

Thursday 18 March 2010
TRIBUNAL SITTING No. 49/ CASE 2
CASE REFERENCE: 812535/AB

Information provider:	Antiphony Limited, Buckinghamshire
Service provider:	Wireless Information Network Limited, High Wycombe
Type of service:	N/A
Title:	Various
Network operator:	All Mobile Network Operators

**THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER
UNDER PARAGRAPH 8.7 OF THE CODE**

BACKGROUND

The service in question was the subject of a PhonepayPlus investigation and adjudication on 26 November 2009 (case ref. 812535) which resulted in sanctions being imposed on the Information Provider.

The Tribunal of the 26 November 2009 imposed the following sanctions:

- Formal Reprimand
- A fine of £50,000 (comprising £40,000 in respect of the upheld breaches with an uplift of £10,000 in respect of breach history)
- The Tribunal ordered the Information Provider to seek compliance advice in respect of this and all similar virtual chat services (whether or not these incorporated a contact or dating element) within two weeks of the publication of the Tribunal's decision, such advice to be implemented to the satisfaction of the Executive within two weeks of it being given
- The Tribunal also ordered that claims for refunds are to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid

Antiphony Limited paid the fine and administration charges in full and on time.

Between 11 December 2009 and 13 January 2010, the Executive had correspondence with the Information Provider regarding the compliance advice sanction which resulted in the Executive raising a concern that the Information Provider had sought compliance advice but failed to implement the changes to the satisfaction of the Executive, within the timing detailed in the wording of the sanction.

The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.7 of the Code.

Between 11 December 2009 and 13 January 2010, the Executive had correspondence with the Information Provider regarding the compliance advice sanction, which resulted in the Executive raising a concern that the Information Provider had sought compliance advice but

failed to implement the changes to the satisfaction of the Executive, within the timing detailed in the wording of the sanction.

On 28 January 2010, a PhonepayPlus Executive randomly monitored the internet and discovered a website promoted by the Information Provider. This promotion had never been submitted to the Executive for compliance advice.

It is the opinion of the Executive that the advice provided was not adhered to within the deadline prescribed by the sanction and, therefore, the Information Provider breached the sanction imposed by the Tribunal on 26 November 2009.

On 29 January 2010, the Executive alerted Antiphony Limited that it had failed to implement compliance advice to the satisfaction of the Executive and, therefore, the case would be dealt with by the Investigations team.

On 17 February 2010, because the Executive had not received a response to the breach letters dated 9 February 2010 and due 16 February 2010, the Executive left several voicemail messages with Antiphony Limited (the Information Provider), requesting an urgent call-back. As there was no response, the Executive contacted the Information Provider's Customer Care Manager and explained that the Information Provider had missed the deadline to respond to the breach of sanction letter.

On 17 February 2010, the Executive received correspondence from the Information Provider, explaining that it had failed to respond due to the downloading of the documents from the service 'YOUSENDIT' [an email device designed to send large documents]. A response to this was sent by PhonepayPlus' Head of Investigations, outlining his concerns, in particular regarding the confirmation the Executive received from 'YOUSENDIT', stating that the document had been downloaded by an email address that was associated with a director of the Information Provider on 9 February 2010.

The Tribunal made a decision on the breach raised by the Executive on 18 March 2010, having heard an Informal Representation from the Information Provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE BREACH OF SANCTION (Paragraph 8.9.3b)

The failure of any service provider to comply with any sanction within any reasonable time period imposed by PhonepayPlus will result in:

b a further breach of the Code by the service provider, which may result in additional sanctions being imposed.

The Executive submitted that, as a result of the sanction imposed by the Tribunal on 26 November 2009, the Information Provider had sought compliance advice in relation to its service(s) that had been the subject of the adjudication.

The Executive made reference to the following the sanction imposed by the Tribunal:

“The Tribunal ordered the Information Provider to seek compliance advice in respect this and all similar virtual chat services (whether or not these incorporated a contact or dating element) within two weeks of the publication of the Tribunal’s decision, such advice to be implemented to the satisfaction of the Executive within two weeks of it being given.”

The Executive made reference to the synopsis table (a document used by the PhonepayPlus Executive to track compliance advice and outstanding issues), which raised compliance concerns by the Industry Support & Policy team. The table noted that, in the opinion of the Compliance Executive, the Information Provider had failed to implement the Executive’s compliance advice to all of its services and promotional material. This included requesting that the service promotion and reminder text messages clearly reflect the whole cost pricing and the requirement that any adult service, irrespective of how it is promoted, run on an adult shortcode.

As part of the background to the case, the Executive had also stated that it had randomly monitored the internet on the 28 January 2010 and, upon discovering a website in relation to an Information Provider service, it stated that the promotional material in relation to the website entitled ‘text-date.com’ had not been submitted to the Executive for compliance advice in accordance with the sanction imposed by the Tribunal of 26 November 2009.

Furthermore, as part of the background of the case, the Executive had also identified two further virtual chat promotions in relation to services operated by the Information Provider which were broadcast on various television channels between December 2009 and February 2010. These promotions had not been submitted to the Executive for compliance advice in accordance with the sanction imposed by the Tribunal of 26 November 2009.

The Executive submitted that, in light of the evidence provided, it was of the opinion that the Information Provider’s virtual chat services had failed to adhere to the advice given by the Executive within the required deadline imposed by the Tribunal and as such the Information Provider was in breach of the sanction imposed by Tribunal.

2. The Information Provider made reference to the sanction wording imposed by the Tribunal and stated that the entire flimsy case of the Executive appeared to be built around the existence of an old, inaccessible and forgotten website entitled ‘text-date.com’. It stated that this website had lain dormant for many months and, over the past six months, only five users had stumbled upon it, spending a total of £52.

The Information Provider made reference to the Executive’s submission that this website, and the service operating behind it, was not in full compliance with the latest Virtual Chat Services Help Note (including text chat)[sic]. It stated that it was of the opinion that the service, although consisting of reasonable terms and conditions, had been missing a small number of changes to bring it into line with the latest regulation. The reason for this was that the Information Provider’s marketing manager had assumed the site was no longer in existence – de-commissioned and unavailable. In fact, the site was still accessible – if the consumer knew the exact URL to type in.

It also made reference to the Executive’s submission that the site had been discovered whilst “randomly monitoring the internet”. It stated that it challenged this version of

events and that the website had been inactive for so long, that it had forgotten it was still there.

The Information Provider stated that there had been no traffic on the website for a very long time and the fact that the site was apparently active had been the basis, in its opinion, on which the Executive was seeking to issue further breaches for non-compliance or adherence to a previous sanction.

It stated that, in hindsight, the website should have been 'killed off' months ago; however, in reality, it was killed off, by being inaccessible. For this reason, it believed that the Executive was trying to paint not only an unfair, but possibly a deliberately misleading picture, in order to try to easily secure a breach of sanction ruling against the Information Provider.

It stated that it contested that the Executive was "randomly monitoring the internet" and was of the opinion that it is more likely that the Executive referred to its internal case-notes for a previous and very minor case (no fine) upheld against 'text-date.com' and had used its insider knowledge of the URL to locate the site. It stated that there has been no public discovery of the site, and no consumer harm. In addition, it stated that, before the reader started to believe that the site was in its unchanged form in any way misleading, the terms and conditions of use on the site were clearer than most competitor services being advertised in the mainstream today.

The Information Provider acknowledged its responsibility to ensure even old and forgotten websites were either pulled down or kept refreshed with latest terms, but that its argument was based around the complete lack of any obvious consumer harm, the apparent willingness of the Executive to go to any lengths to try and prove a point, and just the basic unreasonableness of being found in breach of sanction based on a dusty, buried, inactive website.

3. The Tribunal considered the evidence including the synopsis table and was satisfied that several advertisements were aired on a non-adult television channel in January 2010 and that these advertisements had not been submitted to the Executive in accordance with the sanction imposed by the Tribunal of 26 November 2009 (case ref: 812535) that had required the Information Provider to submit all promotional material in relation to all of its virtual chat services.

The Tribunal was satisfied that the website known as 'text-date.com' had been a genuine oversight by the Information Provider and made no finding in relation to the compliance advice in relation to the promotion.

The Tribunal noted that the Information Provider had not accepted the advice given by the Industry Support & Policy team in relation to the sanction and had resisted the advice in relation to the £10 whole cost pricing and the requirement that any adult service run on an adult shortcode. The Tribunal considered the Informal Representation made by the Information Provider on this point and was satisfied that the Information Provider had failed to implement the compliance advice to the satisfaction of the Executive.

The Tribunal was disappointed to note that the Information Provider had approached the compliance sanction process with insufficient regard to the purpose of the dialogue with the Industry Support & Policy team. The Tribunal noted that the Information Provider had delayed in providing its promotions for copy advice and had been unnecessarily challenging in relation to the compliance advice given.

The Tribunal decided to uphold a further breach of the Code in accordance with paragraph 8.9.3b of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal took the view that non-compliance with any sanction imposed by a Tribunal is **very serious** and could potentially incur a maximum fine, although the circumstances of the individual case should be taken into account when deciding on which sanctions are appropriate.

There were no specific aggravating or mitigating factors for the Tribunal to consider.

The Tribunal expressed the expectation that the Information Provider would approach the compliance process in good faith.

Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- Fine of £75,000;
- The Tribunal ordered that the Information Provider remedy the breach by complying with the original sanction.