

Tribunal meeting number: 247
Case reference: 162293
Level 2 provider: PowerTel Limited (London, UK)
Type of service: Directory enquiries
Level 1 provider: Telecom 2 Limited (London, UK)
Network operator: N/A

This case was brought against the Level 2 provider under Paragraph 4.5 of the Code of Practice.

Background

A service provided by the Level 2 provider PowerTel Limited (the “Level 2 provider”) was the subject of a Phone-paid Services Authority (“PSA”) Tribunal adjudication (case reference: 128953) on 18 September 2018. The Tribunal upheld breaches of rules 2.2.7 (pricing information), 2.3.2 (misleading), 3.4.8 (registration renewal) and 4.2.3 (failure to provide information). The sanctions imposed by the Tribunal were:

- a formal reprimand
- a fine of £200,000
- a requirement that the Level 2 provider remedy the breach by ensuring compliance advice on the Service and its promotions is sought and implemented to the satisfaction of the PSA. Compliance advice must remain implemented for the duration that the Service remains in operation unless otherwise agreed with the PSA.
- a bar on access to the Service until compliance advice on the Service and its promotions is sought and implemented to the satisfaction of the PSA. Compliance advice must remain implemented for the duration that the Service remains in operation unless otherwise agreed with the PSA.
- 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.

In addition, an administrative charge of £9,664.72 was imposed.

The Level 2 provider was informed of the sanctions imposed in a formal notification, which included an invoice for payment of the fine. The formal notification was sent to the Level 2 provider by email and by post on 01 October 2018. The Level 2 provider was informed that payment of the fine and administrative charge was due by no later than 10 October 2018.

In response to the formal notification sent on 01 October 2018, the Level 2 provider stated: *"We do not accept nor knowledge" and "there is no proof of claim nor proof of authority" and that "a full independent review" was required.*

The Executive responded to the Level 2 provider advising how to pursue a Judicial Review or alternatively how to seek a review of the Tribunal decision under paragraph 4.10.1.

On 08 October 2018, a payment reminder was sent to the Level 2 provider. The Level 2 provider responded: *"We do not acknowledge or accept this. It is fully disputed. Your a tions are ultra vires. Furthermore it would be impossible to pay any such ridiculous concocted amount anyhow". [sic]*

Investigation

The Executive conducted this matter as a Track 2 procedure in accordance with paragraph 4.5 of the Code of Practice (14th Edition) ("the Code").

The Executive sent a Warning Notice to the Level 2 provider on 28 May 2019 with a deadline for response of 11 June 2019. Within the Warning Notice, the Executive raised the following breaches of the Code:

- Paragraph 4.8.6(b) – Failure to comply with a sanction
- Paragraph 4.11.2 – Non-payment of administrative charge

The Level 2 provider did not respond to the Warning Notice.

On 17 July 2019, the Tribunal reached a decision on the breaches raised by the Executive. The Tribunal considered the following evidence in full:

- the post adjudication notification sent to the Level 2 provider, including the fine and administrative charge invoices and the refund request
- the Tribunal adjudication of 18 September 2018
- post adjudication correspondence between the Executive and the Level 2 provider
- the case report including the Warning Notice dated 28 May 2019
- proof of service of the Warning Notice.

Preliminary issue - Service

The Tribunal was satisfied that the sending of the documents had been properly served by email and by post.

Submissions and conclusions

Alleged breach 1

Paragraph 4.8.6(b) 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 stated that the Level 2 provider had acted in breach of paragraph 4.8.6(b) of the Code as it had failed to comply with the sanctions imposed by the Tribunal. As set out in the “Background” section above, on 18 September 2018, an earlier Tribunal had upheld four breaches of the Code against the Level 2 provider.

The Executive’s stated that its basis for bringing a breach of paragraph 4.8.6(b) was that the Level 2 provider had made no attempt to make payment of the £200,000 fine imposed.

The Executive did not consider it was proportionate to raise a breach of 4.8.6(b) in relation to the remedy the breach sanction. This was due to the fact that access to the Service was barred on 02 October 2018 as directed by the earlier Tribunal. The Executive stated that although there was no suggestion that the Level 2 provider had taken any steps to comply with the remedy the breach sanction by ensuring compliance advice on the Service and its promotions was sought and implemented to the satisfaction of the PSA. Nonetheless, due to the fact that the Service had been prevented from running, the Executive felt that it would not be proportionate to raise this breach.

The Executive did not raise a breach of paragraph 4.8.6(b) in respect of the Service Bar sanction since the Level 1 provider barred access to the Service on 02 October 2018.

The Executive did not consider it was proportionate to raise a breach of 4.8.6(b) in respect of the General Refunds sanction. Although the Executive had requested that the Level 2 provider complete and return a refund request form by 03 October 2018 and the Level 2 provider failed to respond to this request, the Executive noted that the Level 2 provider had previously responded to complainant information requests. In addition, the Executive stated that it had written to all complainants giving contact details for the Level 2 provider and had not received further correspondence from the complainants suggesting that they were unable to receive a refund and one complainant had confirmed that they had indeed received a refund.

On 01 October 2018, the Executive sent the Level 2 provider a formal notification of the Tribunal's decision, which included the 'post adjudication letter', administrative and fine sanction invoices and the adjudication report.

On 02 October 2018, the Level 2 provider responded to the post adjudication letter and stated it did not accept nor acknowledge the decision and required an independent review.

On the same day, the Executive explained how the Level 2 provider could pursue a Judicial Review or alternatively how it could seek a review of the Tribunal decision.

On 08 October 2018, the Executive sent a payment reminder to the Level 2 provider. The Level 2 provider responded:

"We do not acknowledge or accept this. It is fully disputed. Your actions are ultra vires. Furthermore it would be impossible to pay any such ridiculous concocted amount anyhow."

On 28 May 2019, the Executive sent its case report and Warning Notice to the Level 2 provider but received no further correspondence from the Level 2 provider.

On 14 June 2019, the Executive attempted to telephone the Level 2 provider and was advised that the Level 2 provider's Director was unavailable due to a recent incident.

The Executive stated that it relied upon correspondence with the Level 2 provider that it did not intend to pay the fine. The Executive asserted that the Level 2 provider had intentionally breached rule 4.8.6(b) by failing to pay the fine and had shown a complete disregard for the decision of the earlier Tribunal.

2. The Level 2 provider did not make representations or respond to the Warning Notice of 28 May 2019.
3. The Tribunal considered the Code and all the evidence before it, in particular the correspondence exchanged between the Executive and the Level 2 provider post the adjudication of 18 September 2018. The Tribunal was satisfied that the Level 2 provider had not made any attempt to pay the fine, noting that the Level 2 provider had stated in its correspondence to the Executive that it did not acknowledge or accept the fine imposed. The Tribunal considered the fact that the Level 2 provider's Director had been unavailable when the Executive had telephoned on 14 June 2019, but noted that no evidence had been provided by the Level 2 provider to support the reason for the Director's unavailability. In any event, the Tribunal considered that the Level 2 provider had been given ample opportunity to comply with the sanction prior to the unavailability and was satisfied that this incident had not prevented the Level 2 provider from complying with the sanction.

The Tribunal was satisfied on a balance of probabilities that the Level 2 provider had not complied with the fine sanction within a reasonable time period. Accordingly, the Tribunal upheld a breach of paragraph 4.8.6(b) of the Code.

Decision: UPHELD

Alleged breach 2

Paragraph 4.11.2 – *“Non-payment of the administrative charge within the period specified by the PSA will be considered a breach of the Code and may result in further sanctions and/or legal action.”*

1. The Executive stated that the Level 2 provider had acted in breach of paragraph 4.11.2 of the Code as the full administrative charge of £9,664.72 remained outstanding.

As stated above, the Executive stated that it had sent a formal notification of the Tribunal outcome to the Level 2 provider by email and post on 01 October 2018. This included a separate invoice in respect of the administrative charge of £9,664.72.

On 08 October 2018, a payment reminder was sent to the Level 2 provider.

2. The Level 2 provider did not make representations or respond to the Warning Notice of 28 May 2019.
3. Having considered the Code and the evidence before it, the Tribunal was satisfied on the balance of probabilities that the Level 2 provider had not paid the administrative charge within a reasonable period of time. Accordingly, the Tribunal upheld a breach of paragraph 4.11.2 of the Code.

Decision: UPHELD

Breach severity – Initial assessment

The Tribunal’s initial assessment of the breaches of the Code was as follows:

Rule 4.8.6(b) – Failure to comply with a sanction – **very serious**

In determining the initial assessment of seriousness, the Tribunal considered that the breach demonstrated fundamental non-compliance with the obligations imposed by the Code which, in the view of the Tribunal, undermined public confidence in the regulatory regime and premium rate services.

Rule 4.11.2 – Non-payment of the administrative charge – **very serious**

The Tribunal considered that this breach was committed intentionally and demonstrated a fundamental disregard for the requirements of the Code.

Recommended sanctions – Initial assessment

The Executive submitted that the following sanctions were appropriate:

- a formal reprimand
- a prohibition on the Level 2 provider from providing or having any involvement in any premium rate service for a period of five years or until all sanctions imposed by the Tribunal of 18 September 2018 have been complied with, whichever is the later.

This was based on an initial assessment of the breaches as “very serious”.

The Level 2 provider did not make representations on the recommended sanctions.

The Tribunal agreed with the Executive’s initial recommended sanctions.

Aggravating factors

The Tribunal found the following aggravating factor:

- the Level 2 provider did not respond to the Executive’s further request for information concerning the refunds process.

The Tribunal did not consider that the breach history of the Level 2 provider was an aggravating factor, noting that the current breaches of sanctions breaches essentially flowed from the earlier adjudication.

Mitigating factors

The Tribunal did not find any mitigating factors.

Proportionality considerations

Having considered the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as very serious.

The Tribunal noted that the service had not operated post the earlier adjudication of September 2018 and therefore no further revenue had been generated.

The Executive submitted that the initial sanctions should not be adjusted in light of proportionality considerations and the Tribunal agreed with this view.

The Tribunal was satisfied that there was a clear need to deter the Level 2 provider and the wider industry from the commission of similar breaches, noting that compliance with the sanctions imposed by a Tribunal were essential to the effectiveness of PSA's regulation and the broader protection of consumers. The Tribunal considered that a prohibition on the Level 2 provider would be likely to have an impact upon the Level 2 provider's business, but was satisfied that the recommended sanctions were necessary and proportionate in light of the seriousness of the breaches and the need to achieve the sanctioning objective of credible deterrence.

Final sanctions

The Executive submitted that the following sanctions were appropriate:

- a formal reprimand
- a prohibition on the Level 2 provider from providing or having any involvement in any premium rate service for a period of five years or until all sanctions imposed by the Tribunal of 18 September 2018 have been complied with, whichever is the later.

The Tribunal, having regard to all the circumstances of the case, agreed with the Executive's recommended final sanctions, save that the Tribunal considered that the prohibition should not expire until both the sanctions had been complied with and the administrative charges had been paid in full. The Tribunal therefore imposed the following sanctions:

- a formal reprimand
- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of five years, or until all sanctions imposed by the Tribunal of 18 September 2018 have been complied with the administrative charge has been made in full, whichever is the later.

Administrative charge recommendation: 100%