



Tribunal meeting number 149 / Case 1

Case reference number: 37977

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 William Gray

The Tribunal was asked to consider a prohibition against Mr William Gray 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 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 Mr William Gray, (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;
- A contract between the Level 2 provider and Level 1 provider, TxtNation Limited;
- The covering letter and the breach letter sent to the Level 2 provider on 5 July 2013;
- A response to the breach letter of 9 July 2013, provided by Mr William Gray;
- Post adjudication correspondence between Mr William Gray and the Executive between 6 September 2013 – 23 September 2013;
- The covering letter and breach of sanctions letter of 18 December 2013; and
- The covering letter to the notification of the potential prohibition dated 7 April 2014.

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

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 Gray was an associated individual knowingly involved in a series of mostly 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 Payforit (“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 utilise 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 Mr William Gray was an associated individual at the time the breaches of the Code and the two adjudications occurred as he was a manager with day-to-day responsibility for conduct for the Level 2 provider's affairs. Specifically:

- Mr William Gray was jointly responsible with the director for the oversight of the Level 2 provider's affairs at the relevant time.



- Throughout the investigation and enforcement procedure for both adjudications, Mr Gray was the only individual from the Level 2 provider who corresponded with the Executive.
- Mr William Gray provided a detailed response to the breach letter for the adjudication of 25 July 2013, indicating that he had day-to-day responsibility for the conduct of the business and had extensive knowledge of the Service under investigation.
- Mr William Gray's responses to requests for information from the Executive during the investigation in relation to the adjudication of 25 July 2013 indicated that Mr Gray considered that he was responsible for the Service. In a response he stated:

"I understand that I'm responsible under the code of practice for actions of affiliates and the promotions. However the acts of this individual have been malicious and purely fraudulent it's been done through many different L1 and L2 providers and as a result many services have been shut down, not just my service." [emphasis added]

A further response stated:

"Refunding all users in full will cause a substantial loss to my business." [emphasis added]

- A contract for the provision of a PFI platform between the Level 1 and Level 2 provider of 21 May 2013 was signed on behalf of the Level 2 provider by the "project manager", Mr William Gray. As such, this demonstrated that Mr William Gray held a position of authority that permitted him to authorise contracts on behalf of the Level 2 provider.

In addition, the Executive noted that, following the adjudication of 25 July 2013, Mr William Gray corresponded with the Executive regarding the sanctions. Mr William Gray stated that there had been a delay in complying with the sanctions imposed by the Tribunal as the company director had been out of the country and he wished to obtain the director's permission before submitting a potential review application. The Executive noted that, while Mr William Gray asserted that the decision to comply with the sanctions was that of the director, in light of Mr Gray's seniority and his control of the day-to-day management of the Level 2 provider, there was a shared responsibility between Mr Gray and the director to comply with the sanctions.

The Executive submitted that Mr William Gray was knowingly involved in the very serious breaches of the Code which were upheld by the Tribunal on 25 July 2013 and 23 January 2014 as a result of the evidence in relation to Mr William Gray's responsibility in the Level 2 provider's company, but particularly as a result of the following:

- Mr William Gray was jointly responsible for the oversight of the Level 2 provider's affairs for the reasons outlined above.
- Throughout the investigation and enforcement procedure for both adjudications, Mr Gray was the only individual of the Level 2 provider who corresponded with the Executive. In addition, Mr Gray provided a detailed response to the breach letter for the adjudication of 25 July 2013, indicating that Mr Gray had day-to-day responsibility for the conduct of the business, had extensive knowledge of the Service under investigation and was knowingly involved in the breaches of the Code.

Consequently, the Executive submitted that Mr William Gray was an associated individual who was knowingly involved in a series of breaches many of which were very serious.

2. Mr William Gray 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, Mr William Gray was an associated individual, as he had significant responsibility for the management of the Level 2 provider's affairs. Further, the Tribunal found that Mr William Gray was knowingly involved in the very serious breaches of the Code upheld against the Level 2 provider on 25 July 2013 and 23 January 2014 as a result the information provided by Mr William Gray to PhonepayPlus during the enforcement procedure and the detail of the correspondence provided by him. In particular, the Tribunal found that, as Mr Gray had provided a detailed response to a breach letter and was authorised to sign a contract with the Level 1 provider, he had day-to-day responsibility for the Level 2 provider's affairs and was knowingly involved in the activities of the Level 2 provider that led to the breaches of the Code.

In relation to the breaches of the Code upheld on 23 January 2014, the Tribunal noted that Mr William Gray had stated during correspondence that he was required to obtain the authorisation of the director before payment of the fine and the administrative charges were made. However, the Tribunal found that, although the director may have been required to authorise the payment of the fine and the administrative charge, as Mr William Gray had day-to-day responsibility for the Level 2 provider he could have returned the refund form to comply with part of the sanctions imposed and corresponded with the Executive to notify it of any difficulties in paying the fine – but he did not do so.

In light of all the reasons detailed above, and in accordance with paragraph 4.8.2(g) of the Code, the Tribunal concluded that for the reasons advanced by the Executive, Mr William Gray 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 Mr William Gray from providing, or having any involvement in, any premium rate service for a period of four years from the date of publication of this decision.

In making this decision the Tribunal noted that Mr William Gray had failed to co-operate with, or acknowledge, the prohibition proceedings. In addition, the Tribunal commented that whilst Mr Gray was not the most senior individual within the Level 2 provider, he had overall day-to-day responsibility for the Level 2 provider and held a position of authority as evidenced by his ability to bind the Level 2 provider in important contractual arrangements.

The Tribunal found that there had been fundamental non-compliance with Code obligations. Accordingly, it was satisfied that, given the need to protect consumers from similar conduct balanced against Mr Gray's status as an employee, four years' prohibition was an appropriate period, taking into consideration all the circumstances.