

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

**Thursday 2 April 2009 TRIBUNAL SITTING No. 24 / CASE 3**

**CASE REFERENCE: 774947/JI**

Service provider & area:	Mr Jay Singh t/a JST Promotions, London
Type of service:	Fixed Line
Service title:	Unknown (promoted through missed calls)
Service number:	07042510000-07042510999 07042511000-07042511999 07042516000-07042516999 07061729000-07061729999 07061735000-07061736999 07061750000-07061736999 07061759000-07061759999
Cost:	50 pence per call plus 3.95 pence per minute from a standard BT landline
Network operator:	Hotchilli Communications Limited
Number of complainants:	14

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

#### **BACKGROUND**

The PhonepayPlus Executive (“the Executive”) received 14 consumer complaints regarding the receipt of unsolicited calls to personal 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. The Executive’s monitoring of the service also identified that some of the numbers were associated with a company called ‘Promotions Today’.

The 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 a standard procedure investigation in accordance with paragraph 8.5f of the Code.

In a letter to the service provider dated 17 September 2008, the Executive raised potential breaches of paragraphs 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. An initial response to the breach letter was provided by the service provider on 1 December 2008. Following correspondence between the Executive and the service provider regarding the dispute over allocation of the 070 numbers, the Executive re-issued an updated version of the breach letter on 7 January 2009. The service provider supplied a second response to the breach letter on 19 January 2009.

As some of the questions within the request for information contained in the breach letter were not answered sufficiently, the Executive raised a further breach of paragraph 8.3.3 on 19 January 2009.

Following the identification of additional 070 prefixed ranges which the Executive believed were allocated to the service provider, the Executive re-issued a third breach letter to the service provider on 20 February 2009. The service provider supplied a response to the re-issued breach letter on 26 February 2009.

The Tribunal made a decision on the breaches raised by the Executive on 2 April 2009.

#### **Preliminary Matter – Paragraph 11.3.1**

As a preliminary issue the Tribunal concluded that the service was a regulated premium rate service for the following reasons:

1. The recording of a ringing tone and connection to the company 'Promotions Today' heard by complainants and 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 also 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 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) and was thereby a Controlled Premium Rate Service ("CPRS") as defined within paragraph 2(e) of the Premium Rate Services Condition ("the PRS Condition") as published by Ofcom in December 2003 (as amended in April 2007).

#### **Preliminary Matter – Paragraph 11.3.6**

***“Service provider’ is the first person who falls within Section 120(9)(a)-(d) or Section 120(10) of the Act who, not being a network operator himself, contracts***

***with or enters into arrangements with a network operator for use of the network operator's facilities in the provision of the relevant premium rate service.***

*Where a network operator itself provides premium rate services in any given case in which he falls within Section 120(9)(a)-(d) as well as being the network operator in respect of the relevant service then that network operator or such part of its organisation as is responsible for the provision of the same will be a service provider for the purposes of this Code."*

1. The Executive considered that the service provider had entered into an arrangement with the network operator, Hotchilli Communications Limited, for the use of the prefixed number ranges 07042516000-07042516999, 07061750000-07061750999, and 070617590000-07061759999 for the provision of a premium rate service, despite the fact that no signed contract had been provided. The Executive submitted evidence in the form of email correspondence between the service provider and network operator showing that the service provider had accepted the terms of the service order forms relating to the numbers used to operate the service.
2. The service provider stated that the service order forms and email correspondence for these numbers showed that they were contracted to another service provider for which it acted as a consultant in order to procure the numbers. The service provider commented that it did not see anything in the email correspondence and service order forms which suggested that the numbers were contracted to it and emphasised that the information clearly showed that the network operator knew that the numbers were for the other service provider.
3. The Tribunal considered the evidence and determined that it was not sufficient with regards to the Executive's submission that an arrangement existed in relation to the three number ranges. The Tribunal found that there was only evidence that the respondent was a service provider in respect of those number ranges for which a valid contract had been supplied. It could not therefore be considered a service provider in respect of number ranges 07042516000-07042516999, 07061750000-07061750999, and 070617590000-07061759999. The Tribunal also commented that it could not consider number ranges where no complaints had been received i.e. 07042510000-07042510999 and 07042511000-07042511999 as there was then was no evidence to show that these number ranges had been used for the provision of premium rate services.

**Decision:** The Tribunal concluded that the respondent was a service provider in respect of those 3,000 numbers, being 070 numbers, within the ranges 07061729000-07061729999 and 07061735000-07061736999.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **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 on the following grounds:

Ground 1

The Executive stated 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 that 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 may not have been apparent to the consumer until they received their bill and were thereby misled.

Ground 2

The Executive submitted that some of the complainants who returned the missed call indicated that had been charged for listening to a recording of a ringing tone or a silent line 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 some of the 070 numbers, after connection to the service, a ringing tone was heard, and in some cases, also a recording of a dead line. The Executive considered that the recorded ringing tone or silent line 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 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.

Ground 3

The Executive monitored some of the 070 numbers complaints were received in relation to, and found that two of the calls were answered by a female telephone operator with an Indian accent claiming to be working for a company called ‘Promotions Today’. On both occasions, after the Executive challenged the telephone operator as to why a missed call was made from the 070 number, the operator stated that the call was made in regard to a mobile phone survey in order to check that customers were happy with their mobile phone, but due to a technical fault, the line had been disconnected. The Executive considered that the service had intentionally sought to mislead consumers by creating a fake scenario which included elongated periods of silence and avoiding answering questions directly in order to delay consumers’ termination of the call, thereby prolonging the period in which revenue was generated. In the Executive’s opinion, this was exacerbated by false statements made by the telephone

operators in that it was stated that calls were made to the Executive when in fact the Executive monitored the 070 numbers at least 6 weeks after the incidents involving missed calls to complainants occurred. During one call, the telephone operator also insisted that the charge for calling a 070 number was the same as that for a mobile phone.

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

Ground 1

The service provider did not respond specifically to this breach. However, it stated that the complainant mobile numbers should not have received a call from the service unless they were called by the end user or they were calling the end user.

Ground 2

The service provider did not respond specifically to this breach. However, it stated that on calling the 070 numbers, a comfort message would have been heard followed by a ringing tone as the call was transferred to the end user. The service provider noted that if call back had been enabled, a comfort message would have been heard, the call would then have been terminated and the caller would have been called within 20 seconds.

Ground 3

The service provider did not respond specifically to this breach. However, it stated that 'Promotions Today' was the name of the call centre which signed up users and ran the helpline.

3. The Tribunal considered the evidence and concluded that, in relation to ground one, 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 and that the number they were calling from was a personal mobile number. In relation to ground two, the Tribunal concluded that the service had presented a recording of a ringing tone as a clear and deliberate attempt to mislead consumers into staying on the line in the mistaken belief that connection had not been made, thereby increasing the revenue generated by the service. With regards to ground three, the Tribunal concluded that the missed call and the operator's subsequent explanation together with the elongated periods of silence in the conversation, had the effect of making the callers stay on the line whilst being unaware that they were being charged at a higher rate and not their usual standard rate and they were thereby misled.. The Tribunal upheld a breach of paragraph 5.4.1a of the Code in relation to all three grounds.

**Decision: UPHELD on all grounds**

## **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 submitted 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, given by paragraph 5.7.5 of the Code. None of the 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 specifically to this breach. However, it stated that since the service was a 'follow me' call back service run on 070 numbers, call charges were given on calling the actual service and all users were informed of the price point when they joined the service.
3. The Tribunal considered the evidence and concluded that consumers had not been provided with any pricing information prior to returning the call and consequently incurring a charge. 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 considered that the caller line identification ("the CLI") number displayed on the consumers' handset fell within the definition of promotional material under paragraph 11.3.27 of the Code. None of the 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 specifically to this breach. However, it stated that each of the call centre agents had their own 070 numbers.
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 identity or contact information. The Tribunal therefore 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 submitted that none of the 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 specifically to this breach. However, it stated that numbers were collected within the local communities and the service was promoted within local ethnic communities who called the call centre to activate an account. The service provider further noted that no bought-in data was used and the service was only promoted to those who were canvassed and actively showed an interest.
3. The Tribunal considered the evidence and concluded that the manner in which the service was promoted was inappropriate (i.e. the use of one ring to solicit a call back, the failure to obtain the consent of the recipients prior to calling them, the frequency of the calls (in some cases), and the worry or annoyance caused to complainants by the 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 a sufficient response to some of the questions raised.

2. The service provider did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the service provider had failed to provide a sufficient response to some 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 provider's improper use of 070 numbers was wilful;
- There was material consumer harm; there were 14 consumer complaints, 11 of which related to the 070 prefixed number ranges considered by the Tribunal, and over 212,000 calls made from consumers to these 070 numbers;
- The cost paid by individual consumers was high; 50 pence per call plus 3.95 pence per minute from a standard BT landline, and considerably higher from a mobile phone;
- 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.

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 £110,000; and
- The Tribunal also 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.