



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 348

APPLICANT XD

RESPONDENT KA

The Tribunal orders:

KA is to pay XD \$1,500.00 on or before 21 July 2023.

Reasons:

1. XD bought a fish from someone advertising on [online website]. He now wishes to return the fish and obtain a refund.
2. The first hearing of this claim was set down to be heard by teleconference at 2pm on Wednesday 3 May 2023. At 2pm the applicant, XD, attended the hearing by telephone.
3. The telephone number provided for the respondent, KA, was answered by someone identifying himself as BX. BX said he did not know anything about a Disputes Tribunal claim, did not know the applicant and was not KA.
4. XD said that the telephone number he had provided to the Tribunal was the telephone number he had called and messaged regarding the purchase of the fish and that the person on the telephone (who gave his name as BX) was the person he had purchased the fish from.
5. BX denied selling XD the fish. He said he had had this telephone number for around two years. BX did not wish to provide his residential address to the Tribunal but did give an email address.
6. An adjournment was granted on the basis that BX said he was on a plane preparing to fly to China. Subsequently, the telephone line dropped out. It was clearly necessary to gather more information about the respondent.
7. A further hearing was held on 8 June 2023. At that hearing BX again answered the telephone. At this hearing he said that although he knew KA and was involved in the transaction when XD bought the fish by doing the pick up and drop off of the fish and messaging XD, the fish that had been sold belonged to KA and BX was only acting on his behalf in the transaction.
8. BX provided a telephone number to contact KA. Despite ringing that telephone number twice, KA did not answer or attend the hearing.
9. I explained to BX that he was not a party to the proceedings. I also explained that as KA did not attend the hearing I would consider the matter in his absence, which might include making

an order against him. At that point BX left the telephone call and the hearing continued with XD.

10. The issues I have to consider are:

- a. Is the respondent KA, the same person as BX?
- b. Was there a breach of contract by providing the wrong fish?
- c. If so, what remedy is appropriate?

Is the respondent, KA, the same person as BX?

11. XD said that the person we spoke to at both hearings was actually the person he had bought the fish from, who originally gave his name as KA. He said this conclusion was supported a message regarding the purchase of the fish that he sent to "BX" asking for BX's real name, to which the response was "KA". XD also said that the bank had told him the bank account which he had transferred the money to was in the name of "BX".
12. BX's explanations at the hearings were contradictory and not compelling. At first he denied any involvement in the transaction, or knowledge of the claim or the hearing, despite having earlier received a telephone call from a case manager about the hearing.
13. Later, BX said he was acting on behalf of KA and was involved in the negotiation and delivery of the fish, but that the fish did not belong to him (ie to BX). However, it is not clear to me why he did not disclose this to the Tribunal from the outset.
14. BX did not wish to disclose his address or any information about himself or KA. While I understand his wish to maintain privacy, his unwillingness to provide information to the Tribunal has made it difficult to fully understand his involvement in the transaction.
15. XD sent in the text conversations he had regarding the purchase of the fish. Those conversations were from BX's telephone number, which was rung during the Tribunal proceedings. BX said that had been his telephone number for the last two years.
16. I agree with XD that there is evidence to suggest that BX and KA are the same person. However, it is not necessary for me to make a finding on that matter as the claim has been brought against KA and there is also evidence to show that he was involved in the transaction.

Was there a breach of contract by providing the wrong fish?

17. A contract is a legal agreement between two parties, and the terms of the contract are what each party has agreed to do under the contract. In this situation XD said he thought he was purchasing a [fish species] with a high level of shine, but had instead received an inferior fish that is not shiny along the top and does not have a full colour of gold.
18. XD said that he had seen the fish advertised on [online website], but that the negotiations and purchase occurred outside [online website]. He said he was shown some photographs of a number of [fish species]. He said those photographs showed shiny scales which cross the back of the fish so there is no black on the top of the fish. He said you pay for the shine with [fish species] and these looked really good.
19. XD said he asked to view the fish in person when he was in [City] but was told that they were not available to view. Therefore, he proceeded on the basis of the photographs he had received and purchased what he thought was a [fish species].
20. I accept it is more likely than not that XD has not received one of the fish he saw in the photographs. That is because when I compare the photographs he received prior to purchasing the fish with a photograph of the fish he received there is a marked difference in colour and shine.

21. XD said it was not possible that the shine would develop over time and that the shine of the fish would not be affected by the conditions it was kept in.
22. In the absence of any evidence to the contrary I find that the contract was breached by the respondent failing to send a premium, [fish species] to XD.

If so, what remedy is appropriate?

23. The remedy for a breach of contract is for the breaching party to put the other party back in the position they would have been had the contract been performed.
24. XD said that the maximum value of the fish he received was \$1,500.00. He knew that because he had bought a similar fish from [alternative fish provider].
25. XD sought either a replacement fish or to return the fish he received for a full refund. Taking into account the fact that XD has now had the fish for more than six months, along with the fact that there are only restricted circumstances where contracts for sale of goods can be cancelled, I decline to order that.
26. Instead, I find XD is entitled to \$1,500.00 being the difference between what he paid and the value of the fish he received.

Referee: Souness - DTR

Date: 30 June 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>.