



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 373

APPLICANT HE

RESPONDENT QZ

The Tribunal orders:

1. The claim is dismissed.
2. The counter-claim is dismissed.

Background

1. The adjournment order dated 18 January 2023 sets out the background to the claim and counter-claim.
2. The third hearing took place in [Town] on 12 April 2023. Both parties attended the hearing.

Findings

HE's claim

3. At the third hearing, HE clarified that his claim seeks:
 - a. \$3,348.52, being reimbursement of the amount that HE paid to clear QZ's account with [building supplies company] at the start of the job.
 - b. \$500.00 for repayment of a loan to QZ.
 - c. \$2,200.00 credit for boxing not carried out.
 - d. \$31,625.40, being the amount paid to QC Ltd for "remedial work".

Reimbursement of payment to clear [building supplies company] account

4. HE and QZ entered into a 'labour only' contract. HE was to supply the materials for the build. The parties agreed that HE could use QZ's [building supplies company] account to purchase materials, in order to obtain the discount on that account.

5. QZ had a debt with [building supplies company] of \$3,348.53. The balance had to be cleared before the account could be used.
6. HE submitted that he agreed to clear the balance on the understanding that QZ would re-pay him \$3,348.53 by way of credits on his invoices. No such credits were given during the job.
7. QZ submitted that there was no agreement that he would re-pay HE. QZ submitted that the agreement was that HE would clear the balance at his own cost so that he could use QZ's account and obtain discounts on the purchase of materials. QZ submitted that the amount of discount that HE achieved by doing this significantly exceeds \$3,348.53.
8. There is no other evidence available to me to support or refute either parties' recollection of the deal. Both versions are plausible.
9. This is part of HE's claim. HE has the burden of proof to establish, to the standard of "more likely than not" that it was agreed that QZ would re-pay the \$3,348.53.
10. The only evidence available to me is the conflicting recollections of HE and QZ.
11. HE has not met the burden of proof. This part of the claim must be dismissed.

Re-payment of loan

12. HE submitted that QZ asked if he could borrow \$500.00 for a trip to [City] to go to a concert.
13. QZ has not re-paid the loan.
14. QZ submitted that the advance was not a loan but a payment for work carried out.
15. By HE's own acknowledgement, his payments to QZ for the building work were unstructured and irregular. HE submitted that QZ would demand payment for work, sometimes before the stage of work was completed, and he would pay QZ without question.
16. QZ asking for \$500.00 without an invoice is not inconsistent with that arrangement.
17. There is no other evidence available to me (such as text messages) to support HE's argument that this was a loan and not a payment for services.
18. HE has the burden of proof.
19. It is not proven that this advance was a loan and not a payment for services.

Credit for boxing not carried out

20. HE submitted that QZ was going pour concrete for a footing on part of the build, and he purchased boxing materials for that purpose. There was then a change of approach, and QZ used concrete blocks for the footing instead.
21. HE submitted that he is entitled to a "credit" of \$2,200.00 because the boxing / concreting did not go ahead.
22. However, analysing that claim, my finding is that HE cannot prove that he has suffered any loss.

23. This was a labour only contract. QZ only charged HE for work that he carried out. There can be no 'credit' for labour on the concreting job that did not go ahead, because HE did not charge labour for that job.
24. HE did purchase materials, specifically boxing timber. QZ confirmed that he saw the materials on site. He submitted that he used some of the boxing for other (minor) concreting work around the house but there was still a lot left. HE could have returned the material for a credit if it was not used.
25. HE had no recollection, and no records, about whether the timber was returned for a credit. It could well have been returned.
26. HE has not proven any loss under this heading.

Remedial work

27. After QZ left the site, HE engaged QC Ltd (builders) to complete the build.
28. HE paid Mr Q a total of \$27,500 plus GST.
29. HE claims that amount from QZ on the grounds that it is "remedial work".
30. HE provided a statement from QC Ltd which states:

Prior to commencing the work we met onsite with the building inspector who advised us what was required to bring it to comply with the NZ building code. The work carried out to do this was fixing the out of plumb walls, putting in rafters and replacing incorrect fixings, and replacing the untreated timber used with treated. On top of these there were numerous other items that had to be rectified as we encountered them when we continued with the completion of the build

31. QZ was contracted to complete the build at a labour only cost of no more than \$50,000.00.
32. When QZ left site, the build was not complete. HE had paid QZ \$25,000-\$26,000 at that time (there is no documentation to support this figure, but HE and QZ agreed that it was around that amount).
33. The \$27,500 plus GST that HE paid to Mr Q was not the cost of remedial work. It was the cost of completing the build.
34. This means that the total amount that HE paid for labour was around \$56,000-\$57,000, which is \$6,000-\$7,000 more than he would have had to pay per his contract with QZ.
35. HE could have a claim for damages on the basis that:
 - a. The additional cost reflects the cost remedial work that Mr Q had to carry out; and/or;
 - b. Even if there was no actual remedial work, HE spent \$6,000- \$7,000 more than he would have if QZ had not left the job.
36. However, HE faces the following difficulties in respect of those arguments:
 - a. The only information provided about defective building work is the QC Ltd statement, quoted above, which was written in November 2020, well over a year after QZ left the site. There are no photographs or other evidence showing the allegedly defective work, and no costing of the remedial work.

- b. The building that Mr Q completed is not the same building that QZ was contracted to build. HE's draftsman, Mr N, created new plans in or around February / March 2019. HE argued that the changes were minor, but the reason why Mr N had to prepare and submit new plans was that his original plans did not allow for two habitable units in the building, which HE wanted to use for [holiday] accommodation. QZ quoted on the original plans. I accept QZ's argument that if he had not left the site, he would have had to re-quote the job once the new plans came through.

37. My findings are:

- a. The amount that HE paid to Mr Q is not the cost of remedial work. It is the cost of completing the build.
- b. The evidence provided to me is not sufficient to establish any proven costs of actual remedial work.
- c. HE has not proven a loss on the overall cost of the build because the building that Mr Q completed was materially different to what QZ quoted on. QZ would have been entitled to re-quote the job in light of the revised plans.

QZ's counter-claim

38. QZ submitted that:

- a. The Council issued stop work notice just before Christmas in 2018.
- b. He returned to the site in the new year and was able to do some minor work.
- c. HE was aware of this work.
- d. He issued an invoice on 5 February 2019 for \$3,102.12 for this work, but HE has not paid it.

39. I was provided with a photocopy of a handwritten invoice.

40. HE submitted that:

- a. QZ did not give him this invoice in February 2019. He was not aware of it until QZ filed this counter-claim.
- b. The work detailed on the invoice was either not done, or was not done to an acceptable standard.

41. This work was carried out more than four years ago. There is no evidence that QZ ever followed up on this unpaid invoice.

42. Because of the time that has passed, and the lack of supporting evidence, my finding is that QZ has not proven that he carried out the work detailed in the invoice and that he issued the invoice to HE in February 2019.

43. Therefore, the counter-claim must be dismissed.

Referee: Nicholas Blake

Date: 4 May 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>.