DRN-5625892

The complaint

Mr D complains about issues with a car he has hired on finance with Automobile Association Developments Limited trading as Bsm ('AAD').

What happened

The parties are familiar with the background details of this complaint – so I will briefly summarise them here. It reflects my role resolving disputes with minimum formality.

Mr D was supplied a car via a hire agreement with AAD, for use as part of a driving instruction business.

Mr D complained to AAD about the maintenance service which is part of the hire agreement. In summary, he says that at times:

- the car was not picked up when it should have been;
- repairs were delayed; and
- he didn't receive a courtesy car or it was faulty.

Mr D says AAD is breaching the contract with him by not supplying a car that is suitable to carry out driving lessons. He also says he has been 'mis-sold' the agreement. He says that everything with the car has not been 'hassle free' as he was told it would be when he took out the agreement. He didn't get a courtesy car as promised – and the nearest repair garage was 30 miles away. Had he been told this at the time of signing the agreement he wouldn't have gone ahead with it.

Mr D said he wanted compensation of around £1,350 to reflect loss of earnings caused by the issues he has had with the car.

AAD looked at the complaint and accepted some points Mr D made about its service failings. It paid him £99.43 to reflect four days of hire payments and £175 compensation for the overall inconvenience caused. It would not refund him the loss of earnings he has requested.

Mr D brought his complaint to this service. Our investigator upheld it and awarded Mr D an additional £480 for loss of earnings.

AAD disagreed. It says its contract explains that it is not liable for loss of earnings. And that Mr D could have taken out business interruption insurance to cover events that may cause loss.

I issued a provisional finding on this case which said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

While I might not comment on everything (only what I consider key) this is not meant as a discourtesy to either party – it reflects my role resolving disputes with minimum formality.

Firstly, I note that Mr D has already complained to AAD about problems with the car being collected for repairs around September / October 2023. This was dealt with by AAD's Final Response letter dated 31 October 2023 in which it offered Mr D £50 which he accepted. I won't be dealing with this matter here as it doesn't form part of this complaint. However, the context is useful in determining the impact of later issues on Mr D (which I go on to discuss).

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulators' rules, guidance and standards, codes of practice and (where appropriate) what I consider to have been good industry practice at the relevant time.

I am satisfied the agreement in this case is a regulated hire agreement. As such, this service is able to consider complaints relating to it. AAD is also the supplier of the goods under this type of agreement, and responsible for a complaint about their quality.

After looking at the regulated hire agreement and what is specifically incorporated in its terms I am satisfied I can also consider the maintenance element of the contract which is the focus of Mr D's complaint.

Loss of earnings

I think it prudent to deal with this issue first. As it is the key matter in dispute here. Our investigator acknowledged that AAD exclude liability for Mr D's loss of earnings but said the term was unfair in the context of this complaint.

I note here that the clause in question in the hire agreement (11.3) states AAD will not have any liability for 'loss of profit' as a result of or in connection with the hire agreement or use of the car.

It is not for me to decide if a contract term is unfair – that is a matter for the court. However, I can look at relevant factors pertaining to fairness of contract terms in determining if the application of the clause is fair and reasonable in the particular circumstances. In doing so I do not agree the clause should be disregarded.

Firstly, it must be noted that this is a business to business contract for the provision of a car to be used for driving tuition. In this context exclusions of liability are not automatically deemed unfair in the same way they might be in a consumer contract. In a business to business context there are less stringent tests applied to clauses which attempt to limit the liability of one party. Here I consider the clause will likely be subject to the test of 'reasonableness' by a court.

In deciding if the term would be considered reasonable by a court I note it is not hidden or obscured and is written in relatively plain language. I think that before entering into the contract Mr D would have been able to understand and appreciate its implications (and consider alternatives).

I note the bargaining powers of the parties are not equal here. Mr D is in a weaker position than AAD to impose or negotiate terms. However, considering the nature of the contract involving a car that is liable to increased wear and possible regular breakdowns (and the challenges around the logistics of arranging repairs that may arise) it doesn't seem a particularly unusual or onerous for AAD to seek to limit its liability for disruption caused to Mr D's business. Furthermore, AAD has pointed to the availability of insurance products which would potentially cover Mr D for this.

So, while the car needed repairs, and AAD has accepted it made some mistakes which caused disruption to the process of resolving said repairs– in the context of the agreement and the particular circumstances here I don't consider a consequential award of loss of earnings is the correct and fair remedy.

I also note, there are challenges in saying that Mr D has suffered loss of earnings from the actions of AAD here in any event. While it is no doubt inconvenient if lessons had to be cancelled on a particular day, it is difficult to say this represents lost revenue when it is likely these would have been re-arranged for a different day (particularly if they represent pre-paid lessons booked as part of a 'block').

With this all in mind, I consider it reasonable that AAD only refund Mr D for the service he paid it for which did not go as planned. Along with an award for any distress and inconvenience this caused.

Maintenance of the car

In order to decide what is fair I have looked at the terms of the hire agreement which Mr D signed. I can see that one of the 'obligations' which AAD says is theirs is to provide a 'Maintenance Service'. This is essentially defined in the contract as maintaining the car as a result of any reasonable wear and tear that might occur on it. For clarity, in considering AAD's responsibilities I am including any agents working directly on its behalf to provide this service.

It appears that no one disputes AAD offer a collection of the car as part of this service too – although it doesn't appear to be written into the hire agreement as such. So I consider it reasonable to factor this in when determining what is fair.

From what I can see Mr D complained to AAD about the following incidents in connection with the maintenance side of the hire agreement:

- *Late October 2023 – slow puncture to rear driver side tyre – Mr D complains that when AAD booked it in they left the wrong information on the notes which led to the wrong tyre being replaced and Mr D having to come back again another day.*
- *11 March 2024 – brakes started making a loud noise on the Monday but he was not able to get booked in until the Wednesday. He took it in on Wednesday but the garage noticed a bald tyre which took an extra day to repair as AAD had not approved the tyre fitter and wanted to use their own. After originally being told the car would be delivered back to him he said he had to go and collect it and pay for a taxi to do so.*
- *26 April 2024 – car was struggling to start up and a warning light appeared – but the collection didn't occur at the designated time between 8am and 2pm and was due to be closer to 3:30pm. So Mr D cancelled the collection.*
- *7 May 2024 – the car was re-booked in for collection but no one showed up to take it. And although Mr D got a courtesy car – this was unsuitable for lessons as the clutch was far too high.*

AAD in its response to Mr D has said it couldn't establish whether it was at fault for some things he alleged. However, Mr D's recollections are credible and detailed and overall it does appear AAD accept that at times Mr D didn't receive the service he should have and repairs took longer as a result. So, I am willing to accept that on balance Mr D didn't get the level of service he was expecting which impacted around seven days in total as follows:

- *One day in October 2023*
- *Four days in March 2024*
- *One day in April 2024*
- *One day in May 2024*

However, I don't think this is a simple case of refunding Mr D seven days of his hire costs. Noting that while he experienced disruptions due to poor service by AAD– he would always have expected the car to have been in for repairs during at least some of the time noted above (say in March 2024). And while it is fair to expect repairs would be arranged and completed in a reasonable time I don't think that means they should be completed or arranged the very same day (the agreement doesn't say anything about that from what I can see). Furthermore, there were arguably opportunities for Mr D to mitigate certain issues (such as monitoring his tyre tread so the replacement tyre could have been authorised in advance).

So, all things considered, to reflect this I think that AAD's refund of £99.63 (approximately four days of rentals) is fair and reasonable in the circumstances.

Courtesy Car

I note Mr D complains he didn't get a courtesy car when the car went in for repairs in March 2024. However, looking at the finance agreement he signed I note there is no guarantee of a courtesy car. So I can't fairly say that AAD broke a contractual term here by not providing one.

I also note Mr D complains that when he did get a courtesy car in May 2024 it was faulty. Unfortunately, I don't have a lot of information about what happened with this, but Mr D's testimony is credible so I am willing to accept that the clutch was likely not right for him to use it for lessons. I note that a courtesy car is not part of the service he is paying AAD for – so I can't fairly say he should get a further refund of payments because of this. However, I do think that it should be reflected in any payment for distress and inconvenience here. Which brings me onto a discussion of that point now.

Distress and Inconvenience

Cars breaking down and going to the garage is inconvenient and distressing – but reasonably expected. I want to make it clear that my award for distress and inconvenience is not simply because of this – but the mistakes made by AAD which made things worse.

Mr D has clearly been impacted by these mistakes. I note he has been understandably very worried about his business and livelihood and frustrated at having promises broken, like when he was expecting the car to be collected at a certain time – or having a certain repair carried out that didn't go as it should have due to an administrative error. I can see Mr D has described how 'mentally draining' the errors have been and how stressful. I can see he has been caused considerable worry at what he sees as an unreliable maintenance service. He has also had to re-arrange lessons at times because of errors made by AAD. And while I am not considering the complaint about the issue dealt with by AAD previously – I think it is relevant in the sense that later repeated or similar mistakes have had a far greater impact on Mr D's confidence in the service than they would have otherwise.

I am sorry to hear about the impact on Mr D by any mistakes by AAD. I also note errors appear to have occurred several times – which impacts the level of distress and inconvenience here. I recognise AAD has accepted it did make errors and paid Mr D £175 for distress and inconvenience. But in the circumstances I do not consider this goes far

enough. I have considered our guidance on such awards, and while this is not a science I note that an award around £300 or more might be fair where mistakes have caused considerable distress and or inconvenience. Here I consider an award of £350 is fair and reasonable. Which means AAD have to pay Mr D an additional £175 here to settle this complaint.

Mis-sale

I note that an aspect of Mr D's complaint is that the finance agreement was mis-sold. However, Mr D has not persuaded me this is the case.

I consider it clear from the agreement that:

- *a courtesy car is not guaranteed;*
- *that repairs need to be carried out by authorised garages and not just anyone; - there are no guarantees of repair or collection timeframes.*

So while I can appreciate it was frustrating for Mr D that the nearest authorised garage with availability for certain repairs was some way away. And that Mr D didn't always get a courtesy car. I can't fairly say he wasn't able to reasonably discover this before signing the finance agreement.

And while Mr D says he was verbally promised a 'hassle free' experience I think (if this was mentioned at the time the finance was sold to him) would not be specific enough to amount to a false statement of fact in the circumstances. Nor, would it be reasonable to take this as a guarantee that problems would not possibly arise in connection with the maintenance of the car for his business.

The quality of the car

I note in his complaint to AAD Mr D indicated more generally that it had breached its contract with him in respect of the quality of the car. Mr D hasn't really focused on this or provided a lot of information on this point so I will deal with it briefly and for completeness.

In summary, I don't think there is persuasive evidence the car was not of 'satisfactory quality' in accordance with relevant business to business law. The issues Mr D has raised such as tyres and brakes appear to be related to reasonable wear and tear (noting that the car is used for instruction of different learner drivers and will reasonably be expected to suffer far more wear and tear than a domestic car not used for this purpose).

My redress is not scientific here. However, I consider it a fair way to put things right. I know it isn't exactly what Mr D wants – and he is free to reject my decision and take his dispute by more formal means (such as court) if he considers that the appropriate course of action.

My provisional decision

I partially uphold this complaint and direct Automobile Association Developments Limited trading as Bsm to pay Mr D an additional £175 compensation for distress and inconvenience.

I asked the parties to respond.

AAD accepted my decision. Mr D did not respond by the deadline set.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Neither party has given me cause to change my provisional findings – which I still consider fair for the reasons already given (above). These findings now form my final decision.

Putting things right

See below.

My final decision

I partially uphold this complaint and direct Automobile Association Developments Limited trading as Bsm to pay Mr D an additional £175 compensation for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 14 July 2025.

Mark Lancod
Ombudsman