

REPORT OF THE APPEALS PANEL

Date: 1 September 2011
Appellant: Zed Mobile
Complaint Number: 8940
Complainant: C Schickerling
Applicable versions: 8.0

INTRODUCTION

This is an appeal against the finding against and sanction imposed on the Appellant by the Adjudicator in Complaint 8940.

BACKGROUND TO THE APPEAL

The complaint

On 3 February 2010 the Complainant lodged an unsubscribe request with WASPA stating the following-

"I have received billing on my 3G card on a monthly basis via MTN the service provider. They advised that I have subscribed to a service charged at approx R5 per day and is billed under the heading 'Content Charges'. This is a 3G card that is ONLY used to provide connectivity when away from office. I am advised that I connected to their network using THIS number and subscribed to this service. I therefore would like to get an understanding as to how this is done and in fact whether it is LEGAL to charge for a service that has not been formally been subscribed to?? This is not the first of such incidents and I would like to get clarity before I take further action"

The Appellant was notified of the request and on 4 February 2010 he was unsubscribed. On 24 February 2010 the Appellant telephoned the customer and offered to pay him a full refund. The Appellant provided his banking details and, in an email of that same day, insisted that in addition to being refunded he required interest to be paid on the amounts paid.

On 3 March 2010, the Complainant confirmed that he had been offered a refund but wished WASPA to escalate the matter to a formal complaint. He wrote-

"Thank you for attending to this issue. I had contact with both the parties listed below and refunds were promised. This however does not satisfy my query. I requested a detailed explanation as to how their business model works and how they have such power to raise billings to clients like myself without ANY authority from my side. The sim card involved has never been used in a phone and has been used in a 3G card only. I have never logged onto any of their websites and have never subscribed to any of their services. As I understand it, the service I 'subscribed' to was one where I would be billed for approximately R5 PER DAY to download ringtones; games; etc. Now how STUPID would anybody be to subscribe to such a service when 1000's of these things are available for free anyway?? I urge you to look into this kind of business practise as I suspect 1000's of people are caught this way using underhanded and illegal tactics. I assure you I see this in a VERY serious light and will not rest until I get to the bottom of this. I need your support as the 'watch-dog' to assist"

On 4 March 2010, the Appellant was notified of the escalation and requested to respond within 5 working days i.e. by 11 March 2010.

Appellant's response to the formal complaint

On 4 March 2010, the Appellant wrote to WASPA, in response to the escalation notice, requesting the Complainant's bank details and undertaking to refund the Complainant in full. The Appellant gave no explanation whatsoever as to how the Appellant became subscribed to its service.

The Appellant's response was conveyed to the Complainant who, unsurprisingly, was not satisfied with the offer of the refund in the absence of an explanation as to how he became subscribed to the service. On 5 March 2010 he wrote to WASPA stressing that he still wanted an explanation and insisting that he be paid interest on the amounts deducted from his account.

On 26 March 2010, more than 10 working days out of time, the Appellant sent an email to WASPA showing that the Complainant had been refunded and stating –

"The complainant contacted Mira Networks on the 1st of Feb 2010 to inform them that his MTN 3g Card was subscribed to Club Zed.

The attached Mobile logs reflect the subscription history with Zed Mobile.

The subscription was initiated on the: 12 /04/2009 from the Nokia Mobi wap site from a Nokia 1680 mobile phone. The mobile logs also reflect that all the respective welcome messages as well as the monthly reminder messages have been sent since the 12/4/2009 to the complainant'

The logs attached to the email confirm what is stated in the covering email. As with the Appellant's earlier response, no explanation is given as to how the Complainant became subscribed. The Appellant also offers no explanation as to why its records show that the subscription was initiated on a Nokia 1680 mobile phone contrary to the Appellant's statement that the SIM had never been placed in a mobile phone.

The Adjudication

The Adjudicator's report was published on 20 April 2010.

The Adjudicator considered the following sections of the Code-

Section 11.1.1

Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

Section 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 and may not be an entry into a competition or quiz.

Section 11.1.5

Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

Section 11.1.8

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.

Section 11.1.11

If a subscription service can be initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.

Section 11.2.1

A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

Section 11.2.2

The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

or

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Section 11.5.9

If a consumer lodges a request with WASPA to be unsubscribed from a subscription service, the WASPA member concerned must honour that request within two working days (48 hours) of that request being passed on by WASPA.

Section 11.6.2

When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;

(b) proof that all required reminder messages have been sent to that customer;

(c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and

(d) any record of successful or unsuccessful unsubscribe requests.

The Adjudicator found, upon inspecting the logs, that contrary to section 11.1.11 of the Code, there was no proof that a separate confirmation had been received from the Complainant's handset before any billing took place.

The Adjudicator found that the log provided by the Appellant did not show what content items were downloaded by the complainant for each charge shown. He found this to be a contravention of section 11.6.2.

The Adjudicator ordered the Appellant to refund the complainant and fined it R100,000.00

GROUND FOR APPEAL

The Appellant filed an appeal that dealt with each of the sections of the Code considered by the Adjudicator. It appeals against the findings and the sanction imposed.

Appeal against the Findings

The Appellant denies all wrongdoing and alleges that the Complainant was "incorrectly subscribed" to its service as a result of an error on the MTN network. In this regard and in commenting on the unsubscribe request it states –

"On the 24th of February when we contacted the complainant we informed him that the mobile number belonging to his MTN 3G card could have been subscribed in error due to the various network related issues that were taking place at the time on the MTN network. MTN network's incorrect MSISDN forwarding being the primary reason for his MTN 3G card being incorrectly subscribed."

The appellant also makes submissions on all the sections of the Code considered by the Adjudicator. With regard to –

section 11.1.1 of the Code, the Appellant states that its services are prominently identified as subscription services;

section 11.1.2 of the Code, the Appellant refers to the log where it is reflected (erroneously on its version) that the Complainant clicked on the advertising banner on a Nokia Mobil WAP portal on 12 April and that his request was confirmed when he made a second request to join Club Zed by clicking on the "click here to confirm" button on the landing page;

section 11.1.5 of the Code, the Appellant again states that it requires its customers to confirm twice that they wish to subscribe to Club Zed. The member also refers to the decision in Complaint 8468 in which the adjudicator found that its subscription process was compliant – this is not however relevant to the complaint at hand as the Complainant did not follow the subscription process to become subscribed;

section 11.1.8 of the Code, the Appellant states that a welcome message is sent to a user when he/she subscribes;

section 11.1.11 of the Code, the Appellant argues that this section is not relevant because the service is not initiated by entering a mobile number on a web page or a WAP site and therefore no separate confirmation is required from the customer's mobile handset;

sections 11.2.1 and 11.2.2 of the Code, the Appellant states that reminder messages were indeed sent as required and in the prescribed format;

section 11.5.9 of the Code, the Appellant states that the unsubscribe request was honoured timeously;

section 11.6.2 (a) of the Code, the Appellant states that the records do “clearly” show proof that the Complainant subscribed to the service using an MTN 3G SIM card but concedes –

“However as we have stated above, due [to] the MTN Networks widely publicised MSISDN forwarding errors that took place in 2009, this user was subscribed incorrectly as a result of this error on the 12th of April 2009”

[our emphasis added]

section 11.6.2(b) of the Code, the Appellant states that the log shows that reminder messages were sent to the customer;

section 11.6.2 (c) of the Code, the Appellant states that the logs show a completed subscription history and points out that the service is a subscription service and as such does not charge a fee to consumers per download; and

section 11.6.2(d) of the Code, the Appellant states that the logs are compliant.

Appeal against the Sanction

The Appellant is of the view that as it has not breached any provisions of the Code it ought not to be sanctioned.

FINDINGS OF APPEALS PANEL

Regarding the finding that the Appellant breached section 11.1.11

We agree with the contentions of the Appellant that, on the strict wording of section 11.1.11 it was not required to obtain a separate confirmation message from the customer’s mobile handset as the service was not initiated by entering a mobile number on a web page or a WAP site. Given our acceptance of the version advanced by the Complainant that he did not have any interaction with the site at all we are of the view that this section is in any event not relevant to the complaint.

The appeal in regard to the finding that the Appellant breached section 11.1.11 is upheld.

Regarding the finding that the Appellant breached section 11.6.2

Our understanding of section 11.6.2 is that the WASPA Member is required to provide the logs specified when requested by WASPA. The section is somewhat ambiguous as it does not impose a direct obligation to maintain accurate logs. We also note that, when notified of a formal complaint, a WASPA member is specifically advised that it is not obliged to respond to the complaint.

The Appellant provided the logs as part of its second response to the Complaint but it did not do so pursuant to a request from WASPA. The logs provided substantially comply with WASPA’s requirements.

Although it is arguable that the incorrect information furnished does not constitute “proof” of the Complainant’s subscription to the service, it is our view that section 11.6.2 is not applicable in this instance as the information was not provided pursuant to a request from WASPA.

The appeal in regard to the finding that the Appellant breached section 11.6.2 is upheld.

Regarding the “erroneous” subscription of the Complainant due to MTN’s “network error”

We note that the Appellant admits that the Complainant was subscribed without his consent and that the Appellant lays the blame for this error at the door of MTN. We also note that although the Appellant claims that the errors on MTN's network were "well publicized" it does not substantiate this.

The Panel consulted WASPA's technical committee who stated that they had no knowledge of the alleged network errors. The WASPA Secretariat knows of no other instances where consumers have been subscribed as a result of a widespread network error.

The Panel itself conducted an extensive internet searches but found not one article supporting the claim. Finally, the Panel requested that the allegation be put to MTN - MTN emphatically denied that there had been any errors on its network as alleged by the Appellant.

It is also noteworthy that, prior to receiving notification of the Adjudicator's finding, the Appellant made no mention of the network errors and, in fact, chose not to deal with any of the allegations despite the Complainant's insistence that he be given an explanation. Also, although the Appellant states that it informed the Complainant of the network errors on 24 February 2010, this is not borne out by his subsequent email when he requested that the matter be escalated. It is also contradicted by the Appellant's statement on page 6 of its appeal document that the complainant's subscription was confirmed when he made his second request to joint Club Zed by clicking on the "click here to confirm" button on the landing page

We find that there is no truth in the Appellant's contention that the Complainant became subscribed as a result of a MTN network error.

Consequently, we find that the Appellant in fact breached section 11.1.5 of the Code in that it effectively automatically subscribed a customer to a subscription service without the customer specifically opting in to that service.

SANCTION

Mitigating and aggravating factors

It is clear to the Panel that the Appellant's statement that the Complainant became subscribed as a result of a MTN network error is without factual basis. The Panel regards this attempt to mislead WASPA and falsely apportion blame as an aggravating factor.

The fact that the Complainant has been refunded the funds taken from his account as a result of being subscribed without his consent is a mitigating factor.

The Appellant has been found to have breached the Code five times (excluding this instance) since 2007. Although it has contravened other subsections of section 11 of the Code it has not previously been found to have contravened 11.1.5. The Appellant does not appear to be a serial transgressor of the Code and the fact that this is a first breach of 11.1.5 is a mitigating factor.

The Panel regards a breach of 11.1.5 as a serious matter and notes that such conduct brings the industry into disrepute. The fact that the Complainant initially suffered financial loss and was not given the courtesy of an explanation is regarded as an aggravating factor.

The Panel however finds that the adjudicator's order of a fine of R100,000 is excessive in the circumstances.

Order

We order that the Appellant, within 5 working days hereof, pay a fine of R25,000.

As the appeal has been partially successful we order that half of the appeal fee be refunded to the Appellant.

