



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 555

APPLICANT **L Foundation**

RESPONDENT **OS**

The Tribunal orders:

1. OS is to deliver the dog HJ to EV (as representative of the L Foundation), or to make HJ reasonably available for EV to collect, by no later than 1 June 2023.
2. OS is to pay L Foundation \$7,235.00 by 1 June 2023.

Reasons

1. The adjournment order dated 9 February refers.
2. The second hearing took place by phone on 5 April 2023.
3. The Trust's claim seeks:
 - a. The return of the dog HJ; and
 - b. Payment of a debt allegedly owed by OS.

Return of HJ

4. OS and EV purchased two [breed] puppies from a breeder in [City 1].
5. OS made all the arrangements for the purchase of the puppies and transport to [Region]. The cost of the puppies was \$6,470.00.
6. They named the puppies HJ and UB.
7. OS is in possession of UB.
8. EV was in possession of HJ.
9. OS took possession of HJ in September 2022. There was no understanding that EV was gifting or selling HJ to OS. The arrangement was temporary, although at the time it was unclear how long it could be for.

10. OS submitted that she incurred cost and inconvenience in taking possession of HJ, and HJ has now been homed in another place where she has settled in as the family dog. OS submitted that it would be unfair and harmful to remove HJ from her new home.
11. Although there is some dispute about whether EV was initially going to have UB or HJ, it is clear that the understanding was that they would have one dog each.
12. OS has UB. Although possession of HJ passed from EV, ownership did not.
13. The Trust is entitled to an order for the return of HJ.
14. Where the Tribunal makes an order for the return of physical property, it is common practice to also make a monetary order requiring the Respondent to pay the Applicant for the value of the property if it is not returned.
15. EV stated that she does not want a monetary order.
16. OS is to arrange for the return of HJ to EV (as representative of the Trust) by 1 June 2023.

Payment of debt

17. It is not disputed that:
 - a. OS owed a debt to the Trust.
 - b. OS sold off-grid showers and puppies on behalf of the Trust, and she earned commission on the sales.
 - c. OS sent the full proceeds of her sales to EV on the understanding that her commission would be used to pay off the debt.
18. The parties disagree about what amount of debt OS owes, and what amount of commission she is entitled to.

i. Amount borrowed by OS

19. EV submitted that OS's debt totals \$15,685.00, comprised of

<i>UB</i>	<i>\$3235</i>
<i>Puppies A and B</i>	<i>\$3000</i>
<i>Shower</i>	<i>\$600</i>
<i>Loan for car</i>	<i>\$200</i>
<i>4 shower pods</i>	<i>\$4200</i>
<i>2 unpaid pups</i>	<i>\$4000</i>
<i>[Name]'s shower</i>	<i>\$550</i>

20. OS did not dispute that she owes \$3,000.00 for Puppies A and B, \$4,200.00 for four showers, \$600.00 for her shower, and \$550.00 for [Name]'s shower.
21. OS disputed the claim for \$200 for the car on the grounds that EV did not indicate that she would have to re-pay the \$200, and she used the car for business purposes.
22. However, there is no evidence of any understanding that OS would receive any sort of allowance or payment for using her car in the course of the business.

23. OS was paid by commission and, like most sales agents who earn by commission, she was expected to pay her own expenses. The advance of \$200.00 could not reasonably have been understood as a payment to OS. It was a loan, and OS is obliged to re-pay it.
24. As noted above, there is some dispute about whether OS was to receive UB or HJ. However, I am satisfied that:
- a. The purchase of UB and HJ was funded by money belonging to the Trust (the proceeds of the sale of showers and puppies) and possibly some of EV's own funds. OS did not pay any amount for UB or HJ.
 - b. EV has fairly applied the discount given for the purchase of the second pup by averaging the cost of UB and HJ.
25. Therefore, I find that the \$200.00 advance for the car and the (averaged) purchase price for UB form part of OS's debt.
26. The "2 unpaid pups \$4,000.00" relates to the sale of the last two puppies in OS's possession. EV has guessed the likely sale price of those puppies because OS provided her with no information about the sales.
27. OS submitted that they sold for \$1,000.00 each. OS was not able to provide any evidence in support of that sale price.
28. This part of the claim is difficult to determine because of the lack of evidence. It is EV who is alleging that OS has wrongfully retained the proceeds of sales and therefore owes her this money as a debt. Therefore, EV has the burden of proof to establish the amount of the debt. EV's claim for \$4,000.00 is entirely speculative. The only evidence of any type about the actual sale price is OS's oral evidence that they sold for \$1,000.00 each. Although it is appropriate to treat that evidence with caution, it is the only evidence available to me.
29. Therefore, I find that OS owes \$2,000.00 for the sale of the last two puppies.
30. The total proven debt is \$13,785.00

ii. Commission

31. EV submitted that \$5,800.00 should be deducted from OS's debt calculated as:

<i>Commission on sale of showers</i>	<i>\$3,200</i>
<i>Puppy C and D</i>	<i>\$1,000</i>
<i>Puppies E</i>	<i>\$700</i>
<i>Puppies F</i>	<i>\$600</i>
<i>Payment received from OS</i>	<i>\$300</i>

32. OS accepted the figures for these items, but she submitted that EV's list does not include all of the commission that she is entitled to from puppy sales.
33. In the adjournment order I asked for both parties to provide what evidence they had in support of their submissions about sales and income from sales. Given that this was a commercial enterprise, and that the Applicant is a registered charitable trust which must meet its financial reporting obligations, I was hopeful of reasonably detailed records of sales. Unfortunately, neither party was able to provide that evidence.
34. OS sent money back to EV with no breakdown of what the payments were for.

35. OS submitted that the total amount of money that she sent back to EV supports her argument that she sold more puppies than EV has credited her for. OS also noted that she physically received many puppies from EV, and she no longer has them in her possession.

36. OS's list includes:

<i>2 Puppies- 1 female - 1 male blue eyes</i>	<i>\$1000</i>
<i>4x Puppies \$500 each</i>	<i>\$2000</i>
<i>#1 Puppy male ([redacted])</i>	<i>\$500</i>

37. EV did not dispute that OS made these sales, although she received very little information about how much each puppy sold for.

38. The dispute is about the amount of commission that OS is entitled to.

39. EV submitted that:

- a. She had an understanding with OS that OS would receive a commission of \$500.00 if a puppy sold for its asking price.
- b. [OS' sister] became involved without EV's agreement.
- c. She accepted that [OS' sister] should be entitled to payment by way of commission for her work, but she did not agree with paying a 'double commission', particularly if the puppy was not sold for full asking price.
- d. After an exchange of messages, she and OS reached an understanding that:
 - i. OS's commission would decrease if the sale price was discounted.
 - ii. OS would not be entitled to any commission at all (but [OS' sister] would still receive her commission) if the sale price went below \$2,500.00.

40. OS submitted that:

- a. Caring for and selling the puppies took a great deal of time and resources.
- b. [OS' sister] was entitled to payment for her work.
- c. There was no agreement that she would not receive a commission on sales under \$2,500.
- d. In some instances, she agreed to reduce her commission if she reduced the price of a puppy to achieve a sale. However, if EV reduced the price, she did not agree to reduce her commission.

41. It is not the role of this Tribunal to re-write the terms of the agreement between the parties to create a level of clarity that they unfortunately failed to achieve themselves.

42. However, I am required to determine the dispute in accordance with the substantial merits and justice of the case, having regard to the law (section 18(6) Disputes Tribunals Act 1988).

43. My findings are:

- a. The exchanges of messages create at least a general understanding that if a puppy is sold at a reduced rate, then OS's commission will reduce but [OS' sister] will be entitled to her full commission.

- b. The rationale for this was that EV had an expectation of receiving a minimum net amount from each sale. Therefore, this principle should apply whether the discount was given by OS or EV.
- c. In light of this general understanding, OS could not have an expectation of receiving her full commission on sales below full asking price. It placed an onus on OS to negotiate her commission.
- d. I have no detailed information about the price achieved for the 2 x [puppies] or the 4 x [puppies], or the extent of discount that was given for them.
- e. OS is not entitled, either as of legal right or on the basis of “merits and justice”, to payment of full commission on those sales.
- f. OS is entitled to some commission on the basis that:
 - i. It is not proven that there was a general agreement to completely waive commission on sales under \$2,500; and
 - ii. It is probable that some of the sales were at a level where OS had a reasonable expectation of some commission.
- g. I will award commission of \$750.00, which is 25% of the amount OS has claimed for these sales.

44. The sale of “#1 Puppy male ([redacted])” appears to be a heavily discounted sale to a friend of OS. Because of the discount, it would be unjust to require EV to pay commission on that sale.

45. OS’s list includes commission on Puppies A and B. OS did not sell these dogs. OS kept them herself, and she acknowledges that she owes EV \$3,000 for them. They were supplied to OS at a heavily discounted rate. No commission can apply to this “sale”.

Outcome

46. The dog HJ is the property of the Trust. OS must deliver HJ to EV (as representative of the Trust) by 1 June 2023.

47. OS owes the Trust \$7,235.00 calculated as follows:

Amount owed by OS	\$13,785.00
Less commission and payments	<u>\$6,550.00</u>
	\$7,235.00

Referee: Nicholas Blake
Date: 2 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>.