



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 106

APPLICANT KN

RESPONDENT T Ltd

The Tribunal orders:

KN is to pay \$5,800.00 to T Ltd on or before 20 March 2023.

REASONS

Brief Details of Claims

1. KN owns a property at [Address]. KN submitted an Application for Resource Consent to subdivide the property into three lots. There was an existing house on the proposed Lot 1.
2. During the period December 2021 to March 2022, T Ltd carried out work on the property at KN's request. The work involved constructing a sealed driveway; constructing a sealed entrance way to the property; installing a water connection from [Road A]; installing a water pipe under [Road B]. Separate quotes were provided for each of the four tasks. The quotes were accepted at the time.
3. On 29 April 2022, T Ltd issued three invoices totalling \$70,104. By 4 November 2022, \$30,000 remained unpaid. T Ltd engaged a solicitor to try and obtain payment.
4. On 13 December 2022, KN lodged a claim in the Disputes Tribunal stating the value of the claim to be \$30,000. In the details of claim, it is clear that KN considered T Ltd liable to pay \$7,575 that she had paid to a plumber to replace a septic tank that KN claimed has been damaged by T Ltd's employee. The claim was not specific about what the remaining amount up to \$30,000 was for. The issues mentioned in the claim details were that additional quotes were required after T Ltd had started work which KN said she felt forced to agree to in order to get the subdivision work completed; that there was a delay of 3 weeks to complete work; the original timeframe was 5 weeks to completion, but it took 10 weeks; that the septic tank installed to replace the damaged one needed to be replaced again (at a cost of \$34,414) because it had not been installed properly and would not meet [Regional Council] standards).
5. On 22 February 2023, T Ltd filed a counterclaim, seeking costs amounting to \$30,000 on the basis that the claim lodged by KN was frivolous or vexatious. The costs claimed were legal costs, staff time, travel, and accommodation costs for 4 people to attend the hearing in person. An extensive number of documents were submitted by T Ltd in defence of the claim against it and in support of its counterclaim.
6. After receiving a copy of the counterclaim and documents, on 23 February 2023, KN withdrew her claim.

7. Therefore, the hearing on 27 February 2023 dealt only with the counterclaim. UU and TU attended in person to represent T Ltd. CU and EQ attended in person as witnesses for T Ltd. KN attended by teleconference with QM in support.

Issues

8. The issues for the Tribunal to consider are:

- (a) Whether KN's claim was frivolous or vexatious;
- (b) Whether T Ltd is entitled to the costs claimed under its Terms and Conditions;
- (c) If the answer to either of the above is "yes", whether KN should pay T Ltd and if so, how much.

Was KN's claim frivolous or vexatious?

9. The Concise Oxford English Dictionary definition of "frivolous" is "not having any serious purpose or value". The definition of "vexatious" is "causing annoyance or worry" and, in respect of a legal action, "brought without sufficient grounds for winning, purely to cause annoyance to the defendant".

10. I find that the claim brought by KN against T Ltd was frivolous and vexatious for the following reasons:

- (a) KN accepts T Ltd's evidence that the original septic tank was damaged after the replacement tank had been installed.
- (b) That means that the reason the replacement septic tank was installed at a cost to KN of \$7,575 had nothing to do with T Ltd.
- (c) KN says she relied on her memory of events in January 2022 and simply made a mistake in the date that T Ltd's employee, EQ, accidentally damaged the lid of the old septic tank. I find this hard to accept. The evidence provided by T Ltd is that the original septic tank needed to be replaced because it protruded by around ½ to 1m inside the sealed driveway that KN had engaged T Ltd to construct. In a separate contract between KN and S Ltd, KN had a replacement septic tank installed to continue to service the existing house on the property. KN was project managing the works, was living in the house on the property, and was on site on a daily basis keeping herself up to date with the progress of the works, as evidenced by the extensive set of photographs she has taken of the work. The discussions with S Ltd about the need to move or replace the original septic tank appear to have started in December 2021, a month prior to the installation of the replacement tank. I find it is inconceivable that KN did not know the real reason the replacement septic tank was installed and inconceivable that she could reasonably associate the need for the replacement septic tank with the damage by T Ltd to the old septic tank.
- (d) T Ltd's representatives say that this matter was covered at the on-site meeting with KN in July 2022. Even if it was not, or that KN has no recollection of it being discussed, the letter dated 7 December 2022 from T Ltd's solicitor to KN clearly states that T Ltd's business records show that the digger work carried out by T Ltd on sub-contract to S Ltd to install the replacement septic tank was on 18 January 2022, and the damage to the lid of the old septic tank occurred during work on the driveway on 22 January 2022. This letter was sent only 7 days before KN lodged her Tribunal claim, so if she was under any mistaken belief about the dates as she claims, she had the opportunity to question and check her memory of events.
- (e) I am satisfied that KN's claim in relation to the cost of the replacement septic tank was brought without sufficient grounds for winning.
- (f) In relation to the other issues touched on in KN's claim, as described in Clause 4 above, I am satisfied that KN had no serious intent in pursuing any of these issues. That is evidenced by KN telling me that once she had T Ltd's evidence and realised she had been wrong about the date of the damage to the old septic tank in relation to the date the replacement tank had been installed, she immediately withdrew her claim. KN said she would not have brought the claim at all, had she realised her mistake sooner. KN's claim was for \$30,000 so, excluding the septic tank, the majority of her claim (\$22,425) related to the other issues mentioned. An applicant with serious intent in respect of the other issues is unlikely to withdraw a claim for \$22,425 on the basis that one issue with a value of \$7,575 is no longer to be pursued. Therefore, it seems to me that KN had no serious intent in relation to the other issues mentioned in her claim.

- (g) In making a decision on T Ltd's counterclaim for costs on the basis that KN's claim was frivolous or vexatious, it was necessary for me to have an understanding of the strength or otherwise of KN's claim. Because KN had withdrawn her claim, at the hearing on 27 February 2023 I did not hear the entirety of her evidence in relation to her claim. However, in preparation for the hearing, and prior to KN withdrawing her claim, I read the details of her claim and went through her documentary evidence, as well as the several documents she sent in on the day of the hearing. I also read T Ltd's counterclaim and the Will Say statements submitted by the respondent and had a look through the respondent's extensive bundle of documents to familiarise myself with what was there. At the hearing of T Ltd's counterclaim, UU read through the document T Ltd had prepared in support of its counterclaim, and KN had the opportunity to respond. I am satisfied that KN's claim against T Ltd was unlikely to succeed in any respect, had she not withdrawn it.
- (h) It seems that KN's claim for \$30,000 (the exact amount she owed to T Ltd) was without foundation and was an action intended simply to resist her obligation to pay for quoted work she had commissioned T Ltd to carry out, and therefore intended to cause inconvenience and annoyance.

Is T Ltd entitled to the costs claimed under its Terms and Conditions?

11. Parties to a contract are bound by express and implied terms. Express terms are those that have been made known prior to formation of the contract.
12. All of the work carried out by T Ltd was on the basis of a quote. On the bottom of the quote there is a statement "Our terms of trade can be found here: [redacted]".
13. T Ltd's claim for costs associated with KN's Tribunal claim was not advanced on the basis of the Terms and Conditions and a copy of the Terms and Conditions was not presented during the hearing. However, the terms of trade were referred to in T Ltd's solicitor's letter to KN dated 7 December 2022.
14. As a lay-person's Tribunal, a Referee has an obligation to parties to inform them about the law that applies to the claim. Therefore, even though T Ltd did not advance its claim on the basis of the Terms and Conditions, I have nevertheless an obligation to consider them. Therefore, for completeness, I have addressed this issue.
15. The Terms and Conditions were mentioned on the quote and the location of where they could be seen was made known. Subsequent to the hearing, I have viewed the Terms and Conditions on T Ltd's website and note that they were last updated on 30 October 2020. Therefore, the Terms and Conditions currently viewable were those that would have been available to KN to view, had she chosen to do so. KN indicated that she had not read the Terms and Conditions. However, because they were available to her to read, KN is bound by the Terms and Conditions.
16. Clause 7 sets out the Terms and Conditions relating to payment and the consequences of non-payment. In Clause 7.2 it states, "All costs, including collection charges and legal fees (being full solicitor/client costs) incurred in connection with overdue accounts shall be payable by the client". At Clause 7.4 "The Client acknowledges and agrees to pay all the Company's costs (including legal costs on a solicitor/client basis) incurred by the Company, in connection with any default by the client or enforcement action taken by the Company".
17. I am satisfied that the costs incurred by T Ltd in defending KN's claim have been incurred in connection with overdue accounts. All of the costs were incurred prior to T Ltd being advised that KN had withdrawn her claim. I find that T Ltd is entitled to an award of its costs, based on the terms set out in Clause 7.

Should KN pay T Ltd for its costs and if so, how much?

18. In relation to the costs associated with proceedings, S.43 of the Disputes Tribunal Act states that "Except as provided in this section, costs shall not be awarded against a party to any proceedings before the Tribunal" (S.43(1) DTA). "Where in the opinion of the Tribunal, a claim made by a party is

frivolous or vexatious, it may...order that party to pay ... to a party, the costs of that party in connection with the proceedings” (S.43(2) DTA).

19. I have found that KN’s claim was vexatious in that it was brought without sufficient grounds for winning, and to cause inconvenience and annoyance.
20. I have also found that T Ltd has a legitimate claim under its Terms and Conditions for costs incurred in connection with overdue accounts.
21. However, The Disputes Tribunal is a lay-person’s forum for the low-cost, speedy resolution of disputes of relatively low value. It is clearly the intention of Parliament that, except in very limited circumstances, costs of proceedings should not be awarded. I have taken this into account in making my decision on T Ltd’s claim.
22. I find that T Ltd is entitled to an award of costs because KN’s claim was couched in very broad terms and therefore T Ltd was obliged to address a number of issues. It is clear that considerable time would have been spent obtaining evidence from others to address the issues raised in KN’s claim. However, I have also taken into account the spirit and intent of the Disputes Tribunal Act.
23. T Ltd’s legal costs were \$17,422.50, proven by Invoices submitted. I have not allowed the full legal costs for the following reasons:
 - (a) There is a general principal that a party suffering a loss will take reasonable steps to mitigate its loss. T Ltd could have limited its costs and dealt with the claim itself, as do the majority to parties to a Tribunal claim.
 - (b) T Ltd chose, for reasons of its own, to engage a lawyer to prepare its defence to KN’s claim and to prepare T Ltd-s counterclaim. It is not reasonable that the full cost be passed on to KN.
 - (c) However, T Ltd could reasonably have consulted a solicitor for advice and guidance in respect of its defence and counterclaim, particularly given its inexperience in dealing with a Tribunal claim.
 - (d) I have taken into account T Ltd’s explanation that it is inexperienced in dealing with a Tribunal claim, and that T Ltd considered the business risk was considerable given that the value of KN’s claim was \$30,000. However, I also note that T Ltd was prepared to incur a total of \$24,788.90 in direct costs for its solicitor and travel and accommodation costs with no guarantee its claim for these costs would be successful. That T Ltd was willing to spend that amount to defend a claim of \$30,000 somewhat dilutes its argument about the business risk of losing \$30,000 in the event that KNs claim should be successful. T Ltd risked almost the same amount by incurring the costs it did.
 - (e) I have decided that KN is to pay one third of T Ltd’s legal costs, rounded to the nearest hundred dollars, being \$5,800.00.
24. I have not allowed T Ltd’s claim for \$3,180.40 being the cost of flying four people to [City] for the hearing and one night’s accommodation. The Tribunal provides a teleconference facility for distant parties. It was T Ltd’s choice not to avail itself of that service. The Tribunal is well-practiced at conducting telephone conferences for distant parties and multiple witnesses. Even prior to the advent of Covid 19 restrictions, it was rare for a distant party to attend in person. In these circumstances, it is not reasonable to pass on the cost of T Ltd’s travel and accommodation to KN.
25. I have not allowed the cost of UU’s time in dealing with this matter. In my view this time is an ordinary business cost.

Referee: JF Tunnicliffe
Date: 28 February 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>.