

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 19 AUGUST 2010 TRIBUNAL SITTING No. 60/ CASE 1
CASE REFERENCE: 790143

Information provider: Multiplex Media Limited, Nottingham
Service provider: MX Telecom Limited, London

THIS CASE WAS BROUGHT BEFORE A REVIEW TRIBUNAL FOLLOWING THE GRANTING OF AN APPLICATION FOR A REVIEW UNDER PARAGRAPH 8.10 OF THE CODE

BACKGROUND

On 21 January 2010, a Tribunal upheld breaches against Multiplex Media Limited (the 'Information Provider'), in relation to a competition subscription quiz service, operating under the name 'Mobile Cash Quiz'. The Tribunal upheld the following breaches of the PhonepayPlus Code of Practice 11th Edition (Amended April 2008) (the 'Code'):

- Paragraph 5.2 – Legality
- Paragraph 5.4.1a – Fairness (Misleading)
- Paragraph 5.8 – Contact details
- Paragraph 7.12.3a-c – Promotional material subscription requirements

The original Tribunal considered the breaches to be **significant**, issued a Formal Reprimand and imposed a fine of £50,000. The Tribunal ordered the Information Provider to seek compliance advice in respect of the issues identified by the Executive in relation to this service and its promotion within two weeks from the date of publication of this adjudication, such advice to be implemented to the satisfaction of the Executive within two weeks of receipt. The Tribunal also ordered claims for refunds to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.

REQUEST FOR REVIEW

On 19 February 2010, the Information Provider submitted an application for a review of the Tribunal's decisions of 21 January 2010. Its application was considered by the Chair of the Code Compliance Panel ('the CCP') and the review was granted on the following grounds: the upholding of paragraph 5.2 of the Code in relation to unsolicited text messages in contravention of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations'); reasons 2 and 3 that were upheld in relation to paragraph 5.4.1a of the Code, reason 2 that was upheld in relation to paragraph 5.8 of the Code; and, the upholding of 7.12.3a-c of the Code.

On 12 March 2010, the Information Provider provided further responses to the Chair of the CCP regarding the specific grounds for review. The Information Provider made an Informal Representation to the Review Tribunal. The Tribunal made its decision regarding this case on 19 August 2010.

THE INFORMATION PROVIDER'S CASE

The Information Provider alleged that the original Tribunal's decision had not taken all the evidence (including new evidence submitted by the Information Provider in relation to this Review) into consideration. The Information Provider set out the grounds that were granted review by the Chair of the Code Compliance Panel, which were as follows:

Ground 1

The Information Provider quoted the original Tribunal's decision in relation to this paragraph:

"The Tribunal considered the evidence and noted the Information Provider's acceptance that the registration details of four complainants differed from their subscription details. The Tribunal found that in those cases there had been unsolicited direct marketing. The Tribunal further found that in relation to the other complainants there was a conflict of evidence and on the balance of probabilities the Tribunal accepted the complainants' evidence that they had received unsolicited direct marketing. The Tribunal found that the service had therefore operated in contravention to the Regulations and that there had been a breach of the Code. The Tribunal upheld a breach of paragraph 5.2 of the Code."

The Information Provider stated that, in relation to its 'acceptance' that three mobile phone numbers had not matched the subscription details, it had explained that, of the original six mobile phone numbers that had been 'non-matches', one had been caused by a technical error when a service was in 'live testing' and had been transposed in error when supplied to it from a partner site. It stated that this left three mobile phone numbers where the service registration details differed from the complainant details.

The Information Provider stated that three non-matching leads from a total of 26,000 (web users leads generated via 'My Offers') equated to 0.011%.

It stated that it could prove, by tracking the user interaction, that those mobile phone numbers had been inputted by the people it supplied. It stated that this was simply a statistical anomaly, probably due to the mis-keying of a number, and was in no way the receipt of promotional and/or direct marketing text messages, as submitted by the Executive and found by the original Tribunal.

The Information Provider stated that, in relation to the 'other complainants' (those outside of the six above), the original Tribunal had stated that there was a 'conflict of evidence', but had neglected to specify what 'conflict of evidence' they had found to be contradictory.

It stated that these 'other complainants' had all entered via the web, whether they were a web user or a mobile web user, as each service had been initially activated via a partner website. It stated that it would not be possible for it (or its partner sites) to have matched details to a high percentage had this not been the case, and it would also have been impossible for the text message platform to send out the correct and requested service text messages.

It stated that there had been a serious misinterpretation of how this service(s) worked by the Executive and the original Tribunal.

It stated that the original Tribunal measured 'the balance of probabilities' when arriving at its decision. However, it stated that, as the complainant's transcripts were, at best, 'vague', the

balance of probabilities was that all had entered this promotion, however, had declined to admit it.

The Information Provider made reference to the complainant transcriptions and quoted as follows:

1. *“He thinks he may replied to one of the questions.”*
2. *“She never entered a competition as far as she can remember.”*
3. *“Consumer has received 3 text messages exactly the same as the above, charged £4.50 she has not responded to any message other than stop.”*
4. *“Me and my friends have done loads of these. I think it must be that. Then I did get a message through and I thought I may as well answer. I might £500 but never signed up for these calls.”*

The Information Provider stated that it was of the opinion that the above was completely inadmissible as evidence, and that it was complete conjecture to use the above in determining ‘the balance of probabilities’.

It made reference to point 3 above, where the user claimed to have received three text messages ‘identical’ to the sample text messages of its service outputs, costing £4.50. It stated that this would mean three text messages at £1.50. It stated that it did not send ‘blocks’ of three text messages and its short dial code tariff was £2, therefore, this was a different service, yet it had been taken into account in determining the case and the sanctions.

It stated that all complainants had opted in via the web, and it could demonstrate the user experience with time and date stamps, IP addresses, message logs from the Service Provider and provide evidence of a secure login to the partner sites, where their login and email matched the members’ initial registration details. The secure login was 100% key to proving that complainants had interacted and did input their mobile phone number.

It stated that it could also demonstrate that the mismatched mobile phone numbers had been inputted by a ‘member’, and the mobile phone number had been mis-keyed at the point of entry. As such, the user details submitted to the Executive had been those of the person who logged in, however, in error, had mis-keyed their mobile phone number.

It further stated that its ‘due diligence’ in relation to the web-based service was manifested by allowing one entry/unique mobile phone number into any specific subscription service, and that this was set up entirely to combat the mis-keying of a mobile phone number.

It stated that this was the reason it had a ‘no quibble’ refund policy. It also stated that it could provide a breakdown of the web-based service (superseded in February 2009), as well as the subsequent combined web and mobile web service which demonstrated that the number of leads generated was completely disproportionate to the number of complainants. Furthermore, the introduction of the combined web and mobile web service had further reduced complaints to an insignificant percentage, when compared to the number of leads generated by its partners.

Ground 2

The Information Provider made reference to the finding of the original Tribunal, namely that the text messages had been promotional, misleading and, due to lack of interaction on the part of the recipient, unsolicited.

The Information Provider stated that all 24 web 'opt-in' complainants had interacted with the service, by first having registered with the promotional site and then securely logging in with their email address and/or a user name and password. It stated that any consumer that did not follow this procedure would not have received any service text messages.

It stated that, given this fundamental point, any text messages could not have been considered as promotional, as defined by the Code or direct marketing text messages for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations').

It stated that the text messages had been confirmation of a web entry opt-in, requested after first answering a question on the partner site, entering a mobile number and clicking the 'enter' button. It stated that these text messages were neither promotional, nor unsolicited.

It stated that it was of the opinion that the text messages had not been misleading and made reference to the examples in the original Tribunal's minutes that read as follows:

Freemsg>Thanks for joining! Good luck in our Cash Quiz 4 a chance 2 win £500 each week! Please confirm your answer – Reply with ANSWERA, ANSWERB, ANSWERC

Freemsg>Thanks for joining! Good luck in our Cash Quiz. Help 08445 445 438. T&C's suretowin.com. Promoter MML. Cost £2/wk. To end send STOP to 66333

It stated that the first text message thanked the recipient for joining and asked him or her to confirm the answer he or she had already keyed into the website, as part of his or her interaction with the promotional site and web opt-in (a process that it had already previously described). Secondly, the text message confirmed that the recipient had 'joined' and detailed all the information, as required by the Code prior to receiving any charged service text messages.

Ground 3

The Information Provider stated that it could prove that every complainant opted in via a web opt-in and requested the text messages (questions) that had enabled him or her to complete their web entry (answering with a text message from the handset in question). It stated that this proved that users had come via a promotional partner and were sent the text messages that they had requested. As such, it stated that these text messages could not be promotional text messages.

It stated that there was no other way for users to receive the following text messages (as submitted by the Executive):

Message 1: Free to User

"Freemsg>Welcome 2 the Mobile Cash Quiz 4 a chance 2 win £500 and an iphone! Your first FREE question is on its way - be sure to answer it to win!!"

Message 2: Free to User

"What is the capital of Spain? Reply MADRID or PARIS for a chance of winning £500, chance to scoop an iphone + £50 of Lotto lines!"

It stated that all complainants had registered with a promotional partner, logged in (via secure mechanism), found the offer in question, interacted and opted in via the web for their entry to then be confirmed with a handset.

It stated that the above text messages were linked to one themed promotion only, via one promotional partner, and were not generic, but linked to the promotion in question (demonstrated by the message logs that, in its opinion, had been overlooked and misinterpreted by the Executive and the original Tribunal). It stated that the message logs demonstrated confirmation of the receipt of a complainant's web entry and, furthermore, the speed with which the user replied to the service web-generated text message indicated that users had been aware of the service.

Ground 4

The Information Provider made reference to paragraph 5.8 of the Code and quoted the part of the original Tribunal's response in relation to this issue:

"...The Tribunal also found that there had been a breach of paragraph 5.8 as regards those complainants who had received unsolicited text messages and who had not seen the website. The text messages were promotional material and they did not contain all the necessary contact information. The Tribunal upheld a breach of paragraph 5.8 of the Code."

The Information Provider stated that the fundamental issue here was the statement: *"those complainants who had received unsolicited text messages and who had not seen the website"*.

The Information Provider stated that it was of the opinion that there were no such people, and that every person had interacted with the promotional partner site, had subsequently received solicited text messages and had further replied with a response from the handset in question (the user text message), confirming his or her web entry on the partner site. It stated that the text messages had not been promotional.

It stated that users were also sent the subscription initiation text message prior to the receipt of any premium service text messages, giving them all the relevant details (that they could have also viewed when interacting with the partner website). It stated that users also received monthly reminder text messages, as per regulatory requirements, again detailing all necessary information.

Ground 5

The Information Provider made reference to paragraph 7.12.3a-c of the Code and quoted the part of the original Tribunal's response in relation to this issue:

"The Tribunal considered the evidence and concluded that, for those complainants who had received unsolicited text messages and who had not seen the website, the text messages themselves had not contained the information required for subscription services under the Code. Furthermore the general promotional material on the website had lacked clarity as to the subscription nature of the service. The Tribunal upheld a breach of paragraph 7.12.3a-c of the Code."

The Information Provider also made reference to the following text messages;

Message 1: Free to User

"Freemsg>Welcome 2 the Mobile Cash Quiz 4 a chance 2 win £500 and an iphone! Your first FREE question is on its way - be sure to answer it to win!!"

Message 2: Free to User

"What is the capital of Spain? Reply MADRID or PARIS for a chance of winning £500, chance to scoop an iphone + £50 of Lotto lines!"

The Information Provider stated that the fundamental issue here was the statement: *"those complainants who had received unsolicited text messages and who had not seen the website"*.

The Information Provider stated that it was of the opinion that there were no such people, and that every person had interacted with the promotional partner site, had subsequently received solicited text messages and had further replied with a response from the handset in question (the user text message), confirming their web entry on the partner site. It stated that these text messages had not been "the complainant's first awareness of the service."

It stated that all complainants who received questions to their handset had first interacted with a promotional website, found the offer, entered a mobile phone number and clicked the 'enter' button. These actions had initiated the partner site feed to request web confirmation text messages to be sent from the Service Provider. It stated that this process was 100% automated via a 'live' web feed and actioned by a unique web URL being sent from the promotional partner site (as soon as a number is entered onto its promotion) to its text message provider, which had been the catalyst for the service text messages to be sent to the handset.

It stated that it had matched all the complainant mobile phone numbers to its promotional partners registered contact details, and that this proved that all these people had been registered users and had entered its offer.

It stated that all complainants in relation to this breach of the Code had interacted with the combination of the web and mobile web service.

DECISION

The Review Tribunal considered the grounds submitted to it by the Information Provider and made the following decisions:

Ground 1

The Tribunal considered the evidence and concluded that, in relation to the three mobile phone numbers that the Information Provider had accepted did not match its registration records, the text messages in question had been unsolicited and in contravention of the Regulations. It followed that there had been a breach of paragraph 5.2 of the Code in relation to these three mobile phone numbers. The Tribunal accepted the Information Provider's explanation that the three mobile phone numbers had been mistakenly entered into the data entry field by genuine users and had, subsequently, caused the incorrect mobile phone numbers to receive unsolicited text messages. The Tribunal had no alternative but to uphold a technical breach of paragraph 5.2 of the Code. The Tribunal recognised that this was a technical breach and gave it the appropriate weight when making a final decision.

Ground 2

The Review Tribunal considered the evidence and concluded that the mobile phone numbers of three complainants did not match the Information Provider's registration records and, as such, had been unsolicited in contravention of the Regulations. The Review Tribunal found the text messages received by these three complainants had been promotional. It found that these promotional text messages had misled these complainants into responding and, subsequently, being subscribed into the service. The Tribunal accepted the evidence provided by the Information Provider that demonstrated a valid opt-in in relation to the other complainants. The Review Tribunal upheld the breach of paragraph 5.4.1a of the Code in relation to the three complainants.

Ground 3

The Review Tribunal considered the evidence and concluded that it accepted the Information Provider's evidence and found that, other than the three complainants who did not match the Information Provider's registration records, every other complainant that had replied to the service text message had done so having first interacted with the promotional website. The Review Tribunal concluded that this ground was accepted and it fell away.

Ground 4

The Review Tribunal considered the evidence and concluded that the three complainants who did not match the Information Provider's registration records, and had received unsolicited text messages in contravention of the Regulations, had received a promotional text message that did not contain the contact details of the Service Provider or the Information Provider. The Tribunal accepted the evidence provided by the Information Provider that demonstrated a valid opt-in in relation to the other complainants. The Review Tribunal upheld the breach of paragraph 5.8 of the Code in relation to the three complainants who had not seen the website.

Ground 5

The Review Tribunal considered the evidence and concluded that the three complainants who did not match the Information Provider's registration records, and had received unsolicited text messages in contravention of the Regulations, had also not received the subscription information required in the promotional text messages, under paragraph 7.12.3a-c of the Code. The Tribunal accepted the evidence provided by the Information Provider that demonstrated a valid opt-in in relation to the other complainants. The Review Tribunal upheld the breach of paragraph 7.12.3a-c of the Code in relation to the three complainants who had not seen the website.

SANCTIONS

The Review Tribunal found the breach to be **significant**, affirming the decision of the original Tribunal.

It ordered that the Information Provider remedy the breaches by seeking compliance advice in relation to this service within two weeks of the publication of this decision. Compliance advice is to be implemented to the satisfaction of the Executive within two weeks of receipt.

The Review Tribunal noted that not all the breaches had been subject to review and, therefore, remained unchanged. The Tribunal was reminded that there had been a breach of 5.4.1.a of the Code in relation to the website, which was not the subject of the review. The Tribunal considered that this was a significant, contributing factor to the complaints received.

The Review Tribunal considered its decisions in relation to the Information Provider's submissions, including the further evidence of valid opt-in in relation to some of the complainants, and reduced the original fine of £50,000 to £40,000 (a reduction of £10,000).

The Review Tribunal did not alter any of the other sanctions imposed by the original Tribunal.