

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 5 March 2009 TRIBUNAL SITTING No. 22 / CASE 1

CASE REFERENCE: 784956/MS

Service provider & area:	24 Seven Communications Limited, Leeds
Type of service:	Promotion and operations of a virtual chat service on 070 prefixed numbers
Service title:	Chat Back
Service number:	07033 101112, 07077 600600, 07045 242424 and 07033 100500
Cost:	50 pence per minute
Network operator:	24 Seven Communications Limited
Number of complainants:	1

THIS CASE WAS BROUGHT AGAINST THE SERVICE PROVIDER UNDER PARAGRAPH 8.5 OF THE CODE

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received an industry complaint stating that the numbers 07033 101112, 07077 600600, 07045 242424 & 07033 100500 had been cross-promoted on some of their virtual chat / chat & dating services. This type of cross-promotion is often known as “*poaching*” within the industry.

The promotional messages complained about had apparently been left in the section of the complainant’s own services where a genuine user would normally have left their personal description. The promotional messages had in such instances, the effect of masquerading as messages from legitimate callers. The complainant sent several recordings to the Executive as evidence of such instances, with each message appearing to have been left by a woman.

The Executive subsequently monitored and recorded a service which had been cross-promoted and had been operating on one of the numbers complained about, and noted that a non-sexual virtual chat service named ‘*Chat Back*’ was in operation. Information relating to the CLI numbers (caller display information) that had been used to call the services in order to leave the promotions, and times / dates of some of the calls that had been made, were sent to the service provider in order for them to carry out their own internal investigations into what may have happened in these instances.

Preliminary Matter

As a preliminary issue, the Tribunal considered whether the service was a Premium Rate Service and considered the following matters:

1. whether the service heard by the Executive, constituted a service for the purposes of section 120(7)(a) of the Communications Act 2003 ("Act") and within the meaning of section 120(8)(a) of the Act), being contents of communication.
2. whether there had been for the purposes of sections 120(7)(b), (c) and (d) of the Act: a charge for the provision of the service such charge paid to a person providing an electronic communication service by means of which the service in question was provided; and, such charge imposed in the form of a charge made by that person for the use of the electronic communications service.
3. whether the service involved the use of 070 numbers which were charged at a cost exceeding 10 pence per minute, thereby satisfying the requirements of the Controlled Premium Rate Services Condition ("CPRS") as set and published by Ofcom from time to time.

The Tribunal concluded that the service was a Premium Rate Service for the following reasons:

1. The message heard by the Executive, constituted a service within the meaning of section 120(8)(a) of the Act being contents of communication, and was thereby a service for the purposes of s120(7)(a) of the Act.
2. The service also satisfied subsections 120(7)(b), (c) and (d) of the Act on the basis that the callers to the numbers were charged on connection to the service and some of the monies paid by callers to their respective billing networks, having first been paid to the network operator, were received by the service provider, who appeared to be the end user. The Tribunal noted the lack of any evidence to suggest that there were any other valid end-users to which the 070 numbers had been assigned, other than the service provider.
3. The Tribunal found that the service involved the use of 070 numbers which were charged in excess of ten pence per minute (50 pence per minute from a standard BT landline) which thereby satisfied the requirements of the CPRS Condition.

Complaint Investigation

The Executive received 1 complaint in relation to these services.

The service provider was also the network operator for the services and confirmed that it received 100% of the call revenue for these services. The Executive sent a letter dated 20 November 2008 to the service provider containing a request under paragraph 8.3.3 of the PhoneyPayPlus Code of Practice 11 Edition (amended April 2008) ("the Code") for information about the services. The Executive enclosed a copy of one of the recordings made by the complainant which appeared to demonstrate that a promotional voice message had been left on the complainant's virtual chat service. The service provider responded to this letter in a letter dated 28 November 2008.

Following receipt of the service provider's response, the Executive requested some further information by e-mail on 1 December 2008 and a response was received by e-mail on the same day.

The service provider eventually identified an employee which it stated was responsible for the “poaching” which had taken place and submitted a letter of apology from the employee to the service provider.

The service provider expressed the view that only matters which arose from 19th June 2008 onwards should be considered in relation to this case, as this is the date on which the Executive brought the issue of “poaching” to the attention of the industry. The service provider stated that “poaching” was rife within the industry until the Industry Notice was received.

However, in the Executive’s view the Industry Notice did not obviate the need for compliance with the Code of Practice prior to its issue.

Standard Procedure

In a letter dated 2 December 2008, the Executive raised potential breaches of paragraphs 5.4.1a, 5.7.1, 5.8, and 5.12 of the Code. The service provider’s legal representative provided a response on 19 December 2008 on behalf of the service provider.

The Tribunal made a decision on the breaches raised by the Executive on 5 March 2009.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

MISLEADING (Paragraph 5.4.1a)

*“Services and promotional material must not:
a misled, or be likely to mislead in any way...”*

1. The Executive considered the service to be misleading on the following grounds:

Ground 1

The Executive was of the opinion that consumers may have been led to believe or assume that the promotions (the voice messages which were left on another service provider’s platform), had been endorsed and / or were connected to the service which they had actually called. The Executive submitted that in actual fact the 070 services had absolutely no connection with the legitimate service which consumers had called.

Ground 2

As the promotions all appeared to be sexual (sexually explicit) in nature, it was the opinion of the Executive that some consumers may have called the promoted services in order to enter into a sexual service. However, monitoring of the services undertaken by the Executive suggested that the services were in actual fact non-sexual virtual chat services called *Chat Back* which would typically operate on 0905, 0906 or 08 prefixed numbers (i.e. non-sexual prefixed numbers) where consumers are not expected to be engaged in conversations of a sexual nature.

2. The service provider's legal representative responded to the Executive's allegation as follows:

Ground 1

The service provider's legal representatives stated that no evidence had been provided by the Executive to suggest that consumers had been misled by the promotional material and that the service provider would query on what basis this was considered 'likely' by PhonepayPlus.

Ground 2

The service provider's legal representatives stated that the service provider may accept that if all of the promotional messages contained wording the same or similar to the script provided in the breach letter, this could indeed be the case. The representatives stated that no proof had been provided that an employee of the service provider had left this particular message and on how many occasions, but if PhonepayPlus alleged this to be the case, the service provider would accept the position.

The service provider's legal representatives further stated that the following messages, based on recordings supplied by the Executive, whilst suggestive, were not misleading for the purposes of the Code and that a consumer of the legitimate service or similar services would not have been misled into believing that the numbers routed to an adult service:

"Hi boys, are you looking for some fun? Call now 07045 242424. Lovely ladies online from all over the UK ready and waiting to give you that early morning chat. So what are you waiting for? Call now 07045 242424."

"07077 600600 for hot chat with dirty girls."

"Jose - tall, tanned and toned, love to tease, more than able to please. Satisfaction guaranteed. Come and say hello."

3. The Tribunal considered the evidence and concluded that in relation to ground 1 it was a legitimate consumer expectation to assume that the promotions left on the service which they called were part of the same service, which is reinforced by the fact that there was lack of pricing and contact information within the promotional messages which were left on the service. With regard to ground 2, the Tribunal was satisfied that various words used within the promotions, (including the example messages listed by the service provider containing words such as 'dirty' and 'tease'), suggested that the service promoted would be of a sexual nature. The Tribunal noted that there was a PhonepayPlus Help Note which they expected the service provider to be aware of (on sexual entertainment services in relation to 'chat and dating' and 'virtual chat' services) published in July 2007 which provided examples of words used in promotional material which are likely to suggest that the promoted service is a sexual entertainment service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code on both grounds.

Decision: UPHELD

ALLEGED BREACH TWO

PRICING INFORMATION (Paragraph 5.7.1)

“Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.”

1. The Executive stated that none of the promotions for these services appeared to include any form of pricing information as was required, and that it was the opinion of the Executive that a breach of paragraph 5.7.1 of the Code may have occurred in the instance of each promotional recording which had been left promoting these services.
2. The service provider’s legal representatives conceded that no pricing information was provided in the promotional messages, assuming that the recordings provided by PhonepayPlus were full length. It also stated that the service provider’s chat services that consumers connected to from the numbers were fully compliant with the Code and, where required, full pricing information was provided. The service provider’s legal representatives submitted that the potential damage resulting from the absence of pricing information in the promotions was therefore minimal, if any.
3. The Tribunal considered the evidence including the admission of the service provider, and concluded that the required pricing information had not been provided within any of the promotional messages. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

CONTACT INFORMATION (Paragraph 5.8)

“For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is obvious and easily available to the user.”

1. The Executive stated that none of the promotions for these services appeared to include any form of contact information as was required, and that it was therefore the opinion of the Executive that a breach of paragraph 5.8 of the Code may have occurred in the instance of each promotional message which had been left.
2. The service provider’s legal representative stated that, again, assuming that the recordings provided by PhonepayPlus were full length, the service provider conceded that no contact information was provided in the promotional messages. The service provider’s legal representative stated that this information was given on connection to the service provider’s chat services and that the resulting damage to consumers was minimal, if any.

3. The Tribunal considered the evidence and concluded that the required contact information was not contained within the messages, and the level of consumer harm was irrelevant in deciding whether this provision had been breached. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

INAPPROPRIATE PROMOTION (Paragraph 5.12)

“Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”

1. The Executive stated that a typical example of a promotion for these services was as follows:

“07077 600600. Genuine, filthy phone fuck action right now, just for you on 07077 600600. Come do it”

It was the opinion of the Executive that these promotions were sexual in nature, and that it may have been inappropriate and in some instances offensive to consumers hearing the promotions whilst using non-sexual virtual chat services. For these reasons, it was the opinion of the Executive that a breach of paragraph 5.12 of the Code may have occurred in the instance of each promotional message which had been left.

2. The service provider’s legal representatives submitted that not all of the messages left on the services of competing providers were explicit to the extent implied in the breach letter, and that the recordings provided with the breach letter implied that the service operating on the numbers was a chat service, but not necessarily one containing adult content.

The service provider’s legal representatives further stated that the messages must also be assessed in the context of the likely audience and the typical use of chat services within the industry. It stood to reason that the user of a chat service such as the legitimate service was unlikely to be offended by the content of the promotional messages, even if they did contain adult connotations. The service provider’s legal representatives claimed that they were instructed that messages with more obvious sexual content could have been left on the chat service itself, and that the mere fact that the service provider never received a single complaint from users of the *Chat Back* service supported these submissions.

3. The Tribunal considered the evidence and concluded that, although messages had been left on a competitor’s service without any consideration being given as to whether the messages would be appropriate for that audience, there was no evidence in the absence of consumer complaints or any other specific evidence of

detriment, that the service was, or was likely to be, offensive or harmful. Therefore the Tribunal did not uphold a breach of paragraph 5.12 of the Code.

Decision: NOT UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **significant**.

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factors:

- The service provider was reckless with regard to both the content and promotion of the service and the general practice of poaching within the company. The Tribunal did not consider that the employee notice which had been submitted as having been issued to all chat staff, was a measure which was sufficient to prevent the practice.

In mitigation, the Tribunal noted the following factors:

- The service provider had cooperated with the Executive throughout the investigation and had taken action to terminate the numbers used to operate the service upon first contact from the Executive, even though it had not been specifically instructed to do so.

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand; and
- A £25,000 fine in respect of the upheld breaches. In setting the level of the fine, the Tribunal took into account the significant duration of the cross-promotional activity.

The Tribunal did not impose any bar or requirement for compliance advice as it doubted whether the service could ever be compliant with the Code.