



Tribunal meeting number 159 / Case 2

Case reference: 47828
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 Martijn Phiferons

The Tribunal was asked to consider imposing a prohibition against Mr Martijn Phiferons 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**”) A&M Lead Factory B.V. (26 June 2014, case reference: 42025), which concerned a breach of the sanctions imposed by an earlier Tribunal (31 October 2013, case reference 10568) and non-payment of the associated administrative charge. The case on 31 October 2013 concerned a subscription competition and mobile content service (the “**Service**”).

On 26 June 2014, the Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Martijn Phiferons, (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 31 October 2013;
- The Tribunal decision against the Level 2 provider dated 26 June 2014;
- An extract from the Netherlands Chamber of Commerce Commercial Register dated 14 August 2014;
- Information regarding ownership of the Level 2 provider;
- Extracts from the PhonepayPlus registration database for the Level 2 provider;
- A contract between the Level 1 provider and the Level 2 provider for the provision of the Service (undated);
- A direction for information sent to the Level 2 provider on 20 September 2012 and the Level 2 provider's response of 28 September 2012;
- A direction for information sent to the Level 2 provider on 1 October 2012 and the Level 2 provider's response of 4 October 2012;
- The Level 2 provider's breach letter response for the Tribunal of 31 October 2013;
- The formal notification sent to the Level 2 provider following the Tribunal adjudication of 31 October 2013;
- Email correspondence between the Executive and the Level 2 provider between 12 November 2013 and 10 December 2013 and 15 January 2014 and 23 January 2014;
- The breach of sanctions letter sent to the Level 2 provider on 2 June 2014;
- The covering letter and email to the notification of potential prohibition of 2 October 2014;
- The notification of potential prohibition; and
- Documents confirming the Executive's attempts to deliver the potential prohibition notification to Mr Phiferons and the Level 2 provider dated 3 October 2014.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent notification of a potential prohibition to Mr Phiferons and the Level 2 provider on 2 October 2014 to the Level 2 provider's registered address. In addition, the notification was sent to the address of a company



where Mr Phiferons was a director and to all known email addresses for Mr Phiferons. The Tribunal noted that the email attachments had not been downloaded and, although it had received a non-delivery receipt for one email address, it had not received a non-delivery receipt for the other email address. In relation to the notifications that had been sent to the postal addresses, the Tribunal noted that one delivery had been refused and the other had initially been accepted, before being returned to the Executive.

Taking all the circumstances into account, the Tribunal was satisfied that the Executive had made all reasonable attempts to inform Mr Phiferons and the Level 2 provider, in writing, of the prohibition proceedings and had given an opportunity for a response to be provided. On 30 October 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Phiferons.

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 Phiferons was an associated individual knowingly involved in a serious and series of breaches of the Code, in respect of the adjudications of 31 October 2013 and 26 June 2014.

Adjudication on 31 October 2013, case reference: 10568

On 31 October 2013, the Tribunal adjudicated against the Level 2 provider. The adjudication concerned a subscription competition and mobile content service that operated under the brand name “Pikaboo”. The Service operated on the premium rate shortcodes 61827 and 65013 and was operational between 21 March 2012 and June 2013, when it was voluntarily suspended by the Level 1 provider and the Level 2 provider following correspondence with PhonepayPlus.



Consumers were charged £4.50 per week (via three chargeable SMS messages costing £1.50 each) for the subscription Service.

The majority of complainants stated that they had not understood they would be charged and did not recall entering the Service. In addition, some complainants experienced bill shock. The maximum cost incurred by a complainant was £270.00 over approximately one year. In addition, PhonepayPlus' monitoring of affiliate marketing promotions for the Service gave rise to concerns in relation to consumers being misled into interacting with the Service.

The Executive conducted the matter as a Track 2 investigation against the Level 2 provider. On 31 October 2013, the Tribunal upheld the following breach of the Code against the Level 2 provider:

- Rule 2.3.2 – Misleading

The Tribunal concluded that the breach of rule 2.3.2 of the Code was very serious. The Tribunal determined that the seriousness of the case overall, after taking into consideration several mitigating factors, was serious and imposed the following sanctions:

- a formal reprimand;
- a fine of £10,000; 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 75% of the administrative costs incurred by PhonepayPlus.

Adjudication on 26 June 2014, case reference: 42025

On 26 June 2014, the Tribunal adjudicated against the Level 2 provider for the non-compliance with the sanctions imposed by the Tribunal on 31 October 2013 and non-payment of the associated administrative charge.

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 serious and/or series of breaches of the Code

The Executive submitted that Mr Phiferons was an associated individual of the Level 2 provider as he had day to day responsibility for the conduct of the Level 2 provider's business, along with another individual, at the time breaches of the Code occurred and were upheld by Tribunals on 31 October 2013 and 26 June 2014. Specifically:

- The Executive had obtained extracts from the Netherlands Chamber of Commerce Commercial Register dated 14 August 2014. The extracts revealed that the Level 2 provider had two directors, which were companies and they had held the positions since 10 September 2010. In addition, the Executive established that the Level 2 provider was owned by both these companies. An extract from the Netherlands Chamber of Commerce Commercial Register for one of the companies revealed that Mr Phiferons had been a director of that company since 22 September 2009.

The Executive submitted that as Mr Phiferons was a director of a company that was a joint director and owner the Level 2 provider, he held a position of authority and had responsibility for the Level 2 provider's affairs.

- The Executive received a copy of an agreement between the Level 1 provider and the Level 2 provider for the provision of the premium rate shortcodes. This key agreement was marked for the attention of "M. Phiferons" and another individual. The agreement named the individuals as legal representatives for the Level 2 provider, which the Executive submitted demonstrated that Mr Phiferons held a position of authority and was jointly responsible for the Level 2 provider's affairs.
- Mr Phiferons was named as a responsible person and the primary contact for the Level 2 provider on the PhonepayPlus Registration Scheme database, along with another individual. Mr Phiferons' role was recorded as the owner of the Level 2 provider. The Executive noted that Mr Phiferons remained a responsible person and the primary contact for the Level 2 provider when the breaches of the Code occurred and were upheld by the Tribunals of 31 October 2013 and 26 June 2014.
- Mr Phiferons corresponded with the Executive in response 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 of the breach of the Code.

In light of this evidence, the Executive asserted that Mr Phiferons was jointly responsible, with another, for the oversight of the Level 2 provider's affairs at the relevant time and had day to day responsibility for the conduct of the Level 2 provider's business.

In addition and/or in the alternative, the Executive submitted that Mr Phiferons, as a director of a company, which was a director and owner of the Level 2 provider, held a position where he had control of the affairs of the Level 2 provider and was an individual in accordance with whose directions or instructions the directors of the Level 2 provider were accustomed to act. Accordingly, for all the reasons stated, the Executive submitted that Mr Phiferons was an associated individual in accordance with paragraph 5.3.9 of the Code.

The Executive submitted that Mr Phiferons was knowingly involved in a serious breach of the Code, which was upheld by a Tribunal on 31 October 2013, as a result of the evidence in relation



to Mr Phiferons' responsibility in the Level 2 provider's company, but particularly as a result of the following:

- As a director of a company which was a joint director and owner of the Level 2 provider, Mr Phiferons 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.
- Mr Phiferons was the primary contact for the Level 2 provider and he responded to the Executive's directions for information by providing detailed responses concerning the content, operation and promotion of the Service, which clearly demonstrated a thorough knowledge of the Service and the breach of the Code. In response to a direction for information on 1 October 2012, the Level 2 provider was asked who carried out the random prize draws for the Service. In answer to this question, Mr Phiferons informed the Executive that the "draws are carried out by me personal [sic]". The Executive submitted that this highlighted Mr Phiferons' involvement in the Service. The Executive sent a breach letter to the Level 2 provider on 25 September 2013. The Executive received a response to the breach letter from Mr Phiferons on 8 October 2013, which further demonstrated his knowingly involvement in the Service and the breach of the Code.
- A representative from the Level 2 provider attended the Tribunal hearing on 31 October 2013 and made informal representations. During the informal representations, the representative stated that the Level 2 provider was a small company with only two members of staff operating across four countries. The Executive submitted that Mr Phiferons was likely to be one of the two members of staff due to his active involvement in the Level 2 provider's affairs. As one of two members of staff, the Executive asserted that Mr Phiferons would have been knowingly involved in the breaches of the Code.

The Executive submitted that Mr Phiferons was knowingly involved in very serious breaches of the Code that were upheld by the Tribunal on 26 June 2014, as a result of the evidence in relation to Mr Phiferons' responsibility in the Level 2 provider's company, but particularly as a result of the following:

- On 12 November 2013, the Executive sent an informal notification of the Tribunal adjudication to the Level 2 provider confirming the Tribunal decision of 31 October 2013. Mr Phiferons corresponded with the Executive and stated that the Level 2 provider was experiencing financial difficulties and requested clemency in relation to the payment of the fine imposed. In the email exchanges that followed, the Executive made Mr Phiferons aware of the option of requesting a review of the Tribunal decision and/or a payment plan but the options were not pursued by the Level 2 provider. Mr Phiferons stated in email correspondence that he had been hospitalised and was unable to deal with the matter but would be in touch soon. Mr Phiferons copied the other responsible person for the Level 2 provider into the emails he sent to the Executive. The Executive enquired whether there was another individual within the organisation who could assist and a further email was received from Mr Phiferons which stated that the Level 2 provider was not in a position to commit to a payment plan and reiterated his previous requests for clemency. The Executive issued a breach letter to the Level 2 provider alleging breaches of the Code for non-payment of the fine and administrative charge. The breach letter was sent to the same email and postal addresses that Mr Phiferons had previously used to correspond with the Executive. No response was received from the Level 2 provider. The Tribunal reached a decision on the breaches raised by the Executive on 26 June 2014.
- The Executive submitted that correspondence from Mr Phiferons following the adjudication clearly demonstrated that he was aware of the Tribunal adjudication and, as a person with joint responsibility for the Level 2 provider, he was required to ensure that the Level 2 provider complied with the sanctions imposed and made payment of the associated



administrative charge. The Executive asserted that if the Level 2 provider had been experiencing financial hardship and had difficulties complying with the sanctions, Mr Phiferons could have contacted the Executive rather than cease all correspondence.

The Executive submitted that, as demonstrated by the evidence above, Mr Martijn Phiferons was knowingly involved in the non-payment of the fine and administrative charge, which ultimately resulted in two further very serious breaches of the Code occurring and being upheld by a Tribunal on 26 June 2014.

Consequently, the Executive submitted that Mr Phiferons was an associated individual who was knowingly involved in a serious and/or a series of breaches of the Code.

2. Mr Phiferons 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 Phiferons was an associated individual as he had significant responsibility for the management of the Level 2 provider's affairs and this had been demonstrated by the involvement he had throughout the investigation in corresponding with the Executive, his status as an individual with responsibility for the Level 2 provider contained within a key contract for the provision of the Service shortcodes and as his status as a responsible person and the primary contact for the Level 2 provider on the PhonepayPlus registration scheme database. In particular, the Tribunal noted that Mr Phiferons was a director of a company, which was a director and owner of the Level 2 provider and accordingly taking this into account with the other evidence presented, the Tribunal found that Mr Phiferons had joint day to day responsibility for the Level 2 provider and was an associated individual.

In addition, the Tribunal found that Mr Phiferons was knowingly involved in a series of breaches of the Code, which were serious and very serious, upheld against the Level 2 provider of 31 October 2013 and 26 June 2014. The Tribunal noted that a representative for the Level 2 provider had stated at the Tribunal on 31 October 2013 that the Level 2 provider was a small company with only two members of staff. The Tribunal concluded that Mr Phiferons involvement in the Executive investigation prior to the adjudication of 31 October 2013 indicated that Mr Phiferons was one of the two members of staff and he was knowingly involved in the breach of the Code. The Tribunal noted that Mr Phiferons correspondence with the Executive continued following the adjudication. The Tribunal found that it was clear that Mr Phiferons had knowledge of the adjudication and sanctions and was knowingly involved in the further breaches of the Code upheld by the Tribunal on 26 June 2014.

Consequently, the Tribunal concluded that Mr Phiferons was knowingly involved in a serious and series of breaches of the Code, as an associated individual.

Sanction

The Tribunal decided to prohibit Mr Phiferons from providing, or having any involvement in, any premium rate service for a period of three years from the date of publication of this decision.

In making this decision, the Tribunal noted that Mr Phiferons had failed to co-operate with, or acknowledge, the prohibition proceedings. The Tribunal further noted that there had been non-compliance with sanctions imposed by a Tribunal, which was a very serious matter and indicated a general disregard for the regulatory process. Accordingly, the Tribunal was satisfied that three years was an appropriate period, taking into consideration all the relevant circumstances.