



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 660

APPLICANT OQ

RESPONDENT N Ltd

The Tribunal orders:

N Ltd is to pay OQ \$8,278.85 by 8 December 2023.

Reasons:

1. In June 2022, N Ltd replaced the engine in OQ's car at a cost of \$8,278.85. The engine failed in late October 2022, and OQ claims reimbursement of the replacement cost.
2. Both parties attended the hearings. Mr and Mrs B represented N Ltd at the first hearing, and Mr B at the second hearing.
3. The hearing was adjourned to enable the parties to provide a further vehicle assessment and for N Ltd to contact its insurer.
4. Before the vehicle could be taken for assessment, it was repossessed by the finance company as OQ could not afford repayments on the car as well as the cost of a replacement vehicle.

Background

5. OQ first contacted N Ltd in mid-December 2021 and was advised to book her [car] in for repairs in January 2022. N Ltd initially advised her that a new timing chain kit was required. After further inquiries, N Ltd advised her that she needed a new motor.
6. OQ had mechanical breakdown cover up to \$5,000.00. She informed N Ltd that she could not afford a new engine, so N Ltd endeavoured to locate a secondhand one through [second hand parts dealer]. N Ltd was unable to do so, and in April OQ's partner advised N Ltd that he had searched online and found an engine at [car parts supplier]. N Ltd contacted [car parts supplier], who confirmed it had a replacement engine.
7. OQ's insurer authorised the replacement secondhand engine and, as a condition of acceptance, she signed a waiver of any further claims.
8. [Car parts supplier] supplied a secondhand [car] engine, with a 'silver' 3 month parts warranty. As a condition of the warranty, [car parts supplier] required software updates to be done by a [vehicle] dealer, and various functions coded and calibrated. This work was done by [vehicle dealer] and the vehicle road tested. [Vehicle dealer] found the "*engine and all systems in excellent running order at time of inspection*".
9. On 27 June, N Ltd advised OQ the work was completed, and she collected the car on 5 July.

10. On 30 October, when OQ was driving home, she says the car started to “*putter and blow an extreme amount of smoke out the exhaust pipe*”. She called her partner, who suggested she drive the car home slowly (about 20-30km). The next day she took her vehicle to a local mechanic (5km return), who found that there was no pressure in cylinder 1.
11. Between 31 October and 2 November, OQ contacted N Ltd about the breakdown. On 2 November N Ltd emailed asking for contact details of the local mechanic and pointing out that the motor was outside the 3-month warranty. On 3 November, N Ltd confirmed that [car parts supplier] had advised it was unable to help as the motor was outside warranty. On 25 November, N Ltd emailed OQ advising:
 - 90 day warranty on the second had engine and this has lapsed.
 - We spoke to the mechanic and got the full story about the vehicle and what he had done.
 - I'm sorry there is nothing more we can do.
12. OQ emailed N Ltd on 25 November, 2 December and 27 January, challenging N Ltd's decision not to provide any remedy and referring to her rights under the Consumer Guarantees Act. She asked N Ltd to either repair the vehicle or refund the repair cost. N Ltd repeated that the motor was outside the warranty and the parts supplier would not provide any compensation.

Law

13. The law of contract and Consumer Guarantees Act 1993 apply. Although the motor was covered by a 90-day supplier warranty, the rights under the CGA are additional to any rights under the warranty.
14. The CGA provides for implied guarantees in all consumer contracts that goods supplied will be of acceptable quality (ss 6 and 7), services will be carried out with reasonable care and skill (s 28), and the product of any service will be fit for any particular purpose made known to the supplier (s 29). Where the purpose is an ‘ordinary’ purpose, it need not be specifically made known to the supplier.
15. The term acceptable quality includes being fit for purpose, free from minor defects, and durable (s 7). The test is based on the expectations of a reasonable consumer, taking into account matters such as the nature of the goods, the price, the nature and context of the supply, and any representations made about the goods. The guarantee applies to secondhand goods, although the fact that goods are secondhand is relevant to factors such as durability.
16. Where there is a failure of a guarantee, and the breach is capable of remedy and is not of a substantial character, the consumer must give the supplier an opportunity to remedy (ss 18 and 32). The consumer can also give the supplier an opportunity to remedy even if the failure is substantial. If the supplier fails to remedy the breach, or the failure is substantial, one of the options open to the consumer is to reject the goods, or cancel the contract for services, and obtain a full refund (ss 23 and 38). Where the contract is for the supply of services, the Tribunal can make an adjustment to the refund to take account of any retained value.
17. The right to reject goods can be lost in certain circumstances, such as where they have been lost, or where they have been attached to personal property and cannot be detached without damage.

Was there a failure of a guarantee under the CGA?

18. Between the two hearing dates, the mechanic who inspected the vehicle after it broke down provided a written report stating that OQ brought the vehicle in for inspection on 31 October. The vehicle was described as missing, running rough, and smoking. The vehicle was checked for engine faults using their scanning tool, faults were cleared, the coil and spark plugs checked, and finally the engine was compression-tested. The mechanic found that there was no compression in cylinder 1.
19. N Ltd says there are a variety of reasons why the cylinder could have lost compression, and that OQ could have caused further damage by driving the vehicle after the motor first malfunctioned. It says

the [vehicle] dealership's diagnostic tool would have provided more information than the mechanic's scanning tool.

20. It is unfortunate that the vehicle was repossessed before the car could be taken to the [vehicle] dealership in [Town]. However, those events occurred more than 10 months after the car broke down and N Ltd had ample opportunity within that time to request an independent assessment of the vehicle. N Ltd has mechanical expertise that OQ does not have and, if it thought a detailed diagnostic analysis from a [vehicle] dealer was necessary to determine the cause of the breakdown, it could have either requested or arranged this. Instead, it persistently avoided dealing with the issue, relying on the expiry of the warranty, despite being warned of its potential liability under the CGA.
21. The matters raised by N Ltd about possible causes of the breakdown are speculative and, although it would have been preferable for OQ not to drive the car after it started to malfunction, there is no evidence that doing so for a relatively short distance contributed to the fault identified by the mechanic. Therefore, based on the evidence available, I find that the replacement motor was not of acceptable quality, and the product of the services provided was not reasonably fit for purpose. The breakdown occurred about 4 months after the motor was replaced and after the car had travelled about 9,288km. Having spent \$8,278.85 on the replacement motor, a reasonable consumer would expect it to be more durable than proved to be the case.
22. Due to the nature and extent of the failure, I find that it was substantial in character. Therefore, OQ was entitled to reject the motor without giving N Ltd an opportunity to remedy. Even if the failure was not substantial, N Ltd had the opportunity to provide a remedy, but failed to do so within a reasonable time.
23. N Ltd said in its evidence that it had no previous dealings with [car parts supplier], and that OQ provided the contact. There are circumstances where the guarantee of fitness for purpose does not apply, for example, where it is clear that the consumer is not relying on the supplier's expertise. That was not the case here. Although OQ provided N Ltd with a potential source for a secondhand engine, she was still relying on N Ltd's expertise in ensuring the engine was suitable and correctly installed.
24. N Ltd also made the point that it believes any fault was with the engine and not with its workmanship in installing the engine into the car. While there is no direct evidence of carelessness or negligence on N Ltd's part, the guarantees of acceptable quality and fitness for purpose are strict liability and do not require proof of carelessness.

Is OQ entitled to a full refund?

25. Where the guarantee of acceptable quality is breached, the consumer is entitled to a full refund without deduction. There is a potential argument that the right to reject was lost due to the vehicle being repossessed. However, this occurred well after OQ had rejected the goods and requested a full refund, and it would be unreasonable for N Ltd to rely on a change in circumstances resulting from its own failure to address the breach in a timely way. In any event, even if OQ had lost the right to reject the goods, she still has her right to cancel the contract under s 32.
26. Where a contract for services is cancelled, the Tribunal can make an adjustment for any retained benefit from the services. The benefit she received in this case was a period of trouble-free motoring for about 4 months. However, that needs to be weighed against the inconvenience resulting from having a vehicle she could not use for many months after the breakdown, and the costs incurred with alternative transportation. Although she has not claimed for consequential losses, they are a factor that can be considered when deciding whether to make an adjustment. Therefore, I find that this is not a situation where it is appropriate to make any adjustment-.
27. For these reasons, I find that OQ is entitled to a full refund of the \$8,278.85 she paid for the repairs. The fact that part of the cost was covered by her insurance is not relevant to her claim against N Ltd.

Referee: J P Smith

Date: 24 November 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>.