

**BETWEEN**

**ER  
APPLICANT**

**AND**

**UI LTD  
RESPONDENT**

Date of Order:

16 February 2017

Referee:

Referee Perfect

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the claim is dismissed.**

## **Facts**

[1] Mr ER paid \$6737.00 in fees to study a course in web development at UI Ltd. He signed an 'application/enrolment' form on 17 April 2015 and the course commenced on 11 May 2015.

[2] Mr ER asked to withdraw from the course on 22 May 2015, 11 days after the course started. The enrolment form includes a 'withdrawal and refund policy; as per the Education Act 1989, that states a student may withdraw from their course on or before 8 days from commencement and receive a full refund of fees minus 10 percent It further states "A student withdrawing after eight days will not be entitled to a refund, unless exceptional circumstances are proven". Of course, this is a contractual term and the provisions of the Consumer Guarantees Act 1993 (CGA) are also relevant, beyond that contractual 8-day period.

[3] Mr ER claims that exceptional circumstances exist in that he was not able to understand his lecturer's English due to a strong accent, that his teaching style was not easy to follow, and that this did not become sufficiently apparent until after the 8-day withdrawal period had passed. He seeks a refund of \$6737.00, either on the basis of "exceptional circumstances" or as a CGA remedy for failure of guarantees relating to services.

## **Issues**

[4] The issues to determine are:

- a. Has UI Ltd provided its service to Mr ER with reasonable care and skill as per the guarantee at section 28 of the CGA and was the service fit for its particular purpose as per section 29?
- b. Do the reasons for Mr ER's withdrawal constitute "exceptional circumstances" which would exempt him from the term of the contract (relating to refunds only up to 8 days)?
- c. Is Mr ER entitled to a refund of all or a portion of the course fees paid?

*Has UI Ltd provided its service to Mr ER with reasonable care and skill as per the guarantee at section 28 of the CGA and was the service fit for its particular purpose as per section 29?*

[5] I find that there has been no failure of guarantee by UI Ltd. Mr ER claims that the service was not provided with reasonable care and skill and was not fit for purpose because he could not understand the lecturer and his teaching style was poor. However, the guarantees

provided for in the CGA are objective tests, therefore it is the standard of the lecturer's English and his ability to teach effectively that must be considered in evidence, rather than whether ER understood him.

[6] Mr ER has provided a statement from another student in the class, A (although it is simply type-written with no written name or signature), who states that the teaching made subjects "difficult to understand because there was no continuity to objectives" and that "I agree with ER's complaint our lecturer is difficult to understand if you have not spent time around people with a Pakistani accent".

[7] B from UI Ltd said that A remained in the course but did not pass, and they received no complaints from him until it was clear that he would not pass the course. She also denies that complaints were received from other students (A's statement says 5 other students complained) and has provided a written statement from then the Head of Department (unsigned as with A's statement) who wrote "In the time that D was employed as a tutor in my department, I have not had any students from D's web class complain or talk to me regarding his accent or mentioning that they had an issue understanding his accent".

[8] In fact, B says that when Mr ER discussed withdrawal with her on 22 May 2015, it was not the lecturer's accent that he complained about, rather that he already knew the course content and was stressed by other students asking him questions. She pointed out that Mr ER had a full 8 days to withdraw and obtain a refund, in which time the lecturer's accent and teaching style was the same as it was 11 days from the start of course, but when the class was given the option to raise issues or notify withdrawal on day 8, Mr ER did not come forward.

[9] B states further that in Mr ER's year, of 15 students that started the course, 3 withdrew after the 8-day withdrawal period and 12 students remained for the whole course – of the 12 remaining, 10 passed the course and 2 failed. She says that 3 students withdrawing is not unusual because it is a challenging programme, and that this is consistent with previous years classes in this programme.

[10] UI Ltd also provided a copy of the lecturer's CV, detailing his experience in the subject area which is extensive. UI Ltd's Regional Manager, Mr C, who appeared as a witness for UI Ltd gave his view, based on a background in teaching IELTS and has a Master of Linguistics degree, that the lecturer's English is good. He added that the lecturer has an IELTS score of 7.0, which, although the minimum required for teaching, is considered to be very proficient as the requirement is high.

[11] Based on a consideration of all the evidence from both parties, I find that there is inadequate evidence provided by Mr ER to prove that there has been a failure of guarantee based on an objective test of 'reasonable care and skill' and 'fitness for purpose'. UI Ltd has established that the lecturer is qualified to teach the course and has proficiency in English language to the standard required to teach.

*Do the reasons for Mr ER's withdrawal constitute "exceptional circumstances" which would exempt him from the term of the contract (relating to refunds only up to 8 days)?*

[12] I find that, for the same reasons as given above, Mr ER has failed to prove that the lecturer's teaching style and spoken English were inadequate, and even if they were, he had the opportunity within the 8-day withdrawal period to identify and raise this issue and withdraw in time, which he did not.

[13] Further, I would expect "exceptional circumstances" in the context of a contractual term relating to refund of fees to refer to external events that were not foreseeable and were beyond the parties' control such as sudden illness or accident, rather than an issue of quality of service which has been addressed in terms of the CGA above.

*Is Mr ER entitled to a refund of all or a portion of the course fees paid?*

[14] As there is no contractual entitlement to a refund and there has been no failure of guarantee, no remedy is available to Mr ER and the claim is therefore dismissed.