



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2019] NZDT 1378

APPLICANT **KC Limited**

RESPONDENT **OK**

The Tribunal hereby orders:

On the counter-claim, KC Limited is to pay the sum of \$500.00 to OK on or before 7 August 2019; and

The claim is dismissed.

Reasons

1. On 26 December 2018 Mr K hired a van from KC Ltd ('KC') for 6 days. He paid a daily fee on top of the hireage charge for zero insurance excess for damage caused during the hireage period, and he also paid a \$500.00 bond.
2. On 31 December KC received a breakdown phone call from Mr K over an issue with the clutch. KC retrieved the van from a steep street in [City] and the clutch failed completely on KC's driver's journey back to its offices - the van had to be towed to KC's mechanic.
3. The van required a complete clutch replacement at a cost of \$3413.00. KC claims \$2913.00, being the repair cost of \$3413.00 minus the \$500.00 bond already paid by Mr K, on the basis that Mr K drove the van in a manner that directly caused the clutch damage.
4. Mr K claims \$500.00, being the refund of his bond.
5. The issues to determine are:
 - What was the likely cause of the clutch failure?
 - Is Mr K liable for the clutch damage under the terms of the contract with KC?
 - What amounts, if any, are owed on the claim and counter-claim?

What was the cause of the clutch failure?

6. I find that Mr K drove the vehicle in a manner that caused premature failure of the clutch. Mr K contends that there may have been pre-existing damage to the clutch and points out that the condition of the clutch at the beginning of his hire is unknown. He says he did not ride the clutch and is experienced driving manual vehicles, even though this experience is not recent.
7. KC has provided evidence to show that the previous hire of the van ended on 17 December 2018 - that hirer was phoned at the hearing and gave witness evidence to the effect that he experienced no issues with the clutch, including slipping or any other problem.
8. Mr J for KC notes that the van is one of their newest and was still under warranty, having done only 50,000km in 20 months, which is far too early for normal wear and tear to be a factor. In addition his mechanic, Mr W, was summonsed to appear as a witness at the second hearing and he showed photos of the markings on the clutch plate, explaining that the markings are heatmarks and that their blue/green colour is indicative of substantial burning. Mr W said if these heat-marks had been pre-existing, any previous driver would definitely have noticed the clutch slipping/failing within 5-10 minutes of any trip, noting that it is the worst damage he has seen in 10 years and was definitely caused by 'driver abuse'. He pointed out the visible grooves on the flyplate that would have been worn down if the issue with the clutch had been normal wear and tear/age. Mr W said the damage was so visible and the cause so clear that there was no point making a claim under the warranty.
9. Based on the mechanic's evidence, and Mr K's statement that the clutch had not been slipping during his first five days of hire, I conclude that Mr K must have ridden the clutch or used an inappropriate gear while pulling off in a loaded gear while driving, parking, and/or hill-starting to such an extent that it has burnt out the clutch plate. Also based on the mechanic's evidence I am satisfied that any problems Mr K experienced with the van stalling, as stated by him and some of his passengers, were unrelated to the burnt-out clutch issue.

Is Mr K liable for the clutch damage under the terms of the contract with KC?

10. The contract contains written terms relating to insurance, damage and exclusions to cover. There is no separate contract of insurance and no separate written terms - they are all contained within the "Agreement to Hire a Rental Vehicle" document, which forms the contract between KC and Mr K.
11. Clause 10, under the heading "Insurance" states:

"Subject to the exclusions set out below, the hirer and any driver authorised to drive the vehicle is fully indemnified in respect of any liability he/she might have to the owner in respect of loss or of damage to the vehicle..."

While clutch failure is not something that a general vehicle insurance policy would cover and therefore not something KC can make an insurance claim for, the effect of the wording in KC's contract is that Mr K is fully indemnified in respect of any liability to KC for damage to the vehicle, unless particular exclusions apply (and those are addressed below). While it may be that only damage caused in a collision or other external event-type damage was envisaged, that is not what the clause says.

12. Clause 10(f) under the heading "Exclusions" is the relevant clause for this situation and reads as follows:

"The indemnities referred to above shall not apply where the damage, injury or loss arises when the vehicle is wilfully or recklessly damaged by the hirer..."

13. With respect to exclusion clauses, the onus is on the party seeking the protection of the clause, KC in this instance, to show that the words clearly and aptly apply to the situation that has arisen. KC contends that Mr K damaged the van wilfully because he chose to drive a manual vehicle knowing that he did not have up-to-date experience in one. But making a conscious decision to drive a particular type of vehicle is different to causing damage wilfully, that is, intentionally - it is clear that Mr K did not intentionally or deliberately damage the van/clutch.

14. With respect to the definition of 'reckless', I consider it to be more serious than 'negligent', and note that 'negligent' is not included in the wording of the exclusion clause, because of course the point of vehicle insurance is to cover the insured's negligence. There are some similar synonyms used in the dictionary definitions of both words (reckless and negligent), such as careless, inattentive, heedless and thoughtless, and I am of the view that those words apply to Mr K's driving behaviour in KC's van with respect to the clutch.

15. However, the definition of reckless, in addition to those words which also apply to 'negligent', includes words with an additional element of haste, such as rash, hasty, impetuous, impulsive, daredevil and hot-headed. I am not persuaded that these clearly and aptly apply to Mr K's use of the clutch in KC's van (assuming this involved riding the clutch and or pulling off in low gear in a loaded van) and therefore find that the exclusion clause does not apply to this situation. Mr K's use of the clutch, while it may be described as negligent or incompetent, is nevertheless covered by the indemnity against damage provided by the contract.

What amounts, if any, are owed on the claim and counter-claim?

16. For the reasons given above, Mr K is not liable to pay for the replacement clutch. It flows from that decision, that he is also entitled to a refund of the bond paid to KC of \$500.00.

Referee: J Perfect
Date: 17 July 2019



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 or a mistake was made.

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 outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the 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, and 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>.