



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 551

APPLICANT QD

RESPONDENT L Ltd

The Tribunal orders:

L Ltd is to pay QD \$1,200.00 by 3 October 2023.

Reasons:

1. In February 2023, L Ltd cancelled QD's booking on [Ferry 1], from [Town 1] to [City 1]. QD claims compensation of \$3,297.06 for losses which he says resulted from the cancellation.
2. Both parties attended the hearing.

Background

3. QD originally booked his travel on 3 April 2022. He changed the booking on 21 October 2022, 20 January 2023, and 17 February 2023. The booking was for a car, two seniors, and entry to the lounge.
4. On 28 January 2023, the [Ferry 1] lost power in the [Waterway]. As a result, Maritime New Zealand restricted [Ferry 1] to a freight-only service until satisfied that it was safe to resume the service for passengers.
5. QD's final change of booking on 17 February bought the date forward from early March to 23 February 2023.
6. On 20 February, L Ltd had an issue with the heat exchanger on the [Ferry 2]. It was out of service until the afternoon of 22 February.
7. On the morning of 22 February, L Ltd sent QD the following message, cancelling his booking:

Kia ora, You are booked to sail on [Ferry 1] [at] 2:15 pm Thursday 23 February. Unfortunately, [Ferry 1] is still only carrying freight. We have no space to move your booking too [sic] and unfortunately all we can do is offer full refunds. We apologise again for the disruption to your travel plans. Ngā mihi nui Your [Ferry carrier] Crew.
8. QD had been travelling around [New Zealand] with his sister. He changed the booking to return her to her home in [Suburb] early, as she was suffering from anxiety. As a result of the cancellation, he says he had to make a quick decision about safe storage of his vehicle. He decided to drive to his daughter's house in [City 3] and leave the car there. On the way, he took his sister to [City 2] airport, where she caught a flight to [City 1]. In April, QD flew back to [City 3] to collect his car, and he drove it back to [Town 1] where he caught a ferry back to [New Zealand].

Law

9. The law of contract and the Consumer Guarantees Act 1993 apply.
10. The parameters of the service provided by L Ltd are set out in '[Conditions of Carriage]'.
11. The Consumer Guarantees Act 1993 sets out implied terms that apply to all consumer contracts. Suppliers cannot contract out of the CGA. Section 28 CGA provides that there is a guarantee that services will be carried out with reasonable care and skill.
12. Section 29 CGA provides a guarantee that services will be reasonably fit for any particular purpose, and achieve any particular result, that the consumer makes known to the supplier before or at the time of making the contract. The obligation created by the section is one of strict liability. Where a supplier has, or ought to have, actual knowledge of the consumer's purpose (because it is a common purpose) there is no need for an express notification of the consumer's expectation that the service will be fit for that common purpose.
13. Where the failure is independent of human control, the consumer has no right of redress (s 33 CGA).

Was L Ltd entitled to cancel the contract?

14. L Ltd says it fulfilled its obligations under the contract when it cancelled the booking. It says conditions 6.1, 14.1 and 15.6(a) define the scope of its services:
 - 6.1 We do not guarantee our schedules, departure times, or the duration of journeys. These are all subject to change and may be affected by weather conditions and other factors outside our reasonable control.
 - 14.1 We have the right to refuse to carry you or your Property on any of our Services (including the right to cancel a Ticket or terminate your journey early) where it is reasonably necessary for the safety or comfort of other Passengers, staff, or members of the public, or where you have breached these Conditions or any Law.
 - 15.6 All timetables, schedules or other representations regarding the departure and arrival times of our Services are an indication only and do not bind us, and are subject to change without notice. We:
 - (a) will use all reasonable efforts to carry a Passenger and Property in accordance with that Passenger's Ticket and on time, but the time of departure or arrival of any Service is at our discretion and will depend upon the operating situation. We do not assume responsibility for a Passenger and/or Property making connections for other travel arrangements, or for meeting any appointment, engagement, deadline or any other obligation.
15. Condition 6.1 provides that its schedule is subject to change. The clause does not allow for cancellation of the contract.
16. Condition 14.1 provides that L Ltd may refuse services and cancel a ticket where it is reasonably necessary:
 - a. For the safety or comfort of other passengers, staff, or members of the public. L Ltd has not provided any evidence that this provision applied to the circumstances of the case, and the provision appears primarily directed at misconduct on the part of the customer adversely affecting others.
 - b. Where the customer has breached the conditions or the law. Again, this is directed at misconduct on the part of the customer and is not applicable to the circumstances of the case.
17. Condition 15.6 reiterates that the sailing schedule is subject to change, and goes on to say that L Ltd does not accept the consequences of a change in schedule on the customer's other arrangements. The condition does not provide for cancellation of the contract.
18. L Ltd says that the terms and conditions are not an attempt to contract out of the CGA, but rather define the scope of the services. It refers the District Court case of *Bellis v Spark New Zealand*

*Trading Ltd*¹ in support of this proposition. There is no doubt that L Ltd is entitled to define the parameters of its service, and the variability of its schedule is a legitimate limitation, given the factors beyond its control that may affect the sailing schedule.

19. However, while L Ltd may have been entitled to vary the service provided to QD (for reasons outside its reasonable control), it went beyond this entitlement by terminating the contract altogether when this was not authorised by the conditions of carriage. I therefore find that L Ltd was not entitled to cancel QD's ticket, and it wrongfully repudiated the contract by doing so.

Did L Ltd breach CGA?

20. Because of my finding that L Ltd breached its terms and conditions, it is not strictly necessary to discuss whether it also breached the CGA. There was some discussion at the hearing whether L Ltd's reported failure to replace safety-critical equipment in a timely way (which caused the January breakdown) meant that it had failed to provide the service with reasonable care and skill. QD's submission was based on media reports of an interim report of the Transport Accident Investigation Commission. L Ltd says it does not accept some of the statements in the report and that there is new (undisclosed) information that is likely to affect some of TAIC's preliminary findings. While the evidence, such as it is, points to failings on L Ltd's part, it is not necessary to make any findings on the issue.
21. Of more significance is whether the service provided by L Ltd was fit for purpose. The obvious purpose of the service in this case was to transport QD, his sister, and his vehicle from [Town 1] to [City 2] in a timely way, as near as reasonably possible to the scheduled sailing time (using the [Ferry company] to cross the [Waterway] is a common purpose, so there is no need for a passenger to notify L Ltd of the particular purpose the service is being used for).
22. In its submissions, L Ltd says that, in the event of cancellation, it attempts to rebook on another sailing, but if it cannot it offers a refund and tells the passenger to rebook if they wish. Here, the situation for L Ltd was complicated by the fact that the [Ferry 2] was also out of service for a few days between 20 and 22 February.
23. I have already made a finding that L Ltd is not entitled to cancel a ticket in these circumstances, and that its practices are not aligned to its conditions of carriage. The most significant factor in this case is that, when QD changed his ticket through the website on 17 February for a sailing on [Ferry 1] on 23 February, the [Ferry 1] was restricted to freight-only sailings and could not take passengers. L Ltd says it was confident that the regulator Maritime NZ would approve passenger travel in the near future. It says it was managing the situation in short blocks of time as it did not want to upset passengers and lose business. However, the fact remains that when it allowed the change of booking on 17 February, it did not actually know whether it could carry QD and his vehicle on the [Ferry 1] in 6 days' time. By altering QD's booking to a time when it could not be sure the service was available, it took a calculated risk. This was not a situation that was unforeseeable or outside its control.
24. L Ltd says that when it needs to reschedule passengers it blocks new bookings for a period of time to prioritise existing passengers who need to be rescheduled. However, as QD's ticket was cancelled, he was in the same position as other customers making a new booking. L Ltd says if he had contacted the call centre, the staff could have looked back through its records to see the reason for the cancellation. However, the cancellation email did not advise him to do so. L Ltd says he could have rebooked from the beginning of March. QD says he could not see any available bookings for the next 2 to 3 weeks.
25. Taking all these circumstances into account, I find that the service L Ltd provided to QD was not fit for purpose.

¹ [2022] NZDC 4055 at para [18]

Is the amount claimed reasonable?

26. QD claims compensation of \$3,297.06. He received the cancellation email when he was in [Town 3]. He drove to [City 2], where his sister caught a flight to [City 1]. A family member later drove her from the airport to her home in [Suburb]. He then drove to his daughter's home in [City 3], where he says he could safely store his car. He flew to [City 4], where a family member picked him up and drove him home to [Town 4]. In April, he flew back to [City 3], where he collected his car and drove back to [Town 1], where he caught the ferry.
27. His claim is for \$1,440.05 mileage ([Town 3] to [City 3] and return), \$937.60 for three airfares for himself and his sister, \$510.45 mileage for family members to drive him and his sister from airports to home (and return in his case), and \$409.06 for three nights' accommodation (two in [City 3] and one in [Town 4]).
28. I agree with L Ltd that it cannot know the individual circumstances of each passenger. There are however a range of expenses likely to be incurred in these circumstances, such as vehicle storage and alternative travel costs.
29. There is a duty to mitigate loss and I accept L Ltd's submission that some of the costs claimed by QD were not reasonably foreseeable. QD says he had to make a quick decision about what to do and chose to travel to [City 3] because he could safely store his car there. However, even assuming it was essential for him to return home to [Town 4] immediately, it is likely that there would have been alternative, cheaper options. Certainly, L Ltd could not have predicted that he would drive to [City 3] to store his vehicle. Therefore, the mileage and accommodation costs associated with travelling to and from [City 3] are not proved. The mileage claims for family members to transport QD and his sister are not proved either, although some allowance is reasonable at public transport rates.
30. Airfares were a reasonably foreseeable cost. There is however no evidence whether airfares would have been cheaper if QD had flown from an airport nearer to [City 4] than [City 3]. Because there is no direct evidence about the cheaper options that might have been available to QD, assessing reasonable compensation is not a precise exercise, and the Tribunal must do the best it can based on what information is available. Taking all the factors into account, I find that compensation of \$1,200.00 is reasonable, as it at it covers the reasonable cost of airfares and provides a contribution towards storage or parking costs.

Referee: J P Smith

Date: 19 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>.