



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Integrat, Funmobile, iTouch
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	CJ Fick
Complaint Number:	6920
Code Version:	7.0
Advertising Rules Version:	N/A

Complaint

The Complainant lodged the following complaint:

“Received my Vodacom statement on the 26th May 2009 where I was very surprised about the amount I have to pay. I contacted Vodacom and was told that I Touch billed me with R10 a day. I told them that I do not know these people and for what they were billing me for. I contacted I Touch and they told me I applied for games to be downloaded on my cell phone and my computer. As mentioned I do not know what they are talking about. I never applied for this at all. I immediately contacted them and requested to cancel this subscription and to reverse the amount they deducted every day for things I do not know about or ever used. They cancelled it immediately but refuse to reverse the amount that they say I am liable for. Please it would be appreciated if this could be solved with immediate effect. I told them I am not going to pay this so that they know how I feel about the situation.”

The Complainant was not satisfied with the SP’s response and provided the following reason for escalation:

“Thanks for coming back to me. I would like to know why there is only a partial refund will be made. I want the full amount to be refunded because I never applied for this. I agree with the payment made on 29-05-2009. Where is the payment for June that went through? The payment that went through was promised to be paid into my Vodacom account. Nothing as yet has been done about this.”

The Complainant requested full refund.
The Complainant wrote:

“With reference to your e-mail I would like to bring the following to your attention. As mentioned in my e-mail of the 29th June 2009 a manager at Vodacom spoke to your Charles which confirmed that a payment went through on my Vodacom account for May 2009, after everything with you has been cancelled. I have spoken to you on previous occasions and you also confirmed that everything will be sorted out.

Please can you just arrange that the amount that I was billed for on my Vodacom account be refunded to me? This whole situation has caused me a great lot of problems with Vodacom. It will really be appreciated if we could finalise this still today.”

The Complainant added:

“Thanks for the response. It would be appreciated if you can solve this problem as soon as possible. At the moment I am sitting without a cell phone which I use for business. I have no joy with Vodacom to sort out my problem.”

The Complainant replied to the SP:

“Referring to your e-mail of 06 July 2009, I would like to bring the following to your attention:

These attachments you e-mailed through to me is unknown to me. This is the first time I have ever seen something like this in my life. I really do not know where you got this information from. I never asked for this. I never received any bills regarding any downloads according to you. How can u charge someone who does not use any of these things you mentioned in your e-mail?

This is totally unfair towards me. As mentioned before I never applied for this, and never will, because what would I do with these things at my age. What I cannot understand is, if I applied for this, why was I never notified that I applied but do not use the facility? I would like an answer to this. Another question is, why was I not told that my Vodacom account will be debited, once again if I applied for this facility? I never saw any advertisement on the 27th March 2009 @ 11:33:32 to apply for this. I would like to know where the advert was on, TV etc. Up to now I never received any pin 7761 as mentioned in your e-mail. I never initiated anything to subscribe. I never received any messages during the life span of the Fun club Subscription.

Thanks that you are prepared to pay back the April 2009 deductions. But the question is what about the June 2009 debit which was confirmed by WASPA that they will refund it.

Up to now my problem with Vodacom is not sorted out because of this problem with WASPA. Please can we sort this out once and for all.”

Finally the Complainant stated the following:

“Thanks for the feedback. I still stand to my point mentioned before that the payment they made was for April 2009. They still must rectify the mistake they made by billing me for May and June 2009. This was confirmed by them when I visited your offices. This was confirmed by a Charles at WASPA in the presence of one of your employees. Really this gets totally out of hand.

Please can this be sorted out once and for all? I am not blaming you because you were not involved from the beginning. They send me e-mails where they confirm that they paid this money into my account. Every time this was a lie. Nothing was paid into my account. I well received a payment on the 29th May 2009, this was for April 2009. It seems they do not know what is going on. You can also tell them, because I told them this already, they will be hearing from my attorney. I begged them to sort out this problem but looks like they do not want to do it. Please be so kind as to let me have an answer as soon as possible so that we do not have to go the root I have in plan."

Service provider's response

The SP stated the following:

"Please be advised that the user of mobile number ***** was subscribed to the Buongiorno Fun Club via Web advertisement.

The media Key fca_tek521_3762 is merely one of our companies internal references to tracking both website and wapsite advertisements. This is our way of verifying the user's subscription via a particular advertisement. This can be verified in the detail options window below.

The user was subscribed via the Fun club Advertisement on the 27 March 2007, 11:33:32. The pin number 7761 was sent to the user via sms and he or she did in fact enter the pin 7761 on the webpage advert on the day he or she interacted with our Fun Club Service.

The subscription was initiated by the users own initiative. From the Mobile traffic reports you will find messages sent to the user during the life span of the fun Club Subscription.

As previously mentioned in the unsubscribe #17439, we are prepared to give the complainant a partial refund.

This would be due to the April 2009 monthly reminder message not being delivered to the mobile number +27765353128 as can be seen in the mobile traffic report for April 2009.

The Not Delivered response in the April report window is that the mobile carrier sends back informing us of the success or failure of the message.

In this regard we do not deem the users complainant justified of a full refund as the user did interact with the Fun Club Service 10/pday and did activate the service when he or she entered the pin number that was sent to him or her on the day the subscription was started.

The pin number 7761 was generated and linked to the mobile number +27765353128 on the day the subscription was started and only if the user had entered the pin 7761, as is the case correctly would the subscription be started.

However we do apologize for the inconvenience caused by the April 2009 reminder Message not being sent to the user informing him or her of the mobile subscription.

In light of this we would be more than happy to refund the user all monies billed on and after the 27th April 2009, as the monthly message was not delivered in that month due to network problems.

We have included the entire breakdown of the Fun Club website advertisement further below for the users perusal and yours, which is an indication to the type of service he or she was interacting with, as the wages as well as the T&C are shown in the advertisement and price associated to the mobile content service.

Please be advised that as of 2009-05-27 08:27:41 +0200 the user sent in the keyword "Stop Fun" ending the fun club service and is currently not subscribed to any of the mobile content service of Buongiorno ZA.

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 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 wap link to download content where it states in the terms and conditions and frequently asked questions on the wap 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 31191 to end)."

The SP added the following:

"In addition to our response we would like to add that we did in fact pay over the amount of R290 to Mr. Flick. These monies were deposited into the account provided by the complainant.

Please find proof of payment attached. We are not able to deal with mobile carriers to insert billed monies to the users account as we are not the account holders of the mobile contract.

We trust that this matter is settled to your satisfaction and do apologize for the inconvenience caused to Mr. Flick.”

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", "Brain-age" or other fun club services, 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 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.

It is also ordered that the SP provides the Complainant with a formal excuse in writing.

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.
