



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 271

APPLICANT BS

APPLICANT OS

RESPONDENT PB

**SECOND UQ
RESPONDENT**

The Tribunal orders:

- A. PB is to pay BS and OS \$3,263.25, on or before 27 June 2023.
- B. UQ is to pay BS and OS \$2,087.00, on or before 27 June 2023.

Reasons

1. BS, OS, PB and UQ were flatmates in a property at [address]. All four were on the lease which was a fixed term rental until 13 February 2023. On about 9 November 2022, PB and UQ left the flat. OS and BS continued to live at the premises. When the lease came to an end on the term expiry date (13 February 2023) there were some repairs and cleaning required and a key or swipe card had to be replaced. OS and BS had had to pay the rent from the time the Respondents left until the end of the lease, as well as the expenses incurred. OS had an examination he was required to take for his intended qualification which did not go well. BS and OS filed a claim in the Disputes Tribunal.
2. This is a claim for damages for a breach of a flatmate agreement. Damages are also claimed from PB for the cost of a key, the cost of repairing damage to his room, and some of the cleaning costs, and from UQ for the cleaning costs. OS also claims damages for stress and inconvenience arising from the dispute because he was not successful in his exam, requiring him to repeat the course. The claim against PB is for \$3,422.00 and UQ for \$2,227.00, together with an additional \$2,750.00 for the cost of the course OS was required to repeat, and the filing fee for the claim in the Disputes Tribunal.
3. The issues to be decided were as follows:
 - a. Have PB and UQ breached the terms of a legally binding contract, and if so, which terms were breached?
 - b. If the terms were breached, have the Applicants mitigated their loss?

- c. If the terms were breached, what are the Respondents required to pay by way of compensation/damages?
 - d. Can OS claim the cost of the [training course?
 - e. Can the Applicants claim the cost of the filing fee in the Tribunal?
4. The hearing was convened by telephone. UQ did not answer her phone. Under the Disputes Tribunal Act 1988, I can resolve a dispute in the absence of one or more of the parties.

Have PB and UQ breached the terms of a legally binding contract, and if so, which terms were breached?

5. When two or more parties reach agreement about an exchange of promises or obligations of value, a legally binding contract arises. A contract can be written, or oral, and can be proved by conduct. The terms of the contract are those explicitly agreed between the parties at the time the agreement was reached and includes any necessary terms that can be implied as agreed, to give the contract effect.
6. The parties were subject to a fixed term lease for the property. Both parties acknowledged that the terms of the agreement between each other, which is separate from the lease with the landlord, included the obligation to pay rent as required under the lease. The evidence from both parties was that no process was agreed for how parties to the lease were to terminate their obligations to each other prematurely. As a result, I find that there was no process for cancelling the agreement between each other as flatmates except as available under the general law.
7. Under the general law, specifically the Contract and Commercial Law Act 2017 provisions as to the cancellation of contracts, if one or more parties make it clear by words or action that it will no longer fulfil its obligations, this is a repudiation of the contract. It is not however a cancellation. The other party, on the receiving end of the repudiation, is entitled, under the Act, to either affirm the contract and keep it in force, or to cancel the contract. Either situation allows the non-repudiating party to claim damages, but the consequences of either affirmation or cancellation may be different.
8. In the current case, the Respondents moved out on the same day. The evidence shows they were paid up to 18 November 2022 but no further payments were made. In legal terms their action was a repudiation of the contract. The Applicants affirmed the contract, or in other words, made it plain they did not cancel it and they made it clear that payments were to continue. Because no further payments were made the Respondents breached the contract from 18 November 2022.
9. Other obligations under the lease are able to be assumed as part of the agreement between the flatmates, in the absence of any evidence to the contrary. That includes cleaning, damage to the property and so forth. PB conceded that he was obliged to pay the amount for the replacement key, which is \$70.00.

If the terms were breached, have the Applicants mitigated their loss?

10. Under the law of contract, when a contract is breached by one party, the other party is required to take reasonable steps to mitigate, or minimise, their loss. What is required is a bona fide attempt to keep losses to a minimum; it may not be possible in the circumstances to actually reduce the loss.
11. In this case the obvious way in which the Applicants could mitigate their loss would be to get new tenants in to take over the paying of the rent. PB noted in the hearing that the Applicants could have moved out but this would have meant all would still be liable to pay on the fixed term lease, and this would have made mitigating the loss impossible. The Applicants (wisely) did not

attempt to do this. PB also suggested that the Applicants could have made an application to the Tenancy Tribunal to reduce the rent or other remedy, but I am not inclined to consider this as reasonable. An application for a remedy is no measure of its chance of success, without more. There was no evidence to suggest that this would have actually been a way of mitigating the loss.

12. I am satisfied on the evidence before me that the Applicants took a number of steps to find new tenants without success, through various advertisements on social media, and they interviewed several people. There were only three months to go on the lease however and it is perhaps unsurprising that this kind of temporary accommodation was unattractive. The Applicants were unsuccessful to finding anyone to take the room, and in the circumstances I find that these steps were an adequate but unsuccessful attempt to mitigate their loss. In law, that is sufficient. No reduction in the amount outstanding under the flatmate agreement is therefore required due to a failure to mitigate.
13. There was discussion in the hearing about the fact that the property manager did not advise the Applicants that a sublease was possible, and only discussed the full process of varying the lease to add new tenants. I find however nothing turned on that because no new tenant could be found anyway.

If the terms were breached, what are the Respondents required to pay by way of compensation/damages?

14. When one party to a contract breaches it, he or she is liable to pay damages or compensation in the amount of the other party's loss which was caused by the breach.
15. I have found that the agreement between the parties was that they would share rent and expenses for the period of the fixed term lease. PB and UQ have not done that. OS and BS have discharged their obligation to mitigate their loss which resulted in no reduction of the loss. Therefore PB and UQ are required to pay their agreed portions of the rent and expenses from 18 November to the end of the lease on 13 February 2023.
16. OS calculated that for the period from 18 November 2022 to 13 February 2023, that PB was required to pay \$3,087.00, and UQ to pay \$2,037.00. I accept that these calculations are correct, or at least slightly less than my own calculation. PB and UQ are required to pay these sums to OS and BS.
17. PB accepted that he was also required to pay \$70.00 for a replacement swipe card or key. The Applicants claimed that the Respondents should pay \$100.00 each for the cleaning but I have no evidence that this is not a joint debt for all to pay, so I am only prepared to order that \$50.00 is payable by the Respondents, as quarter shares of the expense. There was damage in the room PB had rented which cost \$75.00 to repair. There was no evidence that PB caused this damage, but it was in his room, which he occupied for about three quarters of the fixed term. I have therefore decided he should pay \$56.25 towards the repair.
18. The total payable by PB is therefore \$3,263.25. The total payable by UQ is \$2,087.00. The payments are to be made to OS and BS jointly.

Can OS claim the cost of the training course?

19. Under the law of contract, claims for damages are only successful if the loss suffered is foreseeable and not too remote. In the Disputes Tribunal it is usually held that there is no jurisdiction for damages for stress following a breach of a contract.
20. OS claims that the events in the last three months of the tenancy caused him stress and anxiety to the point where he failed an exam and had to repeat a course. This is not a foreseeable loss and is too remote from the breach to be claimable, in my view. I am unable to see evidence a sufficient causal link between the events and OS's exam results and I am unable to discount other possible causes of the results he received.

Can the Applicants claim the cost of the filing fee in the Tribunal?

21. Under the Disputes Tribunal Act 1993, section 43, I can only award costs, such as the filing fee in the Tribunal, in the rarest of circumstances. There is nothing in this case that would justify such an award.

Referee: M Wilson
Date: 6 June 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>.