

# THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 21 January 2010  
TRIBUNAL SITTING No. 45/ CASE 2  
CASE REFERENCE: 819430/GL

Service provider:	Royal Northern Star Ltd, London
Information provider:	Claire Powell, London
Type of service:	Fixed-line, sexual entertainment service
Service title:	Unknown
Service numbers:	Various
Cost:	45-50p per minute from a BT landline
Network operator:	TG Support Ltd
Number of complainants:	1

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

### BACKGROUND

In September 2009, the Executive received an industry complaint from a Network Operator in relation to a range of nine 070 numbers operating the same service that contained the same recorded explicit adult content. Upon calling one of these 070 numbers, a recording of a female voice would play. The recording stated that she (the female voice) would provide her mobile number and email address later in the call, with a view to meeting and engaging in sexual activity at no charge.

During the course of its monitoring, the Executive found the same recording occurred on various 070 numbers. The recording lasted 25 minutes, and a mobile number and email address were provided at the end of the recording. However, when the Executive called the mobile number, it was connected to a voicemail and the Executive was unable to speak to anyone. The Service Provider terminated the service within 11 days of its commencement on the basis of its own monitoring

#### **(i) The Service**

The Executive considered that the service was a sexual entertainment service (SES) and that it had been wrongly provided on 070 numbers. The Executive considered that this service was a premium rate service and was regulated by PhonepayPlus.

The Executive had identified a number of issues, which it believed were potentially in breach of the Code:

- a) The Executive noted that SES are not permitted to operate on 070 numbers and, where it appears to the Executive that the service operating on an 070 personal number is a premium rate service and an SES, PhonepayPlus will apply its Code of Practice and will commence an investigation accordingly. The Code defines SES under paragraph 7.11.1

of the Code as “services of a clearly sexual nature or any services for which the associated promotional material indicates, or implies, that the service is of a sexual nature”.

- b) The service did not appear to be a genuine contact service, but an attempt to generate revenue offering an SES on 070 numbers. The service also misled users into thinking it was a genuine contact service through the use of 070 numbers, which consumers may have mistaken for a mobile number as opposed to a premium rate service. However, all the 070 numbers used for the service played the same recording. Had this been a genuine contact service, there would appear to be no need for the use of multiple 070 numbers.
- c) There was also an undue delay by keeping callers on the line for as long as possible to obtain the mobile number and email address that are given at the end of the 25-minute recording, with the inducement of free sex.

## **(ii) Monitoring**

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

07093031779  
07093031798  
07093031773

The whole recorded message lasted 25 minutes. The Executive called the mobile number given at the end of the recorded message but was unable to speak to anyone. Instead, the Executive was played a recorded message stating:

Message 1

*“We can now send a free text to the person you are calling as they are not available to take your call at the moment. If you would like us to send a text please press 1 now or if you prefer to try again later then please hang up.”*

Message 2

*“The mobile phone you have called is not available. The other person has hung up.”*

When the Executive tried calling the three 070 numbers and the mobile number again in the following month (October 2009), the 070 numbers rang but then cut off after one ring, while the mobile number went straight to the same recorded message as Message 1 (above).

## **(ii) The Investigation**

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

The Executive issued a breach letter to the Service Provider on 5 November 2009, raising potential breaches of paragraphs 3.3.1, 5.4.1a, 5.4.2 and 7.11.5a-c of the PhonepayPlus Code

of Practice (11<sup>th</sup> Edition Amended April 2008) ('the Code'). A formal response was received by the Executive on 3 December 2009.

The Tribunal made a decision on the breach raised by the Executive on 21 January 2009.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **DESIGNATED NUMBER RANGE (Paragraph 3.3.1)**

*"Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service, or where Ofcom or a network operator has restricted certain codes or number ranges from being used for particular purposes or for the provision of particular categories of service, those codes or number ranges must not be used in contravention of these restrictions. Ofcom's designations will have precedence over any issued by a network operator."*

1. The Executive submitted that Ofcom has designated 070 prefixed numbers for use only as personal 'follow me' numbers, which should not be used for sexual entertainment services.

It submitted that paragraph 7.11.1 of the Code defined sexual entertainment services as: *"services of a clearly sexual nature or any services for which the associated promotional material indicates, or implies, that the service is of a sexual nature"*.

It submitted that premium rate sexual entertainment services had to be placed on 09 prefixes that have been designated by Ofcom for special premium rate service use. It submitted that Ofcom's definition of Controlled Premium Rate Services ('CPRS') included all sexual entertainment services, regardless of call price, and currently the designated prefixes for sexual entertainment services (SES) were 098, 0909 & 0908.

It submitted that SES should not be operating on 070 numbers, and that the 25-minute recording of a female offering free sex in relation to this service had contained explicit adult content. The Executive made reference to the complainant and monitoring evidence, and submitted that the service had not been used as a personal 'follow me' number, but as a sexual entertainment service. It followed, therefore, that the service had not been operated on the correct prefixes for sexual entertainment services as designated by Ofcom.

2. The Service Provider stated that the nine 070 personal numbers had been issued to a person called Claire Powell on the 9 Sept 2009 for the strict use as a 'follow me' service only. Miss Powell had explained that she wanted to use the numbers to advertise herself on various dating websites.

It stated that, upon issuing Miss Powell with 070 numbers, it had called the service to see that the guidelines were being followed correctly and had determined that this was the case.

The Service Provider stated that, as part of its due diligence checks, it then called the numbers again on 25 of Sept 2009 and heard the message Miss Powell had put on her numbers. It immediately requested that Miss Powell remove the recorded message,

which she failed to do. On 28 Sept 2009 (the next working day), the Service Provider terminated all nine 070 numbers that had been issued to Claire Powell on the basis of non-compliance.

It acknowledged that the service had been unsuitable for the number ranges provided.

3. The Tribunal considered the evidence and concluded that the service had been a sexual entertainment service in accordance with the definition at paragraph 7.11.1 of the Code and, as such, had not been operated on the correct 09 number ranges as designated by Ofcom. The Tribunal upheld a breach of paragraph 3.3.1 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 this had not been a genuine contact service, but a sexual entertainment service attempting to get callers to remain on the line for the full 25 minutes, induced by the prospect of free sex.

It submitted that the same recording was offered on various 070 numbers, and that a person genuinely wanting to leave a number at which to be reached would not have needed multiple 070 numbers. The use of different 070 numbers appeared to be an attempt to give the impression that each 070 number was a genuine, and different, individual, and not a premium rate service with the same female recording on each number. The Executive submitted that consumers had been misled into calling the 070 numbers in the belief they were contacting a genuine contact service, and that consumers calling the 070 numbers would not have had a reason to think that this was not, in fact, the case.

The Executive further submitted that the 070 ‘personal number’ was a relatively unknown technology to the average consumer and, as such, could be confused for a mobile number. Consumers may have been misled into believing that, by calling the 070 number, they were calling a mobile phone number and not, in fact, responding to a commercial enterprise, for which they would incur charges. It submitted that the consumer expectation of responding to a contact service was usually to gain more information and, in this case, that expectation had been defeated, as calling the number had engaged the consumer with a sexual entertainment service. It submitted that, in light of this, the cost of the call may not have been apparent to the consumer until they received their bill and, as such, they were misled.

2. The Service Provider stated that its customer had requested twenty 070 personal numbers to keep track of where her calls were coming from (i.e. which advertisement had generated the best response). It stated that that it had agreed to provide Miss Powell with nine 070 numbers and had originally believed that she had required these for a genuine ‘follow me’ purpose. It was only when it discovered, through its own monitoring, that Miss Powell had added her rather long and graphic voicemail that it changed its mind about the service.

3. The Tribunal considered the evidence and concluded that consumers were likely to have been misled, by the service and the use of 070 numbers, into thinking that it gave rise to a dating opportunity, rather than being a SES with commercial aims. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

**Decision: UPHELD**

**ALLEGED BREACH THREE  
UNDUE DELAY (Paragraph 5.4.2)**

*“Services must not be unreasonably prolonged or delayed.”*

1. The Executive submitted that there appeared to be an undue delay, attempting to keep callers on the line for as long as possible to obtain a mobile number and email address which were provided at the end of the 25-minute recording. During this time, callers were induced to remain on the line by the prospect of ‘free sex’. It submitted that there was no indication of how long consumers would have to wait in order to obtain the mobile number and email address.
2. The Service Provider agreed with the Executive that 25 minutes was too long for a voicemail message. It stated that, if it had been informed by the Information Provider that she wanted to give out such lengthy information and in such a graphic way, then the Service Provider could have issued her with a 09 adult number. It stated that it had not been made aware of Miss Powell’s intention in relation to the recorded message.
3. The Tribunal considered the evidence and concluded that a caller interested in dating would have called the number under the impression that the message was from a genuine contact. Further, callers were informed to stay on the line to be issued with the woman’s mobile number and were induced to stay on the line by the prospect of a sexual liaison. In the context of this service, the Tribunal found that the 25-minute recorded message, before being given that mobile number, had been unreasonably prolonged and callers had been unreasonably delayed. The callers were also given no indication that this was how long it would take to receive the desired information. The Tribunal upheld a breach of paragraph 5.4.2 of the Code.

**Decision: UPHELD**

**ALLEGED BREACH FOUR  
SEXUAL ENTERTAINMENT SERVICES (INTRODUCTORY MESSAGE) (Paragraph 7.11.5a-c)**

*“Save where the relevant network operator has provided an alternative solution acceptable to PhonepayPlus, all sexual entertainment services must provide a message at the beginning of the service stating that:*

- a the user must be over the age of 18,*
- b the user should be either the bill-payer or have the bill-payer’s permission to call the service,*
- c service details may appear on the phone bill.”*

1. The Executive submitted that the 25-minute recording, containing explicit adult content and operating on various 070 numbers, had been a sexual entertainment service, and not a genuine contact service. As such, the service had failed to provide the information required in relation to SES under Code paragraph 7.11.5a-c.
2. The Service Provider stated that it had been told that the numbers were required for a genuine 'follow me' purpose but that, following its monitoring, it agreed that it was 'without doubt' of a clear sexual nature and that this had led to its termination of the service.
3. The Tribunal considered the evidence and concluded that the service came under the definition of a sexual entertainment service in paragraph 7.11.1 of the Code, as it had clearly been of a sexual nature. It further found that the service had failed to provide the information required. The Tribunal upheld a breach of paragraph 7.11.5a-c 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 behaviour of the Information Provider was wilful in relation to the operation of the service.
- The behaviour of the Service Provider was reckless in relation to its poor due diligence, having regard in particular to its agreement to provide nine 070 numbers for a service that did not require that many numbers.
- The cost paid by individuals was high – consumers that heard the full 25 minutes incurred a cost of £12.23.
- Misleading and improper use of 070 numbers has been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The Service Provider was prompt in its monitoring and in its termination of the service, following its earlier lack of due diligence.
- The Service Provider co-operated with the Executive to resolve the outstanding issues.

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

Having taken into account the aggravating and mitigating factors, 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 revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;

- £750 fine;
- The Tribunal ordered that claims for refunds are to be paid by the Service Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.