



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 327

APPLICANT BU

RESPONDENT NPU

The Tribunal orders:

The claim is dismissed.

Reasons

1. BUBU (a Charitable Trust which serves the needs of the [community] in [City]) organised a camp for 3 days at [Island] which is run by the NPU which is also a Charitable Trust. BU say that they experienced a series of incidences where the staff at NPU were disrespectful and unprofessional during their stay. They also say EX (the NPU manager) drove a truck in such a manner that 2 of their young attendees collided with the back of the truck. They also say they were denied access to the bathroom and shower facilities because a motion sensor light was not turned on. BU is seeking a \$3,900.00 reduction of the balance of the invoice it owes NPU.
2. BU refers to breaches of the Health and Safety at Work Act 2015. The Tribunal does not have jurisdiction to hear claims relating to that Act.
3. As applicant in the Tribunal must prove its claim on the balance of probabilities, that is, whether the issues raised by them are more likely than not to have occurred. If that is proved then whether NPU breached the terms of its contract with BU and/or any provision under the Consumer Guarantees Act 1993 (CGA), more specifically the provisions raised by BU (which they say apply in relation to the issues) namely s 28 of the CGA (which provides that services must be carried out with reasonable care and skill) and s 29 (which provides that services must be fit for purpose).

The truck incident

4. BU says when they arrived at [Island], NPU provided a luggage truck for their belongings from the wharf to the campsite. Three of BU's participants jumped and hung on to the rear of the truck's rear bumper for just over a minute, EX (of NPU) forcefully hit the brakes when he saw them hanging on to the truck and scolded them. Two of them collided with the back of the truck. BU say that although there was no harm inflicted by the impact, there was emotional distress and humiliation suffered by the participants. BU says NPU did not exercise any standard of care in these circumstances as EX should have come to a slow and gentle stop. They say NPU was negligent.

5. EX (representing NPU) confirmed he was the driver of the truck. He says he left the wharf slowly, under 10kph as the road is potholed, narrow and has overhanging trees. LN (another NPU staff member) was following, and she alerted him by VHF radio that people had jumped on to the back of the truck. He looked and saw from his right wing mirror one person hanging of the right hand side of the truck, so he stopped the truck immediately. He said he did not know how many people had jumped on to the truck as they were obscured by the body of the truck. He said there was imminent risk of a person being struck by a tree or falling off the truck. He said yes, he did stop the truck abruptly but had to because of the circumstances – it required urgent action.

He said they should not have been on the truck, and this was made clear at the meeting at the wharf. Yes, he did firmly restate this after he stopped the truck. He says any harm emotional or otherwise was totally their own creation and that if he continued to drive the truck with them on board NPU would have been negligent.

6. I agree with EX. He would have been negligent if he did not stop when he did. In any event even if there was a breach of the s28 service guarantee it only allows for certain remedies such as remedying the failure, compensation for the reduction of the value of the service below the charge paid or payable for the service and damages for any loss or damage which was reasonably foreseeable as liable to result from the failure. There is no remedy even if s28 was breached. I have determined EX was not negligent and further the specific “service” as such was for the delivery of luggage only and not for transporting people. The truck had a drivers cabin and a tray with sides which is clearly not for use for delivering passengers to the destination. If NPU had used the truck for that purpose, they would clearly have been breaking the law for carrying passengers in the tray. I note LN was following the truck in a passenger carrying vehicle for people who could not or did not want to walk to the site.
7. Further (and outside the CGA provisions) the Tribunal has jurisdiction to hear claims in tort which includes negligence. However, the Tribunal can only hear claims in relation to a tort in respect of destruction or loss, damage or injury or the recovery of any property. This does not apply to this situation.

Access to bathrooms and shower facilities

8. BU says BU organised their activities of the first day to be physically intensive until sunset. When they finished, they were practically denied access to all the bathroom and shower facilities because of NPU's failure to turn on all the motion sensor lights. They say it was 12am at night when EX came to turn them on and most of the attendees just went to sleep without use of the facilities. They say this was a breach of the contract and the CGA for failure to take reasonable care and skill.
9. EX says yes NPU did miss activating a sensor light that activated lights after dark. He says sunset was at 8.42pm that night and it was 2 ¾ hours before the issue was brought to their attention. He says it was about 11:26 pm (when he was asleep) and he got there in 10 minutes and activated the sensor.
10. I have checked when sunset was in [City] on 6 January (the first day of BU's trip), and it shows it at 8:44pm. There was an on call phone with a mobile number for people to phone if there were issues. As EX says they did not get a call about the issue until much later. At law, an aggrieved party has a duty to mitigate any losses they claim. Had someone from BU called earlier then the issue would have been fixed promptly. Therefore, there is no reasonable loss that BU can claim whether under the CGA or otherwise.
11. BU also says EX was disrespectful to one of BU's volunteer leaders because EX told him to “shut up” after the sensor light issue was pointed out. EX says when he was trying to activate the sensor the person was speaking loudly and very close to him while he was trying to activate the light. He says he was struggling to concentrate and asked him to be quiet firmly.
12. Whether or not EX had in fact spoke to the gentleman disrespectfully is not a matter for the Tribunal, in any award it could give. The CGA does not apply.

Unwelcoming camp induction

13. BU says LN's camp induction was unwelcoming as she screamed at the participants which created an intimidating and hostile environment and was therefore no conducive to the participants learning, safety and enjoyment.
14. EX says before the briefing guests were smoking around the heritage buildings and were reminded this was not permitted (as mentioned in the information pack), which he says they knew because they were concealing the smoking. He says LN had to speak loudly at the safety briefing to gain their attention. Many of them were on their phones and no-one in the BU group assisted LN to ensure they were listening. He says yes LN would have raised her voice to get attention.
15. Safety briefings are important, and, in my view, it is unlikely LN would have raised her voice if the participants were attentive. Whether they were intimidated, or it affected their enjoyment is very subjective. I also cannot see how this would have affected the participants safety given it was, after-all, a safety briefing. I note also this was a large group of 62 participants.

Moving of mattresses

16. BU says LN scolded and falsely accused young participants of misplacing bed mattresses around the campsite. They say the LN admitted she miscounted the mattresses and did not apologise to the young participants.
17. EX says mattresses were moved and they asked them to return the mattresses to the correct location.
18. Even if LN was wrong and miscounted the mattresses, I cannot see how this could be a breach of the CGA. Afterall this was at the end of the camp and would have minimal or no impact on their enjoyment. In any event there is no evidence that the young participants did not move the mattresses. This is a matter of "he said/she said". Further not giving an apology (again assuming LN was wrong) is not something I can consider relevant is making an award. The CGA does not apply here.

Cleaning tasks

19. BU says LN compelled young participants to complete cleaning tasks at the end of their stay which well outside what of what was required of them which included cleaning cobwebs off the walls, flipping over frames inside beds that were untouched and to mop the floor 3 times because LN couldn't smell disinfectant.
20. EX says the standard of cleaning was woefully short. The facility was to be returned to the state it was on arrival. He said NPU is a self-clean facility and this is clearly stated in the information they provided, and which was repeated to them on many occasions. He says BU chose not to purchase their recommended cleaning packs which were cost effective, and they appeared to have only brought dishwashing liquid with them which was inappropriate for cleaning and disinfecting toilets, floors, showers, and other things.
21. EX also says NPU spent over 24 hours and consumables to get the facility back to the standard it was before, which they have not sought to recover.
22. I note the information pack provided does recommend the use of NPU cleaning packs as they are better for the wastewater system and reduces plastic waste. Under NPU's General Rules and Regulations it says the facility is a self-clean facility and that attendees should come prepared for that. It also says what is required which includes bin liners, detergents and disinfectants which are set out in the Group Gear List. It also says additional charges may be incurred if areas are left in an unacceptable condition.

23. There is no evidence that participants were asked to clean outside what BU was required to do. Again, this is a matter of “he said/she said”. Also, if BU did not have disinfectant, then the floors may well have needed to be mopped 3 times (assuming they were asked to do that).

Disrespecting and unprofessional behaviour

24. BU says their [speaker] (who was a guest speaker) tried to speak to LN about the cleaning tasks but she was disrespectful and turned her back on him saying she would only talk to the volunteer leader who was in charge.

25. BU also says EX was unprofessional to their [speaker] when their [speaker] complained about NPU’s management and services, because EX said, “go complain to Jacinda Ardern”.

26. EX says that in their experience given the size of the group it is best to deal with the group leader who can then convey the information to the wider group. He says they “could not be expected to know of other hierarchical structures within the group.”

27. EX says he was approached by an older guest who loudly told him that his wife was disrespectful and that he should discipline her and that he intended to report and complain to the government. EX says he heard him out and did not interrupt him. He pointed out that LN was not his wife and that she was the operations manager who he worked with. He says he did tell the guest he did have the Prime Minister’s email address (which is publicly available) and said he was happy to share it with him.

28. Whilst I understand that BU’s [speaker] may have felt disrespected and felt he was spoken to unprofessionally, this is not a matter for the Tribunal in any award it could give. The CGA does not apply here. In any event there are two differing versions on what occurred.

Google Reviews

29. During the hearing, BU emailed copies of google reviews (13 in total, one being from BU). Those reviews were negative, and all were recorded as being posted “4 months ago”. EX says he can tell they were posts related to BU. He says the review from a OA says he had an experience with a school camp “this year”. EX says there was no school camp.

30. I note google reviews are very subjective and would not be something I would usually rely on as evidence. I have also looked at the 13 reviews and note on most of them NPU replied saying “thank you for your feedback on behalf of BU ...” As mentioned above those were posted at the same time. It is more likely than not that most (if not all) of the 12 other posts were from attendees or people related (in one way or another) to an attendee or BU.

31. I have also read other reviews (about 15) posted around the same time and all were positive. In fact, it was difficult to pinpoint negative comments even from the earlier and later posts.

Inadequate service/not fit for purpose

32. BU have not proved that the service provided by NPU was inadequate and/or not fit for purpose. They have also not proved the NPU breached its contract with them.

Conclusion

33. For the reasons above the claim is dismissed.

Referee: Ms Gayatri Jaduram

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>.