



Tribunal meeting number 149 / Case 2

Case reference: 37976

Case: Prohibition of an associated individual

### THIS CASE WAS BROUGHT AGAINST THE ASSOCIATED INDIVIDUAL UNDER PARAGRAPH 4.8.6 OF THE CODE

#### BACKGROUND

##### i) Summary relating to Ms Patricia Cantrell

The Tribunal was asked to consider a prohibition against Ms Patricia Cantrell pursuant to paragraph 4.8.2(g) of the 12<sup>th</sup> Edition of the PhonepayPlus Code of Practice (the “Code”).

The case related to an adjudication against the Level 2 provider Bafona Ltd (23 January 2014, case reference: 33386), which concerned a breach of the sanctions imposed by an earlier Tribunal (25 July 2013, case reference: 28791) and non-payment of the associated administrative charges. The case on 25 July 2013 concerned a quiz competition service (the “Service”). On 23 January 2014, the Tribunal recommended that the Executive consider initiating the process which may lead to the prohibition of Ms Patricia Cantrell, (an associated individual) pursuant to paragraph 4.8.2(g) of the Code.

The Tribunal considered the following evidence in full:

- The Tribunal decision against the Level 2 provider of 25 July 2013;
- The Tribunal decision against the Level 2 provider of 23 January 2014;
- Incorporation documentation for the Level 2 provider;
- A compliance guarantee agreement between the Level 2 provider and the Level 1 provider, TxtNation Limited;
- A contract between the Level 2 and Level 1 provider TxtNation Limited;
- Affiliate marketing contracts between the Level 2 provider and affiliate marketers x 6;
- PhonepayPlus registration database screenshots;
- The covering letter and breach of sanctions breach letter of 5 July 2013;
- Post adjudication correspondence between the Level 2 provider and the Executive between 6 September 2013 - 23 September 2013; and
- The covering letter and the prohibition investigation letter dated 7 April 2014.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent notification of potential prohibition to Ms Patricia Cantrell and the Level 2 provider on 7 April 2014. The Executive did not receive a response to the notification of potential prohibition. The Tribunal was satisfied that in accordance with paragraph 4.8.6 of the Code, the Executive had made all reasonable attempts to inform Ms Patricia Cantrell of the potential prohibition proceedings. On 1 May 2014, the Tribunal reached a decision on the potential prohibition of Ms Patricia Cantrell.

##### ii) Relevant Code provisions

- Paragraph 4.8.2(g) of the Code states:

“The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. Having taken all relevant circumstances into account, the



Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach:

(g) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from providing, or having any involvement in, any premium rate service or promotion for a defined period.”

- Paragraph 5.3.9 of the Code states:

“Associated individual’ is any sole trader, partner or director or manager of a premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by PhonepayPlus”.

- Paragraph 4.8.6 of the Code states:

“If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any named individual, PhonepayPlus shall first make all reasonable attempts to so inform the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to require an oral hearing”.

## SUBMISSIONS AND CONCLUSIONS

1. The Executive submitted that the following evidence indicated that Ms Cantrell was knowingly involved in a series breaches most of which were very serious breaches of the Code in respect of the adjudications dated 25 July 2013 and 23 January 2014.

### **Adjudication dated 25 July 2013, case reference: 28791**

On 25 July 2013, the Tribunal adjudicated against the Level 2 provider Bafona Ltd. The adjudication concerned a subscription quiz competition service. The Service operated using Payfortit (“PFI”) at a cost of £4.50 per week.

PhonepayPlus did not receive any complaints regarding the Service. Concerns regarding the promotion of the Service were uncovered as a result of in-house monitoring conducted by the PhonepayPlus Research and Market Intelligence team. The monitoring revealed that affiliate marketing, which generated consumer traffic to the Service, appeared to utilize a form of malware that stopped users’ internet browsers working, and resulted in users being unable to access a large number of popular websites, including Facebook, Ebay and Google. Users were told that they were required to sign-up to the Service (and/or other premium rate services) in order to unblock their browsers.

The Tribunal upheld the following breaches of the Code:

- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.3.2 - Misleading
- Rule 2.5.5 – Avoidance of harm (fear, anxiety, distress or offence)
- Paragraph 3.4.12(a) – Registration of the Service

The Tribunal concluded that the breaches of rules 2.3.1, 2.3.2 and 2.5.5 of the Code were very serious. The breach of paragraph 3.4.12(a) of the Code was significant. The Tribunal determined that the seriousness of the case overall was very serious and imposed the following sanctions:

- a formal reprimand;
- a fine of £25,000;
- a warning that if the Level 2 provider fails to ensure that it has sufficient measures in place to prevent actual or potential consumer harm being caused by affiliate marketing in the future it should expect to receive a significant penalty for any similar breach; and
- a requirement that the Level 2 provider must 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.

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

### **Adjudication dated 23 January 2014, case reference: 33386**

On 23 January 2013, the Tribunal adjudicated against the Level 2 provider Bafona Ltd for non-compliance with the sanctions imposed by an earlier Tribunal (25 July 2013, case reference: 28791) and non-payment of the associated administrative charges.

The Tribunal upheld 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 Tribunal concluded that both breaches of the Code were very serious. The Tribunal determined that the seriousness of the case overall was very serious and imposed 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 three years (starting from the date of publication of the decision), or until the breaches are remedied by payment of the fine and original and instant administrative charges, whichever is the later.

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

### **Associated individual knowingly involved in a series of breaches most of which were very serious breaches of the Code**

The Executive submitted that Ms Patricia Cantrell was an associated individual at the time the very serious breaches occurred and upheld in the adjudication dated 25 July 2013 and 23 January 2014 as a result of the following:

- As a director, Ms Cantrell was responsible for the oversight of the Level 2 provider's affairs and the management of the Service at the time the series of breaches, most

of which were very serious breaches, of the Code occurred. The statutory statement, which was prepared at the time of incorporation in the jurisdiction of Saint Christopher and Nevis, confirmed that Ms Cantrell was a director of the Level 2 provider.

- Ms Cantrell is listed on the PhonepayPlus registration database as the owner and primary contact for the Level 2 provider. This status was in place when the series of breaches, most of which were very serious, of the Code occurred.
- Four contracts between the Level 2 provider and affiliate marketers were signed by Ms Patricia Cantrell as the director, which confirmed her position as director of the Level 2 provider. One particular contract was signed by Ms Patricia Cantrell on the same date that the Executive conducted monitoring of the Service that led to the adjudication of 25 July 2013.

The Executive submitted that Ms Patricia Cantrell was knowingly involved in the very serious breaches of the Code which were upheld by Tribunals on 25 July 2013 and 23 January 2014 as a result of the following:

- As a director of the Level 2 provider, Ms Cantrell was, at the time the very serious breaches of the Code occurred, jointly responsible for the oversight of the Level 2 provider's affairs and ensuring that it was properly managed.
- As a director, Ms Cantrell had a fiduciary duty to ensure that all commercial activities, including the operation of the Service was conducted in accordance with the law and the regulatory obligations.
- Six contracts between the Level 2 provider and affiliate marketers were signed by Ms Patricia Cantrell. In addition, the contract with the Level 1 provider had been signed by Ms Cantrell. As such Ms Cantrell had authorised key strategic commercial arrangements for the promotion and operation of the Service. The Executive noted that the contract between the Level 2 provider and one of the affiliate marketers, related specifically to the promotional campaign that was involved in the breaches of the Code adjudicated by the Tribunal on 25 July 2013.

Following the Tribunal of 25 July 2013, the Executive corresponded with the project manager Mr William Gray regarding compliance with the sanctions imposed. Mr Gray stated that the Level 2 provider wished to review the Tribunal's decision and stated that this would be the decision of the director. He explained that the delay in complying with the sanctions was as a result of the director being out of the country. Accordingly, the Executive asserted that this demonstrated that Ms Cantrell was responsible for ensuring that the Level 2 provider complied with the sanctions imposed by the Tribunal.

2. Ms Patricia Cantrell did not provide a response to the notification of potential prohibition.
3. The Tribunal considered all the evidence presented to it. The Tribunal found that, in accordance with paragraph 5.3.9 of the Code, Ms Patricia Cantrell was an associated individual as she was director at the relevant time. Further, the Tribunal found that she was knowingly involved in a series of breaches most of which were very serious breaches of the Code upheld against the Level 2 provider on 25 July 2013 and 23 January 2014, as a result of her involvement in the Level 2 provider's affairs which was demonstrated amongst other factors by her signing key contracts for the promotion of the Service.

In relation to the adjudication of 23 January 2014, Ms Cantrell appeared to have overall responsibility for authorisation of the payment of the fine and administrative charge. In light of this, the Tribunal concluded that for the reasons advanced by the Executive, Ms Patricia



Cantrell had been knowingly involved in a series of breaches of the Code, most of which were very serious, as an associated individual.

#### Sanction

The Tribunal decided to prohibit Ms Patricia Cantrell from providing, or having any involvement in, any premium rate service for a period of five years from the date of publication of this decision.

In making this decision the Tribunal found that there had been fundamental non-compliance with Code obligations. It noted that Ms Patricia Cantrell had failed to co-operate with, or acknowledge, the prohibition proceedings. Further, the Tribunal commented that as a director, Ms Cantrell was the most senior individual within the Level 2 provider company and, had overall responsibility for ensuring that the Level 2 provider was properly managed and that its affairs were conducted in accordance with legal and regulatory obligations.

Accordingly, it was satisfied that, given the need to protect consumers from similar conduct, and in light of Ms Cantrell's position within the Level 2 provider, five years' prohibition was an appropriate period, taking into consideration all the circumstances.