



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 562

APPLICANT **UO**

RESPONDENT **TQ Ltd**

The Tribunal orders:

UO is to pay the sum of \$299.00 to TQ Ltd on or before Monday 4 December 2023.

Reasons:

1. UO and his wife TO are the tenants of a house owned by TO's mother. On 21 July 2023, their hot water stopped working, and TO rang TQ Ltd to come and fix it.
2. TQ Ltd assessed the Infinity water heater and told TO that it was not worth fixing, instead providing a quotation of \$3,622.00 for the cost of a replacement water heater. TO asked if a blocked drain could be cleared while they were there.
3. TQ Ltd invoiced \$299.00 including GST for its work, described in the invoice as "unblocked shower drain". After TQ Ltd left, TO called [second plumbing company], and its plumber Mr H reset the water heater at a cost of \$155.00. UO and TO claim that it has worked ever since, and have refused to pay TQ Ltd's invoice.
4. UO filed a claim for a declaration that he was not liable to pay the invoice, but clarified in the hearing that he accepted liability to pay \$144.00 of the \$299.00, deducting \$155.00 for the [plumbing company] bill. TQ Ltd counterclaims \$842.86, comprising its original invoice, a further \$155.00 plus GST for the gas fitting assessment, \$240.00 plus GST for its time defending the claim, and \$55.11 in interest on the total at 25% per annum.
5. The issues to be determined are:
 - a) What were the terms of the contract?
 - b) Did TQ Ltd carry out its service with reasonable care and skill, and was it fit for the purpose?
 - c) What sum, if any, must UO pay to TQ Ltd?

What were the terms of the contract?

6. It was not disputed that there was a contract between TQ Ltd and UO, which TO had entered into on behalf of both her husband and herself.
7. TQ Ltd submitted that the terms on its website were part of the contract, because it had emailed through a link to the website terms, and TO had signed a "Customer Acceptance Form" that referred to the link as well as listing certain terms.

8. However, the emailed link came too late, as a contract had already been formed by the time the email was sent, just 12 minutes before the scheduled arrival time. Although TQ Ltd asserted it would not have charged a callout fee if TO had cancelled the callout just before its workers arrived, this was not communicated to TO, and it would be reasonable for her to assume that she was already committed once the plumbers were on their way. TO saw the email but said she did not click on the link to read the terms and conditions because the plumbers were about to arrive. Objectively speaking, the contract had already been formed, and it was too late to introduce new terms.
9. The prior availability of the terms on the website, given that TO had found TQ Ltd through Google, may provide better reason to conclude that the usual terms had been accepted. However, the courts have held that any unusual or onerous terms will require greater efforts to bring them to the other party's attention. Although TO signed an acceptance form agreeing to TQ Ltd's terms while the drain was being unblocked, the provision for 25% interest on overdue accounts was not included in the list of terms highlighted in that document, and I conclude that it did not become part of the contract.

Did TQ Ltd carry out its service with reasonable care and skill, and was it fit for the purpose?

10. Section 28 of the Consumer Guarantees Act 1993 (CGA) provides that where services are supplied to a consumer, there is a guarantee that the service will be carried out with reasonable care and skill. CGA s 29 provides that services must be reasonably fit for any purpose the consumer makes known to the supplier before the contract is formed, unless the circumstances show that the consumer does not rely on the supplier's skill or judgment, or it would be unreasonable for the consumer to do so.
11. UO submitted that TQ Ltd should cover the \$155.00 he paid to [second plumbing company] because TQ Ltd failed to fix the water heater where Mr H succeeded. UO said he suspected TQ Ltd of running a scam to make a more profitable sale.
12. Mr H gave evidence that it was an extremely windy day when the water heater stopped working, and surmised that the wind had blown out the flame inside the unit. However, TQ Ltd's representative Mr E said it was not possible for an Infinity water heater to be disabled by the wind, because it should automatically reignite. He therefore presumed there must be an underlying fault and that, given the unit was at least seven years old, it was not worth repairing and could potentially be unsafe to reset. The purpose of fixing the water heater would be subject to the implied limitation "if it is safe to do so".
13. UO bears the onus of proving that TQ Ltd was at fault. Given Mr E is a certifying gasfitter whereas Mr H is only a journeyman gasfitter, it has not been proven that Mr E's assessment is incorrect or that the service provided fell short of the CGA guarantees.

What sum, if any, must UO pay to TQ Ltd?

14. Since UO has not proven any shortcoming in TQ Ltd's service, he must pay the full amount of TQ Ltd's invoice and cannot deduct the \$155.00. However, I find that TQ Ltd is confined to the amount of its original invoice and cannot retrospectively charge extra for the gas assessment just because it was not mentioned on the original invoice. The original invoice was doubtlessly intended to cover both of the services rendered on that day, despite only mentioning the drain unblocking. It would be unreasonable to charge the time as two separate jobs, especially when the reason TO asked for the drain to be unblocked was because TQ Ltd was already there.
15. TQ Ltd cannot claim compensation for the time spent defending the claim since s 43 of the Disputes Tribunal Act 1988 provides that, with very limited exceptions that do not apply here, costs shall not be awarded against a party to any proceedings before a Tribunal.
16. As already explained, the provision for 25% interest on unpaid balances never became part of the contract. The sum payable by UO is therefore \$299.00.

Referee: E Paton-Simpson

Date: 14 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 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>.