



# Employment Court of New Zealand

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## Smithson v Wellington College Board of Trustees [2021] NZEmpC 114 (27 July 2021)

Last Updated: 30 July 2021



*(Disputes Tribunal Act 1988)*

### ORDER OF DISPUTES TRIBUNAL

District Court

[\[2021\] NZDT 1379](#)

APPLICANT	DC
APPLICANT	KE
APPLICANT	KG
APPLICANT	LD
APPLICANT	LS
APPLICANT	RR
APPLICANT	RN
APPLICANT	RI
APPLICANT	SB
APPLICANT	YE
RESPONDENT	JBD Limited

#### The Tribunal orders:

Claim Dismissed.

#### REASONS:

## Brief Details of Claim

1. In 2006, the ten applicants formed an art collective named BD. Over time, the collective purchased a number of paintings. On or about 2016, BD decided to sell all of its paintings. BD arranged with JBD Ltd (JBD) to sell the paintings through JBD's gallery in [Redacted location].
2. One painting was sent to JBD ahead of the remaining 18 paintings, which were delivered to JBD on 14 March 2017.
3. Some paintings were sold through JBD, but others remained unsold.
4. BD arranged for some unsold paintings to be uplifted by XIH for sale by it. Amongst the paintings collected by XIH was a painting entitled B by EH. This painting was uplifted from JBD by XI Gallery in August 2018.
5. BD then arranged for XI Gallery to send several paintings including B to a Gallery called BP. B was delivered to BP in May 2019.
6. BD then arranged for four unsold paintings to be collected from BP by RI on 29 July 2019. BD had arranged with JBD for the paintings to be stored at JBD (together with two paintings still held by JBD) until arrangements could be made later in the year for all paintings to be returned to [Redacted location].
7. In March 2020, BD arranged for Pack & Send to collect the six paintings from JBD for delivery to [Redacted location]. JBD advised BD that there were only five paintings to be collected. At that point, BD discovered that B was missing.
8. The BD claims that the paintings were originally sent to JBD on the basis that the paintings would be insured while on JBD's premises and therefore BD cancelled its insurance on the paintings. BD claims that the painting has gone missing from JBD's premises.
9. JBD has not made a claim on its insurers or compensated BD for the loss of the painting because JBD believes the painting was not delivered to JBD on 29 July 2019.
10. BD claims \$9,500 for the painting B, which is the price originally paid by AD for its purchase.

## Issues

11. The issues for the Tribunal to determine are:
  - (a) Whether RI delivered the painting B to JBD on 29 July 2019;
  - (b) If so, whether there was a contract term that B would be insured by JBD while it was on JBD's premises and if so, whether JBD is liable to compensate BD if JBD refuses to make a claim on its insurers;
  - (c) In the alternative, whether JBD has breached its responsibility as a Bailee to take reasonable care of the painting.
  - (d) Whether AD is entitled to compensation from JBD for the painting, and if so, how much.

## Did RI deliver the painting B to JBD on 29 July 2019?

12. The onus to prove a claim lies with an applicant. The standard of proof required in the Tribunal is "the balance of probabilities". That means that the applicants must prove it is more likely than not that RI delivered the painting to JBD on 29 July 2019. There must be more certainty than doubt.
13. RI gave evidence in person at the hearing and she was adamant that she delivered B to JBD on 29 July 2019 together with three other paintings. RI referred the Tribunal to her email dated 30 July 2019, written to other members of AD, in which she describes in detail what happened when she collected the paintings from BP the day prior and delivered them to JBD. In the email, RI makes particular reference to B in that she asked for something to go between the bubble wrap and the painted surface of B. This email is reasonably strong evidence because it was written so close to the time the paintings were uplifted from BP and delivered to JBD.
14. JBD does not have a process whereby it receipts artworks immediately upon receipt into the gallery. So there is no written record of what was received into the gallery from RI on 29 July 2019.
15. SU (Director, JBD), gave evidence that he has 35 years experience. SU said that nothing has ever gone missing from the gallery, save for two paintings stolen when a vehicle ram raided the gallery.
16. RI says that when she delivered the paintings, ME (JBD) showed her where the paintings would be stored in the back of a store room, together with the other two still held by JBD. The store room has no external exit/entrance. There are two entrances from the gallery into the store room, one down a passage and the other from behind reception via two doors. There is no public access to the store room, unless escorted to the room by a staff member.
17. RI's evidence is that she left the paintings in the reception area, in ME's care, to be moved to the store room. RI's evidence is that there were two women in reception and that she briefly spoke to SU. That means there were 4 people in and around the area that RI left the paintings.
18. RI says that she transported the paintings from BP by Uber. Paintings were transported in the boot of the car. RI is not sure whether, because of its size (B is 101 cm x 76 cm), it was transported in the boot or the back seat of the car.
19. ME gave evidence via telephone. ME said he is certain that B was not one of the paintings delivered on 29 July 2019. ME said he would have recognised it. However, given RI's evidence that something was put over the painted surface and under the bubble wrap of B (as recorded in her email dated 30 July 2019), nothing of the painting may have been visible to ME. I considered ME's evidence was not strong, because there have been a number of movements of paintings from and to JBD and it appeared to me that ME did not have a clear recollection about the details of the delivery on 29 July

2019 (understandable, given the passage of time and the number of artworks and customers ME must have dealt with in the interim).

20. After considering the evidence, I find that BD has not proved it is more likely than not that the painting B was delivered to JBD on 29 July 2019 for the following reasons:
- (a) I fully accept that RI has an honest belief that she delivered four paintings including B into JBD's reception area. RI's email dated 30 July 2019 to other BD members is evidence that that is what she believes she did. However a belief that something was done is not the same thing as whether it was actually done.
  - (b) Balanced against RI's evidence is that of SU that nothing has gone missing from his gallery over the years, save for the ram raid. I have taken into account the likelihood of the painting going missing from the gallery, if it had been delivered. The chances seem very slim, given SU's evidence that no paintings have gone missing from the gallery over the years, that the storeroom appears to be secure from members of the public, and that there were at least four staff members in the reception area where RI left the paintings.
  - (c) There is also the possibility that the painting went missing during the period of delivery, perhaps left in the Uber car or on the footpath.
  - (d) RI may be right that she did deliver B to JBD's reception area. However, BD has to prove this is more likely than not, and BD has not been able to so prove.

## **Outcome**

21. Because BD has not been able to prove that B was delivered to JBD, this claim must be dismissed, and there is no need for the Tribunal to address the other issues set out in Clause 11 above.

**Referee: J.F. Tunncliffe Date: 11 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>.

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