



REPORT OF THE ADJUDICATOR

Complaint reference number:	10680
WASPA member(s):	Linguistic Mobile (IP) / Opera Interactive(SP)
Membership number(s):	1085 / 0068
Complainant:	Public
Type of complaint:	Subscription service
Date complaint was lodged:	2010-09-28
Date of the alleged offence:	2009 - 2010
Relevant version of the Code:	9.0
Clauses considered:	3.3.1, 3.3.2, 3.3.3, 3.9.2, 4.1.1, 4.1.2, 6.2.9, 11.1.5.
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	None

Complaint

A complaint was lodged via the WASPA website referencing Opera, Mira and Oxygen8 as the relevant WASPs and Linguistics Mobile as the relevant IP in respect of this complaint. The complaint pack forwarded to the adjudicator references only Opera as the SP and it has been dealt with on that basis.

The complainant alleged that sections 4.1.1 and 4.1.2 of the Code had been breached as a result of ***“lying to customer”*** and through the ***“provision of incorrect logs”***.

The complainant further alleged that section 6.2.9 of the Code (which imposes a requirement on an SP to send notification messages to consumers advising them that they have exceeded a total service cost of R200 for that month) had also been breached in that the notification message was ***“cryptic”*** and did not require a communication from the consumer that they accepted charges above R200.

The complainant also alleged that section 11.1.5 had been breached through the changing of prices for the service with the consumer's express consent and through adoption of incorrect billing frequencies, including twice in 24 hour periods.

The complainant also alleged that no reminder messages were sent during December 2009 and that reminder messages had failed to be delivered. The consumer alleged that this amount to a breach of section 11.5.1 of the Code.

The complainant went on to alleged as follows:

“We have been offered [an] inappropriate refund in return for our silence. We'd like a full refund and will only accept a [formal] complaint”.

The SP was notified of the complaint on 5 October 2010.

Service provider's response

On 6 October 2010, the SP emailed WASPA and included a copy of an earlier email from its managing director to the complainant in which the SP:

- **apologized to the complainant for any inconvenience caused;**
- **advised that there had been a misunderstanding between the IP and one of the SP's employees regarding certain requested information regarding the complainant's account;**
- **advised that the total charge billed to the complainant was R2 638.80; and**
- **offered the complainant a refund of R3 000.**

On 11 October 2011, the complainant emailed WASPA and confirmed that the SP had refunded him. However he stated further that the matter had highlighted some serious problems with the SP's billing which he assumed would have affected other consumers as well. He therefore advised WASPA that he regarded it as his duty to proceed with the formal complaint.

On 21 October 2010 the SP and IP submitted further responses to the complaint.

In its supplementary response of 21 October 2010, the SP stated, amongst other things:

- **that Linguistic Mobile had not had a formal complaint lodged against them previously;**
- **that neither the SP nor the IP had intentionally deceived the consumer and that the correct charges were not conveyed to the consumer due to human error;**
- **that there was a system error which had lead the IP to erroneously believe that attempts to charge the consumer had failed and which resulted, in turn, in the IP failing to count all successful billings made against the consumer's account;**
- **that the reason the system had incorrectly deduced that payments had not been received was because the system “combines that statuses received from the networks on billings and SMS delivery” and that when the**

system showed a status called "Failed" it meant that "the billing took place but the message failed to deliver to the handset";

- that, in relation to the alleged adjustment of pricing for the service, the price had actually been reduced, not increased; and
- that the SP had attempted to send all required reminder messages to the complainant, that same had been sent to the relevant networks but that not all messages had been successfully delivered to the complainant's handset.

The IP, in its response of 21 October 2010, stated, inter alia:

- that a miscommunication had occurred between itself and the SP when it had requested a total for all **"successfully billed messages"**;
- that this error had been detected when the complainant had insisted that the total charge supplied to him was incorrect;
- that the error resulted from the SP's staff member failing to include the cost of messages marked with a **"Failed"** status when these messages had, in fact, been successfully billed for;
- that **"Opera data confirmed to Linguistic that this end user did not at any stage exceed the ZAR 200 threshold in any 30 day period"** and that **"this incorrect data was received in the form of delivery receipting that confirmed a message 'status' for each billing attempt. In this instance, Opera supplied Linguistic with an 'unknown' message status that confirms an 'UNBILLED' message: this status should have been confirmed as 'successful'..."**
- that the pricing for the service had decreased rather than increased;
- that notification messages were sent to the consumer in all required months except for December 2009; and
- that, in December 2009, Linguistic had launched its own proprietary technology platform which, upon launch, had experienced technical issues with respect to its new hosting facility which had resulted in internet outages and the failure to send reminder or billing messages to the consumer and which, in turn, resulted in a 45 day gap between required notification messages.

Sections of the Code considered

The following sections of the Code have been considered:

3.3.1. Members will not offer or promise services that they are unable to provide.

3.3.2. Services must not be unreasonably prolonged or delayed.

3.3.3. A member is not liable for any failure to provide a service due to circumstances beyond that member's control.

3.9.2 Where any information service provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information service provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and vicariously liable for any breach of the Code resulting from the actions or omissions of any such information service provider.

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

6.2.9. During any calendar month, if the total cost of any service exceeds R200 for that month:

(a) Where the WASP is in control of the billing (e.g. an OBS), a notification must be sent to the customer that they have reached this limit and a communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.

11.1.5. Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

Decision

The IP has admitted that no reminder message was sent in December 2009 as required by the Code. This admission amounts to an admission that section 6.2.9 of the Code was in fact breached.

Section 3.3.3. of the Code provides that **“a member is not liable for any failure to provide a service due to circumstances beyond that member's control.”**

Section 3.9.2 provides that a member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of an information service provider who conducts any activity governed by the Code.

Section 3.3.3 must accordingly be read and interpreted in the light of section 3.9.2 as meaning that a member shall not be liable for service failures which result from circumstances beyond the member's control and beyond the control of the person making use of the member's facilities to provide such services.

The SP and IP refer, in their respective responses to the complaint, to various “system” errors and “technical issues” that resulted in:

- message delivery statuses being erroneously linked to payment statuses,
- successful payments not being tallied against the complainant's account;
- hosting system failures; and
- the failure to send reminder messages and a 45 day gap between notification messages.

Without in any way limiting the meaning of the words **“beyond that member's control”**, these words might typically apply to failures to provide a service in circumstances such as mobile network failures, power outages or force majeure.

Proper billing and accounting system functioning should not be readily assumed to fall beyond the control of a member or an information provider making use of the services of the member. No information has been placed before WASPA in this complaint to indicate that the billing and accounting system failures were beyond the control of the SP or IP or a combination of them. In fact, the IP seems to allege that it had implemented its own proprietary platform and that this platform gave rise to problems. In the present matter it appears likely that the system was either not properly designed, configured or tested, or a combination of the foregoing. The tallying up of charges debited against a consumer's account and the provision of reminder messages is an integral part of the subscription service process and the SP and IP must take responsibility for the systems they design and/or chose implement to do this.

The IP has admitted that no reminder message was sent in December 2009 as required by the Code. The complaint of a breach of section 6.2.9 of the Code is accordingly upheld.

The additional complaints of breach of sections 4.1.1, 4.1.2 and 11.1.5 have not been established on the facts of the matter and the complaints are accordingly dismissed.

Sanctions

Failure to record payments made against a consumer's account and failure to send out notification messages are potentially serious matters. The SP and IP are reprimanded for the implementation and/or use of poorly functioning systems which resulted in the circumstances giving rise to this complaint. It is quite possible, as the complainant has suggested, that other consumers were affected by the poorly functioning systems although there is no specific information before me in this regard.

In respect of the breach of section 6.2.9 of the Code, I impose a sanction of R20 000, R15 000 of which is suspended for a period of 12 months from the date on which the member was first notified of the complaint (i.e. 5 October 2010). The amount of R5 000 is therefore payable to WASPA within 5 days of the delivery of this report. Should any further complaint be upheld against the SP in respect of a breach of 6.2.9 in respect of any conduct that occurred from 6 October 2010 until 5 October 2011, then the suspended portion of the sanction shall become immediately due and payable to WASPA by the SP.

I regard the R3 000 already paid to the consumer (being a refund of the **R2 638.80** plus additional compensation of R371.20) as being adequate compensation to the consumer.