



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2019] NZDT 1304

APPLICANT **MW**

RESPONDENT **EF Ltd**

The Tribunal orders:

1. EF Ltd is to pay to MW the sum of \$4,408.64 on or before 24 December 2019.

Reasons

1. In August 2018, XK invited MW to join an advisory board for his company, EF Ltd (the company). The company designs and supplies management information systems using low-power, long-range sensing, measuring and control devices. The company was looking at ways to grow its business and move into export markets. XK had met MW many years ago and believed he would have combined strengths in business advisory, farming and IT from which the company would benefit.
2. On 6 October 2019, after one meeting of the advisory board, MW resigned from his role as an advisory board member.
3. MW has filed a claim seeking \$15,000.00 in fees for work done for the company between August and October 2018.
4. The issues to be resolved are:
 - (a) Was there a contract between the parties?
 - (b) Was the contract for the advisory board only, or also for consulting work?
 - (c) Is there a basis for a *quantum meruit* award for work not covered by the contract?
 - (d) How much is due to MW for the work undertaken?

Was there a contract between the parties?

5. A contractual obligation is created by an offer, an acceptance of that offer, and a meeting of minds about the key terms of the agreement reached. A contract may be written or oral. If it is written, it may be in a formal document, or contained in an exchange of correspondence.
6. In this case, the parties did not sign a formal contract. Any agreement was created by an exchange of emails and additional discussions. The emails began in July 2018, when XK made contact with MW, and sent him a basic information pack about his company. On 3 August, XK stated that he liked and recalled MW's combined strengths in business advisory, farming and IT, and was keen to hear his views. The parties met on 9 August, and at that meeting, it was agreed that MW would become a member of the advisory board for the company.
7. There is a dispute about the extent of what was agreed, but nonetheless, it is not disputed that an agreement was reached that MW would be on the advisory board. The sum to be paid for that work (\$900 per meeting day, plus one day preparation, plus expenses) was not formally agreed until further discussion about this by email on 16 August and at a meeting on 23 August 2019. However, whilst there was a delay in working out a daily rate and other terms, these negotiations resulted in a contract between the parties.
8. The key issue in dispute was about the scope of the work to be undertaken.

Was the contract for the advisory board only, or also for consulting work?

9. MW's claim is made on the basis that, at the first meeting on 9 August, XK agreed to pay him not only for advisory board work, but also for additional consulting work, and that he would be paid the same daily rate.
10. The parties were operating in a commercial setting, yet neither sent the other a document recording the outcome of the meeting. Perhaps in the context of their background together and underlying friendship, this was not considered necessary. However, given the lack of a written contract, and the dispute over what had been agreed at the meeting, it is not possible to make a finding that there was a meeting of minds about hiring MW as a consultant in addition to being on the advisory board.
11. It is clear that the parties left that meeting with a misunderstanding about the other's intentions. Where a dispute arises of this nature, an objective determination must be made about whether the elements of a contract exist, and if so, on what terms. In assessing this, regard may be had to previous and subsequent conduct, and the context in which the discussions took place. In this case, the following factors indicate that there was no meeting of minds about the consulting work being on a paid basis:
 - (a) First, there was no mention about what would be paid for either the advisory board work, or consulting work. Consulting work is different in nature to simply being on the advisory board, requiring more research and involvement in the company, and a greater investment of time in the preparation and drafting of documents, and it does not necessarily follow that the same rate would apply. Neither party discussed this at the time, or later, when there were discussions about the daily rate for board members.
 - (b) Secondly, it was not unreasonable for XK to assume that the work being undertaken was out of enthusiasm for the impending role on the board, and/or with a view to potential investment in the company. Whilst this was not raised in any email until a week later, and was not in MW's mind at the time, XK was genuinely surprised when he received an invoice for the work. MW was equally surprised that XK did not consider the company should pay. The misunderstanding which arose from the 9 August meeting was allowed to flourish given the lack of a written arrangement, and these misplaced assumptions about MW's motivations.
 - (c) Thirdly, MW had the onus of establishing that an agreement had been made about consulting work, and this was not possible given the dispute over what had been agreed, and the lack of a written document. It was objectively possible that MW was enthusiastic about his potential involvement and was undertaking the work in furtherance of being an advisory board member.

The parties met on 23 August. MW recalled that at that meeting, it was agreed he would charge \$900.00 per day for all consulting work, but XK recalled that this only applied to board meetings, and that all sums due would only be paid in due course in an equity share. As was the case with the meeting of 9 August, in light of this dispute, no findings could be made about the arrangement reached. Other advisory board members attended on a *gratis* basis.

12. I have had regard to emails exchanged whilst work was being produced in which XK praises the work being undertaken, and specifically directs that further work be done. This work is outside the role of an advisory board member, and there is clear instruction to carry it out. Later, the discussions turn to giving MW a role within the company. I have given consideration to whether this conduct entitles the Tribunal to infer on an objective interpretation of subsequent conduct that there had been an agreement on 9 August for MW to be hired as a consultant. I am unable to make that finding given that the scenario was open to be interpreted differently by XK, and the parties had not made their intentions sufficiently clear. It is unlikely that the company would expose itself to an unknown quantity of hours at an unknown price. Had MW invoiced the company after each week or after each piece of work, and the company had paid, or allowed work to continue, it would have been easier to reach a conclusion that a contractual obligation had been agreed. However, the lack of agreed terms, the lack of invoicing to evidence agreement, and the genuine misunderstanding about intentions leads to a finding that, despite the encouragement received, the consulting work was outside the terms of any contract.

Is there a basis for a *quantum meruit* award for the consulting work?

13. A party who has operated with a reasonable belief in a contractual undertaking as a result of reliance on representations that give that impression may be entitled in equity to reasonable remuneration for services rendered. Such a claim can be made where the recipient of the services has received a benefit, and if so, if it is unjust for that benefit to be retained without being paid for.
14. I find that there is a basis for a modest *quantum meruit* award in this case, for the following reasons:
- (a) The meeting of 9 August resulted in a genuine misunderstanding. As a result, MW started consulting work with the belief he would be paid. The company was enthusiastic about his work given the friendship, and the potential benefits of a long term relationship on the advisory board, or as an investor, praised the work, and asked for more to be done.
 - (b) Whilst there was a lack of consensus, and thus a lack of a contract, there were representations made from the correspondence with XK that led MW to believe he was hired not only for the advisory board, but also as a consultant. These arose from general encouragement about what was being produced, and also from specific requests to attend to tasks that went beyond an advisory board role.
 - (c) MW started generating drafts of a number of documents for the company, including a Sales Plan, Export Plan, SWOT analysis, table of tasks, questionnaire, Partnership sales strategy, the first draft of a Commercial Strategy and an Australia Country Analysis. As he did so, he checked in to ask for more direction, and to clarify what should be done. In particular, after starting on the early sales and export plans after the meeting of 9 August, he asked XK for feedback, and to clarify how far his involvement should go with the plans. XK replied on 16 August: "*Thank you for your wonderful responsiveness so far. I'm excited about that as an indicator ahead. I worked through both sales and export templates and can see lots of value ... I would like you to participate in the [redacted] possible business model discussion/s.*" In the same email, XK states: "*We are working to confirm involvement of two others on the board today and tomorrow. We are a significantly good investment too if you wish to please consider that proposition as well*". After a further exchange that day, XK asked MW to begin a SWOT analysis and actionable plan, market by market. MW was then invited to attend a meeting with [redacted]. MW offered a Partnership Strategy Document to assist with those negotiations. On 26 August, XK asked MW to lead and progress the Export Plan, and participate in [redacted] negotiations, and lead the SWOT analysis at the first advisory board meeting. MW then drafted a Partnership Sales Strategy. XK thanked MW for the work and stated that the

document deserved attention at the board meeting. On 31 August, XK thanked MW for “*getting involved with us and bringing already such a large contribution*”, and asked for the export plan and sales strategy to be turned into one document (Commercial Strategy).

- (d) However, after the early draft of the Commercial Strategy was exchanged, which contained a draft table of contents, the parties began to see things differently, and XK became concerned about the document being generated without the required detail. XK proposed that MW join the leadership team or make an equity purchase. The lack of any discussion by that stage about hours spent to date, and the lack of provision of any invoice, adds weight to the finding that there was a misunderstanding about the basis of the consulting work. However, it does not detract from the fact that MW held a genuine belief that he had been asked to do work, and that the work was of some value to the company. The involvement would have ceased by that time if that was not the case, and in fact, MW was being offered a greater role.
- (e) XK then sent MW an email setting out funding issues for the company, and urging MW to invest. Two days later, MW sent an invoice for work done in August. XK then referred to the work done as “templates” that had no value, and the relationship did not recover. However, given all the encouragement and statements made whilst the work was being undertaken, it is not open to XK to state that he did not ask for the work, or that it had no value. Whilst the company had not agreed to pay, XK had given this impression.
- (f) In these circumstances, whilst there is no contractual obligation to pay for hours worked, it would be unjust for the company to retain any benefit and not pay anything for it. The discussions about equity involvement or management roles came too late to have been a motivator for MW at the time of the original discussions. The enthusiasm generated by the prospect of board involvement and the underlying friendship could have been a motivator, but the statements made to MW after the work began encouraged his further involvement on a misunderstood basis.
- (g) In this setting, it is appropriate in principle for MW to be paid a reasonable sum for services supplied for any consulting work that could be proved to have produced a benefit to the company. Where there is no contractual obligation for an hourly rate at a fixed price, the award is based on a measure of the value received, with reference to costs incurred.

How much is due to MW for the work undertaken?

- 15. Under the terms of the agreement for advisory board work, the sum due is \$2,204.32 (\$900 x 2 plus expenses of \$116.80, plus GST).
- 16. For the balance of the work done in a consulting capacity, MW claimed over \$10,000.00 for the work done in August, and a further \$4,657.50 for work done in September. However, he charged for a number of days spent, and a number of meetings. It is the nature of a *quantum meruit* claim that the award is based on reasonable expectations and value received. Having reviewed the invoices and the documents produced, I make the following findings:
 - (a) No charge can be made for the meeting on 9 August. Meetings prior to any arrangement are exploratory and it cannot be said there was any expectation of payment, or benefit received.
 - (b) The early sales and export plans were headings and templates with insufficient content relevant to the company to be of value in any commercial sense. The comments made by XK about these can only be read as encouraging remarks about early work made on the basis that, if they were filled in, they could be useful. The SWOT analysis was in the same vein. The Partnership Strategy document appeared to be a generic document that was not written in its entirety by MW. However, he had gone through and added the name of the company and some key points about it in relevant places. This document would be of use once more company-specific information was loaded into it. However, this never occurred.
 - (c) In the second draft of the export plan, there is a market specific review of Australia and other countries. Whilst this is generic, there is a lot of information in that of relevance to an exporting

company that has been pulled together from other sources into one document. Whilst that information is generic, it was sought. In addition, a task list was also created. A [redacted] partnership exploration was also produced, as requested. MW also attended a meeting with [redacted] as requested.

17. It is not possible to place a commercial value on this information. None of the documents went far enough, and MW never had sufficient access to the company before the relationship ended. However, the company encouraged their creation, and in relation to the latter list in (c) above, some value was received, even if it was of an early or generic nature. Whilst the company states that it never used any of the information, and does not use Word documents, none of this was relayed to MW at the time.

18. Having regard to these factors, I have awarded the following for work done in August:

(a) Task List, Work on export strategies	450.00
(b) Questionnaire, [redacted] Partnership exploration	450.00
(c) [redacted] meeting 23/8/18	900.00
(d) Expenses for [redacted] meeting	<u>116.80</u>
	\$1,916.80

Plus GST **\$2,204.32**

19. Whilst the advisory board work was at \$900.00 per day, the work done on the export strategies documents about overseas countries was early work based on internet research about those markets in general, and was yet to provide advice about strategic direction relating to the company's operations. A lesser daily rate is applicable in a *quantum meruit* award for that type of work. The same applies for the type of information in the [redacted] documents. However, as the meeting itself was more important in a commercial sense, and it was seen by the company has being of value to have MW present, his presence at the meeting should be valued at the full daily rate.

20. No sum has been awarded for work done in September. By the dates stated in the invoice, correspondence between the parties showed that the relationship was being renegotiated, and any expectation of remuneration under the original context had passed.

21. Adding the August award (\$2,204.32) to the equivalent sum due for the advisory board meeting (\$2,204.32), the total sum due is \$4,408.64.

Referee:

J Robertshawe

Date: 4 December 2019



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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 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, and 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>.