

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

## TRIBUNAL DECISION

Thursday 11 June 2009 TRIBUNAL SITTING No. 29 / CASE 3

CASE REFERENCE: 792528/GL

Service provider & area:	Pinnacle International Projects Limited, London
Information provider & area:	N/A
Type of service:	Employment information service, fixed line.
Service title:	N/A
Service number:	09046790679
Cost:	£1.50 per minute
Network operator:	Callagenix Limited
Number of complainants:	6

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

#### BACKGROUND

The PhonepayPlus Executive (the 'Executive') received six complaints regarding a service operating on the premium rate number 09046790679. The Executive established, during the course of its investigation, that the service appeared to be operating as an employment service aimed at labourers, factory workers, electricians, carpenters and other trade persons in the United Kingdom who were seeking work.

The Executive received complaints which stated that they received a text message which advertised a job vacancy stating the location and daily rate of pay. The text message advised the user to call a premium rate number to register and that the vacancy would be filled on a first come, first served basis. Complainants stated that the service was misleading and there was no pricing information.

During monitoring, the Executive called the premium rate number on three different days and noted the same recorded message each time. The service purported to be a live service where the user could speak to an operator; however, the Executive was unable to establish if this was the case as it was unable to speak to anyone when calling the premium rate number.

#### The Service

The Executive formed the view that the service was an employment service operating on the premium rate number 09046790679. The Service Provider stated during the course of the investigation that the service was promoted by flyers and leaflets however complainants stated that they had received promotional text messages which read as follows:

- *Hi Neil I need one more carpenter in Staines £150 per day. Call 09046790679 to register 1st come 1st serve.*

- *Hi Christopher I need one more labourer in London £150 per day. Call 09046790679 to register. First come first serve.*
- *Hi Frank I need one more electrician Enfield £180 per day call 09046790679 to register, first come first served thanks*
- *Hi William I need 1 more electrician in Chesham at least £180 call 09046790679*

On calling the premium rate number there was a recorded message which lasted for two minutes 30 seconds charged at £1.50 per minute. The recorded message stated that it was a job registration line.

### **Complaint Investigation**

#### **Standard Procedure**

The Executive decided to investigate the service using the standard procedure under paragraph 8.5 of the Code. A breach letter was issued by the Executive dated 12 May 2009 alleging breaches of paragraphs 5.2, 5.4.1a, 5.7.1 and 5.8 of the Code. A formal response from the Service Provider to the Executive's breach letter was subsequently received. The Service Provider stated that it had attached copies of the flyers and leaflets which it had used to promote the service, however, the copies were not attached and were not subsequently forthcoming despite the Executive's repeated request for them to be provided.

The Tribunal made a decision on the breaches raised by the Executive on 11 June 2009.

## **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.'*

1. The Executive considered there to be a breach of paragraph 5.2 of the Code on the following grounds:

#### **Ground1**

The Executive submitted that under s.6 of the Employment Agencies Act 1973 the charging of fees to persons for finding or seeking to find them work, whether employed or self-employed (subject to certain exceptions which were not deemed to be relevant in this instance) was not permitted. The Executive submitted that the Service Provider's premium rate charge amounted to a fee for this purpose.

The Executive made reference to s.6(1) of the Employment Agencies Act 1973 ("the Act") which states:

*s.6. Restriction on charging persons seeking employment, etc*

- (1) *Except in such cases or classes of case as the Secretary of State may prescribe, a person carrying on an employment agency or an employment business shall not demand or directly or indirectly receive from any person any fee for finding him employment or for seeking to find him employment.*

The Executive submitted that the service had been promoted as offering employment opportunities to labourers, factory workers, electricians, carpenters and other trade persons.

Ground 2

The Executive submitted that under Paragraph 22(2) of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations'), it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions, or (2) the recipient's details were obtained whilst purchasing a similar or related product or service to that now being promoted and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication. This is sometimes called a 'soft opt-in'.

The Executive made reference to a complaint which stated that the promotional text message received was unsolicited.

Ground 3

The Executive relied on Paragraph 23 of the Regulations which states that:

23. *A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail -*
- a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or*
  - b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided.*

The Executive submitted that the promotional text message failed to provide any address by which the recipient could seek to cease future communications from being sent, in contravention of section 23(b) of the Regulations.

2. The Service Provider responded to the Executive's allegations as follows:

Ground 1

The Service Provider stated that it had set up the premium rate job alert service in order to inform genuine work seekers or people looking to move companies of job opportunities. The Service Provider stated that the recorded message was updated with new jobs as and when it heard about them. The Information Provider stated that it did not operate as an Employment Agency or Employment Business with regards to the jobs mentioned on the recorded message. The Service Provider stated that it merely operated an information line for those individuals who were genuinely looking for work and that if the individual's skill set matched the vacancies it would simply give the individual the companies' details and let them apply directly to the company and it would have no further contact with the individual or the company. The Service Provider stated that the individual would not work either directly or indirectly for the Service Provider and that individual's details were not retained and that it did not have any further contact with the companies.

The Service Provider stated that because it had many connections within the employment sector it felt that the information that it possessed regarding companies recruiting could be valuable to people who were genuinely seeking new opportunities.

#### Ground 2

The Service Provider denied sending the text messages relied upon by the Executive and it suggested the texts may have been sent by a former Director of the company who had left on bad terms. The Service Provider acknowledged that it had sent texts to individuals in the past but it said that these individuals had always been candidates who had registered with it and had given their consent to receive the messages. The Service Provider stated that all registration forms that it had used had a clause which stated:

*'We may contact you from time to time with information or promotions. If you do not wish to be contacted by us please indicate by ticking the box provided.'*

The Service Provider stated that if any individual contacted it in writing or otherwise and had felt that he or she had not given the Service Provider permission to contact them again during the initial conversation with a member of the staff, it would extend its apologies to the individual and remove the details from its database completely. The Service Provider stated that it was not in the business of hounding people who did not wish to be contacted by text message as it was simply not good for business.

#### Ground 3

The Service Provider stated that it had not significantly advertised its premium rate service, but that any material that it had used had conformed to current regulations. The Service Provider stated that it was unsure where the text message content had been sent from, and would investigate the matter. The Service Provider stated that as it had not sent the text messages referred to by the Executive it did not believe that it had breached any regulations.

3. The Tribunal considered the evidence and concluded that in relation to Ground 1, on the basis of the Service Provider's own description of its activities, it had acted

as an Employment Agency within the meaning of section 13(2) of the Act. This section states that;

*“For the purposes of this Act “employment agency” means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding workers employment with employers or of supplying employers with workers for employment by them”.*

The Tribunal further concluded that the premium rate call charge amounted to a fee which was charged for finding work for the callers and that such a charge therefore amounted to a contravention of section 6(1) of the Act, and that the service was thereby in breach of paragraph 5.2 of the Code.

In relation to Ground 2 the Tribunal concluded that on a balance of probabilities the evidence provided by the Executive was insufficient to show that the text messages had been unsolicited. The Tribunal noted that there had been only one complaint received regarding unsolicited texts. The Tribunal therefore found that there was insufficient evidence to conclude there had been a contravention of paragraph 22 of the Regulations and therefore did not uphold a breach of paragraph 5.2 of the Code on this ground.

With regard to Ground 3, the Tribunal found that the text message received by complainants did not contain a valid opt-out address as required by paragraph 23(b) of the Regulations. The Tribunal therefore decided to uphold a breach of paragraph 5.2 of the Code on Grounds 1 and 3.

**Decision: UPHELD in relation to Grounds 1 and 3.**

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

*‘Services must not be unreasonably prolonged or delayed’*

1. The Executive referred to the transcript of the recording heard when calling the premium rate number 09046790679. It submitted that the recording started as follows:

*‘Hi and thanks for calling, your call is incredibly important to us, please bear with us while we transfer you to our job registration line. You’ve been transferred to our job registration line, due to the fact that all of our consultants are busy registering other candidates for work.’*

The Executive stated that the service purported to be a live service in which a user could speak to a ‘consultant’, but that the Executive had been unable to speak to anyone when it called the premium rate number. The Executive submitted that it had called the premium rate number on three different days and had noted the same recorded message each time.

The Executive stated that the message on the premium rate number had given the impression that the call was being ‘transferred’ to a job registration line and

that the reason provided by the message for this delay was 'due to the fact that all of our consultants are busy registering other candidates for work'. The Executive submitted that it appeared that this was just a recording as opposed to a real queuing system.

2. The Service Provider stated that it used to have an answering machine set up in its office as part of the telephone system and if all of its consultants were on the phone it would inform the caller that:

"All of our consultants are on the phone, did you know that Pinnacle know offers and up to date information line giving you information on who's recruiting and who's not in the world of construction. You can obtain information by calling our premium rate number 09046\*\*%^^& (Terms and Conditions and Charges)" [sic].

The Service Provider stated that the reason that it informed the caller that all of its consultants were on the phone was because it assumed that 90% of callers had called the Service Provider at the office, found the phone lines were busy and therefore redialled the premium rate number. The Service Provider stated that the idea was to portray the premium rate line as a different department offering a unique service, this was the reason it had used the word 'transferred'. The Service Provider stated that callers were aware that they had not been transferred because they had been required to hang up and redial the premium rate number. The Service Provider stated that it had read and listened to the recording and agreed with the Executive that the wording could be clearer. The Service Provider stated that the particular recording referred to by the Executive had been present only a few weeks prior to the receipt of the Executive's breach letter and that the Service Provider added new information about companies recruiting as often as it could and generally the whole message was changed every four weeks.

3. The Tribunal considered the evidence and concluded that the premium rate number did not provide access to a 'live' service as purported in the recorded message and therefore users who called the service had been misled. The Tribunal also noted the Service Provider's admission that the wording of the recorded message could have been clearer. The Tribunal therefore decided to uphold a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

### **ALLEGED BREACH THREE GENERAL PRICING PROVISIONS (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 promotional text messages did not provide any pricing information and as such consumers were unaware that the cost of calling the premium rate number was £1.50 a minute
2. The Service Provider stated that it was meticulous in ensuring that the correct terms and charges were on its promotional material. The Service Provider stated

that it did not accept that the text messages referred to by the Executive, which contained no pricing information or terms, had been sent by any of its staff.

3. The Tribunal considered the evidence and noted that there was no pricing information contained in the promotional text message. Since the Service Provider had not provided any other evidence to show that it had ensured users of the service were informed of the costs of the service prior to incurring any charge, the Tribunal concluded, on the balance of probabilities, that users had not been so informed. The Tribunal therefore decided to uphold 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 the promotional text messages did not contain any contact details as required by the Code.
2. The Service Provider restated that it was meticulous in ensuring that the correct terms and charges are on its promotional material. The Service Provider stated that it did not accept that the text messages referred to by the Executive, which contained no pricing information or terms, had been sent from any of its staff.
3. The Tribunal considered the evidence and found that there was no contact information contained in the promotional text message, as required by the Code. The Tribunal therefore decided to uphold a breach of paragraph 5.8 of the Code.

**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 behaviour of the Service Provider was deliberate in relation to its design and promotion of the service;
- The service had caused material societal harm in view of the current economic climate and recession;
- The service was harmful to a vulnerable group of individuals, in this case individuals who were seeking employment in a difficult economic climate.

In mitigation, the Tribunal noted the following factors:

- The Service Provider stated that it would offer refunds to users.

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

The Tribunal therefore decided to impose the following sanctions:

- A Formal Reprimand;
- A total fine of £10,000;
- A bar on this service and any similar service and related promotion material until compliant to the satisfaction of the Executive. However, the Tribunal commented that, based on the evidence it had seen, it doubted that the design of the service could ever be compliant.
- 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.