



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Clickatell
Information Provider (IP) (if any)	TxtNation
Service Type	Subscription
Source of Complaints	Mr F Hayward
Complaint Number	6553
Date received	27 May 2009
Code of Conduct version	7.0

Complaint

The complainant states that on 17 May 2009, while browsing on the Gumtree website, he responded to an advert which read: *"Looking for someone and it might be you"*.

The complainant responded to the advert and provided his mobile number. He received the following messages:

"Ghianne here... Thanks by the way cant wait to get to know you more... I hope youll reply all the messages that I will sent you...."

"Hi Fren, its Ghianne from GTREE, I want to chat to you and maybe date me! TXT YES TO CONNECT NOW! for help 0800982186, 2 endtxtstopR15msgR60sub".

The complainant states that he thought this was a date club and responded to the message, hoping to meet "Ghianne".

The complainant subsequently received a message notifying him that he had spent R300.00. The complainant tried contacting the customer care line provided but alleges that his calls were not answered and no voice mail service was offered.

After finding the SP's contact details on a SMS code web page, the complainant contacted the SP and was allegedly advised that the short code number belonged to MXIT. The complainant argued that the number, as stated in the message he received, was associated with a club called ZASMSCLUB.

The complainant was then advised that the SP were just the vendors and that nothing had been submitted yet from their side. The last message sent from there system was a message from MXIT pertaining to a lost PIN code.

On 22 May 2009, the complainant states that he found the club's web page online and realised that there were certain terms and conditions applicable to the service. The complainant then discovered that this was just a fantasy site, and that no actual relationship could be formed.

The complainant alleges that the original message he received advertising the service was false and misleading. He states that he was led to believe that this was a chat service, like MXIT, which the person preferred to use. The complainant states further that he thought this was for privacy reasons because MXIT required the disclosure of the user's cellphone number.

The complainant also alleges that the customer care number was not functional and that the service had no further way for the complainant to contact them.

SP's response

The SP responded to the complaint on 4 June 2009 and states that it was informed by its client that the complainant had visited the fantasy chat website at: www.zasmsclub.com, which outlines the cost and terms and conditions of accessing the service.

The SP states further that it had not seen the Gumtree advert and have been unable to find it.

The IP also provided feedback to the complaint and confirmed that the complainant had visited the fantasy chat website www.zasmsclub.com which clearly outlines the cost and terms and conditions of accessing the service. It alleges that the complainant entered his name and phone number in order to use the chat service, then checked the check box to confirm that he had read and understood the terms and conditions before clicking on the submit button.

The IP states further that the complainant then received a free confirmation message which outlined the cost of accessing the service and requiring him to reply with a keyword in order to access the service. The complainant successfully replied with the keyword and activated the service and commenced using the service for a period of approximately seven days. During this usage period, the complainant also received the required R300.00 spend notification.

In regard to the IP's free call customer help line, it states that the number is answered by a team of live operators which is available 24 hours a day, seven days a week. The IP is not aware of any faults in regard to this number either on or around the time the complainant opted into the service or in the time following. Upon receipt of this enquiry reporting the potential fault the number was tested to ensure it was fully operational. At no time does the user go to a voice mail box or an automated menu system, all customer calls are answered by a live operator.

The IP also states that despite lodging this complaint on 25 May 2009, the complainant continued to make use of the service by sending a further +-153 messages and only stopped using the service on 26 May 2009 at 21:17.

The IP provided message logs together with its response to the complaint.

The IP has offered the complainant a refund in good faith.

Complainant's further response

The complainant denies that he ever visited the site for the ZASMSCLUB. In particular, he denies that he ever entered his cellphone number on the site and/or that he ticked that he had read, understood and accepted the terms and conditions of the site.

The complainant confirmed that he received the original messages after responding to an advert on the "Girls seeking Guys" section of the Gumtree website.

The complainant also argued that he never alleged that the toll free number goes over to a voice mail service, but that his complaint was that there was no voice mail facility. He had tried the number on several occasions but his call was not answered.

The complainant acknowledges that he did reply to a message on 26 May 2009 that was sent to him as there was still some hope that the person messaging him was legitimately interested in chatting to him.

The complainant also alleges that a number of messages exchanged during the messaging sessions were misleading and sexually explicit.

The complainant has stated that he is willing to accept the offer of a refund.

Sections of the Code considered

2.10. A **"contact and dating"** service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.

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.

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.

4.1.4. Members must make the terms and conditions of any of their services available to customers and potential customers, on request.

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

Decision

The IP has stated that the complainant expressly opted in to the service by visiting the website: www.zasmsclub.com. The IP also states that its terms and conditions, including the pricing linked to this service, are located at this site. The IP has not provided any evidence to support its allegations in this regard.

The complainant denies that he opted in to use the service via the zasmsclub website. Instead, he alleges that he opted in to the service in response to a misleading advert which was found on the Gumtree website. The complainant has not provided a copy of the advert in question.

After responding to the advert, the complainant received the following opt-in message:

"Hi Fren, its Ghianne from GTREE, I want to chat to you and maybe date me! TXT YES TO CONNECT NOW! for help 0800982186, 2 endtxtstopR15msgR60sub".

The reference to GTREE in this message supports the complainant's version on how he was introduced to the service.

It is also noted from the wording of this message that the service appears to be a contact and dating service, as defined in the WASPA Code of Conduct, instead of being an adult chat service where the user either communicates with a human or automated operator but without any prospect of ever meeting another person.

Based on the foregoing, I am of the view that the IP has not conducted itself in a professional manner in its dealings with the complainant. I also do not believe that the IP has dealt with the complainant in an honest and fair manner when introducing him to its adult chat service.

Although I have not had sight of the advert which appeared in Gumtree, the opt-in message received by the complainant was deceptive and misleading as a result of the ambiguity in its wording.

I therefore find that the IP has contravened sections 3.1.1, 4.1.1 and 4.1.2 of the WASPA Code of Conduct.

The IP has also contravened section 8.1.1 by not clearly indicating in the opt-in message that the service is an adult service. The complainant has alleged, and which has not been disputed by the IP, that a number of the messages exchanged during his use of the service were of a sexual nature.

I am also concerned about the promotion of the IP's adult service in the singles section of the Gumtree website where people are looking to meet other people. The content of the IP's service in this case was contrary to the reasonable expectation of the complainant in responding to the advert.

I therefore find that the IP has contravened section 8.1.2 of the Code.

There is also no evidence that the IP has taken any reasonable steps to ensure that only persons of 18 years of age or older have access to its adult service. There is also no evidence that explicit confirmation of the complainant's age was obtained prior to service commencing.

I therefore find that the IP has also contravened section 8.1.3 of the Code.

I have noted that the complainant has admitted that he visited the IP's website on 22 May 2009 and viewed the terms and conditions relating to the service. It was at this point that the complainant states that he became aware of the fact that this was a fantasy service and that he would not be able to meet the person with whom he had been communicating.

It is also common cause between the parties that the complainant continued to use the service from this point onwards and incurred further charges in doing so.

Sanction

The misleading and deceptive manner in which the IP has promoted its adult service is viewed in a serious light. The issues are aggravated by the fact that the IP has not taken any reasonable steps to confirm that persons responding to the promotion are over the age of 18 years.

The following sanctions are given:

1. The SP is ordered to terminate the services offered by the IP at short code 39006;
2. The SP is ordered to refund the complainant all charges made to his account arising from his use of the IP's service;
3. The IP's membership of WASPA is suspended for a period of 4 (four) months.