



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 561

APPLICANT **BK**

RESPONDENT **N Ltd**

The Tribunal orders:

The claim is dismissed.

Reasons:

1. The dispute concerns the amount refunded by N Ltd on a sixteen-week nutrition and exercise programme called [programme] for which BK paid \$3,800.00. BK started the programme on 17 August 2023, but requested to be released from the programme after suffering a herniated disc in her lower back on 2 September 2023. N Ltd refunded \$2,850.00, but BK seeks a further \$407.14, together with compensation for “time, hassle and inconvenience”, bringing her total claim to \$1,000.00.
2. The issue to be determined is whether BK is entitled to any further refund under clause 2.2 of the contract, which provides:

“I accept once a deposit or payment is made on a program any money paid is nonrefundable unless severe injury or illness happens. Certified medical proof from a practitioner must be presented and accepted by the coach in order to receive any refunds. [Programme] reserves the sole right to deduct any payments from the deposit for any services provided to the date of the severe injury or illness.”
3. BK submits that the amount of the refund should be determined on a pro rata basis, calculating the number of days after her injury as a proportion of the 16 weeks. However, clause 2.2 reserves to N Ltd the “sole right” to retain money for “any services provided” to the date of BK’s injury. This suggests a broad discretion rather than a simple pro rata entitlement.
4. Nevertheless, recent decisions in the courts have placed certain limits on the exercise of contractual discretion. A typical expression of those limits is:

The exercise of contractual discretion will be open to challenge where it can be established that it was not exercised honestly in good faith; or not exercised for the purpose(s) for which it was conferred; or when exercised in a capricious or arbitrary manner; or otherwise falls into the category of what would be considered *Wednesbury* unreasonableness.¹
5. Although the precise limits are yet to be defined by the higher Courts in New Zealand,² I do not consider that the way in which N Ltd exercised its discretion can be called unreasonable in any sense that would transgress such limits. N Ltd retained 25% of the total fee, based on BK’s having had access to Phase One out of four during her two weeks on the programme (as well

¹ *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at para 73.

² See *Woolley v Fonterra Co-Operative Group Ltd* [2023] NZCA 266.

as receiving one coaching call, one squad call, and access to an app for logging information). This seems to be a reasonable exercise of N Ltd's discretion, and I conclude that BK is not contractually entitled to any further refund.

Referee: E Paton-Simpson
Date: 14 November 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 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>.