



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

[2023] NZDT 695

**APPLICANT**     V Ltd

**RESPONDENT**   BS

**The Tribunal orders:**

BS is to pay V Ltd the amount of \$26,318.75 on or before 23 January 2024.

**Reason**

1. The dispute concerns insurance commissions and whether V Ltd can 'clawback' commissions from BS. BS was engaged as an independent contractor for V Ltd providing personal insurance to clients. Upon making a sale the insurer would pay a commission to V Ltd, V Ltd kept a portion and passed the rest to BS. If a client terminates the policy the commission is clawed back by the insurer from V Ltd which in turn claws it back from the independent contractor. V Ltd is seeking \$28,000; BS disputes the claim.
2. The issues to decide are:
  - I. Is it reasonable to imply a clawback clause in the contract?
  - II. If so, would such a clause be a personal guarantee?
  - III. Did V Ltd contribute to the clawback through lack of management?

**Implying the clause**

3. To remove any doubt, V Ltd and BS entered into a contract, because it is unwritten and its terms are disputed, the Tribunal may impose reasonable terms necessary to make it enforceable. Reasonable terms may include terms common to such contracts.
4. V Ltd says a clawback clause is reasonable because it is in the unsigned contract, BS paid some 'clawback' money, such a clause for independent contractors is common, and BS had such a clause with his previous agency. BS says he did not sign the contract because of the clause and V Ltd was aware of this, he paid some 'clawback' money out of necessity so he could continue to work and make an income, V Ltd has not provided evidence to show such clauses are common between independent contractors and agencies, and any arrangement he had with the previous agency is not relevant to this dispute.
5. When asked if BS ever worked for another agency where there was no such clause BS said he had not. If such clauses are common, then it is reasonable to imply such a clause into the contract. BS declined the opportunity to adjourn the hearing to obtain evidence to the contrary.
6. I find the contract has a clawback clause.

## **A personal guarantee?**

7. BS says V Ltd is trying to enforce a personal guarantee against him when no guarantee has been given. He refers to the Property Law Act 2007 s27(2) which provides a personal guarantee must be in writing and signed by the guarantor. He says the 'clawback' obligation is one between [Insurance Company] and V Ltd, and any obligation V Ltd is trying to enforce against him would have to be a personal guarantee he would reimburse V Ltd for any 'clawback' paid to [insurance company], which is not enforceable because it is not compliant with s27(2).
8. A personal guarantee is a binding undertaking someone gives to guarantee performance of a party to a contract of which the party giving the guarantee is not a contracting party, and which is enforceable against the guarantor by the other party to the contract. If the contract between [Insurance Company] and V Ltd was signed by BS as a guarantor, then he would be giving [Insurance Company] a personal guarantee of V Ltd's performance of the contract. Is an undertaking in a contract between V Ltd's and BS for BS to reimburse V Ltd for any 'Clawback' V Ltd must make to [Insurance Company] a personal guarantee? [Insurance Company] has no power to enforce anything against BS so there is no guarantee given to [Insurance Company]. I do not believe this is a guarantee, it is most likely an indemnity which is an agreement in a contract that one party will indemnify the other for defined losses. V Ltd is wanting to be indemnified by BS for claims against it by [Insurance Company], this to me has the hallmarks of an indemnity clause, not a personal guarantee.
9. I find the clawback clause is not a personal guarantee and therefore, even if not in writing, is enforceable.

## **V Ltd's performance**

10. BS raised a separate matter which I must address, that is whether V Ltd's did not fulfil its side of the contract by failing to follow up with clients BS signed up which ultimately led to some clients cancelling their contracts. He has provided an email from X and MG which says they found V Ltd's communication poor and often failed to respond to emails, and when BS came on the scene in 2021, they found him to be helpful and professional. They do not say whether their insurance policy was cancelled, and they are not on the list of clients whose commissions were clawed back. BS has not provided evidence that any of the clients on the list cancelled their insurance because of poor service by V Ltd's and declined the offer of adjournment to make enquiries. I am satisfied the list of 'clawback' clients records those clients that cancelled their policies and in the absence of evidence otherwise I find it not proven V Ltd's contributed to the cancellations.
11. In summary, BS was acting as an independent contractor in an industry where clawback clauses appear to be common and where BS would have most likely always had such a clause, no matter whether he contracted directly with an insurer or through an agency such as V Ltd's I find the clawback clause is implied into the contract and is not a personal guarantee and order the amount of clawback for the clients provided by V Ltd's be paid, that amount being \$26,318.75. I do not allow the claim for costs, time and attendance etc as such costs are not recoverable. I do not allow the claim for interest because I do not imply such a clause into the contract.

**Referee:** P McKinstry  
**Date:** 8 December 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>.