

TIO Determination – 01 February 2018

(De-identified for publication)

This document sets out my Determination on a complaint made by the Representative on behalf of the small business consumer (the Company) about the Provider.

On 6 December 2017, I advised the parties of my preliminary view (reproduced in the Appendix). It has been accepted by the Representative. However, the Provider has not responded or provided any further information.

Final determination

I confirm the preliminary view is my final determination in this matter.

Accordingly, I DIRECT the Provider to waive the outstanding balance of the Company's account.

Judi Jones

Telecommunications Industry Ombudsman

Appendix

TIO Preliminary view

This document sets out my preliminary view on a complaint made by the Representative on behalf of the Company against the Provider.

Preliminary View

Based on the information provided, my view is the Provider must, within five business days of this Preliminary View, waive the outstanding balance of the Company's account.

Background

On 12 May 2016, the Representative, on behalf of the Company applied for bundled telecommunications services and equipment. He applied for mobile and broadband and three fixed line services with the Provider, and a Lease agreement with a third party leasing provider.

The third party leasing provider declined to enter a lease agreement with the Company, and the Representative understood that none of the services the Provider was to provide would proceed.

The Provider proceeded to port two of the Company's landline numbers, a main number and a standard number from the Company's original service provider, who had been providing the telephone services.

The balance of the Company's services remained with the original service provider, and the Company continued to receive invoices from the Company's original service provider. The Representative said that on becoming aware that the Company's main number had been ported to the Provider, he immediately arranged to port it back to the original provider. He said the standard number had not worked for months, so he did not take any steps for that number.

The Representative initially complained to the TIO about the Provider only connecting two services when he had applied for all of his telecommunications services to be transferred.

In June 2017 the parties agreed to resolve the complaint. The agreement was the Provider would waive the outstanding balance of the Company's invoice, and the service agreement would be terminated without early termination fees.

The complaint and the Provider's response

The Representative's complaint is that, contrary to the agreement, the Provider continued to seek recovery of the outstanding balance from the Company.

The Provider says there was an implied term that the Company was required to take its services elsewhere, based on industry practice. The Provider says until the Company takes its services elsewhere, the Company is liable to pay.

Preliminary View

Based on the information provided, my Preliminary View is within five business days of this Preliminary View, the Provider is required to waive the outstanding balance of the Company's account.

Reasoning

I believe the Provider is required to waive the outstanding balance of the Company's account because:

- The parties' agreement to resolve the complaint replaces the previous contract between them
- Clause 8.2 of the Telecommunications Consumer Protection Code 2015 requires the Provider to implement a resolution within 10 working days of the Company's acceptance of that resolution
- The Provider has failed to implement the resolution within 10 working days of the Company's acceptance of that resolution
- It is not reasonable to imply a term into the agreement that the resolution was contingent on the Company transferring the services to another provider

The agreement to resolve the complaint replaces the previous contract

The general principle that applies to the settlement of a complaint is that the settlement agreement creates a new contract which effectively replaces the party's rights under the previous arrangements subject to the complaint. This means that I will not consider the issues raised by the Representative in his original complaint. Instead, I will consider the parties rights under the settlement agreement.

The provisions of the Telecommunications Consumer Protection Code 2015

Chapter 8 of the Telecommunications Customer Protections Code 2015 (TCP Code) sets out what telecommunications suppliers must do when consumers make complaints.

Clause 8.2 of the TCP Code deals with Complaint Management. Clause 8.2.1 provides:

8.2.1 A supplier must take the following actions to enable this outcome...

(xii) completing all necessary actions to deliver the Resolution offered within 10 Working Days for the Consumer's or former Consumer's acceptance of that Resolution unless:

A. otherwise agreed with the Consumer or former Consumer; or

B. the actions are contingent on actions by the Consumer or former Consumer that have not been completed...

The Resolution Agreement

The resolution agreement came into effect on 29 June 2017 when the Representative accepted the Provider's offer of settlement.

The parties agreed that the Provider:

- Waive the outstanding balance on the Company's account
- Waive the early termination fee
- Terminate the agreement effective immediately.

The agreement was created by an exchange of emails between the Provider and the Representative.

On 26 June 2017, Provider's representative sent an email to the Representative in which she set out the outcome of a recent telephone conversation between them. The email said:

"-The Provider agrees to waive the outstanding balance on your invoice for telecommunications services used.
- The Provider agrees to waive the early termination fee for breach of the network agreement prior to end of term.
- The Provider maintains that the finance and network agreements are two separate contracts that are not 'bundled' in any way. Therefore, services utilised by the Company were used under the network agreement and payment should have been made as such and the situation is now one of unjust enrichment.
- The Provider would like to stress that leniency has been given to the entity; the Company for reasons of insolvency and debt
- Both parties agree that this is the full and final settlement of all claims now or at any future time.
- Both parties agree that dealings will now cease and the existing agreement is terminated effective immediately.
Please let me know if you have any questions with this and please indicate your acceptance via email."

On 29 June 2017, the Representative responded by email

"Further to below email, we do hereby accept your statement "Both parties agree that this is the full and final settlement of all claims now or at any future time" and "Both parties agree that dealings will now cease and the existing agreement is terminated effective immediately"."

The Representative accepted the offer in full and final settlement of his complaint.

The Provider has failed to implement the agreement

After settlement was agreed, the Provider did not terminate the agreement. It continued to supply the standard number's service, and did not waive the balance of the account.

The Provider did not disconnect the standard number's service or terminate the agreement until August 2017.

The Provider says that it waived the outstanding balance on the account on 26 June 2017, but has not provided evidence of this.

The invoices I have reviewed do not show the Provider waived any part of the debt. The Provider continues to send invoices to the Representative, most recently seeking to recover \$1,777.85.

No implied term that agreement was contingent on the Company transferring services to another provider

I am not satisfied it is reasonable or necessary to imply a term into the agreement between the parties that the agreement was contingent on the Company transferring services to another provider.

The Provider says that there was an implied term that the Company was required to port its services before the Provider was obliged to take any action under the agreement.

I do not agree with the Provider on this point. A term will only be implied into a contract if it is necessary for business efficacy, or where it is so obvious as to go without saying.

In this case, there was no need for an implied term that the remaining service be ported out because the Representative was not using the service, and the Provider was aware of this because it told my office that the number was not in use after November 2016.

In addition, an implied term that the agreement would not be operative until the service was ported would be inconsistent with the express term of the agreement that “the existing agreement is terminated immediately.”