(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 335**

APPLICANT **X Ltd**

RESPONDENT **U Ltd**

The Tribunal hereby orders:

The claim by X Ltd is dismissed.

X Ltd is to pay U Ltd $8,418.54 on or before 5pm on Wednesday 22 March 2023.

Reasons:

1. In March 2021, X Ltd ("X Ltd") and U Ltd ("U Ltd") entered into discussions regarding the provision of services by U Ltd to X Ltd relating to X Ltd's marketing needs. In April 2022, the parties entered into a written agreement whereby U Ltd would provide marketing services to X Ltd. Unfortunately, the relationship between the parties broke down. X Ltd claim $30,000.00 from U Ltd. U Ltd counterclaims $10,675.53 from X Ltd.

2. XX ("XX") appeared on behalf of X Ltd at the Tribunal. XX is a director of X Ltd. DH ("DH") appeared on behalf of U Ltd at the Tribunal. DH is a director of U Ltd.

3. The issues to be determined are as follows:

   (a) What were the terms of the contract between the parties?

   (b) Did the contract include written and oral terms?

   (c) Was there a misrepresentation/s made by U Ltd which induced X Ltd to enter into the contract?

   (d) Have either party breached the terms of the contract?

   (e) Is U Ltd liable to pay X Ltd all or any part of the amount claimed of $20,000.00?

   (f) Is X Ltd liable to pay U Ltd all or any part of the amount claimed of $10,675.53?

What were the terms of the contract between the parties?

Did the contract include written and oral terms?

4. A contract exists when there is offer, acceptance, consideration, and the parties intend to be legally bound. Consideration can be described as the price paid by each party for their rights under the terms of the contract. The terms of a contract should be certain and known to both parties. The law of contract provides that a contract can be written or oral. A contract can also be partially written and partially oral.

5. In contract disputes, there is a legal rule called the Parol Evidence Rule. The Parol Evidence Rule says that extrinsic evidence, including discussions and negotiations that occurred prior to entering into a written contract should not form part of a contract which is in written form. This is on the basis that the terms of a written, and signed, contract should be able to be relied on by parties as setting out their rights and obligations under a contract. However, in limited circumstances prior oral agreements can be implied into the terms of a written contract.

6. There is no dispute between the parties that a written contract was signed by XX, on behalf of X Ltd, and DH, on behalf of U Ltd. Further, there is no dispute to the fact that the signed agreement was exchanged between the parties on or about 4 April 2022 by way of email.

7. XX's evidence was that prior to signing the written contract there had been many conversations between him and DH. XX said that it was verbally agreed that U Ltd would:

   (a) Take over the marketing for X Ltd;

   (b) Perform to "some benchmarks"; and

   (c) An assurance was given by U Ltd that it would not "drop" below stated benchmarks.

8. XX pointed out that the "links" to U Ltd's website that were recorded on the written contract were not active. XX said that that meant that X Ltd was not able to go to the website of U Ltd, via the link recorded on the written contract, to view U Ltd's general terms and conditions. XX did however acknowledge that there was a box, which had been crossed, on the written contract which recorded an acknowledgement and agreement that U Ltd's full terms and conditions were located at a specific address and that he would read those terms and conditions within five days of signing the agreement.

9. Further, XX accepted that the acknowledgement paragraph in the written contract said that X Ltd was entitled to cancel the agreement at any time within five days of signing, being the "cooling off period", with no penalty. Nevertheless, despite that acknowledgement box, XX was adamant that he was unable to reach U Ltd's full terms and conditions via the link provided in the written contract.

10. DH's evidence was that the terms of the contract between the parties were only those set out in the written agreement. DH said that the written agreement was only for a three-month period, and it set out the price to be paid for the services provided. DH drew the Tribunal's attention to the acknowledgement box, discussed above. However, he did not appear to disagree with XX's evidence, being that the link within the written contract was not operable.

11. DH said that he had not made any verbal representations to X Ltd and there had been no verbal agreement before the written contract was signed about "hard numbers" with respect to benchmarks that could be, or would be, achieved. DH said it was standard operating practice to "steer clear of numbers" in an initial contract, because "every day is different" and the "digital market can be volatile". DH's evidence was that numbers and benchmarks were not given prior to or at the time of the written contract being entered into, because U Ltd "needed to establish benchmarks" on which future benchmarks could be set. DH said that is the reason why the written contract was only for a three-month term.

12. I am satisfied that there were many discussions between the parties prior to the written contract being entered into in April 2022. I accept XX's evidence that he was unable to access U Ltd's full terms and conditions via a link that was recorded in the written terms of the contract.

13. There is disagreement between the parties as to whether or not U Ltd promised that specific benchmarks would be achieved by U Ltd for X Ltd. On the one hand, XX was clear in his evidence that U Ltd had promised an increase in the volume of leads as well as the quality of the leads. However, DH's evidence is equally clear when he said that there were no specific numbers or benchmarks given to X Ltd prior to the written contract being entered into. I am therefore faced with a "he-said-he-said" situation.

14. I find that there is no certainty in the evidence as to any oral agreements reached before the written contract was signed. Therefore, I find that the Parole Evidence Rule prevents oral terms relating to specific benchmarks being added as terms of the contract between the parties.

15. I am satisfied that the terms of the contract do not include U Ltd's full terms and conditions, because I accept XX's evidence that those terms and conditions could not be accessed via the link in the written contract.

16. I find that the terms of the contract between the parties are those terms set out in the written contract. Based on the terms of the written contract, I find that the terms of the contract are as follows:

    (a) The term of the contract was for a three-month period with a recorded start date of 7 April 2022. Accordingly, the end date of the contract was 6 July 2022.

    (b) X Ltd would pay U Ltd:

        (i) $1,800.00 plus GST per month for "Get noticed: Google AdWords – 70% ad spend / 30% management fee";

        (ii) $1,200.00 plus GST per month for "Get social: Engage: Setup – 25% management fee"; and

        (iii) $800.00 plus GST per month as a one-time upfront payment for "Google set up".

    (c) 30 days' written notification could be given prior to the expiry of the contract to discontinue U Ltd's services.

Was there a misrepresentation/s made by U Ltd which induced X Ltd to enter into the contract?

17. The Contract and Commercial Law Act provides that if a party to a contract makes a misrepresentation, innocently or fraudulently, which is relied on by the other party and induces the other party to enter into the contract then a misrepresentation at law can be said to have occurred.

18. XX's evidence was that DH represented himself as being an "expert" in the type of marketing services that X Ltd needed. XX said that DH verbally promised that there would be "month on month increases" in the volume as well as the quality of leads. XX repeated several times in his evidence that it was important to draw a distinction between the volume of leads and the quality of leads.

19. XX said that DH represented U Ltd as being a "competent provider – but he is not". XX said that he would never have engaged U Ltd to do the work if DH had not represented that he was competent. In particular, XX said that DH represented that:

    (a) He was "very successful already".

(b) He was an ex-[redacted] employee.

(c) He had been responsible for training other ad agencies to be successful on [redacted].

20. XX's evidence was that the above three factors were the primary representations that he relied on when signing the contract on behalf of X Ltd.

21. DH confirmed that he did tell XX that he was successful and that he was an ex-[redacted] employee. Further, DH agreed that he told XX that he had previously been responsible for training other ad agencies to use and be successful on [redacted].

22. DH's evidence was that he had worked with many "big agencies in [city]" over the years. He also said that he had worked directly under "OC, who is a SME manager at [redacted]". He said that this was to look after small and medium sized businesses in the Asia-Pacific area. DH said he was previously "contracted to [redacted]". DH's evidence was that his final role as an agency account manager meant that he was in charge of helping other ad agencies – "to show them how to use [redacted] and ad management to get results".

23. DH's position was that whilst he would not have provided XX with "much detail", he accepted that he would have represented that he was experienced. DH advised the Tribunal that he had started in marketing in 2008 and had started [redacted] marketing in "roughly 2015". DH said, "I was also Google-certified".

24. DH repeated that he did not specifically tell XX that U Ltd would increase the amount and quality of leads by giving benchmark targets or numbers.

25. I accept DH's evidence that he considers himself to be experienced and to have expertise in the marketing services that U Ltd was to provide.

26. When XX was asked during the hearing exactly what the alleged misrepresentations were, he said that a main factor was that DH had told him that he was an ex-[redacted] employee.

27. It is for the Applicant to prove its case. The Applicant must prove that it is more likely than not that a misrepresentation occurred which it relied on and which induced it to enter into the contract. I am satisfied with DH's evidence regarding his experience in the industry. I have already found that with respect to the allegations relating to stated benchmarks there is a "he-said he-said" situation.

28. I have therefore reached the conclusion, and I find that, that the Applicant has failed to prove that it is more likely than not that a misrepresentation, which induced him to enter into the contract, occurred.

Have either party breached the terms of the contract?

29. XX provided the Tribunal with careful and detailed evidence to say that X Ltd had not brought any "expertise to the table" and they had not increased the quality of leads or regularly brought down the costs of leads.

30. XX said that he was speaking weekly to DH and making it very clear that he believed that the ads by U Ltd were not working. XX said that U Ltd "did not act" on what they were told about their alleged failure.

31. Both parties gave evidence about the discontinuance of [redacted] ads in June 2022. Both parties also gave evidence of XX requesting that the [redacted] ads start again in June 2022.

32. XX said that he made it very clear to DH that X Ltd was in a bad financial situation. XX showed the Tribunal various financial documents, which he says shows losses for X Ltd, which he attributed in the most part to the failure of U Ltd to provide proper marketing services.

33. DH said that X Ltd had failed to pay their monthly fees after being invoiced. DH said that XX repeatedly asked U Ltd to "just wait" and to give them more time to pay.

34. DH explained that U Ltd was responsible to pay Google for ads that it had run for X Ltd. DH showed the Tribunal a tax invoice and Google payment receipts when telling the Tribunal that U Ltd had paid Google for the ads being run for X Ltd.

35. XX questioned whether the "Google bills" that U Ltd was wanting paid related only to work done for X Ltd. DH pointed out that the billing ID on Google matched exactly with the U Ltd account and website and their advertisements which were run on Google. DH pointed out that Google was "very robust" with its billing, and further, that Google billing was "ID-specific". DH's position was that Google would not bill the specific ID number for other ads run for other businesses. DH said that Google bill based on "the number of clicks" on a website, which makes it specific to the customer number and the customer website.

36. XX confirmed that U Ltd did run ads using the Google platform. He further confirmed that X Ltd did not pay Google and that it was reasonable that Google would expect to be paid. XX also said that he understood that a $400.00 fee from Google could be seen as reasonable, however, he went back to the point that the problem here was that any leads were of poor quality. Nevertheless, XX did agree that Google "needs to be paid".

37. In terms of the losses that XX says were caused to X Ltd, directly by the failure of U Ltd to provide proper and professional services, XX showed the Tribunal various financial statements and made comparisons between the period of time when U Ltd was delivering its marketing services to what is currently occurring for X Ltd. XX was adamant that the increase in numbers for X Ltd and profitability showed that U Ltd failed to provide services and caused significant loss.

38. XX said that there was a dispute over the invoices rendered by U Ltd to X Ltd, because U Ltd did not deliver on the agreement, did not meet appropriate benchmarks, did not increase the volume of leads, and importantly, did not increase the quality of leads.

39. With respect to the amount that U Ltd claims from X Ltd, DH's evidence was as follows:

    (a) X Ltd was supposed to pay the first month in advance, however, this did not happen.

    (b) On or about 26 May 2022, U Ltd emailed their first month's invoice in the amount of $3,951.43 to X Ltd.

    (c) On or about 21 June 2022, U Ltd sent a follow-up email to X Ltd regarding the overdue invoice.

    (d) On or about 29 June 2022, U Ltd sent another email to X Ltd regarding the non-payment of the invoice.

    (e) On or about 7 July 2022, U Ltd asked X Ltd to start a payment plan to resolve the issue of the outstanding invoice.

    (f) On or about 20 July 2022, U Ltd sent another email to X Ltd, this time advising them that their account was seriously overdue and that payment of the amount of $4,143.71 excluding GST was required. U Ltd also attached Google invoices.

    (g) By October 2022, U Ltd advised X Ltd that the outstanding invoiced amounts that needed payment was $8,418.54. In addition to that, U Ltd sought $2,256.99 for collection costs "pursuant to U Ltd's Terms and Conditions".

40. DH pointed the Tribunal to communications between X Ltd and U Ltd which he said showed an increase in leads, a decrease in the cost per lead, and satisfaction on the part of U Ltd.

41. As I have previously stated the Applicant must prove its claim. From the evidence that was provided to the Tribunal I am unable to conclude that:

    (a) The losses that XX says were shown in the financial information could be wholly or substantially said to be as a result of a breach of contract by U Ltd.

    (b) The comparison of the financial information for the differing time periods can be relied on to prove that U Ltd breached its obligations under the contract.

    (c) U Ltd failed to provide the services to X Ltd that it was bound to do under the terms of the written contract.

42. I find that X Ltd has failed to prove that U Ltd breached the terms of the written contract.

43. I have already found that it was a term of the contract that X Ltd would pay U Ltd for its services. The evidence establishes that X Ltd has not paid the invoiced amounts. Therefore, I find that U Ltd are in breach of their obligations under the contract.

44. I find that X Ltd is to pay U Ltd $8,418.54 on or before 5pm on Wednesday 22 March 2023.

45. X Ltd is not liable to pay U Ltd for alleged collection costs, because I have already found that the standard terms and conditions did not form part of the written contract between the parties.

Referee: K Hoult
Date: 1 March 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 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.