

**BETWEEN**

**BJ LIMITED**  
APPLICANT

**AND**

**YQ LIMITED**  
RESPONDENT

**AND**

**YQY**  
SECOND RESPONDENT

Date of Order:

11 November 2013

Referee:

Referee McKinstry

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the claim for non liability by the applicant is dismissed.**

### **Facts**

[1] The applicant had been receiving telecommunication services from the respondent for about 5 years. On 15 June 2012 they signed a new contract with the respondent for a further 24 months. Prior to this the applicant says they do not believe there had been a signed contract and the service had been ongoing.

[2] The applicant cancelled the contract before the 24 months had expired and the respondent applied cancellation charges.

[3] The applicant's position is that the service had been poor since they had a new account manager appointed by the respondent; that they were not getting the market leading rates the respondent undertook to provide and that the charges applied by the respondent are effectively excessive penalty charges.

### **Law**

[4] The relevant law is the law of contract

### **Issues**

[5] Did the applicant validly cancel the contract?

[6] Are the cancellation charges excessive?

### **Findings**

*Did the applicant validly cancel the contract?*

[7] The applicant says that the respondent's customer service fell short of what they expected when their usual account manager, AA, was replaced. Amongst their claims they say that the respondent did not tell them that they could provide VOIP service nor did they tell them that the respondent was providing mobile phones to new customers at a lower rate than the applicant was paying.

[8] The respondent says that the service standard remained high after AA was replaced and referred to emails that showed that the new account manager replied to the applicant's requests within hours. They also say that the mobile phone prices are not reflective of the overall market leading rates that they provided the applicant as they say that this was a combination of a package of services they provided the applicant. They also said that they could provide VOIP service but the applicant did not say that they were looking at this before advising they had contracted with another provider.

[9] The respondent further said that they had no feedback from the applicant that they were unhappy with their service, and did not know that they were going to a different provider until they had a request from the new provider to transfer a phone service.

[10] The applicant was unable to refer to any letters or emails to the respondent prior to appointing the new service provider that indicated any dissatisfaction with the respondent.

[11] Parties to commercial contracts may from time to time bring those contracts to an end for whatever reason. Should that reason be that the other party has failed to provide the service they have contracted to provide it would be expected that there would be a paper trail to show that the party wishing to cancel had raised their concerns in order for the other party to fulfil their obligations. In this case there is a total lack of evidence pointing towards any attempt by the applicant to bring to the respondent's attention any problems in their service or delivery standards or any other part of their contractual obligations.

[12] Having considered the evidence presented by the parties I find that the applicant has invalidly cancelled the contract.

[13] When the applicant signed the contract on 15 June 2012 they were directed to the terms and conditions which included the cancellation fees. It is those fees that the applicant considers penalty fees and wishes the tribunal to waive.

*Are the cancellation charges excessive?*

[14] The applicant says that the cancellation fees amount to penalty fees which are harsh and should not be imposed upon them.

[15] The respondent was asked to justify how the fees were calculated. Effectively the cancellation charges allowed them to recoup the monthly fixed charges for each phone service provided and a component of lost profit on calls that would be made based on the

monthly average call rates for each phone. For some phones this meant that the cancellation fee may be slightly higher than if the applicant had merely stopped using the phone and paid the monthly fixed charge. For others the cancellation fee would be the same. They also allow that the respondent has to cover the cost of third party costs during the period of the contract.

[16] The cancellation rates were made available to the applicant to view as part of the contract terms and conditions and the rates applied are not harsh and do not amount to being penalties. They are a fair reflection of the cost of cancelling a commercial contract part way through an agreed fixed term.

[17] Having considered the evidence of the parties on this matter I do not believe the cancellation costs are excessive or harsh and therefore there is no basis on which to set them aside.

[18] Effectively the applicant wishes the terms and conditions of a commercial contract to be set aside without evidence of a failure on the respondent's part to comply with its contractual obligations. I find that on the balance of probabilities the applicant has not proven its claim.

[19] Accordingly the applicant's claim for an order of non liability is dismissed. In making this order it is within the Tribunal's power to order that the applicant is liable to pay up to the amount it seeks the non liability order for. This order dismissing the claim does not go that far as the respondent is seeking an amount greater than the applicant wanted the non liability order for and leaves open the possibility for the applicant to make a claim of non payment in the future..