



Tribunal Meeting Number 142 / Case 2

Case reference: 33386
Level 2 provider: Bafona Ltd (St Kitts & Nevis and North Carolina, USA)
Type of Service: N/A
Level 1 provider: N/A
Network operator: N/A

THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

A service provided by the Level 2 provider Bafona Ltd was the subject of a PhonepayPlus investigation and adjudication (case reference 28791), which resulted in sanctions being imposed by a Tribunal on 25 July 2013. The sanctions imposed by the Tribunal included a fine of £25,000 and a requirement that refunds be paid to all consumers who claim a refund, for the full amount spent by them on the service, within 28 days of their claim save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made. In addition, an administrative charge of £3,329.80 was imposed.

The Level 2 provider was notified of the fine and administrative charge by the Executive in an adjudication letter sent on 21 August 2013. The Level 2 provider failed to pay the fine. In addition, the Level 2 provider was sent a form to complete to assist in the administration of the refund sanction.

The Level 2 provider attempted to make an application for a review of the Tribunal's decision out of time on 11 September 2013. However, despite correspondence with the Executive, the Level 2 provider did not pay the review application fee. After 23 September 2013, the Executive received no further contact from the Level 2 provider. Accordingly, the review was not progressed.

The Executive directed the Level 1 provider to pay to PhonepayPlus withheld revenue of £2,590.10. Consequently, the total amount outstanding to PhonepayPlus is £25,739.70.

The Investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**").

The Executive sent a breach letter to the Level 2 provider on 18 December 2013. Within the breach letter the Executive raised the following breaches of the Code:

- Paragraph 4.8.4(b) – Failure to comply with a sanction
- Paragraph 4.10.2 – Non-payment of an administrative charge

The Level 2 provider did not provide a response. On 23 January 2014, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Paragraph 4.8.4(b)

“The failure of any relevant party to comply with any sanction within a reasonable time will result in a further breach of the Code by the relevant party, which may result in additional sanctions being imposed.”

1. The Executive noted that on 25 July 2013 the Tribunal adjudicated on a service operated by the Level 2 provider that had been the subject of a PhonepayPlus investigation (case reference 28791). The adjudication resulted in the imposition of sanctions, including a fine of £25,000 and a requirement that the Level 2 refund all consumers who claim a refund, for the full amount spent by them on the service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

On 21 August 2013, the Executive sent the Level 2 provider a post adjudication letter which included an invoice for payment of the £25,000 to be made within seven working days. Payment was not made within the time period specified.

In addition, on 21 August 2013, the Executive issued a form to the Level 2 provider, which it was required to complete within 48 hours, by providing contact details to ensure consumers could request and receive refunds. The Executive did not receive the completed form or any other evidence demonstrating that the Level 2 provider had complied with the refund sanction.

Accordingly, the Executive submitted that the Level 2 provider had failed to pay the fine and comply with the refund sanction within the time period specified (or at all) in breach of the paragraph 4.8.4(b) of the Code.

2. The Level 2 provider did not provide a response to the breach letter.
3. The Tribunal considered the evidence. The Tribunal concluded there had been a further breach of the Code due to non-payment of the fine and failure to comply with the refund sanction. Accordingly, the Tribunal upheld a breach of paragraph 4.8.4(b) of the Code.

Decision: UPHELD

ALLEGED BREACH 2

Paragraph 4.10.2

“Non-payment of the administrative charge within the period specified by PhonepayPlus will be considered a breach of the Code and may result in further sanctions and/or legal action.”

1. On 25 July 2013, the Tribunal recommended that PhonepayPlus impose 100% of the administrative costs incurred in relation to the Level 2 provider’s case (£3,329.80). On 21 August 2013, the Executive sent the Level 2 provider a post adjudication letter which included an invoice for the payment of the administrative charge. The invoice requested that payment be made within seven working days. The deadline for payment passed without PhonepayPlus receiving payment of the administrative charge.

In light of the above, the Executive submitted that a breach of paragraph 4.10.2 of the Code had occurred.



2. The Level 2 provider did not provide a response to the breach letter.
3. The Tribunal considered the evidence and concluded that on the basis of the Executive's evidence that there had been a further breach of the Code as a result of the non-payment of the administrative charge. Accordingly, the Tribunal upheld a breach of paragraph 4.10.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

The Tribunal's initial assessment of the breaches of the Code was as follows:

Paragraph 4.8.4(b) – Failure to comply with a sanction

The initial assessment of paragraph 4.8.4(b) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider's failure to pay the fine demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

Paragraph 4.10.2 – Non-payment of an administrative charge

The initial assessment of paragraph 4.10.2 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider's failure to pay the administrative charge demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

The Tribunal's initial assessment was that, overall, the breaches were **very serious**.

Final overall assessment

The Tribunal did not find any aggravating or mitigating factors. The Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions imposed

Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand; and
- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of three years (starting from the date of publication of this decision), or until payment of the outstanding fine and the original and instant administrative charges, whichever is the later.