

Tribunal meeting number 272

Case reference: 178980
Case: Prohibition of an associated individual

This case was brought against the Level 2 provider under Paragraph 4.8.6 of the 14th edition of the Code of Practice (“the Code”).

Background

The Tribunal was asked to consider imposing a prohibition against Mr Peter Lyons pursuant to paragraph 4.8.3(g) of the Code.

The case related to two previous adjudications against the Level 2 provider, PowerTel Limited, ‘the **Level 2 provider**’, one dated 18 September 2018 (case reference: 128953) that involved a directory enquiry service, and one dated 17 July 2019 (case reference: 162293) which related to a failure to comply with the financial sanctions and administrative charges imposed by the Tribunal on 18 September 2018. As part of the first adjudication, the Tribunal recommended that the Executive conduct an investigation into the potential prohibition of Mr Lyons pursuant to paragraph 4.8.3(g) of the Code.

Relevant Code provisions

- Paragraph 4.8.8 of the Code states:

“(a) If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.3(f), 4.8.3(g) or 4.8.3(h) in respect of any associated individual, the PSA shall first make all reasonable attempts to notify the individual concerned and the relevant party in writing. (b) It shall inform each of them that any of them may request an opportunity to make representations in writing, or in person, to the Tribunal and of the right of any of them (or the PSA itself) to instead require an oral hearing.”

- Paragraph 4.8.3(g) of the Code states:

“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 as it deems to be appropriate and proportionate: (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 PRS 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 the PSA.”

Preliminary issues – Service and proceeding in absence

The Tribunal noted from the correspondence between Mr Lyons and the Executive that Mr Lyons had indicated that he wished to make informal representations to the Tribunal in his response to the Warning Notice on 10 September 2020. The Tribunal further noted that the Executive had arranged for Mr Lyons to provide informal representations to the Tribunal for 30 minutes at 15:30 and was therefore expecting Mr Lyons to join the Tribunal at this time.

Having convened at 15:30 the Tribunal waited for Mr Lyons to join the Tribunal, however by 15:45 he had failed to join. At this stage the Tribunal questioned the Executive on whether any further correspondence had been received from Mr Lyons which indicated that he was unable to join. The Executive confirmed that no correspondence had been received. At 15:50 the Tribunal decided that it would proceed to consider the issue of service and proceeding in the absence of Mr Lyons.

Service

The Tribunal observed that the Executive had brought the case in accordance with paragraph 4.8.8 of the Code which meant that there was a duty on the Executive to ensure that Mr Lyons was informed of the proceedings and provided with an opportunity to request an oral hearing and/or make informal representations to the Tribunal.

The Tribunal noted that the Warning Notice had been served on Mr Lyons initially on 10 July 2020 by email, and that a hard copy was sent by post on 27 July 2020. A further copy was emailed to Mr Lyons on 28 July 2020 and a Warning Notice with additional formatting had been sent on 17 August 2020. The Tribunal observed that it was clear from the postal records as well as the electronic records that the Warning Notice had been successfully delivered. The Tribunal also noted that the correspondence between Mr Lyons and the Executive showed that Mr Lyons had received the Warning Notice.

The Tribunal also observed that the Executive had provided Mr Lyons with an opportunity to make informal representations to the Tribunal. Accordingly, the Tribunal found that the Executive had made all reasonable attempts to notify Mr Lyons and the Level 2 provider of the prohibition proceedings and of the right to attend and make representations to the Tribunal. The Tribunal was therefore satisfied that service was effective in accordance with paragraph 4.8.8 of the Code.

Proceeding in absence

The Tribunal considered the correspondence between the Executive and Mr Lyons following the service of the Warning Notice. The Tribunal noted that the Executive had provided a number of extensions in order to ensure that Mr Lyons was able to respond to the Warning Notice. In addition to this, the Tribunal observed that the Executive had listed the Tribunal in accordance with Mr Lyons availability and that it had arranged a successful test call to ensure that Mr Lyons was able to participate remotely in the proceedings.

The Tribunal noted that Mr Lyons had previously requested an adjournment on 15 October 2020 on the grounds that he did not agree that the Tribunal should be held remotely and wished to attend in person. This application had already been considered by the Chair of the Tribunal and refused. The basis of the refusal was that the Chair considered the arrangements to hold the Tribunal remotely still meant that the Tribunal could fairly adjudicate on the case and that it was therefore in the interests of justice for the case to proceed. The Tribunal noted that this decision had been communicated to Mr Lyons.

The Tribunal was mindful that the case before it concerned the prohibition of an individual and that it was therefore incumbent on the Tribunal to proceed with caution in the absence of Mr Lyons. However, the Tribunal was of the view that the Executive had taken a number of steps to ensure that Mr Lyons was able to attend the Tribunal remotely to make representations. The Tribunal considered that the Executive had not received any information from Mr Lyons which indicated that he wished to renew his application for an adjournment.

The Tribunal observed that while Mr Lyons was not in attendance, he had provided a detailed response to the Warning Notice which it could consider and that this mitigated any potential unfairness to Mr Lyons, particularly given that this was a paper-based tribunal. The Tribunal was also of the view that there was nothing to suggest that an adjournment would secure Mr Lyons' future attendance. For all of those reasons, the Tribunal was of the view that it was both fair and in the interests of justice for the Tribunal to proceed.

Postscript

After the Tribunal had concluded its adjudication on the case the Executive received an email from Mr Lyons which indicated that he could not attend the Tribunal due to having had an accident. No further details were provided by Mr Lyons.

This information was passed to the Chair of the Tribunal by the Executive. The Chair of the Tribunal was mindful that the Tribunal had already concluded its deliberations and reached a decision on the case. Neither the Code nor the Supporting Procedures contained any provision for re-opening an adjudication in this scenario. The Chair considered that even if there was case law which suggested that a discretion to re-open the case could exist in other jurisdictions, the information from Mr Lyons was insufficient to justify this as a course of action. In particular the Chair noted that the email from Mr Lyons did not contain any detail as

to what had occurred and when, provided no supporting evidence and that there was no indication from Mr Lyons that he wished to attend remotely at any future date should the matter be re-opened.

Submissions and conclusions

1. The Executive submitted the following evidence in support of its assertion that Mr Lyons was an associated individual knowingly involved in a serious and/or series of breaches of the Code in respect of the adjudications of 18 September 2018 and 17 July 2019:

Adjudication of 18 September 2018 (case reference: 128953)

The case concerned a directory enquiry service operating on premium rate numbers 118023, 118822, 118093 and 118041 (the "Service"). The Level 2 provider for the Service was PowerTel Limited (the "Level 2 provider"). The Level 2 provider first registered with the Phone-paid Services Authority ("PSA") on 10 June 2011.

The Level 1 provider for the Service was Telecom 2 Limited ("the Level 1 provider").

A company called IPV6 Limited ("IPV6") obtained the 118 numbers, on which the Service operated, from Ofcom and was the number range holder. IPV6 is not part of the commercial agreement and contract made between the Level 2 provider and the Level 1 provider in relation to the Service. The Level 2 provider had been authorised by IPV6 to manage and act on its behalf for the Service on numbers 118822, 118041, 118093 and 118023.

IPV6 stated the Service started on 21 June 2016 for 118023, 1 October 2015 for 118822, 1 October 2015 for 118093 and 20 June 2016 for 118041.

The Service was said to be promoted via a recorded promotional message on unconnected and/or unallocated geographic numbers and via promotional websites. The promotional websites for 118023, 118093 and 118041 were launched in 25 March 2017. The promotional website for 118822 was launched on 1 October 2015.

On 18 September 2018 the Tribunal adjudicated against the Service. The Tribunal upheld the following breaches of the Code raised against the Level 2 provider (as outlined below):

- Rule 2.2.7 - Pricing prominence
- Rule 2.3.2 - Misleading
- Rule 3.4.8 - Registration renewal
- Rule 4.2.3 - Failure to provide information

The Tribunal considered the overall case to be **very serious** and imposed the following sanctions:

- 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.

The Tribunal also recommended that the Level 2 provider pay 100% of the administrative costs which totaled £9,664.72.

Adjudication of 17 July 2019 (case reference: 162293)

On 17 July 2019 the Tribunal adjudicated against the Level 2 provider for non-compliance with the sanctions and administrative charges imposed by the Tribunal on 18 September 2018. The Tribunal upheld the following breaches of the Code raised against the Level 2 provider (as outlined below).

- Paragraph 4.8.6 (b) - Failure to comply with any sanction; and
- Paragraph 4.11.2 (b) - Non-payment of an administrative charge

The Tribunal considered the overall case to be **very serious** and 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 and the administrative charge has been made in full, whichever is the later.

The Tribunal also recommended that the Level 2 provider pay 100% of the administrative costs which totalled £4,805.

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

The Executive asserted that Mr Lyons was an associated individual within the meaning of paragraph 5.3.9 of the Code as he had day-to-day responsibility for the conduct of the Level 2 provider. The Executive relied on the following evidence to support this assertion:

- Mr Lyons has been a director of the Level 2 provider since the date of incorporation of the company on 20 April 2009 and resigned on 5 December 2019 according to Companies House
- Mr Lyons was also the sole shareholder of 100% of the Level 2 provider company. This is evidenced by the CreditSafe report for the Level 2 provider company
- Mr Lyons has been listed as the sole and primary contact for the Level 2 provider on the PSA registration database since the Level 2 provider first registered
- in Mr Lyons' contact information on the PSA Registration Scheme, he stated his job title to be "Director" and registered himself as a 'responsible party' by the title of "Director"
- on 14 October 2015, Mr Lyons in his capacity as director of the Level 2 provider signed a contract to operate premium rate services with the Level 1 provider.
- following the outstanding fine and administration fees, the Executive began to pursue the debt by winding up the Level 2 provider company. A winding up order was made in December 2019 by the High Court and liquidators were later appointed in June 2020. On 29 January 2020, Mr Lyons, in his capacity as former director and shareholder of PowerTel Limited, applied to rescind the winding up order.

The Executive asserted that the evidence as set out above clearly demonstrated that Mr Lyons was an associated individual, who had day-to-day responsibility for the conduct of the Level 2 provider's business by virtue of his role as a director, sole shareholder and only named primary contact on the PSA registration database.

The Executive further submitted that Mr Lyons, as an associated individual, was knowingly involved in a series of serious breaches. The Executive noted that at the time that the breaches were upheld by the Tribunals of 18 September 2018 and 17 July 2019, Mr Lyons was listed as the primary contact for the Level 2 provider and held the post of Company Director.

When questioned, the Executive confirmed that there had been a second director at PowerTel Limited but that the Executive had only ever corresponded with Mr Lyons. As a result of this, the Executive submitted that Mr Lyons had overall responsibility and oversight of the Level 2 provider and its compliance with the Code.

The Executive also relied on the following evidence to demonstrate that Mr Lyons was made aware that the Level 2 provider was operating non-compliantly:

- during the service operation, the Executive received 12 complaints regarding the Service when Mr Lyons was a director. At the time the complaints were made, information requests were sent to the Level 2 provider. The Executive received responses to all 12 of the information requests from Mr Lyons. The Executive submitted that this showed that Mr Lyons was aware of the complaints received

regarding the Service, and as a responsible individual he was able to access detailed information in relation to users of the Service in order to respond to the requests.

- Mr Lyons corresponded with the Executive in relation to the operation and promotion of the Service. Correspondence received and responded to by Mr Lyons included:
 - a response to an informal enquiry dated 28 February 2017
 - responses to directions for information dated 14 November 2017, 2 January 2018, 12 March 2018, 16 March 2018 and 25 April 2018
 - the formal notification of the Tribunal outcome issued on 1 October 2018
 - the payment reminder issued on 8 October 2018 after the Tribunal on 18 September 2018 imposed a financial sanction and administrative charges.

- Mr Lyons also responded to correspondence from the Executive without signing his name. However the correspondence was sent by the Executive to the same email addresses which Mr Lyons had previously responded from by signing off as “Peter Lyons”. Examples of this correspondence included a response to a Warning Notice which stated “Not able to download until 6 September 2018” dated 6 August 2018; further responses which indicated that Mr Lyons was away and unable to respond until 1 September 2018 (dated 7th August 2018) and a response to the Executive’s Head of Investigations and Enforcement dated 13 August 2018.

- Mr Lyons was also sent correspondence to which he did not respond, although the Executive noted that some of the correspondence did not require a response. The Executive asserted that despite the lack of response, this correspondence was relevant as it demonstrated that Mr Lyons received updates informing him of the investigations. Examples of this correspondence included:
 - the allocation to a Track 2 investigation notification issued on 23 August 2017
 - the informal notification of the Tribunal outcome issued on 25 September 2018
 - the allocation of the breach of sanctions investigation notification issued on 8 January 2019the Warning Notice regarding non-compliance with sanctions issued on
 - 28 May 2019 (case ref: 162293)
 - the informal notification of the Tribunal outcome issued on 24 July 2019
 - the formal notification of the Tribunal outcome issued on 31 July 2019
 - the payment reminder issued on 12 August 2019.

The Executive stated that the evidence above clearly indicated that Mr Lyons was knowingly involved in a series of serious breaches of the Code as he had been made fully aware of the non-compliance of the Level 2 provider throughout the Executive’s investigation.

The Executive concluded its submissions by stating that the evidence taken as a whole clearly supported the assertion that Mr Lyons was an associated individual and that he was knowingly involved in a series of serious breaches.

2. Mr Lyons denied that he was an associated individual who was knowingly involved in a serious breach or series of breaches of the Code.

In his response to the Warning Notice, which was received on 21 August 2020, Mr Lyons stated that he had never had any apparent association or knowing involvement in a non-compliant service and that he had acted in good faith at all times, believing that the service provided complied with all the applicable regulations. Mr Lyons emphasised that he had never had any plan nor any intention to be involved with a non-complaint service and that he accordingly denied the Executive's accusations of association and knowing involvement.

Mr Lyons stated that while he was the named contact for Level 2 provider on the Executive's registration system he was consistently aided with his responses for requests for information to the Executive as other people were also employed by the Level 2 provider.

Mr Lyons also indicated that he had resigned as the director of the Level 2 provider in December 2019 and that he considered himself to have acted on behalf of the Level 2 provider at all times as opposed to acting in an individual capacity. Mr Lyons further asserted that as the Level 2 provider had already been prohibited, he considered the matter had already been dealt with and that the proceedings to prohibit him as an associated individual (and to hold him personally accountable) were unwarranted. Mr Lyons indicated that he never had any intention to be personally involved in the premium rate services market and that he would not do so in the future.

Mr Lyons also submitted that he considered the original Track 2 adjudication (case reference: 128953) to be flawed as the Level 2 provider had little control over the Service and had always issued refunds though complaints were very low. In addition to this, Mr Lyons asserted that the Executive had acted unfairly in bringing the second case against the Level 2 provider for non-compliance with the sanctions and administrative charges and in pursuing a winding up order in relation to the Level 2 provider and the unpaid fines and administrative charges. Overall Mr Lyons questioned the validity of the Executive's investigation and of the adjudication process stating that he did not consider that any Tribunal would act with any degree of independence.

In his response Mr Lyons also stated that he considered that the Executive had acted in a draconian manner, not only in bringing the cases, but also in the steps that it had taken in relation to debt recovery of the outstanding fine and administrative charges which had included seeking a winding up order.

3. The Tribunal carefully considered all of the evidence before it including the representations made by Mr Lyons.

The Tribunal considered Mr Lyons' representations in relation to the validity of the process and the previous adjudications but was mindful that it was not the role of this Tribunal to seek to go behind previous adjudication decisions when there was a separate review process for adjudication decisions (under paragraph 4.10 of the Code) as well as other routes of challenge. The Tribunal was of the view that as the previous adjudications had not been the subject of any

successful review or any court proceedings that it should proceed on the basis that the previous adjudications were sound. In addition to this the Tribunal was of the view that it was not for it to comment on the Executive's actions in applying for the winding up order but that there was nothing in relation to bringing of this case which was inherently unfair, or which meant that the case should not proceed.

The Tribunal therefore went on to consider whether Mr Lyons was an "associated individual" in accordance with paragraph 5.3.9 of the Code. The Tribunal noted that the Code defined associated individuals as being "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....".

While the Tribunal noted that Mr Lyons denied being an associated individual, the Tribunal was of the view that the evidence presented by the Executive was compelling as it clearly showed that Mr Lyons was listed as Director and well as the sole shareholder and named contact for the Level 2 provider.

The Tribunal accepted Mr Lyons' submission that there were other individuals employed at the Level 2 provider. However, the Tribunal was nonetheless persuaded on the balance of probabilities that Mr Lyons exercised day-to-day responsibility for the Level 2 provider by the documentation relied upon by the Executive. In particular, the Tribunal noted that the Executive's evidence demonstrated that it was Mr Lyons who had signed the contract with the Level 1 provider and that it was Mr Lyons who had applied to rescind the winding up order.

The Tribunal was also satisfied on the balance of probabilities that Mr Lyons had been knowingly involved in a series of serious breaches of the Code. The Tribunal noted that both previous adjudications in relation to the Level 2 provider were given an overall severity rating of very serious.

In relation to "knowing involvement", the Tribunal considered that the Executive's evidence clearly demonstrated that Mr Lyons had been made aware that the Service was non-compliant throughout the relevant time. The Tribunal further noted that Mr Lyons had responded to some of the communications sent by the Executive such as formal directions. The Tribunal was of the view that even if Mr Lyons had responded to the Executive's correspondence with some assistance, he would still have been aware of the nature of that correspondence which made it clear that there were concerns in relation to the Service.

In addition to this, the Tribunal also considered Mr Lyons' representations that he (in conjunction with others) had taken steps to ensure the Service was compliant. The Tribunal was of the view that even if this had been the case, Mr Lyons was made aware by the Executive of concerns in relation to the compliance of the Service and the adjudication of 18 September 2018 had made it clear that the Service had acted in breach of the Code. The Tribunal was therefore not persuaded by Mr Lyons' submissions that he had not been knowingly involved.

As a result of all of the above, the Tribunal was satisfied on the balance of probabilities that Mr Lyons was an associated individual who was knowingly involved in a serious or series of breaches of the Code.

Sanctions

The Executive recommended that Mr Lyons should be prohibited from providing or having any involvement in any premium rate service in the UK for a period of five years from the date of publication of this decision. The Executive asserted that this was a proportionate outcome due to the severity of the breaches that had been upheld in the two previous adjudications.

The Tribunal noted that Mr Lyons had indicated that he did not wish to return to the premium rate services market. In light of this, the Tribunal considered that the impact of a prohibition on Mr Lyons would not be substantial, though it could still result in some reputational damage. After carefully considering all of the facts of the case, including Mr Lyons' submissions, the Tribunal decided that a five-year prohibition was both proportionate and appropriate despite the potential impact it could have on Mr Lyons. The Tribunal was of this view given the severity of the breaches that had been upheld by the two previous Tribunals and as a result of the need to ensure that any sanction served as a credible deterrent.

Accordingly, the Tribunal decided to prohibit Mr Lyons from providing, or having any involvement in, any premium rate service in the UK for a period of five years from the date of publication of this decision.

The Tribunal also considered the administrative charge recommendation as a result of Mr Lyons' submissions in relation to the financial impact of the previous proceedings and the impact of the debt recovery proceedings that the Executive had initiated. The Tribunal was of the view that the impact of the administration charge could be detrimental to Mr Lyons, but that the case had been properly brought by the Executive and so the administrative charge recommendation should be 100% and that the matter of debt recovery was one for the Executive to consider.

Administrative charge recommendation: 100%