

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 19 February 2009 TRIBUNAL SITTING No. 21 / CASE 1

CASE REFERENCE: 786176/AC

Service provider & area:	The Number UK Limited, Cardiff
Type of service:	Question and Answer service
Service title:	Ask Us Anything (AUA)
Service number:	118118
Cost:	60 pence for first answer of the day then all answers are free before midnight
Network operator:	Mobile Operators
Number of complainants:	1

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

BACKGROUND

The 118118 AUA ('Ask Us Anything') service provided by The Number UK Limited, is a widely publicised service. On the 26th November 2008 the PhonepayPlus Executive ("the Executive") received a call from The Number with regard to expected negative news coverage in the national newspapers the following day. This concerned potentially offensive texts which had been sent to a consumer using the 118118 AUA service. On the 27th November 2008 articles appeared in national newspapers regarding jokes of a potentially offensive nature regarding Pakistani / Asian jokes.

A single complaint was received by the Executive on the 27th November 2008. This complaint appeared to be received from the same complainant as had made the complaints directly to 118118 and to various newspapers.

A further article appeared in a national newspaper on 28th November 2008 regarding a potentially offensive text which had been sent to a consumer using the AUA service which made comments about the private life of a television sports personality.

The Executive's understanding of how the service was promoted and operated

The 118118 AUA service was promoted via:

- TV commercials - ITV, Channel 4, Channel 5 and satellite TV stations.
- TV sponsorship of The Simpsons.
- National radio via the "Newslink" network.
- Tube card posters (above seating in London Underground trains)

- Coffee Republic coffee cups, branding in 36 London taxis and on bar media such as beer mats and washroom panels.
- London Underground escalator panels.
- UK Press – Advertisements in Metro, The Sun, The Mirror, The News of the World, The Daily Star, Zoo and Nuts.
- Online banner advertisements on MSN, Time Out, Yahoo, and View London web sites.

AUA provided a service whereby consumers could call the number and ask a question on a variety of subjects and receive an answer to the question posed via the 118118 number. The consumer was also able to request travel directions, generic advice or jokes. The service charged a one off fee of 60 pence which enabled the user to ask as many questions as they wished to up to midnight, without incurring any further cost. The service provided a response to questions asked by way of text messages sent to the user's mobile phone.

The service operated via a number of call centres in Texas (US), Kansas (US), Makati (Philippines), Santa Rosa (Philippines) and Cardiff (UK). The Cardiff office performed a management and product development function and was not involved in the transmission of messages.

Complaint Investigation

The investigation was initiated as a result of a self reporting by The Number (UK) Ltd on 26th November 2008 which was prior to the widespread media coverage on 27th November 2008.

The articles in the newspapers referred to 2 jokes which had been sent to a Muslim student which said,

- a. 'What's the difference between ET and an Asian? ET got the message and went home' and
- b. 'How do you save a drowning Pakistani? Take your foot off his head.'

The complaint received by the Executive on the 27th November 2008 stated that:

"More than a week ago, I and a friend decided to text the service after we have seen it advertised. What happened was that we received jokes from the service, which were just everyday jokes at first. Then we receive two racist jokes all together. Since then the story has been in the news and they have admitted it's a breach of standard, but they have not sacked the person involved even though they said they would deal with it accordingly. We could have resolved the situation when I phoned them last week, but they were rude and didn't take it seriously."

The Sun newspaper also reported on a further 118118 text on November 28th, 2008. This article raised concerns regarding a further message which was alleged to have stated: 'Mark Lawrenson is married and regularly takes it up the arse. Thx'. The Executive conducted investigation into both matters and issued a letter requesting

information from The Number on 28th November 2008. A reply was received on 5th December 2008.

During the assessment of message logs supplied by The Number (UK) Ltd to the Executive in response to its request for information the Executive discovered the existence of messages from the AUA service which appeared to provide addresses for brothels following specific requests for such information. It appeared from further investigation that one of the addresses supplied was in Preston, Australia and not Preston, UK (the address of the recipient). The other address given was a Gentleman's Club in Preston, UK.

In a letter dated 15th December 2008 the Executive raised potential breaches of paragraphs 5.3.1 d, e, and g of the PhoneyPayPlus Code of Practice 11th Edition (amended April 2008) ("the Code"). The Number replied on 22nd December 2008. An addendum to the breach letter was issued on 30th January 2009, and this was responded to by the service provider on 4th February 2009.

The Tribunal made a decision on the breaches raised by the Executive on 19 February 2009. Prior to the Tribunal considering the breaches raised, it heard informal representations made in person by representatives of the service provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

HARM AND OFFENCE (Paragraph 5.3.1d)

*"Services and promotional material must not, or must not be likely to:
d induce or promote racial disharmony"*

1. The Executive was concerned that SMS messages received by a complainant were likely to induce or promote racial disharmony. During the investigation of the complaint, call logs were provided showing that the AUA service received an inbound SMS worded "*Asian joke*" on 15th November 2008 and sent an SMS text in reply containing a joke: "*Q: What's the difference between ET and an asian. A: ET got the message and went home. thx*", which was sent on the same date. The call logs also showed an inbound message sent to AUA service on the same date stated: "*Pakistani Joleep [joke]*", and the text sent in response from AUA was: "*Q: How do you save a drowning Pakistani? A: Take you foot off his head. thx*". The Executive considered that the content was such as to be likely to induce or promote racial disharmony which is prohibited under paragraph 5.3.1d of the Code.
2. The service provider accepted that the messages had been issued by AUA. The service provider made it clear that since it entered the UK market in 2003 it has strived to make new, innovative and high quality services available to its customers. The service provider said that it had endeavoured to ensure that the services provided by AUA complied at all times with relevant legal and regulatory requirements and that they remained within generally acceptable standards. The

service provider expressed its disappointment that the events in question had occurred and, to the extent that the messages in question had caused distress or offence to their recipients, this was “deeply regrettable”.

The service provider stated that it received on average 100,000 AUA texts per day and that the complaints it received represented a very small percentage of the total volume, which it suggested was evidence of a transitory problem and not a systemic one. The service provider made it clear that the messages were not transmitted via AUA’s automated “keyword” joke service and that it had now put in place a “*profanity filter*” which was now fully operational. The service provider also stated that its Customer service training materials demonstrated that issues of a sensitive nature were included in the training agenda.

The service provider went on to state that there was a deliberate attempt by the complainant to undermine the AUA service by soliciting inappropriate content and that, in common with his requests for Asian/Pakistani jokes, the complainant’s call log showed a pattern of him repeatedly asking for information of that type.

The service provider also provided a copy of the call log in which it was reported that the complainant had stated:

“I’m sure you’ve seen the papers by now and you’ll know what it is regarding. My number is 07870282548. If you wish to settle out of court then I’d advise you give me a call otherwise we will be taking legal action. Thank you.”

The service provider also stated that it had made an unreserved apology to the complainant as soon as details of his complaint came to light, and that it had taken disciplinary action against the individual agents involved in the delivery of the texts for conduct which it considered to be unacceptable.

During informal representations made to the Tribunal, the service provider provided assurances that the company had found the incident regrettable and had made firm changes to its internal processes and systems so as to ensure that the incidents did not recur.

3. The Tribunal considered the evidence and concluded that the service was likely to have induced or promoted racial disharmony as a result of sending the two messages identified by the Executive. The Tribunal noted the service provider’s submission that the problem was not a systemic one, and acknowledged the improvements put in place since the incident occurred. The Tribunal upheld a breach of paragraph 5.3.1d of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

HARM AND OFFENCE (Paragraph 5.3.1e)

*“Services and promotional material must not, or must not be likely to:
e cause grave or widespread offence”*

1. The Executive was concerned that SMS messages being sent by the service contained content which may have caused grave or widespread offence. During the investigation, call logs were provided which showed that on 13th November 2008 the AUA service received an inbound SMS text asking "*Is Mark Lawrenson gay?*". The service then responded on the same day with an SMS text stating: "*Mark Lawrenson is married and regularly takes it up the arse. thx*", which was sent on the same date. The Executive considered that the content was such as to be likely to cause grave or widespread offence which is prohibited under paragraph 5.3.1e of the Code.
2. The service provider reiterated its earlier comments in response to this alleged breach of the Code. It further commented that the message in question was sent to one individual and that no complaint concerning the content of the message has been received from that individual.
3. The Tribunal considered the evidence and determined that the service was likely to have caused grave or widespread offence as a result of sending the text message in question.. Again, the Tribunal noted the service provider's submission that the problem was not a systemic one, and acknowledged the improvements put in place since the incident occurred. The Tribunal upheld a breach of paragraph 5.3.1e of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

HARM AND OFFENCE (Paragraph 5.3.1g)

*"Services and promotional material must not, or must not be likely to:
g promote or facilitate prostitution"*

1. During the course of the investigation, the Executive became aware of SMS messages being sent by the service containing content which appeared to include addresses of 'brothels'. These were sent in response to a request made by the complainant for such details. During the investigation, call logs were provided showing that the AUA service received an inbound SMS text worded "*Brothels in Preston?*" which was later followed up with: "*Any others*", both sent on 16th November 2008. The AUA service sent two SMS texts in reply containing two different addresses – the first relating to a place in Preston, Australia, and the second relating to a Gentleman's Club in Preston, United Kingdom. The Executive considered that the provision of these addresses to a consumer seeking a brothel amounted to facilitation of prostitution which is prohibited under paragraph 5.3.1g of the Code.
2. The service provider reiterated its earlier comments in response to this alleged breach of the Code. It stated it believed that in this case, since prostitution is illegal in the UK, an agent had attempted to provide value to the customer by providing information relating to a Lap Dancing Club and /or Gentleman's Club

but had not directly answered the question posed. The service provider did not believe that there was any intent on the part of the agents concerned to promote or facilitate prostitution and stated that it would not in any way encourage or condone such activities. The service provider questioned whether, as a matter of fact, listing information for a 'brothel' had been sent in each instance and therefore whether it could properly be said to have promoted or facilitated prostitution. It noted that the Preston, UK address appeared to be a legitimate establishment that operated within the requirements of the law.

The service provider stated that, in future, the profanity filter would hopefully identify incoming messages requesting these kinds of information and automatically prevent them from being handled by the agents. The service provider further stated that, since the events of November 2008, it had issued a briefing note to all agents which specified that requests for prostitutes, brothels and massage parlours are to be sent the response "there are some questions...." (i.e, questions that it could not answer).

3. The Tribunal considered the evidence and concluded that the texts sent by the service were likely to facilitate prostitution. The Tribunal noted that these texts had been sent in response to specific requests for details of 'brothels'. The Tribunal concluded that, regardless of whether the addresses given were actually for brothels or merely for Gentleman's Clubs, this did not prevent the messages from being likely to facilitate prostitution. Again, the Tribunal noted the service provider's submission that the problem was not a systemic one, and acknowledged the improvements put in place since the incident occurred. The Tribunal upheld a breach of paragraph 5.3.1g of the Code.

Decision: UPHELD

SANCTIONS

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

In determining the sanctions appropriate for the case, the Tribunal concluded that there were no aggravating factors in this case.

In mitigation, the Tribunal noted the following factors:

- The service provider had made attempts to identify the risk of harm and offence which could result from its agents' responses to questions from the public by putting in place some training programmes and systems designed to prevent offensive communications.
- The breaches were inadvertent in nature insofar as the design of the service was concerned
- The service provider had reported the incident to the Executive when it became aware that breaches had occurred.

- The service provider had cooperated with the Executive throughout the investigation and had taken action to change its systems and processes immediately following the incident.

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

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand.

The Tribunal did not impose any other sanction as it accepted the service provider's assurances that it deeply regretted the breaches, that the messages causing harm and offence had only been received by one individual in each case and not broadcast more widely, and in particular that effective systems were now in place to prevent a repeat of such breaches.

The Tribunal instructed the Executive to conduct occasional monitoring of the service for a period of six months.