

Tribunal meeting number: 218

Case reference: 135071

Level 2 provider: DK Call Ltd, Bournemouth, UK

Type of service: Information, Connection and Signposting Service

Network operator: TelcomIQ Ltd

This case was brought against the Level 2 provider under Paragraph 4.8.6(b) of the Code of Practice

Background

This case concerned a potential breach of sanction imposed by an earlier Tribunal (23 March 2017, case reference: 116798), by an Information, Connection and Signposting Service (ICSS) service operating under the brand name “Record the Call” on the number range 0984653XXXX (“**the Service**”).

The Level 2 provider for the Service was DK Call Limited (“**the Level 2 provider**”). The Network Operator for the Service was TelecomIQ Ltd (“**the Network**”).

The Service was stated to be a “Call Connection” service that connected consumers to a variety of commercial and public organisations at a charge of £3.60 per minute. In addition, the Service offered the consumer an option of downloading a recording of their phone call. The Level 2 provider stated that the Service commenced operation on 14 September 2016.

The Executive had received 69 complaints concerning the Service between 24 September 2016 and 30th November 2016.

On 23 March 2017, the Tribunal upheld breaches of rules 2.2.1 (transparency and pricing), 2.2.7 (pricing information), 2.3.2 (misleading), 3.11.3 (breach of a special condition ICSS 1), 4.2.2 (provision of false or misleading information). The overall assessment was that the case was **very serious** and imposed the following sanctions against the Level 2 provider:

- a formal reprimand
- a total fine of £645,000
- a requirement that the Level 2 provider obtain compliance advice on its Service promotions, such compliance advice to be implemented to the satisfaction of the Phone-paid Services Authority before charging any new consumers
- 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 the PSA that such refunds have been made.

The Tribunal also recommended payment of 100% of the administrative charge of £11,780.27. The Level 2 provider was notified of the Tribunal's decision.

The fine and administrative charge

A payment reminder had been sent to the Level 2 provider on 13 April 2017, but the Level 2 provider did not make any response. A further payment reminder was sent to the Level 2 provider on 21 April 2017, again, the Level 2 provider did not respond to the Executive. No further communication was received from the Level 2 provider and on 25 April 2017, the PSA issued a formal direction to the Network to suspend the Level 2 provider's service for its apparent non-compliance with the imposed sanctions.

This was a case in which interim measures had been put in place. In light of the Level 2 provider's apparent non-compliance with the sanctions, the Executive directed the Network to release the withheld revenues as part payment of the overdue fine and administration charge. The Network released a total of £450,184.34 to the PSA, which was received on 24 May 2017. The withheld funds were used to pay the administrative charge and refunds in full and part payment of the fine.

The Executive asserted that the outstanding amount owing to the PSA for the fine totalled £207,986.24.

The refund sanction

The Executive had been contacted by 10 complainants who each alleged that the Level 2 provider stated, prior to the imposition of the refund sanction, that it was unable to provide refunds due to its revenues being withheld by the Network, as directed by the Executive. On the 7 April 2017, following the imposition of the refund sanction by the Tribunal, the Executive requested that the Level 2 provider complete and return a refund request form by 11 April 2017, which detailed all of the necessary information to be communicated to complainants who wish to claim a refund. The Level 2 provider did not acknowledge or respond to this request from the Executive.

On the 6 June 2017 the Executive was contacted by the Cotgrave Advice Centre, who stated it was dealing with a complainant's refund request. The Cotgrave Advice Centre stated that it was unable to reach the Level 2 provider in order to claim a refund on behalf of the complainant. In addition to this complainant, a further 11 complainants stated that they attempted to make claims for refunds and were unable to contact the Level 2 provider.

As the Level 2 provider had not responded to the Executive's requests following the Tribunal of 23 March 2017, the Executive contacted the Network and requested that it resolve the outstanding complainant refund claims. On the 27 June 2017 the Network agreed that it would

refund all users who made a valid refund claim. All refund payments made by the Network were refunded by the PSA using the withheld revenues made available to the PSA on 24 May 2017. As of the date of the current Tribunal, the Network had evidenced and confirmed that nine complainants had received full refunds and three complainants had yet to claim.

In light of the refund payments being made by the Network, the Executive did not raise a breach of paragraph 4.8.6(b) for failure to comply with a refund sanction, although it maintained that on a technical level, the Level 2 provider had failed to comply with this sanction.

Compliance Advice sanction

The Executive had no evidence that the Level 2 provider sought compliance advice. However, due to the formal suspension of the service by PSA on 25 April 2017, the Executive took the view that the risk of actual and potential harm to consumers had, in effect, ceased and no further complaints had been received after the suspension of the Service. For those reasons, the Executive did not raise a breach of paragraph 4.8.6(b) for failure to comply with the compliance advice sanction.

Preliminary issue

After hearing from the Executive and noting the correspondence sent by the Executive to the Level 2 provider, the Tribunal was satisfied, on the balance of probabilities, that there had been good service of both the electronic and physical notice of the hearing.

Apparent breach of the Code

The Executive raised the following potential breaches of the Phone-paid Services Authority (“PSA”) Code of Practice (14th Edition) (“**the Code**”)

- paragraph 4.8.6(b) – Failure to comply with a sanction

On 20 September 2017, the Tribunal reached a decision on the breaches raised by the Executive. The Tribunal considered the following evidence in full:

- correspondence between the Executive and the Level 2 provider
- correspondence between the Executive and the Level 1 provider
- the minutes of the 23 March 2017 Tribunal for the original adjudication against the Level 2 provider
- PSA Guidance on “Consent to Charge” (Code 14).

Submissions and Conclusions

Alleged Breach

Paragraph 4.8.6(b) of the Code states:

“The failure of any relevant party to comply with any sanction within a reasonable time will result in:

(b) a further breach of the Code by the relevant party, which may result in additional sanctions being imposed”.

1. The Executive asserted that the Level 2 provider had acted in breach of paragraph 4.8.6(b) of the Code as it had failed to pay the full fine imposed by the Tribunal.

On 23 March 2017, the earlier Tribunal had upheld five breaches against the Level 2 provider. One of the sanctions imposed was a total fine of £645,000.

The Level 2 provider was formally notified of that Tribunal's decision on 7 April 2017. The formal notification comprised of:

- a cover letter dated 7 April 2017;
- the Tribunal's decision of 23 May 2017;
- an invoice for payment of the fine of £645,000;
- a further separate invoice for payment of the administrative charge of £11,780.27.

The total sum, representing both the fine and the administrative charge, owed to the PSA was £656,780.27.

As set out above, the Level 2 provider is said to have failed to respond to all communication attempts with the Executive following the Tribunal decision on the 23 March 2017. The Executive submitted that despite the length of time and opportunities provided to the Level 2 provider to make payment of the outstanding fine, it had failed to pay £207,986. 24. In light of the above, the Executive asserted that the Level 2 provider had not complied with the fine sanction imposed by the earlier Tribunal.

On 7 April 2017, the Executive had sent the Level 2 provider formal notification of the Tribunal's decision, which included the 'post adjudication letter' informing the Level 2 provider that the Tribunal had imposed a fine of £645,000:

“Invoices

You will find invoices in respect of the fine sanction and administrative charge imposed attached, both of which must be settled within seven working days by 20 April 2017”.

The amounts due are:

| <i>Invoice</i> | <i>Amount</i> |
|--------------------------------------|--------------------|
| <i>Fine Sanction Invoice [13814]</i> | <i>£645,000.00</i> |
| <i>Admin Charge Invoice [13815]</i> | <i>£11,780.27</i> |

In light of the above, the Executive asserted that a breach of paragraph 4.8.6(b) of the Code has occurred.

2. The Level 2 provider did not make any response to the Warning Notice and as such, neither admitted nor denied the breach.
3. The Tribunal considered the Code and all the evidence before it, applying the civil standard of proof. The Tribunal carefully considered the correspondence exchanged between the Executive and the Level 2 provider.

The Tribunal was satisfied, on the balance of probabilities, that the Level 2 provider had failed to take all reasonable steps to comply with the direction of the Tribunal of 26 May 2016 to pay the full fine amount. The Tribunal found that there was a breach of paragraph 4.8.6(b) of the Code, to the extent that £207,986. 24 of the fine remains outstanding.

For the reasons set out above, the Tribunal was satisfied that the Level 2 provider had failed to comply with a sanction, in breach of paragraph 4.8.6 of the Code.

SANCTIONS

Initial assessment of sanctions

1. The Executive submitted that the following sanction was appropriate:
 - a prohibition from providing any premium rate service for a period of five years from the date of publication of the Tribunal's decision.
2. As set out above, the Level 2 did not respond to the Warning Notice and as such, did not make any submissions on sanction.
3. The Tribunal's initial assessment of the breach of the Code was that it was **very serious**. In making this assessment, the Tribunal found the following:
 - The breach, to which the breach of sanction in this case relates, was considered by the earlier Tribunal to be **very serious**. The Tribunal considered that the breach of a sanction in such a case must be at least as **serious**.
 - Non-compliance with the sanctions imposed by the earlier Tribunal represented a fundamental non-compliance with the Code and undermined the PSA as a regulator.

Proportionality Assessment

Assessment of aggravating and mitigating factors

1. The Executive submitted that there were no mitigating factors in this case. It asserted that although refunds had been processed by the Network, they had been arranged by agreement with the Executive with no involvement by the Level 2 provider. The Executive submitted that it was an aggravating factor that the Level 2 provider had failed co-operate with the regulator by not responding to any of the Executive's correspondence since the Tribunal adjudication of 23 March 2017.
2. The Tribunal found that there were no mitigating factors and that the Level 2 provider had demonstrated complete disregard for the regulatory process, which was an aggravating factor.

Financial benefit/need for deterrence

1. The Executive submitted that the breach in this case was **very serious** and that there was a need to deter the Level 2 provider and the wider industry from failing to comply with sanctions imposed by a Tribunal in future. Further that the imposition of a prohibition was justified as that would ensure that the Level 2 provider did not benefit from breaching a sanction.
2. The Tribunal was satisfied to the requisite standard, that there was a need in this case for deterrence, both to the Level 2 provider and the wider industry, as well to ensure the Level 2 provider did not benefit from non-compliance with a sanction.

Sanctions adjustment

1. The Executive submitted that the sanction of a prohibition was appropriate given that the Level 2 provider had shown a complete disregard for the regulator and the sanction imposed by the earlier Tribunal.
2. Having taken into account the full circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions imposed

Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanction:

- a prohibition from providing any premium rate service for a period of five years from the date of publication of the Tribunal's decision.

In imposing the above sanction, the Tribunal took into account that the provider had failed to take any reasonable steps to comply with a sanction previously imposed by a Tribunal, which it considered to be a very serious matter. In these circumstances, the Tribunal was satisfied, on the balance of probabilities, that the above sanctions were proportionate and justified.

Administrative charge recommendation: 100%