



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Rowley Medlin
Complaint Number:	7129
Code Version:	6.2
Advertising Rules Version:	N/A

Complaint

This complaint is the escalation of unsubscribe request.

The Complainant wrote the following:

"I discovered some time ago, that Vodacom was deducting a sum of money that I knew nothing about from my account. I contacted you and your representative informed me that you, (Vodacom,) could do nothing about this as you (Vodacom,) had been instructed by a firm Buongiorno or i Touch had instructed you, (Vodacom,) to deduct the amount monthly. This was cancelled but it looks like it is starting up again. Your representative gave me two Cape Town numbers of this "i Touch" company. After numerous attempts to get hold of them, I eventually was contacted by a Mr. Frank Neethling. He told me that I had subscribed to their "Fun Club" on Dec 28th 2008. This I refuted explaining that I am a pensioner and that I have no interests in "Fun Clubs" I also explained that no one has access to my cell phone as it is on me at all times. There are no children in the house. He then asked me to send him my banking details as they would reimburse the deducted amounts. This I did repeatedly to the e-mail address as well as different combinations of the address.

I have also tried to make telephonic contact again but the numbers they use e.g.: 012 4178000 /0 or 0820048351 to make contact with their Fun Club number but I am pushed from one "press 1 for.. or press 2 for.." I cannot make contact. Even up to yesterday, I could not get hold of a "person" to speak to and their e-mail are returned "Time Out" or "Full" or "no such number exists." Firstly I think it is very bad business practice that Vodacom can act on "instructions" from a firm to simply start deducting amounts of money from

long standing customers without first verifying that the deductions are valid and are known to the Vodacom customer. Secondly that I got the impression, "it is not our, (Vodacom's) responsibility to help a loyal customer."

In my telecom with Mr. Frank Neethling he said that he would send me a print out as proof of my "joining this 'Fun Club'" The "proof arrived" and nowhere until here at the end (when I on instructions from i touch, cancelled my "subscription" is any communication made from my cell number but as from Dec 2008 there are numerous calls registered as made to my number that I did not receive. These calls were to welcome me to the "Fun Club" and monthly updates to what I could "receive." The name of the "subscriber," (me) was also totally wrong the name Mr. RS NEDLIM. Please help me to rectify this matter and to recover the monies deducted from my account. I am holding a full report to the Broadcasting Complaints Commission and my lawyers until I hear what the outcome of this issue is. Please keep me informed as to what Vodacom's response is to this practice and is you can help to make contact with this i touch Fun Club."

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

"Thank you Mr Donovan Mathews for the "proof" that you sent me. Unfortunately, I can find no proof in the two documents you sent me that I contacted you by mobile phone or via internet on December 28th 2008 subscribing or joining your "Fun Club" Contrary to that, I have, as I said in the letter to Mr Frank Neerhling of your firm, never made contact by phone (as he said,) requesting to subscribe or join your Fin Club. My billing from Vodacom for December 28th 2008 reflects no calls made from my phone to any one of your listed numbers or any "strange" numbers for that date. I therefore again refute that I subscribed using my cell phone.

You, Mr Mathews now say I subscribed via internet. I have since receiving your letter of "proof" and in which you change the story to subscribe via internet, had my computer serviced and the service provider confirms that I did not use Internet facilities on Dec 28th 2008 I have checked my "send box" for December 28th 2008 and I did not send any e-mail out on that day as I was not connected to the internet. I thus refute your claim that "my joining your club" was via internet or e-mail.

In the two documents of "proof" that you provided. The one in Excel gives a cell phone number (mine,) and list the billing from December 28th 2004 until May 3rd 2009 (a total of 128 days,) where you charged me R10:00 per day. This is not 'Proof' that I subscribed. With respect anyone, at any time can draw up a table like the one you sent me saying "here is the proof."

In the second document, no mention is made of the "call I made from my cell phone," (Mr Neethling's statement,) that I subscribed. only that your firm contacted me on numerous occasions especially over the period December 28/29 saying I have joined the "club" or the monthly notification that I am still a member. As in my letter to Mr Neethling, I refute this in too. I would have

immediately cancelled the subscription in that case. The only reference of my number, 082 415 7117 being recorded on your "proof" is when I tried repeatedly to cancel this "subscription."

The fact that your firm had the wrong name e.g. RS Nethlim with my cell phone number, also lends to either you have been billing the wrong person or there is something else going on that I think should be looked at by Vodacom. Your offer of repaying R280 for the period December 28th until 3rd March does not correspond with your "proof of subscription" where you claim that I was billed for 128 days R10:00.

As my original complaint was with Vodacom (reference above) who referred it to WASP, (Reference above,) I still want to have an answer as to how can any firm instruct you to add deductions to my account with out my knowledge and consent.

I make no accusations but is this not part of the fraud that is going around at the moment? I trust that I will finally get a positive response in writing (I have asked that all correspondence be conducted in e-mail form and not per cell phone,) so that record is available as to who has said what and when in case this mater has to go further. For Vodacom and WASP, I have all the documentary proof of the above and if necessary, i can provide it to you."

After the SP had replied to the formal complaint the Complainant wrote the following:

"I still dispute that I subscribed to this "Fun Club" Examination of their "proof" does not show anywhere were I (using my cellular phone,) as "stated by them and later changed to e-mailed them requesting subscription" My number reflects as being phoned or Smsed from them to me but NOTHING from me to them. First they claimed I had phoned and when I pointed out that my Cell phone account for December did not reflect any call to their numbers, than they changed their tune to say I e mailed them.

1. No I am not satisfied with their explanation and "proof" of joining.
2. Up to now, despite promises, (on two occasions) to refund my money, nothing has been repaid into me account July 28 @13:00."

Service provider's response

The SP provided the following response:

"Our investigation shows that the user had subscribed via the fun club website advertisement as can be seen in the Reporting information window. The user was not subscribed when he or she initially interacted with the Fun Club website advertisement. The website advertisement informs the user of the subscription service as well as the billing amount that would occur once subscribed to the Fun Club.

When the user initially went through the steps in order to be subscribed to the Fun Club he or she was sent a 4 digit pin number 3870, which he or she would have needed to have entered correctly in order to be welcomed into the Fun Club Service i.e.:

[Welcome to the Fun club! U get UNLIMITED games, tones, vids ; more! Start downloading now! Help:0214178001 R10/day service. Sms stop fun to 31194 to end]

The pages accessed by the user via web informs the user of the Fun Club subscription mobile content service and also displays the Terms and Conditions of the Fun Club.

The pin number 3870 sent to the users mobile device would have needed to be entered on the website advertised pages as shown below in order to be subscribed to the fun club service. This pin number is sent to the user mere seconds after the user enters his or her mobile number online on the web page. The messages that follow are the welcome messages to the fun club.

We have agreed to a partial refund due to the user's monthly fun club reminder message not being delivered to the user on 8th February 2008. This might have been due to the user's mobile cell phone not being available or system errors on our part. Hence we are more than happy to refund the user for any billing that has occurred during February 2009.

Further below is the entire process the user would have needed to follow in order to have been subscribed to the Fun Club. The pages accessed below are all informative of the subscription started by the user and what billing would take place once the subscription was initiated. It has been recorded that the user repeatedly sent in incorrect stop commands but eventually did manage to end the service all on the same day, as when the incorrect stop commands was sent in to the short code 31194. These were recorded on the 4th May 2009.

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 21194 to end)

Should you require any further information, please do not hesitate to contact us. In this regard we do not deem a full refund possible, as all pages display that he or she was in fact interacting with a subscription based service. We are more than happy to reimburse the user a partial refund due to the reminder message for February 2009 not being delivered."

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.
