



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 553

APPLICANT **UI**

RESPONDENT **Q Ltd**

The Tribunal orders:

Q Ltd is to pay \$1,500 to UI on or before 31 March 2023.

REASONS

Brief Details of Claim

1. UI booked a guided [boat] trip on the [location] circuit with Q Ltd. The cost of the trip was \$2,000 which included \$500 for the first two days of training. UI successfully completed the two days training with Q Ltd's BN and was assessed as suitable to complete the trip.
2. The day after training, the trip itself commenced by [boat] on the [location]. The trip was led by BN. There was a trainee guide on the trip and there were two other customers along with UI. There was also a Technical Expert (LS) from RB, who was attending the first day of the trip as part of a three year safety audit of Q Ltd's operations.
3. After observing UI's decision-making on the river, BN made the decision that UI was not sufficiently confident or competent to continue on the trip. UI walked back to the start after, having [paddled] only 800m of the river, where she was met by BN's wife and transported back to [Town].
4. UI claims \$1,500 of the \$2,000 she paid to Q Ltd (after having deducted the \$500 paid for the two days training which she benefitted from and enjoyed) on the basis that BN did not give her sufficient guidance on the river and that he shouted and swore at her so that she lost confidence, and felt bullied.

Issues

5. The issues for the Tribunal to determine are:
 - (a) Whether Q Ltd has failed to deliver its service with reasonable care and skill;
 - (b) Whether the service provided by Q Ltd was not fit for beginners, as promoted;
 - (c) Whether UI is entitled to a refund of all or part of the money she has paid.

Did Q Ltd fail to deliver its service with reasonable care and skill?

6. The Consumer Guarantees Act (CGA) applies to this transaction. There is a guarantee in the CGA that services supplied to a consumer will be carried out with reasonable care and skill (S.28 CGA). That means the reasonable care and reasonable skill of a competent person in the industry.

7. I find that Q Ltd has failed to provide its service with reasonable care and skill for the following reasons:
- (a) UI describes BN as having yelled at her. UI says she had pulled into the bank after having made a mistake and gone down a piece of river backwards. UI said she knew she had made a mistake. However, BN came along side her and shouted at her saying “What the f..k do you think you are doing” and “why did you do that”. UI said there were a barrage of shouted questions. UI says she lost her confidence after that, which contributed to her subsequent nervousness in decision-making. UI felt picked-on and bullied.
 - (b) BN acknowledges he shouted once at UI, to be heard over the river and when UI was heading towards a metal stake in the river. BN denies shouting at UI when they were on the river bank, rather that he jokingly said “What the F... were you doing”. BN acknowledges he uses the “F” word, but this is his style would have been known to those attending the two day training.
 - (c) While I am faced with one party’s word against the other in respect of shouting, I do have the evidence given orally at the hearing by LS, the Technical Expert who was there to carry out an audit of Q Ltd’s practices. LS confirmed that he observed UI as being nervous and tentative. LS considered BN’s decision that UI could not continue on the trip was the correct one. LS said that had he been leading the trip, he would not have been able to continue on the trip because it would not have been safe to do so. I accept LS’s evidence on this point, and I am satisfied that there has been no failure by BN to exercise his judgement that it was not safe for UI to continue on the trip.
 - (d) However, while LS did say that he did not hear BN shouting at UI (except for the incident on the river), LS did describe BN’s manner as “very military”. LS said that different guides have different styles. LS said that had he been leading the trip, he would have been much softer with UI, particularly as he saw her eyes had teared up while BN spoke to her. I accept LS’s description of BN’s style as “military”, particularly as BN’s himself said he runs the trip like a “boot camp”.
 - (e) LS’s description of BN’s style does somewhat explain UI’s perception that she was being shouted at. There is a fine line between a military attitude on the one hand and the perception, by someone unused to a military style, of being shouted at on the other.
 - (f) I am satisfied that BN’s attitude towards UI was such that it appeared to UI that she was being shouted at and that BN was angry with her. BN’s use of the “F” word, directed at UI is likely to have reinforced her belief.
 - (g) It does not seem unreasonable that a guide, taking a range of different people into challenging circumstances, would have an adaptable approach to respond to the different people in his care. In addition, I find it hard to conceive that it would be common practice for outdoor guides to make liberal use of the “F” word.
 - (h) It is on the aspect of how BN dealt with UI when she made mistakes on the river that I find Q Ltd has failed to deliver its service to UI with reasonable care. This finding should not be considered to involve the one incident where BN shouted at UI while she was on the river and heading towards a metal stake. That is the reasonable behaviour of an assertive person with the responsibility to ensure a person in his care can hear the warning.

Was the serviced not fit for beginners as promoted?

- 8. There is a guarantee in the CGA that services provided by a supplier will be fit for the particular purpose (S.29 CGA).
- 9. The trip is promoted as being “great for beginner/intermediate [boaters]”. Therefore the service provided by Q Ltd is required to be suitable for beginner [boaters], as was UI.
- 10. I find that there has been no failure by Q Ltd in this regard. There is no evidence that the trip is not suitable, in general, for beginner [boater]. In addition, BN’s evidence is that it is rare for a person

undergoing the training to be found unsuitable to continue on and do the trip, and even more rare for a person commencing the trip to be found to be unsuitable to continue.

Is UI entitled to a refund of all or part of the money she has paid?

11. I have found there has been a failure to deliver the service to UI with reasonable care and skill, which means that Q Ltd has failed to comply with the guarantee in the CGA as to reasonable care and skill.
12. If there has been a failure to comply with a guarantee, and the failure is one that can be remedied, the supplier is entitled to an opportunity to remedy. Where the failure cannot be remedied, or cannot be remedied within a reasonable time, the consumer may cancel the contract and seek a refund. The Tribunal is able to order that all or part of the money paid for the service be retained by the supplier (S.32 & 38 CGA).
13. There is no doubt that, at the point BN told UI she could not continue on with the trip, this was the appropriate decision by BN for safety reasons.
14. BN did offer to meet UI at the end of the trip, to take her onto the river again for further instruction, with the opportunity to then book on a subsequent trip. However, I am satisfied that BN's military style and his language was the significant factor in UI deciding not to take up this offer. I say that, because UI recalls precisely the wording used to her by BN ("What the F. do you think you are doing") so those words have left an indelible impression. BN acknowledges using those words. A reasonable consumer is unlikely to be comfortable attending another course with BN, or embarking a trip in challenging conditions for several nights.
15. I am satisfied that the failure was not capable of remedy. That means that UI is entitled to cancel the contract.
16. UI seeks a refund of the \$1,500 she paid for the guided trip. I find that UI is entitled to a refund of that amount for the following reasons:
 - (a) UI did not gain any benefit from the \$1,500 she paid to Q Ltd;
 - (b) UI could not derive any benefit from the money by rebooking on a subsequent trip because a reasonable consumer, exhibiting uncertainty and nervousness having her mistakes dealt with in a military style and been sworn at in the process is unlikely to want to avail him/herself of a future service provided by Q Ltd.
 - (c) I note from the Guide Book that the food provided for trip participants is dehydrated, and therefore can be stored by Q Ltd for reuse, so there appears to be no expense directly attributable to UI's trip alone for which Q Ltd will suffer a loss.

Concluding Comment

17. I have considered Q Ltd's cancellation policy set out in its Terms and Conditions. However, the provisions of the CGA cannot be contracted out of, and they apply irrespective of the cancellation policy.

Referee: JF Tunnicliffe

Date: 6 March 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>.