

Tribunal meeting number 156 / Case 4

Case reference: 47777

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 Mr Ran Shemuel Feingold

The Tribunal was asked to consider imposing a prohibition against Mr Ran Shemuel Feingold pursuant to paragraph 4.8.2(g) of the 12th edition of the PhonepayPlus Code of Practice (the “**Code**”).

The case related to an adjudication against the Level 2 provider (the “**Level 2 provider**”) CommandM PTY. Limited (23 January 2014, case reference: 30361), which concerned a breach of the sanctions imposed by an earlier Tribunal (11 July 2013, case reference 18062) and non-payment of the associated administrative charges. The case on 11 July 2013 concerned a virus and malware facts subscription service (the “**Service**”).

On 16 June 2014, after considering further information provided by the Executive relating to an initial instruction to instigate the process in respect of other associated individuals, the Chair of the 23 January 2014 Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Ran Shemuel Feingold, (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 dated 23 January 2014;
- The current and historical company extract for the Level 2 provider from the Australian Securities and Investment Commission;
- The covering letter and email to the breach of sanctions letter of 6 August 2013 and 30 December 2013;
- Post adjudication correspondence with the Level 2 provider between 3 February and 6 February 2014;
- Notification of potential prohibition dated 14 July 2014; and
- Mr Feingold’s response to the notification of potential prohibition provided by his legal representative dated 8 August 2014.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent the notification of a potential prohibition to Mr Ran Shemuel Feingold and the Level 2 provider on 14 July 2014 and Mr Ran Shemuel Feingold’s legal representatives provided a response on his behalf on 8 August 2014. On 21 August 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Ran Shemuel Feingold.

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 Mr Ran Shemuel Feingold was an associated individual knowingly involved in a series of breaches of the Code, which were very serious, in respect of the adjudication dated 23 January 2014.

Adjudication dated 23 January 2014, case reference: 30361

On 23 January 2014, the Tribunal adjudicated against the Level 2 provider for the non-compliance with the sanctions and non-payment of an administrative charge imposed by the Tribunal on 11 July 2013.

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;
- 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 this decision) 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 serious or series of breaches of the Code

The Executive submitted that Mr Ran Shemuel Feingold was an associated individual at the time the breaches of the Code occurred and were upheld by a Tribunal on 23 January 2014, as he was a director of the Level 2 provider. The current and historical extract for the Level 2 provider from the Australian Securities and Investment Commission revealed that from 28 December 2013 Mr Feingold was a director of the Level 2 provider and at the time of the decision remained in that position. Further, he was the sole director from 16 January 2014 onwards.

The Executive submitted that Mr Ran Shemuel Feingold was knowingly involved in breaches of the code, which were very serious, that were upheld by the Tribunal on 23 January 2014 as a result of the following:

- The Executive noted that Mr Feingold commenced his directorship two days prior to the breach of sanctions letter being issued to the Level 2 provider. As a director of the Level 2 provider, Mr Feingold was responsible for the oversight of the Level 2 provider's affairs and ensuring that it was properly managed. The Executive submitted that as a new incoming director, Mr Feingold would have been made aware of the outstanding fine and administrative charges owed by the Level 2 provider to PhonepayPlus.
- As a director, Ms Feingold 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.
- During Mr Feingold's directorship, the Level 2 provider received a breach of sanctions letter for failure to comply with the sanctions and pay the administrative charge.
- The Executive noted that the primary contact for the Level 2 provider responded to the breach of sanctions letter sent on 30 December 2013 and stated that the "relevant people" that needed to respond to the breach letter were away due to the Christmas break and he would be able to provide a response the following week. An extension to the deadline was granted but no further response was received. The Executive submitted that it appeared that the primary contact was asserting that the responsibility for compliance with the sanctions rested with other senior officers of the Level 2 provider. At this time, the Executive noted that the only senior officers of the Level 2 provider were Mr Ran Shemuel Feingold and one other director.

Consequently, the Executive submitted that Mr Ran Shemuel Feingold was an associated individual who was knowingly involved in breaches of the Code which were very serious.

2. Mr Ran Shemuel Feingold contested the case for an imposition of a prohibition against him and stated that he was not an associated individual at the time the breaches of the Code occurred and accordingly was also not knowingly involved.

Mr Feingold stated that he was appointed as a director of the Level 2 provider on 28 December 2013, which was after the breaches of the Code (which were the subject of the adjudication on 23 January 2014) occurred. Mr Feingold submitted that the breaches of the Code occurred in July 2013, at a time when he was not an associated individual of the



Level 2 provider. Further, Mr Feingold stated that he was also not knowingly involved in the breaches of the Code because he had no involvement at all with Level 2 provider at the time they occurred.

Mr Feingold noted that the Executive's only basis for asserting that he was an associated individual of the Level 2 provider was because he was a director. Mr Feingold asserted that he could only be held responsible for acts that the Level 2 provider had carried out when he was an associated individual, and not for acts committed at other times during the Level 2 provider's existence. Mr Feingold submitted that the breach occurred in July 2013 and the Executive had appeared to accept this when it had stated:

"On 24 July 2013, the Executive sent the Level 2 provider a formal notification of the Tribunal's decision of 11 July 2014, which included an invoice for payment of the administrative charge and fine sanction. The invoice requested that payment be made within 7 calendar days."

In addition, he noted that the Executive had listed significant events that had occurred in relation to the non-compliance with the sanctions and non-payment of the administrative charge. These included the expiry of the deadline to make payment, receipt of the first breach of sanctions letter, attempts between the Executive and the Level 2 provider to negotiate a payment plan and receipt of a further breach of sanctions letter. Save for one event all had occurred by 28 December 2013. Accordingly, he submitted that it was clear from the Executive's description of events that by 28 December 2013 the Executive had made numerous attempts to obtain compliance with the sanctions imposed and the breaches had already occurred.

Mr Feingold asserted that the Tribunal decision of 23 January 2014 had also made it clear that the relevant breaches occurred at around the end of July 2013, when it stated:

"The Tribunal considered the evidence. The Tribunal found that the Level 2 provider had not paid the fine or taken steps to comply with the refund sanction in the time period specified and concluded on the basis of the Executive's evidence that there had been a further breach of the Code. Accordingly, the Tribunal upheld a breach of paragraph 4.8.2(b) of the Code."

Mr Feingold submitted that it was clear that the Tribunal found that it was the Level 2 provider's failure to pay the required amounts within the time period specified that constituted the relevant breach. Consequently, he submitted that the breach occurred at around the end of July 2013, some months before he had any involvement at all with the Level 2 provider.

Mr Feingold specifically addressed the submission made by the Executive that, as he was a director on 23 January 2014 when the Tribunal made its determination regarding the breaches of the Code, he should be held responsible for the breaches. Mr Feingold stated that "is obviously an absurd assertion". Further, he noted that the Executive appeared to argue that as he was a director two days before the breach letter was sent to the Level 2 provider he was responsible for non-compliance with the sanctions. Mr Feingold stated that when he was appointed as a director of the Level 2 provider, it did not have sufficient funds to pay the fine and administrative charge. Accordingly, he did not need to make a decision not to pay the amounts outstanding to PhonepayPlus, as there was simply no money available to make payment.



Mr Feingold stated that the Executive's stance would have the bizarre consequence that any individual appointed as a director of the Level 2 provider at any time in the future, who did not procure immediate payment of all outstanding sums owing to PhonepayPlus would be knowingly involved in a regulatory breach, regardless of the financial affairs of the Level 2 provider. He stated that could not be the correct position.

Further, in light of the submissions detailed above, Mr Feingold submitted that he was not knowingly involved in the Level 2 provider's failure to pay the outstanding amount due to PhonepayPlus, as this had taken place long before he had any involvement with the Level 2 provider.

3. The Tribunal considered all the evidence presented to it including Mr Feingold's written submissions. The Tribunal found that non-compliance with sanctions and failure to pay an administrative charge became breaches of the Code as soon as the deadline for compliance expired, but continuing non-compliance meant that the breaches were also ongoing. Accordingly, the Tribunal concluded that the relevant period when the breaches of the Code occurred (resulting in the adjudication of 23 January 2014) was 2 August 2013 onwards. However, the Tribunal noted that the Executive had not initially taken action against the Level 2 provider for its non-compliance as it was engaging in discussions with the Executive to negotiate a payment plan. These discussions ended on 17 September 2013 due to the Level 2 provider's failure to respond. Accordingly, the Tribunal found that from 18 September 2013 onwards breaches of the Code were continuing. The Tribunal determined that these breaches of the Code were outlined in the breach letter that the Executive issued on 30 December 2013, accordingly the breaches of the Code that had been upheld by the Tribunal of 23 January 2014 spanned the period between 17 September 2013 and 30 December 2013. The Tribunal noted that Mr Feingold commenced his directorship on 28 December 2013, which was a Saturday.

Consequently, the Tribunal found that Mr Feingold was a director for two days of the relevant period and therefore was an associated individual. The Tribunal commented that Mr Feingold was not an associated individual on the date when the breaches commenced.

Further, the Tribunal considered whether Mr Feingold was knowingly involved in very serious breaches of the Code upheld against the Level 2 provider on 23 January 2014. The Tribunal found that Mr Feingold as a director should not have been ignorant of his obligations in relation to the provision of premium rate services. However, as he had only been a director for two days (and those days were on a weekend) it was, on the balance of probabilities, unlikely that Mr Feingold was knowingly involved in the continuing breaches of the Code upheld by a Tribunal on 23 January 2014.

Having regard for all the circumstances of the case, the Tribunal concluded that, there was insufficient evidence to establish that Mr Feingold had been knowingly involved in any of the breaches of the Code upheld against the Level 2 provider on 23 January 2014. Accordingly, the Tribunal did not impose a prohibition on Mr Ran Shemuel Feingold.

The Tribunal noted that the sanctions imposed by the Tribunal of 11 July 2013 were still outstanding. Further, it noted that Mr Feingold is an associated individual of a Level 2 provider that continues to be in breach of the Code and he is therefore knowingly involved with those continuing breaches of the Code.