

TIO Determination – 22 May 2014

(De-identified for publication)

This document sets out my Determination in relation to a dispute between Ms F and the Provider.

Background

In 2012, Ms F was a customer of the Provider and had three mobile services on her account.

One of these three services was service number XXX, which was used by the Consumer's partner, Mr F. The complaint relates to that service.

Ms F has authorised Mr F to make the complaint.

The complaint

Mr F says:

- on Wednesday, 22 August 2012, his mobile phone handset and SIM card for service number XXX were stolen from him in Cape Town, South Africa
- he tried to contact the Provider by telephone, but was not successful in making a connection, so he reported the theft through the Provider's customer portal. He requested cancellation of the SIM card on Wednesday, 22 August 2012
- he attempted to call the mobile number a few days later and got no response, so assumed the SIM card had been cancelled
- however, the Provider did not cancel the SIM card, and from 28 August 2012 the service was used to make calls to international numbers, incurring significant call charges
- in December 2012, Ms F was contacted by the Provider and asked for a direct debit authority for unspecified outstanding charges on the mobile phone account. She provided the authority, assuming a standard monthly charge would be debited, but then found two debits had been made totalling \$6,061.28
- Mr F reimbursed Ms F for the debit that had been made, and asked the Provider to refund the disputed debits, disputing all

international call charges incurred after he reported the theft and requested cancellation of the SIM card

- he believed that he had reached agreement with the Provider in around mid-2013, that it would refund \$5,033 to him as a resolution of his complaint, however
- the Provider has failed to refund the amount as agreed.

To resolve the complaint, Mr F is seeking a refund of \$5,115.26.

The Provider's response

The Provider told the TIO that:

- it had agreed to pay Mr F approximately \$5,000 to resolve his complaint
- the amount involved was a large amount for the Provider
- its response has been delayed as at the time of the issue in the complaint there was a different owner of the company, and it was trying to get the former owner to contribute to paying the refund
- it wants to pay the refund in instalments, and
- on 24 December 2013 it made a payment of \$250 to Mr F's account towards resolution of the complaint.

Issues in dispute

1. Did the Provider breach an obligation owed to Ms F by failing to deactivate the SIM in August 2012?
2. What charges were incurred on Mr F's mobile service after the theft was advised to the Provider?
3. Was the Provider authorised to debit Ms F's debit card in December 2012?
4. Does the Provider have an obligation to pay a refund to Ms F? If so, how much should it refund to her?
5. Is it reasonable for the Provider to pay Ms F a refund in instalments?

Information considered in determining this matter

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

In determining this matter, I have considered the following:

1. A screenshot of a message from Mr F to the Provider on 22 August 2012 reporting the theft of his phone and requesting cancellation of SIM.
2. An invoice from the Provider dated 4 September 2012 for \$1,027.39 addressed to Ms F.
3. A second invoice from the Provider dated 29 September 2013 for \$5,033.89 addressed to Ms F.
4. A copy of a bank statement dated December 2012 in the name of Ms F showing:
 - a) debit card transactions paid to the Provider on 7 December 2013 for \$1,027.39 and \$5,033.89
 - b) a deposit of \$6,061.28 on 10 December 2013 with the reference "Mr F", and
 - c) a Lodgement Receipt from the Provider's bank showing a payment from the Provider to Mr F on 24 December 2013 of \$250.

Assessment

Did the Provider breach an obligation owed to Ms F by failing to deactivate the SIM in August 2012?

Mr F says that on 22 August 2012, he tried to telephone the Provider to tell it that the handset had been stolen, but could not connect. Instead, he sent a message via the Provider's customer portal. He has provided a screen shot of the message – Incident #317 dated 22 August 2012.

The screen shot shows that the message was sent with "Emergency" priority and headed "emergency assistance required".

The message read:

"Hey guys – I have had my phone stolen, I am currently in Cape Town.

Please urgently cancel my sim so it cannot be used

My email is [address]

XXX was my number

Address was [address]

Thanks Mr F"

In my view, the message from Mr F was clear and sufficient for the Provider to act on the request – and the need – to cancel the SIM.

It is clear from an invoice dated 4 September 2012 that the SIM was not cancelled and from 28 August 2012 it was used to make numerous calls to numbers in Africa.

In my view, it was incumbent upon the Provider to act on Mr F's advice that the SIM had been stolen to cancel it, so that unauthorised use did not result in charges to the account. This view is consistent with the TIO's Position Statement "*Stolen Phones*".

Accordingly, I am satisfied that the Provider had no entitlement to charge Ms F for calls made after 22 August 2013 on the mobile service.

What charges were incurred on the mobile service after its theft was advised to the Provider?

First Invoice

A copy of the invoice for \$1,027.39 issued 4 September 2012 to Ms F by the Provider shows the following:

- 82 calls were made on the service between 3 August and 21 August, and one SMS was sent at 2.13am on 22 August. Almost all these calls were to Australian numbers, apart from a few to Hong Kong numbers. The call charges for this usage totalled \$560.55 and are not disputed
- No usage occurred on the service from the early morning of 22 August until 1.06pm on 28 August 2012, and
- 92 calls were made between 1.06pm on 28 August and 12.20am on 29 August 2012. These calls were all, bar one, to +27 (South Africa) and +234 (Nigeria) numbers. The exception was to a +971 number (UAE). The call charges for this usage totalled \$331.37.

The pattern of calls after 22 August is consistent with the theft of the phone in South Africa as claimed by Mr F and apparently accepted by the Provider.

Second invoice

Mr F has provided the TIO with a copy of an invoice from the Provider addressed to Ms F issued on 29 September 2013. This invoice provides no itemisation of charges, simply stating the amount owing on the account as \$5,033.89.

Mr F has told the TIO that this was the last in a series of invoices for this amount from the Provider he was sent during 2013. These invoices were sent after the debit had occurred, and no further amounts were charged.

The Provider has not responded to the TIO's request for original invoices or an itemisation of the amount on the invoice. Mr F told the TIO that he

no longer has any services with the Provider and is unable to access its internet portal to obtain a copy of old invoices.

The Provider has an obligation under Chapter 5 of the Telecommunications Consumer Protections Code 2012 to provide an itemised bill for these charges which it has failed to discharge. In the absence of such a bill establishing the basis for the charges, I consider that all charges on that invoice should be treated as related to unauthorised activity using the stolen phone.

In total, I consider that the charges incurred as a result of the theft of the phone total \$5,365.26, comprising \$331.37 from the 4 September 2012 invoice and \$5,033.89 from the 29 September 2013 invoice.

In my view, Ms F is not liable for that amount.

Was the Provider authorised to debit Ms F's debit card in December 2012?

It is not in dispute that the Provider debited two amounts from Ms F's debit card account on 7 December 2012. The parties agree that the Provider contacted Ms F and asked for her card details and that she provided those details.

One debit was for \$1,027.39 and the other for \$5,033.89. These amounts correspond with the bills issued on 4 September 2012 and 29 September 2013.

Ms F says that the Provider did not tell her that it intended to debit the large amounts.

I do not consider that there is any explanation that would satisfactorily explain the Provider's decision to debit amounts relating to calls and texts after the reported theft.

In December 2012, the Provider was well aware that Mr F's handset and SIM had been stolen on or about 22 August 2012. All calls made using the service after that date were unauthorised and were the result of the Provider's failure to cancel the SIM and liability for those charges fall to the Provider.

Does the Provider have an obligation to pay a refund to Ms F? If so, how much should it refund to her?

Given the Provider was not entitled to charge Ms F for use of the mobile phone after it was notified as stolen, and nor was it authorised to debit her debit card, in my view the Provider should refund \$5,115.26 to Ms F.

This amount is calculated as follows:

Unauthorised charges debited \$5,365.26

Less repayment made \$250

Is it reasonable for the Provider to pay Ms F a refund in instalments?

The Provider says that it cannot pay the amount owing to Ms F as a lump sum, saying:

We are a very small business and a debt of this magnitude has a dramatic effect on our cash flows and hence our offer of a payment plan

I do not regard this as an acceptable claim on the Provider's part. The unauthorised debits were taken in the space of one day from a consumer's personal bank account, without proper authority or advice as to what was intended and in relation to call charges for which Ms F had no liability.

In addition, the Provider's offer in December 2013 was to pay \$1,000 per month. At the time of writing this Determination, I understand only one payment has been made, for \$250. If the offer by the Provider had been kept, almost all of the amount wrongly debited would be accounted for.

Given this, and having regard to the Provider's obligation to pay, it should repay the amount in full and within 14 days.

Preliminary view

On 28 April 2014, a Preliminary View in relation to this dispute was sent to the parties who were asked to:

- respond to the Preliminary View
- provide any new and relevant information which might change the conclusions reached, and
- identify any misunderstanding or misinterpretation of the facts in the Preliminary View.

The Preliminary View was that a fair and reasonable outcome would be for the Provider to pay \$5,115.26 into the Ms F's nominated bank account within 14 days.

Mr F, as Ms F's nominated representative, advised that he accepted the Preliminary View. The Provider did not respond.

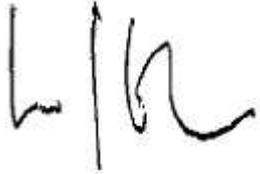
Determination

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 Provider to pay Ms F \$5,115.26.

I direct the Provider to pay \$5,115.26 to the nominated bank account:

The Provider must complete this action within 14 days of the TIO providing to it a completed TIO Release Form signed by the complainant.

A handwritten signature in black ink, appearing to read 'S. Cohen', written in a cursive style.

Simon Cohen
Ombudsman