

## TIO Determination – 10 July 2013

### (De-identified for publication)

#### Summary of determination

This complaint is about liability for charges following unauthorised transfers of a landline service between 22 December 2011 and 5 March 2012. The Consumer says that he transferred his landline service from Provider A to Provider B on 22 December 2011 and that Provider A then transferred the service back to itself. He says that the transfer out to Provider B and then back to Provider A without authorisation occurred multiple times. The Consumer disputes all charges paid to Provider A after 22 December 2011.

The primary matter for determination is whether Provider A transferred the Consumer's service to itself without authorisation and, if so, whether Provider A should refund any amount to the Consumer. My determination is that Provider A did transfer the Consumer's service to itself without authorisation, and that it was not entitled to do so. I consider that the appropriate resolution to this complaint is for Provider A to refund all charges the Consumer paid for calls made after 22 December 2011, and all amounts paid for access charges after 21 January 2012.

I have therefore directed Provider A to refund an amount of \$124.18 to the Consumer's bank account.

#### The Consumer's claim

The Consumer's claim is that Provider A transferred his service back to itself on numerous occasions without his authorisation after 22 December 2011 and that he should not have been charged for any service by Provider A after that date.

He seeks a refund of all amounts charged to him from 22 December 2011.

The Consumer told the TIO:

- He had always paid in advance for his service with Provider A, and did so on or around 15 December 2011, so was concerned when Provider A direct debited one month's access fee on about 15 January 2012.

- He contacted Provider A to ask why it had debited one month's access fee and was told that he had to wait 30 days for the cancellation to be confirmed. At this time, Provider A had transferred the service back to itself without his knowledge or authorisation.
- He completed and submitted a cancellation form to Provider A on 9 January 2012. However, his account was debited again by Provider A in February. Provider A attempted to debit his account again in March 2012 but this was not successful as he had cancelled his credit card.
- Following a successful transfer to Provider B, Provider A transferred his services back to itself without his authorisation on about 15 February 2012 and Provider B charged a disconnection fee of \$160 on 3 March 2012 (which I understand was subsequently waived).
- Provider B transferred the service back at his request on or about 5 March 2012 and his service has remained with Provider B since then.

### The Provider's response

During the TIO's conciliation process, Provider A responded by email dated 27 March 2012, saying:

- The service was transferred to Provider A in November 2011 (from the Consumer's previous service provider, Provider C).
- Provider A was unable to assist with the transfer to Provider B because "a reversal would send them back to Provider C's old supplier since there has been no churn loss since then".
- The service was finally transferred away from Provider A on 8 March 2012.
- All charges from 9 March 2012 have been waived and an additional goodwill credit of \$23.80 was applied to close the account.

As the complaint was not resolved during conciliation, the TIO began an investigation. Provider A did not respond to the investigation or provide any further information or documentation.

### Issues in dispute

#### The following matters require assessment:

1. Did the Consumer transfer his service from Provider A to Provider B on 22 December 2011?

2. Did Provider A then transfer the Consumer's service back to itself after 22 December 2011?
3. Was Provider A entitled to transfer the Consumer's service back to itself after December 2011?
4. What, if any, charges was Provider A entitled to claim from the Consumer after 22 December 2011?
5. What, if any, charges is Provider A required to refund to the Consumer?

### Information considered in making this Determination

The TIO makes decisions based on the law, good industry practice and what is fair and reasonable in the circumstances.

In making this Determination, I have considered the following:

- Correspondence between the Consumer and Provider A in January 2012.
- Correspondence to, and discussions between, the TIO, the Consumer and Provider A in relation to this complaint.
- Provider A's Standard Form of Agreement ("SFOA").
- Bills issued by Provider A to the Consumer on 1 January, 1 February and 1 March 2012.
- The Telecommunications Consumer Protections Code 2007 ("Code").

### Assessment

#### *1. Did the Consumer transfer his service from Provider A to Provider B on 22 December 2011?*

I accept the Consumer's claim that he successfully transferred his service from Provider A to Provider B on 22 December 2011. The TIO has put the Consumer's claim to Provider A and asked it to respond, and provide evidence, during investigation. Provider A did not respond to the investigation and has not provided any information or evidence that is contrary to the Consumer's claims.

For this reason I consider that the Consumer did transfer his landline service from Provider A to Provider B on 22 December 2011.

#### *2. Did Provider A transfer the Consumer's landline service back to itself after 22 December 2011?*

I accept the Consumer's claim that, following the transfer of his service to Provider B on 22 December 2011, Provider A transferred the service back to itself, and that this process was repeated multiple times.

The Consumer has provided detailed information to the TIO about the events that gave rise to his complaint. The TIO has put the Consumer's claims to Provider A and asked it to respond, and provide evidence, during investigation. Provider A did not respond to the investigation and has not provided any information or evidence that is contrary to the Consumer's claims. Invoices provided by the Consumer and by Provider A show that it continued to bill him after 22 December 2011.

For these reasons I consider that Provider A did transfer the service back to itself at some point (or on multiple occasions) after 22 December 2011.

### *3. Was Provider A entitled to transfer the Consumer's service back to itself after 22 December 2011?*

The Consumer did not give any written notice to Provider A of an intention to transfer his service (and thereby terminate the agreement) prior to arranging with Provider B to do so on 22 December 2011. The first that Provider A knew of this intention was when the services were transferred.

Provider A continued to charge the Consumer, issuing a bill on 1 January, 1 February and 1 March 2012.

On 9 January 2012, after the Consumer questioned Provider A's actions, Provider A sent an email to the Consumer, enclosing a Cancellation of Service Request form. The email referred to the SFOA and stated that "1 month's notice in writing is writing (sic) to termination (sic) or relocate service (or payment in lieu thereof)."

The Consumer completed and submitted a cancellation form that day.

I understand that the service was transferred back to Provider A on or before 14 or 15 February 2012 and that this was without the Consumer's authorisation. The service was finally transferred to Provider B on or about 5 March 2012 and has been with Provider B since that time.

The terms of the contract between the Consumer and Provider A were set out in the SFOA. In relation to termination, the SFOA provided at clause 9.1:

**Termination:** Either of us may terminate the Agreement (whether it is a non-fixed length agreement or a fixed-length agreement) by giving a calendar month's written notice to the other at any time. The notice to cancel the service will be effective on the date on which we receive that request. Where notice is not provided and/or short notice

is provided, We may bill you in lieu of providing a calendar month's notice, as well as: -

- (a) unbilled calls received to the date of receipt of your notice; and
- (b) where a fixed term agreement is in place, the minimum monthly spend for the remaining whole months of agreement; and
- (c) the value of any hardware provided to you;
- (d) for DSL services, a disconnection fee of \$100 per service."

At clause 9.5, the SFOA provides that:

"We reserve the right to reject a cancellation notice including a transfer, or reverse churn, to another provider in the event that you have not provided notice in accordance with clause 9.1, you owe us money or we have been unable to verify a request to cancel service with us".

In my view, the date on which Provider A became aware of the Consumer's authorised transfer of the service to Provider B is the effective date of notice under the SFOA.

Clause 9.1 does not provide that failure to give notice will result in a transfer being reversed. In fact, it provides for payment of one month's service fee in lieu of notice. I have considered clause 9.5 and in my view the meaning of this clause is unclear and it does not entitle Provider A to transfer a service back to itself after it has been successfully transferred away.

I note that aside from the provisions of the SFOA, under clause 8.1.3(d) of the Code, Provider A was required to obtain the consent of the Consumer or his authorised representative to transfer the service to itself. In my view, Provider A did not do this. In this respect, Provider A was in breach of its obligations under the Code.

Because neither the contract nor the Code permitted it, I consider that Provider A was not entitled to transfer the Consumer's service back to itself after he transferred it to Provider B on 22 December 2011.

#### *4. What, if any, charges was Provider A entitled to claim from the Consumer after 22 December 2011?*

Under the SFOA, the failure to give one month's notice permitted Provider A to charge for access in lieu of notice. I consider that effective notice occurred on the date of transfer, that is, 22 December 2011. Provider A was also entitled to charge for any unbilled call charges to that date. In

my view, Provider A is not entitled to charge any further amounts under the SFOA.

Clause 9 of the SFOA expressly deals with Provider A's entitlements in circumstances where the customer does not provide advance written notice of a termination or relocation. In my view, the proposition that the termination or relocation is ineffective without prior written notice is inconsistent with those express terms.

Clause 9.1(a) also does not allow Provider A to charge for calls after the date of termination or relocation, or indeed to charge for any services beyond the express entitlement to payment in lieu of one month's notice.

In this instance, I am satisfied that transfer of the service occurred on 22 December 2011 and the calendar month for which the Consumer was liable for access charges in lieu of notice began on 22 December 2011 and therefore ended on 21 January 2012.

The Consumer was billed in advance for service access, from the 1st of each month until the end of the month. Provider A billed the Consumer for monthly service access charges for January 2012 in the amount of \$98.51, for February 2012 in the amount of \$89.90 and for March 2012 in the amount of \$90.50 (inclusive of GST). By the time of the last bill, the Consumer had cancelled his direct debit facility and so Provider A was not able to debit the final billed amount from the Consumer's account.

At the time of transfer of the service, the Consumer had paid in advance to 31 December 2011.

Under the terms of the SFOA, Provider A was entitled to charge an additional amount to cover access charges to 21 January 2012. I calculate the daily access charge in January 2012 to be ( $\$98.51 / 31 \text{ days} \approx \$3.18$ ). For the additional 21 days from 1 January 2012 to 21 January 2012, the access charge is \$66.73.

Under the SFOA, the Consumer was liable to pay all call charges to the date of notice, 22 December 2011. The TIO has not been provided with an itemised copy of the December 2011 bill and I am therefore unable to form a view about any calls that the Consumer may be liable for. As the Consumer has told the TIO that he did not make calls from the service, I have accepted that there are no relevant call charges.

For these reasons I consider that the Consumer was liable to pay Provider A \$66.73 on cancellation of his service.

*5. What charges, if any, is Provider A required to refund to the Consumer?*

Provider A's bills show that the Consumer was billed the following amounts after 22 December 2011:

<b>Bill date</b>	<b>Amount</b>	<b>For</b>
1 January 2012	\$101.16	Services (\$98.51), Merchant Service Fee (\$2.65)
1 February 2012	\$89.90	Services
1 March 2012	\$90.50	Services

Payments the Consumer made to Provider A are recorded by Provider A on the following month's bill, and listed as "previous balance" and "payments/credits". By looking at those payment amounts, I consider that the Consumer paid Provider A \$101.16 in January 2012 and \$92.40 in February 2012, a total of \$193.56. The Consumer did not pay the March 2012 bill and Provider A has since credited (\$66.70) and written off (\$23.80) the balance, so no sum is payable for that bill.

I consider that Provider A should refund the Consumer \$124.18. This is made up as follows:

- 10 days' access charge from 22 to 31 January 2012 at \$3.178 per day: \$31.78, and
- All charges the Consumer paid for February 2012: \$92.40.

### 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 an appropriate outcome to this complaint was for Provider A to refund the amount of \$124.18 to the Consumer.

This Preliminary View was sent to the parties on 4 June 2013 to allow them an opportunity to:

1. respond to the Preliminary View and reasons
2. provide any additional evidence, and
3. provide a submission on the proposed outcome.

### Responses to the TIO's Preliminary view

On 5 July 2013 the Consumer advised that he accepted the findings in the Preliminary View. Provider A did not respond to the Preliminary View.

I have not changed the conclusions reached in the TIO's Preliminary View.

### Determination and 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 the appropriate outcome to this complaint is for Provider A to refund \$124.18 to the Consumer's bank account.

Accordingly, I DIRECT Provider A to complete the following action within 14 days of the TIO providing to Provider A a Confirmation of Resolution signed by the Consumer:

- Refund the amount of **\$124.18** to the bank account from which Provider A direct debited the Consumer's charges, or to another account nominated in writing by the Consumer.

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**Simon Cohen**  
**Ombudsman**

**10 July 2013**