



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1332

APPLICANT NN

RESPONDENT MF

The Tribunal orders:

The claim is dismissed.

Reasons

1. Ms F signed up online to complete a course of weekly online business coaching with Mr N. The sessions were one hour, and cost \$99.00 each.
2. On 10 November 2019, Ms F advised that she wished to terminate the coaching services. No further payments were made after termination. Mr N seeks \$600.00, on the basis that his terms and conditions require a 6-week (30 business day) notice period, during which period he could have expected to receive this sum. Ms F states that she never received adequate notice of the terms and conditions requiring this notice period.
3. The issues to be resolved are: (a) Do Mr N's terms and conditions normally include a notice period? (b) Was this term within the contract entered into by Ms F? (c) If so, was Ms F given adequate notice of that term?

Do Mr N's terms and conditions normally include a notice period?

4. I accept that Mr N's terms normally include a notice period.
5. The terms state that weekly debits will continue until customer services receives an email terminating the arrangement, and that 30 business days' notice is also required to cancel the account. The terms are arguably unclear that those weeks are to be paid weeks, and it would be wise to clarify this for the avoidance of doubt. However, it is also arguable that a notice period is designed to enable recovery of payment, and that an obligation to make ongoing payment is implied. For the reasons set out below, nothing turns on this.
6. Ms F stated that she considered the notice period was unreasonable. Decisions about the reasonableness of terms is made by the Commerce Commission under the Fair Trading Act 1986, rather than the Disputes Tribunal.
7. It is noted that there is a 30% penalty applied in the terms to overdue accounts. Penalties of this nature are not recoverable in law. Debt recovery costs may be, but it is only possible to recover losses, not any sum imposed by way of a penalty. Nothing turns on this observation given that recovery costs were initially pursued, but no penalty was sought in this case.

Was the notice period within the contract entered into by Ms F?

8. I am unable to make a finding that the notice period was incorporated within the contract entered into with Ms F. This is so for the following reasons:
- (a) A contract is made up of an offer, and an acceptance, on agreed terms. Whilst there was an agreement to pay for services, the evidential onus was on Mr N to prove that additional terms (such as the notice period) were understood and accepted by Ms F.
 - (b) Whilst Mr N produced a script that he stated was used by him at the time he signed up Ms F, it was disputed by Ms F that she was advised in her conversation about the notice period. In the absence of a recording, I was unable to make a finding about the matter.
 - (c) Mr N stayed online, when he was signing up Ms F, and talked her through the process. To complete the contract, Ms F was to tick a box confirming agreement to terms and conditions. As this occurred whilst Mr N was taking her through the set up process, I was unable to make a finding that Ms F read those terms, or had adequate notice of them. As a provider of a consumer service, Mr N has a duty to ensure knowledge of any unusual terms, and to allow customers to make an independent purchasing decision about those terms, I could not be satisfied this had occurred in this case.
 - (d) Mr N stated that EzyPay (the payment gateway used by his business) automatically send its own terms, and Mr N's terms, as soon as the set-up process is complete. Ms F states that the link to Mr N's terms did not work when she tried it. Mr N disputes this, and has shown with a later link that the PDF opens, and shows the notice period. Nothing turns on this dispute, as any terms must be incorporated and agreed *before* sign-up. Any terms sent after set-up are not incorporated into the contract.

Was Ms F given adequate notice of the term?

9. As I cannot make a finding in this case that the term formed part of the contract with Ms F, I need not consider whether adequate notice was given of an incorporated term.

Referee:

J Robertshawe

Date: 18 June 2020



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 28 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 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, 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>.