



Tribunal Sitting Number 132 / Case 5

Case Reference: 28205
Level 2 provider: Upright Line S.A
Type of Service: Quiz competition
Level 1 provider: N/A- Breach of sanction
Network operator: N/A- Breach of sanction

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

BACKGROUND

A service provided by the Level 2 provider Upright Line S.A. was the subject of a PhonepayPlus investigation and adjudication (case reference 11099) which resulted in sanctions being imposed by a Tribunal on 18 April 2013. The sanctions imposed by the Tribunal included a fine of £200,000 and general refunds. In addition, an administrative charge of £12,009.30 was imposed.

The Level 2 provider was advised of the fine and the administrative charge by the Executive in an adjudication letter sent by email and post on 1 May 2013.

The Level 2 provider made an application for a review of the Tribunal's decision on 15 May 2013. The application was refused on 27 May 2013.

On 14 June 2013, the Executive contacted the Level 2 provider to highlight the consequences of failure to settle the outstanding fine and administrative charge invoices. On the 18 July 2013, the Level 2 provider confirmed that it had no further funds available and did not intend to pay the outstanding fine and administration charge.

The Investigation

The Executive conducted this matter as a Track 2 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 31 July 2013. Within the breach letter the Executive raised the following breaches of the Code:

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

The Level 2 provider responded on 14 August 2013]. On 22 August 2013, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

Preliminary issue

The Level 2 provider provided an extensive response to the breach letter, which included a number of recordings. The Tribunal considered all the material provided by the Level 2 provider. However, the Tribunal commented that a significant amount of Level 2 provider's submissions and evidence appeared to relate to the underlying breaches and whether or not they should have been upheld. The Tribunal



noted that these submissions could be relevant to an application for a review or an oral hearing, but were not relevant to a breach of sanctions adjudication.

ALLEGED BREACH 1

Paragraph 4.8.4(b)

The failure of any relevant party to comply with any sanction within a reasonable time will result in a further breach of the Code by the relevant party, which may result in additional sanctions being imposed.

1. The Executive noted that on 18 April 2013, the Tribunal adjudicated on a service that had been the subject of a PhonepayPlus investigation (case reference 11099) and had been operated and promoted by the Level 2 provider. The adjudication resulted in the imposition of a fine of £200,000 and a requirement that the Level 2 provider refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, 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 10 May 2013, the Executive sent the Level 2 provider a post adjudication letter which included an invoice for payment of the £200,000 fine to be made within seven calendar days. The deadline passed without PhonepayPlus receiving payment of the fine.

The Executive also issued a form to assist with the payment of refunds to consumers on 1 May 2013. The form was accompanied by a direction to complete and return the form within 48 hours. The Executive did not receive the completed form until 6 June

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

2. The Level 2 provider stated that it did not accept that PhonepayPlus had “legal grounds” to impose and enforce the collection of the fine and/or administrative charges. The Level 2 provider asserted that this was on the grounds that the fine and administrative charges were not issued in accordance with the Code and that the adjudication was not made in accordance with the five principles of good regulation (which it outlined in full).

The Level 2 provider submitted that the Tribunal panel, “made it clear the case was about marketing using the word “free””. It asserted that the Tribunal stated during informal representations that, “This breach is about using the word free when its clearly not”. It added that the Tribunal further stated that it was, “misleading to say something is free when it[']s not”. The Level 2 provider also said that, “During the tribunal it was established that this promotion is consistent with the guidelines published by Phone[p]ayPlus itself”. The Level 2 provider submitted that the adjudication concerned, “content not being delivered as promised,” but that, “regardless of the fact that the investigation and tribunal was based upon usage of the word “free”, PhonepayPlus failed to act in a “targeted” and “transparent” manner. The Level 2 provider stated that the following points demonstrated that PhonepayPlus had not acted with transparency:

- i. “The case officer and/or Phone[p]ayPlus failed to act with transparency when the results from monitoring tests was excluded from the case bundle...This does not meet the requirement for transparency since a transparent act would be to include this into the case bundle together with inserted screenshots of the promotion.”
- ii. “A member of the [T]ribun[al] stated that it does not matter if the service worked or not as the case was about using the word free so the outcome is irrelevant...The Tribunal found that on the basis of probabilities the service was not working and / or the promises was not being fulfilled.”



In relation to the service, which was the subject of the underlying adjudication, the Level 2 provider asserted that there were no reasonable grounds to suspect consumers were not satisfied. It stated that “both” services had no complaints about the services, “not being materialized”.

In addition, the Level 2 provider stated that PhonepayPlus should have included in the case report all documents available that detailed in-house monitoring. It submitted that such documents would have supported its assertion that the underlying service was fully compliant and, “incentivised promotions was being materialized if offered.” The Level 2 provider stated that the issue was raised during the original Tribunal hearing and that, “a member of the tribunal stated it does not matter as this “breach is about using the word free” in the marketing”. In addition, it stated that after it had received the case bundle, its own investigations had uncovered additional monitoring conducted by PhonepayPlus on the service (Ustre) on or around “2012-07-16 14:10:07”, “2012-08-14 12:47:16” and “2012-08-14 13:31:18”. It submitted that the evidence of the testing:

“[S]upport[s] that the adjudication is made without accountability since there is no justification to why the service would be tested multiple times without even being mentioned in its case. The outcome of these tests, had it been available during the [T]ribunal, would have been crucial for the outcome. Such acts could even be considered fraudulent[.] Facts were excluded from the case bundle, if its systematic or an isolated incident we do not know. The facts favour Upright Line that is the L2 provider. The facts that were excluded from the case bundle would have changed the outcome of the case, as it would have demonstrated that our service is a compliant service.”

It concluded that for the reasons set out above, it acknowledged that it had received the correspondence from PhonepayPlus but that it did:

“[N]ot acknowledge the legality of this claim. There is no legal justification for the claim; the evidence discovered following the tribunal showing that there was critical information was withheld from the case bundle and Level 2 provider. These facts would have been discovered should the Level 2 provider have provided the case bundle in a timely manner, which PhonepayPlus also failed to do.”

Further, the Level 2 provider stated that it was aware that “certain proceedings” were in place but that it was not in a financial position to follow the proceedings as they would, “accrue substantial costs for our business”. It voiced concerns regarding the handling of the case by PhonepayPlus and that it did not believe that there was legal justification for the alleged breaches. It alleged that, “The adjudication was made with false or misleading representation of facts and the case handling did not follow the principles of good regulations,” and that the case should be handled by an entity which has legal authority. It therefore invited PhonepayPlus, “to drop all its claims, sanctions and publications related to the alleged breaches”. It also asserted that the financial hardship it had suffered was “beyond repair” and that this was caused by PhonepayPlus.

In relation to the allegation that the Level 2 provider had not returned the completed refund form, the Level 2 provider stated that prior to the Tribunal it had already refunded all consumers, who had claimed that they were charged for a service that they did not receive, and that it had not received any additional complaints on this issue following the adjudication. It stated that it had provided a full list of refunds prior to the adjudication and that this list had not changed. It added that its financial position did not allow it to provide goodwill refunds to anyone who complained



“without a cause”. Further, it stated that there had been no complaints stating that, “a promise in the marketing was not materialized”. It submitted that it:

“[S]trongly object to being in breach with the code of practice for not satisfying the sanction supply refunds, we used our right to save where there is good cause to save and have refunded everyone who had a complaint related to the breach raised by the Tribunal.”

Finally, the Level 2 provider stated that the, “contact information document was provided on June 6 2013 through E-mail. It was also available through the portal website of PhonepayPlus.”

3. The Tribunal considered the evidence and concluded on the basis of the Executive’s evidence that there had been a further breach of the Code due to non-payment of the fine. The Tribunal noted that a significant part of the Level 2 provider’s submissions were not relevant to the breach before it. Accordingly, the Tribunal upheld a further breach pursuant to paragraph 4.8.4(b) of the Code.

Decision: UPHELD

ALLEGED BREACH 2

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. The Tribunal of 18 April 2013 recommended that PhonepayPlus impose 100% of the administrative costs incurred by PhonepayPlus on the Level 2 provider (£12,009.30). On 1 May 2013, the Executive sent the Level 2 provider a post adjudication letter which included an invoice for the payment of the administrative charge. The invoice requested that payment of £12,009.30 be made within seven calendar days. The deadline for payment passed without PhonepayPlus receiving payment of the administrative charge.

In light of the above, the Executive submitted that a breach of paragraph 4.10.2 of the Code had occurred.

2. The Level 2 provider asserted that the administrative charge imposed on it was disproportionate and,
“was inflated with irrelevant secondary cases and no apparent primary case.”

The Level 2 provider stated that:

“The invoice raised in the amount of £12,009.30 was raised for the investigations related to the adjudication where Upright Line was found to be in breach with the code of practice for having misleading marketing campaigns by making promises that never materialized. During the Tribunal it was stated that whether they materialized or not is irrelevant as the tribunal / breach was related to using the word “free”

“...[T]he total amount refunded by Velti sums up to be approximately £302.30, the consumer harm and / or distress that Phone[p]ayPlus adjudicated against could therefor[e] be assumed to have a value of less than £303. Having an administrative charge imposed that is 40 times higher than the potential consumer harm seems to be out of proportions.”

3. The Tribunal considered the evidence and concluded on the basis of the Executive’s evidence that there had been a further breach of the Code by non-payment of the administrative costs. The



Tribunal noted that a significant part of the Level 2 provider's submissions were not relevant to the breach before it. Accordingly, the Tribunal upheld a further breach pursuant to paragraph 4.10.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal's initial assessment of the breaches of the Code was 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 pay the fine incurred 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 did not find any aggravating or mitigating factors. The Tribunal was concerned that the Level 2 provider failed to respond to the Executive's questions in relation to the identity of the individual who responded to the breach letter on the Level 2 provider's behalf.

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 service for a period of five years (starting from the date of publication of this decision), or until the breaches are remedied by payment of the fine and original and instant administrative charges, whichever is the later.