

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 24 May 2012

TRIBUNAL SITTING No. 100 / CASE 3
CASE REFERENCE: 06065

Level 2 provider: Simon Johnson (sole trader)
Type of service: Career advice and information service
Network operator: Oxygen8 Communications Limited

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

BACKGROUND

On 14 February 2012, the PhonepayPlus research team monitored and recorded premium rate promotions for the Cruise Ship Careers Advice and Information service (the “**Service**”) that were posted on the “*General Jobs*” section of the online classifieds website, www.gumtree.com (“**Gumtree**”) (**Appendix A**). The promotion appeared to advertise specific employment opportunities on cruise ships and gave a premium rate number, 0906 635 6141, for enquiries. The cost of calls to the number was not specified and a non premium rate UK contact number was provided. On calling the number, the research team was provided with a ten minute recorded information line, which included a list of general positions that are required on cruise ships and a list of cruise ship operators and the country of their headquarters. At the very end of the recording, it was stated that the service was not a “*work seeking agency or service*”.

The Investigation

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the Code.

The Executive sent a breach letter to the Level 2 provider on 25 April 2012. Within the breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.2- Misleading;
- Paragraph 3.9.1- Responsibilities of Level 2 providers;
- Rule 2.2.1(a)- Transparency;
- Rule 2.2.5- Pricing; and,
- Paragraph 3.4.12(a)- Registration of numbers.

On 24 May 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 manner in which the promotion was displayed and worded was similar to an employment advertisement. For example, the promotion was placed in the “*General Jobs*” section of www.gumtree.com and contained the words, “[C]ontract type: temporary” and was titled, “*Hotel catering and service staff*” (**Appendix A**).

However, in reality the Service offered was confined to a ten minute recorded information line, which set out a list of general positions that are required on cruise ships and a list of cruise ship operators and the country of their headquarters.

The Executive submitted that the promotion for the Service had misled, and/or would have been likely to have misled, consumers into dialling the premium rate number, on the basis that the provider of the premium rate service was offering specific employment opportunities. The Executive maintained that rule 2.3.2 of the Code had been breached.

2. The Level 2 provider, a sole trader, submitted that it was never his intention to mislead in any manner. The provider stated that it was clear in the promotional material and the recorded message that the Service was not a recruitment service.

In addition, the Level 2 provider stated that he had encountered: “[C]opy/paste problems displaying the correct promotional material on Gumtree”.

3. The Tribunal considered the evidence and the Level 2 provider’s submissions. The Tribunal found that the advertisement on Gumtree was likely to mislead consumers into believing that the Service was being run by a recruitment or employment business that had specific employment opportunities available. The Tribunal noted that the recorded message heard when the premium rate number was dialled stated that the Service was not a recruitment service, however this information was only provided at the very end of the call. The Tribunal upheld a breach of rule 2.3.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Paragraph 3.9.1

“Before promoting or providing services, Level 2 providers must have readily available all documentary and other evidence necessary to substantiate any factual claims made. This material, together with a statement outlining its relevance to the factual claim in question must be provided without delay if requested by PhonepayPlus”.

1. The Executive submitted that the Level 2 provider promoted the Service on Gumtree, without having the necessary evidence to substantiate the factual claims made in promotional material. Specifically, the Executive noted that the following claims were made in the Gumtree promotion: “*Many Opportunities- All Ages- No Experience needed*” and, “*Excellent pay and conditions*” (**Appendix A**).

The Executive made a specific request for documentary evidence to substantiate the claims on 27 February 2012. No documentary evidence was provided, although the Level 2 provider commented that: “*I assumed through personal research that all of the above statements were honest and true. I never intended to mislead*”.

The Executive submitted that the Level 2 provider should have been able to substantiate the claims made and, for example, provide evidence of negotiations with prospective employers of his target audience. The Executive accordingly submitted the Level 2 provider had breached paragraph 3.9.1 of the Code.

2. The Level 2 provider denied the breach and submitted that he had thoroughly researched all the claims made in the promotions and had: *“[A]ssumed through proper, in-depth research online that the following statements [were] correct and true*
 - *Many Opportunities – All Ages - No Experience Needed, and*
 - *Excellent Pay and Conditions.”*

Further, the provider commented that: *“With many new cruise ships coming into service in the near future, each needing on average hundreds of staff, would it not seem logical to assume the above statements correct [including] my research on Pay and Conditions?”*

3. The Tribunal considered the evidence, including the submissions of the Level 2 provider and concluded, for the reasons given by the Executive, that the factual claims had not been substantiated with evidence and that the Code had therefore been breached. The Tribunal was not satisfied, in the absence of any documents from the Level 2 provider, that the appropriate factual evidence was available. The Tribunal did not consider internet research was in any way sufficient to satisfy this provision in any event. The Tribunal upheld a breach of paragraph 3.9.1 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

Rule 2.2.1(a)

“Promotional material must contain the name (or brand if part of the name) and the non premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious”.

1. The Executive submitted that the Gumtree promotion did not contain either the name of the provider or a non premium rate UK contact number of the Level 2 provider (**Appendix A**). The Executive noted that the provider was aware that a non premium rate UK contact number was a necessity and had addressed this in his amended draft promotion, which he submitted to the Network operator (**Appendices B and C**).

Accordingly, the Executive submitted that the Level 2 provider had breached rule 2.2.1(a) of the Code.

2. The Level 2 provider denied the breach. The provider submitted that he was not aware that the provider’s name, in his case Simon Johnson, had to appear on promotional material, but that he was aware of the requirement for a non premium rate number and had duly included a number on his intended promotional material (**Appendix C**). The provider stated that he was: *“[H]aving continual ‘copy and paste’ problems transferring [the] correctly intended material onto Gumtree”.*
3. The Tribunal considered the evidence, including the Level 2 provider’s submissions, and concluded that a non premium rate UK contact number and the Level 2 provider’s name had not been included in the Gumtree promotion. The Tribunal therefore upheld a breach of rule 2.2.1(a) of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

Rule 2.2.5

“In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service”.

1. The Executive submitted that the Gumtree promotion seen did not contain any pricing information for the premium rate number (**Appendix A**). Therefore the Executive alleged that the Level 2 provider had breached rule 2.2.5 of the Code.
2. The Level 2 provider accepted that the Gumtree promotion (**Appendix A**) did not contain any pricing information as a result of “copy/paste” problems and that the promotion should have been subjected to greater scrutiny. However, the provider commented that cached versions observed by the Executive on 7 February 2012 did contain pricing information.
3. The Tribunal considered the evidence, including the Level 2 provider’s submissions, and concluded that pricing information was absent from the Gumtree promotion (**Appendix A**). The Tribunal therefore upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

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 submitted that the Level 2 provider was allocated the premium rate number 0906 635 6141 from the Network operator on 13 January 2012. This number became operational immediately and the premium rate number was later used to provide the Service. Although the Level 2 provider was registered with PhonepayPlus on 29 December 2011, the Service provided on the number was never registered with PhonepayPlus. As a result of the above, the Executive alleged that the Level 2 provider had breached paragraph 3.4.12(a) of the Code.
2. The Level 2 provider accepted that he had failed to register the Service as he did not appreciate that he had to. The provider apologised and stated the breach was not deliberate.
3. The Tribunal considered the evidence and concluded that for the reasons given by the Executive, and the admission of the Level 2 provider that he had failed to register the premium rate number as required by the Code, paragraph 3.4.12(a) had been breached. The Tribunal therefore upheld the breach of paragraph 3.4.12(a) of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal's initial assessment of each 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 criterion:

- The Service had the potential to generate higher income as a result of the breaches.
- The Service had promotional material that had been designed with the intention to not provide consumers with adequate knowledge of the Service or the costs associated with it.
- The Service was non compliant in relation to a series of rules and responsibilities, which indicated a systemic failure to meet the outcomes set out in the Code.
- The Service had the potential to generate substantial revenues through a non-compliant promotion that misled consumers.

Paragraph 3.9.1– Responsibilities of Level 2 providers

The initial assessment of rule 3.9.1 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The nature of the breaches meant that the Service damaged consumer confidence in premium rate services.
- The Service had promotional material that had been designed with the intention to not provide consumers with adequate knowledge of the Service or the costs associated with it.
- The Service was non complaint in relation to a series of rules and responsibilities, which indicated a systemic failure to meet the outcomes set out in the Code.
- The Service had the potential to generate substantial revenues through a non compliant promotion that misled consumers.

Rule 2.2.1(a)– Transparency

The initial assessment of rule 2.2.1(a) of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The nature of the breaches was likely to have caused or had the potential to cause a drop in consumer confidence in premium rate services.

Rule 2.2.5– Pricing

The initial assessment of rule 2.2.5 of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The nature of the breaches was likely to have caused or had the potential to cause a drop in 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 **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The nature of the breaches was likely to have caused or had the potential to cause a drop in consumer confidence in premium rate services.
- The Level 2 provider had negligently failed to comply with a PhonepayPlus requirement, namely the registration of numbers.

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

Final Overall Assessment

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

- The Level 2 provider failed to follow PhonepayPlus' Guidance on 'Employment, Employment Information and Business Opportunity Services'.

There were no mitigating factors.

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

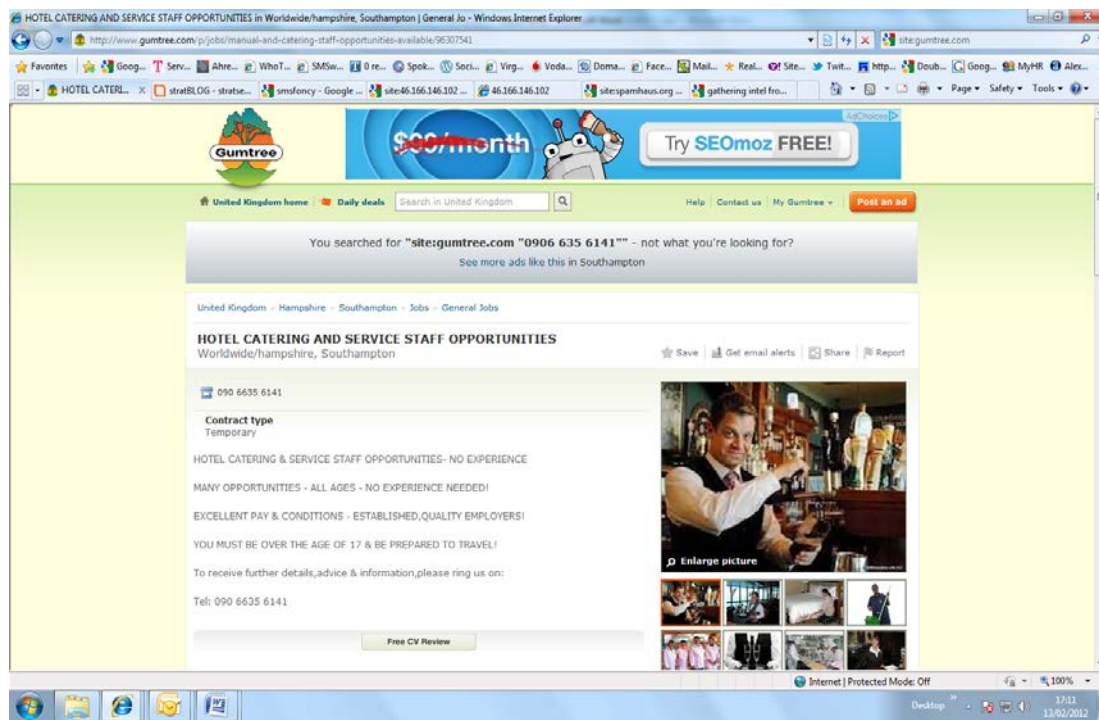
Having taken into account the aggravating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

Sanctions Imposed

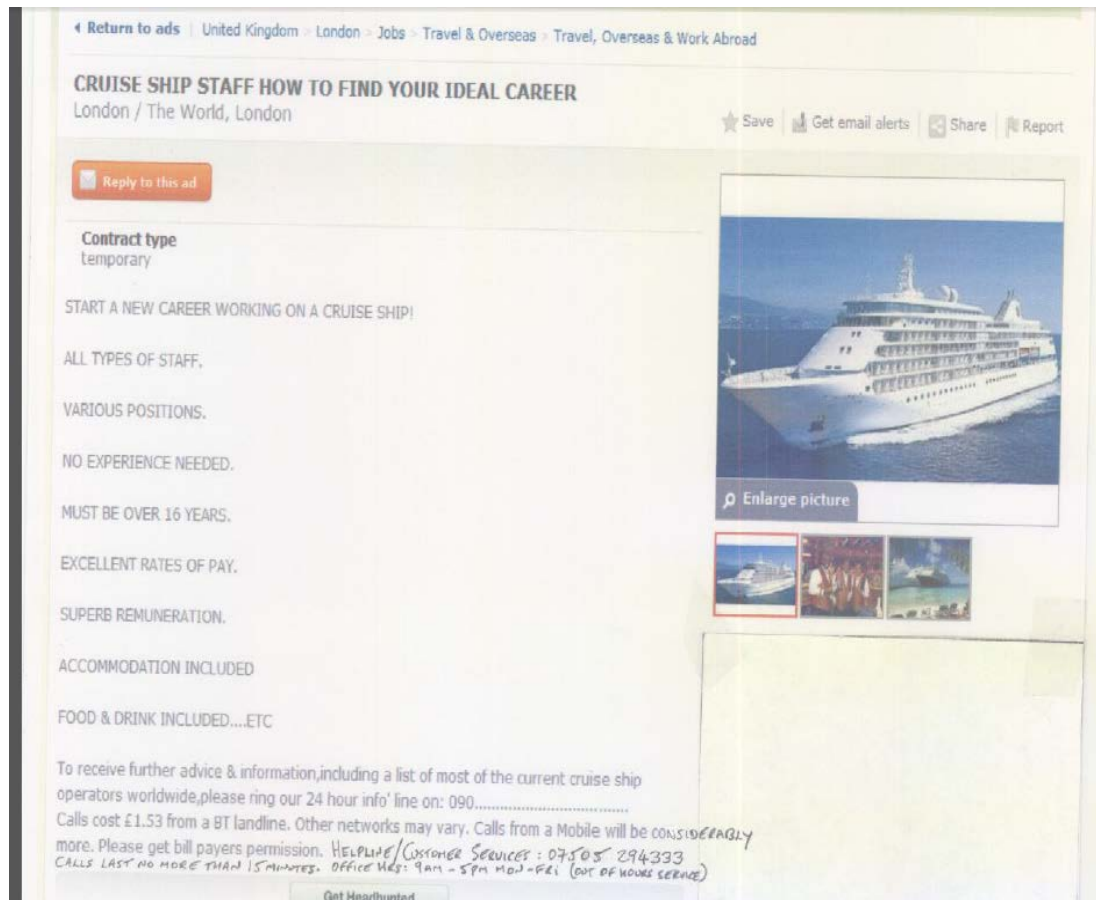
Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- A formal reprimand;
- A fine of £500; and,
- A requirement for the Level 2 provider to submit all premium rate services and promotional material to PhonepayPlus for prior permission for a period of 3 years.

Appendix A- promotion on www.gumtree.com on 14 February 2012:



Appendix B- Initial promotion submitted to the Network operator:



Appendix C- Amended promotion submitted to the Network operator:

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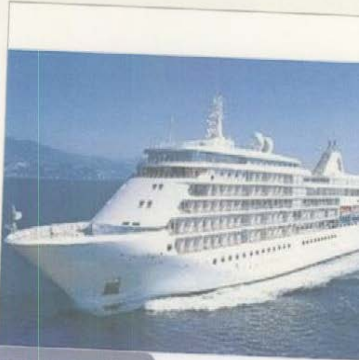
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- VARIOUS POSITIONS.
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