



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe request
Complainants:	Dan Lategan
Complaint Number:	6575
Code Version:	6.2
Advertising Rules Version:	N/A

Complaint

Complainant indicated the he received a sms's requesting to calculate his brain age. The Complainant has contacted them before.

The SP was requested to unsubscribe, provide proof of subscription and/or refund. And provide proof indicating this sms's was sent to him and where his number was obtained.

The Complainant did not accept "no refund" offer and asked to explain reasons for it.

The reason for the escalation of the complaint is the following:

"The "status" indicated on your website is unacceptable. I have already "unsubscribed" but require a refund. The website states "no refund". Please give a clear written explanation why you state that no refund is to be given. The circumstances under which the "subscription" was supposed to have been made in response to the "brain age" invitation were misleading and clearly designed to trick Vodacom customers into responding. If I had known then, as I do now, I would definitely not have responded to the invitation and in any case did not utilize the so-called "subscription" at any time afterwards and have no intention to ever do so."

In the reply to the SP's response the Complainant wrote the following:

"Thank you for the communication. It is a pity the communication at the time of the so-called subscription is not as clear. Whatever may have transpired at the time I know that I would never have agreed to a R10/day subscription to whatever the "fun club" offered if the implications were made clear. I remained convinced that the brain age offer was a once-off game. No matter how they try to justify their

actions the "fine print" is clearly designed to be inconspicuous thus ensuring that as many people as possible are tricked into paying them for something that has no value of any kind. What is also very disappointing is that Vodacom who should be a trusted service provider condones and facilitates this kind of activity by taking the payments, probably with some compensation for themselves. It is quite clear that a refund will not happen, but I, and hopefully many others, will remain convinced that the "fun club" communication is deliberately misleading.

Please ensure that Vodacom is made aware of this response since they claim to have "nothing to do" with the fun club's communications."

Service provider's response

The SP in its response stated the following:

"The complaint was subscribed our Fun Club Web advertisement. Interaction with the service shows the user in the header that he or she is interacting with a Mobile Subscription based Service.

Sms sent to the user informs the user that he or she is interacting with a mobile subscription based service at R10/pday as can be seen in the Mobile Traffic Report below.

In this regard, we do not deem a refund possible as the user was informed of the service via Website and Sms interaction.

Below is the entire process broken down which the user had to have followed in order to have been subscribed to the service. A pin is generated, which has to be entered correctly before the subscription is initiated.

Please note that the service has been cancelled as of the 2009-03-31, 13:18:12.

Background to the Brain Age web based game:

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 8220; subscription service R10/day and the full terms and conditions. In the terms and 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

Below are screenshots of the entire process that the user would have take part in, before being subscribed.

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 ensures 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, =ids & more! Start Downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to 31194 to end)."

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 *****, 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;

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The SP is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 5921 refer:

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;

2. The SP shall send an sms notification to all existing subscribers of the service in the format prescribed in 11.4 of the current Code (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);

3. The SP shall ensure that welcome messages sent to the service's subscribers comply with the requirements of 11.1.10 of the current Code;

4. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites that the service is a subscription service and

further precisely what the subscription entails. These indications must be clearly visible and unambiguous.

5. The SP shall ensure that any reference to or implication of the availability of single items is removed from the service's site such that the site only makes reference to its subscription content in clear and unequivocal terms;

6. The SP shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;

7. The SP is fined:

7.1. R20 000 for its breach of 4.1.2 on the basis set out above; and

7.2. R30 000 for its non-compliance with 11.1.2 and 11.1.4 in that it bundled a single item with a subscription service and its failure to adequately differentiate between single items and subscription services.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.