



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	iTouch
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainant:	Chrisna Greef
Complaint Number:	5985
Code Version:	6.2 / 7.0
Advertising Rules Version:	Not applicable

Complaint

In its initial complaint The Complainant wrote:

"I do have a serious problem as I found costs debited to my account for something called Borjournio, or something like that. Neither me or my husband has ever subscribed to any of these stupid things and we would not enrol for anything like that at all. On my January account I found that from the 10th of January I was billed daily for this. I phoned Customer Care and they advised me to go to the Vodashop which I did. The people at the Vodashop gave me a

number to call to stop Bonjournio - still do not know what it is! That was Sunday! I called the number and the recorder message gave me a number to sms to stop this. I did this and I was told that it takes 48 hours to stop. In the meantime I tried to find out what this was all about and who gave the permission to subscribe to what ever it is all about. The same night I received an sms from Vodacom that I have exceeded 90% of my allowed account. In the early hours of the morning on Wednesday, I received an sms that my cell was soft blocked due to the overspending of my account. This means that this is still on my account. I am now sending you this message to tell you that I do not want any subscriptions on my telephone, only my normal package. Please stop this immediately and ban these people from abusing your customers. Also be so kind to Refund us our money for January and February as we did not subscribe to it. Furthermore, I wish to point out that my cell phone is only used for when I really need it and it has been 3 days that I was not able to use it and this is unacceptable as I did not use this money. You are welcome to check my previous accounts and you will see that that is the truth. If in an emergency I will not be able to get help. Please stop this

now! In this financial crisis nobody need nonsense like this but if you do not act upon this, I will certainly contact the papers and also see a lawyer. This is the same as stealing. These people do not even answer the phone, the lines just go dead after a few second. Please help me to get rid of this.

I talked to the Customer Care branch of I Touch who said that they received a subscription per PC or Laptop on the 7th of January 2009. I requested my money to be refunded as I did not subscribe and this lady said that the money will not be refunded but she can not understand why I am upset as the service was already stopped on 28 February 2009. This is unacceptable. I now paid for 2 months to the approximate value of R400.00 excluding VAT for something that I did not subscribe to as well as not having the benefit. Please be so kind to request the money from I Touch and request their proof of subscription which they do not have.”

Later the Complainant wrote the following:

“Firstly, according to my complaint to Vodacom that I did not know what I was billed for and was told to send a SMS to the numbers listed to stop whatever you billed me for.

Secondly my telephone can not even receive any MMS or such items or pictures, why would I prescribe for nonsense like that? I do not know how this was done, but it was definitely not done by me and I am very worried if any person who knows your cell number can enrol to things on your name. I am now asking Vodacom to put a block on my cell number for any such items and I will gladly sign a petition against nonsense like this. I will also like Vodacom to present this to their attorneys for investigation. Please wipe my name and number off your list as I do not want to be associated with such foolishness.”

The reason for escalation is the request of refund.

The Complainant wrote the following after the SP's official response:

“This is a lot of nonsense. I never subscribed to any of this. This is definitely not resolved.

My phone can not even receive the messages from you. I made a complaint to Vodacom and even wanted to change my cell number as these sms's which must have included the pin number you are talking about, were sent at any time of the night, sometime 3 sms's per night. These sms's were deleted as I can not read it.

I never subscribed to any of this and I want my money back.

I asked Vodacom to add this to their investigations as this is unethical and you are stealing peoples money.”

Service provider's response

The SP stated the following:

“This is a web based subscription that was initiated by the user on the day of subscribing to the fun club service. In no way was the advert misleading in any way to the public. This is in essence a subscription based service and the user was informed of this when accessing the webpage on the day the subscription has started. The pin which was sent to the user needed to be entered on the webpage in order for the subscription to be initiated.

Below is the entire process the user would have had to follow to start the Fun Club subscription at R10/day.

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, clause 3.1.1:

- 3.1.1. 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 of 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.”

The SP provides the screenshots of the entire process that the user needs to take part in before being subscribed.

“Based on the above mention we do not feel that we are in breach of any clauses of the code of conduct. We have no intention on misleading the public in any way and therefore give the customer all necessary details on the subscription, including a website where full terms and conditions are available (as seen in the terms and conditions outlined below). Full terms and conditions are available on both the website and website with the call center number is if he | she wishes to unsubscribe or find out more information.

The banner on the top of the advert as well as the terms and conditions are included on every page of the subscription as can be seen below. This insures that the customer is aware through the entire process on any information that they may require.

Upon subscription the customer is sent a welcome message stating that they are part of the FUN CLUB and how to unsubscribe, what the billing is as well as the call center number.

After the welcome message they are sent the web link to download content where it states in the terms and conditions and frequently asked questions on

the web site what the billing is and that it is a subscription service and how to unsubscribe.

This welcome message is as below:

“Welcome to the Fun Club! U get unlimited game, tones, vids & more!Start downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to =1194 to end)

Should you require any further information, please do not hesitate to contact us. In this regard we do not deem a refund possible, as all pages display that he or she was in fact interacting with a subscription based service.

Below you will find the date on which the subscription was started and stopped as per the user's request. The mobile traffic report shows that messages were delivered to the user as per the network (Vodacom), as these delivered statuses is that the networks send back to us as confirmation, in this instance Vodacom. Attached you will find messages sent to the user from the fun club service as well as sms's sent in to our services from the user.”

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 her knowledge and hence her 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 this specific matter the Complainant denied ever subscribing to the 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.