



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 734

APPLICANT **EC**

RESPONDENT **NI**

The Tribunal orders:

NI is to pay EC \$800 by 29 December 2023.

Reasons:

1. NI contracted EC to prepare his property then sow a lawn using a hydroseed method with tall fescue seed. This work was carried out May 2023 and an invoice was sent for payment of \$3429.12 on 13 May 2023.
2. NI paid \$1610, with holding \$1819.12 for the hydroseed work.
3. EC claims \$1819.12 from NI on the basis he provided the service and payment should have been made within 7 days of completion of the job.
4. The issues to be resolved are:
 - a. Was the job carried out with reasonable care and skill and was it fit for purpose?
 - b. If not, is any payment due?

Was the job carried out with reasonable care and skill and was it fit for purpose?

5. The Consumer Guarantees Act 1993 (CGA) implies into all consumer contracts a set of minimum standards (guarantees) for goods and services when they are supplied in trade to consumers. The relevant sections regarding guarantees are in s 28 -that a supplier will carry out its services with reasonable care and skill; and in section 29 of the CGA a guarantee that a service, and any product resulting from the service, will be reasonably fit for any particular purpose and of a nature and quality that fits the particular result or purpose that the consumer makes known to the supplier.
6. Where a failure is minor, or can be rectified, the remedy is one of repair, and the consumer must give the supplier of the service the right to carry out a remedy. If this is not carried out within a reasonable time the consumer may have the failure remedied by a third party and claim the reasonable costs of repair from the supplier (s32(a)), or may cancel the contract and obtain a refund.
7. In this case NI has withheld payment for the disputed work.

8. I find the service was not provided with reasonable care and skill because I am more persuaded by NI's argument and evidence that the hydroseeding was carried out too late.
9. I find EC did not provide service and a product resulting from that service that was fit for purpose because he did not provide evidence that he achieved a good strike by August.
10. I heard EC's argument that it was not too late to sow, that NI didn't provide sufficient watering in the first two weeks. EC said there is no evidence from NI that he sowed the lawn again and he said using [lawn product] like NI did is against advice.
11. However, I prefer NI's argument that the recommendation for sowing grass in NZ is early autumn (February/March). The outcome of sowing in May is the risk of frost and a very slow growing period that allows weeds to overcome the grass. NI said [Town] had 5 frosts in May and a record amount of rain. While EC cannot predict the weather for May and the following months, he took a risk by hydroseeding in May that in the end caught him out. I do not accept EC's statement that a contribution to the grass not being established was due to poor watering in the first two weeks, because I accept NI's statement that his son in law was watering but also that there was regular rainfall in May.
12. EC said he was not obliged to carry out after sales service because he hadn't been paid. The CGA does not specifically address this aspect of a contract. However, the guarantees given are strict in that the service and product resulting from the service must be fit for the purpose agreed to by the parties. If part of the service includes after sales service to achieve the guarantee of fitness for purpose, particularly if there is an element of risk because of the late sowing, then NI's decision to withhold payment should not have resulted in EC not providing service to meet the guarantee. The CGA would not contemplate that the guarantee of fitness for purpose is met if the lawn to be achieved is not provided.
13. I consider that EC's decision not to meet with NI in August was poor judgement because NI is required to give EC an opportunity to remedy and EC had an obligation to remedy, including to resow and remove weeds as necessary. EC had no valid reason not to trust that NI would not pay because he had part paid the invoice for undisputed work and he had been a trusted client in an earlier lawn.
14. I considered EC's response that the grass that has grown now is the grass he originally sowed and not the seed NI sowed.
15. However, EC has no evidence of this and had no photos to show his hydroseeding was on track to grow a good lawn. In contrast, NI's photos show a very poor strike after 3 months. I accept NI's account that he did preparation work and resowed the lawn in September and after 6 weeks achieved a good grass strike in October/November.

Is EC entitled to any payment?

16. Where there is a failure to remedy, or if the failure is substantial (s36), there is also a right to cancel (s32(b)). Cancellation entitles a refund of sums paid (s38), unless there is some value retained in the work done (s39(4)). In addition, there is a right to reasonably foreseeable consequential losses (s32).
17. NI's position is that he should not have to pay the outstanding sum and EC's position is that it is unfair to expect him to provide a remedy when he hasn't been paid in the first instance.
18. As explained earlier the CGA does not say what should happen if work is not paid for. It does not say that the obligation to provide the service and product resulting from the service ends because payment has not been made. In addition, because hydroseeding has to produce a result and is not the completed job as soon as hydroseeding has taken place, I am more of the view that NI was entitled to reject the work and obtain a refund.

19. The general principles of contract law provide that if some value is retained in the job, benefitting one party, it should be reflected in the amount ordered payable by the other party.
20. I find \$800 to be a fair and reasonable sum because the indications are that some value was provided by EC and because NI's costs of seed, fertiliser and travel were not counterclaimed for and so this is my best assessment to provide an outcome that meets the substantial merits and justice of the case.

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>.