



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 193

APPLICANT O Ltd

RESPONDENT NT

The Tribunal orders:

NT is to pay \$14,109.91 to O Ltd on or before Monday 1 May 2023.

Reasons:

1. NT signed a contract for services as an independent contractor with O Ltd on 2 March 2022. Appendix 2 of the agreement outlined the calculation of commission payable to the real estate agent. Clause 2.4 of the appendix provided that *“an advance of \$40,000 on commissions will be paid to [NT] on a weekly basis being \$769.23”*.
2. NT achieved one sales commission and a portion of the weekly payment advance was deducted from the commission that was otherwise due to him. NT terminated the contract on 22 August 2022 leaving a balance of \$13,806.31 of advances on commission paid to him. O Ltd claimed for payment of its weekly advances and for insurance premiums it incurred on NT’s behalf.
3. After hearing from both parties, the issues to be resolved are:
 - (a) Was NT liable to refund the advance on commissions he received if he did not achieve a commission payment?
 - (b) Did NT breach the contract by failing to refund O Ltd for the insurance premiums it paid on his behalf?

Was NT liable to refund the advance on commissions he received if he did not achieve a commission payment?

4. NT agreed that \$13,806.31 was paid to him in advance of his commission and that it remained outstanding when he terminated the contract. However, he said he was not liable to refund that sum as it was not a debt between O Ltd and himself. As there were no outstanding commissions upon cancellation of the agreement, there were no funds to meet any advance in excess of what O Ltd had already recovered from the single sale he made. He considered the contract set out the terms on which he was bound, and there was no agreement that the advance he received would be repaid to O Ltd from any other source apart from commission payments NT received.
5. SP, director of O Ltd, agreed that the written contract was silent on whether NT would need to refund the commission advances paid to him if he did not earn a sufficient commission to cover that cost. However, he considered it was reasonably implied into the term that if NT failed to make sufficient

sales to cover his advance on commission payments, then he would be liable to refund O Ltd if he terminated the contract.

6. Appendix 2 sets out the basis on which a commission would be paid to the licensee salesperson. The only clause that refers to the advance is Clause 2.4, which simply states that “*an advance of \$40,000 on commissions will be paid to [NT] on a weekly basis being \$769.23*”. It does not provide how the advance was to be repaid. Clause 2 provides that NT was to be paid a commission, and from that commission O Ltd would deduct:

2.1 The payment of any listing fees, referral fees, or commission due to other Real Estate Agencies.

2.2 The payment of \$625.00 administration fee for each sale.

2.3 The payment of an 8% Franchise and Technology fees to [real estate company].

7. Clause 3 provided that the remainder of the net commission after the deduction of 2.1 to 2.3 was known as the basic commission, and that sum was divided between the agent and O Ltd accordingly to an ascending prescribed scale. Clause 2.1 to 2.3 costs were all specified to be deducted from the commission. The clause, however, is silent on whether the weekly advance on commissions would be deducted from the commission and how the advance was to be repaid. What the clause did specify, however, was that the money was paid as an advance on future commissions and therefore was to be repaid.
8. I accept the position of both the parties that it is reasonably implied within clause 2 that the advance would be deducted from the commission to be paid. In fact, that did occur when NT made his first sale.
9. The agreement provides that NT was to be an independent contractor, was to supply a GST registration number and render a tax invoice for all commission charged to O Ltd, and was liable to pay his own taxes. He was not an employee, and his earnings were from commissions only. I therefore find that the advance was a debt that NT was to repay. It was implied in the agreement that it would be deducted from future commissions, but I do not agree that if there was no commission payable that NT would not need to repay the advance. In the event that NT terminated the contract without earning sufficient commission to repay the debt, then I find that it was reasonably implied that he would repay the balance of the advance paid to him. I find that an objective bystander observing the formation of the contract would conclude that the parties did not write that term into their agreement because it was obvious to them both. I therefore find that NT is liable to refund O Ltd the full amount of the balance of the advance he received.

Did NT breach the contract by failing to refund O Ltd for the insurance premiums it paid on his behalf?

10. NT agreed that the contract provided that he was liable for the repayment of the insurance premium payment that O Ltd incurred on his behalf. SP provided invoices that showed O Ltd incurred a charge of \$303.60 over the six month period of the contract. The sum of \$303.60 is therefore added to the amount of the order.

Conclusion

11. As O Ltd has proven that NT breached the contract by failing to repay the advance it paid to him of \$13,806.31 and the insurance premiums of \$303.60, an order is made for payment of both of those amounts.

Referee: Cowie DTR
Date: 13 April 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>.