



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 389

APPLICANT M Ltd

RESPONDENT ON

The Tribunal orders:

ON is to pay M Ltd \$1,500.00 within 28 days.

Reasons

[1] M Ltd, represented by director XC, purchased a small second hand digger from ON. XC says that ON misrepresented the condition of the digger, and claims compensation.

[2] XC said that he saw the digger advertised on Trademe in March 2022 at a price of \$7,000.00. He contacted ON, who had placed the advertisement. In response to his enquiry, ON said that the digger had been regularly serviced. XC produced a copy of an email message from ON, who stated that "Yes, it had been serviced regularly..". The parties agreed a price of \$6,500.00, and the digger was sent to [City].

[3] XC then arranged for N Ltd, a company that sells and services heavy machinery, to inspect the digger in April 2022. N Ltd examined it, and found a number of defects. N Ltd provided a list of its findings to XC in a document dated 9 May 2022. The digger remained in N Ltd's possession while it sourced parts, and eventually repair work was completed. N Ltd's total invoice, dated 9 May 2023, was for \$6,354.30. XC had contacted ON on 16 March 2023 to inform him that defects had been found in the digger, and had requested a contribution to the cost of repairing them.

[4] XC said that he had not expected to pay so much to N Ltd, but the costs had increased as N Ltd had found problems with the digger, and there had been considerable delay in N Ltd's finding parts.

[5] XC considered that ON had misrepresented the condition of the digger by saying that it had been serviced regularly. XC provided a copy of N Ltd's list of the defects and its repair work. That list has been provided to ON, so I shall not copy it here. The list was extensive; N Ltd had found leaks, rust, and broken and worn parts, and had carried out the necessary repairs. XC's view was that it was clear that the digger had not been regularly serviced, and that was the opinion of N Ltd.

[6] XC claimed \$5,000.00. He said that he had paid \$6,500.00 for a digger that was worth at the time of his purchase, in his opinion and that of N Ltd, about \$1,500.00. He had known the digger was old, but had expected that it would be in reasonable working order, it having been regularly serviced.

[7] ON said that he had bought the digger from a hire company that had had its own service department. It was a small digger, some 15 – 20 years old, he thought, and he had wanted it for his wife's use in the garden. She had used it some 12 or 15 times, after which, because of house renovations, it had been stored in the garage for about a year. He had put a new battery in it after that, and it had started and was used on one more occasion.

[8] ON said that he had assumed, because the hire company had told him so, that the digger had been regularly serviced before he had bought it. He was of the impression, because he had been told so, that such a company would have maintained its hire equipment in good order. He had not had the digger serviced during the time that he had owned it because the small amount of use to which his wife had put it had not justified a service.

[9] ON expressed concern about the length of time that XC had had the digger, knowing that defects had been identified, without contacting him to discuss the matter. If, said ON, XC had told him at the time that problems began coming to light, he would have perhaps offered a refund to XC. He had been surprised to hear suddenly from XC, a year after the sale, that XC was having repairs done and was requesting that he, ON, make a contribution towards their cost.

The issue

[10] The question for me to decide is whether M Ltd is entitled to be compensated for repairs that N Ltd did on the digger. If so, I must consider how much reasonable compensation should be paid by ON.

The law

[11] Section 35 of the Contract and Commercial Law Act 2017 provides that if a person is induced to enter a contract by a misrepresentation made by the other party, whether innocent or fraudulent, that person is entitled to compensation from that other party as if the misrepresentation were a term of the contract. In this case, XC must prove that ON's statement that the digger had been regularly serviced was incorrect; that it induced him to enter the contract; and that it resulted in the losses that he claimed.

Did ON misrepresent the condition of the digger by saying it had been regularly serviced?

[12] I consider that XC's evidence establishes that the digger had not been regularly serviced. I accept that ON's statement that it had been made honestly; he reasonably relied on what the seller had told him and, because the seller was a hire company, he accepted that it would have serviced its equipment. However, honestly made or not, his statement was inaccurate. It is clear that at least some of the defects found by N Ltd, that included rust, broken and defective parts and extensive leaking, would not have been present in a digger that had been serviced regularly and in a state that it could have been offered for commercial hire. Thus, I consider that ON's statement about regular service was a misrepresentation and, as XC had particularly asked about this, that XC relied on it and agreed to buy the digger.

What compensation should be paid by ON?

[13] In my view, ON should compensate M Ltd to some extent but by less than the claimed sum of \$5,000.00. That is because:

- XC has not proven that all the repairs that were carried out were attributable to the lack of regular servicing. Some repairs were needed because some parts were old, or poorly functioning, and would not in any event have been identified, or repaired or replaced during a routine service; and
- The work done by N Ltd was extensive, and it has considerably improved the digger, which was 15 – 20 years old when M Ltd bought it. M Ltd was entitled to receive a digger of that age, that had probably been subjected to a considerable amount of work during its periods of hire, and that had been regularly serviced. There is obviously a great deal of betterment resulting from N Ltd's work; and
- XC did not contact ON immediately upon becoming aware that repairs were needed. Rather, he waited nearly a year before doing so, as there were delays in getting parts and having the work done. By doing this, XC deprived ON of the opportunity of assessing the gravity of the defects before the repair work was done and considering what steps he might take, or any offer he might make, to resolve the situation. I do not think it reasonable that ON should now be required to pay for all the repairs in those circumstances; and
- it is questionable whether it was reasonable on XC's part to spend \$6,534.30 on repairing a machine, known to be old and well used, that he had bought for \$6,500.00; and

- XC has not provided any objective evidence that the digger, in the state it was at the time of his purchase, had a value of \$1,500.00.

[14] Because of these uncertainties, my assessment of the sum that ON should pay cannot be a precise arithmetical one. I simply do not have the evidence to carry out a calculation with certainty. I must therefore do the best I can with the evidence available to me. I have examined the details of the work done by N Ltd, and I consider that some of the defects, such as leaks and worn parts, would have been identified during a service and, it would be reasonable to assume, have been fixed if the cost of doing so had been justified. Having regard to this, and the factors I have mentioned above, I consider that a reasonable sum for ON to pay should not exceed \$1,500.00. That is the sum that I have ordered that he should pay to M Ltd.

Referee: C Hawes

Date: 21 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>.