



Tribunal meeting number 168 / Case 1

Case reference: 64036
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 Marie Monaghan

The Tribunal was asked to consider imposing a prohibition against Ms Marie Monaghan 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**”) Circle Marketing Ltd (19 February 2015, case reference: 58930), which concerned a breach of the sanctions imposed by an earlier Tribunal (27 November 2014, case reference 29838) and non-payment of the associated administrative charges. The case on 27 November 2014 concerned premium rate adult and glamour video subscription services which were operated under the names “UrHottestBabes”, “Fun-sexygirls”, and “HornyHotBabes” (the “**Services**”). Among other issues, the Services could be accessed from applications that appeared to utilise a form of malware that suppressed the receipt of Service messages.

On 19 February 2015, the Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Ms Marie Monaghan 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 27 November 2014;
- The Tribunal decision against the Level 2 provider dated 19 February 2015;
- A Current Appointments Report for the Level 2 provider from Companies House, dated 15 May 2015;
- A gateway agreement between a Level 1 provider and the Level 2 provider (signed for and on behalf of the Level 2 provider by Ms Marie Monaghan), dated 27 January 2010;
- A deed of novation between a separate Level 1 provider as the contract party, the Level 2 provider as the novator and a novatee (signed for and on behalf of the Level 2 provider by Ms Marie Monaghan), dated 22 January 2014;
- An extract from the PhonepayPlus registration database identifying Ms Marie Monaghan as the responsible person for the Level 2 provider;
- Correspondence between Ms Marie Monaghan and the Executive, including a preliminary direction (and response thereto) dated 21 August 2013;
- A breach letter from the Executive dated 15 October 2014, together with a corresponding acknowledgement from Ms Marie Monaghan, dated 23 October 2014 (both relating to case reference 29838);
- A formal notification (together with annexures) to the Level 2 provider from the Executive regarding the outcome of case reference 29838 dated 10 December 2014;
- Payment reminders from the Executive to the Level 2 provider for outstanding invoices, dated 30 December 2014 and relating to case reference 29838;
- A formal notification (together with annexures) to the Level 2 provider from the Executive regarding the outcome of case reference 58930 dated 4 March 2015;



- Correspondence between the Executive and the Level 2 provider's appointed liquidator between 23 January 2015 and 6 February 2015;
- London Gazette announcements relating to the liquidation of the Level 2 provider;
- Proof of service of the prohibition letter on Ms Marie Monaghan, the Level 2 provider and the Level 2 provider's liquidators dated 18 May 2015; and
- Letters to Ms Marie Monaghan and the Level 2 provider's liquidators (together with proof of service), confirming the date of the Tribunal hearing regarding a potential prohibition against Ms Marie Monaghan, dated 5 June 2015.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent notification of a potential prohibition to Ms Monaghan, the Level 2 provider and the Level 2 provider's liquidator on 18 May 2015 but it did not receive a response. The Tribunal was satisfied, in accordance with paragraph 4.8.6 of the Code, that the Executive had made all reasonable attempts to inform Ms Monaghan of the prohibition proceedings. On 11 June 2015, the Tribunal reached a decision regarding the imposition of a prohibition on Ms Monaghan.

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 Ms Monaghan was an associated individual knowingly involved in a serious and/or series of breaches of the Code, in respect of the adjudications of 27 November 2014 and 19 February 2015.

Adjudication on 27 November 2014, case reference: 29838



On 27 November 2014, the Tribunal adjudicated against the Services operated by the Level 2 provider. The Tribunal upheld three breaches of the Code raised against the Level 2 provider which are outlined below.

The Services were operated under the names “UrHottestBabes”, “Fun-sexygirls”, and “HornyHotBabes” on the premium rate shortcodes 89333, 85222, and 88150. Consumers were charged £3 or £4.50 per week depending on the Service they engaged with.

UrHottestBabes commenced operation in March 2012, whereas Fun-sexygirls and HornyHotBabes began operating in June 2013. Circle Marketing Ltd operated the Services until January 2014 when the Services were novated to another Level 2 provider.

The Services were promoted online via banner advertisements or a wireless application protocol (“**WAP**”) push message which was sent to consumers. Consumers subscribed to the Services, using mobile originating (“**MO**”) opt-in or a WAP link. Consumers could also engage with the Services using an Android application (the “**Application**”) which utilised an MO opt-in.

The majority of the complainants stated that they had received unsolicited, reverse-billed text messages but that they had not engaged with the Services. In addition to this, concerns regarding the Application were uncovered as a result of a blog article by the anti-virus vendor Kaspersky Labs (“**Kaspersky**”). The article outlined its detection of over 300 adult Android applications, deemed as “SMS Trojans”, from consumers’ handsets. Kaspersky provided the samples to the PhonepayPlus Research and Market Intelligence Team (the “**RMIT**”), which identified concerns regarding the operation of the Application that appeared to utilise a form of malware that suppressed the receipt of Service messages.

The Executive conducted the matter as a Track 2 investigation against the Level 2 provider. On 27 November 2014, the Tribunal upheld the following breaches of the Code against the Level 2 provider:

- Rule 2.3.1 – Fair and Equitable Treatment;
- Rule 2.3.3 – Consent to Charge; and
- Rule 2.4.2 – Consent to Market.

The Tribunal concluded that the breaches of rules 2.3.1 and 2.3.3 of the Code were very serious and the breach of rule 2.4.2 of the Code was serious. The Tribunal determined that the seriousness of the case overall was very serious and imposed the following sanctions:

- a formal reprimand;
- a warning that if the Level 2 provider fails to demonstrate that it has robust verifiable evidence of consumer consent to charge in the future it should expect to receive a significant penalty;
- a fine of £130,000 (which included a £20,000 uplift that was imposed as a result of the Level 2 provider’s relevant breach history);
- a requirement that within three months of the Level 2 provider re-commencing trading, the Level 2 provider submit to a compliance audit of its procedures for ensuring consumers provide valid consent to be charged and that it has robust verifiable evidence of that consent. The recommendations of the audit must be implemented within a period defined by PhonepayPlus and the costs of such audit must be paid by the Level 2 provider; 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 on 19 February 2015, case reference: 58930

On 19 February 2015, the Tribunal adjudicated against the Level 2 provider for non-compliance with the sanctions imposed by the Tribunal on 27 November 2014 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; and
- 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 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 Ms Monaghan was an associated individual of the Level 2 provider, as she was the sole director of the Level 2 provider at the time the breaches of the Code occurred which were upheld by Tribunals on 27 November 2014 and 19 February 2015. A Companies House search conducted on the Level 2 provider revealed that Ms Monaghan was the sole director of the Level 2 provider from the date of incorporation of the company on 26 January 2009, and she remained in control of the company until liquidators were appointed on 5 February 2015.

The Executive submitted that Ms Monaghan was knowingly involved in the breaches of the Code upheld by the Tribunal on 27 November 2013, as a result of the following:

- As the sole director of the Level 2 provider, Ms Monaghan was, at the time the serious and very serious breaches of the Code occurred, exclusively responsible for oversight of the company affairs and ensuring that the company was properly managed.
- Ms Monaghan was the sole shareholder of the Level 2 provider, and accordingly had a personal interest in the company in addition to her fiduciary duty to ensure that all commercial activities, including the operation of premium rate services, were conducted in compliance with the law and regulatory obligations.



- When considering that Ms Monaghan was the sole director of the Level 2 provider, the Executive asserted that it was highly unlikely that she would have been unaware of the non-compliant manner in which the Service was operating. The Executive particularly noted that, during the period of Ms Monaghan's directorship, key business actions and decisions of the Level 2 provider, which led to the launch and operation of the non-compliant premium rate Service, were taken. Ms Monaghan, as sole director of the Level 2 provider, actively participated in the following:
 - The signing of a gateway agreement between a Level 1 provider and the Level 2 provider for the provision of the premium rate shortcodes (signed for and on behalf of the Level 2 provider by Ms Monaghan on 2 February 2010); and
 - The signing of a novation agreement between the Level 1 provider as the contract party, the Level 2 provider as the novator and a novatee (signed for and on behalf of the Level 2 provider by Ms Monaghan on 22 January 2014).
- Ms Monaghan was listed as a responsible person on the PhonepayPlus Registration Scheme.
- During Ms Monaghan's directorship, key events occurred which would have alerted her to the fact that the Level 2 provider was likely to be operating a non-compliant Service:
 - PhonepayPlus received 68 complaints regarding the Service and notified the Level 2 provider of each complaint during Ms Monaghan's directorship, the earliest being on 10 December 2012; and
 - PhonepayPlus issued a number of requests for information regarding the Service following ongoing receipt of the above complaints. The Executive particularly notes that Ms Monaghan personally answered a preliminary direction dated 21 August 2013 which demonstrated that, in her capacity as the sole director, Ms Monaghan had a thorough knowledge of the Service under investigation and was knowingly involved in the production of the features that were in breach of the Code.

The Executive asserted that, despite being alerted to the fact that the Level 2 provider was likely to be operating a non-compliant Service, there was no evidence of any action taken by Ms Monaghan to address the issues raised by PhonepayPlus during her directorship. The Executive accordingly submitted that Ms Monaghan was aware that her company was likely to be operating a non-compliant Service, but did not take any action to rectify the issues and continued to allow the Service to operate without alteration despite the ongoing regulatory action by PhonepayPlus and the influx of complaints.

The Executive submitted that, for the following reason, Ms Monaghan 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 19 February 2015.

- Notwithstanding the fact that the Level 2 provider went into liquidation on 5 February 2015, at the time the breaches of paragraphs 4.8.4(b) and 4.10.2 of the Code occurred (i.e. on 30 December 2014, when the fine and administrative charge that was payable following conclusion of case ref: 29838 became overdue), as the sole director of the Level 2 provider Ms Monaghan was responsible for ensuring that the Level 2 provider (i) adhered to sanctions imposed against it by the Tribunal on 27 November 2014, and (ii) paid the resulting administrative charge.



Consequently, the Executive submitted that Ms Monaghan was an associated individual who was knowingly involved in a series of breaches of the Code, most of which were assessed as very serious.

2. Ms Monaghan 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, Ms Monaghan was an associated individual as she was the sole director of the Level 2 provider at the relevant time. Further, the Tribunal found that, for the reasons raised by the Executive, and in the absence of any response to rebut the evidence presented, Ms Monaghan was knowingly involved in a series of serious and very serious breaches of the Code, which were upheld against the Level 2 provider on 27 November 2014 and 19 February 2015.

Sanction

The Tribunal decided to prohibit Ms Monaghan 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. The Tribunal was satisfied that a three year prohibition was an appropriate period as it matched the corresponding term of prohibition imposed against the Level 2 provider during the Tribunal hearing on 19 February 2015.