

DETERMINATION

4 February 2011

Subject: Unauthorised transfers and disputed charges

Circumstances of the complaint

The complainant is a director of a small business, and he is disputing charges relating to a number of transfers of his business landline service to the Carriage Service Provider (the CSP) which he claims were unauthorised. The complainant is seeking a refund of the payments he made to the CSP (on behalf the business) totalling \$560.20. The complainant has also sought business loss compensation for the disconnection of services.

From mid 2008 to early 2009, the TIO received a number of complaints against the CSP involving the unauthorised transfer of services. The TIO initiated a potential systemic investigation into the CSP's practices, specifically those relating to point of sale advice, the transfer (and "claw back") of services, and credit management action.

The outcome of the investigation included an acknowledgement by the CSP that it now understood what constitutes good industry practice. As part of the resolution to this matter the TIO sought an undertaking from the company to waive all charges incurred and reimburse charges already paid by consumers. However, the CSP only agreed to waive unpaid outstanding charges, which the TIO assessed may not, in all cases, be fair and reasonable in the circumstances.

The TIO examines all complaints on a case by case basis having regard to their individual circumstances. In this case the TIO has formed the view that a fair and reasonable outcome to this complaint is for the CSP to provide the complainant with a refund of all payments made.

The complainant's perspective

The complainant first contacted the Telecommunications Industry Ombudsman (TIO) on 12 December 2008 and he said that he had been contacted by a telemarketing representative in March 2008 who he believed was calling on behalf of his business's preferred service provider. He stated that during this conversation he was offered a better deal and agreed to change the plan. He claims that after receiving a bill from the CSP some weeks later, he discovered that his main business service number had been transferred away from his preferred service provider and he made arrangements to transfer it back immediately.

The complainant advised the TIO that from May 2008 until December 2008 the service was transferred back to the CSP on a number of occasions without his authorisation. Included in his advice to the TIO, the complainant said that he contacted his preferred service provider and the CSP on a number of occasions to have the service transferred back to his preferred service provider.

Subsequently, the complainant indicated that the service was disconnected by the CSP when he refused to pay the disputed invoices. He also told the TIO that on one occasion he had to pay disputed amounts to the CSP to "allow" him to transfer the service back to his preferred service provider. On one weekend when the service was disconnected, he said he was unable to process electronic payments for an entire day which led to lost income.

The complainant has suggested that a reasonable outcome to the complaint would be for the CSP to refund all amounts paid, and he is seeking compensation for business loss suffered as a result of the services being disconnected.

In support of his claims the complainant has provided the TIO with:

- a copy of the front page of an the CSP invoice issued on 1 December 2008 indicating \$526.91 in charges owing on the business account
- a copy of a credit card statement (in the name of the complainant) indicating that a payment of \$560.20 was made to the CSP on 9 December 2008, and
- a copy of the front page of the CSP's invoice issued on 30 December 2008 indicating a payment of \$526.91 was received.

The CSP' perspective

The CSP has said that the complainant agreed to transfer the service to the CSP in May 2008, and that the complainant did not pay invoices for seven months. The CSP has said that it "clawed" the service back on two occasions in September 2008 and November 2008, after the complainant transferred his service to his preferred service provider.

The CSP has told the TIO that it has waived \$293.12 in charges outstanding on the account.

In support of its claims the CSP has provided the TIO with a copy of the voice recording completed on 23 May 2008.

The following documents and information have been requested from the CSP but have not been provided to the TIO:

- an account reconciliation showing all amounts billed to and paid by the complainant
- a record of all pre-sale discussions
- copies of all of the invoices related to this account
- customer service and complaint handling records, and
- copies of all letters sent to the complainant in relation to credit management action.

The TIO's consideration

The TIO's role is to resolve complaints in a fair and reasonable manner based on the evidence and information available. However, where a Member has not fully participated in the process and provided requested information, the TIO may need to make findings on limited evidence, once it is satisfied that procedural fairness has been afforded to both parties. In this case the TIO has been placed in the difficult situation of having to make a decision about the merits of this complaint in the absence of particular evidence which the TIO believes the CSP is likely to possess or have access to and which may be of assistance in deciding the complaint one way or the other.

In assessing what a fair and reasonable outcome to this complaint might be, the TIO has considered whether the evidence provided suggests that the initial transfer of the service to the CSP was properly authorised. The TIO has also considered whether any subsequent transfers were properly authorised. In addition, the TIO has considered whether any compensation is payable.

1. Was the initial transfer authorised?

Chapter 8 of the Telecommunications Consumer Protections (TCP) Code sets out industry best-practice in relation to a supplier's obligations in soliciting, completing and recording transfers. Under clause 8.1.3(e) of the TCP Code, "a supplier must take all reasonable steps to ensure that the consent obtained is informed consent."

The TIO takes the view that telecommunications providers should clearly identify the name of the gaining service provider, and give consumers sufficient information about a product to allow them to make an informed purchase or to give their informed consent when they agreed to buy the product.

The TIO has listened to the voice recording provided by the CSP which suggests that the complainant's service was transferred over to it on 27 May 2008. A close review of the recording shows that it includes some of the information required for a transfer. For example:

- the CSP is identified as the gaining service provider, and
- the name and authority of the consumer is established, and the relevant telephone service to be transferred is identified.

However, only part of the recording has been provided, and none of the pre-sale discussion has been provided to the TIO for assessment. The recording includes very limited information about the terms and conditions of the transfer, and the recording provided appears truncated, both at the beginning and end.

The CSP has not directly responded to the claim that the complainant was misled into transferring the service to the CSP during the pre-sales discussion. Given that the complainant claims that it was during the pre-sales discussion that he was advised that the representative was from his preferred service provider, this information is critical to deciding this complaint. The TIO expects telecommunications providers to collect any evidence relating to pre-sales discussions and provide it to the TIO when requested. This is because this information is important in establishing whether a consumer has been given sufficient information, prior to any agreement being formed, to enable them to make a fully informed decision.

The TIO has taken into account the claims of the complainant in this case that he believed that he was speaking with a sales representative calling on behalf of his preferred service provider, and that had he had known that it was an alternative provider he would not have agreed to the transfer. In the absence of information which the TIO reasonably believes that the CSP has access to or ought to have access to, and considering the complainant's claims, the TIO cannot satisfy itself that the complainant was provided with all of the information necessary to make a fully informed decision about transferring the service.

For the above reasons the TIO is of the view that the CSP has not provided sufficient evidence to demonstrate that the transfer of the service on 27 May 2008 was authorised.

2. *Were the subsequent transfers authorised?*

The complainant indicated that he first became aware of the unauthorised transfer after receiving the initial invoice, and that he subsequently sought to transfer the service back to his preferred service provider. To date, the CSP has not provided any evidence that any transfers after May 2008 were authorised by the complainant.

The TIO has been provided with evidence from the complainant's preferred service provider that shows the dates when the service was transferred between his preferred service provider and the CSP's wholesale provider. While the TIO has not been specifically advised that the company was the CSP's wholesale provider at the time, on the information available this appears to have been the case.

I have summarised this information in the table below:

| Date of transfer | Transfer description |
|-------------------------|-----------------------------|
| 27/05/2008 | To the CSP |
| 06/09/2008 | From the CSP |
| 21/10/2008 | To the CSP |
| 03/11/2008 | From the CSP |
| 07/11/2008 | To the CSP |
| 12/12/2008 | From the CSP |
| 06/10/2009 | To the CSP |
| 22/10/2009 | From the CSP |

This available evidence appears to support the complainant's position that he sought to transfer the service back to his preferred service provider.

The TIO notes that it appears that some two months elapsed between the complainant receiving his first invoice (issued on 30 June 2008) and having the service transferred back to his preferred service provider on 6 September 2008. The complainant has been unclear about the precise timing of actions he took. This, in combination with the CSP's failure to provide complete customer care and complaint handling notes means that the TIO is unable to conclude whether the delay in having the service transferred back to the preferred provider was caused by the CSP or the complainant.

However, what the above evidence does show is that the CSP took the service back from his preferred service provider on three additional occasions after the first transfer and that on each occasion the complainant had to take active steps to arrange for the service to be transferred back to his preferred service provider.

The TIO presented these records to the CSP for consideration; however, no response has been received. The CSP has not presented any evidence, such as voice recordings or system notes, to show that transfers after May 2008 were authorised by the complainant. The CSP ought to have reasonable access to pre-sale discussions along with any subsequent authorities transferring the service back to it and should be in a position to provide this information to the TIO.

In the absence of evidence that the TIO reasonably believes the CSP has access to, the TIO is not satisfied that the CSP has provided a sufficient basis on which to claim that the subsequent transfers were legitimate.

3. Liability for charges following unauthorised transfer

The TIO's position statement on the *Liability for charges following unauthorised transfer* outlines the TIO's view that where a service provider has failed to take reasonable steps to ensure that there was informed consent to a service being transferred; the TIO expects the consumer to bring the matter to the attention of the gaining service provider as soon as practicable, and the TIO expects the service provider to waive any accounts issued.

The TIO understands that the CSP has waived all remaining amounts outstanding on this account totalling \$293.12; however, no evidence to support this position has been presented.

The TIO is satisfied that the complainant took steps, on becoming aware that the service had been transferred to the CSP, to bring this to the attention to both the CSP and his preferred service provider. The complainant also claimed that he paid disputed charges to have the service reconnected and avoid subsequent disconnections. If this is correct the TIO believes that the CSP may have breached clause 7.4.10(a) of the TCP Code which provides that a supplier should not take credit management action in relation to genuinely disputed amounts.

The complainant has advised the TIO that prior to making the payment he was advised that the outstanding debt had incurred interest, and that he had to pay more than the charges appearing on the account. The complainant has provided the TIO with a credit card statement indicating that a payment of \$560.20 was made on 9 December 2008. However, the TIO notes that the subsequent invoice issued shows a payment of only \$526.91 was received. The TIO is of the view that the credit card statement supports the complainant's claims that he in fact paid \$560.20, and accepts his account in this respect.

The TIO is satisfied that the evidence before it in this case shows that the complainant paid \$560.20 in charges which accrued as a result of a series of transfers by the CSP without properly informed consent, and that therefore, these charges should be refunded.

4. Compensation under the Customer Service Guarantee (CSG) Standard

There is a lack of evidence from the information provided by both parties to support a finding that any compensation is payable under the Customer Service Guarantee (CSG) Standard for incorrect disconnection of a service or a delay in service reconnection is due.

In addition, the complainant's claim has centred on the loss of weekend trade as a result of the disconnection of the main business service and it is pertinent to note that compensation under the CSG Standard does not accrue on weekends.

Given these matters, no finding is made about this aspect.

5. Assessment of business loss compensation

As part of his complaint the complainant would like the CSP to pay compensation for lost business income which he says occurred because the telephone line for his business was disconnected.

The TIO has had regard to the complainant's claim for compensation. The complainant has been unable to provide information to the TIO about precisely when, and for what period of time, the service for the business was disconnected.

The complainant has also not been unable to provide evidence that the business suffered a loss of profit and, if it did, that the loss was due to the actions or inaction of the CSP.

For these reasons the TIO is not in a position to conclude that the CSP should compensate the complainant for business loss.

The TIO's preliminary view

Having considered all of the material presented to the TIO in relation to this complaint, and having regard to the law, good industry practice and what is fair and reasonable in all the circumstances, the TIO formed the preliminary view that a fair and reasonable outcome to this complaint was for the CSP to provide the complainant with a refund cheque totalling **\$560.20**.

In line with its normal process, the TIO circulated its preliminary view on 23 December 2010 to the parties to allow them an opportunity to:

1. respond to the TIO's view and its reasons
2. provide any additional evidence, and
3. provide a submission on the proposed outcome.

It is the TIO's practice to allow a 28 day period for responses to a Preliminary View.

No response has been received from the complainant or the CSP.

On 25 January 2011, the TIO contacted the CSP via email to alert it to the fact that its response to the Preliminary View was due, and that the TIO would move to determine the matter if no response was received by close of business that day. No reply was received.

Accordingly, the TIO has determined this matter in accordance with its Preliminary View.

Directions

For the reasons set out above, and having regard to the law, good industry practice, and what is fair and reasonable in all the circumstances, I am of the view that a fair and reasonable outcome to this complaint is for the CSP to apply a refund of all charges incurred.

Accordingly, I direct the CSP to pay the complainant the sum of \$560.20 by cheque.

This action should be carried out by the CSP within 14 days of the TIO providing it a completed TIO Release Form signed by the complainant.

**Simon Cohen
Ombudsman**

4 February 2011