



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1425

APPLICANT TX and BX

RESPONDENT Y Limited

The Tribunal orders:

The claim is dismissed.

Reasons

1. Mr and Mrs X had a motel management contract with Y under which they were paid a weekly management fee. They claim \$30,000.00 from Y for breaching that contract by deducting \$26,834.50 from their management fee for 22 weeks during the New Zealand COVID-19 lockdown period in 2020. They also claim \$3,380.50 for their legal costs. Y denies the claim.
2. Mrs Y, director of Y Ltd was unable to attend the hearing and was represented by her husband, Mr Z.
3. The issues I need to decide are:
 - a) Has Y breached the Management Agreement by reducing the weekly management fee payments to Mr and Mrs X between 3 April & 28 August 2020?
 - b) If so, what is the loss suffered by Mr and Mrs X?
 - c) Are Mr and Mrs X entitled to payment of the legal costs claimed?

Has Y breached the Management Agreement by reducing the weekly management fee payments to Mr and Mrs X between 3 April & 28 August 2020?

4. Parties to a contract must perform their respective obligations. If they do not, they will be in breach and need to account for any loss to the other party to the contract.
5. Mr and Mrs X had a Management Agreement with Y dated 7 November 2016 (the Agreement) under which they were paid a weekly management fee of \$1,569.75. They say that during the

period of 3 April to 28 August 2020, which was during the period of New Zealand's lock down restrictions due to COVID-19, Y breached the Agreement by reducing their fee to \$350 per week without their agreement, and that clause 8 of the Agreement provides that no modifications of the Agreement shall have any effect until they are reduced to writing and executed by both parties which has not been done.

6. Mr Z says that he and Mrs Y visited Mr and Mrs X and talked about the economic consequences of the COVID-19 lockdown, and the availability of the wage subsidy. He says it was agreed orally that Mr and Mrs X would apply for the wage subsidy and then Y would top up the wage subsidy to ensure there was no change to Mr and Mrs X's weekly income. Accordingly, Mr and Mrs X applied for the wage subsidy and for the period from 3 April until 28 August 2020 received \$1,170.00 a week in wage subsidies which Y topped up by \$350.00 to ensure Mr and Mrs X continued to receive the equivalent of their weekly management fee. Mr Z says that Mr and Mrs X did not raise any issue with this arrangement either at the time it was first discussed or during the duration of the qualifying wage subsidy period and he and Mrs Y did not know they were unhappy about it.
7. Mr and Mrs X say they told Mr Z and Ms Y at the time that they could not reduce their fee payments. However, I have regard to their evidence at the hearing that they did not raise any issue with the proposed arrangement as they did not want to lose their jobs during lockdown. I also have regard to Mr Z's reference to two emails indicating Mr and Mrs X's willingness to engage in Y's proposal, being an email response he received from Mrs X when he sent them the link to guidelines for applying for the wage subsidy on 27 March 2020 where Mrs X advised that they had already applied for the subsidy and thanked him for the good news for the "rest of the crew", and an email from Mrs X on 29 June 2020 where she advises they would not charge Y during the wage subsidy period for the fee they normally charged under a separate contract for managing the service of an Airbnb property owned by Mrs Y. I am satisfied it is more likely than not that Mr and Mrs X waived their contractual right to receive the full management fee from Y under the Agreement for the duration of the qualifying wage subsidy period. I find that Y has not breached the Agreement by reducing the weekly management fee payments to the X's between 3 April & 28 August 2020. The claim is dismissed.
8. In light of my decision it is not necessary for me to consider the other issues. However, for the purposes of clarity I will address the issue of loss to Mr and Mrs X if I had found that there had been a breach of the Management Agreement.

What is the loss suffered by Mr and Mrs X if there had been a breach of contract?

9. A party breaching a contract needs to account for any loss caused to the other party to the contract, and the party not in breach needs to prove that loss. The party not in breach also has a duty to take all reasonable steps to mitigate its losses that flow from the breach.
10. Mr and Mrs X say that Y's unilateral decision to reduce their fee caused them loss and forced them to apply for the wage subsidy. I am satisfied that reasonable steps for Mr and Mrs X to take to mitigate their losses flowing from Y's breach of the Agreement would be to apply for and receive the wage subsidy available to them for the duration of the qualifying wage subsidy period, which they did. I am satisfied that Mr and Mrs X did not suffer any loss as they continued to receive the same weekly income, comprised of the wage subsidy topped up by Y.

Referee: B Curtis
Date: 18 March 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 20 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.