



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 434

APPLICANT DU

RESPONDENT QN

The Tribunal orders:

The claim by DU is dismissed.

Background

1. On 5 January 2023, DU purchased a Labrador puppy, DJ, from QN and his wife. The puppy was approximately 7.5 weeks old when it went to DU.
2. At a routine vet check on 2 February 2023 when DJ was aged approximately 11.5 weeks old, the vet noticed that DJ had some clicking in his hips. She also noted that DJ had hip pain on examination, although there was no history of any issues.
3. Pain on examination was confirmed by a vet at a further examination. The vet's examination notes of 7 February 2023 showed a normal gait assessment and no lameness was detected. DJ then underwent PennHIP x-rays, which showed bilaterally Ortolani Signs and a Distraction Index of 0.47. The vet diagnosed DJ as having canine hip dysplasia (CHD).
4. DJ then underwent juvenile pubic symphysiodesis (JPS) surgery on 14 February 2023 which is intended to correct the laxity of the hip joint and prevent against the development of future problems, notably osteoarthritis. DJ also undergoes regular and ongoing physiotherapy.
5. DU sought a refund from QN who agreed DU could return DJ for a full refund of the purchase price (\$1,500). This was after the 11.5 week vet check but before any formal diagnosis of DJ's condition had occurred.
6. DU did not wish to return DJ as she had become attached to him and so it was agreed that if there was evidence that DJ did have a defect in his hips that was due to a breeding issue, DU could keep DJ and also receive a full refund. The terms of this agreement are discussed in more detail under the last issue below.
7. The issues to resolve this claim are as follows:
 - a. Was DJ sold with a "defect" that QN had an obligation to identify and was he required to ensure he didn't offer a dog for sale with that problem?
 - i. Has DU shown DJ has hip dysplasia?
 - ii. Was this present at the time of sale?

- iii. is the degree of that dysplasia sufficient that it is a “defect” that the dog should not have been sold with?
- b. If so, does that entitle DU to receive the \$1,500 purchase price value back while retaining the dog?
- c. Does the fact the purchase price was offered to be refunded but this was declined by DU, change her entitlement to a refund of the price?
- d. Has DU shown that the extent of DJ’s hip dysplasia falls within the terms of the agreement made between the parties after the sale of the dog that QN would refund the sum of \$1,500 and DU could keep DJ if specialist examination showed the cause of the hip dysplasia is a breeding fault?

Was DJ sold with a “defect” that QN had an obligation to identify and was he required to ensure he didn’t offer a dog for sale with that problem?

8. The extent of QN’s obligations depends whether he and his wife were “in trade” for the purposes of selling puppies, or whether this was simply the private sale of puppies from a family dog. If QN is in trade, then he and his wife are caught by the provisions of the Consumer Guarantees Act 1993 which requires that any puppies sold are of “acceptable quality” as a Labrador puppy is a “good” within the meaning of the Act and one that is ordinarily acquired for personal, domestic, or household use or consumption (as required in the definition of a “consumer”).
9. QN is of the view that he is a private seller. He explained to the Tribunal that at the time of DJ’s sale, he and his wife were simply trialling whether or not to carry out a puppy breeding business. It was his view that they began running a business as from 1 April 2023, as by that time they had carried out the trial, decided to proceed with the business, and other incidental things such as registering with [Accounting Company] for accounting purposes were all in place.
10. Taken together, the evidence shows on the balance of probabilities that in 2022 when DJ was sold, QN and his wife were in trade, although it was only the very early stages of their business. The following facts support this conclusion:
 - a. QN and his wife had in mind that they could breed puppies as a business venture;
 - b. They were breeding from two breeding dogs, not just a single family pet;
 - c. Four litters of puppies producing a total of approximately 35 puppies were bred, although not all survived and not all could be sold at a full value.
 - d. There was a purpose-built enclosure for the puppies, an indoor shed that had a heat lamp, a whelping box and a monitor, intended to ensure the well-being of the puppies;
 - e. The puppies are weighed daily
11. QN and his wife were in trade and are therefore obliged to ensure that any puppy they sell to a consumer is of “acceptable quality.”

i. Has DU shown DJ has hip dysplasia?

12. DJ’s vet provided a written statement dated 9 March 2023 that stated that DJ was diagnosed with CHD in February 2023. A letter provided by the vet to the insurance company (undated but presumably from February 2023) also states examinations and tests are “consistent with hip dysplasia” and recommended JPS surgery for “DJ’s hip dysplasia.”
13. QN stated in the hearing, and it also is apparent in his dealing with DU, that he accepts that DJ has CHD.

ii. Was this present at the time of sale?

14. It was a condition of sale, that DJ was to be checked by a vet before DU accepted him. Both parties agreed that no issues with DJ were identified at this time.
15. CHD is largely a genetic, inherited condition. Environmental factors will worsen a genetically predisposed individual. A dog without the genes for CHD is very unlikely to develop CHD.
16. QN suggested that perhaps something had occurred which gave rise to the CHD in the time that DU had DJ, but he did not identify any particular cause or event.
17. It was clear that DU is a careful and caring pet owner, and she was not aware of any adverse events which had occurred with DJ, such as a fall or being dropped. Two common events which create the expression of CHD are overfeeding or a traumatic injury. The report from the vet on 7 February 2023 records normal activity levels, including not leaving the property, as well as gentle treatment at home. It also recorded good muscle condition and there was no reference to DJ being too heavy or showing unusually fast growth which might relate to overfeeding and be a causative event.
18. On the balance of probabilities, I find that DJ's CHD was present at time of sale.

iii. is the degree of that dysplasia sufficient that it is a defect that the dog should not have been sold with?

19. Under section 6 of the Consumer Guarantees Act 1993 there is a guarantee that goods purchased will be of acceptable quality.
20. The Act explains in section 7 what "acceptable quality" means. A consumer can expect that the item they purchased is fit for the purpose such goods are commonly used for, acceptable in appearance and finish, free from minor defects, safe and durable. This is judged against what a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, and takes into account the nature of the goods, the price, as well as all other relevant circumstances of the supply of the goods.
21. It can be difficult to determine whether a good is of acceptable quality when that "good" is a living thing. It is further complicated when the problem complained of is a genetic issue and one which is very common in that particular type of animal.
22. In relation to the sale of DJ, a Labrador puppy, the essential question is whether the CHD can be considered a defect or failure of acceptable quality, or whether that condition is more in the nature of a known characteristic of the breed.
23. It is well known (according to literature provided by the parties) that larger breeds of dogs, including Labradors, have a greater propensity for hip problems than other breeds of dogs. This is no different than might be expected in relation to other dogs which carry other genetic tendencies.
24. A responsible breeder will therefore try and ensure that they only breed from dogs known to have a lesser risk of hip issues. A common measure of whether a dog has good hips is their distraction index (DI), however there are other methods of identifying whether a breeding dog is better bred in relation to hip formation than others.
25. QN has provided vet evidence which suggests that both the father and mother of DJ are dogs with reasonably well-formed hips. This is consistent with the fact that DJ has a DI of 0.47. In Labradors, the literature suggests that an average score is around 0.49, so DJ has a slightly better than average DI.

26. The onus is on DU to satisfy the Tribunal that DJ's CHD amounts to a failure to meet the standard of acceptable quality, having regard to what a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, and that takes into account the nature of the goods.
27. I am not satisfied that she has been able to show this before the Tribunal. A reasonably informed consumer purchasing a Labrador puppy would be aware that CHD is a known risk in the breed. Although DU has established that DJ has CHD, given the evidence about his DI score which is better than average for the breed, the information about the prevalence of this condition within the Labrador breed, and the fact DJ's parents do not have evident issues with their hips, I am unable to conclude the hip dysplasia in DJ amounts to a failure of acceptable quality.
28. QN has shown that he and his wife were aware of the possible risk of CHD and they took steps in terms of selection of the breeding dogs and the care of the puppies to ensure the quality of the puppies they were selling. DJ was checked at the time of sale and no known problems were identified. DJ has a DI score that is better than the average Labrador, and although he has gone on to exhibit CHD as a young puppy, this is simply an unfortunate outcome within the known characteristics of the Labrador breed.
29. I therefore conclude that DJ was a Labrador of acceptable quality when he was sold.

If so, does that entitle DU to receive the \$1,500 purchase price value back while retaining the dog?

30. Because I have found that DJ was of acceptable quality, this question does not need to be answered.

Does the fact the purchase price was offered to be refunded but this was declined by DU, change her entitlement to a refund of the price?

31. Because I have found that DJ was of acceptable quality, this question does not need to be answered.

Has DU shown that the extent of DJ's hip dysplasia falls within the terms of the agreement made between the parties after the sale of the dog that QN would refund the sum of \$1,500 and DU could keep DJ if specialist examination showed the cause of the hip dysplasia is a breeding fault?

32. After the preliminary assessment of clicking in DJ's hips made at the 11.5 week check up, QN offered DU a full refund and the right to retain DJ if specialist examination showed the cause of the CHD to be a breeding problem.
33. This arrangement was an additional agreement reached between the parties. It is separate from the obligations conferred by the Consumer Guarantees Act.
34. As QN's wife said during the hearing, both they and DU expected that with hip issues being identified in such a young dog, testing would show a poor DI score. A poor DI score would indicate a poorly bred dog.
35. However, DJ had a DI score of 0.47 which is just above the average for a Labrador.
36. Although CHD is a genetic condition, it is also very prevalent within the breed and to be a breeding fault would need the dog to have a DI at a higher than average level.
37. As DJ scored better than average, it is not established that his CHD was a breeding fault within the meaning of the agreement between the parties.
38. As such, DU is not entitled to a refund of \$1,500 under this agreement.

Conclusion

39. It is clear that DU cares very much for DJ's wellbeing. It is understandable that she was disappointed to have purchased a puppy with a health condition when there were no signs of any problems prior.
40. However, there are risks with all dog breeds and in Labradors, it is that they can suffer problems with their hips.
41. DU had the opportunity to return DJ and receive her money back, but she chose to keep him. Because the evidence in this case shows that DJ's problems do not amount to a failure to provide a puppy of acceptable quality, DU does not have any remedy under the Consumer Guarantees Act. The condition of the additional agreement between the parties to provide a refund was also not met.
42. I therefore dismiss the claim by DU.

Referee: S Simmonds

Date: 4 September 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>.