TIO Decision – 28 November 2018

(De-identified for publication)

This document sets out my decision on a complaint made by the Consumer about the Provider.

1 Decision

My decision is I direct the Provider to waive all charges relating to data used on 3 and 4 February 2018 for phone service xxxx xxx xxx.

If there is a balance owing after the charges are waived, the Consumer should pay that amount.

2 Background

From about 2012 to May 2018, the Consumer had a number of services with the Provider, including mobile number xxxx xxx xxx, which was on a SIM-only $20 per month plan. The Consumer's child used that number.

The contract originally provided 1.5GB of data plus 150GB of "included social media" data (which could be used on Facebook, MySpace, Twitter, Linkedin, Ebay and Foursquare).

On 1 July 2017, the Provider changed the terms of the contract by removing the 150GB allowance for social browsing. The change added 500MB to the general data allowance to bring the total data allowance to 2GB and all social browsing counted towards standard monthly data usage. The Provider sent an email to the Consumer and a text message to xxxx xxx xxx referring to the change.

Between 8.25am and 9.15am on 4 February 2018, the Provider sent three text messages to service number xxxx xxx xxx saying 50%, then 85% and then 100% of the data allowance had been used.

On 21 February, the Provider sent the Consumer a bill for $2,902.84 for 21 February. The bill showed $2,780.40 of this was for excess data on xxxx xxx xxx – a total of 15902MB (approximately 15GB). The Provider says the Consumer's child used this data overnight between 11.07pm on 3 February and 11.31am on 4 February.

3 The complaint and the Provider's response

The Consumer says their child did not use the 15GB of data.

The Consumer says their child was nowhere near the [location] tower which the Provider says recorded the data.

The Consumer asked for evidence of how the data was used, but the Provider declined to give this information. The Provider initially claimed providing the data would be a breach of privacy and later that the information is commercial in confidence. It agreed to provide a high level summary showing which towers recorded the data usage, which it says shows when the data was used for social media browsing, but no details of how the data was used.

The Provider says the data was used and that the charges are valid.

4 Reasons

I am satisfied my decision is fair and reasonable because:

- the Provider has not demonstrated the Consumer's child used the data
- the Provider's notification about the change to the plan in July 2017 misled the Consumer.

4.1 The Provider has not demonstrated that the Consumer's child used the data

I am not satisfied the Provider has demonstrated that the Consumer's child used the data.

Given the amount the Provider asked the Consumer to pay and the claimed 15GB of usage over 12 hours, it was reasonable for the Consumer to ask the Provider for information to show how the data was used.

The Provider sent the Consumer a record which the Provider says shows service xxxx xxx xxx connected to a tower at [location] for approximately 13 hours from 11.07pm on 3 February 2018.

The Consumer disputes this and says their child was nowhere near [location] that night.

The Provider says its wholesale provider does not record how data is used, although it can identify when it is used on Facebook. The Provider agreed to provide a simplified table to the Consumer.

The table gives no information about how the data was used, other than to identify some sessions by the code "FB" which the Provider says denotes social media browsing. It is not clear whether social network browsing forms part or all of the sessions for which it is identified.

Figure 1 Simplified Usage Table

Cellular Number	Air Time Charges	Calling Placed	Call End Date	Call End Time	Peak Usage	Off Peak Usage	Other Usage	Charge Overrid
[redacted]	00000000075	[redacted]	20180202	153302	000000636	000000000	000000000	
	00000000000		20180202	152302	000008366	000000000	000000000	FB
	00000001431		20180202	200802	000012214	000000000	000000000	
	00000000000		20180202	184502	000003656	000000000	000000000	FB
	00000000000		20180202	202102	000000000	000000001	000000000	
	00000000003		20180202	221102	000000000	000000024	000000000	
	00000000002		20180202	234703	000000000	000000014	000000000	
	00000000008		20180203	162303	000000066	000000000	000000000	
	00000000014		20180203	171203	000000122	000000000	000000000	
	00000000000		20180203	171103	000000016	000000000	000000000	FB
	00000071832		20180203	222903	000612902	000000000	000000000	
	00000000000		20180203	230703	000000000	000001652	000000000	FB
	00001732535		20180204	113104	000000000	014782723	000000000	
	00000013784		20180204	113104	000117607	000000000	000000000	
	00000000277		20180204	120704	000002364	000000000	000000000	
	00000000000		20180204	120704	000000153	000000000	000000000	FB
	00000000015		20180204	195004	000000000	000000126	000000000	

That table is not the same as another usage table the Provider has given my office, but will not provide to the Consumer on the basis that it considers the information confidential. The second usage table provides more detail on session times, but no details on how data was used.

My Technical and Regulatory Advisor has indicated there are concerns about the data in this second usage table, including that data usage is recorded on more than one tower at a time over successive periods, without any explanation on why this would be the case. This raises a number of issues, including the possibility that the service was hacked.

In particular, a session which the Provider says was used for social browsing is shown as ending at 23.07pm on 3 February. That session overlaps with another session that is shown to have started at 22.29pm the same day (40 minutes earlier), which the Provider says was not used for social browsing.

This second session is the session that the Provider says ran for 13 hours and 2 minutes and that used over 15GB of data, but the Provider cannot tell the Consumer, or me, how it was used, other than to say it was not used for social media browsing.

The Provider has not demonstrated how the data was used, or that the Consumer's child used it. It has speculated that the Consumer's child watched video clips throughout the night, but has provided no information to substantiate the claim.

On the information provided, I am not satisfied that the Provider can distinguish when the service was or was not used for social browsing or when sessions began and ended or who used the data.

4.2 The Provider misled the Consumer about the change to the plan in July 2017

On balance, I am satisfied the Provider's notification in July 2017 to the Consumer about the change to the plan misled the Consumer. This is because the notification (see Figure 1):

- referred to the change as an "update"
- made no reference to removal of the 150GB social media allowance, and
- represented that the Provider was increasing the data limit, rather than dramatically reducing it.

It is particularly relevant to know how the data was used because, until 1 July 2017, the service had 150GB for browsing social media and an additional 1.5GB for other data use.

The Provider removed the 150GB social browsing allowance and notified the Consumer by way of an email and a text, which said the Consumer's plan had been "updated at no additional cost".

In my view, the notification was misleading, by representing that the Provider was giving additional data for the plan. Rather than giving the Consumer an additional 0.5GB of data as highlighted in the notification, the Provider's unilateral variation of the contract effectively reduced the total data allowance by 146GB. This is because the original plan allowed for 1.5GB of data, and an additional 150GB for browsing social media, making a total of 151GB available to the Consumer's child. It is difficult to see that this was an "update" as the Provider represented.

Figure 2 The Provider's notification to the Consumer about the change to the plan

[Image of the notification]

I consider the Consumer would not have been prompted to consider whether the Consumer should find a different plan, given the significant change, but would instead be likely to believe they had a better plan. The notice says "all social media use will count towards your standard monthly data", and

- the headline statement does not alert the Consumer to read the information in the smaller print, and
- the notice does not make it clear the change removed access to 150GB of data for social media browsing.

Even if the Consumer had read the information in the smaller print, the Provider told the Consumer the Provider did not expect the Consumer to take any action as a result of the change: “We don’t expect you to do anything…”

The Provider says the plan’s current inclusions are more favourable to the Consumer than the original inclusions, on the basis of its assertion that the data was not used for social media browsing. It says under the former inclusions, the Consumer would have been charged more and that, even if the Consumer was misled by the notification, the Consumer suffered no detriment.

This shows a misunderstanding of the concept of detriment in misleading conduct claims. Detriment is not calculated according to what the situation was before the conduct (that is, to put the Consumer back in the same position), but by considering what options the Consumer could have taken up, had they known the truth.

By not being given the opportunity to clearly understand the adverse impacts of the change, the Consumer was deprived of the opportunity to change to a plan with a more generous data allowance or to change the manner in which the phone service was used and avoid excess data charges.

Judi Jones

Telecommunications Industry Ombudsman