



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 494

APPLICANT **KC**

RESPONDENT **M Ltd**

The Tribunal orders:

KC is to pay \$200.00 to M Ltd by 28/11/23.

Reasons:

1. KC entered into a year long gym membership contract in September 2021. After moving to [City 1], she continued in her [City 1] gym then wished to pause or exit the contract as her employer instigated a work from home policy due to the effects of COVID. As the gym was next to her work, it was no longer convenient for her to travel into town just to attend the gym. She also was of the view that the gym services provided when she started her contract were not the same as [City 1] was then in a restricted COVID setting.
2. On 15/3/23 she agreed to a 1 month pause fee and paid that. Thereafter, as her work circumstances had not changed, she stopped paying the monthly fee. She then terminated the year long contract via her email to M Ltd dated around 6 May 2022.
3. M Ltd is pursuing her for a termination fee it says is due under the contractual agreement of \$469.58 (she is seeking a declaration it is not payable) and she also wishes to reclaim the pause fee of \$30.00 she had already agreed to and paid.

Cancellation without termination fee?

4. I am satisfied that KC was not entitled to terminate the contract on the reasons she has relied upon, without paying a termination fee (clause 13). I say that because:
 - a. KC received a full copy of the contract by email after she had signed up in [City 2]. She had the opportunity to fully read it and accept all its terms or not, at that time. She raised no objection to its terms and conditions then and is deemed to have accepted them then. She is precluded from raising objection to them later in the circumstances of this dispute.
 - b. I accept the [City 1] gym remained open for use in April /May 2022 albeit with public safety measures in place.
 - c. As this was the second COVID restriction phase, it was reasonably foreseeable to all that a further restrictions could be imposed in late 2021/2022.

- d. Clauses 14 (Force Majeure) and 15 (Unplanned Closure, part and/or all) of the contract allowed for the services offered to be modified.
 - e. A frustration of contract argument fails on these facts and the difference in services (public safety measures) are permissible
 - f. I find the dominant reason for termination was the work restrictions imposed on KC by her employer (working from home and associated inconvenience) and not any actions of M Ltd.
5. There is no entitlement to a refund of the \$30.00 pause fee as she agreed to that at the time and paid it.

Amount of Termination fee

6. When asked to make a declaration of non-liability I am empowered to order any of that sum I find payable to be paid.
7. It is for M Ltd to produce evidence to satisfy me, to the appropriate evidential level (the balance of probabilities being what is more likely than not) that its termination fee has been correctly calculated in accordance with the agreed contractual terms. I have not been satisfied on the balance of probability that the \$469.58 termination fee claimed is payable under the contract.
8. I say that because:
- a. Clause 13 limits that fee to \$370.00
 - b. M Ltd could not identify a collection fee entitlement clause in the contract in the amount claimed or any amount.
 - c. Its method of calculating the claimed termination fee was unclear especially in light of an unexplained imposition of a further 7-week unpaid period.
 - d. It had granted a 2 month pause period (through to after 6 May 2022) rather than 1 month as KC had understood applied and does not seem to have taken that into account.
 - e. On the date of cancellation (6/5/22) it had then calculated the termination fee to be \$278.46.
 - f. There was insufficient evidence filed before today's hearing to ascertain the correctness of that figure.
9. Bearing in mind KC unjustifiably cancelled the contract and she had agreed, by accepting the written terms of the contract, that an early termination fee for this year long commitment is payable I find, in the particular circumstances of this dispute, that \$200.00 is a reasonable termination fee.

Referee: Hayes

Date: 3 October 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>.