



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 274

APPLICANT BT

RESPONDENT T Ltd

The Tribunal orders:

T Ltd is to pay BT \$1,469.30 on or before 14 July 2023.

Reasons

1. BT purchased a [phone] online from T Ltd. He received the phone on 5 October 2022, and within a few days it was clear that the phone could not detect the pen or stylus as it was supposed to. BT took it to T Ltd's kiosk at [mall] on 19 October 2023. BT was informed he was entitled to a replacement phone, because this was an out of box failure (referred to as an OBF). The [phone] was sent back to T Ltd, but it was repaired instead of replaced. When BT received the phone back, while at the [mall] kiosk, the phone clearly failed again, or had not in fact been repaired. The salesperson at the kiosk who saw all this said it would be sent back with an instruction that it would proceed as an OBF, and a replacement provided. When it was returned to T Ltd, the company refused to replace it because it said it had been repaired. BT did not see the phone again, and despite multiple calls to T Ltd, no appropriate response was forthcoming. BT filed a claim in the Disputes Tribunal for a refund.
2. This is a claim for a refund of the cost of a phone which has not been returned to BT nor properly repaired, in the sum of \$1,469.30. BT also claims costs of \$500.00 for the inconvenience.
3. The issues to be determined today were as follows:
 - a. Has T Ltd breached either its own terms and conditions of sale, or the Consumer Guarantees Act 1993 in failing to provide a replacement phone?
 - b. If so, what compensation can BT claim?
4. When I convened the hearing today I had only an 0800 number to call T Ltd on. A helpful call centre person gave me the [suburb] office number. That phone number was not answered and thus T Ltd did not attend the hearing. Under the Disputes Tribunal Act 1988 I can resolve a dispute in the absence of one of the parties.

Has T Ltd breached either its own terms and conditions of sale, or the Consumer Guarantees Act 1993 in failing to provide a replacement phone?

5. If a retailer breaches its terms and conditions which include a promise that a replacement will be provided if problems are found within a certain time, it is a breach of that contractual obligation not to act as promised, for which damages may be payable. If goods fail to comply with the guarantee of acceptable quality under the Consumer Guarantees Act 1993 (CGA), remedies under that Act include repair, if that is possible, which if not possible or not successful within a reasonable time, may lead to an order for a refund.
6. I was advised by BT that the OBF procedure that T Ltd operates was implemented in this case because there was a clear fault with the product within the time specified. By failing to provide a replacement phone in accordance with their own terms and conditions, T Ltd have breached the contract. Considering that some months have passed, BT had to buy another phone and so a replacement is no longer of any use to him. T Ltd must pay damages for BT's loss which is the cost of the phone.
7. T Ltd have also clearly breached the Consumer Guarantees Act by failing to repair the phone (even though they were not supposed to) within a reasonable time. This allows BT to require either a refund or a replacement. I find it is no longer an option for T Ltd to repair the phone, under the CGA.

If so, what compensation can BT claim?

8. Compensation for breach of contract is intended to put the purchaser, in this case, back into the position they would have been in but for the breach. When a breach of the CGA occurs and repair is not carried out successfully or within a reasonable time, it is the purchaser's election whether to ask for a replacement or a refund.
9. BT is entitled to his refund. A replacement is not required. T Ltd must pay BT \$1,469.30.
10. Because this is such a clear breach of the CGA and the contract terms, BT asked for damages for inconvenience in the sum of \$500.00. I am not able to award such damages in the Tribunal, particularly where there is no actual financial loss to BT from this inconvenience. It is surprising to say the least that after all these months BT has neither the phone nor the refund, but it is not for the Tribunal to award damages for poor service.

Referee: M Wilson
Date: 30 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>.