THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Thursday 16 February 2012
TRIBUNAL SITTING No. 93 / CASE 1
CASE REFERENCE: 856050

Network operator:	All mobile Network operators
Service Provider:	mBlox Limited
Information Provider:	WildACE Marketing Limited

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.10 OF THE CODE

BACKGROUND

On 8 December 2011, the Tribunal heard a case for adjudication (the "**Original Tribunal Hearing**") against the Information Provider. This case was in relation to a service called "MobyOffers" where several consumers had received an unsolicited (free) text message, to which some had texted back "STOP" and incurred no charge, whereas others who did not respond were later charged £1.50. The Tribunal found that the Information Provider had deliberately provided false, inaccurate and misleading information to the Executive. The Original Tribunal Hearing was heard in accordance with paragraph 8.7 of the PhonepayPlus Code of Practice (11th edition, Amended April 2008) (the "**Code**").

The Tribunal considered the breaches to be serious and issued the following sanctions:

- A Formal Reprimand;
- A fine of £9000; and
- A prohibition from involvement in, or contracting for, the provision of premium rate services for a period of six months (starting from the date of publication of the decision) (the "**Prohibition Sanction**").

On 21 December 2011 the Executive supplied the Information Provider with a copy of the Tribunal's decision, along with the invoices associated with a fine and administrative charges.

Requests for Review

The decision was published on the PhonepayPlus website on 22 December 2011. On the same day the Information Provider sent an application for review relating to the Prohibition Sanction only and requested its immediate suspension.

On 5 January 2012 the Information Provider paid the fine sanction imposed during the Original Tribunal Hearing.

The application for review was considered by the Chair of the Code Compliance Panel (the "**CCP**") on 22 December 2011 who rejected the application, stating that it was without merit. The Executive was of the view that the rejection of the review application was as a consequence of the fact that it had been hastily prepared and lacked substantive arguments

to be merited by the Chair of the CCP. Accordingly, the Information Provider's request for suspension of the sanction was also rejected.

Following receipt of news of the rejection of the review application, the Information Provider immediately notified the Executive of its continued interest in appealing the prohibition sanction under paragraph 8.9.2(g) of the Code, and therefore expressed its intention to begin proceedings for an oral hearing. The Executive received this correspondence on 23 December 2011 while the office was closed, however it liaised with the sole director of the Information Provider on 23 and 28 December 2011. During the course of this correspondence the Information Provider was given until 12 January 2012 to submit a request for an oral hearing.

Further correspondence was exchanged on 5 January 2012 relating to the oral hearing procedure and its potential cost.

The Information Provider submitted a cover letter and notification form relating to an oral hearing on 12 January 2012 via email. It also re-submitted documentary evidence supplied in relation to the Original Tribunal Hearing.

The Executive also had a telephone conversation with the sole director of the Information Provider on 13 January 2012 to confirm receipt of the cover letter and notification form. During this conversation, the Information Provider reasserted its interest in keeping costs down and indicated that it would be interested in a review hearing rather than an oral hearing if that was possible. On 18 January 2012, the Executive accordingly submitted the Information Provider's application for consideration under paragraph 8.10 of the Code as a fresh application for a review and not an oral hearing.

The Chair of the CCP stated in his reply dated 20 January 2012 that, while it was unusual for an application for a review, once rejected, to be renewed, there were no provisions within the Code that precluded such a practice. The Chair of CCP concluded that the fresh application was supported by more comprehensive grounds than those originally submitted in the review application dated 22 December 2011. The Executive was of the view that this reflected additional time spent considering the published decision from the Original Tribunal Hearing in full. The fresh application did not contain details of any new facts of evidence, but instead provided submissions relating to points of law and an assessment of whether the Information Provider believed that the sanctions imposed had been in accordance with the Mission Statement of the Code:

"In carrying out our mission, we are committed to the following…maintaining or understanding of relevant technological developments so that our regulation remains targeted and proportionate, and allows innovation and investment…"

On this basis the Chair of the CCP concluded that the application was merited and that the Executive should proceed with the review hearing, although the review was restricted to a consideration of the Prohibition Sanction imposed by the Tribunal under paragraph 8.9.2(g).

The relevant Code provisions

Paragraph of the Code 8.10.1 states:

"*On reasonable grounds, a Tribunal may, at its discretion, review determinations made in respect of applications for prior permission and adjudications and/or sanctions.*"

The Second Review Application (which was accepted by the CCP) was made in writing under paragraph 8.10.2 of the Code. Paragraph 8.10.3 of the Code states:

"*Having received a written request setting out the reason why a determination made in respect of…an adjudication and/or sanction should be reviewed, the Chairman of the Code Compliance Panel will decide whether the review is merited in which event a Tribunal will carry out the review.*"

The information provider made a request for a suspension of the Prohibition Sanction. A suspension was granted by the Chairman of the CCP under paragraph 8.10.4 of the Code on 20 January 2012.

THE INFORMATION PROVIDER'S CASE FOR REVIEW

In summary, the Information Provider argued that the Prohibition Sanction:

- Was disproportionate and unfair;
- Had been imposed with consideration of aggravating factors that ought not to have been considered;
- Had been imposed without consideration of mitigating factors that ought to have been considered;
- Was inconsistent with case precedent;
- Had a significant impact on the financial health of the Information Provider, the consequences of which would result in financial hardship, job losses and reputational damage; and
- Had been imposed without regard to the benefit of proactive compliance support.

The Executive noted that the above six grounds raised in the fresh application focused on the PhonepayPlus Sanctions Guide 2008 and the Tribunal's assessment of the sanctions in light of the aggravating and mitigating circumstances that had been considered. The Information Provider also made specific reference to previous adjudications which it considered relevant when assessing the proportionality, fairness and consistency of the decision reached on 8 December 2011, although during informal representations at the Tribunal hearing on 8 December 2011, the Information Provider conceded that these prior adjudications were not as relevant as it had first thought, given none of them involved findings by the Tribunal that the provider had deliberately provided false or misleading information to the Tribunal.

During its informal representations the Information Provider also stated that it truly regretted the events that had occurred in relation to the service that had been the subject of the Original Tribunal Hearing. The Information Provider stated that the service had been operated independently by a former, trusted employee. This former employee left the company during PhonepayPlus' initial investigations of the service and the sole director of the Information Provider was left to gather information requested from PhonepayPlus in relation to its investigation of the Service. The Information Provider asserted that it had provided all the information it was able to find in relation to the service and there had never been any intention to deceive PhonepayPlus by wilfully providing false, misleading and inaccurate information. The Information Provider was willing to engage with the Executive going forward and seek and implement compliance advice in lieu of the Prohibition Sanction.

DECISION OF THE REVIEW TRIBUNAL

The Review Tribunal considered the Information Provider's arguments and concluded that, on balance, it had demonstrated a positive attitude and a genuine commitment to future compliance advice, and remorse for what had happened. The Tribunal considered the Information Provider's statement that it was genuinely willing to engage with the Executive going forward and that the past actions of the Information Provider had arisen as a result of naivety and the placing of too much faith in a former member of staff.

In light of this finding the Review Tribunal concluded that the Prohibition Sanction should be revised as follows:

- A prohibition from involvement in, or contracting for, the provision of premium rate services for a period of six months, to be suspended for a period of one month (starting from the date of publication of this Review decision) to allow the Information Provider to obtain and implement compliance advice on any existing services, to the satisfaction of the Executive, failing which, the Prohibition Sanction would come into force.

In addition to the above revised Prohibition Sanction, the Review Tribunal imposed the following additional sanction:

- A requirement for the Information Provider to submit all categories of its future services and their promotional material to PhonepayPlus for prior permission for a period of 12 months (from the date of publication of this Review decision).