



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2021] NZDT 1403**

**APPLICANT NN Limited**

**RESPONDENT FS**

**The Tribunal orders:**

FS is to pay \$2,051.28 to NN Ltd on or before 28 May 2021.

**REASONS**

**Brief Details of Claim**

1. In July 2019 FS engaged NN Ltd (NN) through her Barrister to provide expert valuation advice in relation to an insurance claim and related valuation in respect of storm damage to FS's property at [address]. NN was to review an assessment by OX of the damage; review the cost of works assessed by OX; and review the HI report and costings (refer letter of engagement dated 5 July 2019).
2. It was agreed that NN would not be paid until FS had settled with her insurer and received payment.
3. The fee basis for the initial scope of work was \$185 plus GST per hour with a budget of \$5,000 plus GST. Excluded from the initial scope of work was any follow up work that might be required.
4. NN's initial report was supplied in August 2019.
5. In October 2019, NN was asked to attend a site meeting on 18 November 2019. Further work was requested in the period January- March 2020.
6. The total cost of the work done was \$8,429.28. NN made a mistake on Invoice 1655 dated 31 May 2020 sent to FS by failing to include reference to previously issued Invoice 1635. In response to the Invoice, FS paid a total of \$6,358.00 (by way of two separate payments of \$20 and \$6378). EH (NN) thanked FS by email for her payment, not realising there had been a mistake or that no GST had been paid. On 15 July 2020, NN sent an email to FS explaining there had been errors and requesting payment of the unpaid balance of \$2,051.28. FS responded that same day disputing payment for several reasons. EH replied that he would write the balance off.
7. On 10 December 2020, NN advised FS that he had reconsidered and sought payment of the outstanding amount. FS did not pay.

8. NN claimed payment of the outstanding \$2,051.28 plus \$1,634 for interest at 2%/mth from 30 January 2020. In addition NN claimed \$539.88 for 2 ½ hours time preparing for and attending the Tribunal hearing and \$90 for the Tribunal filing fee.

### **Issues**

9. The issues for the Tribunal to determine are:
- (a) Whether NN is prevented from bringing this claim because EH previously told FS he would write off the debt;
  - (b) Whether FS has been charged for work she did not request;
  - (c) Whether NN should be paid for a meeting in November 2019 where EH had little input;
  - (d) Whether NN has charged excessively for work done;
  - (e) Whether NN is entitled to claim for an invoice mistakenly missed from NN's final invoice;
  - (f) Whether FS is exempt from paying GST;
  - (g) Whether NN is entitled to interest and if so, how much;
  - (h) Whether an award of costs of proceedings can be made in favour of NN.

### **Is NN prevented from bringing this claim because EH had previously told FS he would write off the debt?**

10. A contract can be discharged by agreement. However, where a contract has been wholly performed, a promise by one party to discharge the other from contractual obligations must be supported by separate consideration to be contractually binding.
11. That means that unless NN received something of value or benefit from FS in exchange for the promise to write off the debt, the promise is not legally binding.
12. NN did not receive anything of value or derive any benefit from its promise to write off the debt and therefore NN is entitled to bring this claim.

### **Has FS been charged for work she did not request?**

13. A principal is bound by the actions of an agent acting within the agent's actual and apparent authority.
14. In this case FS is the principal. She appointed an agent, her barrister. The barrister, acting as FS's agent, engaged NN.
15. I am satisfied that FS gave her barrister authority to act for her to help resolve the dispute between herself and her insurer.
16. FS says that she did not know that EH was to attend the November 2019 meeting or do extra work during January-March 2020. FS says she found out after each event. When FS raised it with her barrister, he told her that NN was "part of the team".
17. Even if FS did not expressly ask her barrister to engage NN to attend the November 2019 meeting or do extra work during January-March 2020, because the barrister had previously acted to engage NN's services, NN was entitled to believe that the barrister did have the authority to engage NN for the additional work. This is called apparent authority and FS is bound by the actions of her agent who engaged the services of NN. If FS has any issue with her barrister's actions, that is a matter between herself and her barrister.
18. I find that FS, through her barrister, did engage NN for all work done. FS is bound by the actions of her barrister engaging the services of NN for the meeting in November 2019 and the additional work in March 2020.

### **Should NN be paid for the meeting in November 2019 where EH had little input?**

19. FS says that she received no value from EH's presence at a site meeting at the property on November 2019 and that he did not need to be there.
20. However, I am satisfied that, through her barrister, FS requested EH attend the site meeting. EH agrees that he had little input at the meeting because the focus of the meeting was not within his

expertise. Nevertheless, EH had been requested to attend, he did attend, and was available in case his expertise was required. Therefore I find NN is entitled to be paid for EH's time associated with attending the November 2019 meeting.

#### **Has NN charged excessively for work done?**

21. NN may not charge more than a reasonable price for work done.
22. FS said that her barrister had charged less than NN charged, despite that the barrister worked on FS's dispute with her insurer over a longer period of time than did NN.
23. I find that NN has not charged excessively for the work done. NN's hourly rate was set out in the letter of engagement dated 5 July 2019 for the initial scope of work. The initial scope of work was within the \$5,000 budget. NN has provided an oral description of the work done in November 2019 and January-March 2020 and has supplied time records for the work associated with each piece of work and with each of the invoices. I accept EH's evidence. The rate charged is consistent with the hourly rate in the letter of engagement. FS has provided no evidence that NN has charged more than anyone else in the profession.

#### **Is NN entitled to claim for an invoice mistakenly missed from its final invoice to FS?**

24. I am satisfied that Invoice 1635 dated 29 February 2020 for \$1,116.94 was sent to FS when it was generated, as all other invoices were sent when they were generated. Payment for invoices sent was not expected to be made until FS had received payment from her insurer.
25. NN sent invoice 1655 dated 30 April 2020 to FS. This was intended to be the final invoice. That invoice showed a figure of \$6358.56 as being the total amount of the claim to date. GST on that figure was shown on Invoice 1655. The prior Invoice 1635 for \$1,116.94 was mistakenly omitted from Invoice 1655. Responding to invoice 1655, FS paid \$6,358.00 to NN, which did not include GST and nor did it include the unpaid invoice 1635 for \$1,116.94 GST inclusive.
26. A person or company that has completed work for another is not precluded from charging for that work simply because of a mistake on the final invoice. The mistake was discovered 5 days after FS made her payment and there has been no detriment to FS as a result of the mistake.
27. I find that NN is entitled to claim for Invoice 1635 that was missed from invoice 1655.

#### **Is FS exempt from paying GST?**

28. In her email dated 15 July 2020 to NN, FS said she had been told that no GST would be added to the invoice as she was not a business. FS also said that EH had told her that she would not have to pay GST if she paid the account within 2 months. FS thought she may not have to pay GST as she lives in [country].
29. The service provided by NN is not one of the services that is exempt from GST under the law. Therefore NN is obliged to charge all of its customers GST. The contract was formed in New Zealand and the work was carried out in New Zealand and therefore the New Zealand law relating to GST applies.
30. EH denies telling FS she would not have to pay GST because she is not a business. The wording in FS's email of 15 July 2020 infers that it was FS's barrister who FS says gave her that advice about GST (FS's barrister has the first name "E" as does EH). Even if FS's barrister did tell her that she would not have to pay GST because she was not a business (which seems unlikely), that is wrong.
31. FS said that EH told her in an email she would not have to pay GST if she paid the account within 2 months. However, EH's email of 4 May 2020 actually says "Attached is my invoice updated for all work on your property. You may recall that the arrangement allowed interest where settlement moved into 2020, however I am more than happy to waive that right provided the matter settles within the next couple of months". At the hearing, FS accepted she had been wrong in her recollection that EH had agreed in an email to waive GST if the invoice was paid within 2 months.

32. I find that FS is not exempt from paying GST either by law or because any agreement with EH.

**Is NN entitled to interest and if so, how much?**

33. EH said that it was an agreed term that payment would not be made until FS settled with her insurer. Interest would not be charged unless settlement of the insurance claim extended into 2020.

34. The Standard Terms of Engagement attached to letter of engagement dated 5 July 2019 states "Payment of invoices is to be completed by the 20<sup>th</sup> of the month following and should be made directly into our bank account. We reserve the right to charge interest on any unpaid amount which is more than seven days overdue. Interest will be invoiced separately and calculated at the rate of 2% a month".

35. NN initially claimed compounding interest of \$1,634.00 commencing from 30 January 2020 at the rate of 2%/month, revised down at the hearing to \$372.78 for interest for the period 11 July 2020 – 11 April 2020 at simple interest of 2%/mth.

36. I find that NN is not entitled to any award of interest for the following reasons. Firstly, FS was not told prior to January 2020 that NN intended to exercise its right to charge interest, so FS did not have an opportunity to avoid that cost by paying the invoice. Secondly, the reason FS did not make full payment when she received invoice 1655 was partly because NN had mistakenly missed off invoice 1635 from it. Thirdly, NN told FS in July 2020 that NN would write off the debt. There was a delay of 5 months before NN advised FS it had changed its mind, causing more resentment and intransigence on FS's part. Fourthly, the way NN sets out its invoices is confusing. It is difficult to understand the total figure including GST that is outstanding from the way invoice 1655 is set out. Finally, the reason NN was not paid the full amount promptly is at least in part (if not wholly) due to NN's own actions.

**Can the Tribunal make an award of costs?**

37. "Costs" are all those costs associated with preparing for and attending a hearing. The Disputes Tribunal is able to make an award of costs only in very limited circumstances (S.43 Disputes Tribunal Act).

38. NN claims the cost of the time preparing for and attending the hearing and the Tribunal filing fee. These expenses fall under the definition of "Costs". The Tribunal is not able to make an award of costs in the circumstances of this case.

**Outcome**

39. FS is to pay \$2,051.28 to NN for work done.

**Referee: J.F. Tunnicliffe**

**Date: 28 April 2021**



## 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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.