



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 531

APPLICANT **MC**
APPLICANT **TC**
RESPONDENT **B Ltd**

The Tribunal orders:

1. The claim is dismissed.
2. The counter-claim is dismissed.

Background

1. In October 2022, MC and TC booked a 5-day [trek] with B Ltd.
2. The cost was \$7,500.00.
3. MC and TC arrived at the [ranch] on 17 April 2023 for the commencement of the trek.
4. They were paired with their horses. MC was paired with a gelding named XJ.
5. XJ had suffered a fence injury to his hind hock approximately five weeks before.
6. The first day of the trek is a two-and-a-half-hour introductory ride. The purpose of the introductory ride is to ensure that the riders are comfortable with their horses and to deal with any issues with equipment.
7. MC was asked to ride with XJ at the rear of the pack. She submitted that XJ 'kicked out' at other horses three times during the ride, which lasted approximately 45 minutes.
8. That evening, MC raised concerns about XJ kicking out.
9. The next morning, MC strongly expressed concerns about XJ's injury and his 'kicking out' behaviour. After some discussion with XB and MF, MC and TC elected to leave the trek.
10. The claim seeks a partial reimbursement of the cost of the trek (\$6,900.00).
11. B Ltd's counter-claim seeks compensation for costs associated with responding to MC and TC's claim and to the WorkSafe complaint laid by MC and TC.

12. The hearing took place in [City] on 11 September 2023. MC and TC attended the hearing in person. XB and MF (representing B Ltd) attended by phone.

Law

13. The parties entered into a contract. The contract has explicit terms, including B Ltd's terms of trade, which are detailed on its website and are also provided to customers at the time of booking.

14. The contract also has implied terms. These are terms that are necessary to give efficacy to the contract, or that are so obvious to both parties that they go without saying.

15. B Ltd provides services to consumers. They are therefore subject to the Consumer Guarantees Act 1993 which states that service providers must exercise "reasonable care and skill".

16. If one party breaches the term of a contract the other party can, in certain circumstances, cancel the contract¹.

17. A consumer can cancel a contract for services in certain circumstances if the supplier fails to exercise reasonable care and skill².

18. To succeed in their claim, MC and TC must establish that:

- a. B Ltd had a duty to provide them with a horse of a particular type / quality; and
- b. B Ltd failed to meet this duty; and
- c. The circumstances of the breach are such that MC and TC were entitled to cancel the contract.

19. If MC and TC did not have a legal right to cancel the contract, then they do not have a legal right to a refund.

20. The other issue raised in MC and TC's claim, distinct from the cancellation / refund issue, is that the introductory ride lasted only 45 minute and not two and half hours as described on B Ltd's website.

Findings

Did B Ltd have a duty to supply a horse of a particular type / quality?

21. B Ltd offers treks for riders with a range of experience.

22. Part of the service that B Ltd provides is the training and selection of horses that are suitable for providing the experience that consumers are purchasing.

23. B Ltd's website gives details of some of the horses that it uses on its treks. The website emphasises the personal and physical characteristics of the horses that make them suitable for trekking.

¹ Sections 36 & 37, Contract and Commercial Law Act 2017 (CCLA)

² Section 32, Consumer Guarantees Act 1993 (CGA)

24. I am satisfied that B Ltd had a duty, both as an implied term in the contract and under its obligation to exercise reasonable care and skill, to provide a horse that was reasonably suitable for trekking, both in terms of its physical abilities and its temperament.

Did B Ltd meet this duty in this instance?

25. MC and TC submitted that:

- a. They viewed the horses on B Ltd's website at the time of making the booking, but XJ was not on the website at that time.
- b. The description of the [trek] on B Ltd's website stated that there is a maximum of ten riders. When they arrived, they saw that there were twelve riders (customers) plus two B Ltd riders.
- c. Possibly because of a shortage of horses, B Ltd elected to use XJ on this trek. XJ was not suitable because of his injury and because of his temperament.
- d. The injury to XJ's leg was visually obvious and the leg was swollen. MC was concerned that XJ could sustain an impact during the trek which would exacerbate the injury and cause pain.
- e. XJ kicked out violently three times during the brief introductory ride. MC raised this issue with XB after the ride but XB "brushed off" her concerns. XJ's kicking behaviour meant that:
 - i. They were concerned that he may injure another horse; and
 - ii. XJ was required to travel at the back of the pack. MC did not want to ride at the back. TC was on a horse that travelled near the front of the pack.
- f. The purpose of the holiday was enjoyment and relaxation, which was not possible due to their concerns about XJ's welfare and the welfare of the other horses.
- g. B Ltd offered MC another horse, but did not accept that XJ should not be used on the trek. MC and TC did not want another rider to have to ride XJ.

26. XB and MF submitted that:

- a. Not all of their horses are profiled on their website.
- b. The information on the website about the number of riders was out of date. The limitation only applied for a period when an access road was washed out, which meant that all of the equipment had to be brought by pack horses accompanying the riders. The road has now been reinstated and pack horses are no longer required.
- c. They did not have a shortage of available horses. They have 28 regular trekking horses.
- d. After XJ's injury they consulted their local vet, who gave them some initial advice.
- e. On 24 March, approximately 6 days after the injury, they contacted an [equine specialist]. JS, a vet at [equine specialist], provided a consultation via video call. JS provided the following plan for XJ's treatment:

Use Bute paste am and pm 4ml for 3 days then once daily

Give him this week off to allow the tissues to start healing under the skin

Then please continue with light riding to ensure he stays saddle and pack saddle sound

Please walk and trot in a straight line after the 7 days. If no lameness is observed, please start trekking him again

- f. XJ continued to heal and showed no signs of lameness.
- g. Horses in groups naturally adopt 'pack' behaviour. There are leaders, and there are followers. XJ's natural position in this order is at the rear of the pack.
- h. XJ's 'kicking out' is common horse behaviour, communicating to other horses to keep their distance. The purpose of the behaviour is to warn, not to attack. XJ has never (to their knowledge) kicked another horse. XB and MF submitted that MC exacerbated the kicking out behaviour by riding XJ into the pack rather than remaining at the rear during the introductory ride.
- i. XJ has participated in many treks, often ridden by MF. After MC and TC left the trek, another rider rode XJ. That person expressed no concerns about XJ's behaviour and described him as "gentle" in an unsolicited review [online]. XJ is still used on treks and is now profiled on B Ltd's website.

27. My findings are:

- a. B Ltd had a duty was to provide a horse that was reasonably fit for the trek, both in terms of its physical health and its temperament.
 - b. The presence of an injury does not necessarily render a horse unsuitable for use on the trek. B Ltd was entitled to rely upon veterinary advice provided by a suitably skilled and qualified person. I am satisfied that JS is skilled and qualified to provide veterinary advice. I am satisfied that JS was able to adequately assess XJ's injury via a video call consultation. JS was capable of exercising her professional judgment as to whether a 'face to face' consultation was necessary. Clearly, she did not consider that it was necessary in this instance.
 - c. The veterinary advice did not recommend keeping XJ away from trekking until the wound had fully healed. In fact, it encouraged returning XJ to trekking, provided that there were no signs of lameness or worsening of the injury.
 - d. I am satisfied that there were no signs of lameness in the lead up to the trek or during it.
 - e. I accept that 'kicking out' is an aspect of horse behaviour that can be defensive / communicative rather than aggressive. I have no evidence to contradict B Ltd's statement that XJ has never kicked another horse.
 - f. I accept that horses naturally adopt a pack order. Therefore, on any given trek, riders must expect that they may be on a leader / front of pack horse, or they may be on a follower / rear of pack horse. The fact that a horse is a follower, or low in the 'pecking order', does not render it temperamentally unsuitable for use on treks.
 - g. There is no evidence to indicate that any other riders have experienced problems, or expressed concerns, about XJ's temperament.
28. Therefore, I find that it is not proven that B Ltd failed to provide a horse that was reasonably fit for the trek either in terms of physical health or temperament.
29. This finding is grounds for dismissing the claim for a full refund. However, for the sake of completeness, I will also address the question of whether MC and TC had grounds for cancellation even if a breach had been proven.

Were the circumstances such that, if a breach was proven, MC and TC were entitled to cancel the contract?

30. A party to a contract may cancel the contract if the other party breaches an “essential term”³.
31. A consumer may cancel a contract for services if⁴:
- a. The service provider fails or refuses to remedy breach of a guarantee (such as the guarantee to exercise reasonable care and skill); or
 - b. The breach cannot be remedied or is of a “substantial character”.
32. When MC expressed her concerns about XJ in the morning of 18 April, B Ltd offered to swap horses. Several other riders stated that they were willing to swap with MC.
33. MC declined that offer. She stated that she did not want any other riders to be disadvantaged by having to ride XJ.
34. Having regard to the criteria for cancellation set out above, my finding is that even if it was proven that B Ltd had breached a contractual and / or Consumer Guarantees Act obligation by failing to provide MC with a suitable horse for the trek, MC did not have grounds for cancelling the contract on 18 April.
35. The offer of another horse on the morning of the second day of a five-day trek remedied any breach at a stage when only a small part of the contracted services had been provided. This meant that:
- a. The breach could not amount to a breach of an essential term. It did not “go to the heart of the contract”.
 - b. B Ltd did not fail or refuse to remedy a breach of a guarantee.
 - c. The breach was not incapable of being remedied, and it was not a breach of a substantial character.

Duration of the introductory ride

36. As noted above the other issue raised in MC and TC’s claim is the duration of the introductory ride.
37. The description of the trek on B Ltd’s website formed part of the contract terms that MC and TC accepted by making a booking and paying the deposit. The website states that the five-day trek begins with a two-and-a-half-hour introductory ride.
38. It is not disputed that in this instance the introductory ride lasted approximately 45 minutes.
39. B Ltd’s terms and conditions also form part of the contract terms. Section 12 of the terms and conditions states:

Although [B Ltd] has provided an itinerary for the trail, these can be subject to alteration without notice and are intended as a guide only. Alterations may come about due to road, trail, or weather conditions [...]

³ Section 37(1)(b) and 37(2)(a) CCLA

⁴ Section 32 CGA

40. XB and MF submitted that the introductory ride was shortened due to weather conditions. They referred to notes that they made on 18 April about the previous day's riding:

With clouds gathering overhead, as the group of riders reached [ranch] cattle yards 30 mins into their ride, [redacted] advised them "It's going to pour with rain shortly, do you want to continue riding and get soaked or do you want to head back to the quarters?". Guests overwhelmingly voted to return to the quarters. On these 5 day trails we have lots of flexibility to pick and choose days we ride longer hours with the nicer weather for maximum enjoyment for our riders.

41. XB and MF submitted that it rained heavily that evening (17 April).

42. XB and MF provided statements from other riders. The other riders' recollections of the weather conditions during the introductory ride and for the remainder of the afternoon and evening differ somewhat.

43. MC and TC submitted that the weather was overcast but there were no signs of imminent rain. They denied that it rained heavily that evening. They denied that XB asked the group whether they wanted to continue in light of the weather conditions.

44. MC and TC provided detailed information of rainfall records from the four [Regional] Council rain recorders located nearest to the trek. None of the recorders show any rainfall on 17 April. All of them show some rain beginning around 3am on 18 April.

45. My findings are:

- a. MC and TC were contractually entitled to receive a 2.5 hour introductory ride unless there was an "alteration" justified by weather, trail conditions, or some other relevant consideration. B Ltd's terms and conditions should not be read as giving B Ltd an unlimited discretion to alter the itinerary.
- b. Rainfall can be localised, but the evidence that MC has provided from the four rain recorders supports a finding that it did not rain in this area on 17 April.
- c. However, it seems that the weather was overcast, and rain was 'on the way'. It was reasonable for B Ltd to consider the possibility of rain, and to take into account the comfort of the riders and other considerations including:
 - i. Whether the purposes of introductory ride had been met; and
 - ii. The fact that it was the first day of the trek, and lost riding time could very likely be 'made up' over the next four days.
- d. B Ltd cannot be expected to accurately forecast rain. In light of the information available to XB at the time and having regard to the other considerations listed above, I am satisfied that the shortening of the introductory ride was a legitimate exercise of B Ltd's discretion to alter the itinerary due to weather conditions.
- e. Therefore, there is no breach of contract, and no grounds for an award of damages.

B Ltd's counter-claim

46. B Ltd's counter-claim seeks compensation for time and inconvenience in preparing its defence to MC and TC's claim, and dealing with WorkSafe after MC and TC filed a complaint.

47. The Disputes Tribunal has no power to award any party costs associated with preparing for or attending hearings, except in certain limited circumstances as set out in section 43 of the Disputes Tribunal Act 1988.

48. None of those circumstances apply in this instance.

49. MC and TC were entitled to make a complaint to WorkSafe, and WorkSafe have a statutory power to investigate complaints. There was no breach of a legal duty by MC and TC and no legal basis to hold them liable for B Ltd's costs.

50. The counter-claim is dismissed.

Referee: Nicholas Blake

Date: 27 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>.