



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	iTouch
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainant:	Competitor
Complaint Number:	5980
Code Version:	6.2
Advertising Rules Version:	Not applicable

Complaint

The Complainant lodged the following informal complaint:

“At the end of December 2008, I saw what appeared to be something of interest on a local web site. I opened the page and went through the process and later when I saw that it was requiring web access from a cell phone, I exited from the site. Shortly thereafter I received a message on my cell phone with a pin number which I immediately deleted. The supplier claims that I processed the pin to gain access. This is not true and I have all my cell phone records to prove that no reply was sent to the number quoted. As far as my knowledge of the law of contract goes, one has to accept the service offered before any contract comes into being. I did not accept the offer as I discarded the pin number without using it. Furthermore I do not access the web in any format via my cell phone. I use it for SMS, MMS AND NORMAL CALLS ONLY.”

The Complainant provided the following reason for escalation to a formal complaint:

“Emails received from complainant 2009/03/09: Thanks for your reply. My problem remains the refund of the funds that were charged to my cell phone without my consent. By copy of this e-mail I am requesting my service provider to advise if they have been credited. Until I receive this credit, the matter will not be resolved.”

Service provider's response

In its initial response to the informal complaint the SP stated the following:

"The customer's sub has been cancelled on the 17th Feb. The pin would not have been used by the cell phone. Once the pin was received by the MSISDN, should it have manually been entered onto the website - via PC. Only then would this have started the sub. Please see attached, the sub process for the start of the Fun Club via the "Brain Age Tester. We have received successful delivery reports of all notification to the MSISDN, from his network provider."

The SP asked for an extension twice due to the discussion with its third party advertiser.

In its final response the SP wrote the following:

"Please find attached proof that the user did in fact insert the pin number 8051, which the subscription could only have been started if the correct pin was inserted. The pin would have needed to have been inserted on the webpage in order for the subscription to have started and billing to commence. If the user did not insert the pin then the subscription would not have been initiated. Below is the process once again outlined for your perusal, as we ourselves have QA'd the service before having the interface made live...

This is a Fun Club page that is created by our online advertising agency and is served on a variety of South African websites.

As a full member of WASPA we pride ourselves in remaining above board without misleading our customers.

As can be seen in the WASPA code of conduct, members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

On all our pages we have included the text "subscription service R10/day" and the full terms and conditions. In the terms on conditions it instructs the user how to unsubscribe to the service.

Below it can be seen (blocked in red) that it is mentioned 3 times on the advertising landing page that it is a subscription service and that it is billed at R10/day. It is Arial font as to ensure clarity on a website. This information is also on every page in the process of the subscription."

Sections of the Code considered

4.1.1. Members are committed to 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.

11.1.2. 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.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.2.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

11.2.3. The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).

11.2.4. Members must ensure that the termination mechanism is functional and accessible at all times.

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 response.

The SP has provided proof of the fact that the Complainant in this matter has indeed subscribed to its services through a website. A pin was subsequently issued and the Complainant, after allegedly entering the pin, became subscribed.

As can be seen on the logs and the SP's database, this was logged and subsequent services started.

Although the Adjudicator is not implying that the Complainant in this matter is not providing facts true to the best of his knowledge and hence his subsequent recollection of events, it has to be stated that in the absence of any evidence on behalf of the Complainant proving otherwise as to what was logged by the SP, it is difficult for the Adjudicator to make a finding, based on the words of the Complainant alone.

However, should there be some overriding factor(s) which might alter the opinion of the Adjudicator, mention thereof must be made, and this is indeed what is unfolding here.

It has come to the attention of the Adjudicator that there have been several complaints in the same month pertaining to the same services.

These were all lodged as formal complaints against the SP in this matter.

All complaints have its origins based on the same allegations alleged by the Complainant in this matter, uttering their frustrations with the "brain-age" service, stating that they either did not receive a pin, or when receiving the

pin, did not enter the pin and therefore did not consent to a subscription service.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, having regard to evidence supplied by the SP, the Adjudicator has to ask him / herself whether such evidence can be relied upon?

Without having sufficient access to the said systems generating these logs, and therefore any mechanism to guarantee the fail-save operation of the SP's operational system, the Adjudicator can also not merely imply that the SP is in breach of any section of the Code of Conduct.

The Adjudicator is however of the opinion, taking all the relevant circumstances into consideration, based on circumstantial evidence alone, that there must be an instance of malfunction on behalf of the SP, or at the very least, something to that extend.

This read together with the decision provided in Adjudication 5921, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 of version 6.2 of the Code and 11.1.5 of version 7.4 of the Code.

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;

The SP is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 5921 refer.