

update

24 August 2007

Friday Facts: Unfair term in contract

In the recent case of Free v Jetstar Airways Pty Ltd ("Jetstar") the Victorian Civil and Administrative Tribunal ("VCAT") decided that a term in the contract between Free and Jetstar in relation to an airline ticket was an "unfair term" in a "consumer contract" under the Fair Trading Act (Vic) 1999 (the "Act").

Ms Free had booked two tickets for flights on Jetstar from Melbourne to Honolulu via the Jetstar website for herself and her sister for travel on 11 May 2007.

Shortly before 7 March 2007, she was told by her sister she would be unable to travel on the booked flight. Ms Free wanted her niece to be able to use the ticket which had been booked in her sister's name. She telephoned Jetstar on that day to request a change to the name for the ticket. Jetstar advised that they would only allow the name change if Ms Free was prepared to pay a "change fee" of \$75.00 per person per flight, plus the difference between the fare cost applicable on the day she first purchased the tickets and the day she changed the tickets. The difference in relation to the latter equated to \$600.93 as Ms Free had booked the flights on a day that there was an introductory sale in relation to the new route being offered by Jetstar.

Ms Free paid the difference but also issued proceedings in VCAT against Jetstar claiming that the "change fee" was an unfair contractual term, misleading and deceptive conduct, false representation and unconscionable conduct within the meaning of the Act.

Under the Act an "unfair term" in a

"consumer contract" is void if a Court or Tribunal assesses it to be unfair by taking into account whether the term was individually negotiated. Whilst it was established that Ms Free had agreed to the "change fee" as part of the terms and conditions of the contract she had entered into with Jetstar by accepting the terms and conditions on the internet, the Tribunal decided that it was in fact an "unfair term" of a "consumer contract" as Ms Free did not have the ability to individually negotiate the term.

Having decided that the term was unfair, the Tribunal decided that it was not necessary for it to decide whether Jetstar's conduct in including the term in the contract was unconscionable, misleading and deceptive or a false representation. It ordered that Jetstar repay the difference of \$600.93 to Ms Free and declared it was a term of the contract which was void. Jetstar has appealed to the Supreme Court of Victoria.

For more information

For more information, please contact:

- Mary Nemeth, Partner on
03 9321 7810 or 0400 627 048
mnemeth@rigbycooke.com.au

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