



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 711

APPLICANT **OL**

RESPONDENT **CD Limited**

The Tribunal orders:

CD Limited is to pay directly to OL the sum of \$1,050 on or before Wednesday, 31 January 2024.

Once payment is made, OL is to release the two purchased scooters to the respondent.

Summary of Reasons:

- [1] The hearing was convened by teleconference. Both parties appeared at the hearing. OL was supported by NL who was also going to benefit from the scooter purchase. The respondent was represented by SX, its director.
- [2] The applicant seeks a refund on two electric scooters he brought from the respondent via [online marketplace] in October 2023.¹ The applicant claims one scooter has never charged and the second only charged once, ran for approximately 15 minutes and then not accepted any further charge. The applicant returned the scooter a few days after purchase.
- [3] Whereas the respondent agreed to inspect the scooters, and acknowledges neither scooter will now accept a charge, the respondent denies liability claiming the applicant could have damaged the scooters in the few days they were in his possession.
- [4] I have listened carefully to both parties to understand their claims. One concern is the invoice that has been provided in support of the sale. The invoice is dated 10/3/2023. I assume this is recording an American date on a New Zealand sale and the correct date of sale is 3 October 2023.
- [5] More significantly, the parties agree that whereas the invoice is issued in the amount of \$1,811.25 including GST, the parties agreed to a cash sale discounted by the GST amount and the applicant paid \$1,575 cash for three scooters, making the invoice before me false though it is difficult to see any tax advantage for the respondent if its business records including invoices show a greater amount than what was actually paid.
- [6] It is also clear on the evidence of the parties that they are deeply suspicious of each other. The Tribunal can only determine the claim on the evidence before it. The Tribunal is required to apply an evidential standard. The burden is on the applicant to prove his claim on the balance of probabilities. I can do little to address the two-way suspicion.

¹ The applicant purchased three scooters but has already received a refund for the third.

- [7] Having carefully considered all the evidence before me, including the email correspondence. It is unclear why SX wanted the applicants and his two friends photo id, address, phone number, email, and debit or credit card after the sale and not before, but that is not material other than as possible evidence that this is not a usual consumer sale. Both parties were happy to do a cash deal and the respondent suggests the applicants are purchasing the scooters for more than personal consumer use. However, neither party has provided me with any reliable evidence on which to make any finding on this point and I am satisfied that on the surface at least this is a sale governed by the Consumer Guarantees Act 1993 (CGA) because the goods supplied by the respondent to the applicant were of a kind ordinarily acquired for personal use. Even if I am wrong in this finding, the outcome would be the same given the scooters failed within two to three days, leading to a total failure of consideration under contract law.
- [8] In terms of the CGA, goods supplied to a consumer must be of acceptable quality. A consumer has a right of redress against a supplier of goods if the goods fail to comply with the guarantees contained in the Act, such as being fit for the purpose for which goods of the same type are commonly supplied, acceptable in appearance and finish, free from minor defects, safe, and/or durable.
- [9] A consumer has several remedies against the supplier if goods fail to comply with a guarantee, in this case the scooters failing to take a charge. If the failure can be remedied, the consumer may require the supplier to do so. If the supplier does not, the consumer may either have 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.
- [10] I accept the scooters are not fit for the purpose for which electric scooters of the same type are commonly supplied, free from minor defects, or durable. An electric scooter that will not charge is of no use and clearly fails the guarantees under the CGA. I have considered the respondent's claim that damage must have been caused by the applicant or his friends to the scooters, but it has provided no evidence of this. In the absence of any evidence on why the batteries failed after only a few days, I prefer the evidence of the applicant that the problem lies with the scooters themselves, not how they were used. Had the interval before the failure been greater, the burden may have shifted to the applicant somewhat to show that he had not misused the product. Given the short time before failure, it is more likely on the balance of probabilities that the fault lies with the product.
- [11] I have considered what remedy is due. In this case, the batteries could be replaced, and in most instances the Tribunal will order repair before cancellation. However, I am persuaded by the respondent's evidence that the respondent 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 scooters and obtain a full refund.
- [12] The applicant also claims costs. Under s 43 of the Disputes Tribunals Act 1988 costs shall not be awarded against a party to any proceedings before a Tribunal except in certain circumstances, including frivolous or vexatious claims, claims knowing lodged outside of jurisdiction or unnecessarily prolonged proceedings. As none of these exceptions apply in this case the applicant's claim for costs is dismissed.
- [13] I also do not allow the additional \$5.00 refund claimed on the third scooter. The parties' evidence is somewhat contradictory on whether the applicant was given a \$525 or \$520 refund on the third scooter. Given the de minus amount, and the absence of any independent evidence, I make no finding on this part of the application.

Referee: Hannan DTR

Date: 19 December 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 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>.