

Tribunal meeting number: 271
Case reference: 182930
Case: Prohibition of an associated individual

This case was brought against the Level 2 provider under Paragraph 4.8.6 of the 14th edition of the Code of Practice (“the **Code**”).

Background

Summary relating to Mr Devon Kelly

The Tribunal was asked to consider imposing a prohibition against Mr Devon Kelly pursuant to paragraph 4.8.3(g) of the Code.

The case related to two previous adjudications against the Level 2 provider, Madlenka Limited ‘the **Level 2 provider**’. The first was dated 12 June 2019 (case reference: 151390) and involved a directory enquiry service. The second was dated 13 November 2019 (case reference: 179036) and related to a failure to comply with the financial sanctions and administrative charges imposed by the Tribunal on 12 June 2019. As part of the first adjudication on 12 June 2019, the Tribunal recommended that the Executive consider initiating the process which may lead to the prohibition of Mr Kelly pursuant to paragraph 4.8.3(g) of the Code.

Relevant Code provisions

- Paragraph 4.8.8 of the Code states:

“(a) If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.3(f), 4.8.3(g) or 4.8.3(h) in respect of any associated individual, the PSA shall first make all reasonable attempts to notify the individual concerned and the relevant party in writing. (b) It shall inform each of them that any of them may request an opportunity to make representations in writing, or in person, to the Tribunal and of the right of any of them (or the PSA itself) to instead require an oral hearing.”

- Paragraph 4.8.3 of the Code states:

“Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach as it deems to be appropriate and proportionate: (g) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from providing, or having any involvement in, any PRS or promotion for a defined period.”

- Paragraph 5.3.9 of the Code states:

“‘Associated individual’ is any sole trader, partner or director or manager of a Premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any

individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by the PSA.”

Preliminary issue – Service and proceeding in absence

The Tribunal noted that the Executive had brought the case in accordance with paragraph 4.8.8 of the Code, meaning that there was a duty on the Executive to ensure that Mr Kelly was informed of the proceedings and provided with an opportunity to request an oral hearing and/or make informal representations to the Tribunal.

The Executive sent notification of the potential prohibition to Mr Kelly initially on 14 July 2020 by email (which was undelivered) and on 20 July 2020 by post, but it did not receive a response. The Level 2 provider had not provided a contact number on the Executive’s registration database. However, the Executive attempted three telephone calls to numbers that it had become aware of during the original investigations and which had been provided by Telecom 2, (‘the **Level 1 provider**’). None of the three numbers connected.

The Executive posted details of the Tribunal date and time to Mr Kelly on 2 September 2020. Tracking information from the courier service confirmed that the documents had been delivered and signed for by “K Kelly” on 3 September 2020. The Executive also attempted to telephone the Level 2 provider and Mr Kelly using the same three telephone numbers on 16 September 2020 but none of the numbers connected.

The Tribunal noted that the Executive had provided Mr Kelly with notification of the proceedings, the date and time of the proceedings as well as an “Informal Representation” form in July 2020 when it had sent notification of the potential prohibition. This detailed that the Tribunal would be taking place remotely and provided instructions to Mr Kelly on how he could participate in the proceedings. The Tribunal was of the view that the Executive had made all reasonable attempts to notify Mr Kelly and the Level 2 provider of the prohibition proceedings and of the right to attend and make representations to the Tribunal. The Tribunal was therefore satisfied that service was effective in accordance with paragraph 4.8.8 of the Code.

The Tribunal noted that Mr Kelly had not responded to the Executive despite confirmation that the documents posted by the Executive had been received and signed for. The Tribunal considered that Mr Kelly had chosen not to engage with the proceedings and that an adjournment of the case would serve no useful purpose. Accordingly, the Tribunal decided that it was fair to proceed in the absence of Mr Kelly.

Submissions and conclusions

1. The Executive submitted that the following evidence indicated that Mr Kelly was an associated individual knowingly involved in a serious and/or series of breaches of the Code in respect of the adjudications of 12 June 2019 and 13 November 2019.

Adjudication of 12 June 2019 (case Reference: 151390)

The Level 2 provider operated a directory enquiry service that operated on the premium rate numbers 118068 and 118298 (the “Service”). The Service commenced operation on 17 May 2018. The Executive received a total of 11 complaints concerning the Service between May 2018 and August 2018.

On 12 June 2019, the Tribunal had adjudicated against the Service operated by the Level 2 provider. The Tribunal had upheld the following breaches of the Code raised against the Level 2 provider (as outlined below):

- Rule 2.2.7 – Pricing Prominence

The Executive submitted that the Level 2 provider had acted in breach of Rule 2.2.7 of the Code as the pricing information was not proximate to the initial call to action to the Service. The pricing was stated after the premium telephone number had been given twice and therefore the Executive asserted that this could cause consumers to hang up the phone and dial the Service without knowing the cost. The Level 2 provider did not respond to the Warning Notice, but in a previous response it indicated that the pricing was compliant, as having the pricing at the beginning of the call would be confusing for consumers and that there was no evidence that consumers would hang up before listening to the pricing information. The Tribunal upheld the breach on the basis that there was potential for consumers to disconnect the call before the pricing information was given and that it did not agree with the assertion that having pricing at the beginning of the call would be confusing/misleading. The Tribunal found the breach to be **serious**.

- Rule 2.3.2 – Misleading

The Executive asserted that the Level 2 provider acted in breach of Rule 2.3.2 of the Code, as the promotional message on the 0345 numbers was misleading. The Executive submitted that the language of the recorded message gave the impression to consumers that they were engaging with companies directly instead of a directory inquiry service. Although the Level 2 provider had engaged with the Executive, it did not respond specifically to this breach. The Tribunal upheld the breach for the reasons asserted by the Executive and found the breach to be **very serious**.

The Tribunal considered the overall case to be **very serious** and imposed the following sanctions:

- a requirement to remedy the breaches
- a formal reprimand
- compliance advice
- that access to the Service be barred until the breaches are remedied to the satisfaction of the Executive
- a requirement that the Level 2 provider refunds all consumers who claim a refund

- a fine of £250,000.

The Tribunal also recommended that the Level 2 provider pay 100% of the Executives costs which totalled £8,093.50.

Adjudication of 13 November 2019 (Case Reference: 179036)

On 13 November 2019, the Tribunal had adjudicated against the Level 2 provider for non-compliance with the financial sanctions, non-financial sanctions and administrative charges imposed by the Tribunal on 12 June 2019. The Tribunal upheld the following breaches of the Code raised against the Level 2 provider:

- Paragraph 4.8.6 (b) - Failure to comply with a sanction
- Paragraph 4.11.2 (b) - Non-payment of an administrative charge

The Tribunal considered the overall case to be **very serious** and imposed the following sanctions:

- a formal reprimand
- that the Level 2 provider be prohibited from having any involvement in any current or future PRS operated on a number or number range within the PSA's regulatory remit for five years or until all sanctions imposed by the Tribunal of 12 June 2019 have been complied with, whichever is the later.

Associated individual knowingly involved in a serious/series of breaches of the Code

The Executive asserted that Mr Kelly was an associated individual within the meaning of paragraph 5.3.9 of the Code as he had day-to-day responsibility for the conduct of the Level 2 provider. The Executive relied on the following evidence to support this assertion:

- Mr Kelly had been the sole director of the Level 2 provider since its incorporation on 11 May 2018 and had remained registered as the sole director, according to CreditSafe reports
- Mr Kelly was also the sole shareholder of the Level 2 provider company. This was evidenced by the CreditSafe report for the Level 2 provider company
- Mr Kelly had been listed as the sole and primary contact for the Level 2 provider on the PSA registration database since the Level 2 provider first registered
- the Executive also noted that within Mr Kelly's contact information on the PSA Registration Scheme, he stated his job title to be "CEO" and registered himself as a 'responsible party' by the title of "Director"
- on 21 May 2018, Mr Kelly, in his capacity as Director of the Level 2 provider, signed a contract to operate premium rate services with the Level 1 provider

- on 24 December 2018, Mr Kelly, in his capacity as Director of the Level 2 provider, filed annual returns with the Companies Registration Office in Ireland
- on 8 April 2019, Mr Kelly, in his capacity as Director of the Level 2 provider, signed and submitted an application to the Registrar for the Level 2 provider to be struck off the Companies Register in Ireland on the grounds that it had never traded.

The Executive asserted that the evidence as set out above clearly demonstrated that Mr Kelly had day-to-day responsibility for the conduct of the Level 2 provider's business by virtue of his role as the sole director, sole shareholder and named primary contact on the PSA registration database. In addition to this, the Executive submitted that Mr Kelly had taken an active role as Director of the Level 2 provider by filing annual returns and making an application for the company to be struck off and that this was indicative of Mr Kelly having day to day responsibility for the Level 2 provider.

The Executive also submitted that Mr Kelly, as an associated individual, was knowingly involved in a series of serious breaches. The Executive noted that at the time that the breaches were upheld by the Tribunals on 12 June 2019 and 13 November 2019, Mr Kelly was listed as the primary contact for the Level 2 provider and held the post of Company Director. The Executive further submitted that as he held those roles, Mr Kelly had overall responsibility and oversight of the Level 2 provider and its compliance with the Code.

In addition to the above, the Executive relied on the following evidence to demonstrate that Mr Kelly was made aware that the Level 2 provider was operating non-compliantly:

- The PSA received 11 complaints regarding the Service during Mr Kelly's directorship. At the time the complaints were made, information requests were sent to the Level 2 provider. The Executive received responses to 10 of the 11 information requests from Mr Kelly. This evidence demonstrated that Mr Kelly was made aware of the complaints received regarding the Service as the responsible individual.
- Mr Kelly corresponded with the Executive in relation to the operation and promotion of the Service. Mr Kelly responded to the informal enquiry into the Service dated 27 June 2018 and all four of the Executive's directions for information in relation to the Service (which were sent between 8 November 2018 and 18 February 2019).
- Mr Kelly was also sent other correspondence from the Executive which he did not respond to and/or was not required to respond to. This correspondence included:
 - Warning Notices for both cases which were sent in April 2019 and October 2019 respectively
 - emails notifying Mr Kelly that no response to the Warning Notice had been received which were sent in April 2019 (for case reference 151390) and October 2019 (for case reference 179036)
 - notifications of the outcome for both Tribunals

- payment reminders following both adjudications
- notification that the breach of sanction case (case reference 179036) had been allocated.

The Executive stated that the evidence above demonstrated that Mr Kelly was knowingly involved in a series of serious breaches of the Code as he had been made fully aware of the non-compliance of the Level 2 provider.

The Executive concluded its submissions by stating that the evidence clearly supported the assertion that Mr Kelly was an associated individual and that he was knowingly involved in a series of serious breaches.

2. Mr Kelly did not provide a response to the notification of potential prohibition.

3. The Tribunal carefully considered all of the evidence before it. The Tribunal first considered whether Mr Kelly was an “associated individual” in accordance with paragraph 5.3.9 of the Code. The Tribunal was satisfied that, on the balance of probabilities, Mr Kelly was an associated individual as he was the sole Director, sole shareholder and named contact for the Level 2 provider. The Tribunal was also persuaded that Mr Kelly exercised day-to-day responsibility for the Level 2 provider by the documentation relied upon by the Executive as this evidence demonstrated that Mr Kelly had signed the contract with the Level 1 provider, submitted an annual return and had applied to have the company struck off the Companies Register in Ireland.

The Tribunal was also satisfied on the balance of probabilities that Mr Kelly had been knowingly involved in a series of serious breaches of the Code. The Tribunal noted that both previous adjudications in relation to the Level 2 provider were given an overall severity rating of very serious.

In relation to “knowing involvement”, the Tribunal considered that the Executive’s evidence clearly demonstrated that Mr Kelly had been made aware by the Executive that the Service was non-compliant throughout the relevant time and further noted that Mr Kelly had responded to some of the communications sent by the Executive such as formal directions.

As a result of all of the above the Tribunal was satisfied on the balance of probabilities that Mr Kelly was an associated individual who was knowingly involved in a series of serious breaches.

Sanctions

The Executive recommended that Mr Kelly should be prohibited from providing, or having any involvement in, any premium rate service in the UK for a period of five years from the date of publication of this decision. The Executive asserted that this was a proportionate outcome due to the severity of the breaches that had been upheld in the two previous adjudications.

The Tribunal noted that it had no specific information as to the impact that a prohibition for five years would have on Mr Kelly's financial circumstances as Mr Kelly had not responded to the notification of potential prohibition.

Considering all of the facts of the case, including the severity of the breaches that had been upheld by the two previous Tribunals, the Tribunal decided that a five-year prohibition was both proportionate and appropriate despite the potential impact it could have on Mr Kelly's financial circumstances.

Accordingly, the Tribunal decided to prohibit Mr Kelly from providing, or having any involvement in, any premium rate service in the UK for a period of five years from the date of publication of this decision.

Administrative charge recommendation: 100%