

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

**Thursday 10 January 2013
TRIBUNAL SITTING No. 117/ CASE 2
CASE REFERENCE: 14089**

Level 2 provider:	mBill Pty Ltd
Type of service:	N/A- breach of sanction
Level 1 provider:	OpenMarket Ltd
Network operator:	All mobile network operators

**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 mBill Pty Ltd was the subject of a PhoneyPayPlus investigation and adjudication (case reference 08104) which resulted in sanctions being imposed by a Tribunal on 27 September 2012. The sanctions imposed by the Tribunal included a fine of £150,000.

The Level 2 provider was advised of the fine by the Executive in an adjudication letter sent on 10 October 2012. The Level 2 provider paid the administrative charge but stated that it had limited financial means and therefore could not pay the fine immediately.

Despite lengthy correspondence with the Executive, the Level 2 provider failed to provide the evidence necessary to verify that it had limited means and therefore PhoneyPayPlus was not in a position to offer any flexibility with regard to payment.

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 12 December 2012. Within the breach letter the Executive raised a further breach of the PhoneyPayPlus Code of Practice (12th Edition) (the “**Code**”) under the following provision:

- Paragraph 4.8.4(b) – Non-payment of a fine

The Level 2 provider responded on 28 December 2012. On 10 January 2013, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

**ALLEGED BREACH ONE
Paragraph 4.8.4(b)**

“The failure of any relevant party to comply with any sanction within a reasonable time will result in:

(b) a further breach of the Code by the relevant party, which may result in additional sanctions being imposed.”

1. On 27 September 2012, the Tribunal upheld a number of breaches of the Code against the Level 2 provider and imposed a fine of £150,000.

On 10 October 2012 the Executive sent the Level 2 provider a post adjudication letter which included an invoice for payment of the fine to be made within ten calendar days. The deadline was later informally extended.

The Level 2 provider requested that PhonepayPlus accept payment of the fine in instalments due to it experiencing financial hardship.

On 18 October 2012 PhonepayPlus requested that the Level 2 provider provide three months of bank statements and the company’s accounts (such as the profit and loss account and the balance sheet) so that it could verify the Level 2 provider’s claims of financial hardship.

On 23 October 2012, the Level 2 provider supplied a single sided profit and loss statement. Despite a further request being made, no other documents or information were received by the Executive and the fine remained unpaid.

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

2. The Level 2 provider stated that it was a small private company that had never intentionally set out to mislead or defraud anyone and had always prided itself on its morals and ethics. It submitted that the original adjudication was due to circumstances that were, “completely out of our control,” and that it had been taken advantage of by a trusted affiliate marketing partner. It asserted that it had improved compliance and had now, “put all our ducks in a row”.

The Level 2 provider stated that it had suffered financial “issues” over the past two years. It asserted that the imposition of the fine had had a negative impact on its business and that it was suffering from financial distress and could not raise additional investment. The Level 2 provider added that in its 11 plus years of trading it had never previously received a fine. Further, the Level 2 provider stated that the payment of the fine was beyond its means and that it was concerned about its immediate future. It was also stated that the owner and sole director of the business was currently unable to work due to his personal circumstances. As a result, it was asserted that the Level 2 provider was unable to obtain the required financial data from its accountants to evidence its claim of financial hardship.

3. The Tribunal considered the evidence and concluded on the basis of the Executive’s submissions that there had been a breach of the Code. The Tribunal considered the submissions of hardship made by the Level 2 provider in mitigation. However, the Tribunal was not persuaded that sufficient evidence had been produced in support of those submissions. The Tribunal noted that the Level 2 provider had been given an opportunity to provide documentary evidence of hardship and it was reasonable to expect that information to be produced. The Tribunal considered that the

documentary evidence provided by the Level 2 regarding its financial position was unsatisfactory. The Tribunal upheld a breach of the Code under paragraph 4.8.4(b).

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Paragraph 4.8.4(b) - Non-payment of a fine

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 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 breach was **very serious**.

Final Overall Assessment

The Tribunal took into consideration the following aggravating factors:

- The Level 2 provider failed to provide sufficient evidence to support its assertion that it was unable to pay the fine immediately and to assist in the determination of whether payment by instalments was appropriate.

The Tribunal took into account the following mitigating factors:

- The Level 2 provider paid the administrative charge of £8,061 on 22 October 2012.
- The Level 2 provider complied with a direction in relation to the payment of refunds and refunded some consumers.

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 mBill Pty Ltd. from providing, or having any involvement in, any premium rate service for a period of three years or until the breach is remedied by payment of the fine, whichever is the later. The prohibition is suspended for 28 days to allow for full payment of all monies outstanding to PhonepayPlus (including the original fine and instant administrative charge) or for an agreement to be concluded with PhonepayPlus for staged payments ("**payment plan**"). The Tribunal further ordered that, in the event that the Executive agrees to a payment plan and there is any default in respect of any of the payments due under the terms of the payment plan, the prohibition will come into immediate effect from the date of such default. If the outstanding monies are fully paid during the 28 day period of suspension or in accordance with the terms of the payment plan, the prohibition is not to take effect.