

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 15 April 2010
TRIBUNAL SITTING No. 51/ CASE 3
CASE REFERENCE: 827372/JI

Network Operator: Starcomm Limited, Wetherby

THIS CASE WAS BROUGHT AGAINST THE NETWORK OPERATOR UNDER PARAGRAPH 9.1 OF THE CODE

BACKGROUND

PhonepayPlus received 25 complaints from members of the public regarding unsolicited missed calls being made from 070 prefixed numbers which were operating on the Starcomm Limited ("Starcomm") network.

The complaints were linked to the Service Provider known as Mr Jaswinder Singh and, as a result, an emergency procedure investigation was initiated by PhonepayPlus in relation to Mr Jaswinder Singh (Case reference 784649). This Service Provider was found to be in breach of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code') on 8 January 2008.

The Investigation

The Executive conducted this matter as a standard procedure investigation in accordance with paragraph 9.1 of the Code.

The Executive sent a breach letter dated 14 January 2010 to the Network Operator raising potential breaches of the PhonepayPlus Code of Practice (11th Edition Amended April 2008) ('the Code'). A formal response to the breach letter was received by the Executive on 29 January 2010, following a request for an extension by the Network Operator.

The Tribunal made a decision on the breaches raised by the Executive on 15 April 2010.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

GENERAL RESPONSIBILITIES PREVENTION OF EVASION OF SERVICES (Paragraph 2.1.1b)

"Network operators must ensure that PhonepayPlus regulation is satisfactorily maintained by:

b taking all reasonable steps to prevent the evasion or undermining of the regulation of premium rate services."

1. The Executive considered the Network Operator to be in breach of paragraph of 2.1.1b on the following grounds:

Ground 1

The Executive submitted that during the course of its investigation in relation to Jaswinder Singh (case ref 784649) on 18 December 2008, the Network Operator ('Starcomm') had stated the following in an email: "*I confirm that in this case all calls lasted no more than 1 minute and no less than 1 second. As there are clawbacks to Starcomm on this range and additional costs to the caller I pointed this out to Mr Singh who stated that the calls would never last longer than 1 minute.*".

It submitted that in a separate email sent on the same date, Starcomm had stated as follows: "*I have written a manual SQL query to check the calls which went over 1 minute which appear to represent less than 5% of the total calls.*"

It submitted that on 22 December 2008, Starcomm stated that: "*In terms of my customer Mr Singh – it was easier to just count the calls and pay him 30ppc – irrespective of call duration – and this is how I have been calculating his commission – apparently losing money again – since a big proportion of calls were over 1 minute in call duration.*"

It submitted that on 5 January 2009, Starcomm stated in an email: "*our billing platform is incapable of accurately billing for any call longer than one minute...I simply hadn't bothered to query for calls of a duration greater than 1 minute as I had no need – until you asked – when I had to create a new query to do so – which then made my losses apparent.*"

The Executive submitted that as a result of Starcomm's failure to identify calls to premium rate numbers lasting over one minute at the time the service was in operation, it had not been in a position to discover that its client, Jaswinder Singh (the Service Provider), was operating the service contrary to its statement claiming that calls would last a maximum duration of one minute. It submitted that monitoring of the service, by Starcomm, at the time of operation was likely to have identified this discrepancy and subsequently any potential misuse of the '070' numbers.

The Executive submitted that it was of the opinion that Starcomm had not taken reasonable steps to prevent the evasion and undermining of the regulation of premium rate services.

Ground 2

The Executive submitted that in a telephone conversation on 15 December 2008, the sole director of Starcomm admitted to the Executive that he was not familiar with the Code as he had not dealt with regulatory matters for a period of four years. It submitted that he had stated that he last read the Code in the year 2000 and was unsure what had changed since that time. The Executive submitted that having explained that a network investigation may be initiated in accordance with section 2 of the Code, the sole director requested a weblink to the Code as he did not know where to find it.

It submitted that on 14 December 2008, Starcomm stated in an email: "*In regards to (item 6) the OFCOM Numbering Policy clearly defines the 09 number ranges as premium rate. It clearly defines 07 and mobile or personal numbering. From what you state it appears that the Adjudication Tribunal can decide if 01 or 02 (Geographic Numbers) are premium rate or not, which clearly doesn't match the policy as set out by OFCOM.*".

The Executive submitted that it was of the opinion that if Starcomm had had knowledge of the current requirements of the Code, it would have been in a better

position to identify potentially non-compliant services. It submitted that Starcomm was not familiar with the Code requirements at the time the breaches in respect of the Service Provider- Jaswinder Singh (case ref 784649) had occurred. Starcomm had not accepted that '070' numbers could be used as premium rate numbers and as such it had been unable to prevent the evasion and undermining of the regulation of premium rate services. It submitted that this was despite PhonepayPlus having issued a notice to industry regarding premium rate services operating on 070 numbers three months earlier.

Ground 3

The Executive submitted that in a telephone conversation on 26 November 2008, the Executive had spoken with the sole director of Starcomm, in relation to the investigation in relation to the Service Provider (case ref 784649). During the conversation, the director had stated that he believed the problems with the service had been occurring over the last two to three months but as he had been holidaying in China, he had not realised what was happening.

The Executive submitted that it was of the opinion that if Starcomm had suspected that there were genuine problems with the service, it should have taken steps at that time to identify the source of the problems and resolve the issues as opposed to waiting several months for an emergency procedure investigation to be initiated. It submitted that Starcomm had not taken all reasonable steps to prevent the evasion and undermining of the regulation of premium rate services.

2. The Network Operator responded to the Executive's allegations as follows:

Ground 1

The Network Operator stated that it had no good reason to suspect a change in the operation of a service that had originally been tested at the commencement of its contract. It stated that the Executive had failed to supply sufficient evidence to support its theory of wrong doing and had failed to supply real customer records of alleged complainants. It stated that when it had asked the Executive to supply evidence in the form of real telephone number complaints, the Executive supplied approximately seven unique telephone numbers, some of which were duplicated calls.

The Network Operator stated that its statements had been taken out of context and embellished- to paint its response in a negative light.

It stated that it was apparent that the regulator had failed to regulate or educate network operators as to the latest techniques used by those who may seek to undermine the regulation of premium rate services. It stated that the Service Provider had always stated that its services were in fact genuine and no evidence had been supplied to the Network Operator from real customers to indicate anything to the contrary. It stated that it was of the belief that the Service Provider had offered to refund all the complainants and yet the Service Provider's requests for complainant address details were apparently ignored.

Ground 2

The Network Operator stated that it was the regulator's duty to promptly inform network operators of any changes to the definition of "Premium Rate" and to educate network operators as to the implications of such changes. It stated that the Executive's reference to the PhonepayPlus warning to industry did not identify a specific date of this change. It stated that it was unreasonable to imply that its

contracts with its customers/former customers could be changed retrospectively to cater for later changes from PhonepayPlus. It stated that its customer contracts were reinforced by continual performance of their terms. It stated that contract law did not easily permit retrospective insertion of new clauses to enforce new rules.

Ground 3

The Network Operator stated that its statement had been taken out of context. It stated that the statement had been made following the Executive's investigation. It stated that it had been requested by the Executive to carry out an in depth analysis of its records. It stated that during this exercise it became apparent in December 2008 that a percentage of calls had exceeded the maximum one minute call duration which the Service Provider had originally stated was the maximum call duration. It stated that its own billing system had not automatically highlighted such excessive call times.

3. The Tribunal considered the evidence as a whole and found that the Network Operator had not been as familiar with the Code as they would expect for a Network Operator. The Tribunal were surprised about this lack of familiarity given the Network Operator's place in the industry. The Tribunal found that, whether this was genuine ignorance or wilful disregard, this had undermined the regulation of premium rate services as the Network Operator had not been familiar with its obligations. The Tribunal also found that the Network Operator had not carried out sufficient enquiries at the outset or undertaken sufficient monitoring in relation to the call durations of the service and had not been in a position to identify the Service Provider's abuse of the numbers. The Tribunal upheld a breach of paragraph 2.1.1b of the Code on all grounds.

Decision: UPHELD on all grounds

ALLEGED BREACH TWO

NETWORK OPERATOR'S SPECIFIC OBLIGATIONS (Paragraph 2.5.1b)

"When directed to do so by PhonepayPlus, network operators shall provide to PhonepayPlus within such time as it shall specify such information (including copy documents) as it requires in relation to any complaint received or investigation being carried out by it. Such information may include, but is not limited to:

b the number and length of calls to or from any number"

1. The Executive submitted that on 4 December 2008, it sent formal directions to the Network Operator 'Starcomm' asking it to supply call volume statistics for the service being investigated in respect of Jaswinder Singh (case ref 784649) by 11 December 2008. Within the directions, the Executive requested the specific duration of each of the calls to the premium rate numbers that carry the services in question.

It submitted that on 17 December 2008, Starcomm provided a document showing the total number of calls to the premium rate numbers and corresponding revenue amounts paid out to the Service Provider. On the same date, Starcomm stated in an email: *"Please note that as the number range in question is a Pence Per Call number range and not a pence per minute I have not included any call durations in the figures calculated as all calls were less than 1 minute in duration but greater than 20 seconds."*

The Executive submitted that on the same date, it sent an email to Starcomm stating: *"The pn7 tariff is 50 pence per call plus 3.95 pence per minute, therefore the duration of the calls are relevant to this case. If all calls lasted less than one minute, then we*

are satisfied with the total figure you supplied in item 7, but we will need to see a breakdown of the duration of those calls.”

On 18 December 2008, it submitted that Starcomm had stated as follows: *“I confirm that in this case all calls lasted no more than 1 minute and no less than 1 second. As there are clawbacks to Starcomm on this range and additional costs to the caller I pointed this out to Mr Singh who stated that the calls would never last longer than 1 minute.”* and in a separate email on the same date, Starcomm stated: *“I have written a manual SQL query to check the calls which went over 1 minute which appear to represent less than 5% of the total calls.”*

The Executive submitted that two sample call logs submitted by Starcomm on 19 December 2008 indicated that 1,468 calls, lasting longer than one minute, were made by consumers to the premium rate numbers being investigated in May 2008 and 184 calls were made in November 2008. The Executive submitted that it was of the opinion that this discrepancy had invalidated Starcomm’s previous claim that calls made from consumers to the premium rate numbers had lasted less than one minute.

It submitted that on 22 December 2008, Starcomm stated as follows: *“In terms of my customer Mr Singh – it was easier to just count the calls and pay him 30ppc – irrespective of call duration – and this is how I have been calculating his commission – apparently losing money again – since a big proportion of calls were over 1 minute in call duration.”* and on 5 January 2009, Starcomm stated in an email: *“our billing platform is incapable of accurately billing for any call longer than one minute.”*

It submitted that as Starcomm had failed to supply call volume statistics that demonstrated the call duration of all consumer calls for the entire period of operation of the service, the Executive had been unable to determine how much consumers were charged and subsequently the total revenue generated on the service.

It submitted that Starcomm had failed to comply with a direction to supply the length of calls made by consumers to the premium rate numbers.

2. The Network Operator (‘Starcomm’) made reference to the Executive’s email of the 17 December 2008 and stated that the Executive’s assertions had been inconsistent with the out-payment received by Starcomm from the originating network operator (British Telecom or ‘BT’). It stated that it was unaware of how much BT had charged BT customers for calling Starcomm’s ‘070798’ numbers beyond the first minute. It stated that it was apparent that different operators e.g. Mobile Operators and VOIP operators may charge much more or less than the 50 pence per call charged by BT. It also stated that it was unclear what BT charged for durations greater than one minute.

It stated that the Interconnect data supplied by BT to Starcomm had shown that BT paid Starcomm a gross sum of 42 pence per call for the first one minute of call duration and then deducted sums of approximately £0.03p from this 42 pence per call figure.

It stated that there was need for all operators to charge a consistent rate to members of the public so that it is easy for network operations to have accurate and consistent billing. It states that regulators had failed to enforce such a fixed rate on the industry and therefore the public risked being overcharged.

3. The Tribunal considered the evidence and concluded that it was satisfied that the Network Operator had not provided all the information required by the Executive in

relation to the alleged breach. It also found that the sample of calls provided by the Network Operator indicated that it had been capable of providing this information to the Executive and had failed to do so. The Tribunal upheld a breach of paragraph 2.5.1b of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

NETWORK OPERATOR'S SPECIFIC OBLIGATIONS (Paragraph 2.5.1e)

"When directed to do so by PhonepayPlus, network operators shall provide to PhonepayPlus within such time as it shall specify such information (including copy documents) as it requires in relation to any complaint received or investigation being carried out by it. Such information may include, but is not limited to:

e all details of outpayments including amounts, bank details and dates of payment to service providers (which may include such proof of payment as PhonepayPlus shall specify)"

1. The Executive submitted that on 4 December 2008, it sent formal directions to the Network Operator 'Starcomm' asking it to supply call volume statistics for the service being investigated in respect of Jaswinder Singh (case ref 784649) by 11 December 2008. Within the directions, the Executive requested the specific duration of each of the calls to the premium rate numbers that carry the services in question.

It submitted that on 17 December 2008, Starcomm submitted a document showing the total number of calls to the premium rate numbers and corresponding revenue amounts paid out to the Service Provider. On the same date, Starcomm stated in an email: *"Please note that as the number range in question is a Pence Per Call number range and not a pence per minute I have not included any call durations in the figures calculated as all calls were less than 1 minute in duration but greater than 20 seconds."*

The Executive submitted that on the same date, it sent an email to Starcomm stating: *"The pn7 tariff is 50 pence per call plus 3.95 pence per minute, therefore the duration of the calls are relevant to this case."*

On 18 December 2008, Starcomm stated as follows: *"I confirm that in this case all calls lasted no more than 1 minute and no less than 1 second. As there are clawbacks to Starcomm on this range and additional costs to the caller I pointed this out to Mr Singh who stated that the calls would never last longer than 1 minute."*

The Executive submitted that two sample call logs submitted by Starcomm on 19 December 2008, as requested by the Executive, indicated that 1,468 calls, lasting longer than one minute, were made by consumers to the premium rate numbers being investigated in May 2008 and 184 calls were made in November 2008. The Executive submitted that it was of the opinion that this discrepancy had invalidated Starcomm's previous claim that calls made from consumers to the premium rate numbers had lasted less than one minute.

The Executive submitted that if all calls made from consumers to the premium rate numbers lasted less than one minute, the total consumer revenue would have been easily determined by knowing the tariff of 50 pence per call plus 3.95 pence per minute and the total number of calls. It submitted that Starcomm had provided information that suggested that some consumers did make calls which lasted over one minute, but had failed to supply call volume and revenue statistics that showed

the duration of all consumer calls for the entire period of operation of the service, the Executive was unable to determine how much consumers were charged and subsequently the total revenue generated on the service.

It submitted that Starcomm had failed to comply with a direction to supply revenue statistics that demonstrated the total cost of the service to consumers.

2. The Network Operator 'Starcomm' stated that it had used a combination of Telephone exchange linked to an external server to answer calls to its '070798' range and had forwarded such calls on to the Service Provider. It stated that this had involved new technology and it was possible that if a customer had not terminated the call themselves, the call remained until the server terminated by default. It stated that at the time a new revision of the server software was released and its server was updated and that it was possible that a bug in this new software had not terminated the call in a timely manner as had happened before.
3. The Tribunal considered the evidence and concluded that it was satisfied that the Network Operator had not provided all the information required by the Executive in relation to the alleged breach. It noted that the Network Operator had received a request from the Executive, by email dated 17 December 2008, to confirm the figures it had provided. The Tribunal found that the Network Operator had failed to confirm the figures it had already provided and had failed to provide further financial and transfer figures as requested by the Executive. The Tribunal upheld a breach of paragraph 2.5.1e of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

NETWORK OPERATOR'S SPECIFIC OBLIGATIONS (Paragraph 2.5.1f)

"When directed to do so by PhonepayPlus, network operators shall provide to PhonepayPlus within such time as it shall specify such information (including copy documents) as it requires in relation to any complaint received or investigation being carried out by it. Such information may include, but is not limited to:

f details of other numbers held by relevant service providers."

1. The Executive submitted that on 4 December 2008, it sent formal directions to the Network Operator 'Starcomm' asking it to supply call volume statistics for the service being investigated in respect of Jaswinder Singh (case ref 784649) by 11 December 2008.

It submitted that Starcomm responded on 11 December 2008 by submitting a list of '1341' terminating mobile numbers with the last digit replaced by the letter 'x' (the Network Operator had stated as follows: *"last digit removed DPAct"*). The Executive also submitted that on 17 December 2008, Starcomm stated in an email: *"You already have the list of these numbers replace the X with digits 0 – 9"*.

It submitted that on 19 December 2008, Starcomm provided an updated list of '1610' terminating mobile numbers, however, there was no record of which terminating numbers corresponded with the '070' numbers which were being investigated. It submitted that when asked by the Executive to explain the discrepancy between the number of terminating numbers supplied on 11 December 2008 and those supplied on 19 December 2008 (which should have been the same data), Starcomm responded as follows: *"I have had to copy and paste the results of various queries (from an application called MS SQL Query Analyser) into an Excel spreadsheet and it*

is likely I have probably pasted duplicate data twice into the spreadsheet. I was rushing as I have had to do some other urgent work”.

The Executive submitted that Starcomm had failed to comply with a direction to supply a full list of terminating numbers for each corresponding ‘070’ number allocated to the Service Provider subject to investigation.

2. The Network Operator (‘Starcomm’) stated that it had been involved in High Court proceedings since February 2008 without legal representation. It stated that the deadlines imposed on Starcomm by the Court had interfered with its ability to comply as effectively with the Executive as may have been possible otherwise.
3. The Tribunal considered the evidence and concluded that it was satisfied that the Network Operator had not provided all the information required by the Executive in relation to the alleged breach. The Tribunal found that the Network Operator had not supplied the Executive with details of all the other terminating mobile numbers it held. The Tribunal was not satisfied that the numbers that had been supplied to the Executive on the 11 December 2008 and the subsequent clarification of the 19 December 2008 had been sufficient to discharge this obligation. The Tribunal took into account the Network Operator’s comment that the data was subject to the Data Protection Act 1998 however it highlighted paragraph 2.2 of the Code and found that the Network Operator’s obligations had not been discharged. The Tribunal upheld a breach of paragraph 2.5.1f of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

PAYMENT OF WITHHELD REVENUE (Paragraph 2.5.2e)

“When directed to do so by PhonepayPlus, network operators shall immediately: e pay over to PhonepayPlus such an amount of any money withheld pursuant to paragraph 2.3.3 or to sub-paragraph 2.5.2d above as PhonepayPlus may require in order to satisfy outstanding fines and/or administrative charges, such payment to be made within 30 days of such direction.”

1. The Executive submitted that it had sent post-adjudication formal directions to the Network Operator (‘Starcomm’) on 26 January 2009 requesting confirmation that the Network Operator was withholding revenue from the Service Provider pursuant to paragraph 2.5.2d of the Code, in respect of the Service Provider case (ref 784649). It submitted that on 28 January 2009, Starcomm responded to the formal directions by confirming that it was withholding a total of £3,945.90 from the Service Provider.

It submitted that on 25 March 2009, the Executive sent formal directions to Starcomm instructing it to make payment to PhonepayPlus of the amount withheld from the Service Provider to satisfy an unpaid fine and administrative charge. The deadline given was 30 days from the date of the directions being sent.

The Executive submitted that it contacted Starcomm several times by both telephone and email between March 2009 and January 2010 and submitted that, to date, it had not received payment from Starcomm in respect of the amount withheld from the Service Provider.

It submitted that Starcomm had failed to comply with a direction to make payment to PhonepayPlus of revenue it was instructed to withhold from a Service Provider to satisfy an unpaid fine and administrative charge.

2. The Network Operator stated that it had no intention of not paying the sum collected from the Service Provider. It stated that it had sought agreement from the Executive to its proposal to offset the sum owed against a credit it stated was due in relation to an administrative charge it had previously paid to the Executive. It stated that this sum had already been calculated and put forward to the Executive and that the Executive had not agreed.
3. The Tribunal considered the evidence and noted that the Network Operator argued that it was owed a sum of money by the Executive in relation to an administrative charge it had previously satisfied. However, the Tribunal found that the Network Operator had failed to make any payment (regardless of the disputed amount which was less than the amount held) as directed by the Executive and was therefore in breach of the Code. The Tribunal upheld a breach of paragraph 2.5.2e 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:

- There was an outstanding service provider fine from a previous adjudicated case which breached PhonepayPlus' Code as a result of the Network Operator's due diligence failures. The Service Provider, Jaswinder Singh (Case reference 784649), was fined £45,000.

There were no mitigating factors for the Tribunal to consider in this case.

Having taken into account the aggravating factor, 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, the Tribunal decided to impose the following sanctions:

- Formal Reprimand;
- The Tribunal considered that the totality of the breaches (including the Network Operator's failure to take reasonable steps to prevent the undermining of PhonepayPlus Regulation and its failure to comply with a direction to pay monies withheld when instructed to do so had a direct bearing on the fact that the outstanding fine was not paid, either in whole or in part. The Tribunal instructed the Network Operator to remedy the consequence of the breaches by paying the fine of £45,000 which was imposed on the Service Provider and had not been paid.
- A fine of £25,000