



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 720

APPLICANT **XK**
RESPONDENT **Q Ltd**
SECOND **KT**
RESPONDENT

The Tribunal orders:

Q Ltd is to pay \$690 to XK by 5 January 2024.

Reasons:

1. XK booked [Band 1], a 2 piece band, on 3 March 2023 for her daughter's wedding in February 2024 and soon after paid a \$690 deposit.
2. In October 2023 XK's daughter discovered [Band 1] was not the band she wanted. XK contacted KT from Q Ltd to explain that [Band 1] was mistakenly booked. She said she thought she had booked [Band 2] (a 3 piece band) but as a 2 piece band to fit the venue, and thought [Band 1] was the name used as a 2 piece band.
3. [Band 2] was not available as a 3 piece or a 2 piece and XK cancelled [Band 1] and asked KT for a refund of her deposit.
4. XK claims \$2690 from Q Ltd and KT in his personal capacity on the basis a mistake was made by her and KT and the law allows for this to be remedied with a refund of her deposit. The claim of \$2000 is for pain and suffering.
5. The issues to be resolved are:
 - a. Is KT a party to the contract or is he personally liable?
 - b. Was there a qualifying mistake under the Contract and Commercial Law Act 2017 allowing the Tribunal to grant relief to XK by way of a refund of \$690?
 - c. If not, is the deposit refundable applying the general principles of contract law?
 - d. Is XK entitled to compensation of \$2000 for pain and suffering relating to her daughter?

Is KT a party to the contract or is he personally liable?

6. There is no evidence before me that KT is a party to the contract or has liability in his personal capacity. Being the director of a company that has entered into a contract with XK, does not automatically result in him having personal liability.

Was there a qualifying mistake under the Contract and Commercial Law Act 2017 allowing the Tribunal to grant relief to XK by way of refund of \$690?

7. The three types of mistakes, as they would be applicable here are:

- (i) Where XK was influenced, to Q Ltd's knowledge, by a mistaken belief (a unilateral mistake known to the other party).
- (ii) (ii) Where XK and the Q Ltd were influenced by the same mistaken belief (a common or mutual mistake).
- (iii) Where both XK and Q Ltd both had a mistaken belief, but on different matters (different mistakes about the same subject).

8. XK maintained there had been a common or mutual mistake made because she claimed Q Ltd had to have known about her intention to book [Band 2], because of the email communication with KT, that she had not made any enquiry about [Band 1] and she mistakenly assumed [Band 1] must be the name of a downsized [Band 3] band. She said her text to B from [Band 2] informing him she had just booked his band is further evidence of a mistake made.
9. KT from Q Ltd did not answer 3 calls I made to join him to the hearing. However, XK provided recent emails (October 2023) between her and KT where KT sets out Q Ltd's position on this matter.
10. XK said she could not provide email evidence from the original conversations leading to her booking [Band 1] because they had all been lost in a gmail crash. She commented that KT did not re-send her all the emails from that time.
11. KT provided a screenshot showing XK booked [Band 1] on 3 March. KT's email of 5 October to XK states that on 27 February XK requested quotes for [Band 2] and [Band 1]. KT said on 28 February he gave the quote for [Band 2] as a 3 piece band and on 1 March this band as a 2 piece band. He gave another duo option of [Band 4]. KT said XK asked for [Band 1]'s cost which he provided on 2 March and on 3 March XK booked this band.
12. The onus of proof lies with XK, Q Ltd and KT do not have to prove anything. However, without the emails XK says tell a different story, I am unable to make a finding there was a common or mutual mistake, nor a unilateral mistake - because KT does not indicate he made a mistake or that he was aware XK made a mistake; or that there were different mistakes about the same subject.
13. I carefully considered the texts between B from [Band 2] and XK, because XK said this supports her claim that she thought she had booked B's band. However, XK was not entering into a contract with B or [Band 2]. XK's communication with B in my view was not helpful in her contract with KT. I am puzzled that at no time in her texts with B or emails with KT that XK did not ask if [Band 1] was the name of [Band 2] as a 2 piece band, especially before accepting the booking with [Band 1].

Is all or any part of the deposit refundable?

14. Q Ltd's cancellation policy is as follows: If you need to cancel your event after accepting a quote and booking a band there are cancellation fees. This is only because in nearly all cases

the band could have booked another event on the date you have booked, and often they have made travel and accommodation plans for you.

Cancellation Fees are a percentage of the full balance, and are as follows:

Cancel Date (before gig date)	Cancellation Fee
More than four weeks	25% (Deposit)
Three - Four Weeks	40%
Two - Three Weeks	60%
One - Two Weeks	80%
7 Days or Less	100%

15. The term in the contract relating to deposits, quoted above, is not unusual or extraordinary. It reflects the general legal principles around deposits, that:
If a buyer of the service pays a deposit then withdraws from the purchase without having legal grounds to cancel the contract,
- the seller/provider of the service may retain some or all of the deposit depending upon the terms of their agreement about how deposits will be dealt with, if there are any;
 - taking into account the amount of the deposit in relation to the reasonable costs and losses of opportunity that the seller has incurred.
16. XK cancelled the contract because of a mistake she made, but has not proved a right to compensation under s 24 of the Contract and Commercial Law Act.
17. Although the contract does provide clear terms about how a deposit is dealt with when the contract is cancelled, I must also have regard to the usual purpose of a deposit, that being to ensure the provider of the service is not out of pocket for reasonable costs and losses of opportunity incurred.
18. Q Ltd and KT did not attend the hearing and there is no evidence before me as to any losses or costs. The cancellation happened more than 5 months before the proposed booking date.
19. In the absence of evidence from Q Ltd of any unrecoverable costs and losses of opportunity, and on the basis this is a very popular time of year for weddings and events and 5 months was available for other bookings for [Band 1], I allow the full refund of \$690.

Is XK entitled to \$2000 compensation for pain and suffering relating to her daughter?

20. XK's daughter is not a party to the contract as set out by XK or to the claim filed. This is a bar to having an order made for her daughter, if the Tribunal had jurisdiction to allow costs for pain and suffering. Reasonably foreseeable losses, which may include costs can be considered for a breach of guarantee until the Consumer Guarantees Act, however that Act is not applicable in this claim.
21. Although sorting out disputes can be extremely stressful for parties, the Tribunal does not generally award costs claimed by parties where a dispute has arisen. This is because claims of this nature are a challenge to address as these losses are of a subjective nature and the extent of intangible harm is difficult to prove and to price. If measured, any award is open to criticism on the basis that the outcome is unpredictable.

Referee: J Savage
Date: 14 December 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>.