



(Disputes Tribunal Act 1988)

ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 68

APPLICANT **BK and BH**

RESPONDENT **F**

The Tribunal orders:

FF is to pay BK and BH \$3,800.00 by Friday 28 April 2023.

Reasons:

1. BK and BH booked and paid \$32,794.00 for two first class return fares from [Country 1] to [Country 2] and back. They paid for the fares in cash (without using award Airline points and the like). When they boarded the return flight (to Country 1) in [Stopover Country 1] they were told that BH's seat had a mechanical malfunction which was not able to be repaired and therefore there was no electricity to that seat. This meant there was no movement for the seat, the reading and convenience lights did not work, the electronics did not work and all other aspects of the seat were not working. BK sat in the "malfunctioning seat" from [Stopover Country 1] to [Stopover Country 2]. When they arrived in [Stopover Country 2], there was one seat available behind the "malfunctioning seat" which BK took.
2. FF have compensated the BK and BH by giving them 80,000 [Airline points] for the "malfunctioning seat" which they say are valued at US\$2,400.00 (which at today's exchange rate is around NZ \$3,800.00).
3. BK and BH say, "the product [did not meet] the reasonable expectations for what had been promised and what we had paid for...In other words, two first class seats fully operating for a couple sitting alongside each other had not been provided." BK and BH want compensation totalling \$15,000.00 as follows:
 - a. \$11,000.00 – being the fare differential between first class and premium economy (premium economy being the first level down that does not have electric seating). This is in relation to the flight between [Stopover Country 1] to [Stopover Country 2]. However, as an alternative, BK and BH say that if the Tribunal feels that the monetary sum put forward by FF (being the value of approximately NZ \$3,800.00 that FF say the 80,000 Airline points are worth) they want that amount awarded as compensation; and

- b. \$4,000.00 - for loss of enjoyment (at \$2,000.00 each) because they were separated on the flight from [Stopover Country 2] to [Country 1].
4. DM, representing FF, accepts that the BK and BH are entitled to compensation in relation to the “malfunctioning seat” but does not accept the level of compensation BK and BH are claiming. FF have already compensated the BK and BH in the form of 80,000 [Airline points] which DM says can be used to book further flights or upgrades with FF. Further FF does not accept that the BK and BH are entitled to any further compensation because they could not sit together on the [Stopover Country 2] to [Country 1] leg of the flight.
5. The issue therefore relates to the measure of compensation (if any) in relation to:
 - a. The “malfunctioning seat” in relation to the flight from [Stopover Country 1] to [Stopover Country 2].
 - b. The loss of enjoyment for not being able to sit together on the flight from [Stopover Country 2] to [Country 1].

What should be the measure of compensation (damages) from [Stopover Country 1] to [Stopover Country 2] in relation to the “malfunctioning seat”?

6. As mentioned above the BK and BH have calculated the \$11,000.00 as the fare differential between first class and premium economy for the flight between [Stopover 1] to [Stopover 2].
7. The BK and BH paid \$32,794.00 for two first class return fares from [Country 1] to [Country 2] and back. The \$11,000.00 the BK and BH are seeking is about one third of the total return fare paid for two fares. The return trip had a total of six flights (being [Country 1] - [Stopover Country 2] – [Stopover Country 1] – [Country 1] then return [Country 2] – [Stopover Country 2] – [Stopover Country 1] – [Country 2]). The “malfunctioning seat” was in relation to the flight from [Stopover Country 1] to [Stopover Country 2]. This was one sixth of the number of flights and the second longest in distance ([Country 2] to [Stopover Country 1] is approximately 4,500 miles and [Stopover Country 1] to [Stopover Country 2] approximately 5,500 miles). I conclude that BK and BH compensation amount of \$11,000.00 to be (for want of a better word) miscalculated.
8. I agree with FF submission that there were still significant benefits in first class that are not available in premium economy which includes a private suite with personal mini bar, a superior range of complimentary food and drink and an entertainment system featuring a 32 inch high definition screen. Whilst I note that the entertainment system would not have worked in relation to the “malfunctioning seat”, the relevance here is only for the purposes of calculating the measure of compensation. BK and BH also say no alcohol or meal service was consumed by them. Again, for the same reason this is not relevant.
9. In relation to the 80,000 [Airline points] FF have given BK and BH in compensation, the BK and BH say they are not worth as much as what FF say they are. BK and BH say they are worth around NZ \$720.00.
10. FF says the price of 1,000 [Airline points] is USD 30 so for 80,000 they are valued at US\$2,400.00 (which as mentioned above at today’s exchange rate is around NZ \$3,800.00). FF say this “is approximately equivalent to the difference in monetary value between a premium economy and first class flight from [Stopover Country 1] to [Stopover Country 2] (which is the [BK and BH] proposed measure of compensation)”. They refer to FF’s website which says:

If you’ve got your eye on a reward but don’t have enough [Airline points] in your account, simply buy more [Airline points]. Whether you’re within touching distance of a reward flight or you’d like to splash out on a flight upgrade, get there faster. It costs just USD 30 per 1,000 [Airline points] and you can buy up to 100,000 or 200,000 [Airline points] in a year, based on your membership tier.

11. I am satisfied on the evidence before me that the value of the 80,000 [Airline points] is NZ \$3,800.00.

Are the BK and BH entitled to the cash equivalent of the 80,000 [Airline points]?

12. The Consumer Guarantees Act 1993 (CGA) is applicable. There are certain guarantees under the CGA (which cannot be contracted out of). The applicable guarantee is that the guarantee the service is reasonably fit for a particular purpose (s29 of the CGA). The “malfunctioning seat” was clearly not reasonably fit for purpose. The failure could not be remedied and the only option (under the CGA) is for damages in compensation.

13. Damages are monetary amounts and not, in this case, the [Airline points]. Though it might have the same value as money, [Airline points] do have conditions attached to them. For example, on the FF’s website it says:

Although your [Airline points] must be redeemed before they expire, you can use them to book a reward ticket that is valid for up to 12 months. This means that even if you can’t travel before your [Airline points] expire, you can still redeem them now for a future trip.

If you have any [Airline points] in your account that are due to expire in the next 3 months, you can pay to extend their validity for another 12 months beyond the date of the original expiry.

Another section of the website says:

Extend expiring [Airline points]

If any of your [Airline points] are expiring soon, you can extend their validity for up to 12 months at a special rate. Just remember to extend your [Airline points] three months before their expiry date.

14. Therefore, if the BK and BH were unable to travel before the [Airline points] were to expire within 12 months of issue (for whatever reason) they would have to pay an amount to extend it for a further 12 months and they would also have to extend it three months before the expiry.
15. The BK and BH also say the [Airline points] only applies on very few flights and there were almost no business or first class flights. They say [Airline points] are mostly applicable to upgrades and that they had searched for all first class flights for April and October 2023 and there were no business class or first class tickets available using the [Airline points].
16. For the reasons above, I conclude that the measure of compensation (damages) from [Stopover Country 1] to [Stopover Country 2] relating to the “malfunctioning seat” is the monetary amount of NZ \$3,800.00 being the value of the 80,000 [Airline points].
17. Accordingly, FF must pay the BK and BH NZ \$3,800.00 from [Stopover Country 1] to [Stopover Country 2] in relation to the “malfunctioning seat”.
18. FF is entitled to cancel the 80,000 [Airline points] it has given to the BK and BH once it has made the payment to BK and BH.

Can the BK and BH recover amounts for loss of enjoyment because they were not able to sit together on the flight from [Stopover Country 2] to [Country 1]?

19. FF refer to clause 5.4 of their Conditions of Carriage which says:

[FF] will try to meet advance seating requests, but we cannot guarantee that you will be able to sit in any particular seat. [FF] can change your seat for a similar seat at any time, even after you have boarded the aircraft.

20. Another functioning seat was provided for the flight from [Stopover Country 2] to [Stopover Country 1]. The reason the change was made was because of the “malfunctioning seat”. BK sat

in the “malfunctioning seat” from [Stopover Country 1] to [Stopover Country 2], presumably because no other seat was available.

21. The BK and BH however say FF knew about the fault with the seat before they boarded and they were not told until after boarding and the shutting of the doors. I agree with the BK and BH’s comment that the situation is different from a malfunction that happens after take-off.
22. The BK and BH say that FF are seeking to deny liability in particular under the fair trading laws. There is no evidence that FF misled or deceived the BK and BH. I note that FF staff told them when they were on board that they had been unable to repair the malfunction. It is possible they were trying to repair it until boarding.
23. The CGA is applicable. For the flight from [Stopover 1] to [Country 1], there was a seat with the electronics that worked which was behind the seat BH was in. The guarantee in s 29 of the CGA however goes further in that the particular purpose must be of “a nature and quality that it can reasonably be expected to achieve any particular result that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be.”

In this regard given the BK and BH booked seats together (when they purchased the tickets), being seated together (for the purposes of s29) was the result the BK and BH desired to achieve. BK and BH did not get that result.

24. Loss of enjoyment is a consequential loss. Consequential losses can be awarded under the CGA in some situations.
25. However, loss of enjoyment is not a consequential loss of the type contemplated under the CGA. This is because loss of enjoyment is not a financial consequential loss.
26. Further, whilst it may be foreseeable that because BK was seated behind BH this may have caused them both loss of enjoyment, such loss is difficult to quantify given its subjective nature. In other words, it cannot be given an objective figure.
27. I am therefore unable to make an award for loss of enjoyment.

Referee: Ms Gayatri Jaduram

Date: 31 March 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>.