THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Tuesday 2 October 2012
TRIBUNAL SITTING No. 110
CASE REFERENCE: 06680

Level 2 provider: Glass Mobile LLC

Level 1 provider: Netsize UK Limited

THIS CASE WAS BROUGHT BEFORE A REVIEW TRIBUNAL FOLLOWING THE GRANTING OF AN APPLICATION BY THE EXECUTIVE FOR A REVIEW UNDER PARAGRAPH 4.7 OF THE CODE

BACKGROUND

On a 19 July 2012, a Tribunal (the "**Original Tribunal**") decided a case against the Level 2 provider, Glass Mobile LLC. The case related to an Android app and a related premium rate subscription service (the "**Service**") that purported to extend the life of consumers' smart phone batteries. The Executive received 87 complaints regarding the Service. In the main, the complainants queried why they had incurred charges and raised issues concerning misleading promotional material.

The Original Tribunal hearing was heard in accordance with paragraph 4.5 of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**"). The Tribunal upheld two breaches of the Code, rule 2.3.2 (misleading) and rule 2.3.12(d) (pricing, the content of subscription reminder messages).

The Original Tribunal found that, notwithstanding the breaches, the Service was designed to provide a legitimate service and was capable of providing value.

The initial seriousness rating attributed to both breaches was 'moderate'. After taking into account one aggravating and four mitigating factors, the Original Tribunal considered the breaches overall to be 'minor' and issued the following sanctions:

- a formal reprimand;
- a fine of £5,000; and
- a requirement to seek compliance advice in relation to the Service.

On 30 July 2012, the Executive informally notified the Level 2 provider of the outcome of the Tribunal hearing. Full payment of the fine and PhonepayPlus' administrative charge was received on, or about, 3 August 2012.

On 2 August 2012, a subsequent Tribunal adjudicated against the Level 2 provider Sight Mobile LLC ("Sight Mobile") (which was a related, but separate, legal entity) in relation to a near identical service and near identical breaches of the Code. The Tribunal considered the breaches overall to be 'significant' and issued the following sanctions:

- a formal reprimand;
- a fine of £75,000; and

- a requirement for the Level 2 provide to submit current or future app-based services with a premium rate service billing mechanism, including promotional material for prior permission for a period of one year.

REQUEST FOR REVIEW

On 16 August 2012 the Executive submitted an application for review to the Chair of the Code Compliance Panel ("**CCP**"). Generally the Executive submitted that the decisions in relation to seriousness and sanctions made by the Original Tribunal were so unreasonable that no reasonable Tribunal could have reached them. The specific grounds were as follows:

- Ground 1: "Breach of Rule 2.3.2 of the Code – Misleading services: The initial assessment was unreasonable in all the circumstances and ought to have been considered more serious than 'moderate'."
- Ground 2: "Aggravating factors: A relevant aggravating factor relating to the failure of the original Track 1 procedure case used by the PhonepayPlus Executive did not appear to have been given sufficient consideration for the purpose of arriving at the final seriousness rating assessment."
- Ground 3: "Mitigating factors: Three out of the four mitigating factors were unreasonably considered to be relevant when making the final assessment."
- Ground 4: "The sanctions imposed were based on an unreasonably low final overall assessment, which was set at 'minor'; and the sanctions, including the fine sanction, were disproportionate and unreasonable in all the circumstances."
- Ground 5: "The adjudication as against another Level 2 provider, Sight Mobile LLC, in relation to the same product or service model, was so distinct as to demonstrate that the decision made in relation to the Glass Mobile LLC case was so unreasonable."

On 30 August 2012, the Chair of the CCP concluded that a review of the decision was merited in relation to Ground 5 only (on the basis that only the determinations on sanctions, and not component parts of the decision, were permitted to be reviewed (under the wording of paragraph 4.7.1 of the Code)). The Chair's decision was as follows:

> "I therefore allow a review in this matter, limited to the decision on sanctions. The Review Tribunal is to proceed on the basis that liability has been established and on the facts found in the findings on liability. Otherwise, the Review Tribunal is to determine the issue of sanctions de novo, having considered afresh all aspects which are necessary for it to determine sanctions, including the seriousness rating of the breaches individually and collectively, any aggravating/mitigating factors and the weight if any to be given to service revenue and breach history."

The relevant Code provisions

Paragraph 4.7.1 states:

> "Tribunals may, at their discretion, review any determinations made in respect of applications for prior permission, adjudications, sanctions and/or administrative charges."

The application was made in writing under paragraph 4.7.2 of the Code. Paragraph 4.7.4 of the Code states:

> "Having received a request for a review, the Chairman of the CCP (or other legally qualified member of the CCP) will consider the grounds of the application and decide

whether a review is merited. If it is decided that the review is merited, a Tribunal will carry out a review of the relevant decision(s) as soon as is practicable."

On 2 October 2012, and after hearing informal representations on behalf of the Level 2 provider, the Review Tribunal considered the Executive's submissions and the comments and additional evidence provided by the Level 2 provider.

REVIEW SUBMISSIONS AND CONCLUSION

PRELIMINARY ISSUE

In light of the decision of the Chair of the CCP, the Executive acknowledged the CCP Chair's decision that the first four grounds did not in themselves constitute acceptable grounds for a review. Notwithstanding this, the Executive submitted that the first four grounds were in themselves distinct component parts of Ground 5 (having been restated, in summary form, within this Ground), and that consequently it was appropriate to consider the submissions contained in the first four grounds.

The Review Tribunal noted the Executive's submission and further noted the submissions of the Level 2 provider, in particular that it was unusual, unfair and undesirable for a later decision to be allowed to form the grounds for review of an earlier decision, and that such action would unsettle fundamental principles of jurisprudence. However the Review Tribunal concluded that the first four grounds had in themselves formed the basis of specific submissions set out within Ground 5 and therefore the submissions had not solely relied on the later Tribunal's decision. As such those submissions were capable of consideration independently of the Executive's comparison with the later Tribunal's decision. It followed that a consideration of those submissions would not cause unfairness or otherwise unsettle any fundamental legal principles.

THE EXECUTIVE'S CASE FOR REVIEW

GROUND 1
"Breach of Rule 2.3.2 of the Code – Misleading services: The initial assessment was unreasonable in all the circumstances and ought to have been considered more serious than 'moderate'."

1. The Executive submitted that the initial assessment of 'moderate' in relation to the breach of rule 2.3.2 was so unreasonable that no reasonable Tribunal could have reached it. This was asserted on the grounds that the Original Tribunal had failed to properly consider the scale and impact of the breach.

   The Executive noted that the Tribunal used the following descriptors set out within the 'moderate' seriousness rating category listed at paragraph 51 of the Investigations and Sanctions Procedure (the "**I&SP**") as criteria for determining that the breach of rule 2.3.2 of the Code was 'moderate': "A breach was found within Services that were still capable of providing value to consumers and which were designed to provide a legitimate service.
   The breach was likely to have had a discernible effect, directly or indirectly, on consumers and showed evidence of some potential harm to affected consumers."

   The Executive submitted that, while agreeing the Service was still capable of providing value to consumers, this criterion was also contained within the descriptors of the higher seriousness rating of 'significant'. When considering the second criterion, the Executive submitted that (i) the relatively high number of complaints received and (ii) the very high revenue figures for the Service (falling within Band 1,

£500,000+) showed that the case caused more than a discernible effect on consumers and the harm caused to consumers was in fact material as opposed to potential.

In addition, the Executive submitted that it was clear from an analysis of the five distinct reasons given by the Original Tribunal for upholding the breach that the breach ought to have been attributed a higher seriousness rating than 'moderate'.

In summary, given the nature of the misleading elements of the Service and the fact that multiple elements amounting to breaches were found in relation to the Service and its promotion by the Level 2 provider, who had failed to heed a prior warning, the Executive submitted that the decision to rate the initial seriousness of the breaches as "moderate" and not a higher severity level, was so unreasonable that no reasonable Tribunal could have reached it.

2. The Level 2 provider strongly refuted the arguments made by the Executive. The provider stated:

> "[I]n arguing how unreasonable the Tribunal was, the Executive submits that the breach should have been considered 'significant' rather than 'moderate'. It argues that whilst it agrees that the services are capable of providing value to consumers, so can this be said in respect of 'significant (rather than merely 'moderate) breaches. Referring to the separate examples given as per paragraph 54 of the ISP, the Executive argues that the harm caused was 'material' as opposed to potential and as such, it was clearly unreasonable for the Tribunal to have found only a 'moderate' breach. However, the Executive does not present the full picture in respect of the example given in instances of 'significant' breach: 'The cost incurred is likely to be material to consumers, with the breaches likely to generate considerably inflated revenues for the service. The service itself is still capable of providing some purported value to consumers". Though seeking to rely on these guidelines, the Executive has entirely failed in its submissions to take into account that this is a two-limbed test: not only should the cost be likely to be material, but also there is a causation element (namely that the breaches must themselves be likely to generate the additional revenue, which must itself be considerable). The Executive has not even begun to address this, let alone produced any 'substantive evidence'.
>
> "We do not understand how the Executive can suggest that the high "unreasonableness" test has been met. Rather than the decision being clearly unreasonable, it is more likely, for example, that the Tribunal concluded that the causation link between the breaches and the increase in revenues had not been made out. Reasoned exercise of discretion, whether or not it may be possible to take a different view, is not subject to Review under the Code...The reality is that these five reasons, and all other relevant factors, were carefully considered and weighed up three times: once as part of the initial verdict, then again in consideration of the aggregating [sic] factors, and finally yet again in consideration of the mitigating factors (resulting in a decision to downgrade the breach from 'moderate 'to 'minor). Such a systematic process points only to a reasoned decision, rather than an unreasonable one. There is no evidence provided by the Executive that the Tribunal's initial assessment was unreasonable, whether to the high degree required or at all."

3. The Review Tribunal considered the submissions of both the Executive and the Level 2 provider and concluded that on the evidence before it, it would not have reached the same decision as the Original Tribunal had it been considering the case afresh.

The Review Tribunal concluded after very careful consideration that the decision reached by the Original Tribunal in relation to its initial seriousness assessment of 'moderate' (in respect of the breach of rule 2.3.2 of the Code) was within the boundaries of a decision that a reasonable Tribunal, exercising its discretion, was entitled to reach, and was therefore not a decision that was so unreasonable as to meet the level of unreasonableness required by paragraph 4.7.3 of the Code.

GROUND 2

"Aggravating factors: A relevant aggravating factor relating to the failure of the original Track 1 procedure case does not appear to have been given sufficient consideration for the purpose of arriving at the final seriousness rating assessment."

1. The Executive submitted that where it is found that prior compliance advice has not been followed, the impact of such an aggravating factor should sufficiently dissuade a Tribunal from downgrading an initial seriousness rating. The Executive submitted that the aggravating factor was a serious matter as a Track 1 procedure had been undertaken to ensure future compliance and, as part of that process, advice had been given regarding potentially misleading statements. To ensure future compliance, amendments were necessary. However, the decision showed that the Original Tribunal considered that the Level 2 provider had failed to follow compliance advice. As a result, compliance standards dropped leading to a relatively high number of complaints.

   The Executive submitted that regardless of mitigation shown, the serious nature of this aggravating factor was such as to dissuade any Tribunal from adjusting the severity level downwards. The Executive submitted that in all the circumstances of the case, the decision to downgrade the severity level was disproportionate to the seriousness of the breaches identified and underlying consumer harm.

   The Executive submitted that the lack of sufficient consideration of the aggravating factor and/or its appropriate weight, led to a decision that was so unreasonable that no reasonable Tribunal could have reached it.

2. The Level 2 provider made submissions in relation to Grounds 2 and 3 together. The provider stated that both grounds had not been made out and that:

   > "In considering which aggravating and mitigating factors to accept, and which to reject, and further in assessing the weight to be attached to either, we are clearly dealing with the exercise of the Tribunal's discretion. This is clearly set out in the relevant sections of the ISP, which the Executive itself has cited in its Application:
   >
   > > "55 ... The Tribunal has the discretion to adjust the severity upwards or downwards within the five bands .... 61 ... While these factors may be considered, it is the discretion of the Tribunal to attribute a final assessment that remains proportionate to the breaches identified ..."
   >
   > "In this instance it is not the case that, for example, there has been a "lack of sufficient consideration of the aggravating factor" (as the Executive allege), but rather that the aggravating factor has been considered, and that (in its valid discretion) the Tribunal has not held it to be sufficient to outweigh the mitigating factors in any downgrade. Likewise, in attaching greater significance to three of the mitigating factors, the Tribunal has exercised its discretion."

3. The Review Tribunal considered the submissions of both the Executive and the Level 2 provider and found that it was clear that the Original Tribunal had considered the

failure of the Track 1 procedure as an aggravating factor. The Review Tribunal found that whilst the Original Tribunal may not have placed as much weight on the aggravating factor that the Review Tribunal would have done had it been considering the case afresh, the weight attributed by the Original Tribunal was a decision that was within the boundaries of a decision that a reasonable Tribunal, exercising its discretion, was entitled to reach. The decision was therefore not so unreasonable as to meet the level of unreasonableness required by paragraph 4.7.3 of the Code.

GROUND 3
"Mitigating factors: Three out of the four mitigating factors were unreasonably considered to be relevant when making the final assessment."

1. The Executive noted that the Original Tribunal in determining the final overall assessment for the case, found four mitigating factors - three of which were as follows:

- In December 2011, the proposed user experience was submitted for "feedback" to a member of the PhonepayPlus Complaint Resolution team.
- The Level 2 provider asserted that it had changed the coding behind the user reviews and the wording of the subscription reminder messages.
- The Level 2 provider engaged with PhonepayPlus in a manner that went beyond the level of co-operation that is generally expected. This included an offer to meet the Executive during the investigation.

The Original Tribunal then concluded that the seriousness of the case should be regarded overall as 'minor'.

In relation to the first mitigating factor detailed above, the Executive submitted that given the nature of the correspondence between the Complaint Resolution team and the previous corporate entity (Pegasus Blue which received the compliance advice), a significant number of the elements that were considered misleading by the Original Tribunal were not reviewed or commented on by the Complaint Resolution team. This was because the information provided by Pegasus Blue in the report sent to the Executive in late November 2011 did not cover all the aspects of the Service and promotional campaign launched by the Level 2 provider. In these circumstances, the Executive asserted that it was wholly unreasonable for the Tribunal to take into account the first mitigating factor and/or to give it the weight that it did when taking it into account.

With regard to the second mitigating factor, the Executive submitted that the Level 2 provider deliberately created a false impression by introducing the coding behind the website to manipulate the date of user reviews to show the current date. This coding was only removed after the investigation brought the issue to the Level 2 provider's attention. The Executive submitted that it was unreasonable in all the circumstances for the Tribunal to have taken this into account as a mitigating factor and/or to give it the weight that it did when taking it into account

With regard to the third mitigating factor, the Executive submitted that, as a result of the failure of the Track 1 procedure to ensure future compliance, the complaints received in 2012 were properly handled by the Executive using the Track 2 procedure. It was submitted that in all the circumstances it was completely unreasonable for the Level 2 provider to suggest it had proactively engaged with PhonepayPlus in a manner that went above the level of co-operation that is generally expected. It is submitted that it was wholly unreasonable for the Tribunal to have taken into account the third mitigating factor and/or to give it the weight that it did

when taking it into account.

In light of the above, the Executive submitted that the Tribunal's decision to take into account the three mitigating factors detailed above, was in all the circumstances of the case, a decision that was so unreasonable that no reasonable Tribunal could have reached it.

2. The Level 2 provider relied on its submissions outlined above in relation to Ground 3.

3. The Review Tribunal considered the submissions of both the Executive and the Level 2 provider and found that all three mitigating factors were relevant and were therefore it was within the Original Tribunal's discretion to consider them. Further, the Review Tribunal found that the Original Tribunal had not placed undue or excessive weight on the three mitigating factors so as to render the decision unreasonable, let alone meet the level of unreasonableness required by paragraph 4.7.3 of the Code.

GROUND 4
"The sanctions imposed were based on an unreasonably low final overall assessment, which was set at 'minor'; and the sanctions, including the fine sanction, were disproportionate and unreasonable in all the circumstances."

1. The Executive noted that the revenue in relation to the Services was within the range of Band 1 (£500,000+) and that the Original Tribunal concluded that the seriousness of the case should be regarded overall as minor. The Executive noted that the I&SP stated the following in relation to 'minor' cases:

   > "Minor cases are likely to have had little or no direct or indirect impact on consumers and shown little evidence of potential consumer harm arising…The cost incurred by consumer may be minimal, with the breaches having the potential to generate limited revenue streams…"

   One of the examples stated:

   > "The service promotional material is not clear in its description of the service, but there is no evidence of consumers incurring any financial detriment"

   The Executive submitted that the facts of this case in no way fitted the above descriptors, which whilst they were not binding, were very helpful in correctly categorizing seriousness levels. Given these and all other circumstances, the Executive submitted that the decision to give the case a downgraded final overall assessment rating of minor was so unreasonable that no reasonable Tribunal could have reached it.

   Further, the Executive noted the large revenue and number of complaints and added that overall, the facts of the case, which led to breaches of rules 2.3.2 and 2.3.12 of the Code being correctly upheld, ought reasonably to have been found to have a severity level which was higher than 'minor'. The decision to find the initial assessment as 'moderate' and the final assessment as 'minor' was so unreasonable that no reasonable Tribunal could have reached it. The Executive therefore submitted that the sanctions imposed against the Level 2 provider ought to be reviewed and based on a reasonable, and higher, final overall assessment.

2. The Level 2 provider stated that:

"Essentially the Executive argues that because a low fine has been imposed, therefore the decision reached must be unreasonable. This is effectively inviting the Chair to work backwards, ignoring the fact that the level of fine is the last stage of the Tribunal's decision process. The level of fine arrived at should not be a separate ground for Review: the fine which is imposed is entirely dictated by the level of seriousness of breach held, including consideration of the aggravating and mitigating factors. If the Tribunal disputes the level of fine, this amounts to the same thing as disputing the level of seriousness of the breach (and as such Ground 4 essentially repeats Ground 1).

"In this instance, the breach was held to be 'minor': as such the level of fine was set at the upper limit of that particular bracket. We do not understand how the fact that the fine imposed was set at the top limit of that available to the Tribunal (once the seriousness of breach had been established) can possibly be held to be 'unreasonable'. On the contrary, what would be unreasonable is if, having found the breach to be minor, the Tribunal sought to impose a level of fine beyond the prescribed levels set.

"The Executive also takes exception to the seriousness of breach being held to be 'minor' on the basis that the description of 'minor' breaches (in the ISP) does not match the facts of this case. This is wrong: the seriousness of the breach was arrived at by way of downgrade following the acceptance by the Tribunal of the mitigating factors. This is no more than the proper and reasonable procedure. The ISP description of 'minor' breaches is of limited application, since it applies prior to the consideration of any aggravating or mitigating factors."

3. The Review Tribunal considered the submissions of both the Executive and the Level 2 provider and found that considering the decision in the round, it may not have reached the same conclusion as the Original Tribunal had it been considering the case afresh. However, the Review Tribunal concluded that the decisions of the Original Tribunal in relation to overall assessment and sanctions were within the boundaries of a decision that a reasonable Tribunal excising its discretion was entitled to reach. The decision was therefore not a decision that was so unreasonable as to meet the level of unreasonableness required by paragraph 4.7.3 of the Code.

GROUND 5

"The adjudication as against another Level 2 provider, Sight Mobile LLC, in relation to the same product or service model, was so distinct as to demonstrate that the decision made in relation to the Glass Mobile LLC case was so unreasonable."

1. The Executive noted the near identical facts between the case against the Level 2 provider and the Tribunal adjudication against the Sight Mobile on 2 August 2012. The Executive submitted that for the reasons outlined in Grounds 1 - 4 together with the evidence provided by the facts and findings in the Sight Mobile LLC adjudication, the Original Tribunal's decision in relation to sanctions was so unreasonable that no reasonable Tribunal could have reached it.

2. The Level 2 provider strongly refuted the submissions made by the Executive and asserted that:

"The question of whether the Tribunal acted unreasonably, and what factors it ought to have included in its consideration, can only be assessed in the light of facts and precedents known to the Tribunal at the time of the decision. The Sight Mobile decision is of no relevance to this question, Since it post-dates the

decision in question. Indeed, and contrary to the inference of the Executive's argument, it would be unreasonable that the Tribunal be expected to have arrived at a decision which was to be consistent with an unknown future decision by another Tribunal…

“The Executive also argues that a Review is necessary as there "may be a lack of clarity and regulatory certainty as to the way the offending service, and services of a similar nature, are to be delivered in future", quoting the relevant section of the ISP. However, the ISP is quoted out of context: the extract in question reads as follows:

> "When applying sanctions, the Tribunal will be guided by “the need to provide clarity and regulatory certainty as to the way the offending service, and services of a similar nature, are to be delivered in the future". [our emphasis]

“The requirement is on the Tribunal to ensure clarity and regulatory certainty in applying sanctions: namely, to be consistent with the sanctions it orders given its findings as to any breach. This has already been dealt with under Ground 4 - there is no question that the Tribunal acted reasonably in this instance, since the maximum fine available to it was dependent on its decision that the breach was 'minor'.

“In any event, whether in *"applying sanctions"* (to quote the section of the ISP) in the present case or in re-examining the finding as to the level of breach, there is no question of a *"lack of clarity* or *regulatory certainty"* resulting from the Tribunal's decision: at the time the Sight Mobile case had yet to be decided. This was therefore not a relevant factor to consider…

“It is our contention that, had the Executive truly been interested in clarity and regulatory certainty going forwards, it would have agreed to have the two cases heard together. Instead, it has pursued them separately, and subsequently applied to review only the one it did not agree with, for nakedly financial reasons. This is not only illogical (given that it is reviewing the earlier decision partly on the basis of the latter), but also far from evenhanded in its approach. Such an approach does little to assist clarity and certainty in regulation.”

3. The Tribunal considered this ground in the context of the submissions made by both parties in relation to Grounds 1- 4 and thereby concluded that although it may have come to different decisions than those made by the Original Tribunal, had it been considering the case afresh, those decisions of the Original Tribunal, for the reasons set out in respect of Grounds 1 – 4, were not so unreasonable that no reasonable Tribunal could have reached them.

DECISION OF THE REVIEW TRIBUNAL

In light of the reasons outlined above, the Review Tribunal considered that whilst the Original Tribunal’s decision on seriousness and sanctions was not necessarily one that it would have reached had it been considering the case afresh, it nevertheless was not so unreasonable that no reasonable Tribunal could have reached it. Accordingly, the Review Tribunal decided it was unable to interfere with the decision of the Original Tribunal.