wanting everything sorted out by 1 May in preparation for the ending of the contract in early June..
- d. The next day he sent Mr C a text stating:

Please include matters both party’s would like addressed by that 1st may time frame

This shows his understanding that he had until 1 May to resolve all of the issues.

37. I heard evidence from Mr C. Mr C submitted that there were multiple issues of concern that had been on-going for some time before he sent the 2 February letter.

38. The most serious of those concerns was to do with leaking water troughs and the lack of water in some paddocks. This issue was not mentioned in the 2 February letter, apparently due to an error / oversight.

39. Mr C submitted that he issued the breach notice because he wanted to escalate the concerns, and to indicate to Mr C that it was not acceptable for them to continue. The notice was a ‘shot across the bows’.

40. Mr C submitted that he was satisfied that Mr X took some more active steps after receiving the notice, such as arranging for weedspraying. He was satisfied that the meeting in March was generally positive.

41. In April, Mr N contacted him expressing his concerns about continuing issues relating to stock not having access to water, and milking. He told Mr N that he could terminate the agreement on the basis of animal welfare, but ultimately it was Mr & Mrs N’s decision to make.

42. My finding is Mr & Mrs N’s words and conduct (and the words and conduct of Mr C, as their agent) communicated a decision to continue with the contract, and to not take up the right to cancel that arose in February 2023. I have had regard to the following factors:

³ *Jansen v Whangamata Homes Ltd* HC Hamilton CIV-2003-419-1511, 29 November 2004

⁴ *Kipling v Van Kan* [2012] NZCA 163

- a. After the expiry of the notice period, Mr & Mrs N sought to have Mr X remedy the breaches rather than cancel the contract. Mr X made efforts to comply with those requests, including paying \$1,794.00 to a contractor for weedspraying. In *Ford v Ryan*⁵, a case involving building defects, Justice MacKenzie held that the plaintiffs had affirmed the contract and lost their right to cancel because⁶:

The plaintiffs sought to have the defendants remedy the defects, rather than to cancel the contract. Efforts were made by the defendants to comply with the defendant's requests, including paying some \$8,000 to Joyce Group Ltd.

- b. The purpose and intent of the 2 February letter was to encourage Mr X to address the issues of concern. This was confirmed by the approach that Mr & Mrs N took after the notice period expired. Mr C wanted Mr X to make progress towards addressing the issues, and he was largely satisfied with the progress that Mr X was making. This was further confirmed in the meeting on 14 March.
- c. Adding to this was discussion around tidying up matters by 1 May. This date was geared towards the ending of the contract on 8 June.
- d. From all of this, an objective observer would have reasonably understood that Mr & Mrs N did not intend to terminate the contract on the basis of the unremedied February breaches, but intended to continue to work with Mr X until the end of the contract period, provided that Mr X did the things that he needed to do.
43. Having affirmed the agreement, the right to cancel that arose in February was lost. However, the obligations under the contract continued, and the right to cancel for breach (per the terms in the contract) still existed.
44. Therefore it is necessary to consider whether a new grounds for termination were available when Mr & Mrs N issued the notice to terminate on 10 April.

Was the termination on 10 April lawful?

45. The termination letter states:

We regret to inform you that your Contract Milking Agreement with MN and KN is terminated effective upon receipt of this letter for the following reasons:

Failure to provide water to livestock

Failure to milk all cows as agreed

Effluent management that breaches the farm resource consent

Farm walks not completed as agreed by 7 April 2023

46. As noted above, the Agreement allows a party to terminate if:

- a. The other party is in breach of "any of its obligations under this Agreement" and either:
- i. The breach is not capable of being remedied; or
- ii. The breach has not been remedied within 10 working days after the party not in breach has given a written breach notice to the other party.

47. Applying those principles to the grounds for termination stated in the 10 April letter:

⁵ HC Wellington CIV-2005-485-845

⁶ At paragraph 43

- a. The contract does not include specific provisions about the supply of water to livestock or ensuring that all cows are milked, but it does include a general provision about farm management duties:

The Contractor shall, at all times, supply the Services:

- (a) in a competent and professional manner;
- (b) in accordance with best farming practice; and
- (c) in accordance with the law.

Mr X disputed these alleged breaches. Mr X submitted that he had problems with leaking troughs, but he ensured that the stock always had access to water. Mr X submitted that a photograph showing an empty stock trough does not mean that there were stock in that paddock that had no access to water. Mr X submitted that due to the terrain of the property cows were sometimes missed for milking because they went into the bush, but this was not due to him failing to comply with “best farming practice”.

The alleged breach in respect of the provision of water is a breach that is capable of being remedied. Mr & Mrs N have not issued a breach notice apart from the 2 February notice, which does not refer to failing to provide water.

It is arguable whether the alleged breach of failing to bring cows to milking is capable of being remedied.

However, the fact that some cows missed milking does not inherently mean that Mr X failed to meet the standard of “competent and professional” farming or “best farming practice”. I accept Mr X’s argument that the terrain of the farm, the standard of the fencing, and many other factors must be taken into account.

My finding is that there is not sufficient evidence to establish that Mr X failed to provide the services in a competent and professional manner, and in accordance with best farming practice.

- b. The contract has specific provisions in respect of effluent systems.

The ‘resource consent breach’ issue seems to relate to an incident in October 2022. The local council issued an abatement notice, which Mr X paid.

There is no evidence to indicate that there was any new or continuing breach in respect of effluent management as at April 2023.

- c. The requirement to do farm walks was not an “obligation under this Agreement”. There is no reference to farm walks in the Contract Milking Agreement. Therefore, this cannot provide grounds for termination under the termination provisions in the agreement.

48. Therefore I find that there was no legal basis for the termination on 10 April 2023.

What losses can Mr X recover?

49. Mr & Mrs N’s unlawful termination of the agreement amounts to a repudiation. Mr X is entitled to damages, assessed on the basis of putting him back in the position he would have been in had the agreement not been terminated.

50. Mr X seeks loss of earnings, comprised of:

- a. Base contract payments of \$6,555.91 for the balance of the month of April and \$10,351.44 for the month of May; and
- b. Milk solids payments of \$5,761.80 for April and \$2,311.50 for May.

51. The contract provides for a base payment of \$108,015.00 for contract period, plus milk solid payments at a rate of \$0.90 per kg.

52. It appears that the base payment was paid in equal monthly installments over the period of the contract. The claim for base payments for the balance of April and May 2023 is proven. Mr X would have received these payments if the agreement had not been terminated.

53. Mr X would also have been entitled to receive payments at a rate of \$0.90 per kg for milk solids. This part of the claim is based on an estimate of milk production for the months of April and May.

54. I understand that Mr X has been paid per the terms of the contract up to the date of termination, both for the base contract payment and the milk solids.

55. The evidence provided in support of Mr X's assessment of milk solids revenue for April and May is extremely limited. It consists of a screen shot of an 'estimator' from an unknown website or app. The figures are presumably based on data from previous months during Mr X's contract.

56. Mr & Mrs N did not strongly contest the figures. I accept that Mr X received milk solids revenue and there is no reason to think that he would not have received revenue in April and May had the agreement not been terminated. However, it is appropriate to take a conservative approach to assessment of compensation given that:

- a. The figures are necessarily estimates and range of factors could affect the amount of milk production; and
- b. I was given no information about how the estimates were calculated; and
- c. Any assessment of Mr X's actual loss must take into account the expenses that he would have incurred as well as the revenue that he would have earned if the agreement had continued.

57. Applying these principles, and on the very limited information available to me, I will award one-third of the milk solids revenue claimed.

58. Mr X seeks storage costs on the basis that if the contract had finished in June as intended, he would have moved straight into a new contract with housing included. Because it finished in April, it was necessary for him to put his goods into storage.

59. Mr X provided an invoice from Self Storage [Region] for \$300.00 for the storage of goods for one month. I agree that this type of loss is recoverable on the grounds that it is an expense that Mr X would not have incurred if the agreement had not been terminated. I will award the proven cost of storage, which is \$300.00.

Use of calf milk powder and power for water pump

60. These parts of Mr X's claim were essentially an 'after-thought' and were not well evidenced or argued.

61. The claims were disputed by Mr & Mrs N.

62. The claims are not proven.

Outcome

63. My findings are:

- a. The termination of the agreement was unlawful.
- b. Mr & Mrs N repudiated the contract.
- c. Mr X is entitled to damages as a consequence of the repudiation.
- d. Mr X is entitled to loss of earnings damages totalling \$19,598.45.
- e. Mr X is entitled to storage costs of \$300.00.
- f. The other parts of Mr X's claim are not proven.

Referee: Nicholas Blake
Date: 8 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 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>.