



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 493

APPLICANT DX

RESPONDENT STX

**SECOND SCX
RESPONDENT**

The Tribunal orders:

SCX is to pay DX \$5,159.13 by 25 October 2023.

Background

1. In 2019, DX contracted ON to supply an engraved headstone.
2. At that time, the business was owned and operated by ON Ltd (STX).
3. In accordance with ON's usual practice:
 - a. DX provided details of the words and images that she wanted on the headstone;
 - b. DX began making payments towards the quoted price for the headstone and ON held the headstone until such time as it was completed and paid for.
4. DX paid for that headstone in full by August 2020.
5. DX's mother passed away in November 2020.
6. DX instructed ON to continue to hold the first headstone and to prepare a headstone for her mother. She began making payments towards the second headstone, which was fully paid by 2022.
7. In December 2021, ON Ltd sold the business to SCX, STX's niece. SCX operated the business as a sole trader.
8. DX was informed of the change of ownership, and she dealt with SCX after December 2021.
9. DX made several requests to view the completed headstones but was not given that opportunity.
10. DX did not see the headstones until 3 June 2023, the day before the unveiling. DX had made arrangements for the unveiling including booking a marae and purchasing food.

11. There were engraving errors on both headstones as follows:
 - a. TD: Different font used, incorrect word “Grandmother” (should be Grandfather), incorrect spelling of name “[redacted]” (should be [redacted]).
 - b. FX: Incorrect word “Godmother” (should be Grandmother).
12. DX contacted SCX about the errors, but SCX was not receptive to her concerns. DX arranged for another stonemason to correct the errors. The unveiling was postponed.
13. DX’s claim seeks the cost of remedial work, costs associated with the cancellation of the unveiling on 3 June 2023, travel, and compensation for “hurt and humiliation”.
14. The hearing took place by phone on 18 September 2023. DX and STX participated in the hearing. I was not able to contact SCX on the phone number provided.

Law

15. The relevant law is the Consumer Guarantees Act 1993 (“CGA”).
16. Where services are provided to a consumer there is a guarantee that:
 - a. The services will be provided with “reasonable care and skill”; and
 - b. Any product from the service will be fit for the purpose that the consumer makes known to the supplier at the time of requesting the service.
17. If the service provider breaches a guarantee, then the consumer may require the service provider to remedy the breach.
18. If the service provider refuses or fails to remedy the breach within a reasonable time, then the consumer may:
 - a. Have the breach remedied elsewhere and require the service provider to pay the cost; and
 - b. Recover from the service provider any costs and losses that were reasonably foreseeable as likely to result from the breach.

Findings

19. DX’s claim names both STX and SCX as Respondents.
20. As noted above, SCX did not participate in the hearing.
21. STX submitted that:
 - a. His company received full payment for the TD headstone, including payment for engraving.
 - b. However, the engraving was not done before he sold the business in December 2021.
 - c. His company received partial payment for the FX headstone, but again did not do the engraving.

- d. The sale to SCX included 'works in progress', and these were taken into account in the valuation of the business.
22. This submission is consistent with DX's record of payments and the fact that DX asked ON to hold the TD headstone.
23. I am satisfied that the engraving of both headstones was carried out when SCX owned the business.
24. My finding is that SCX breached the CGA guarantees of reasonable care and skill and fitness for purpose. In the absence of any other explanation, the errors on the headstones can only be described as careless.
25. DX gave SCX a reasonable opportunity to remedy the breach, but she refused to do so.
26. SCX is liable for the proven cost of remedial work. DX provided two invoices from TX (TC) totalling \$2,340.00 to re-face and re-engrave the headstones.
27. The balance of DX's claim seeks consequential losses under two headings:
- a. Costs relating to the cancellation of the unveiling on 3 June 2023; and
 - b. Travel, inconvenience, hurt and humiliation.
28. As noted above, the CGA states that a consumer can recover reasonably foreseeable consequential losses in addition to the cost of any repair / remedial work.
29. The costs associated with the cancellation of the unveiling were a reasonably foreseeable consequence of the failure to exercise reasonable care and skill. The unveiling was dependent on the headstones being of acceptable quality. Neither of them was. DX's claim for a refund of the marae booking cost (\$50.00), food (\$569.13), and wasted travel / petrol costs (\$200.00) is proven and is fair and reasonable.
30. Compensation for stress, hurt, and inconvenience can be recovered if the purpose (or part of the purpose) of the particular contract is the provision of peace of mind or the prevention of distress.
31. I am satisfied that the contract in this instance is of that type¹, and that it is appropriate to award compensation for hurt and inconvenience in this instance.
32. Courts are traditionally cautious about the amount of damages that they are prepared to award under this heading.
33. It is important to acknowledge that the unveiling was an important and emotionally difficult event for DX and her whanau. DX relied upon SCX to do her job so that the event could be successful. The basic and inexcusable errors on the headstones showed a lack of care that was disrespectful and hurtful for DX.
34. I will award general compensation of \$2,000.00 for hurt and inconvenience.

Referee: Nicholas Blake

Date: 2 October 2023

¹ In *Mason v Westside Cemeteries Ltd* (1996) 135 DLR (4th) 361, the Ontario Court of Justice awarded stress / hurt damages to plaintiff when the defendant lost the ashes of the plaintiff's parents



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>.