Telecommunications
Industry
Ombudsman

Decision and direction – 26 July 2019
(De-identified for publication)

This document sets out my decision and direction on a complaint from the Consumer about the Provider.

My decision is what I believe to be a fair and reasonable outcome, having regard to:

- relevant laws and codes (based on my view of what a Court would be likely to find in all the circumstances), and
- good practice, including industry guidelines.

1. Decision and direction

My decision is I DIRECT the Provider to:

- waive the balance of the Consumer's account, and
- refund $653.28 to the Consumer within 10 business days of receiving their written acceptance of this Decision.

2. Background

The Consumer had three successive contracts with the Provider for mobile phone services. The contracts each included a bundled handset. For each contract, the Consumer applied for and the Provider granted their application for the plan and bundle.

Table 1 sets out the history of contracts from 2013 to 2015.

Table 1 Mobile Phone contracts between the Provider and the Consumer

Date	Service	Bundled handset	Monthly cost
December 2013	[product 1] plan	[handset 1]	$92
April 2015	[product 2] plan	Payment contract for [handset 2]	$132
November 2015	[product 3] Plan	Payment contract for [handset 3]	$187

3. My proposed resolution to the complaint and the parties' responses

On 17 May 2019, I sent the parties my proposed resolution to the complaint. The proposed resolution was that the Provider should waive the outstanding charges on the Consumer's service and refund $653.28 because:

- the Provider has obligations to provide telecommunications products responsibly, and
- the Provider should not have approved the new services in April 2015 or November 2015

The Consumer accepted my proposed resolution.

The Provider rejected it, saying:

- the Consumer was up to date on their payments on 15 November 2015 when it approved a new service, and
- the Consumer needed a new handset in November 2015, and if the Provider had supplied a new mobile handset instead of recontracting, it may have cost the Consumer an additional $47 per month.

4. The complaint and The Provider's initial responses

The Consumer's complaint was about the Provider's approval of services they could not afford, and an outstanding debt on their account.

4.1 Unaffordable contracts

The Consumer says they could not afford the contracts and when they applied for a new service in November 2015, the Provider declined the application because they had failed a credit check. Despite this, the Consumer says they then received [handset 3] in the mail. The Provider told the Consumer it was sent in error and agreed to allow them to proceed with the contract.

The Provider disputes declining the Consumer's application in November 2015. The Provider says if the Consumer was unable to afford the service they could have refused to activate it. The Provider says it is the Consumer's responsibility to ensure they understand what they are agreeing to.

4.2 Outstanding debt

In August 2016, the Consumer complained they could not afford their contract. The Provider offered to cancel the contract and waive all fees, except the handset payment amount of $837.59. The Consumer assumed their contract was over and began to make payments for the handset.

The Provider agrees it did offer to remove all charges except the handset payout fee in August 2016 but says the Consumer did not accept the offer.

On 20 September 2016, the Provider barred calls on the Consumer's mobile service. It says the Consumer continued to be liable for the service charges until the service was disconnected on 12 January 2017. The Provider referred a debt of $2,810.48 to [debt collection company].

The Provider was not prepared to reinstate the offer, and says the Consumer was liable for the full balance of the debt.

5. Reasons

The reasons for my decision are:

- the Provider should not approve services a consumer cannot afford
- a responsible credit assessment would have made clear the Consumer could not afford the services
- the Provider should not have approved the services
- it is fair and reasonable for the parties to share the cost of the handsets

5.1 The Provider should not approve services a consumer cannot afford

The Provider had obligations under the Telecommunications Consumer Protection's Code (the TCP Code) to conduct a credit assessment to determine the level of credit (if any) to be provided to a consumer before supplying a post-paid service.[1] In my view, a purpose of the obligation to conduct a credit assessment is to ensure that consumers

[1] Clause 6.2 TCP Code 2012 and Clause 6.2 TCP Code 2015

are not provided with services that they cannot afford.

Indicators of financial difficulty and inability to afford services include a history of requesting payment plans, consistently late payments, and short payments. If these factors are present, a provider is on notice there may be an affordability issue and should conduct adequate checks before providing additional services.

5.2 A responsible credit assessment would have made clear the Consumer could not afford the additional services

In my view, a responsible credit assessment at the time the Consumer applied for the new services would have made clear they could not afford them.

The Consumer's payment history showed they consistently could not meet their payments when they fell due. Consequently, it should have been evident to the Provider that the Consumer would likely not be able to afford the increased payments for the new services.

I accept that the Consumer did not have an overdue balance when the Provider approved the second and third services. However, the Consumer had an extensive history of late payments and payment arrangements during the period of each of the first two contracts.

The Provider's failure to consider the Consumer's history means it did not properly assess the Consumer's ability to service the contract, and I am satisfied that the Consumer could not afford the new services.

In December 2013, the Consumer applied for and the Provider approved a phone service for $92 per month. During that contract, the Consumer applied for multiple payment arrangements with the Provider. I am satisfied the Consumer was in financial hardship during the period of this contract because they did not make payments to their account when they fell due.

On 13 April 2015 the Provider approved the Consumer's application for [handset 2]. The Consumer's minimum monthly commitment increased to $132.00. I am satisfied the Consumer remained in financial hardship during the period of this second contract because they did not make payments to their account when they fell due. In addition, the Consumer asked the Provider for multiple payment extensions before the Provider approved new post-paid services. Appendix 1 summarises the Consumer's payments, and Appendix 2 summarises the Consumer's requests for extended time to pay.

On 17 November 2015, the Provider approved the Consumer's application for [handset 3]. Their minimum monthly commitment increased to $187.00. This included monthly payments for [handset 1].

Given the Consumer had demonstrated they were unable to afford their first contract, the Provider should not have approved a second and third contract with higher minimum monthly costs.

5.3 The Provider breached the TCP Code by approving the services

I am satisfied the Provider breached the TCP Code by approving the services.

The approval of the new bundle increased the Consumer's total monthly payments from $132 to $187. As I have mentioned above, the Consumer had already demonstrated they could not afford to pay monthly payments of $132 when they fell due. The Provider should not have offered a contract which increased the Consumer's monthly charges by $55.

The Provider considers the approval of a new bundle in November 2015 was in the Consumer's best interest because the Consumer had broken their handset. The Provider also says the Consumer should not have applied for new services if they could not afford them.

The Provider's argument demonstrates a fundamental misunderstanding of the respective obligations of the parties to this transaction:

- The Consumer had an obligation to provide truthful responses to any enquiries the Provider made when the Consumer applied for their services; the Consumer does not have an obligation to the Provider to refrain from applying for new services
- The Provider's obligation to conduct a credit assessment applies even when the customer has broken their handset; the Provider does not have an obligation to sell customers new handsets if their existing handsets are broken

5.4 It is fair and reasonable for the parties to share the cost of the handsets

I consider it is fair and reasonable that the parties should share the cost of the handsets equally.

The Provider should not have approved the bundled services, and it is not appropriate that the Provider should profit from its breach of the TCP Code.

However, the Consumer had the benefit of the handsets and it is reasonable that they should pay something for this use. Given the Consumer's financial position, I consider it reasonable for the parties to share the costs. Table 2 sets out a calculation of the costs shared between them.

Table 2 Handset costs for the two handsets supplied

Handset	Retail cost	Half share of cost
[handset 1]	$1,128	$564
[handset 2]	$1,368	$684
	Total	$1,248

5.5 The Provider should waive the balance of the debt and refund $653.28 to the Consumer

I remain of the view the Provider should waive the balance of the debt and refund $653.28 to the Consumer because:

- the Consumer should pay for charges they would have incurred if the Provider had not approved new contracts
- the Consumer has paid more than I consider reasonable

I have considered the position the Consumer would have been in if the Provider had not approved new plans in April 2015 and November 2015.

The Consumer's monthly commitment for their original plan was $92. In my view, they should pay no more than $92 per month for the 17 months from April 2015 to August 2016, when the Consumer stopped using the service.

The Consumer should also pay $1,248 for the wholesale costs of the handsets. In total, the Consumer should be liable to pay $2,812 (see Table 3).

Table 3 Calculation of the Consumer's liability to the Provider

Item	Charges
Service charges April 2015 to August 2016 @ $92 per month	$1,564
Handset costs (reduced)	$1,248
Total	$2,812

5.6 The Consumer has paid more than I consider reasonable

In total, the Consumer has paid the Provider $3,465.28, which is $653.28 more than the amount I have found the Consumer should be liable for.

Between April 2015 and August 2016 the Consumer paid the Provider $2,835.28. Since the cancellation of the Consumer's services, the Consumer has also paid $630 (21 fortnightly payments of $30).

This means the Provider should waive the balance of the debt, and refund $653.28 to the Consumer.

Judi Jones

Telecommunications Industry Ombudsman

Appendix 1 – Summary of account payments

Date	Previous bill	Amount paid	Outstanding balance	This bill	Amount due
7 Apr 2015	$385.87	$231.63	$154.24	$248.90	$420.69
7 May 2015	$420.69	$360.00	$60.69	$522.01	$586.66
7 Jun 2015	$586.66	$150.00	$436.66	$144.95	$596.61
7 Jul 2015	$596.61	$0.00	$596.61	$168.04	$764.65
7 Aug 2015	$764.65	$100.00	$664.65	$132.00	$811.65
8 Sep 2015	$811.65	$0.00	$811.65	$132.00	$973.65
7 Oct 2015	$0.00	$973.65	$0.00	$142.71	$142.71
7 Nov 2016	$142.71	$100.00	$42.71	$146.39	$189.10
7 Dec 2016	$189.10	$50.00	$139.10	$191.67	$331.32
7 Jan 2016	$331.32	$50.00	$281.32	$207.00	$503.32
7 Feb 2016	$503.32	$60.00	$443.32	$197.00	$655.32
8 Mar 2016	$655.32	$450.00	$205.32	$207.00	$427.32
7 Apr 2016	$427.32	$210.00	$217.32	$259.26	$476.58
7 May 2016	$476.58	$100.00	$376.58	$253.10	$629.68
7 Jun 2016	$629.68	$0.00	$629.68	$232.00	$861.68
7 Jul 2016	$861.68	$0.00	$861.68	$202.00	$1,063.68
7 Aug 2016	$1,063.68	$0.00	$1,063.68	$202.00	$1,265.68
10 Sep 2016	$1,265.68	$0.00	$1,265.68	$204.39	$1,470.07
7 Oct 2016	$1,470.07	$0.00	$1,470.07	$202.00	$1,672.07
7 Nov 2016	$1,672.07	$0.00	$1,672.07	$207.60	$1,879.67
6 Dec 2016	$1,879.67	$0.00	$1,879.67	$213.99	$2,093.66
6 Jan 2017	$2,093.66	$0.00	$2,093.66	$213.99	$2,307.65
24 Jan 2017	$2,307.65	$0.00	$2,307.65	$1,042.83	$3,350.48

Appendix 2 – Summary of requests for extra time to pay

Date	Event
11 Feb 2014	Request for a payment extension for a $72.90 balance. The Consumer said they were waiting for a gift card so they could make the payment
09 Mar 2014	Request for a payment extension for a $53.00 balance
06 Apr 2014	Request for a payment extension for a $279.22 balance
08 May 2014	Request for a payment extension for a $430.30 balance
08 Jun 2014	Request for a payment extension for a $72.30 balance
28 Oct 2014	Request for a payment extension for a $124.33 balance
12 Dec 2014	Request for a payment extension for a $139.30 balance
07 Jan 2015	Request for a payment extension for a $154.07 balance
02 Feb 2015	The Provider **rejected** the Consumer's request for a payment extension
06 Feb 2015	Request for a payment extension for a $301.98 balance
14 Feb 2015	The Provider **rejected** the Consumer's request for a payment extension
16 Feb 2015	Request for a payment extension for a $201.98 balance
13 Mar 2015	Request for a payment extension for a $285.87 balance
06 Jun 2015	Request for a payment extension for a $436.66 balance
15 Jun 2015	Request for a payment extension for a $596.61 balance
07 Jul 2015	The Consumer said they could not afford their plan and asked for a payment extension for a $764.65 balance
29 Aug 2015	Request for a payment extension for a $811.65 balance

25 Jan 2016	Request for a payment extension for a $281.32 balance
05 Feb 2016	Request for a payment extension for a $443.32 balance