



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 1

APPLICANT IQ

RESPONDENT UF

The Tribunal orders:

1. IQ is to hold the [vehicle] for a period of 14 days. In that period, if UF can advise IQ if he wishes to do so that he will take back the car and pay to IQ the purchase price in return of \$4,760.00.
2. If IQ is not advised of this election in 14 days, then IQ may dispose of the car as he sees fit, and UF is to pay IQ \$3,960.00 on or before 31 August 2023.

Reasons

1. On 27 September 2022, IQ (the applicant) purchased a [vehicle] from UF (the respondent) for \$4,760.00.
2. A few days after purchase, the car started to exhibit issues, first with starting, and then with overheating, and then (after replacing coolant) with a loss of all power. IQ is concerned there are fundamental issues with the engine, that could be as serious as a cracked head gasket. He has filed a claim seeking a refund.
3. The respondent defends the claim on the basis that any issues that arose did so after purchase, when the car could have been misused, and at a time when the car was at the applicant's risk. He also states that this was a private sale, as he is not a car dealer, that he was selling the car on behalf of a friend, and that any statement he made about the car was correct.
4. The issues to be resolved are:
 - (a) Was the respondent either a car dealer, or selling the car "in trade"?
 - (b) If not, was the advertisement correct?
 - (c) If not, how much compensation should be awarded?

Was the respondent either a car dealer, or selling the car "in trade"?

5. If the respondent was a motor vehicle dealer, or was acting in trade, the Consumer Guarantees Act 1993 would apply, and the car would need to be of acceptable quality and fit for purpose. If it failed these tests, then the applicant would be entitled to a refund.
6. On the evidence presented, I was unable to make a finding that the respondent is a car dealer or was selling the car "in trade".

7. A person is considered to be a car dealer if they sell more than 6 cars in a 12-month period, unless they can show that they were not selling them for the primary purpose of gain (s8 Motor Vehicle Sales Act 2003 (MVSA)).
8. At first blush, it certainly appeared that the respondent was a car dealer, as he had what looked like a large number of trades of various vehicles on [website] over a 12-month period. However, it was established that the respondent is a roofer, not a car dealer. As we went through the spreadsheet of transactions provided by [website], this corroborated the respondent's evidence that cars were a hobby, rather than a trade. The respondent explained that he had purchased all vehicles on a movie set, as he collects older cars, and to obtain the ones he wished to keep, he had to buy all the vehicles. Some of these he on-sold. Many of the listing provided did not result in a sale. The respondent has retained the classic cars which he sought to purchase from the set. Of those transactions that resulted in a sale, one was a work van from his roofing business and several were motorbikes from the movie set (and therefore not part of the count for the purposes of the MVSA).
9. I was therefore unable to make a finding that the respondent was caught by the provisions of the MVSA from his activities.
10. I have given consideration to whether the respondent was nonetheless generally acting "in trade", even if he is not a motor vehicle dealer, given his "hobby", which had resulted in so many transactions, albeit not all of motorcars.
11. The term "trade" is defined in the Consumer Guarantees Act 1993 as any undertaking, whether carried on for gain or reward or not, or any undertaking in the course of which goods or services are acquired or supplied, whether free of charge or not. The term "undertaking" has been interpreted to mean a project or enterprise organised and directed towards an end result, as opposed to a series of unrelated transactions.
12. The scale of the list of [website] transactions, does start to give a picture of what might be called an "undertaking", even if it is a weekend hobby, given the number of advertisements. Notably, the respondent explained that he had on-sold the [vehicle] for a friend. Whilst this may have been so, it was unusual to have taken on the risk of such a deal when he seemed to know little about the car, and did not hold it for long. Having said that, the respondent was able to provide a verifiable answer in relation to his movie set deal which linked his activities to a personal hobby, and once the number of transactions after this deal were explained, the picture lacked probability as to his status as any form of "dealer". If the same pattern had emerged in the year prior to his movie set purchase, or had he not retained cars from that deal, the outcome may have been different, but I am only able to make findings based on the evidence presented.

Was the advertisement correct?

13. Nonetheless, even if the respondent was not acting "in trade" when he sold the car, the applicant may still be entitled to damages. In a private sale, any statement of fact about the car must be correct, and if it is not, then compensation may be awarded (s35 Contract and Commercial Law Act 2017).
14. The [website] advertisement stated "tidy car, for real well". Both parties agreed that this was meant to read, and did objectively mean, "*tidy car, goes real well*". The respondent explained that in the short time he had had the car, he had no problems with it, so advertised it as such. However, I am satisfied that the car was not in fact in that state. An engine light came on almost straight away, and the car was misfiring, within 45 kms, and had completely broken down within a matter of days, (after a total of just 140kms).
15. In addition, the advertisement stated: "*Only selling as I have to many cars and this is not being used at all*". In fact, this was not the case. This statement suggests the car had been owned and driven by the respondent, when in fact, he was only selling it for a friend, and he had no background with the car.

16. A mechanic from [Mechanic Shop] who has made a superficial initial assessment of the car (at a cost of \$253.00) explained that the car has a number of faults that render it currently undriveable. Whilst there has been no full engine inspection, there are codes that have come up on an initial inspection that suggest problems with an oil leak from the rocker cover, A/C belt cracked, sparkplugs, ignition coil, the fuel cut system and camshaft. It is possible, although unknown, that a headgasket has blown, but there has been no full inspection to determine this. The mechanic advised that a further assessment would cost in the order of \$1,000.00.
17. I have had regard to the submission of the respondent that the applicant could have misused the car in the short time he drove it. I do not consider that this is a probable cause of the issues. The car was held by the respondent for such a short time and was driven such a short distance by the applicant before problems arose. The mechanic stated there was no evidence of driver misuse. The respondent was concerned that the mechanic was a friend of the applicant, but this was not borne out in the evidence presented. The respondent was concerned I had made a comment in the proceedings that the applicant did not strike me as someone who would have abused the car and then filed the claim, and I accept credibility in that respect cannot be safely weighed as a determining factor. However, the timeframe was so short, and the respondent's knowledge of the car was so limited, that the balance of probabilities suggest a defect that was not known, leading to an incorrect advertisement. It is the seller who takes the risk of this, where assurances are made that indicate underlying facts.

How much compensation should be awarded?

18. The mechanic gave evidence at the second hearing which established that there are serious issues, but the cost to repair these has not been determined as the applicant has elected not to spend more on further analysis given the potential loss to him that might not be recoverable. It is a reasonable decision to make, with a car of this age and mileage (194,000) and the cost of further inspection, to consider the car not worth spending more on. Nonetheless, there could be a market for a car of this nature, for someone who has the ability to take on the project of its repair. The car will therefore have some resale value, albeit in its current state, but at a value that might be little more than scrap.
19. IQ gave evidence at a final hearing that the best price he could recover is \$800.00 (from a wrecker). UF did not provide any alternative valuation, or offer to take the car back, but reiterated his position that the advertisement was not a misrepresentation. He also noted that the car could be fixed for the price of a small part (e.g., \$89.00). That was not a reasonable assessment of the evidence presented by the mechanic, as listed above. However, if that was his view, he could elect to take the car back, and suffer no loss by repair and resale.
20. For these reasons, an order has been made giving UF that opportunity. If, as he has previously advised, he still does not want to take that option, then it is not possible to order the return of the car, and the only measurable loss is the price paid for the car less \$800.00 (\$3,960.00).
21. Orders have been made accordingly.

Referee: J Robertshawe
Date: 28 July 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>.