



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 712

APPLICANT **KC**

RESPONDENT **BC Limited**

The Tribunal orders:

BC Limited is to pay directly to KC the sum of \$1,948 on or before Wednesday, 31 January 2024.

The respondent may uplift from the applicant, at its own cost, the [dryer] delivered in September 2023 on or before 31 January 2024. If the respondent does not uplift the dryer by 31 January 2024, the applicant may dispose of the dryer as she sees fit.

Summary of Reasons:

- [1] The hearing was convened by teleconference. Both parties appeared at the hearing. NM, General Manager appeared for the respondent. NM stated the respondent did not intend to defend the claim and he would not remain at the hearing as he *knows how the Tribunal works*. NM hung up.
- [2] Notwithstanding the respondent has chosen not to attend the hearing I am satisfied the respondent has been properly notified of the hearing, and therefore I will proceed to consider the claim in its absence.

Background

- [3] The applicant seeks a refund for a washing machine and dryer she purchased sight unseen from the respondent's website in September 2023. The applicant claims the goods were advertised as new-box damaged but that when she unboxed the appliances, she found the washing machine had a sticker that stated *fixed dent in front panel*. The dryer had a sticker that stated *right body dent, inner drum minor dent, right corner front panel dent*. The applicant claims these stickers show the machines are not new and were therefore misrepresented in the sale advertisement.
- [4] The applicant further claims that she feels misled by the respondent and has lost all trust given the tone of NM's correspondence with her and the respondent's refusal to negotiate with her.

Issues

- i) Are the appliances new.
- ii) Has the respondent lost the right of repair.

Issue 1

[5] The applicant is clear that to her new means without having had any repairs, that is as it has come off the production line without any damage or previous owners.

[6] As stated above the respondent has not appeared today, nor provided the Tribunal with any evidence. However, it is clear from the respondent's written correspondence that the respondent gives a different meaning to *new*, as stated on its website:

[brand] products are brand new, box damaged items. This means the product or packaging has been damaged in some way or form resulting in the product not making it to normal retail stores. They have never been owned by anyone prior. We buy all such [brand] products we can source, inspect, test and repair before making them available to you at the lowest prices possible. You will enjoy the same quality [brand] product as sold at any other retailer in New Zealand with the advantage of the lowest possible buying prices. Products may have had parts replaced that were damaged in order to bring them back to as close to original condition as possible.

As part of our contract with the supplier of these [brand] products all [brand] factory warranties are void and KC take over the warranty provisions and servicing.

We provide a 12 month standard warranty. Serial numbers are removed to prevent abuse of these terms and conditions of warranty and are replaced with our own serial number and warranty labels.

We also source small quantities of 100% retail brand new, non-box damaged [brand] product occasionally. These items carry full [brand] factory warranty and are labelled and advertised differently from our box damaged [brand] product and will have the original [brand] serial number intact to enable service via [brand].

It is important to note that we sell brand new, box damaged as well as refurbished [brand]. The advertising for the product will make this clear, if you have any doubt, our staff will be happy to assist you.

[7] The applicant admits this wording is on the respondent's site, but claims it was not present when she purchased the goods. Unfortunately, the respondent has not remained at the hearing, so I am unable clarify this with the respondent at hearing.

[8] The applicant claims the respondent breached the contract by misrepresenting the appliances. Under the law, a misrepresentation is to be understood in its established sense of a false or erroneous statement of fact. To be considered a breach, a misrepresentation must induce a person to enter a contract. Induce means that the respondent intended the applicant to act in a particular way or that it wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the applicant did. A misrepresentation need not be the sole reason for making the contract; it is enough if it is clearly one inducing cause.

[9] Section 35 of the Contract and Commercial Law Act 2017 treats a misrepresentation as if it were a breach of a term of the contract, damages are awarded according to the contract. Even if a purchaser is able to prove the goods were misrepresented, it does not automatically follow that they are able to cancel the contract and receive a full refund. In many cases an innocent party is only entitled to repair or compensation to put them back in the position they would have been in had the breach not occurred. A substantial failure often allows a party to cancel the contract.

[10] In this case and having considered all the evidence before me, I am persuaded the appliances sold to the applicant were new and not misrepresented. I accept new means the applicant is the first purchaser after production, even if some time has elapsed and new is not a guarantee that a manufacturing fault or other damage has not been repaired before sale. This is different from a refurbished good, which is not new, as the appliance has not been *used*. I am persuaded of this even if the respondent did not make that very clear on its website, however it is of course desirable that the respondent has now clearly set this out, even if I am unable to determine when this information was upload.

[11] I understand the applicant has lost faith in the respondent, and as outline below, I consider for good reason, however that is not grounds on which I can cancel a sale without first finding a breach. The applicant has confirmed the washing machine does not currently have any damage or faults and, on that basis, I am not persuaded the applicant is entitled to cancel the sale. Of course, if any future fault arises the applicant is entitled to rely upon the provisions of the Consumer Guarantees

Act 1993 (CGA) and is not limited by the respondent's limited express warranty or lack of [dryer brand] warranty.

- [12] The issue however is different with the dryer. I accept the applicant's evidence, supported by the sticker referred to above, that the drum of the dryer is dented. This dent was not brought to the applicant's attention and on the respondent's own evidence, that is its website, the drum should have been replaced in order to bring it back to as close to original condition as possible if advertised as new.
- [13] If the respondent did not wish to replace the dented drum, the respondent was entitled to sell the dryer as a second or damaged, so purchasers were aware of the unfixed damage. Whereas I do not find the dryer was misrepresented as such, with it still being a *new* machine, the respondent has breached the CGA in that the dryer is not acceptable in appearance and finish and free from minor defects as the internal drum is dented.
- [14] I accept the dryer was described as *scratch*,¹ but I am not persuaded a scratch is the same as a drum dent. A dented drum being more significant than a cosmetic scratch. Had the dryer only been scratched, it is likely my decision would be different.

Issue 2.

- [15] Under the CGA, a consumer has a right of redress against a supplier of goods if the goods fail to comply with the guarantees contained in the CGA, in this case the drum defect. A consumer has a number of remedies against the supplier if goods fail to comply with a guarantee. If the failure can be remedied, the consumer may require the supplier to do so. If the supplier does not, the consumer may have either the failure remedied elsewhere at the supplier's expense or reject the goods. Where the failure cannot be remedied or is of a substantial character, the consumer may reject the goods outright or obtain damages from the supplier as compensation for the reduction in value of the goods. The consumer may also obtain damages from the supplier for any reasonably foreseeable loss or damage.
- [16] In this case, the drum could be replaced, and in most instances the Tribunal will order repair before cancellation. However, I am persuaded by the tone of the respondent's correspondence with the applicant that it has been given ample opportunity to remedy and it clearly does not wish to do so. On that basis I am persuaded the applicant is entitled to reject the dryer and obtain a full refund including delivery costs as ordered above.
- [17] The respondent has an opportunity to uplift the dryer at a time convenient for the applicant, at its own cost but that is a matter for the respondent.

Referee: Hannan DTR

Date: 19 December 2023

¹ Indicating a second



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 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>.