

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 8 January 2008 TRIBUNAL SITTING No. 18 / CASE 7

CASE REFERENCE: 784649/JI

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|------------------------------|--|
| Service provider & area: | Mr Jaswinder Singh, London |
| Information provider & area: | N/A |
| Type of service: | Fixed Line |
| Service title: | Unknown (promoted through missed calls) |
| Service number: | 07079800000-07079800999 (x1000) 07079811000-07079811999 (x1000) 07079820000-07079820999 (x1000) 07079822000-07079822999 (x1000) 07079830000-07079830999 (x1000) 07079833000-07079833999 (x1000) 07079844000-07079844999 (x1000) 07079855000-07079855999 (x1000) 07079866000-07079866999 (x1000) 07079877000-07079877999 (x1000) 07079888000-07079888999 (x1000) 07079899000-07079899999 (x1000) |
| Cost: | 50 pence per call plus 3.95 pence per minute from a standard BT landline |
| Network operator: | Starcomm Limited |
| Number of complainants: | 25 |

BACKGROUND

The PhonepayPlus Executive (“the Executive”) received 25 consumer complaints regarding the receipt of unsolicited calls to personal landlines or mobiles from one or more 070 prefixed numbers. The complainants were consistent in claiming that the call they received terminated after one ring. This prompted consumers to return the call whilst being unaware that the number was not a mobile number and would incur higher rate charges. The vast majority of complainants who returned the call claimed that they were connected to a recording of a ringing tone or a voicemail messaging facility.

Ofcom has designated 070 numbers for use only as personal ‘follow me’ numbers, which are charged at a higher rate. Ofcom does not allow end-user revenue share on 070 numbers. This service charged users 50 pence per call plus 3.95 pence per minute from a standard BT landline, and appeared to charge consumers from the commencement of the ringing tone.

The Executive was concerned that the complainants were experiencing a modified version of what is commonly known as ‘wangiri’, a well known trend for misuse of premium rate and personal numbers, involving a computer using hundreds of phone lines to randomly dial mobile phone numbers. After one ring, the call disconnects, which

leaves the number stored in the receiving parties' mobile phone. If the call is returned, the caller is usually charged at premium rate for connection.

The Executive conducted the matter as an emergency procedure investigation in accordance with paragraph 8.6 of the Code.

In a letter to the service provider dated 9 December 2008, the Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, 5.8 and 5.12 of the Code, together with a request for information under paragraph 8.3.3. The service provider declined to supply a formal response to the breach letter. As the questions within the request for information contained in the breach letter were not answered, the Executive raised a further breach of paragraph 8.3.3 on 18 December 2008.

The Tribunal made a decision on the breaches raised by the Executive on 8 January 2009

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 ringtone recording heard by complainants and the Executive, and/or the voicemail messaging facility heard by complainants only, 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 ringtone recording heard by complainants and the Executive, and/or the voicemail messaging facility heard by complainants only, 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 also appeared to be the end user. Furthermore, the Tribunal noted the lack of any evidence suggesting that there were any other valid end-users to which the 070 numbers were assigned, other than the service provider.

3. The Tribunal noted that the service involved the use of 070 numbers charged in excess of ten pence per minute (50 pence per call plus 3.95 pence per minute from a standard BT landline), which thereby satisfied the requirements of the CPRS Condition.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

LEGALITY (Paragraph 5.2)

“Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.”

Under Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 it is an offence to make direct marketing calls to subscribers who either have previously notified the caller that the calls should not be made to them on that line, or whose telephone numbers have been listed on the register maintained by the Telephone Preference Service pursuant to Regulation 26 for 28 days or longer, unless the subscriber has given specific consent notwithstanding the register to receive such calls and such consent remains valid.

1. The Executive noted that of the 25 complaints received, two complainants reported to having received calls on numbers, which were registered with the Telephone Preference Service. The Executive considered that calls had been made to consumers who were registered with the Telephone Preference Service for direct marketing purposes, in order to promote a premium rate service which was operating on 070 prefixed numbers. As neither of the two complainants registered with the Telephone Preference Service appeared to have given specific consent to their telephone lines being used for such calls, it appeared that a breach of 5.2 had occurred.
2. The service provider did not respond to the breach raised.
3. The Tribunal considered the evidence and determined that the service provider had made calls to consumers who had registered their telephone number with the Telephone Preference Service. The Tribunal found that calls had been sent to consumers who specifically refused consent to receive direct marketing calls service. Accordingly, the calls made to those consumers were unsolicited and in breach of the Regulations. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

MISLEADING (Paragraph 5.4.1a)

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

1. The Executive considered the service to be misleading for the following reasons:

Reason 1:

The Executive noted that complainants reported to have received unsolicited missed calls from numbers they did not recognise. The calls lasted for the duration of one ring and terminated before it was possible for complainants to answer. The Executive considered that receiving a missed call in this manner, prompted consumers to return the call. The Executive commented that the 070 'personal number' was a relatively unknown technology to the average consumer, which could result in the number being confused for a mobile number and the call being returned. Consumers would therefore be unaware that they were responding to a commercial enterprise, for which they would incur charges.

The Executive considered the consumer expectation of responding to a 'missed call' was usually to find out more information about who had called and their reason for calling. That expectation was defeated in this instance, as responding to the 070 number directly engaged the consumer with the service, which was a commercial enterprise. Consequently, the cost of the call might not be apparent to the consumer until they received their bill and were thereby misled.

Reason 2:

The Executive noted that some of the complainants who returned the missed call, indicated that had been charged for listening to a recording of a ringing tone without realising they were connected to the number and, in any event, did not at the time realise they were being charged.

The Executive monitored the service and found that, on playback of the recordings of two of the 070 numbers, after connection to the service, a ringing tone was heard. The Executive considered that the recorded ringing tone had been presented to consumers in a manner which implied that a connection had not been made and consequently no charge incurred. The Executive considered that that the service had intentionally sought to mislead consumers by creating a fake scenario in order to delay consumers' termination of the call, thereby prolonging the period in which revenue was generated.

2. The service provider did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the missed calls made to consumers' handsets were likely to mislead recipients into returning the calls in the belief that they had missed a call from someone who wanted to speak to them. The Tribunal also noted that the service had presented a recording of a ringing tone, which was a clear and deliberate attempt to mislead consumers into staying on the line, in the mistaken belief that connection had not been made, thus increasing the revenue generated by the service. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

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 noted that the service was charged at 50 pence per call plus 3.95 pence per minute. The service therefore had the potential to cost more than 50 pence overall, which was confirmed by the individual complaints and the Executive’s monitoring of the service. As such, the Executive considered that the service did not fall under the exemption from the requirement to provide pricing information, granted by paragraph 5.7.5 of the Code. None of the 25 complainants reported to having been informed of the cost of returning a call to a 070 number at any point prior to incurring a charge. Only upon receiving their phone bill, did complainants realise that the service was in fact premium rate.
2. The service provider did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that consumers had not been supplied with any pricing information prior to returning the call and incurring a charge. The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

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 considered that the number displayed on the consumers’ handset (“the CLI”) fell within the definition of promotional material under paragraph 11.3.27 of the Code. None of the 25 complainants were provided with contact information at any point during the service; either at the point of promotion when the missed call was initially made to them or after calling the premium rate service. Therefore complainants had no way of contacting the service provider other than returning the missed call and hence calling the premium rate number.
2. The service provider did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the display of CLI on consumers’ mobiles or land lines constituted promotional material for the purposes of paragraph 11.3.27. It also concluded that this promotional material had failed to provide consumers with any contact information. The Tribunal therefore upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

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 noted that none of the 25 complainants reported to have consented to receive missed calls from the 070 prefixed numbers, which related to the service. Several complainants explicitly stated that the calls were unsolicited. Furthermore, the calls lasted for the duration of one ring before terminating, prompting a call back from consumers. The Executive considered that the calls made to consumers who had not consented to receive them and the manner in which those calls were made, constituted inappropriate promotion. As such, it was the opinion of the Executive that the service provider had not used all reasonable endeavours to ensure that the services were not promoted in an inappropriate manner.
2. The service provider did not respond to the breach.
3. The Tribunal considered the evidence and concluded that the service had been inappropriately promoted due to the intention of the promotion, the lack of consent of the recipients, the frequency of the calls (in some cases) and the worry or annoyance caused by the apparent missed calls. The Tribunal upheld a breach of paragraph 5.12 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

FURTHER INFORMATION (Paragraph 8.3.3)

“During investigations, or as part of the adjudication process, PhonepayPlus may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents.”

1. The Executive made various requests for information under paragraph 8.3.3 of the Code. The service provider failed to supply any response to the questions raised.
2. The service provider disputed the Executive’s allegations. The service provider stated that he had supplied the information requested, but that the Executive had not supplied the information he had personally requested in return (in order to trace complainants). The service provider stated that he had already been

named as guilty on the PhonepayPlus website (referring to the standard alert published in respect of current emergency procedures) and requested that the Executive made no further contact with him.

3. The Tribunal considered the evidence and noted that the service provider had entirely failed to provide responses to any of the Executive's requests for information under paragraph 8.3.3 of the Code. The Tribunal therefore upheld a breach of paragraph 8.3.3 of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The service was valueless to consumers;
- The service provider's operation of the improper use of 070 numbers was wilful;
- There was material consumer harm; 25 consumer complaints;
- The cost paid by individual consumers was high; 50 pence per call plus 3.95 pence per minute;
- The misleading and improper use of 070 numbers is a concern which has previously been brought to the attention of the industry; and
- The service provider did not cooperate with PhonepayPlus when notified of the breaches. The service was stopped by the network operator, Starcomm Limited.

There were no mitigating factors for the Tribunal to consider:

Taking into account the aggravating factors and lack of mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A fine of £45,000;
- A bar on the service and all numbers providing access to the service unless and until the service is considered to be compliant by PhonepayPlus or for a period of 12 months, whichever is the longer. The Tribunal doubted whether the service could ever be compliant. The service provider is required to seek compliance advice regarding the future use or allocation of premium rate numbers which provide access to the service in question.
- The Tribunal ordered that claims for refunds are to be paid by the service provider for the full amount spent by users, except where there is good cause to believe that such claims are not valid.