



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2020] NZDT 1370**

**APPLICANT TB**

**RESPONDENT DF Ltd**

**The Tribunal orders:**

DF Ltd is to pay \$440.00 to TB by Friday 30 October 2020.

**Reasons**

1. TB is claiming a partial refund of \$440.00 for two tickets she purchased for the Elton John concert on 16 February 2020. That equates to approximately 50% of the full price of the two tickets she purchased (including fees).
2. TB says Sir Elton John had “walking pneumonia” so didn’t get to see the whole concert. Sir Elton John performed for less than 2 hours and only played 14 of the songs on his songlist of 24. She says he had consistently played 24 songs on tour and he should have cancelled before the concert.
3. DF Ltd was represented at the hearing by BT (the Chief Operating Officer for DF Ltd). DF Ltd says it is not a party to the U’s contract with TB and in any event DF Ltd is not legally required to deliver a concert that did not meet TB’s expectations. They say “If [DF Ltd] was not legally required to deliver a concert that met TB’s expectations, then it should not have to compensate her because those expectations were not met.”
4. The issues are:
  - a. Is the U contract also between DF Ltd and TB?
  - b. Was there a breach of contract?
  - c. What remedy is TB entitled to if there was a breach?

*Is the U contract also between DF Ltd and SB?*

5. Under clause 1.2 of the contract headed “Purchase Policy” (contract) it states:

U sells tickets as an agent for and on behalf of the “Presenter” (the party who presents the event, which may include a promoter or producer or venue, as the case may be, details of which are available from U) ...

6. DF Ltd is the promoter and therefore the “Presenter”. DF Ltd is the principal and U its agent. Therefore, the contract is also between DF Ltd and SB and accordingly DF Ltd would be liable for any breach under that contract.

*Was there a breach of contract?*

7. Although TB is bound by the contract between the parties there is overriding protection under the Consumer Guarantees Act 1993 (CGA) regardless of what the contract says. In fact, the contract acknowledges this. It says in clause 1.4:

Nothing in these policies is intended to limit or exclude U's liability, or the liability of a Presenter, under applicable consumer law including the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.

Similar wording in relation to the CGA is also repeated in clause 9.3.

8. Under the CGA there is a guarantee that the service will be reasonably fit for any particular purpose and of such a nature and quality that it can reasonably be expected to achieve any particular result (section 29). The contract is subject to that guarantee.
9. For the purposes of the CGA, DF Ltd is a supplier in trade, TB is a consumer and the performance (the delivery of the concert) is the service.
10. TB said Sir Elton John said in his opening address that he had been diagnosed with walking pneumonia earlier that day and that his voice was shot. She said the performance got worse as it went on and there were breaks for medical attention. As mentioned above he played 14 out of the 24 on his songlist. BT says it was 16 and that even if it were 14 out of 24, he could not see link to claiming 50% of the ticket price back.
11. DF Ltd says it does not promise concerts are of a particular length, or of with any particular content. DF Ltd says it “reserves the right to vary advertised programs” and points to clause 16.2 of the contract which says:
- The Presenter reserves the right to add, withdraw or substitute artists provided it does not cause a fundamental change in the characteristics of the event for which the ticket was purchased... *[emphasis added]*
12. Clause 16.2 however is not relevant here. This was not a matter of adding, withdrawing or substituting an artist. The intention of that provision is that something could be changed before the event if it does not cause a fundamental change. That could be, for example, changing a base player of a band if the base player was ill.
13. The fact that Sir Elton John was ill cannot not be said to be a variation of the content and duration of the show as DF Ltd seem to be suggesting. Sir Elton John could not, of course be substituted or withdrawn as that would be a fundamental change in the characteristics of the event (clause 16.2) and if he was ticketholders would have been entitled to a full refund.
14. DF Ltd says they did meet the required standard in that Sir Elton John played 16 songs (although TB says it was 14). DF Ltd compares other popular artists whose concerts are about 16 songs in length.
15. TB refers to various playlists from the Melbourne and Napier concerts where there were 24 songs. I note that the setlist for the Auckland concert (which TB attended) lists 15 songs. However, the last song “Daniel” was only the introduction because the concert was cut short because of Sir Elton John’s walking pneumonia. The evidence supports TB’s contention that there were only 14 songs.
16. DF Ltd’s comment about the playlists TB produced are that DF Ltd did not publish them and say “[it] cannot be fairly be held responsible for [the playlists].” They go on further to say that in any event the playlists do not affect their analysis that [Sir Elton John’s] concert met the “minimum standard” of 16 songs. I disagree. I comment as follows:

- a. As mentioned above 14 songs were played (see paragraph 15).
  - b. It does not matter that DF Ltd did not publish the playlist. The evidence supports TB contention that it would be usual for him to sing around 24 songs. It might be usual for say Ed Sheeran to play 16 songs, but it is not usual for Sir Elton John. The third parties publishing the playlists do not simply make them up.
  - c. DF Ltd supplied in evidence the playlists for the tours for Taylor Swift, Ed Sheeran and Justin Bieber to support its argument as to the “minimum standard”. However, DF Ltd discredited TB’s use of the playlists for Sir Elton John yet DF Ltd uses other playlists to try and support its argument as to the “minimum standard”.
  - d. The Sir Elton John’s tour was titled “Farewell Yellow Brick Road Tour”. The song “Yellow Brick Road” would have been the final song (as an encore) as shown on the Melbourne and Napier playlists. This song was not played. If using a “minimum standard” (as DF Ltd contend) then it would be reasonable to expect the “Yellow Brick Road” to have been sung given the tour was named after that song.
  - e. The songs got worse as the concert went on and there were breaks for medical attention. That also would not meet a “minimum standard”.
17. DF Ltd also says that “the problem with TB’s approach is that she is seeking to be compensated for the difference between the show she expected (ie an “optimum” show, from her perspective) and the show that she received.” They go on to say Sir Elton John’s “performance was a comparable length to other popular music concerts, and met the standards required of it.” I have already commented above as to why I disagree with DF Ltd’s minimum standard approach. I also disagree that TB expected an “optimum” show, “from her perspective.” It is well documented (via various media) that the concert was not what it would have been even in relation to the songs that were played had Sir Elton John not been ill. The show was interrupted for a period of time so Sir Elton John could receive medical help, and, in the end, he had to be helped off the stage as he had lost his voice. One could hardly say that the performance satisfied the “reasonable person test”. Of course, it was not Sir Elton John fault that he was ill, and it was unfortunate that he was.
18. This brings me to the next point DF Ltd raised. They say “[e]ven if Sir Elton’s concert did not meet the required standard..., [DF Ltd] is not responsible for that if it was outside of its control. The [CGA] provides that [DF Ltd] is not responsible for any redress where a service is not fit for purpose because of a cause independent of human control.”
19. What DF Ltd is referring to is section 33 of the CGA which says (in part) that the consumer cannot make a claim for breach of the fitness for purpose guarantee where that guarantee was breached for reasons beyond the control of the service supplier.
20. The fact that Sir Elton John got ill was beyond his or anyone else’s control. What was within the control of DF Ltd is the provision of the service (the concert). They knew before the concert that Sir Elton John was diagnosed with walking pneumonia. Given the diagnosis it would have been reasonable for one to expect that his voice would have been affected (which it was). Also, as mentioned above, Sir Elton John announced at the beginning of the concert that he was diagnosed with walking pneumonia that morning and that his voice is shot. The concert should have been cancelled or postponed (rescheduled) and then the concert goers’ rights would then be governed by the terms of the contract.
21. The concert could have been cancelled or postponed under clause 9.1. This was within DF Ltd’s control. This appears to have occurred in relation to the concerts that were to be held on 19 and 20 February 2020 which were rescheduled. Under clause 9.1 the presenter (DF Ltd) can authorise refunds which they appear to have done in relation to the rescheduled concerts if the ticketholder is unable to attend the rescheduled concert.
22. DF Ltd, armed with the knowledge that Sir Elton John had walking pneumonia the morning of the concert, chose to proceed and having chosen to proceed had to guarantee that the concert was

reasonably fit for purpose and of such a nature and quality that it can reasonably be expected to achieve the result intended (section 33 of the CGA). It wasn't.

23. For the reasons above DF Ltd had breached that guarantee and therefore the contract.

*What remedy TB be entitled to?*

24. Under section 32 of the CGA where the breach (failure) is of "substantial character" or cannot be remedied a consumer is entitled to obtain damages from the supplier in compensation for any reduction in the value of the product of the service below the charge paid.

25. Failure to comply with a guarantee is of substantial character if it includes any case where the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure (section 36 of the CGA). I find on the evidence before me and from the media reports at the time that it is highly unlikely that a reasonable person fully acquainted with Sir Elton John's condition would have purchased tickets to go to the concert.

26. TB's claim in relation to the ticket price is approximately 50%. I do not therefore need to address whether or not she would have been entitled to a full refund. I find that she would at least be entitled to the amount claimed for the reasons above (in particular in paragraphs 15 to 17).

27. TB also sought to claim the Tribunal filing fee. However, under section 43 of the Disputes Tribunal Act 1988 such costs cannot be awarded.

28. TB paid \$885.54 for two tickets (which would have included an administrative fee or similar). Her claim however was for \$440.00 which is just under the 50% she paid. This is the amount I am awarding her.

### **Conclusion**

29. For the reasons above DF Ltd must pay TB \$440.00.

**Referee: Ms G Jaduram**  
**Date: 9 October 2020**



## 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 28 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 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 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>.