

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 29 October 2009

TRIBUNAL SITTING No. 39/ CASE 3

CASE REFERENCE: 818522/AB

Service provider:	Vale DS Communications Ltd, Woking
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:	Opal Telecom
Number of complainants:	9

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

BACKGROUND

The PhonepayPlus Executive (the 'Executive') received nine 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 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. Some of the 0871 number range provided by the Service Provider had been complained about. The results are below:

08717812030 - 33
08717812031 - 26
08717812032 - 32
08717812033 - 45
08717812034 - 44
08717812036 - 35
08717812037 - 31
08717812038 - 44
08717812039 - 25
08717812040 - 25
08717812041 - 0
08717812042 - 0

08717812043 - 0
08717812044 - 0
08717812045 - 0
08717812046 - 0
08717812047 - 0
08717812048 - 0
08717812049 - 0

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 21 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 are as follows:

““Did it to me this morning at 2am waking me up when I have to be up for work at 5am! I was concerned as well thought it might be important, when I called back it said the number I had dialled was not in use....weird!....”

“Got called at 4:07am today – really not impressed, makes me panic that something is wrong with family or friends!”

2. The Service Provider submitted that it had been unaware of when the promotion or marketing activity was running and, as such, it was just as disappointed and saddened to see that members of the public had received distressing calls at unacceptable times of the night. It stated that, even though it had not provided the actual 0871 service, it still acknowledged the inconvenience that had resulted and, with hindsight, it wouldn't have provided numbers to this particular Information Provider.
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, that expectation was 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 was not apparent to the 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 these numbers to the Information Provider in absolute good faith, on the understanding that they were going to be used for inbound marketing campaigns and/or promotions. It stated that it had also been under the impression that the Information Provider was supplying a fully legitimate service and, if prizes were being promised, then this would have been delivered upon.
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.

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 had no control of what information was actually being provided to the public who made, or received, the calls. It stated that, as part of its due diligence as a Service Provider, it always recommends to any of its dealers, partners or customers, that all information and pricing relating to these services is made fully available before going live.
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 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, therefore, 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, had not been presented with any content which 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 always made recommendations to any of its customers or dealers that any promotion or marketing activity must be compliant with all Codes of Practice – in this case, once it discovered that the service was not being used in accordance with its recommendation, it withdrew the numbers and contacted PhonepayPlus.
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 receiving 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 has not used all reasonable endeavours to ensure that its services were not promoted in an inappropriate way and, therefore, a breach of paragraph 5.12 appeared to have occurred.

2. The Service Provider stated that it was not privy to what database or list of numbers that the Information Provider had used for this service. The Service Provider stated that it supplied the numbers on the understanding that these strict guidelines were adhered to, and that no unsolicited calls would be made. It stated that as soon as it discovered this was not the case, it reacted by withdrawing 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, the Service Provider had not used all reasonable endeavours to ensure that promotional material was not harmful and, as such, 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 had been 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 £1,000