

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS  
TRIBUNAL DECISION**

**Thursday 21 June 2012  
TRIBUNAL SITTING No. 102 / CASE 1  
CASE REFERENCE: 07571**

Level 2 provider:	Andrew Price (also known as Thomas Ferguson, trading as Thomas Ferguson & Company)
Type of service:	N/A
Level 1 provider:	N/A
Network operator:	Elephant Talk Communications PRS UK Ltd

**THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER  
UNDER PARAGRAPH 4.4 OF THE CODE**

**BACKGROUND**

A service provided by Andrew Price (also known as Thomas Ferguson trading as Thomas Ferguson & Company), the Level 2 provider, was the subject of a PhonepayPlus investigation and adjudication (case reference 04321) which resulted in sanctions being imposed by a Tribunal on 29 March 2012. The sanctions imposed by the Tribunal included a fine of £10,000 and a requirement that refunds be paid to all consumers who claim a refund, for the full amount spent by them for the service, save where there is good cause to believe that such claims are not valid. In addition, an administrative charge of £6,501.60 was imposed.

The Level 2 provider did not respond to the initial investigation or Tribunal proceedings. In addition, it transpired that the address provided by the Level 2 provider when it registered with PhonepayPlus was not valid. As a result, PhonepayPlus sent correspondence electronically to the email addresses for the Level 2 provider as provided by the Network Operator.

The Level 2 provider was advised of the above sanctions and administrative charge in an adjudication letter, sent on 11 April 2012. Invoices in respect of the fine and administrative charge were sent to the Level 2 provider on the same date. In addition, the Level 2 provider was directed to complete a form in order to facilitate the payment of refunds. The Level 2 provider did not respond to any of the correspondence or directions and it did not make any payment to PhonepayPlus or provide any refunds to consumers.

As a result of the lack of communication from the Level 2 provider, the Executive directed the Network Operator, Elephant Talk Communications PRS UK Limited, to make refunds to complainants out of the withheld service revenue, which was £1,400.12. On 10 May 2012, despite one refund being paid by the Network Operator, £1,400.12 was paid to PhonepayPlus on behalf of the Level 2 provider.

**The Investigation**

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 22 May 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Paragraph 4.8.4(b)- Failure to comply with a sanction; and
- Paragraph 4.10.2- Non payment of an administrative charge.

The Level 2 provider did not respond to the alleged breaches. On 21 June 2012, the Tribunal reached a decision on the breaches raised by the Executive.

## **SUBMISSIONS AND CONCLUSIONS**

### **ALLEGED BREACH ONE**

#### **Paragraph 4.8.4(b)**

*“The failure of any relevant party to comply with any sanction within a reasonable time will result in:*

*(b) a further breach of the Code by the relevant party, which may result in additional sanctions being imposed...”*

1. The Executive noted that on 29 March 2012, the Tribunal adjudicated on a service that had been the subject of a PhonepayPlus investigation (case reference 04321) and had been operated and promoted by the Level 2 provider, Andrew Price (also known as Thomas Ferguson, trading as Thomas Ferguson & Company).

The adjudication resulted in the following two sanctions, amongst others, being imposed on the Level 2 provider:

- A fine of £10,000; and
- A requirement that refunds be paid to all consumers who claim a refund, for the full amount spent by them for the service, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

On 11 April 2012, the Executive sent the Level 2 provider a post adjudication letter which included an invoice for payment of the £10,000 fine to be made within 10 calendar days and a form requesting contact information for consumers for the purposes of refunds, which directed the provider to complete and return within 48 hours. The provider did not provide the information or return the form. In addition, the deadline for compliance with the fine sanction passed without receipt of payment.

In light of the above, the Executive submitted that a further breach of the Code had occurred under paragraph 4.8.4(b).

2. The Level 2 provider failed to provide any response.
3. The Tribunal considered the evidence and concluded on the basis of the Executive's submissions that there had been a further breach of the Code. Accordingly, the Tribunal upheld a further breach of the Code under paragraph 4.8.4(b).

**Decision: UPHELD**

### **ALLEGED BREACH TWO**

## Paragraph 4.10.2

*“Non-payment of the administrative charge within the period specified by PhonepayPlus will be considered a breach of the Code and may result in further sanctions and/or legal action.”*

1. On 29 March 2012, the Tribunal recommended that PhonepayPlus invoice the Level 2 provider 100% of the £6,501.60 administrative costs incurred as a result of the investigation and Tribunal proceedings. On 11 April 2012, the Executive sent the provider a post adjudication letter by email, which included an invoice for the payment of the administrative charges within 10 calendar days. The Level 2 provider did not pay the invoice. In light of the above, the Executive submitted that a breach had occurred under paragraph 4.10.2 of the Code.
2. The Level 2 provider failed to provide any response.
3. The Tribunal considered the evidence and concluded on the basis of the Executive’s submissions that there had been a breach of the Code. Accordingly, the Tribunal upheld a breach of the Code under paragraph 4.10.2.

**Decision: UPHELD**

## SANCTIONS

### Initial Overall Assessment

The Tribunal’s initial assessment of the breaches of the Code were as follows:

#### Paragraph 4.8.4(b)- Failure to comply with a sanction

The initial assessment of paragraph 4.8.4(b) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider’s failure to both pay the fine incurred and follow the Direction made by the Executive to ensure the payment of refunds demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

#### Paragraph 4.10.2- Non payment of an administrative charge

The initial assessment of paragraph 4.10.2 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider’s failure to pay the administrative charge demonstrates fundamental non-compliance with the obligations imposed by the Code, which in the view of the Tribunal, undermines public confidence in the regulatory regime and premium rate services.

The Tribunal’s initial assessment was that, overall, the breaches were **very serious**.

### Final Overall Assessment

The Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

## **Sanctions Imposed**

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

- A formal reprimand; and
- A prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate services for a period of 5 years (starting from the date of publication of this decision), or until the breaches are remedied by payment of the original fine and the original and instant administrative charges, whichever is the later.