



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Shirley Spagnolo
Complaint Number:	6700
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

The Complainant lodged the following complaint:

“Please note this is the 4th time I am unsubscribing to you. You have not responded. Plus Vodacom sent you a message to unsubscribe. These are the dates and times please acknowledge my email and sms the change, also ensure that my account is not charged. You have charged me for one and a half months, under false pretences. Not good business.

Phone number 31194 stop fun 9.03 9th May
31194 stop fun 09.08 9th May
36060 stop cm 05.51 6th May
31194 stop fun 05.29 14th May.”

The Complainant provided the following reason for escalation:

“I have also been told that they have taken me off their system, however I see that I have been charged again this month, surely this is unfair and wrong. Please arrange a credit for my account and keep me advised.”

The Complainant wrote:

“I just cannot go on paying them for nothing and I am sure you will agree, as I still do not know how I got onto their system, from all the radio new and people I have spoken with they trick you into their system.

I am not happy as they have charged my account again, please they must pass a credit.”

Two weeks after the SP's response the Complainant wrote:

"I have just received another bill from Vodacom for the amount of R142.52 plus VAT for Data Services Fun Club.

I would like to bring the following to your attention.

Fun Club are now asking me to pay once again for something I did not order from them, but have been tricked into, which I am told was from clicking through whilst checking someone's website.

I have requested this to be removed untold times, both communication from Vodacom and myself please see below. I received an SMS on the 19th May 2009 stating we have cancelled your subscription from the fun club 021 4178001.

Their bills have been as follows:

31st March 2009 =81.77

30th April 2009 =319.93

31 May 2009 R300.73

30th June 2009 =162.47

TOTAL AMOUNT OF 964.90

Please will you arrange for a credit from Fun Club for the above and advise me accordingly.

Thanking you for your help. I am sure you agree that one wants business, however it must be good sound business not trickery."

The Complainant required from the SP to prove when and where he joined the service and wrote the following:

"Thank you for your message. However this means absolutely nothing to me. Yes, I know I got messages on my phone, unfortunately I did not think to read them as I thought someone was advertising, also I need to take out my glasses to read the phone. When and where did I consent and join them on the website and whose website? The way I see it, they trick one into playing their games and someone needs to take them on."

Service provider's response

The SP wrote:

"Please would you be so kind as to have a look at the mobile traffic reports below for the months of February 2009 to May 2009.

Please note that no stop command was sent in by the complainant to 31194. The only communication that has occurred was the initial subscription sms's sent to the user when the user subscribed to the Fun Club service.

Messages have been sent out monthly to inform the user of his or her subscription. These messages do consist of the stop command, as well as the iTouch / Bungiorno call centre contact number.

We would be more than happy to look at other forms of proof of the complainant to substantiate his or her claims that they had tried to unsubscribe from the Fun Club Service on various occasions as so stated.

Please be advised that the user of this mobile number is as of the 19 May 2009 no longer subscribed to any of our services.

Should you require any further information, please do not hesitate to contact us in this regard.”

Sections of the Code considered

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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

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.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

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.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

11.1.10. Once a customer has subscribed to a subscription service, neither the amount nor frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

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.

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. Logs were also provided to indicate the sending of subsequent reminder messages. No other information was provided by the SP.

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 real evidence on behalf of the Complainant, the facts would under normal circumstances amount to mere speculation.

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 period 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, complainants uttering their frustrations with either the "IQ test", or "Brain-age" or "FUN Club" 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 and whether there might be a case of bundling and an instance of the SP misleading its customers?

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 decisions provided in Adjudication 5921, 6039, 6112 and several others, 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 7.0 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:

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.