



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 338

APPLICANT **X School**

RESPONDENT **H Ltd**

The Tribunal orders:

1. H Ltd is to pay X School \$27,633.52 on or before the 4th day of August 2023.
2. The counterclaim is dismissed.

Reasons:

Introduction:

3. In September of 2019 the X School Hall was deemed structurally unsound. On the 25th day of October 2019 X School (X) and H Ltd (H) entered a contract to remedy the structural integrity of the hall. The Ministry of Education was to provide funding for the project.
4. The project costs exceeded the funding provided by the Ministry of Education by \$24,029.15 plus GST. (\$27,633.52) X had to pay for the overrun because there was no further funding available.
5. Had X applied to the Ministry of Education for additional funding in January of 2021, additional funding sufficient to cover the overrun would have been available as part of the covid stream of funds.
6. X lost the opportunity to apply for that funding because they were not advised that the project expenses would exceed the funding allocation.
7. X says that as project manager, H was responsible for letting them know if the project was likely to or had already exceeded the allocated budget.
8. The issues to be resolved are:
 - i. Was H the project manager?
 - ii. Was H required to notify X when costs exceeded available funds?
 - iii. Did H's failure to notify X when costs exceeded available funds cause a loss?

9. The law of contract is central to this dispute. The contract signed between the parties was titled, "short form agreement for consultant engagement." The parties are familiar with contracts.

Was H the project manager?

10. It was clear that H was the project manager. The Ministry of Education requires that a project manager be appointed to large projects. H advertised themselves on their website as Project, and Construction Management providers. The contract that the parties entered included payments to H for project management and H billed for project management.

Was H required to notify X when costs exceeded available funds?

11. DG agreed that H was the project manager and agreed that financial management of the project was part of that role. He said that they were prevented from performing that role by X interfering with financial management by paying one of the contractors without consulting them. This was an overpayment of \$100,000.00 that took a year to resolve.
12. DG said that it was his view that X had taken over financial management of the project in 2021 and there was no further communication between them until DC contacted him about the overrun in 2022.
13. DG agreed that he had not told X that H could no longer be responsible for financial management of the project.
14. DC said that there was no evidence that X had taken over the financial management of the project.
15. DC provided invoices from 1st November 2019 until 21st March 2021 from contractors that were approved for payment by H. DC said that because H had to approve all contractor payments they must have been aware of the financial outgoings of the project.
16. In February of 2021 the Ministry of Education emailed NK, the project manager from H for the X School Hall project saying that they had paid out \$315,743.45 and were retaining 10% of the left-over available budget \$35,082.00. for final payments.
17. DC thought that H ought to have known that there was a risk of overrun by September 2020 but certainly by January 2021 at the latest. This was the date of the last contractor payments for the project.
18. I find that H ought to have been aware that the costs had exceeded available funds by January 2021 and should have notified X.

Did H's failure to notify X when costs did or were likely exceeded available funds cause a loss?

19. X did not find out about the costs overrun until July or August of 2022. In January of 2023, DC emailed HH at the Ministry of Education to ask whether, if he had applied for additional funding for the X School Hall in January of 2021, there would have been funding available. The response was that "if the funds had been requested at that time – they would have met the criteria for the covid funding that was available then."
20. I find that H as the project manager with financial responsibility for the project was responsible for notifying X where there was a risk that the costs of the project would exceed the available funds. In failing to notify X when they ought to have known this, by January of 2021, they caused a loss to X School.
21. H are to pay X School \$27,633.52.

Counterclaim

Introduction:

22. H Ltd (H) are seeking an apology from X School for bullying and harassment by DC.
23. DC is a member of the Board of Trustees for X School.
24. DG and DC had several meetings.
25. Hare claiming \$30,000.00 for emotional harm.
26. The issue to be decided is whether DC's behaviour at these meetings was either bullying or harassment.

Was DC's behaviour at these meetings either bullying or harassment?

27. DG said that DC had really blasted him. That he blamed DG and H. He was bullying and spoke over DG. DG said that he was very upset and did not tell his wife about it. He felt disrespected.
28. WT an employee of H was present at the Tribunal and had been at the first meeting. He said that DC had talked down to DG.
29. DC refuted the claim that he had been bullying or that he had harassed DG. He said that he had acted professionally, and that DG had met with him on his own on two other occasions and not complained until the matter came before the Disputes Tribunal. He said that X had a robust system for lodging complaints and that DG could have approached any number of people to complain.
30. QX, the principal of X School was present at the Tribunal and had been present at that first meeting. QX said that she had known DC for 2 years now and that he was calm and well informed at that first meeting as he has been throughout the Tribunal process.
31. DC acknowledged that DG had been upset at the Tribunal today. He apologised to DG saying that he had never intended to upset him.
32. Based on evidence at the Tribunal hearing today, H could not make out the grounds for emotional harm damages.
33. The counterclaim is dismissed.

Referee:**Verdun Tawhara****Date:****13th day of July 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>.