

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Friday 8 June 2012
TRIBUNAL SITTING No. 101/ CASE 1
CASE REFERENCE: 06239

Level 2 provider: Juno Apps Limited
Type of service: Medhelpline- NHS Direct call connection service
Level 1 provider: N/A
Network operator: CFL Communications Limited

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

BACKGROUND

Between 10 February and 24 April 2012, PhonepayPlus received 38 complaints from members of the public, regarding the promotion of a National Health Service (“**NHS**”) Direct call connection service (the “**Service**”) operated by the Level 2 provider, Juno Apps Limited on premium rate number, 0906 532 4040.

The Service was promoted by way of a sponsored link, which appeared at the top of Google search engine results (Google AdWords), and therefore above the actual NHS Direct website (**Appendix A**). By using the Google link, the user was taken to the website of the Level 2 provider. This website contained in large print the words, “*Looking for NHS Direct?.....NHS Direct*”, followed by the premium rate number. By calling the premium rate number, consumers were directly connected to NHS Direct at a charge of £1.02 per minute.

Complainants stated that promotional material on the Level 2 provider’s website, www.medhelpline.co.uk, was misleading and had led them to dial the premium rate number believing that it was the official number for NHS Direct (**Appendix B**). The Executive’s monitoring of the Service supported the complainant’s accounts. In addition, the Executive submitted that the Service had taken advantage of members of the public, who were vulnerable as they required medical advice immediately.

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 (12th Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 14 May 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2- Misleading;
- Rule 2.3.10- Vulnerable groups; and,
- Paragraph 3.4.12(a)- Registration of numbers.

The Level 2 provider responded on 28 May 2012. On 08 June 2012, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.3.2

“Premium rate services must not mislead or be likely to mislead in any way.”

1. The Executive submitted that the Level 2 provider had breached rule 2.3.2 for two reasons.

Firstly, the Executive submitted that, although the small print stated the Service had no affiliation with NHS Direct, the promotional material was misleading as it was presented in such a way as to imply the Service was associated with NHS Direct. For example:

- The Google AdWords promotion stated in bold font, *“NHS Direct Contact”* (**Appendix A**).
- The Google AdWords promotion displayed the web address as *nhsdirect.medhelpline.co.uk/* (**Appendix A**).
- When the Service website was accessed, the tab in the web browser displayed the title *“National Health”* (**Appendix B**).
- The website used a shade of blue for its background that is very similar to the NHS branding colour (**Appendix B**).
- Promotional material on the Service website prominently made the statements, *“Looking for NHS Direct?”* and *“NHS Direct”* (**Appendix B**).

In addition, the Executive submitted that the promotional material contained a number of misleading statements regarding the type of service offered and the cost effectiveness of the Service. Firstly, the Service claimed to be a directory service, when in reality the Service was a call connection service that routed the caller to the NHS Direct number. Secondly, in promotional material the Service was described as, *“...simply a cost effective call connection service in the same way as calling BT 118 500 or 118 118 and having your call connected”*. However, the Executive submitted that the Service was not a directory enquiry service that offered direct connection in a transparent manner and that the Service was not a cost effective method of contacting NHS Direct, as direct calls to NHS Direct cost 5p per minute (from a BT landline). Therefore the statements misled, or were likely to have misled, consumers.

The Executive accordingly submitted that for the reasons outlined above rule 2.3.2 of the Code had been breached.

2. The Level 2 provider submitted that it set out to provide the Service in good faith, with the aim of providing a competitive enquiry and call connection service. It stressed that at no stage did it attempt to mislead. The provider submitted that it sought to provide a convenient way for consumers to access NHS Direct at a lower cost than most of the prominent directory enquiry providers in the market. The Level 2 provider, maintained that it provided clear pricing and expressly stated that it was not affiliated with NHS Direct. However, the provider commented that, in hindsight, it would not

have embarked on the Service and had refunded all consumers who had requested a refund.

3. The Tribunal considered the evidence and noted the Level 2 provider's submissions. The Tribunal accepted the Executive's submissions that the promotion of the Service was presented in such a way as to imply an association with NHS Direct and that consumers were misled into the belief that the Service was a directory service when it was not. The Tribunal also concluded that it was misleading to describe the Service as "cost-effective", given the low cost of calling the actual NHS Direct number. The Tribunal therefore held that consumers had been misled, or were likely to have been misled. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Rule 2.3.10

"Premium rate services must not seek to take advantage of any vulnerable group or any vulnerability caused to consumers by their personal circumstances."

1. The Executive submitted that the Level 2 provider was aware that potential consumers would be vulnerable as a result of their need for timely medical advice and had deliberately designed promotional material to take advantage of such vulnerability. This was evidenced by the Service being promoted and designed to imply an association with NHS Direct (**Appendices A and B**). The Executive supported its submissions by reference to the complainants' accounts, many of whom reported that they had used the Service at a time of high stress and that they had thought they were calling the NHS directly. Therefore, the Executive submitted that the Level 2 provider had sought to take advantage of members of the public who were vulnerable due to their urgent need for medical advice. The Executive accordingly submitted that rule 2.3.10 of the Code had been breached.
2. The Level 2 provider denied the breach and specifically submitted that at no stage did it attempt to mislead or take advantage of vulnerable members of the public. The provider also made the general points noted in its defence relating to the alleged breach of rule 2.3.2 of the Code.
3. The Tribunal considered the evidence and noted the Level 2 provider's submissions. The Tribunal concluded that members of the public who required the services of the NHS Direct were likely to need timely medical advice and were therefore vulnerable due to their personal circumstances. On the grounds submitted by the Executive, the Tribunal held that the Service and its promotion operated in a manner that took advantage of a vulnerability caused to consumers by their personal circumstances. Accordingly, the Tribunal upheld a breach of rule 2.3.10 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

Paragraph 3.4.12(a)

"Level 2 providers must provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service."

1. The Executive brought a number of “Notice[s] to Industry” regarding Registration to the Tribunal’s attention.

The Level 2 provider was allocated the premium rate number 0906 532 4040 (the “**number**”) by the Network operator. On 2 February 2012, the Service began operation on the number. The number was not registered with PhonepayPlus until 20 February 2012. Consequently, the Executive submitted that the Level 2 provider had failed to register the number in a timely manner and therefore was in breach of paragraph 3.4.12(a).

2. The Level 2 provider stated in correspondence that it agreed that each of the points raised by the investigations team were valid, whilst asserting that at no stage did it attempt to mislead or take advantage of vulnerable members of the public.
3. The Tribunal noted the Executive’s submissions and concluded that there is an obligation on Level 2 providers to register services within a reasonable period having regard to paragraph 3.4.12(a) and (c) of the Code and the “Notice[s] to Industry”. The Tribunal found that a period of 18 days was excessive and concluded that paragraph 3.4.12(a) had been breached. Accordingly, the Tribunal upheld a breach of paragraph 3.4.12(a) of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal’s initial assessment of the breach of the Code was as follows:

Rule 2.3.2- Misleading

The initial assessment of rule 2.3.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The case had a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact on consumers.
- The nature of the breach meant that the Service damaged consumer confidence in premium rate services.

Rule 2.3.10- Vulnerable groups

The initial assessment of rule 2.3.10 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The case had a clear detrimental impact, directly or indirectly, on consumers and the breach had a clear and damaging impact on consumers.
- The nature of the breach meant that the Service damaged consumer confidence in premium rate services.

Paragraph 3.4.12(a)- Registration of numbers

The initial assessment of paragraph 3.4.12(a) of the Code was **moderate**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider unreasonably delayed registration of a premium rate service.

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

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal took into account the following two aggravating factors:

- The Level 2 provider failed to follow PhonepayPlus Guidance on "Public information services".
- The Level 2 provider failed to take account of relevant previous adjudications regarding public information services and the use of Google "Adwords", and the "Notices to Industry" published by PhonepayPlus regarding registration.

In determining the final overall assessment for the case, the Tribunal took into account the following mitigating factor:

- On being notified of the investigation, the Level 2 provider removed all promotions of the Service via Google "Adwords" and on its website.

The revenue in relation to this service was at the low end of the 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**.

Sanctions Imposed

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

- A formal reprimand;
- A fine of £5,000;
- A requirement that the Level 2 provider seeks compliance advice for all current premium rate services and promotional material and/or future services launched within 6 months from the date of publication of this decision. In respect of current services and promotional material, advice is to be sought within 2 weeks of publication and thereafter implemented within 2 weeks. In respect of future services the compliance advice is to be obtained and implemented before the service is launched.
- A requirement that, the Level 2 provider must refund all complainants who claim a refund, within 4 weeks of receipt of the claim, for the full amount spent by them on 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.

Appendix A- Screenshot of Google search result for “NHS Direct contact”:

The screenshot shows a Google search interface. The search bar contains the text "NHS DIRECT CONTACT". Below the search bar, the text "Search" is followed by "About 2,580,000 results (0.18 seconds)". On the left side, there is a vertical menu with options: "Everything", "Images", "Maps", "Videos", "News", "Shopping", and "More". The main search results area displays three advertisements. The first ad is titled "NHS Direct Contact Number - Call our quick directory service" with the URL "nhsdirect.medhelpline.co.uk/" and the text "We offer a call connection service". The second ad is titled "NHS Direct Phone Number - Need to call NHS Direct?" with the URL "nhsdirect.fastphonenumber.co.uk/" and the text "Use our quick directory service.". The third ad is titled "Calling NHS Direct? | phonenumber.co.uk" with the URL "www.phonenumber.co.uk/NHSDirect" and the text "Use Our Quick Directory Service To Find Numbers They Hide! Call Now".

Appendix B- Screenshot of www.medhelpline.co.uk/nhsdirect.html:

The screenshot shows a web browser window displaying the website "MEDICAL HELPLINE HEALTH ADVICE AND INFORMATION DIRECTORY". The main heading is "Looking for NHS Direct?". Below the heading, there is a sub-heading "To get connected to NHS Direct for instant health advice and information call the phone number below." and an image of a 3D white figure sitting on the floor and using a laptop. Below this, there is a section titled "TO GET CONNECTED TO NHS DIRECT CALL THE DIRECTORY NUMBER BELOW" which displays "NHS Direct" and the phone number "0906 532 4040". A small note below the number states: "Calls from BT landlines charged at only £1.02 per minute or part thereafter. Calls from mobiles and other networks may cost considerably more." Below this, there is a section titled "Further information." which contains several lines of text explaining the call connection service and providing contact information for Juno Apps Ltd.