

## Tribunal meeting number 156 / Case 2

Case reference: 47776

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 Shokoofeh Jafari

The Tribunal was asked to consider imposing a prohibition against Ms Shokoofeh Jafari 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 (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 led to the prohibition of Ms Shokoofeh Jafari, (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 11 July 2013;
- 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;
- Documentation provided by the Level 1 provider in relation to its due diligence and risk assessment of the Level 2 provider and the Service;
- Correspondence with the Level 2 provider between 13 June 2013 and 6 February 2014;
- The covering letter and email to the breach letter of 13 June 2013 and the covering email to the Level 2 provider’s response dated 27 June 2013;
- The covering letter and email to the breach of sanctions letter of 6 August 2013 and 30 December 2013;
- Notification of potential prohibition of 14 July 2014;
- Correspondence with the legal representatives who stated that they were representing Ms Shokoofeh Jafari dated 28 July 2014; and
- Ms Shokoofeh Jafari’s response to the notification provided by her legal representative dated 12 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 Ms Jafari and the Level 2 provider on 14 July 2014 and Ms Jafari’s legal representatives provided a response on her behalf on 12 August 2014. On 21 August 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Ms Shokoofeh Jafari.

## 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 subparagraph 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 Shokoofeh Jafari was an associated individual knowingly involved in a series of breaches of the Code, most of which were serious or very serious, in respect of the adjudications dated 11 July 2013 and 23 January 2014.

### **Adjudication dated 11 July 2013, case reference: 18062**

On 11 July 2013, the Tribunal adjudicated against the Level 2 provider. The adjudication concerned a virus and malware facts premium rate subscription Service that operated at a cost of £4.50 per week for one virus fact to be sent to consumers. Consumers subscribed to the Service as part of an upgrade to the Level 2 provider’s “Battery Booster application”, which was available free of charge on App stores. The Service operated between December 2011 and 29 May 2013.

Generally complainants stated that they had received unsolicited, reverse-billed SMS messages and that they had not engaged with the Service. Other complainants acknowledged downloading the application but stated that they believed the Service was free.

The Tribunal upheld the following breaches of the Code:

- Rule 2.3.2 - Misleading
- Rule 2.2.5 – Pricing prominence and proximity
- Paragraph 4.2.5 – Failure to disclose information

The Tribunal concluded that the breach of rule 2.3.2 of the Code was very serious, the breach of rule 2.2.5 of the Code was serious and the breach of paragraph 4.2.5 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 £250,000;
- a requirement that access to the Service is barred until compliance advice is sought and implemented to the satisfaction of the Executive; and
- a requirement to 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: 30361**

On 23 January 2014, the Tribunal adjudicated against the Level 2 provider CommandM PTY. Limited 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 the 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 Ms Shokoofeh Jafari was an associated individual at the time breaches of the Code occurred and were upheld by Tribunals on 11 July 2013 and 23 January 2014, as she was a director of the Level 2 provider. The current and historical company extract for the Level 2 provider from the Australian Securities and Investment Commission revealed that between 3 May 2013 and 28 December 2013, Ms Jafari was the sole director of the Level 2 provider and she remained a director until 16 January 2014.

The Executive submitted that Ms Shokoofeh Jafari was knowingly involved in a series of breaches of the code, most of which were serious or very serious, that were upheld by a Tribunal on 11 July 2013, as a result of the following:

- As a director of the Level 2 provider, Ms Jafari was, at the time the breaches of the Code occurred, responsible for the oversight of the Level 2 provider's affairs and ensuring that it was properly managed. For a significant period of her directorship, Ms Jafari was the sole director and therefore it was highly likely that she was aware of the non-compliant manner in which the Service was operating.
- As a director, Ms Jafari 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 the early period of Ms Jafari's directorship, key events occurred which would have alerted her to the non-compliant manner in which the Service was operating and she should have taken action to intervene:
  - The Level 2 provider was notified by PhonepayPlus that it had received a further 14 complaints concerning the Service (in addition to the 63 complaints already received);
  - A direction for information was issued to the Level 2 provider on 14 May 2013;
  - The Service was suspended by the Level 1 provider on 29 May 2013;
  - The Level 2 provider was sent a breach letter on 13 June 2013; and
  - The Level 2 provider was subject to an adjudication on 11 July 2013.

The Executive submitted that Ms Shokoofeh Jafari was knowingly involved in two very serious breaches of the code that were upheld by a Tribunal on 23 January 2014, as a result of the following:

- Ms Jafari was made aware of the outcome of the adjudication of 11 July 2013 and the consequences of the failure to comply with the sanctions imposed and make payment of the administrative charge in a letter sent to the Level 2 provider on 24 July 2013.

- The Executive noted that correspondence following the adjudication of 11 July 2013 was with another individual at the Level 2 provider (who was named as the primary contact), however the Executive submitted that as a director, Mr Jafari should have been aware of the following key events that took place during her directorship:
  - The deadline to make payment of the fine and the administrative charge expired;
  - The Level 2 provider attempted to negotiate a payment plan between 7 August and 7 September 2013; and
  - The Level 2 provider received a breach letter for non-compliance with the sanctions and non-payment of the administrative charge.
  
- The Executive noted that the primary contact for the Level 2 provider responded to the breach of sanctions letter of 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 Ms Shokoofeh Jafari and one other director.

Consequently, the Executive submitted that Ms Shokoofeh Jafari was an associated individual who was knowingly involved in a series of breaches, most of which were serious or very serious.

2. Ms Shokoofeh Jafari did not oppose the imposition of a prohibition on her but provided written submissions via her legal representative to explain her situation. She accepted that she was a director of the Level 2 provider and therefore an associated individual but, she did not accept that she was knowingly involved in the breaches of the Code.

To provide a clear understanding of the circumstances of Ms Jafari’s involvement with the Level 2 provider, she provided some background information. She described herself as a 32 year old female who worked as a personal trainer. She stated that she had planned to open her own gym in the future and during 2013, one of her clients introduced her to another individual. They both told her that in order to borrow funds to set up a gym she would need a good credit rating. They suggested that by appointing her as a director of a company she would be in a good position to borrow money from a bank in the future. Ms Jafari explained that she knew very little about the business only that it was a “phone business of some sort” and it was very successful. She stated that she would be paid each time it was necessary for her to sign documents. Despite this promise, she stated that she was not paid anything for signing documents.

During the directorship, Ms Jafari stated that she was not required to involve herself in the operation of the business, nor did she have any knowledge of the business dealings. Further, she stated that she had no knowledge that she was the sole director of the Level 2 provider.

Ms Jafari submitted that she rarely gave the business any thought, other than asking the individuals concerned whether she was obtaining a good credit rating and she was assured all was going well.

Consequently, Ms Jafari asserted that the first she knew of the mismanagement of the Level 2 provider was when she received the notification of potential prohibition. In summary, she stated that she had no qualifications in business nor had she ever managed or controlled a business. She stated that she was aware that the Executive was seeking a prohibition against her from providing or having any involvement in premium rate services and she stated that she did not intend to involve herself in any company of this type in the future and accordingly did not challenge such a prohibition.

3. The Tribunal considered all the evidence presented to it including Ms Jafari's written submissions. The Tribunal found that, in accordance with paragraph 5.3.9 of the Code, Ms Jafari was an associated individual as the evidence presented by the Executive demonstrated that she was a director of the Level 2 provider at the relevant time. The Tribunal went on to consider whether Ms Jafari was knowingly involved in a serious or series of breaches of the Code upheld against the Level 2 provider on 11 July 2013 and 23 January 2014. The Tribunal found that Ms Jafari, as a director, should not have been ignorant of her obligations in relation to the provision of premium rate services. However, Ms Jafari had provided detailed written submissions to rebut the presumption that she, as a director of the Level 2 provider, was knowingly involved in the breaches of the Code. This included explaining that she had no knowledge of the business dealings of the Level 2 provider and had agreed to be a director at the request of two other individuals involved with the Level 2 provider who had asked her to sign various documents but otherwise not involved her in the day to day dealings of the Level 2 provider. The Tribunal noted that Ms Jafari had stated that she had no experience in the premium rate service industry and that she did not intend to engage in this type of business again, as such she had not opposed the imposition of a prohibition. Accordingly, having regard for all the circumstances of the case, the Tribunal concluded that there was insufficient evidence to establish that Ms Jafari had been "knowingly involved" in any of the breaches of the Code upheld against the Level 2 provider on 11 July 2013 and 23 January 2014. Accordingly, the Tribunal did not impose a prohibition on Ms Shokoofeh Jafari.