



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1604

APPLICANT NQ

RESPONDENT OW Ltd

The Tribunal orders:

OW Ltd is to pay to NQ the sum of \$1,000.00 on or before 19 July 2021.

Reasons:

1. In January 2021, NQ engaged OW Ltd ("OW LTD") to uplift and transport her household items from [City] to [Town].
2. In early February 2021, the items were delivered to the address in [Town]. Many items had sustained damage and NQ says that various items were missing.
3. An insurance claim was commenced as NQ had taken out insurance.
4. Items were either repaired or a cash settlement made by the insurance company.
5. NQ paid \$10,953.15 to OW Ltd for the service including \$998.00 for the insurance.
6. NQ is seeking a refund of the amount paid for the service along with an additional \$14,000.00 for distress, inconvenience and time spent having to deal with this matter, including the insurance claim. The total amount sought was \$25,000.00.
7. The issues the Tribunal has to consider are:
 - a. Does the Consumer Guarantees Act 1993 ("CGA") apply and if yes, has OW Ltd breached the CGA by failing to provide its services with reasonable care and skill?
 - b. If the CGA applies, is NQ entitled to a refund of the amount paid for the service of \$10,953.15?
 - c. If the CGA does not apply, is NQ entitled to compensation under the Contract and Commercial Law Act 2017 ("CCLA")?
 - d. Is NQ entitled to compensation of \$14,000.00?

Does the CGA apply and if yes, has OW LTD breached the CGA by failing to provide its services with reasonable care and skill?

8. This was a contract for the carriage of goods. The Contract and Commercial Law Act 2017 (“CCLA”) deals with contracts for the carriage of goods.
9. Part 5, subpart 1 of the CCLA applies to all domestic carriage of goods within New Zealand. The CCLA provides for four different categories of contracts, and the extent of an individual carrier’s responsibility for damage to goods depends upon which kind of contract governs the particular case.
10. It was not disputed that this contract was a contract at owners’ risk. NQ had taken out insurance to cover damage or loss of items during transport. OW Ltd had no liability for damage or loss of NQ goods.
11. The CGA can apply to other claims regarding the service provided by OW Ltd which do not involve damage to the goods.
12. Section 28 of the CGA means that where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill.
13. NQ says that OW Ltd did not carry out its service with reasonable care and skill because she felt intimidated and harassed by an employee of OW Ltd telling her on the phone she had to sign a delivery docket, she felt intimidated by a driver from OW Ltd driving up and down outside her property in [Town], she found the attitude of the uplift staff in Auckland to be unprofessional including one particular staff member writing comments on the wrapping on her piano, she felt the staff in [Town] were in a hurry and rushed the job, she was given incorrect advice as to how long she had to make the insurance claim, the insurance assessor took two weeks to contact her and OW Ltd did not handle her possessions with care as stated in the contract.
14. In relation to the claim that OW Ltd did not handle her possessions with care, the CGA does not apply to that part of the claim as that is related to the damage to the items and is therefore covered by the CCLA.
15. Section 244 of the CCLA means that despite any rule of law to the contrary, a carrier is not liable in its capacity as a carrier, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by the carrier except in accordance with the terms of the contract of carriage and the provisions of this subpart, or where the carrier intentionally causes the loss or damage.
16. NQ cannot claim for any possible breaches under the CGA that relate to the damage to or loss of her possessions and they must be considered under the CCLA.
17. However, I am satisfied that OW Ltd breached the CGA in relation to other aspects of its service. In relation to the behaviour of the employee at uplift in [City] and the behaviour of an employee on the phone with NQ after her possessions had been delivered, I find that work was not carried out with reasonable care and skill.
18. An employee at the uplift in [City] was heard by NQ to be swearing and generally showing a bad attitude to the work. While this in itself may not have been enough to breach the CGA, this same employee later wrote a comment on the wrapping of NQ piano which was unnecessary and had nothing to do with the work being done. UE of OW Ltd told the Tribunal that the employee in question had been spoken about his conduct. The Tribunal notes that this employee was described as an experienced employee by OW Ltd and yet appeared to demonstrate an unprofessional attitude to NQ’ possessions.
19. I am satisfied that other comments written on the piano wrapping were endorsements by employees that they had dealt with the item in question and as such were part of the service provided by OW Ltd. This is not a breach of the CGA.

20. NQ said she was put under pressure by an employee of OW Ltd to sign a delivery docket after her items had been delivered in a damaged condition. NQ explained to the person on the phone that she was not going to sign the docket due to the damage she had discovered but had written on it that all items had been delivered but subject to further inspection due to scratches, dents and gauges. OW Ltd thought that those words were written by NQ after the phone call. I accept NQ's account in that regard as she said she told the person on the phone what she had written on the docket but was still told by that employee that she had to sign it.
21. I find that putting an already distressed customer under pressure to sign a delivery docket that she had already endorsed in the manner described was failing to carry out its service with reasonable care and skill.
22. I am not satisfied that any of the other matters raised by NQ are a breach of the CGA by OW Ltd. The behaviour of the truck driver in [Town] has been explained in a written account from him. It is possible that NQ misunderstood his actions at the time, which appear to have been an attempt by the driver to retrieve a dropped fuel card.
23. I do not need to make any findings regarding advice that NQ says she was given regarding how long she had to make a claim. NQ made OW Ltd aware of the situation immediately and the insurance claim was processed within the appropriate time frame. Both NQ and OW Ltd's account of what was discussed could equally be true, so I make no finding on that issue.
24. I am satisfied that the insurance claim was processed within a reasonable time. The insurance company is a separate entity to OW Ltd, and it could not have been held responsible for its actions. OW Ltd did what it needed to do to get the insurance claim started, a process NQ was initially reluctant to go through.
25. OW Ltd have breached the CGA by not carrying out its service with reasonable care and skill in relation to the actions of its employees at uplift in [City] and the phone call after delivery to [Town].

If the CGA applies, is NQ entitled to a refund of the amount paid for the service of \$10,953.15?

26. Section 32 of the CGA deals with options for consumers where a service does not comply with a guarantee. Where the failure cannot be remedied or is of a substantial character, the consumer can, if there is a contract between the supplier and the consumer for the supply of the service, cancel that contract or obtain from the supplier damages in compensation for any reduction in value of the product of a service below the charge paid or payable by the consumer for the service.
27. I do not accept that this was a breach of a substantial character. However, the breach cannot be remedied as OW Ltd cannot undo the actions of its employees.
28. NQ is entitled to compensation for the reduction in value of the service she got below the charge paid or payable by her for the service.
29. I am not satisfied that a full refund is appropriate in this case. The main concern for NQ was the damage to her possessions. That matter has been dealt with through the insurance company. I appreciate that NQ may not be completely satisfied with that outcome as some items were unable to be repaired. While she did receive compensation for the damage, she still has items of damaged furniture in her home. The insurance company allowed for depreciation of many items and while that may aggrieve NQ, the Tribunal would have had to undertake a similar exercise if this was a claim for damage to items.
30. NQ cannot point to a specific quantifiable loss that she suffered as a result of the behaviour of either of the employees.

31. OW Ltd said it incurred costs in providing the service to NQ and ultimately her possessions were moved from [City] to [Town]. OW Ltd estimated the costs they incurred to be in the region of 90% of what NQ paid, although no evidence to support that was produced.
32. Taking into account all that was discussed at the hearing and to address the substantial merits and justice of the claim, I find OW Ltd should refund a portion of the fee paid by NQ for the service. NQ is entitled to \$1,000.00 by way of compensation for breaches of the CGA.

If the CGA does not apply, is NQ entitled to compensation under the CCLA?

33. I have found that the CGA applies to some parts of the service provided by OW Ltd and have dealt with it above.
34. This was a contract for the carriage of goods at owners' risk. This means that the carrier is not obliged to pay compensation if the goods are lost or damaged, unless the carrier intentionally loses or damages them.
35. There was no evidence of OW Ltd intentionally damaging or losing any of the goods.
36. NQ has received compensation for the damage and loss of her possessions through her insurance.
37. NQ is not entitled to any further compensation under the CCLA.

Is NQ entitled to compensation of \$14,000.00?

38. NQ was seeking further compensation for the distress and inconvenience of having to deal with this matter and the amount of time she spent on it, both with OW Ltd and the subsequent insurance claim.
39. Clause 3.2 of the contract between the parties means that to the extent that the services are not subject to the carriage of goods legislation, OW Ltd shall not be liable whether in negligence, or any other kind of tort or in contract or on any other basis whatsoever for any consequential or indirect loss whatsoever arising from or in connection with any loss or damage to the goods.
40. OW Ltd have excluded liability for the consequential losses claimed by NQ.
41. The CGA cannot be contracted out of and OW Ltd would remain liable for foreseeable consequential losses arising out of its breach of the CGA as found by the Tribunal. However, the losses claimed by NQ were consequential on the damage and loss of her possessions and did not arise out of the specific breaches of the CGA as found by the Tribunal.
42. For these reasons, NQ is not entitled to any of the further amount sought by her.
43. OW Ltd is to pay to NQ the sum of \$1,000.00 on or before 19 July 2021.

Referee: P Byrne
Date: 28 June 2021



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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.