

Tribunal meeting number 286

Case reference: 192312
Case: Prohibition of an associated individual

This case was brought against a person alleged to be an associated individual under paragraph 4.8.8 of the 14th edition of the Code of Practice (**'the Code'**).

Background

1. The tribunal (**'the Tribunal'**) has been asked to consider imposing a prohibition against Ms Pahonea, pursuant to paragraph 4.8.3(g) of the Code.
2. The case related to a previous adjudication against the level 2 provider, Taptronic FZC, (**'the Level 2 provider'**), heard on 17 August 2021 (case reference: 152741) (**'the Adjudication'**). The Adjudication concerned a subscription-based fitness service, Fitguru (**'the Service'**), operated by the Level 2 provider. As part of the Adjudication against the Level 2 provider, a tribunal (**'the Previous Tribunal'**) recommended that the Executive consider initiating the process which may lead to the prohibition of Ms Pahonea pursuant to paragraph 4.8.3(g) of the Code.
3. The Service provided consumers with fitness training and nutritional videos. The Service operated via direct carrier billing, using two value chains and two shortcodes: 64055 and 80206.
4. The Executive received a total of 410 complaints concerning the Service between May 2018 and February 2020. Complainants variously alleged that they had not signed up to nor agreed to be charged by the Level 2 provider and that they were unable to successfully complain to the Level 2 provider.
5. In the Adjudication, the Previous Tribunal upheld the following breaches of the Code by the Level 2 provider:
 - Fairness – rule 2.3.1.
 - Consent to charge – rule 2.3.3.
 - Complaint handling – rule 2.6.1.
 - Registration – paragraph 3.4.14.
 - False and misleading – paragraph 4.2.2.
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6. The Executive had raised a third alleged breach of paragraph 4.2.2. However, that third breach was not upheld by the Previous Tribunal.

7. The Previous Tribunal considered the overall case to be “very serious” and imposed the following sanctions:
 - a. a formal reprimand.
 - b. a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of six years, starting from the date of publication of the Previous Tribunal’s decision, or until all sanctions imposed have been complied with, whichever is the later
 - c. a requirement that the access to the Service is barred for a period of six years.
 - d. 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 PSA that such refunds have been made
 - e. a fine of £1,250,000.
8. The Previous Tribunal also recommended that the Level 2 provider pay 100% of the administrative costs, which totalled £11,315.00.
9. The relevant provisions of the Code for the present matter relating to Ms Pahonea’s potential prohibition include:
 - a. Paragraph 4.8.8, which 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.*
 - b. Paragraph 4.8.3(g), which 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.*
 - c. Paragraph 5.3.9, which 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

10. The Tribunal considered, as a preliminary issue, whether the Executive had made reasonable efforts to properly serve the warning notice (**'the Notice'**) on Ms Pahonea. The Tribunal carefully considered whether enough had been done by the Executive to bring the matter to Ms Pahonea's attention and whether there was any other reasonable option available to the Executive to notify Ms Pahonea about the proceedings. It questioned the Executive at length on this issue in order to satisfy itself that all reasonable attempts to notify Ms Pahonea and the Level 2 provider had been made.
11. In response to questioning, the Executive submitted that it believed it had exhausted all of the avenues to contact Ms Pahonea and the Level 2 provider.
12. The Executive stated that it had issued the Notice to Ms Pahonea and the Level 2 provider on 7 October 2021, via email, to all the registered email addresses that the PSA had on file for them. The Executive stated that it had also attempted to send the Notice to other email addresses it had for Ms Pahonea in relation to two other services. The Executive stated that one of the Level 2 provider's email addresses was still active at the relevant time. It added that while automatic replies for all email addresses had been received, the Executive subsequently received failure to deliver notifications for three out of the six email addresses it had sent the Notice to.
13. The Executive stated that a hard copy of the Notice was also sent via post to two addresses on 12 October 2021. Those addresses included the registered address for the Level 2 provider on the PSA's Registration Scheme and the address on the Level 2 provider's certificate of formation. Delivery to those addresses was not successful. In response to questioning, the Executive confirmed that the Level 2 provider had not registered any further postal addresses with the PSA.
14. The Executive advised that it had also attempted to call Ms Pahonea on 28 October 2021 and 2 November 2021, but that all telephone numbers it had for Ms Pahonea were either out-of-service or unavailable.
15. The Executive submitted that it had exhausted all avenues to bring the matter to Ms Pahonea's attention in writing and that it had additionally attempted to contact Ms Pahonea by telephone.
16. The Tribunal took the view that, in these circumstances, the Executive had made all reasonable attempts to notify both Ms Pahonea and the Level 2 provider. The Tribunal

additionally noted that providers have a responsibility to have register up-to-date and active contact details with the PSA. The Tribunal was satisfied that the Executive had made all reasonable efforts to serve the Notice and had complied with paragraph 4.8.8 of the Code.

Proceeding in absence

17. The Tribunal was told – and accepted – that the Executive had sent a letter to Ms Pahonea, dated 10 November 2021, with details on the steps she would need to take to participate remotely in the proceedings. That letter was sent, via email, to all of the known email addresses for Ms Pahonea and the Level 2 provider. There was no response from either Ms Pahonea or the Level 2 provider.
18. In all the circumstances, the Tribunal was satisfied that it ought to proceed with the hearing in the absence of Ms Pahonea. It did not consider that there would be any or any sufficient benefit in adjourning the matter, as, among other things, it appeared unlikely that such an adjournment would secure Ms Pahonea’s attendance at any future hearing.

Associated individual

The Executive’s case

19. The Executive submitted that Ms Pahonea was an associated individual, for the purpose of paragraph 5.3.9 of the Code, as, it said, she had day-to-day responsibility for the conduct of the Level 2 provider.
20. The Executive had submitted, in writing, that this was evidenced by the following:
 - a. CreditSafe reports, ordered by the Executive on 11 May 2021 and 16 September 2021, listed Ms Pahonea as a current director for the Level 2 provider and her position was recorded as Business Development Manager. The Executive noted that Ms Pahonea had not been listed as a director on an earlier Creditsafe report obtained on 15 June 2020.
 - b. Ms Pahonea was listed as a website user and an associated connection for the Level 2 provider on the PSA Registration Scheme Database.
 - c. On 7 March 2018, the Level 2 provider completed a due diligence and risk control form, which was required by the level 1 provider (**‘the Level 1 provider’**) and Ms Pahonea’s details were confirmed as the compliance contact for the Level 2 provider.
 - d. In August 2021, the Executive checked Ms Pahonea’s LinkedIn profile. It stated that she was a mobile content advertiser and was employed by the Level 2 provider as a Business Development Manager.

- e. In September 2021, the Executive checked Ms Pahonea's Apollo profile. It stated that she was employed by the Level 2 provider as a Business Development Manager.
- f. On 5 November 2018, Ms Pahonea responded to the Executive's automatic email regarding changes to the Level 2 provider's registration.
- g. On 2 December 2019, Ms Pahonea contacted the Executive for assistance updating the Service on the PSA website.
- h. Throughout the Service's operation, Ms Pahonea responded to the majority of requests for information sent by the Executive regarding individual consumer complaints.
- i. On 21 June 2018, Ms Pahonea was copied into a meeting request to the Executive in order to provide an overview of the Level 2 provider's services in the UK and its marketing practices.
- j. On 8 July 2021, another individual (**'Associated individual 1'**), which the Executive considered was also a director for the Level 2 provider, stated to the Executive: "I would also like to point out that having [redacted] and Ms Pahonea down as directors is factually incorrect. [Redacted] was taken on with the specific responsibility to grow the business in India and other Asian markets. In addition [redacted] provided regulatory and legal oversight for the business. Ms Pahonea was employed as a business development manager and responsible for customer support and user acquisition."
- k. On 21 July 2021, Associated individual 1 told the Executive that "[Redacted's] role was to grow the Taptronic business in Asian markets, primarily India. [Redacted] also oversaw administration for the business and helping Bianca with compliance and regulations". The Executive submitted that the same showed that Ms Pahonea was involved with the day-to-day compliance and regulations aspects of the company.
- l. The Executive acknowledged that it was not likely that Ms Pahonea was a director of the Level 2 provider company until 2021. However, as she was a business manager and dealt with the compliance function and regulation (as confirmed by Associated individual 1), the Executive considered Ms Pahonea to be an associated individual at the time the breaches of the Code were committed. Nonetheless, the Executive considered that it remained noteworthy that Ms Pahonea became a director of the company in 2021, as that demonstrated her responsible position within the business.
- m. The Executive submitted that Ms Pahonea was an associated individual within the meaning of the Code. This was because under paragraph 5.3.9 of the Code, an

associated individual is a broad term, which includes not just directors but also individuals who have day-to-day running of the business. The Executive submitted that the evidence demonstrated Ms Pahonea had day-to-day responsibility for the conduct of the Level 2 provider's business and was an associated individual under paragraph 5.3.9 of the Code when the breaches of rules 2.3.1, 2.3.3, 2.6.1 and paragraphs 3.4.14 and 4.2.2 were being carried out.

21. The Tribunal invited the Executive to provide any additional oral submissions, and respond to questions from the Tribunal, about its case.
22. The Tribunal asked for clarification about what Apollo was. The Executive responded that it was an online profile displaying job information and progression and was therefore similar to LinkedIn.
23. The Tribunal then asked the Executive to clarify what Creditsafe was. The Executive responded that Creditsafe pulled reports about companies and directors. The Executive then went on to clarify what the reports indicated. Although the Executive's case was that Ms Pahonea fell into the definition of an associated individual because she was a business manager, it also noted that the information obtained from Creditsafe appeared to show that Ms Pahonea became a director in 2021.
24. The Tribunal asked the Executive to comment on why Associated individual 1 had stated to the Executive that the Creditsafe reports were factually incorrect. The Tribunal asked the Executive to offer an explanation as to why Ms Pahonea was down on the later Creditsafe reports under the heading of director but, at the same time, with the position of Business Development Manager. The Executive stated that it suspected Ms Pahonea became a director because her name was provided underneath the heading director. The Executive pointed out that there was a separate section listing employees of the company and that it was noteworthy that Ms Pahonea appeared under the director heading. However, the Executive re-stated that Ms Pahonea did not need to be a director to fall under the broad definition of paragraph 5.3.9.
25. The Tribunal questioned whether the corporate structure of the Level 2 provider was considered any further by the Executive and gave an example of Companies House being a highly reliable source that one would look at when considering the corporate structure of UK companies. The Executive responded that it was quite difficult to get information in respect of companies based in the United Arab Emirates and that it had done its best.

Ms Pahonea's response

26. Ms Pahonea did not respond to the Notice and, therefore, did not make any representations about whether she was an associated individual or not.

Conclusions

27. The Tribunal considered all of the evidence before it and came to the conclusion, on the balance of probabilities, that Ms Pahonea was an associated individual, within the meaning of paragraph 5.3.9 of the Code.
28. The Tribunal was not satisfied that Ms Pahonea was a director, either at the time the relevant breaches occurred or indeed at any subsequent time. The Tribunal was, however, satisfied that Ms Pahonea was, at the material time, a manager having day-to-day responsibility for the conduct of the Service/business.
29. The Tribunal noted the Executive's submissions. It noted that Ms Pahonea was named in the agreement with a Level 1 provider as the compliance manager responsible in the setting up of the Service. It noted the Apollo document stating that she had held the position of the Business Development Manager since January 2018. It noted the lengthy responses that Ms Pahonea had given the Executive during the Executive's investigation into the Service. It noted the duration that Ms Pahonea had, on the evidence, been involved with the business, the correspondence she had received and the responses she had sent. It noted, in particular, the significant regulatory and compliance aspects of Ms Pahonea's role.

Knowing involvement

The Executive's case

30. The Executive submitted that key events had occurred which would have alerted Ms Pahonea to the potential breaches of the Code and/or the fact that the Level 2 provider was operating non-compliantly.
31. The Executive relied on the following:
 - a. On 14 June 2018, the Executive sent a registration notification to the Level 2 provider which Ms Pahonea was copied into and, shortly afterwards, the Level 2 provider registered the Service.
 - b. An allocation notification was sent to the Level 2 provider and Ms Pahonea was one of the recipients.
 - c. During the Service's operation, the Executive received 410 complaints about the Service, during Ms Pahonea's directorship/role. At the time the complaints were made, information requests were sent to [redacted], who passed most of the requests on to Ms Pahonea to respond to directly. The Executive stated that this demonstrated Ms Pahonea's awareness of the complaints received regarding the Service.

- d. On 12 March 2019, the Executive sent a monitoring notification to Associated individual 1 and [redacted], which was passed to Ms Pahonea to investigate and respond to. The Executive submitted that this would have made her aware that the Service was acting non-compliantly with the Code. Additionally, Ms Pahonea reached out to the Level 2 providers' compliance partners for help investigating the malware concerns who confirmed that malware was present.
- e. The Executive stated that during the investigation into the Level 2 provider, the Executive sent and received responses from Ms Pahonea. Ms Pahonea last corresponded with the Executive in relation to the operation and promotion of the Service on 7 July 2020.
- f. An allocation notification was sent to the Level 2 provider and Ms Pahonea was one of the recipients.
- g. On 12 March 2019, the Executive sent a monitoring notification to the Level 2 provider confirming that one of the Executive's monitoring MSISDNs was automatically opted into the Service without consent. The Executive included a PCAP file which demonstrated the opt-in was caused by malware capable of simulating interaction between Level 1 provider and Level 2 provider platforms. The Executive also confirmed that the issue was likely to cause consumer harm and its expectation was that the Level 2 provider should properly investigate the issues. Ms Pahonea entered into correspondence with the Level 2 provider's compliance partners. Ms Pahonea responded to the monitoring notification with the Level 2 provider's investigation and evidence that it had refunded affected consumers.
- h. On 4 December 2019, Ms Pahonea formally responded to the Executive's fourth direction for information on behalf of [redacted]. The response included in-depth information regarding MSISDN interactions, details around the Level 2 provider's complaint process, transaction detail relating to malware, and about refunds.
- i. Ms Pahonea received the Executive's fifth direction for information and formally responded to it on 5 February 2020. The response included payment gateway transactional data, access logs and promotional/campaign details.
- j. Ms Pahonea received the Executive's sixth direction for information and formally responded to it on 19 April 2020. The response included further details related to "Header Data" (transactional details), details of current status, number of subscriptions and migration details for the Service operating on the original value chain.
- k. Ms Pahonea received the Executive's seventh direction for information and formally responded to it on 30 June 2020. The response included financial information, the transfer agreement and additional information regarding transactional data.

- l. On 7 July 2020, Ms Pahonea received the Executive's eight direction for information. Ms Pahonea responded to it on the same day and her response included financial information and a request for an extension to provide MSISDN data.
 - m. On 8 July 2020, Ms Pahonea confirmed that the Level 2 provider was unable to provide MSISDN data and referred the Executive to the associated Level 1 provider.
- 32. The Executive submitted that Ms Pahonea was an associated individual with knowledge in a series of breaches of the Code that were upheld and considered overall to be "very serious" by the Previous Tribunal. The Executive stated that the evidence it had produced demonstrated that Ms Pahonea was knowingly involved in the non-compliant conduct at the relevant times.
- 33. The Tribunal asked the Executive to explain why it had not, in the documentation, set out specifically why it said that Ms Pahonea was knowingly involved in each breach upheld. The Executive responded that this was because all breaches were found to be "very serious" and that Ms Pahonea had full visibility of the PSA's concerns throughout its investigation into the Service and had responded throughout the investigation to complainant reports, monitoring notifications, and directions. The Executive accepted that it could have gone through the case breach by breach, but emphasised that paragraph 4.8.3(g) required knowing involvement in only one serious breach or a series of breaches.
- 34. The Tribunal questioned and challenged the Executive on the distinction between merely being "involved" and being "knowingly" involved in a breach. The Executive responded that Ms Pahonea was the head of compliance and regulatory compliance and that a huge number of complaints were received by the PSA about the Service which should/would have alerted Ms Pahonea that the Service was not operating compliantly. The Executive went on to argue that when the case was allocated to a Track 2 procedure, Ms Pahonea would have been aware there were significant issues that required addressing but the Service continued to operate.

Ms Pahonea's response

- 35. Ms Pahonea did not respond to the Notice and, therefore, did not comment on her alleged knowing involvement in a serious breach or a series of breaches of the Code.

Conclusions

- 36. The Tribunal had to decide whether it was satisfied, on the evidence before it, and on the balance of probabilities, that Ms Pahonea was knowingly involved in a serious breach or a series of breaches of the Code.

37. The Tribunal had regard to the submissions and evidence relied on by the Executive.
38. First, the Tribunal considered the nature and extent of Ms Pahonea's involvement (or otherwise) in the proven breach of rule 2.6.1 (regarding complaint handling). The Tribunal was satisfied that Ms Pahonea was responsible for compliance and would have had a sufficient understanding of the relevant regulations in that regard. It was satisfied that she was also involved in business development and bringing new customers to the service. The Tribunal was satisfied that Ms Pahonea would have known about the volume (and nature) of complaints against the Service and had responsibilities in that regard. On the balance of probabilities, the Tribunal was satisfied that Ms Pahonea was knowingly involved in the proven breach of rule 2.6.1.
39. Second, the Tribunal considered the proven breach of rule 3.4.14 (regarding registration). The Tribunal was satisfied that Ms Pahonea had responsibility as the compliance manager and that that included duties relating to the proper registration of the Service. The Tribunal noted the evidence of the Apollo document that Ms Pahonea was in position of the business development manager since January 2018 and found that she was in her position at the time of the registration requirement in June 2018. The Tribunal was satisfied, on the balance of probabilities, that Ms Pahonea was knowingly involved in the breach of paragraph 3.4.14.
40. Third, the Tribunal considered the first proven breach of paragraph 4.2.2. It considered the correspondence from Ms Pahonea as well as the correspondence sent by Ms Pahonea on the behalf of [redacted] to the Executive during the course of the investigation. The Tribunal noted, in particular, the email dated 4 December 2019 sent from Ms Pahonea's account on behalf of [redacted] stating: "below you can find our response and relevant documentation regarding the last Direction for information we received...". The Tribunal took the view that the wording "our response" indicated that Ms Pahonea was also involved in gathering information provided in this email. The Previous Tribunal held that the information provided in the email dated 4 December 2019 was false and misleading. Accordingly, the Tribunal was satisfied, on the balance of probabilities, that Ms Pahonea was knowingly involved in this breach.
41. More generally, the Tribunal noted the nature and apparent extent of the role that Ms Pahonea held and the duration of her involvement in relevant matters.
42. The Tribunal was therefore satisfied that Ms Pahonea was knowingly involved in a serious breach and/or a series of breaches of the Code. It was satisfied that Ms Pahonea was knowingly involved in the breaches of rule 2.6.1, paragraph 3.4.14 and paragraph 4.2.2 and used those as examples that provided sufficient evidence of Ms Pahonea's necessary knowing involvement that the Service was not operating compliantly with the Code.

Sanctions

43. The Executive recommended that Ms Pahonea 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 earlier adjudication.
44. Ms Pahonea had not directly provided her view on the sanction and how it might impact on her.
45. The Tribunal decided (unanimously) to prohibit Ms Pahonea 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 did not identify any or any sufficient evidence to mitigate the duration of the sanction.
46. The Tribunal considered that such a prohibition was appropriate, proportionate and justified due to the proven conduct of the Level 2 provider and the Tribunal's finding that Ms Pahonea was knowingly involved in the same. The Tribunal took into account the deterrent effect of sanctions and the need to ensure that such non-compliant conduct would not be repeated by Ms Pahonea. It had regard to the wider public interest and the PSA's legitimate aim of protecting consumers and the public, and upholding standards and confidence in the sector. While the sanction may have a significant adverse impact on Ms Pahonea individually, the same had to be balanced against the legitimate aims of the PSA and the regulatory scheme.

Administrative charge recommendation: 100%