

Tribunal meeting number 162 / Case 1

Case reference: 55141
Case: Prohibition of an associated individual

**THIS CASE WAS BROUGHT AGAINST THE ASSOCIATED INDIVIDUAL UNDER PARAGRAPH
4.8.6 OF THE CODE**

BACKGROUND

(i) Summary relating to Mr Roger Cheung

The Tribunal was asked to consider a prohibition against Mr Roger Cheung pursuant to paragraph 4.8.2(g) of the 12th Edition of the PhonepayPlus Code of Practice (the “**Code**”).

The case related to an adjudication against the Level 2 provider (the “**Level 2 provider**”) Clarium Telecom Limited (16 October 2014, case reference: 50967), which concerned a breach of the sanctions imposed by an earlier Tribunal (26 June 2014, case reference 29242) and non-payment of the associated administrative charges. The case on 26 June 2014 concerned a virtual chat service (the “**Service**”).

On 16 October 2014, the Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Roger Cheung, (an associated individual) pursuant to paragraph 4.8.2(g) of the Code.

The Tribunal considered the following evidence in full:

- The Tribunal decision against the Level 2 provider dated 26 June 2014;
- The Tribunal decision against the Level 2 provider dated 16 October 2014;
- Contracts between the Level 2 provider and the Level 1 providers;
- Information regarding the Level 2 provider supplied by the Level 1 providers;
- An extract from the PhonepayPlus registration database for the Level 2 provider dated 11 November 2014;
- A sample of the correspondence between the Executive and the Level 2 provider between 14 March 2014 and 16 September 2014;
- The Level 2 provider’s response to the breach letter relating to the adjudication of 26 June 2014;
- The covering letter and email to the notification of potential prohibition dated 14 November 2014;
- The notification of potential prohibition dated 14 November 2014; and
- Documents confirming delivery of the potential prohibition notification to Mr Roger Cheung and the Level 2 provider.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent notification of a potential prohibition to Mr Cheung and the Level 2 provider on 14 November 2014, but it did not receive a response. The Tribunal was satisfied that, in accordance with paragraph 4.8.6 of the Code, the Executive had made all reasonable attempts to inform Mr Cheung of the prohibition proceedings. On 11 December 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Cheung.

(ii) Relevant Code Provisions

- Paragraph 4.8.2(g) of the Code states:

“The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. 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:

(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 premium rate service 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 PhonepayPlus”.

- Paragraph 4.8.6 of the Code states:

“If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any named individual, PhonepayPlus shall first make all reasonable attempts to so inform the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to require an oral hearing.”

SUBMISSIONS AND CONCLUSIONS

1. The Executive submitted that the following evidence indicated that Mr Roger Cheung was an associated individual knowingly involved in a series of serious and very serious breaches of the Code in respect of the adjudications of 26 June 2014 and 16 October 2014.

Adjudication dated 26 June 2014, case reference: 29242

On 26 June 2014, the Tribunal adjudicated against the Level 2 provider. The adjudication concerned a virtual chat service, (the “**Service**”), which operated under the brand names “Instamatch” and “40 second match” (formerly known as “Speedmeet”) on the premium rate shortcodes 82233 and 84439. The Service commenced operation on 7 February 2013. The Instamatch Service was voluntarily suspended on 19 October 2013 and the 40 second match Service (operating under the brand name “Speedmeet” until August 2013) was voluntarily suspended on 4 October 2013, following correspondence with PhonepayPlus. Consumers were charged £1.50 for each SMS message received (up to seven messages may have been received for each message sent).

Between 25 June 2013 and 5 December 2013, PhonepayPlus received 18 complaints from consumers in relation to the Service. The majority of complainants stated that they had not interacted with the Service but had incurred unsolicited charges. Other complainants

reported receiving and responding to SMS messages but stated that they were unaware they would incur charges. The Tribunal upheld the following breaches of the Code.

- Rule 2.3.2 - Misleading
- Rule 2.4.2 – Consent to market
- Paragraph 3.9.2 – Appropriate use of a number range

The Tribunal concluded that the breaches of the Code were serious. The Tribunal determined that the seriousness of the case overall was serious and imposed the following sanctions:

- a formal reprimand;
- a fine of £75,000; and
- a requirement that the Level 2 provider must 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.

In addition, to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

Adjudication dated 16 October 2014, case reference: 50967

On 16 October 2014, the Tribunal adjudicated against the Level 2 provider for the non-compliance with the sanctions and non-payment of an administrative charge imposed by the Tribunal on 26 June 2014. The Tribunal upheld 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 Tribunal concluded that both breaches of the Code were very serious. The Tribunal determined that the seriousness of the case overall was very serious and imposed 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 the decision) until the breaches are remedied by payment of the fine and original and instant administrative charges, whichever is later.

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

Associated Individual knowingly involved in a serious and/or series of breaches of the Code

The Executive submitted Mr Cheung was an associated individual, as he was a manager and had day to day responsibility for the Level 2 provider at the time the breaches of the Code occurred and were upheld by Tribunals on 26 June 2014 and 16 October 2014. This was evident from the PhonepayPlus registration database, where Mr Cheung was listed as the responsible person for the Level 2 provider and his title was recorded as “Manager” of the Level 2 provider.

The Executive obtained a copy of the contracts between the Level 2 provider and the Level 1 providers. These key agreements for the provision of the Service had been signed on behalf of the Level 2 provider by Mr Cheung in his capacity as a “Manager”.

In addition, the Executive submitted that, as Mr Cheung was the only individual to correspond with the Executive throughout the investigation and the enforcement procedure and he had signed key agreements for the Service, this demonstrated that Mr Cheung had day to day responsibility for the conduct of the Level 2 provider.

The Executive submitted that Mr Cheung was knowingly involved in the breaches of the Code upheld by the Tribunal on 26 June 2014, as a result of the following:

- Mr Cheung named himself as the responsible person and the primary contact for the Level 2 provider, when the Level 2 provider registered with PhonepayPlus on 27 July 2011.
- Mr Cheung was the only individual to correspond with the Executive, on behalf of the Level 2 provider, throughout the investigation. Mr Cheung provided detailed responses to requests for information concerning the operation, content and promotion of the Service. The Executive submitted that, as a result of his detailed knowledge of the Service under investigation, Mr Cheung was knowingly involved in the serious breaches of the Code which were upheld by the Tribunal on 26 June 2014.
- The Executive sent a breach letter to the Level 2 provider on 20 May 2014. The Executive received a response to the breach letter on 6 June 2014, which had been sent by Mr Cheung. The Executive submitted that this indicated that he had read the breach letter, was fully aware of the content, and had sufficient knowledge of the issues raised, to be able to provide a full response.
- The due diligence risk assessment and control reports obtained from both Level 1 providers demonstrated that key contracts for the provision of the Service have been signed, on behalf of the Level 2 provider, by Mr Cheung. The Executive noted that one report named another individual as the Director of the Level 2 provider, but that individual had not corresponded with the Executive, nor had he been mentioned in any other documents pertaining to the Service or the Level 2 provider. The Executive submitted that Mr Cheung’s involvement in the Level 2 provider’s affairs by signing important documents for the Service clearly indicated that he held a position of responsibility and had knowing involvement in the breaches of the Code upheld by the Tribunal of 26 June 2014.

The Executive submitted that Mr Cheung was knowingly involved in very serious breaches of the Code, which were upheld by a Tribunal on 16 October 2014, as a result of the following:

- The Level 2 provider was informed of the sanctions imposed by the Tribunal of 26 June 2014 on 9 July 2014. The notification was also sent to Mr Cheung’s email address, which he had previously used to correspond with the Executive. On 15 July 2014, the Executive sent a reminder email to the Level 2 provider and Mr Cheung to remind the Level 2 provider that it had five days to comply with the sanctions and make payment of the administrative charge. The Executive received an email from Mr Cheung stating that the Level 2 provider was unable to pay the invoices that totalled nearly £85,000 within seven days. He queried whether there was an alternative option available. Mr Cheung’s response stated

“... With regards the fine and the invoice, this amount is far in excess of what we are able to pay at the moment. I appreciate you need to set a deadline, but 7 days to pay invoices totaling nearly £85,000 is not something we are able to do”. The Executive submitted that the response demonstrated that Mr Cheung had accepted responsibility on behalf of the Level 2 provider for arranging payment of the amounts outstanding to PhonepayPlus and had knowing involvement in the non-payment of the fine and the administrative charge.

- The Executive responded to Mr Cheung’s email on 17 July 2014 to advise that the administration charge must be paid no later than 18 July 2014 and requested further information about the Level 2 provider’s inability to make payment by the stipulated deadline. Two further emails were sent to the Level 2 provider at Mr Cheung’s email address but no further response was received from Mr Cheung or the Level 2 provider.
- Payment was not made within the time period specified (or at all).
- The Executive submitted that, as the manager and the named responsible person of the Level 2 provider, Mr. Cheung was responsible for ensuring that the Level 2 provider adhered to sanctions imposed against it by the Tribunal on 26 June 2014, and paid the associated administrative charge.

The Executive submitted that if the Level 2 provider had financial difficulties complying with the fine, Mr Cheung, as the primary contact and responsible person for the Level 2 provider, could have continued to correspond with the Executive to explain its situation. The Executive submitted that Mr Cheung was knowingly involved in the non-payment of the fine and administrative charge, which ultimately resulted in two further very serious breaches of the Code being upheld by a Tribunal on 16 October 2014.

2. Mr Cheung did not provide a response to the notification of potential prohibition.
3. The Tribunal considered the Code and all the evidence presented to it.

The Tribunal noted that Mr Roger Cheung had signed key agreements with the Level 1 providers demonstrating that he held a position of responsibility, as a manager within the Level 2 provider. The Tribunal found that Mr Cheung’s significant responsibility for the day to day management of the Level 2 provider’s affairs was further evidenced by the involvement he had throughout the investigation in corresponding with the Executive, and by his status as a responsible person and the primary contact for the Level 2 provider on the PhonepayPlus registration scheme database. Taking this evidence into account, the Tribunal found that Mr Cheung was a manager and had day to day responsibility for the Level 2 provider and accordingly was an associated individual, in accordance with paragraph 5.3.9 of the Code.

The Tribunal noted Mr Cheung’s significant day to day responsibility within the Level 2 provider and that he was the only individual to correspond with the Executive on behalf of the Level 2 provider throughout the investigation and the enforcement procedure. Further, given Mr Cheung had provided detailed responses to requests for information concerning the operation, content and promotion of the Service, the Tribunal found that Mr Cheung was knowingly involved in a series of breaches of the Code which were serious and very serious, and had been upheld against the Level 2 provider on 26 June 2014 and 16 October 2014.

Sanction

In accordance with paragraph 4.8.2(g) of the Code, the Tribunal decided to prohibit Mr Roger Cheung from providing, or having any involvement in, any premium rate service for the period of three years from the date of publication of this decision.

In making this decision, the Tribunal noted that the underlying case had been deemed as serious and there had been further non-compliance with Code obligations in a subsequent case. Mr Cheung had failed to co-operate with, or acknowledge, the prohibition proceedings. Accordingly, the Tribunal was satisfied that, given the need to protect consumers from similar conduct, three years' prohibition was an appropriate period, taking into consideration all the circumstances.

Administrative charge recommendation: **100%**