



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1342

APPLICANT **NO Ltd**

RESPONDENT **JL Limited**

SECOND **SI**
RESPONDENT

The Tribunal orders:

SI is liable to pay NO Limited \$4,156.98 on or before 20 February 2021.

Reasons

1. SI accepts responsibility for a vehicle accident that caused damage to one of NO's power poles in May last year. NO says it has cost \$5,196.23 (including GST) to repair the damage SI caused and claims this sum from him. SI is insured with JL. Liability for the damage has been accepted, but JL, and SI, claim a deduction should be made from the amount claimed to reflect betterment and a failure to mitigate costs.

2. NO says the costs of repairs involve both a materials and labour component and associated costs, specifically:

- a. a replacement pole and fittings;
- b. work in hours across 8 staff; and
- c. costs for mileage and plant.

3. JL and SI have referred to *T&G Processed Foods Ltd v Hawk Packaging* [2019] NZHC 643; *Echo Records v Frederick Reid* (unreported, District Court, Christchurch NP 4618/94 27 May 1997) and *Leaderbrand Produce Ltd v Danfoss & Anor* (unreported, High Court, Auckland CP 2006-404-6531, 23 May 2008, Hammond J) in support of its position. I have read all of those cases and from them it appears that:

- a. A party claiming damages must act reasonably to minimise loss. Reinstatement may be appropriate if reasonably necessary for the business.
- b. Betterment can be considered the unexpected improvement in a party's position including where a replacement items is of greater value; is more efficient or useful or has a longer lifespan.
- c. A deduction for betterment should occur after allowance for any disadvantages associated with the involuntary nature of a party's investment (for example interest on the premature use of capital to replace a wasting asset). This "middle ground" is as opposed to either 'extreme'

position of the full cost of replacement without deduction for betterment or little or no recognition of the cost of unplanned and unwelcome investment of capital forced upon a party.

d. A party claiming damages has the onus of proving the presence and quantum of loss flowing from the unexpected expenditure. A defendant has the onus of showing betterment has occurred and the value and extent of that; that replacement was unnecessary or there has been a failure to mitigate loss.

e. Own costs of labour, where an employee was being paid anyway and could be reassigned, cannot be claimed.

4. But for SI's accident NO would not have needed to replace the pole and fittings and arrange for its staff to do so and with some urgency, on the day of the accident and I accept this was reasonably necessary for NO to continue its usual operation and comply with regulatory requirements.

5. That said, the pole and fittings would at some point require replacement. The physical items have a finite lifespan and at some point in time NO would have had to replace them and incur a cost in doing so. SI's accident brought that process forward and presumably replacement will now occur at a later date. I accept too NO has had immediate investment forced upon it through no fault of its own.

6. On the points made and referred to in the cases, I consider it is appropriate to allow a deduction for betterment of the pole and fittings. While SI and JL have approached this on a 'lifespan' basis and suggested a 40% reduction is appropriate, that ignores any cost of investment of NO. NO has not sought to quantify forced investment or other costs to it. In the round I consider a 20% reduction is appropriate.

7. As to the balance of the repairs charged, JL suggested lower employee rates and time spent should be considered as the starting point and helpfully suggested some figures at the hearing. I have also had regard to the case of *Unison Networks Limited v Nottingham Forest Trustee Limited* [2019] NZHC 2280 in support of JL's position, particularly that the summary of costs information NO has relied on should be considered insufficient. In the *Unison* case the repair costs claimed were recorded by the Court as being substantiated by material lists, timesheets and subcontractor's invoices. JL is critical of NO's refusal (for stated confidentiality and privacy reasons) to provide similar underlying source documents supporting its cost recovery rates for mileage and labour. Corrected errors in NO's information summary has concerned JL.

8. I do not see anything sinister in the fact NO has had errors in both the hours spent and the age of the pole, or consider there is a sound basis for suggesting NO's assertion it has simply applied calculated cost recovery rates cannot be relied on because the costs have been inflated. However, in light of a lack of underlying source documents (which I understood NO will consider providing in the future) I think a 20% reduction of those costs too results in a fairer outcome for both parties.

9. Applying that deduction across the sum claimed, the balance is to be paid as ordered above.

Referee: J Costigan
Date: 19 January 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 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>.