



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

**District Court**

**[2020] NZDT 1311**

**APPLICANT     XD**

**RESPONDENT   MU**

**The Tribunal orders:**

1. MU is to pay to XD the sum of \$950.00 on or before 30 June 2020.

**Reasons**

1. MU and XD agreed to erect a boundary fence between their new houses. XD paid \$2,300.00, being half a quoted sum from ABC Company (ABC). MU then erected the fence in a manner to which XD did not agree.
2. XD sought a partial repayment of his contribution, or a rebuilt fence to agreed specifications.
3. The issues to be resolved are: (a) What were the terms of the fencing agreement? (b) Were those terms carried out? (c) If not, is any sum due back to XD?

**What were the terms of the fencing agreement?**

4. There is no dispute that both parties wanted a fence built, but the parties dispute the terms. There was no written contract, exchange of letters, emails or texts to assist in determining what had been said.
5. Where there is a dispute about terms, a finding is made about what is most likely based on how a reasonable person would interpret the situation. Based on the evidence that could be presented at the hearing, it appeared that the fence would be built at a cost of \$4,600.00 by ABC. This finding arose from the main document, which was a quote done by ABC that was given to XD. ABC has been involved in other fencing work in the subdivision, and XD paid half the ABC quote, on the reasonable assumption that it would be doing the work. MU had sent an email with the quote stating that he was ready to get underway with the fence, but as this email was sent with a quote from ABC, the email fell short of proving that XD knew that MU was doing the work himself, rather than simply arranging it, or assisting with it.
6. MU recalled being clear at the time that he was only using the ABC quote to show how much the fence would cost, and therefore to calculate XD's contribution. However, the owner of ABC was called. He stated that he could not recall ever being told he was not doing the fence, and was unable to say XD was aware this was so. Consequently, the only finding that could be made was that it appeared to a reasonable person that ABC would be doing the work.

7. It is clear from the quote that the fence was to be 1.8m high. Both parties also accepted that the style was agreed to be in keeping with other fencing in the subdivision. The fence that was built was in that general style, albeit with some modifications.
8. XD also believed that there had been an agreement that the palings would be on his side. This was not able to be established on the evidence that could now be produced. A witness gave evidence that he heard MU say he was thinking about continuing the palings on XD's side, but this evidence was not wholly independent, and in any case did not go far enough to show a meeting of minds about the matter.

**Were those terms carried out?**

9. I find that the fencing agreement was not followed in the following manner:
  - (a) The fence was in fact built by MU, not by ABC.
  - (b) The palings were put on MU's side without XD's consent. As there was no proved meeting of minds about the matter, MU should have sent a fencing notice, enabled a cross notice, and then had a hearing to determine the point, or alternatively negotiated a deal to have the palings on his side. MU raised some good points about why the palings should be on his side given the layout of his house on that aspect. However, if one party takes the benefit of the palings against the wishes of the other, this is usually reflected in the contributions of each to the fence.
  - (c) The fence was not completed, in the sense that there was a small amount of work required to complete the joining of the new fence to another existing fence.
10. XD was concerned that the fence exceeded the agreed height of 1.8m due to a concrete nib being installed in a manner that was level to the footpath, rather than tapering with the section. I was not able to make a finding about this breach, and the explanation given about the nib appeared reasonable. In any case, any alteration now to the nib would be at a cost that was disproportionate to any loss.
11. MU stated that XD had watched the fence being built with the palings on MU's side and had not said anything. Had this been the case, this may have created an "estoppel", stopping XD from later disputing the matter. However, XD explained that he has a business in Wellington and was not at the property whilst the palings were being put on. He therefore did not realise what MU was doing until he got back, by which time the work was largely completed. I was not able to make findings about the matter, and accordingly, any defence of estoppel was unable to succeed.

**Is any sum due back to XD?**

12. To put the matter right, three matters need to be addressed. First, the cost of the fence should be recalculated at a rate chargeable by MU as a neighbour, not as a retail supplier of fencing work. A usual labour rate in those circumstances is \$30 per hour, with no GST added. Secondly, the contribution should be altered from 50:50 to 1/3<sup>rd</sup>:2/3<sup>rd</sup> to reflect the fact that MU decided to take the benefit of the palings. Thirdly, there is minor finishing work to do which could have reasonably been expected to be completed as part of the 3.5 days labour accounted for.

13. A reasonable cost of the fence is calculated as follows:

Materials	\$2,602.13
Digger	\$ 400.00
Post-hole borer	\$ 205.00
Labour 3.5 days @ \$30	<u>\$ 840.00</u>
	\$4,047.13

14. On that basis, and taking into account the position of the palings, the sum due back is:

Total cost	\$4,047.13
Split 1/3 <sup>rd</sup> 2/3 <sup>rd</sup>	<u>\$1,349.04</u>
Less sum paid	<u>\$2,300.00</u>
Sum due back	\$ 950.96

15. These costs are of their nature not exact, but this process cannot now produce an exact figure, given the manner in which the arrangement was made. I am satisfied that, in the round, this sum represents a reasonable reassessment of XD's contribution to the fence.
16. XD sought a rearrangement of the panels, which could not be ordered. In any case, this would destroy the palings. However, XD can use the refunded sum for double skinning the fence, thereby providing a more uniform appearance on his side. This will also address the "finishing" required to join the two fences. Whilst the partial refund of his contribution may not fully cover his costs in doing so, it will assist to reduce the visual impact of the fence the way it is. The readjusted contribution was the most that could be awarded given the lack of evidence available about some of the other points XD raised.
17. MU indicated he had left over screws and nails which he could provide for any further work that would be done on the fence. Whilst this would be a courtesy, it is not an order made, as it cannot be enforced in the same manner as a monetary order. In the absence of receiving these, the screws and nails can be purchased by XD for his own work.

### **Conclusion**

18. XD is entitled to a partial refund of his contribution to the fence, as it was not constructed as understood by ABC, and was not constructed in a manner to which he had agreed. The parties had a genuine misunderstanding on how the fence should be, and in those circumstances, costs should be recalculated, and split differently, to reflect the benefit taken of the finished product.
19. However, the fence will remain as it is on MU's side, as the extent of the breaches claimed could not be established. The matter can be put right by a monetary adjustment that will enable XD, if he wishes, to mitigate the visual impact on his side of the fence.

**Referee:**

**J Robertshawe**

**Date:**

**14 May 2020**



## 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>.