



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1394

APPLICANT FU Ltd

RESPONDENT TB Ltd

The Tribunal hereby orders:

TB Ltd is to pay the sum of \$1559.24 directly to FU Ltd on or before 25 March 2020.

Reasons

1. TB Ltd ('TB') performed a WOF inspection for FU Ltd, for a vehicle FU Ltd ('FU') had sold to a customer. The WOF inspection was performed 9 days prior to FU's customer arriving from Wellington to collect the vehicle and drive it home.
2. Some 6 hours into that journey a wheel bearing seized and the wheel flew off the vehicle while it was travelling at 90kph, causing a crash. Fortunately the occupants were uninjured, but were understandably highly distressed. FU provided a full refund of their vehicle purchase as well as \$400.00 compensation for their travel costs.
3. FU contends that the problem must have been evident during the WOF inspection and claims losses of \$3224.24 from TB, being travel compensation paid to the customer, tow costs, repairs costs and the Tribunal filing fee.
4. The issues to determine are:
 - Is FU a consumer and TB a supplier under the Consumer Guarantees Act 1993?
 - Did TB perform its service with reasonable care and skill, that is, was the failure of a nature that symptoms would have been noticeable during a WOF check 9 days earlier?
 - What remedy, if any, is available to FU?

Is FU a consumer and TB a supplier under the Consumer Guarantees Act 1993?

5. TB is a supplier under the CGA in this case because the definition of supplier extends to situations where there is no direct contract between the consumer and the person/company providing the service. Even though FU is in trade, it is the nature of the service that determines

whether or not they are a consumer under the CGA and a WOF inspection is the type of service that is ordinarily acquired for personal, domestic or household use.

6. Even though FU is on-selling the car in trade, they are not 'resupplying WOF inspection services' in trade, and are therefore not excluded from the definition of consumer on that basis.
7. The statutory guarantees contained in the CGA therefore apply.

Did TB perform its service with reasonable care and skill, that is, was the failure of a nature that symptoms would have been noticeable during a WOF check 9 days earlier?

8. The CGA provides a guarantee to consumers that suppliers will perform services with reasonable care and skill.
9. I find, on the balance of probabilities that the failure was of a nature that symptoms of the wheel bearing problem would have been noticeable during the WOF check performed by TB, and therefore that TB did not perform its service with reasonable care and skill. I note that Mr X was shocked by the events that transpired with this vehicle and was credibly adamant that he had carried out checks thoroughly and that the vehicle showed no sign of noise or play in the wheel bearing when he checked it.
10. However, Mr X also agreed with FU and FU's witness Mr L that the failure must have been preceded by symptoms of noise and play, which could not have started only within the 9 day period between the WOF check and the crash. As the part is not one that could easily have been changed on the vehicle between the WOF check and the handover to the new owner (nor would there have been any obvious reason or benefit to anyone in doing so), the logical conclusion must be that TB has made an honest mistake during the check and failed to detect symptoms that must have been present.

What remedy, if any, is available to FU?

11. Section 32(c) of the CGA provides as a remedy on failure of a service guarantee that the consumer may obtain from the supplier damages for any loss resulting from the failure which was reasonably foreseeable as liable to result from the failure.
12. Taking into consideration the nature of the failure, I find that it is reasonably foreseeable that alternative travel costs, towing costs and repair costs would result from the failure. However only travel costs after the crash are reasonably foreseeable, not those incurred by the customer having travelled a long distance to collect the car, so \$100 of the \$400 claimed for travel costs is awarded. Towing costs are inevitable and the fact that the vehicle was at some distance from Auckland when the crash occurred does not lessen TB's liability to pay actual towing costs, which were \$897.00.
13. Repair costs of \$1837.24 were claimed and an invoice provided but it transpired during the hearing, that TB had paid cash to FU's witness Mr L, towards the repair costs, which Mr L had not informed FU about nor deducted off its repair invoice. There was a slight discrepancy in the amount but I accept Mr X's higher amount of \$850.00 due to the irregularity of Mr L not having deducted it from the invoice to FU (Mr L said it was only \$800).
14. Further, FU's Mr H acknowledges that the repair cost claimed included a repair to the original wheel bearing issue which is not a cost resulting from the failure to detect that problem in the WOF check, rather a cost that would have to have been incurred even if the problem had been picked up. He had not provided a breakdown of the amount for that original repair but noted it would include the bearing kit at \$103 plus GST plus 1-2 hours labour. Mr X estimated that

repair would have cost between \$350 and \$500. As it is up to FU to prove its claim, I set the deducted repair amount at the higher estimate, at the mid-range of Mr X's figures at \$425.00.

15. The Disputes Tribunal filing fee is not able to be awarded under the Disputes Tribunal Act 1988. The total reasonably foreseeable losses payable by TB is \$1559.24.

Referee: J Perfect

Date: 4 March 2020



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 28 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 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 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>.