

### Tribunal meeting number 150 / Case 2

**Case reference:** 37406  
**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 Sunil Kapil**

The Tribunal was asked to consider the imposition of a prohibition against Mr Sunil Kapil 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 Amectro Ltd (20 March 2014, case reference: 38260), which concerned a breach of the sanctions imposed by an earlier Tribunal (12 December 2013, case reference: 13335) and non-payment of the associated administrative charges. The case on 12 December 2013 concerned a pay-per-stream glamour video download service (the “**Service**”).

On 12 December 2013 and 20 March 2014, the Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Sunil Kapil, (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 12 December 2013;
- The Tribunal decision against the Level 2 provider dated 20 March 2014;
- Correspondence between Mr Sunil Kapil and the PhonepayPlus Complaint Resolution team;
- The covering letter and breach report of 5 November 2013 from the Executive to the Level 2 provider;
- Post adjudication correspondence between 8 January – 21 January 2014;
- The covering letter and breach of sanctions report of 19 February 2014;
- Post adjudication correspondence of 2 April 2014;
- The Level 1 provider’s due diligence report dated 18 September 2012;
- PhonepayPlus registration database screenshots;
- The covering letter and notification of potential prohibition of 15 April 2014; and
- Confirmation of delivery of the notification of potential prohibition of 17 April 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 Sunil Kapil and the Level 2 provider on 15 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 Sunil Kapil of the potential prohibition proceedings. On 15 May 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Sunil Kapil.

##### **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 Sunil Kapil was an associated individual knowingly involved in a series of very serious breaches of the Code in respect of the adjudications dated 12 December 2013 and 20 March 2014.

### **Adjudication dated 12 December 2013, case reference: 13335**

On 12 December 2013, the Tribunal adjudicated against the Level 2 provider Ametro Ltd. The adjudication concerned a pay-per-stream glamour video download service. The Service operated at a cost of £3.00 for 24 hours access or £3.00 per download depending on the method of entry.

The majority of complainants stated that they had not engaged with the Service but had been charged. Certain complainants acknowledged receiving messages from the Service but stated that they were unsolicited.

The Tribunal upheld the following breach of the Code:

- Rule 2.3.3 – Consent to charge

The Tribunal concluded that the breach of rule 2.3.3 of the Code was very serious. 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 is barred to all the Level 2 provider's premium rate services for 12 months or until compliance advice has been implemented to the satisfaction of PhonepayPlus, whichever is the later; 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 20 March 2014 case reference: 38260**

On 20 March 2014, the Tribunal adjudicated against the Level 2 provider Amectro Ltd in relation to non-compliance with the sanctions imposed by an earlier Tribunal (12 December 2013, case reference: 13335) 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 very serious breaches of the Code**

The Executive submitted that, as a director of the Level 2 provider, Mr Sunil Kapil was an associated individual both at the time the very serious breaches occurred and were upheld in the adjudications dated 12 December 2013 and 20 March 2014.

Further, the Executive submitted that Mr Sunil Kapil was knowingly involved in the very serious breaches of the Code which were upheld by Tribunals on 20 December 2013 and 20 March 2014 as a result of the following:

- As a director of the Level 2 provider, Mr Sunil Kapil was, at the time the very serious breaches of the Code occurred, responsible for the oversight of the Level 2 provider's affairs and ensuring that it was properly managed.



- As a director, Mr Sunil Kapil had a fiduciary duty to ensure that all commercial activities, including the operation of the Service, were conducted in accordance with the law and the regulatory obligations.
  - Mr Sunil Kapil was named as the responsible party and the director for the Level 2 provider on the due diligence report provided by the Level 1 provider.
  - Mr Sunil Kapil corresponded with the Executive throughout the preliminary investigation into the Service with the PhonepayPlus Complaint Resolution team and provided detailed responses to directions for information concerning the operation, content and promotion of the Service. The Executive submitted that the responses demonstrated a detailed knowledge of the Service and the breaches of the Code.
  - As a director, Mr Sunil Kapil was responsible for ensuring that the Level 2 provider adhered to the sanctions imposed by the Tribunal on 12 December 2013.
2. Mr Sunil Kapil did not provide a response to the notification of potential prohibition documentation.
  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 Sunil Kapil was an associated individual as he was the director of the Level 2 provider at the relevant time.

The Tribunal noted that the evidence in the underlying adjudication (12 December 2013) appeared to indicate that some complainants had been transferred from one Service to another without their consent, the Level 2 provider had provided inaccurate message logs to PhonepayPlus and that the Level 2 provider had informed PhonepayPlus that the Service had been terminated in relation to a particular complainant, yet message logs demonstrated that this was not the case. As a result of this, and Mr Sunil Kapil's significant involvement in the Level 2 provider's affairs, the Tribunal found that there was clear evidence that Mr Sunil Kapil as a director had been knowingly involved in deliberate non-compliance with the Code.

In addition, Mr Sunil Kapil failed to ensure that the Level 2 provider complied with the sanctions imposed. The Tribunal found that this illustrated systematic non-compliance with the Code and regulatory enforcement regime.

Accordingly, for all the reasons outlined above, the Tribunal found that Mr Sunil Kapil was knowingly involved in a series of very serious breaches of the Code upheld against the Level 2 provider on 12 December 2013 and 20 March 2014.

### **Sanction**

The Tribunal decided to prohibit Mr Sunil Kapil 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 as Mr Sunil Kapil had failed to co-operate with, or acknowledge, the prohibition proceedings. Further, the Tribunal commented that as a director, Mr Kapil 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, the Tribunal was satisfied that, given the need to protect consumers from similar conduct, and in light of Mr Kapil's position within the Level 2 provider, five years' prohibition was an appropriate period, taking into consideration all the circumstances.