

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 29 October 2009

TRIBUNAL SITTING No. 39/ CASE 2

CASE REFERENCE: 816212/AB

Service provider:	Open Telecom Limited, Kingston upon Thames
Information provider:	Fastline Communications, Guildford
Type of service:	Prize line (Missed call scam)
Service title:	N/A
Service numbers:	Various
Cost:	10p per minute from a BT landline
Network operator:	Gamma Telecom Holdings Limited
Number of complainants:	44

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received 44 complaints in relation to a range of 0871 numbers operating the same service. These complainants reported receiving a 'one ring' missed call from one of the 0871 number ranges. The vast majority of the complainants stated that they had received the missed call in the early hours of the morning and some stated to have been distressed by this call as they thought something had happened to a member of their family. In some cases, complainants called the number back and stated that there was a muffled automated recorded message offering a prize claim service.

(i) Monitoring the service

The Executive monitored the following numbers and noted that the same automated recording message featured on all five lines:

0871 703 3983
0871 703 3981
0871 703 3982
0871 703 4523
0871 703 4526

The whole recorded message lasted four minutes and 43 seconds.

In addition, the Executive visited the website whocallsme.com and noted that there had been many complaints posted on this site from members of the public who also reported to have received a missed call from one of the 0871 numbers. The majority of the 0871 number range provided by Open Telecom had been complained about. The results are below:

Number range	Number of complaints on whocallsme.com
8713322350	0
8713322355	0
8713322360	0
8717033981	15
8717033982	53
8717033983	37
8717034522	30
8717034523	43
8717034524	0
8717034526	31
8717034527	22
8717034528	27
8717034529	49
8717034531	32
8717034532	26
8717034533	21
8717034534	28
8717034536	50
8717034537	35
8717034538	31
8717034539	28
8717034541	28

The Executive noted that a vast majority of these complainants were unsure who to contact to report their complaint. For this reason, the PhonepayPlus Communications team posted a notice on each of the above numbers that stated as follows:

“The above number has been suspended pending an investigation by PhonepayPlus, the phone-paid services regulator.

If you have been called by this number and would like your experience to be considered as part of the investigation, you can make a formal complaint by contacting PhonepayPlus.

In order to log your complaint, PhonepayPlus will need the following information:

- *Date and time of the call you received*
- *If you called the number back, what you experienced*
- *Whether you returned the call from your mobile*

- *The estimated cost incurred*
- *Any other information*

You can reach PhonepayPlus on:

- *0800 500 212 (Mon-Fri, 8am-6pm)*
- *www.phonepayplus.org.uk*

(ii) The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.5 of the Code.

The Executive sent a breach letter dated 14 September 2009 to the Service Provider, raising potential breaches of paragraphs 5.3.1b, 5.4.1a, 5.7.1, 5.8 and 5.12 of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). The Service Provider provided a formal response to the breach letter on 19 September 2009.

The Service Provider attempted to invoke an Information Provider pass-through; however, the Director of Fastline Communications failed to sign the Information Provider undertaking form, hence the investigation being pursued against the Service Provider.

The Tribunal made a decision on the breaches raised by the Executive on 29 October 2009, having heard Informal Representation from the Service Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

HARM AND OFFENCE (FEAR, ANXIETY OR DISTRESS) (Paragraph 5.3.1b)

“Services and promotional material must not, or must not be likely to:

b. induce an unacceptable sense of fear, anxiety or distress,”

1. The Executive made reference to consumer complaints and submitted that some complainants reported that, because the missed calls were received in the middle of the night, this had caused a sense of fear and distress. Examples of consumer complaints were as follows:

“Called me at 5:30am in the morning! Rang twice then hung up. Very annoyed as I have family overseas and was concerned something had happened.”

“Don't they know its rude to call after 9pm? Terrify you into thinking something's happened to a loved one far away.”

2. The Service Provider stated that it was unaware that providing 0871 marketing numbers to the Information Provider (Fastline Communications) would have caused such upset to the general public. It stated that, in hindsight, it should never have provided the numbers and, in future, it would carry out full due diligence with any partner company as to the purpose of the 0871 numbers. It also stated that it had severed all ties with the Information Provider.

The Information Provider stated that the first it knew of the public anxiety was when it received notification by its Telecoms Provider, Gamma Telecom, that the Executive was requesting information on the use of the numbers and that there had been consumer harm. It stated that immediately on receiving this information, it ceased all numbers with Gamma Telecom, wrote to the PhonepayPlus Compliance team and visited the Executive's offices to provide any further information required.

It stated that, at no point, until notified by Gamma Telecom, had it been aware that it was doing anything untoward.

3. The Tribunal considered the evidence and concluded that, on the basis of the consumer complaints and the Service Provider's acceptance of the alleged breach, the late night calls in question had induced an unacceptable sense of fear and distress amongst the complainants affected. The Tribunal upheld a breach of paragraph 5.3.1b of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
FAIRNESS (MISLEADING) (Paragraph 5.4.1a)**

*"Services and promotional material must not:
(a) mislead, or be likely to mislead in any way."*

1. The Executive submitted that all 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 the complainants to answer. It submitted that, by receiving a missed call in this manner, consumers were prompted to return the call. Some complainants stated that they had returned the call and were connected to a muffled automated recorded message offering a prize claim service.

It submitted that the consumer expectation of responding to a 'missed call' was to usually find out more information about who had called and their reason for calling. In this case, it submitted that the expectation had been defeated, as responding to the 0871 number engaged the consumer with the service directly, which appeared to be a commercial enterprise. It submitted that, as a consequence, the nature of the call and reason for making it had not been apparent to consumers, and they had been misled.

The Executive submitted that it was of the belief that the service was misleading to the complainants and was likely to mislead other consumers due to the manner in which calls were terminated, and the use of what would appear to be a 0871 number to promote the service.

2. The Service Provider stated that it provided the 0871 numbers to the Information Provider to use however it saw fit. It stated that it provided non-geographic numbers to partners as a matter of course and, from now on, it would be more stringent in providing such numbers.
3. The Tribunal considered the evidence and concluded that, on the basis of the

consumer complaints and the Service Provider's acceptance of the alleged breach, the nature of late night calls in question had misled complainants into returning the call as they had an expectation that it was a missed call, rather than a means of engaging in a commercial enterprise. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

**ALLEGED BREACH THREE
PRICING (COST) (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 it was apparent from some of the complainants' comments that they were unsure of the cost of calling these 0871 numbers. The Executive made reference to examples of the complainants' uncertainty as to how much the call would cost such as:

“Just got stung by this one. No bloody credit left on my phone now...how much is the rate?”

“Do not call back – a scam. You have a missed call and they expect you to ring back paying £1 a min to listen to a long recorded message that is muffled and mostly inaudible...”

The Executive submitted that it had monitored the service 0871 number range prior to its suspension. It submitted that, although the recording was muffled and the wording was barely audible, it had noted that no pricing information was provided.

It submitted that the fact that consumers were not fully informed, clearly or straightforwardly, of the cost of calling the service before incurring charges amounted to a breach of the pricing information provision.

The Executive also submitted that the number displayed on the consumers' handsets was considered promotional material within the meaning of paragraph 11.3.27 of the Code.

2. The Service Provider stated that it provided the 0871 numbers and had no responsibility whatsoever for the service that was attached to those numbers.
3. The Tribunal considered the evidence and concluded that, on the basis of the consumer complaints, the Executive's monitoring and the Service Provider's acceptance of the alleged breach, the recorded message heard when the missed call was returned by the consumer had not contained any pricing information. It followed that the Service Provider had failed to ensure that consumers were fully informed of the cost of the service. 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 otherwise obvious and easily available to the user.”

1. The Executive submitted that none of the complainants had been provided with contact information at any point during the service, either at the point of promotion when the initial missed call was made, or after complainants had called the premium rate service. It submitted that complainants had no way of contacting the Service Provider, with the exception of returning the call made to them and, hence, calling the premium rate number.

It submitted that, even those consumers who had returned the call and had incurred premium rate charges, they were not presented with any content that gave an indication as to the identity of the caller.

The Executive also submitted that the number displayed on the consumers’ handsets was considered promotional material within the meaning of paragraph 11.3.27 of the Code.

2. The Service Provider stated that it did not provide the service, only the numbers.
3. The Tribunal considered the evidence and concluded that, on the basis of the consumer complaints and the Service Provider’s acceptance of the alleged breach, consumers had at no point been provided with the identity or contact details in the UK of the Service Provider or the Information Provider, as required by the Code. The Tribunal 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 submitted that none of the complainants reported to have consented to receive calls from 0871 prefixed numbers in connection with this service. On the contrary, 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, promoted the service in a way that was inappropriate for those complainants. As such, it was the opinion of the

Executive that the Service Provider had not used all reasonable endeavours to ensure that its services were not promoted in an inappropriate way.

2. The Service Provider stated that these text messages were not its services and it had no promotional material. It stated that it had simply supplied the 0871 numbers.
3. The Tribunal considered the evidence and concluded that, on the basis of the consumer complaints submitted by the Executive and the Service Provider's acceptance of the alleged breach, the Service Provider had not used all reasonable endeavours to ensure that promotional material was not harmful and, as such, had promoted the service in an inappropriate way. The Tribunal upheld a breach of paragraph 5.12 of the Code.

Decision: UPHELD

SANCTIONS

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

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

- The service was valueless to consumers – there was no evidence that the competition referred to in the IVR actually existed.
- The behaviour of the Service Provider was negligent in its due diligence of the Information Provider. The behaviour of the Information Provider had been wilful in relation to the operation of the service.
- There was societal harm as complainants were anxious and distressed by the timing of the missed calls.
- Missed call scams have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Service Provider co-operated with the Executive when notified of the breaches. It contacted the Network Operator requesting that the 0871 numbers in question be suspended.
- The Service Provider was a small company and the regulation of 0871 numbers was a relatively new regime.

The revenue in relation to this service was in Band 6 (£1-£5,000).

Having taken into account the aggravating factors, mitigating factors and the other assessment criteria listed above, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Having regard to all the circumstances of the case, including the number and seriousness of the Code breaches, and the revenue generated by the service, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;

- A fine of £2,000