



REPORT OF THE ADJUDICATOR

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| Complaint reference number: | 15163 |
| WASPA member(s): | Buongiorno SA |
| Membership number(s): | 0002 |
| Complainant: | Public |
| Type of complaint: | Subscription Service |
| Date complaint was lodged: | 2011-10-10 |
| Date of the alleged offence: | 2011-05-10 |
| Relevant version of the Code: | 10.0 |
| Clauses considered: | 11.2.1, 11.2.2, 11.2.3 |
| Relevant version of the Ad. Rules: | Not applicable |
| Clauses considered: | Not applicable |
| Related cases considered: | 11863 |

Complaint & Response

1. The complainant in this matter alleges that the member subscribed him to a subscription service and charged him without his consent.
2. The member is a full member of WASPA, and the complainant is a member of the public.
3. The complaint was made on behalf of the complainant by Vodacom.
4. On the 24th of August 2011 an unsubscribe request was made by Vodacom on behalf of the complainant in respect of a subscription service operated by the member, using WASPA's unsubscribe facility. The member confirmed on the 26th that it had unsubscribed the complainant from the service in question, and that it had not offered him a refund of charges.
5. On the 12th of September Vodacom entered the following into the unsubscribe system:

To whom it may concern: Please credit the clients money as he did not sign up for this application. [removed]; is on a contract with Vodacom and did not agree for any sort of content service to be activated on his contract. According to the Consumer Protection Act nothing can be added onto accounts without the client's notification. This customer has now been cut off from Vodacom because they say he has not paid his account and this client is religious in making the same payment of R500 per month and often he has a credit with Vodacom. He has surely been charged for a service that he has not asked for. Please credit the client so that I can liaise with Vodacom Accounts Department to reactivate the clients account. If you need any further information please do not hesitate to call me on behalf of [removed].

6. The member responded on the 13th that the complainant had already been unsubscribed. The WASPA Secretariat requested that the member provide proof. It is not clear whether the Secretariat meant proof that the complainant had been unsubscribed, or proof that the complainant had been properly subscribed in the first place. The member's response to this was to state again that the complainant had previously been unsubscribed from its database.
7. The WASPA Secretariat accordingly escalated the complaint to a formal complaint on the 10th of October 2011 for the following reason:

Complainant requested information as to where his number was obtained - WASP did not supply this information and the secretariat believes it requires further investigation.
8. The WASPA Secretariat sent the member formal notice of the complaint on the 12th of October, and the member responded to it on the 13th.
9. The member's submission was comprehensive, with a detailed description of its subscription process for a certain subscription service with accompanying screenshots, an MO/MT log of SMS communications between the parties, and a billing record.
10. In its submission the member referred to the adjudicator's report in complaint number 11863 in support of its contention that its subscription process was in compliance with the Code of Conduct. The submission was also virtually identical to its responses in complaints 14643 and 14644.
11. For reasons set out below, it is not necessary to set out the member's submissions at this stage.
12. The complainant was not satisfied with the member's response, but his ire was directed at his network operator which he blamed for allowing him to be subscribed to the service.
13. Finally, while the complaint did not set out which subscription service was subscribed to, the complainant did not contradict the member's submission that the service subscribed to was the "35050 VIP" service, and that the "POLO" promotion provided the means by which the subscription took place. This is borne out the complainant's SMS that "tks i wil take the polo" as described below.
14. The adjudicator requested that the WASPA Secretariat ascertain from the member whether the "POLO" promotion, by which the complainant is alleged to have been subscribed, was still active. The member advised that it was not.

Sections of the Code considered

15. The conduct complained of took place before the 8th of June 2011, so version 10.0 of the WASPA Code of Conduct is applicable to this complaint. The following sections have relevance:

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

Decision

16. The complaint turns on the allegation that the member subscribed the complainant to a subscription service without the complainant's consent. There is no specific allegation as to how the member would have done this.
17. I anticipate that a subscription could have been made in a limited number of ways:
- 17.1. The complainant could have knowingly subscribed to the service and now wishes to deny doing so,
- 17.2. The complainant could have been confused by the member's subscription process to subscribe to a service when he thought he was entering a competition or some other similar activity,
- 17.3. The member's systems could have been faulty or not compliant with the WASPA code and subscribed him when they should not have, or
- 17.4. The member could have subscribed the complainant fraudulently.
18. To deal with the question of a fraudulent subscription first, the member would have had to contrive log entries in order to "cover up" its fraud. Falsifying log entries in this way is a serious offence, and the member is doubtless aware that doing so would attract harsh sanction from any WASPA adjudicator. Equally, an adjudicator must have incontrovertible evidence that falsification has occurred before he or she can make such a finding. I have perused the logs provided by the member, and I can find nothing untoward in them that would indicate that they have been falsified; further, there is no circumstantial evidence for such a conclusion.

19. The member refers to the adjudicator's report in complaint number 11863, and on closer inspection I find that it dealt with exactly the same subscription service operated by the member, and that the subscription process as described by the member in its submission in this complaint is the same as that examined in that one.
20. Complaint 11863 dealt with two aspects of the member's subscription process:
- 20.1. a banner advertisement for a competition run by the member, and
 - 20.2. the website that the user was taken to on clicking on the banner advertisement, through which the user would be subscribed to the member's service.
21. The adjudicator in complaint 11863 found that the banner advertisement used by the member to funnel traffic to its website infringed section 11.1.1 of the Code of Conduct. The website itself, however, and the subscription process that was effected through it, were found to be compliant with the Code of Conduct.
22. I have read the report in complaint number 11863, and am in agreement with it. As that report is in respect of the very service and subscription method complained of here, it is not necessary to analyse the member's submissions in this matter regarding its subscription system.
23. The member in its submission says that the complainant subscribed to the service via its website, which would have then been in the manner examined in complaint number 11863. There is no indication however that the complainant was directed to the website by means of a banner ad as in complaint 11863, so I do not apply that aspect of the adjudicator's report.
24. The only information I have been provided regarding the subscription process is the member's submission that describes the website and subscription process.
25. Accordingly, in the light of the information provided, I must conclude that the member's subscription process for the service in question was compliant with the Code of Conduct.
26. The MO/MT logs provided by the member show that:
- 26.1. A confirmation code was sent to the complainant's MSISDN on the 10th of May 2011. The message reads:

 >> Your CODE is 4298 << enter it in the web confirmation page and youll be subscribed to 35050 VIP at R3/day for mp3s, games and tons more.
 - 26.2. A welcome message was sent the same day.
 - 26.3. The complainant SMSed the following to the member on the same date:

 tks i wil take the polo

26.4. The member's system sent the following to the complainant in response:

Sorry! Our service didnt understand your request. Please call our call center on 0214178001 (std rates apply) they will gladly assist you.

26.5. An unsubscribe confirmation was sent on the 25th of August 2011.

27. It seems from the above that the complainant misunderstood the nature of the service, thought he was entering a competition, and didn't realise that he was in fact subscribing to a subscription service.
28. It is very possible that he was attracted by the promotional competition advertised by the member and did not pay close enough attention to the statements on the website that he was subscribing to a subscription service, or to words to that effect in the confirmation SMS quoted above. However, I am satisfied that the content of the website and the subscription process followed gave him sufficient notice that he was in fact subscribing to a subscription service.
29. Of the three remaining possibilities identified in paragraph 17, I can find no indication that the member's systems were faulty or not compliant with the WASPA Code, or that the complainant is not acting in good faith. I find it most likely that the complainant was confused by the member's subscription process and subscribed in error.
30. Accordingly, the member has not infringed any of the clauses cited above.
31. The complaint is dismissed.