IN THE DISTRICT COURT
AT WELLINGTON

CIV-2007-085-1063

BETWEEN	GLEN WILLIAMS Appellant
AND	THE PATTER LIMITED First Respondent
AND	INTERNATIONAL MANAGEMENT GROUP LTD Second Respondent

Hearing: 25 September 2007

Appearances: Appellant in person
Mr R Upton for Respondents

Judgment: 28 September 2007

JUDGMENT OF JUDGE T J BROADMORE

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[1] The 2006 Ironman New Zealand event, scheduled to be held in Taupö on 4 March 2006, ran into difficulties purportedly as a result of adverse weather. The event was shortened and varied in several ways. Glen Williams was an entrant into the event and was aggrieved at the turn of events. He considered that the organisers were ill-prepared to cope with the weather, and had an inadequate risk management strategy and contingency plan. As a result, he considered that the event had been modified to a greater extent than was necessary. As a further result, the event in the form in which it took place disappointed entrants, who had undertaken many months of training for the event.

[2] Mr Williams took these matters up with the organisers but was unable to obtain satisfaction from them. In those circumstances, he embarked on a claim

before the Disputes Tribunal seeking compensation in the sum of $444.80. This amount was calculated on the basis of the entry fee paid, amounting to $629.80, with credit given for $185.00 being the largest entry fee Mr Williams could identify for a half ironman event run in New Zealand, presumably on the basis that the event as actually run was the rough equivalent of a half ironman event.

[3] The legal basis for the claim was said to be s 28 of the Consumer Guarantees Act, which implies a guarantee that services supplied to a consumer will be carried out with reasonable care and skill.

[4] Mr Williams brought his claim against the two respondents on the basis that The Patter Limited was the event organiser contracted to Ironman New Zealand Limited, and that International Management Group Limited ("IMG") is the owner of the event. I am uncertain as to the precise role of Ironman New Zealand Limited, although it may be a subsidiary of IMG. Nevertheless, there did not seem to be a dispute about whether or not the claim had been brought against the correct parties.

[5] The claim was dealt with by Ms Robyn Wilson, a Disputes Tribunal Referee, at a hearing on 26 July. In a decision delivered on 3 August, she rejected the claim, concluding that Mr Williams had not satisfied her that the organisers had failed to exercise reasonable care and skill. However, she concluded that IMG was in breach of the Fair Trading Act through its continued denial that the Consumer Guarantees Act applied, and ordered IMG to pay Mr Williams $100 as damages for that breach.

[6] As to parties, the Referee concluded that there could be no claim against The Patter Limited because there was no contract between it and Mr Williams, and because it did not otherwise come within the scope of the Consumer Guarantees Act. (It was not a party to a contract with Mr Williams, and was not a supplier within the meaning of the Act because it supplied services to Iron Man New Zealand Limited and not to the participants.) Mr Williams did not challenge that conclusion.

[7] From that decision, Mr Williams appealed. Recognising that he could not challenge the merits of the decision, he asserted that the conduct of the hearing was procedurally unfair in the following ways:

1. Decisions to admit or exclude evidence did not always appear to be based on whether it was relevant, reliable and logically valid, and capable of being tested in some form.

2. The evidentiary basis for determination of the result was not "on the balance of probabilities".

3. New statements of facts were considered in the decision when there was no prospect for adequate preparation and no reasonable opportunity for refutation.

4. The burden of proof was placed on the party least capable of providing it.

[8] Procedural unfairness has been said to encompass the following:

1. Allowing each party to present all relevant evidence.

2. Giving parties a reasonable opportunity to assemble that evidence.

3. Permitting the opposing side to test such evidence by questions.

4. Allowing the affected side to call evidence in support of its claim and in rebuttal of the other side's claim.

5. When adjudicating, to listen to the case for each party and stay out of the arena as much as possible.

6. To consider and rule on all applications for adjournment and to decide the outcome having regard to justice to the applicant balanced against any injustice to other parties.

7. To approach the hearing without bias for or against any party.

[9] Those principles are often summarised in colloquial terms by saying that the Referee is required to give the parties *"a fair crack of the whip"*.

[10] It will be seen that Mr Williams' complaints essentially related to the evidence presented and considered by the Referee.

[11] I have reviewed Mr Williams' written submissions prepared for this appeal, the Referee's order of 3 August and her appeal report. It is apparent that Mr Williams put before the Referee a good deal of information of one kind or another concerning the events of the day, the weather conditions, contingency planning for the event, and the standards against which contingency planning in general should be assessed. In relation to that last point, Mr Williams referred the Referee to the Australia/New Zealand Standard as to risk management. It is also clear that the respondents put considerable information before the Referee; and that both parties made detailed oral statements concerning their respective positions and the case of the opposite party.

[12] Having regard to s 18(6) of the Disputes Tribunals Act, to which I will refer in more detail shortly, I do not consider that a Disputes Tribunal Referee is required to insist on receiving evidence in the same manner as would be appropriate in a Court case. Section 40 of the Disputes Tribunals Act gives wide powers to the Tribunal to receive evidence and information whether or not it would be admissible in a Court of law. I take the view that, provided the Referee has given each party a fair crack of the whip at providing all information it wishes to the Tribunal and of responding to points made by the opposite party, then there should be no objection to such evidence being received.

[13] On the basis of the Referee's order and report, I am satisfied this requirement was observed by the Referee, whose report is in most cases to be considered decisive as to the manner in which the proceedings are conducted: *Underhill v Brodka* [1987] 3 DCR 557.

[14] Mr Williams complains that certain evidence from the respondent was accepted without corroboration, or that the Referee preferred other evidence to that

of his own. That is not an issue of procedural unfairness – it is simply the every day case of a Referee considering all the evidence and reaching a conclusion on it. That is what the Referee's task – or for that matter a Judge's - involves. I add that except in very limited classes of case of which this was not one, there is no legal requirement for corroboration even in a court of law.

[15] As to the burden of proof, the reality is that there must be a rule for a claimant to prove his or her case to the standard of the balance of probabilities. If a decision-maker is unable to make up his or her mind as between the cases of the respective parties then the claimant's claim must fail. That is what happened in this case: as the Referee makes perfectly clear both in her order and in her appeal report, she considered that there were a number of shortcomings in the way in which the respondents had conducted the event and dealt with the weather issues which arose. She also considered that there were shortcomings in the arguments and evidence adduced by the respondents at the hearing. Nevertheless, she was left uncertain as to the standard which should be applied in determining whether the organisers had acted with reasonable care and skill. At the end of the day, she was, in her words, *"left wavering"* as to the merits of the case based on the information provided to her. In those circumstances, she was not satisfied to the balance of probabilities that Mr Williams had made out his case.

[16] Even if in the circumstances it is difficult for a claimant to advance proof of its case to the requisite standard, that does not and cannot mean that some lesser standard should prevail, or that the onus should be placed on the respondent to show that it is not responsible.

[17] The fact is that in this case, as in any other Disputes Tribunal hearing, what the Referee is required to do under s 18(6) of the Disputes Tribunals Act is to –

> determine the dispute according to the substantial merits and justice of the case, and in doing so [to] have regard to the law but [is not] bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[18] I am quite satisfied that the Referee determined the dispute in accordance with this requirement. What she was required to do was not to analyse and determine every point of evidence and every submission of law made to her, but

merely to have regard to the law and reach a decision in accordance with substantial merits and justice. Disputes Tribunal Referees are not required to be lawyers and are not required to know or apply all the law except to the extent that it is drawn to their attention.

[19] I am conscious that Mr Williams bears a sense of grievance about this event, and nothing I can say in this judgment will convince him otherwise, or satisfy him that his grievance has been addressed. I can do nothing about that. I do however observe that the merits of Mr Williams' stance received substantial vindication from the referee, and that the respondents cannot derive much comfort from her decision, which was critical of them in a number of ways.

[20] I am satisfied that the appeal must fail, and it is therefore dismissed. Having regard to the Referee's concerns about the respondents' conduct and their approach to Mr Williams' claim, I do not propose to award costs in their favour.

T J Broadmore
District Court Judge