



REPORT OF THE ADJUDICATOR

Complaint reference number:	16493
WASPA member(s):	Buongiorno SA (SP)
Membership number(s):	0002
Complainant:	Public
Type of complaint:	Subscription Services
Date complaint was lodged:	2012-02-22
Date of the alleged offence:	2011-09-22
Relevant version of the Code:	11
Clauses considered:	11.2.1, 11.10.2, 14.3.14
Relevant version of the Ad. Rules:	N/A
Clauses considered:	N/A
Related cases considered:	11863, 10245, 14403

Complaint

The Complainant in this matter alleged that the SP subscribed him to a service to which he never subscribed or opted in. After the SP offered the Complainant a settlement proposal, the Complainant still refused resolution and queried the logs' authenticity provided by the SP.

Service provider's response

The SP provided a detailed response:

"1 On 23 February 2012 we received notification from WASPA Complaints that a formal complaint, numbered 16493 (the "**Complaint**"), had been lodged against us by a member of the public (the "**Complainant**").

2 Based on the facts surrounding the Complaint, we submit that the version of the WASPA Code of Conduct applicable to this Complaint is version 11 (this version will hereinafter be referred to as the "**Code**").

3 The grounds for the Complaint, to put it concisely, is that the Complaint denies that the subscribed to our 35050 GOLD service (the "**Service**").

4 We confirm that, for some inexplicable reason, our call centre did not provide the records evidencing subscription when they were requested by the Complainant. We apologise to the Complainant for this, and confirm that we have addressed reprimanded our call centre accordingly.

5 Please now find attached hereto:

5.1 The campaign through which the Complainant became subscribed (annexures "B1" – "B3" (both inclusive))

5.2 Our MO/MT logs (annexure "B4"); and

5.3 Our billing records (annexure "B5")

6 Despite our call centre's conduct in this matter, the records provided in paragraph 5.2, do evidence that the Complaint did subscribe to our ZAP service (the "Service") and was therefore legitimately billed for this Service.

Subscription to the Services:

7 We believe that the campaign and subscription process contained therein is compliant with the Code and the Advertising Rules (the "Rules"). Please see below for more detail.

7.1 The banner ("B1") and the confirmation page ("B2") both contain the requisite subscription information on each page, in the prescribed format, as is required by the Code and the Rule.

8 We confirm that the campaign is compliant with the double opt-in requirements set by the Code under section 11.3 (inclusive of relevant sub-sections). By way of further amplification, we are instructed to advise that

8.1 potential subscribers are made fully aware, on the banner and confirmation page of the service, that what is being offered is a subscription service at a daily charge;

8.2 if the potential subscribers are interested then they have to click the "join" or "confirm" button before being subscribed;

8.3 only after taking the positive step of clicking the "join" or "confirm" does the potential subscriber then become subscribed to the service.

9 By adopting this procedure before subscription it is highly improbable that a potential subscriber could subscribe to the service without intending to do so. The Complainant, or someone with access to his mobile phone, must have followed the above process and subsequently become subscribed to the Service.

10 In addition to the above:

10.1 On the confirmation page, before subscribed the potential subscriber has access to our terms and conditions, which confirm the subscription element of the service being offered – this is not a requirement of the code.

10.2 Our campaigns contain a further welcome page, which we will refer to as the "Welcome" page ("B3"). This page follows the confirmation page and is only accessible to customers who have actually completed the subscription process, and become subscribed. Once they have reached this point, they can be in no doubt that they have become subscribed to our Service.

10.3 Once subscribed the Complainant received the prescribed Welcome message containing the a) subscription element of the Service; b) the cost thereof; c) our helpline details; and b) an instruction on how to unsubscribe (which instruction was easy to follow and implement) (see "B4").

10.4 Furthermore, the requisite reminder messages were also sent as prescribed by the Code. These messages also contained *inter alia* the following information: a) the subscription element of the Service; b) the cost thereof; c) our helpline number; and b) the unsubscription mechanism (see "B4").

11 On the evidence it is difficult to argue that the Complainant, or someone with access to his mobile phone, did not act positively to become a member of the Service - a Service which any reasonable person, at the time of subscribing, would have known or should have known was a subscription service, billed at R6 per day.

12 We have now provided the logs requested by the Complainant, evidencing subscription. Should he require any further information and/or clarity thereon he is welcome to request same. We trust that the Complainant is now satisfied and that this Complaint will now be reviewed as "resolved" by WASPA.

13 We have not dealt with each and every other possible section of the Code which would be applicable to this campaign. To do so without further guidance as to alleged breaches would be practically impossible. Therefore, should this be referred to adjudication – which we submit it should not – the Adjudicator and/or the Complainant wish us to deal with other specific sections of the Code they are free to revert to us and we will gladly address these specified sections.

14 Based on the original complaint and the above, we submit that the Complainant, or someone with access to her mobile phone, did knowingly and actively subscribe to the Service. We do however acknowledge that we did not provide the logs requested by the Complainant until responding to this formal complaint. We reiterate that our call centre has been brought to book on this specific issue."

Sections of the Code considered

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.

11.10.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

14.3.14. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent reply.

The SP alleged various processes followed and submitted various banners and web pages to illustrate its subscription process.

The SP then provided logs, both created on the 27th of February 2012, aiming to proof the alleged subscription of the Complainant.

These logs were provided in an excel format. The logs were not print screen copies of actual computer generated logs.

Section 11.10.2 states inter alia that:

“...a member must provide **clear** (own emphasis) logs for any subscription service customer which include the following information:

(a) proof that the customer has opted in to a service or services...”

The logs submitted, together with the other annexures provided by the SP as so-called proof does not in the opinion of the Adjudicator fulfil the requirement of section 11.10.2 (a) and does not in the opinion of the Adjudicator illustrate authenticated proof that the Complainant has indeed subscribed to the services of the SP.

The mere fact that these logs were created in excel, subsequent to the alleged subscription, and the fact that the logs seem to indicate that the first payment was deducted before the Complainant was notified, raise suspicion on the authenticity thereof. The Complainant also indicated or alleged that he only received notification at a much later stage, when he received his first reminder notification, a month after the alleged subscription.

The Adjudicator therefore forms the opinion that the SP failed to proof that the customer has opted in to a service in terms of section 11.10.2 (a) and subsequently find the SP in breach of section 11.2.1.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct; and
The SP's subsequent response.

The SP is instructed to reimburse the Complainant in full.

The SP is fined R 15 000-00 which must be paid to the WASPA Secretariat within 7 (seven) days are being notified hereof.