



(Disputes Tribunals Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court: Tauranga

Case number: CIV-2017-070-000353

FIRST Robert Michael Love
APPLICANT

SECOND Robert Michael Love as executor of the Estate of Freda Joan Love
APPLICANT

RESPONDENT Bupa Care Services NZ Limited
 91 Alan Livingston Drive
 St Kilda
 Cambridge 3434

The Tribunal hereby orders:

Bupa Care Services NZ Limited is to pay Robert Michael Love \$10,000.00 by 16 November 2017.

Reasons:

1. Mr Love has brought a claim for compensation against Bupa in relation to the care provided to his late mother Mrs Love at its St Kilda Care Home in Cambridge. She lived there between 15 August 2016 and 18 January 2017. The standard care services provided by Bupa were fully subsidised. However, Mrs Love paid an additional \$52.00 per night for a premium room and enhanced services.
2. The principal contract was between Bupa and Mrs Love. Mr Love signed the contract as her power of attorney and he also signed in his personal capacity as guarantor. Following a jurisdictional hearing on 22 June I made a finding that Mr Love could bring the claim both as guarantor and as executor of her estate.
3. Both parties attended the substantive hearing on 5 October. Bupa was represented by Mrs Baker, who was accompanied by the care home manager as a support person.
4. Mr Love has two broad complaints, firstly about the adequacy of the day-to-day care provided by Bupa and secondly the suitability of his mother's room. He alleges that Bupa breached the terms of the contract and the Consumer Guarantees Act 1993 ("CGA"). He also alleges that Bupa engaged in misleading behaviour under the Fair Trading Act 1986 ("FTA").
5. The contract provided that Bupa would use all reasonable endeavours to: maintain appropriate staffing levels (1.3.1), deliver services in a "competent manner" (1.3.3), and put resources in place to meet the resident's "unique needs" (1.3.4). Section 28 CGA provides for a guarantee that services will be provided with reasonable care and skill. There is a degree of overlap between the claims in contract and under the CGA and it is convenient to deal with both together.

Did Bupa fail to provide services with reasonable care and skill?

6. Mr Love says that during the time his mother lived at St Kilda there were 14 documented instances where there was a serious failure in providing for her care. He says many of the incidents involved "multi faceted" failures.
7. Mrs Love went to St Kilda with an indwelling catheter ("IDC"). Many of Mr Love's complaints relate to Bupa's management of the IDC. A catheter tube is held in place within the bladder by an inflated balloon. The drainage tube should be strapped to the patient's leg, and the catheter bag secured, to prevent the tube from becoming dislodged and the balloon being pulled from the bladder.
8. Mr Love described several occasions where he found the catheter detached from his mother's leg, sometimes leaving marks where the tape had been pulled from her skin. He attributed this to rough, unskilled or careless handling. The first incident was on the day after his mother's arrival. He found the tube hanging over the end of the bed and the bag on the floor. The IDC was dislodged and her bedding was soaked in urine.
9. In late September Mr Love wrote to Bupa expressing concern about two occasions where he found the catheter bag left in his mother's bed, the tube unattached to her leg, and the IDC dislodged and leaking. On 3 October he wrote about a similar incident on 1 October. He said these incidents were distressing for his mother, causing her pain and discomfort.
10. On 24 October Mr Love arrived at St Kilda in the morning to find his mother cold and distressed, and her bed soaked in urine. The window was open, there was no heating, and she was only covered with a thin shawl. The IDC tube had become detached from her leg and dislodged from her bladder. Her call bell was out of reach.
11. In a letter dated 1 November Bupa accepted that its staff put a thin blanket over Mrs Love in the early hours of the morning without closing the window, and left her without the call bell. Her bed was found wet in the early hours and the bedding changed. However, the registered nurse was not informed. Both caregivers were new to St Kilda and it acknowledged the registered nurse should have taken a supervisory role and given them instructions about monitoring and reporting on resident care. It said the new staff would be undertaking training in November so that it could be "confident of their knowledge and skills especially the Bupa policies and procedures".
12. On 14 November Mr Love wrote to Bupa about finding his mother sleeping flat on her back on 11 November, despite repeated request that her bed be elevated to 10°-20°. He described her sleeping position as dangerous and uncomfortable. He also raised concerns about staff using inappropriate products such as paper towels rather than TENA wipes, and using an incontinence product rather than the agreed blue safety sheet. Later that day Mrs Love had to wait for 2 hours 50 minutes to use the commode as there were insufficient staff available. By the time she was attended to her bowels had moved. Mr Love says this was not an isolated incident.
13. In a letter of 20 January Bupa acknowledged its staff left Mrs Love flat on her back after repositioning her in bed, contrary to instructions. It accepted staff had used the wrong wipes. It apologised for both shortcomings. It had run out of the blue sheets, so staff used an incontinence product instead, which it regarded as a sensible use of resources at hand. Bupa accepted Mrs Love should have been toileted without delay and apologised. However it was unaware she had been left "sitting in faecal matter". Mr Love did not specifically mention this aspect of the incident in his initial letter of complaint on 14 November, although I have no reason to doubt the accuracy of his recollection.
14. On the morning of 22 November Mr Love found his mother's catheter leaking. The problem was not resolved for over 12 hours, when staff replaced the catheter. During that time there were several changes of bedding. The following day the IDC was found to be leaking again. She was sent to Waikato Hospital where the catheter was changed and the problem resolved.

15. On 25 November Mrs Love suffered a clonic seizure. Mr Love says she had no history of seizures and he believes the combined effect of poor care and a high ambient temperature was a contributing factor, although he accepts there is no direct evidence of causation.
16. On 10 December Mr Love found the catheter bag unsupported on the side of the bed. There was a mark on his mother's leg where the plaster had pulled off. He provided photographic evidence of the mark.
17. On 29 December Mr Love wrote to Bupa about continued use of medication after it being stopped by the doctor. He asked why it was not using an over-the-counter antifungal powder intended to prevent skin irritation. He has also questioned continued use of an antifungal cream after its use was supposed to stop. Bupa said it was waiting for formal advice on the change in medication and it would not use the powder without medical approval. It acknowledged the cream should have been removed from her room.
18. On 1 January Mr Love found his mother in pain and distress. Her bed was heavily soaked in urine, the catheter bag was on the floor, and both the bag and tube were empty of urine. There was a six hour delay before the problem was resolved by flushing sediment from her bladder. During that time there were frequent changes of bedding. On 4 January he wrote to Bupa expressing concern about the delay and the competency and lack of co-ordination of staff. In its reply of 31 January, Bupa said staff had been told the catheter bag should be off the floor and secured to the side of the bed. It acknowledged this requirement had been missed on occasions. It accepted that management of the situation could have been more "*precise and on point*" and apologised for the delay. It gave an assurance that any future problems with the IDC would be dealt with promptly.
19. At a meeting with Mr Love on 12 January Bupa recommended that the use of the IDC be discontinued and replaced with incontinence products. Mr Love disagreed, saying this was contrary to medical advice he had received from a senior geriatrician at Waikato Hospital.
20. On 15 January Mr Love wrote to Bupa about a dressing that had been placed on Mrs Love's buttocks. The adhesive part of the dressing was placed over broken skin. As she was repositioned every two hours during the night the adhesive would have pulled on her skin, likely causing pain. In a written reply Bupa denied the dressing was placed on any "*red areas*", but acknowledged there was a "*better way*" of placing a dressing in this location.
21. On 18 January, Mrs Love's condition had deteriorated to the point where she was transferred to Waikato Hospital.
22. Although Bupa accepts many of the factual complaints made by Mr Love, it says it has met the relevant requirements for providing care and medication in a safe and timely way in audits by Health and Disability Auditing New Zealand. It says its caregivers and nurses hold appropriate qualifications and undergo regular training. In a letter of 14 March Waikato DHB said that Bupa had apologised for incidents where it could have better managed Mrs Love's care and had taken corrective action; although it added that Bupa could have contacted it earlier for expert guidance and support.
23. Bupa clearly breached clause 1.3.3 of the contract and section 28 CGA by failing to provide services in a competent manner and with a reasonable level of care and skill. Nor were the services tailored to meet Mrs Love's specific needs (1.3.4). A number of the shortcomings, particularly around IDC management, were repeated throughout Mrs Love's stay at St Kilda. Although Bupa acknowledged and apologised for the problems, this did not lead to a material improvement in her care. Bupa confirmed that staff turnover was quite high at the time, and this was most likely a contributing factor.
24. It is fair to note that, in his correspondence with Bupa, Mr Love frequently acknowledged individual acts of care and kindness from members of staff and management. However, this does not alter the fact that there was systemic failure to provide his mother with a reasonable level of care.

Did Bupa fail to provide an adequate level of staff?

25. Mr Love alleges Bupa breached the contract by failing to maintain an appropriate level of staff. Mrs Love was in the Tristram Wing, which had a staff ratio of one caregiver for 10



residents. Because she required hospital level care, two caregivers were required whenever she was transferred to the commode, the shower, or a wheel chair; and whenever she needed to be repositioned in the bed. Mr Love says that by contrast the staffing level in the 'hospital wing' at the care home is two care workers to 8 residents.

26. Whenever a second caregiver was required there was potential for delay while another staff member was found, often between 30 minutes and an hour, and sometimes longer. Mr Love says another consequence of the low staff level on the Tristram Wing was that caregivers sometimes had minimal or no experience in working together. This had particular consequences for managing transfers using the hoist. There were occasions where the hoist was not correctly positioned in the room to complete the manoeuvre or the straps were not correctly placed around his mother's legs. Mr Love described some of the transfers as *"less than smooth and sometimes even dangerous"*.
27. Bupa says the staffing level of 1:10 was sufficient and staffing levels have been approved in the HDANZ audits. It says there was a mix of residents in each wing and that a more meaningful measure of staffing levels is 'hours required' rather than a specific ratio. In the neighbouring Tavistock Wing there were 4 caregivers for 25 residents, as well as a registered nurse and an activities co-ordinator. On any given day, one of the Tavistock caregivers was allocated to assist with Mrs Love.
28. A number of the incidents described by Mr Love arose from a lack of available staff to assist with Mrs Love's care. Some level of delay was to be expected, as staff would inevitably be busier at some times than others. However, the level of delay Mrs Love experienced on a regular basis was unacceptable. Therefore I find that Bupa breached clause 1.3.1 of the contract by failing to provide an adequate level of staff to provide for Mrs Love's care.

Was the room provided by Bupa fit for purpose?

29. A primary source of concern for Mr Love was the temperature of the room. He says it soon became apparent that the room became hot by mid-morning. Bupa's response to his initial complaint was to install a sun-filtering screen. This darkened the room and made some difference to the temperature. However, as summer progressed, the room continued to become hotter and consistently exceeded 30°C during the middle part of the day, even with the blinds and thermal drapes shut. To alleviate the problem he bought a fan, a dehumidifier, and eventually a portable air-conditioning unit. Even with this equipment operating he was not able to bring the temperature down below 30°C. As a result Mrs Love was often living in hot, humid and dark conditions.
30. Mr Love believes the problems with excessive heat resulted from poor design: the room is north-facing and there is no air-conditioning in the room, only in the corridor outside. He says Bupa's solution was to have residents vacate their rooms during the hot part of the day. This was not a practical option for his mother. He says his mother's exposure to hot and humid conditions resulted in respiratory difficulties, dehydration and fungal infections.
31. As a result of Mr Love's complaint Bupa monitored the room temperature, a contractor was engaged to assess the situation, and a solar 'film' was installed to reduce heat. Bupa says it was advised by the air-conditioning contractor that it was not measuring temperature correctly, and that it was actually 3°-4°C lower. However, Bupa did not provide any documentary evidence to verify this claim.
32. Bupa says it offered to relocate Mrs Love in a different wing at the home, but that Mr Love declined and elected to move her to another room within the same wing. There is little documentary evidence to confirm that Bupa offered a room in a different wing as a permanent solution. In an email dated 9 December Bupa referred to a temporary move to another room. In reply Mr Love said he was reluctant to put his mother through a temporary relocation, although he thought this would be helpful if there was a delay in solving the heat problem. He asked to be shown the room Bupa had in mind. It is not clear whether there was any follow-up to this suggestion. At the meeting on 12 January Bupa made it clear that moving Mrs Love would be dependent on the availability of another room.

33. Mr Love says the shift to another room within the same wing made little difference to his mother. Even though the new room had an air-conditioning vent in the hallway outside the door, there was little improvement to the temperature inside the room.
34. In a letter dated 14 March Waikato DHB stated that "*all reasonable efforts*" had been made to address Mr Love's concerns about the temperature of the room and appropriate steps taken to prevent dehydration.
35. Despite that apparent finding from the Waikato DHB, Bupa has not provided any persuasive evidence to contradict Mr Love's evidence about the hot and humid conditions inside his mother's room. Although there is no evidence from either party about a safe maximum temperature for residents, I find that the temperatures described by Mr Love were not suitable for someone in Mrs Love's circumstances. Therefore the room was not reasonably fit for purpose.

Did Bupa engage in misleading or deceptive behaviour?

36. The FTA provides that no person in trade shall: engage in conduct that "*is misleading or deceptive or likely to mislead or deceive*" (s 9 FTA); engage in conduct that is "*liable to mislead the public as to the nature, characteristics [or] suitability for a purpose ... of services*" (s 11 FTA); or "*make a false or misleading representation that services are of a particular kind, standard [or] quality ...*" (s 13(b) FTA). The Court of Appeal and Supreme Court have adopted various tests for deciding whether conduct is misleading. The common elements are that the conduct must be objectively capable of misleading someone in the applicant's position, and the applicant must have been misled. There is no need to prove any intention to mislead or deceive.
37. Mr Love says he chose the Bupa St Kilda facility because of its "*impressive*" and "*persuasive*" marketing material. He says a common thread through the material is a promise to provide the "*best possible care*". He says that when he met with Mrs Baker before signing the admission agreement she spoke of the skill and competence of her staff.
38. The only room available at the time attracted a premium of \$52.00 per day. The premium was charged for the larger size of the room and the "*Enhanced Services*" provided. Mr Love believed the enhanced services included "*meaningful enhanced care*" and not just the hotel-type services referred to in the agreement. He says Bupa was unable to provide the services advertised and it made representations without having reasonable grounds to believe it could fulfil its promises.
39. Bupa denies it told Mr Love his mother would receive a superior level of care under the premium room agreement. The premium charge was for a larger room and additional services such as a newspaper, a regular glass of wine, and a choice of menu.
40. The contract detailed the extra services provided and the advertising brochures refer to the premium rooms having a range of superior features. Neither the contract nor the brochures refer to the quality or level of care provided. Therefore I find that, in this respect, Bupa did not misrepresent the enhanced services included with a premium room.
41. Mr Love believes Bupa was aware of the problems with room temperature: he says the regional manager acknowledged similar problems at another facility of similar design. Bupa says it was not aware of any problems with room temperature before August 2016. St Kilda was newly built and neither of the two residents who had lived in her wing prior to her admission reported any problems.
42. Because the facility was relatively new, there is insufficient evidence to prove that Bupa knew or ought to have known the room was unsuitable for someone in Mrs Love's circumstances. Therefore this aspect of the claim is not proved.
43. The situation is different with the representations about the level of care available. Bupa was aware of Mrs Love's circumstances and the facility manager was aware of the requirements for safe management of an IDC. During Mrs Love's time at St Kilda the staff consistently demonstrated an inability to properly manage her IDC. Bupa ought to have known it was not able to provide the level of care required for someone in her

circumstances. I therefore find that its statements about its ability to provide the necessary care were objectively misleading and in fact misled Mr Love.

Are the amounts claimed proved?

44. Compensation for breach of contract is intended to put the applicant in the position they would have been in had the contract been performed. The calculation of compensation will depend on the circumstances of the case and the nature of the loss. The loss must be reasonably foreseeable and not too remote. Where a supplier breaches a guarantee under the CGA the consumer can, in broad terms, claim a refund and any reasonably foreseeable losses (ss 32, 37 and 38 CGA). Under the FTA the Tribunal has a broad discretion to order a refund of money or payment for loss. The Tribunal's overriding duty is to determine the claim according to its substantial merits and justice, having regard to the law (s 18(6) Disputes Tribunals Act 1988). Any assessment of compensation must be consistent with this requirement.
45. Mr Love seeks reimbursement of the premium paid for the room: \$8,112.00, being 156 nights at \$52.00 per night. He also claims \$1,387.00 for the cost of the fan, dehumidifier and air-conditioning unit. Finally, he claims personal costs of \$2,629.44 for additional travel and \$5,000.00 for lost income. The claim totals \$17,124.44; which he has reduced to \$15,000.00 to bring it within the Tribunal's monetary jurisdiction.
46. *Room premium:* Bupa's breaches of the contract, the CGA and the FTA affected both the standard services, which were covered by the government subsidy, and the premium services, which Mrs Love paid for. It would be unduly artificial to apportion losses between the two different levels of service. For significant periods of time the premium room was not fit for purpose, and the care provided was well below a reasonable standard. In these circumstances, it would be unreasonable to expect Mrs Love to pay for the cost of the premium room and enhanced services. There I find that Bupa must refund the amount paid.
47. *Equipment:* Had the room been fit for purpose, Mr Love would not have bought the fan, the dehumidifier and the air-conditioning unit. Buying those items represented both an actual and an opportunity cost. However, it would not be reasonable to award the full amount claimed, as the cost of the items can to some extent be offset against their residual value. Although the equipment is of no use to Mr Love, it could be sold to defray expenses. Taking into account opportunity cost, the likely cost of selling the items, and a fair estimate of their residual value, I have awarded compensation of \$850.00, which is roughly equivalent to 60% of the purchase price.
48. *Personal costs:* Mr Love says, because of the problems his mother experienced, he travelled to St Kilda more often than would otherwise have been the case. He also says he was unable to take up work opportunities.
49. The claim for additional travel is reasonable in principle, as it was foreseeable that the problems encountered would result in Mr Love taking a more active role in his mother's day-to-day care. The difficulty is in proving how much extra travel was involved. He has estimated 22 extra trips at 72c/km (the IRD rate). However, there is no clear evidential basis for arriving at the figure of 22 trips. I have therefore allowed just over \$1,000.00 and rounded the total compensation to \$10,000.00. The claim for loss of earnings is too remote as it was not a reasonably foreseeable consequence of Bupa's breaches. This aspect of the claim is therefore dismissed.


Referee: J P Smith

Date: 2 November 2017





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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 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, and 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>.