



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 718

APPLICANT TD

RESPONDENT E Ltd

The Tribunal orders:

E Ltd is to pay TD \$1,432.00 on or before 12 February 2024.

Reasons:

1. TD had dental work done by E Ltd in October 2021. The work consisted of five fillings. TD says the work was not done with reasonable care and skill and was not fit for purpose. TD seeks an order that E Ltd is liable to pay her damages of \$13,425.00.
2. The issues to be resolved are:
 - a. Has there been a breach of the Consumer Guarantees Act 1993 by E Ltd?
 - b. If so, what remedy is appropriate?

Has there been a breach of the Consumer Guarantees Act 1993 by E Ltd?

3. I find that it is most likely that the dental work undertaken by E Ltd in relation to four of the five fillings done by E Ltd was not provided with reasonable care and skill and was not fit for purpose.
4. The Consumer Guarantees Act 1993 (CGA) provides that where services are provided to a consumer there is a guarantee that the services will be provided with reasonable care and skill and will be reasonably fit for purpose.
5. In October 2021 TD had five fillings done in her teeth by E Ltd. The fillings were for teeth 36, 27, 26, 16 and 17. TD paid E Ltd \$1,790.00 for this work. TD used a loan from MSD to pay for the dental work, I understand MSD has put the loan on hold pending the result of this claim and a complaint TD has made to the Health and Disability Commissioner.
6. TD says that after the work was done, she had ongoing pain in the teeth at the filling sites and was unable to chew even soft food. She went back to E Ltd a few days after the original work was done. E Ltd reduced the height of one of the fillings.
7. TD says she continued to have pain after that, and at the end of October she went to another dentist, ND from [dental practice], who eventually replaced four of the fillings in June 2022. TD says

the delay in having the fillings replaced was because she did not have enough money to pay the new dentist until then (TD obtained another loan to pay for the treatment from ND).

8. ND provided a written report in which he said that he first saw TD on 29 October 2021, when she complained of pain and bite sensitivity. He says he found there was decay present on several teeth including under the recently placed fillings on teeth 17, 16, 26 and 27. ND said there was no decay under the filling on tooth 36, and that filling was left in place.
9. TD says that E Ltd did not do the original fillings with reasonable care and skill, and that the work was not fit for purpose.
10. E Ltd says that the decay that was originally treated in TD's teeth was "arrested decay" and not "active decay" and that it was good professional practice to leave the arrested decay under the fillings. E Ltd said it took a conservative approach to removing the decay to preserve the tooth structure, and avoid damaging the nerve. E Ltd provided some extracts from professional journals as evidence of the correct treatment of arrested decay.
11. At the second hearing I spoke to ND, the second dentist who treated TD. He said that when TD came to see him, she was experiencing pain from the teeth that had been filled by E Ltd. He x-rayed her teeth and could see dark areas indicative of decay under four of the fillings. He said he then removed the fillings in those four teeth and found leathery decay (a texture indicative of active decay) which dyed red with a caries dye, which also indicated infected decay. He said it is his view that the decay under the fillings was active decay and not arrested decay. He removed the decay and refilled the teeth.
12. I am satisfied that it is most likely that the work done by E Ltd in relation to teeth 17, 16, 26 and 27 was not done with reasonable care and skill. This is because TD continued to experience pain after the fillings in those teeth were done by E Ltd, and ND's evidence was that there was active decay under the fillings when he saw TD. The pain in TD's teeth resolved after ND removed the decay and replaced the fillings. I consider this is evidence that the decay under the fillings was causing the ongoing pain TD experienced, and that it is most likely that this decay should have been removed before the teeth were filled by E Ltd.

What remedy is appropriate?

13. I find that E Ltd is liable to pay TD damages of \$1,432.00.
14. Where there is a breach of the CGA in relation to the provision of services, and the failure is of a substantial nature, the consumer is entitled to compensation for the reduction in the value of the services below the price paid, together with damages for any other losses which were reasonably foreseeable as likely to result from the failure.
15. The breach of the CGA in this case was substantial because a reasonable consumer, fully aware of nature and extent of the failure in this case, would not have acquired the services of E Ltd in the first place.
16. I am satisfied that there was no value in the work done by E Ltd on the four teeth that needed to have the E Ltd fillings and the decay underneath removed. E Ltd charged TD \$1,790.00 for the five fillings, which equates to \$358.00 per filling. Four of the fillings had to be replaced, and so TD is entitled to a refund from E Ltd of \$1,432.00 (4 x \$358.00).
17. Under the CGA a consumer can also be entitled to damages for any losses that were reasonably foreseeable as likely to result from the breach of the Act (effectively consequential losses).
18. TD's claim was for \$13,425.00. She claimed this amount as damages for the pain and suffering she experienced until she could afford to replace the fillings in June 2022. TD calculated her claim for damages at a rate of \$1,790.00 (the amount she originally paid E Ltd) per month from October 2021 until the four fillings were replaced in June 2022.

19. Section 317 of the Accident Compensation Act 2001 (ACCA) provides that no person may bring proceedings in New Zealand for damages arising directly or indirectly out of a personal injury covered by the ACCA. It seems likely that any pain suffered by TD after the dental treatment by E Ltd was a personal injury, in which case the Tribunal cannot consider a claim for damages arising directly or indirectly as a result of the personal injury.
20. TD paid the second dentist \$3,150.00. ND said that this charge related to treatment of ten teeth in all, and not just to the four teeth that had been filled by E Ltd. ND said that there was no extra charge to remove the fillings that had been placed by E Ltd. I do not consider that TD is entitled to recover any of the amount she paid ND – because this was the cost of having the work on the four teeth done properly, which she was always going to have to pay for.
21. I understand from TD that she has not been charged interest on the loan from MSD while this matter has been in dispute.
22. I accept that TD experienced ongoing stress and inconvenience as a result of the defects in the work done by E Ltd. TD said she lost weight because she was unable to eat, suffered mental health difficulties, and had to visit her doctor with associated expense. However, there is no evidence before me of any losses TD has suffered. There is doubt whether the Tribunal has the jurisdiction to make an award of general damages for such losses under the CGA.
23. In any event it seems likely that most of the difficulties TD suffered after the treatment by arose because of TD's particular financial circumstances, which meant she could not have the remedial treatment necessary until around 7 months after the treatment by E Ltd. I do not consider that this delay was reasonably foreseeable, which is a requirement for the award of consequential losses under the CGA.
24. For these reasons I am unable to make any award for consequential losses in this case and so I find that E Ltd is liable to pay TD \$1,432.00.

Referee: L Trevelyan
Date: 20 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>.