

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 5 March 2009 TRIBUNAL SITTING No. 22 / CASE 4

CASE REFERENCE: 760879/JI

Service provider & area:	Jack Barnard Telecom Services, Essex
Information provider & area:	N/A
Type of service:	N/A
Service title:	N/A
Service number:	N/A
Cost:	N/A
Network operator:	N/A
Number of complainants:	N/A

BACKGROUND

Following receipt of complaints from consumers regarding the receipt of unsolicited calls from 070365 prefixed numbers allegedly made using Automated Calling Equipment (ACE) and a subsequent emergency procedure investigation by the PhonepayPlus Executive (“the Executive”), a Tribunal adjudicated on the case on 14 August 2008 and upheld breaches of paragraphs 5.2, 5.4.1a, and 5.8 of the PhonepayPlus Code of Practice (11th Edition, Amended April 2008) (“the Code”). The Tribunal considered the case to be **serious**, issued a formal reprimand, and imposed a fine of £200,000.

The service provider subsequently made two separate applications for a review of the case, the first of which was made in relation to the breaches and sanctions. The second application was made by the Premium Rate Association (“PRA”) on behalf of the service provider in relation to the financial hardship of the service provider. In both applications the service provider challenged the level of the fine imposed on it. However, both applications were refused by the Chair of the Code Compliance Panel in accordance with paragraph 8.10.3 of the Code and the reasons given by the Chair were duly communicated to the service provider in a letter sent subsequent to each decision.

In a letter dated 4 February 2009, the Executive raised potential breaches of paragraphs 8.9.3b and 8.12 of the Code in relation to the service provider’s failure to pay the fine and administrative charge imposed by the original Tribunal.

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

SUBMISSIONS AND CONCLUSIONS

The Executive’s Case

The Executive sent a breach notice to the service provider on 4 February 2009 setting out the alleged breaches in respect of the service provider’s failure to settle the fine and administration charge invoices originally sent to the service provider on 26 August 2008.

The breach notice made the service provider aware that should breaches be upheld in respect of paragraphs 8.9.3b and 8.12 of the Code, the Tribunal may instruct the network operator contracted with the service provider for use of the numbers found to be in breach, to pass over any money withheld from the service provider in accordance with paragraph 2.5.2e of the Code. The breach notice also stated that the Tribunal may also consider instructing the relevant network operator(s) to bar access to some or all of the numbers allocated to the service provider until such time as full payment is made.

The service provider supplied a response to the breach notice on 12 February 2009. In the response, several issues were raised, some of which had been raised on previous occasions and considered by the Chair of the Code Compliance Panel in the two requests for a review.

Service Provider's Case

In its response to the breach notice, the service provider made submissions regarding the level of the fine imposed by the Tribunal, and in particular that it did not have sufficient funds to pay the original fine imposed and believed the fine to be far in excess of any reasonable level. The service provider offered to pay a reduced sum of £20,000 as commensurate with similar cases at the time and revenue generated from the relevant numbers.

The service provider stated that no account had been made at the original Tribunal of any mitigating circumstances surrounding the case and no opportunity had been given for the service provider to defend itself against the alleged breaches. The service provider further noted that no clear information had been given as to why the initial review was rejected.

The service provider commented that the issuing of the emergency procedure was inappropriate and it supported the argument that the investigation was more about stopping the service provider from trading than stopping consumer harm.

The service provider submitted that if the Tribunal would consider its submissions, it would be willing to provide any additional evidence as appropriate in order to obtain what it believed would be a more equitable outcome. The service provider concluded that as a result it may well be that the original fine would be reduced to a level that could be paid, and any subsequent breaches for non-payment could be rescinded.

Tribunal Considerations and Sanctions

The Tribunal considered the submissions and concluded that it had no power to reconsider the decision of the original Tribunal in relation to the original breaches, or to vary or otherwise change the sanctions imposed by that Tribunal. The Tribunal noted that the service provider had already exhausted the rights of appeal under the Code with regard to the decision of the previous Tribunal having requested and withdrawn its request for an oral hearing, and twice made an application for a review which was subsequently refused on both occasions by the Chair of the Code Compliance Panel. The Tribunal therefore concluded that it could only consider the breaches raised in the breach notice dated 4 February 2009 and any mitigating or aggravating factors which were relevant to those breaches.

The Tribunal proceeded to consider the evidence and noted that the failure to pay the fine and administrative charge imposed by the Tribunal were not in dispute. The Tribunal therefore upheld breaches of paragraph 8.9.3b and 8.12 of the Code and decided to impose a bar on access to all of the service provider's premium rate services and numbers used for premium rate services until such time as payment has been made in full. This sanction was suspended for 48 hours (from notification of the decision) to give the service provider a final chance to make payment, failing which the bar would come into immediate effect. The Tribunal also ordered the service provider to pay an additional administration charge of £208.00 (ex VAT) in respect of the time spent by PhonepayPlus in chasing payment.

The Tribunal decided not to impose any further fine in relation to the upheld breaches having taken into account, as a mitigating factor, the financial difficulties submitted by the service provider and the evidence received from the PRA in earlier correspondence.