

Tribunal meeting number 150 / Case 1

Case reference number: 37150

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 [name redacted]

The Tribunal was asked to consider imposing a prohibition against [name redacted] pursuant to paragraph 4.8.2(g) of the 12th edition of the PhonepayPlus Code of Practice (12th edition) (the “**Code**”).

The case related to adjudications against the Level 2 providers Peekaboo Investments Ltd (20 December 2013, case reference: 11894) and Mobjizz Ltd (20 December 2013, case reference: 14491), both of which were settled by way of Consent Order. These cases concerned the promotion and operation of adult video download services (the “**Service(s)**”). In addition, evidence from an adjudication dated 18 March 2010 against Antiphony Limited was presented to the Tribunal.

The two Consent Orders dated 20 December 2013 permitted the Executive to present evidence to an Oral hearing Tribunal for it to consider whether it was appropriate to impose a prohibition on [name redacted]. On 27 March 2014, after considering written submissions from the Executive and [name redacted], the Oral hearing Tribunal instructed the Executive to initiate the process which may lead to the prohibition of [name redacted], (an associated individual) pursuant to paragraph 4.8.2(g) of the Code.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent a notification of potential prohibition to [name redacted] on 4 April 2014 and representatives acting on behalf of [name redacted] responded on 6 May 2014. On 15 May 2014, the Tribunal reached a decision on the potential prohibition of [name redacted].

The Tribunal considered the following evidence in full:

- The Peekaboo Investment Ltd Consent Order and associated investigation documentation;
- The Mobjizz Consent Order and associated investigation documentation;
- The Tribunal decision against Antiphony Limited of 18 March 2010 and associated investigation documentation;
- Directions issued by the Chair of the Oral hearing Tribunal dated 13 March 2014;
- The Executive’s memorandum of 11 March 2014 to the Oral hearing Tribunal;
- Peekaboo Investment Ltd and Mobjizz Ltd’s submissions to the Oral hearing Tribunal dated 18 and 25 March 2014 in response to the Executive’s memorandum;

- The Oral hearing Tribunal's decision of 27 March 2014 in relation to the potential prohibition of an individual; and
- [Name redacted]'s detailed response to the potential prohibition notification and associated annexures.

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 name redacted, 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 [name redacted] was an associated individual knowingly involved in a series of very serious breaches of the Code in respect of two adjudications settled by way of Consent Order dated 20 December 2013 and an adjudication dated 18 March 2010.

Adjudication by consent of 20 December 2013, case reference: 11894

On 20 December 2013, an adjudication against the Level 2 provider Peekaboo Investments Ltd was settled by way of a Consent Order dated 20 December 2013. The adjudication concerned three adult video download services operated by the Level 2 provider and the Level 2 provider's non-registration with PhonepayPlus. There were three services: the subscription service cost £4.50 per week; and the two pay-per-video

services cost £4.50 per video. In addition, the first pay-per-video service cost £4.50 to a rate a video and the second one cost £1.50 to do so.

The investigation arose as a result of 67 complaints. Generally, complainants stated the charges incurred were unsolicited or that the pricing information in the promotional material was not clear. The Level 2 provider accepted that the following breaches of the Code had occurred:

- Rule 2.2.5 – Pricing prominence
- Rule 2.3.2 – Misleading
- Rule 2.3.3 – Consent to charge
- Paragraph 3.4.12 – Registration of the organisation

The sanctions agreed by the parties were:

- a formal reprimand;
- a fine of £150,000;
- a requirement that the Level 2 provider must refund all consumers affected by any of the admitted breaches and who claim a refund, for the full amount spent by them on the relevant Service(s), 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.

Adjudication by consent of 20 December 2013, case reference: 14491

On 20 December 2013, an adjudication against the Level 2 provider Mobjizz Ltd was settled by way of a Consent Order dated 20 December 2013. The adjudication concerned two adult video download services operated by the Level 2 provider. The Services cost £4.50 per week (£4.50 per video and £1.50 to rate a video).

The investigation arose as a result of 67 complaints. Generally, complainants stated the charges incurred were unsolicited or that the pricing information in the promotional material was not clear. The Level 2 provider accepted that the following breaches of the Code had occurred:

- Rule 2.2.5 – Pricing prominence
- Rule 2.3.2 – Misleading
- Rule 2.3.3 – Consent to charge
- Rule 2.3.11 – Method of exit

The sanctions agreed by the parties were:

- a formal reprimand;
- a fine of £150,000; and
- a requirement that the Level 2 provider must refund all consumers affected by any of the admitted breaches and who claim a refund, for the full amount spent by them on the relevant Service(s), 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.

Adjudication of 18 March 2010, case reference: 812535

On 18 March 2010, the Level 2 provider Antiphony Limited was subject to an adjudication. The adjudication related to a failure to fully comply with a sanction imposed in a previous adjudication (26 November 2009, case reference 812535). The Level 2 provider complied with the sanctions imposed save for not implementing compliance advice in full. The Level 2 provider stated that this was on the basis that it disputed two specific instructions from the Executive. As a result the Executive raised a further breach of the Code.

The Tribunal upheld a breach of paragraph 8.9.3(b) of the PhonepayPlus Code of Practice (11th edition). The Tribunal imposed the following sanctions:

- a formal reprimand;
- a fine of £75,000; and
- a requirement to remedy the breach.

Associated individual knowingly involved in a serious breach or series of breaches of the Code

The Executive asserted that [name redacted] was an associated individual at the time the breaches of the Code and the three adjudications occurred as s/he is, or was at the relevant time, an individual with significant management responsibilities of Peekaboo Investments Ltd, Mobjizz Limited and Antiphony Limited.

The Executive submitted that this demonstrated that [name redacted] was knowingly involved in a series of very serious breaches of the Code upheld in the adjudications against Peekaboo Investments Ltd (20 December 2013), Mobjizz Ltd (20 December 2013) and Antiphony Limited (18 March 2010).

2. In summary, [name redacted] accepted that s/he was an associated individual in relation to the matters against Peekaboo Investments Ltd and Mobjizz Ltd. However, it was strongly disputed that [name redacted] had been knowingly involved in the breaches of the Code upheld in the matters against Peekaboo Investments Ltd and Mobjizz Ltd. [Name redacted] did not accept being an associated individual in respect of the matters involving Antiphony Limited and/or being knowingly involved in the breaches of the Code upheld against it. Further and in the alternative, [name redacted] submitted that the imposition of a prohibition would be wholly disproportionate.

Generally, [name redacted] stated that a prohibition against an individual is the “ultimate sanction”. [Name redacted] submitted that the proposed prohibition was unprecedented and drew the Tribunal’s attention to previous prohibition cases, which s/he asserted involved “fraudsters”, “rogue operators” and/or firm evidence of deliberate and/or persistent breaches of the Code. Further, s/he referred to the practices of other regulatory bodies in relation to the prohibitions of individuals.

[Name redacted] accepted that s/he was an associated individual of the Level 2 providers Peekaboo Investments Ltd and Mobjizz Ltd. In respect of the Level 2 provider, Antiphony Limited, [name redacted] stated that s/he

had resigned in 2011 and the company had dissolved in 2013. Consequently, [Name redacted] submitted that s/he was not an associated individual in accordance with the definition at paragraph 5.3.9 of the Code, since no such premium rate service provider currently exists.

[Name redacted] did not accept that s/he had actual knowledge of the breaches of the Code in which s/he was said to be involved. In addition, [name redacted] disputed that s/he had ever been found to have been “knowingly involved” in a serious breach or series of breaches of the Code. [Name redacted] did not accept that there had been an agreement or finding that any of the breaches in the 2013 adjudications were “serious” or “very serious”. [Name redacted] made detailed representations on these matters and on the meaning of “knowing involvement” and generally stated that it was for the Executive to prove that s/he had actual knowledge and that s/he had consciously and deliberately taken part in the breaches of the Code.

In relation to the adjudication against Antiphony Ltd of 18 March 2010, [name redacted] made detailed submissions supported by evidence. In summary, [name redacted] stated that this was not a case where there was a “failure to act” in response to a sanction or a failure to engage with the regulatory process. [Name redacted] asserted that the provider had promptly paid the fine and implemented all but two compliance recommendations and was in ongoing discussions with the Executive when the Executive instigated a further case for non-compliance. Further, [name redacted] stated that relying on the adjudication against Antiphony Ltd four years after the relevant event was disproportionate and an unlawful interference with [name redacted]’s human rights.

3. The Tribunal considered all the evidence presented to it. The Tribunal found that [name redacted] was an associated individual of the Level 2 providers Peekaboo Investment Ltd and Mobjizz Ltd. Further, it found that [name redacted] had significant management responsibility with Antiphony Limited at the time the breaches occurred and at the time of the adjudication, therefore s/he was an associated individual at the relevant time for the purposes of paragraph 4.8.2(g) and 5.3.9 of the Code.

However, the Tribunal concluded that there was insufficient evidence to establish that [name redacted] was “knowingly involved” in any of the breaches of the Code upheld against Peekaboo Investments Ltd on 20 December 2013, Mobjizz Ltd on 20 December 2013 or Antiphony Limited on 18 March 2010. Accordingly, the Tribunal did not impose a prohibition on [name redacted]. As a result of the Tribunal’s decision, the Tribunal determined that it was not necessary for it to consider the detailed legal and factual submissions made on [name redacted]’s behalf.