

WASPA appeals panel
Complaint 10533

REPORT OF THE APPEALS PANEL

Date: 13 December 2011

Service Provider: Buongiorno SA

Appellant and Information Provider (IP): n/a

Complaint Number: 10533

Applicable versions: 9

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a unsubscribe request which was escalated on 14 September 2010, by an individual against Buongiorno.

1.2 The complaint relate to subscription services, which the complainant denies subscribing to. The adjudicator's decision revolves, to a great extent, around the accuracy of various records.

1.3 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The appeal relates to alleged breaches of the following section:

11.5.2 The reminder message specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are 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 [shortcode].
or

You are 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 [shortcode].

2.2 FINDINGS AND DECISIONS OF THE ADJUDICATOR

2.3 Finding of the Adjudicator

The Adjudicator stated: “I note that the contents of the logs produced by the SP are disputed by the complainant - specifically the details pertaining to the entry of the message codes and the details of the subscription process. Purely with reference to the content of the logs produced by the SP, it emerges that:

- (i) has met its obligations in respect of the provisions pertaining to subscription services and processes in respect of the Fun Club service with the exception of the irregularity of the billing amount specified in the welcome message;
- (ii) has not met its obligations in respect of the provisions pertaining to subscription processes in respect of the Sexy Cherry Lesbian service as the logs make no reference to, *for instance*, the welcome message that is meant to follow subscription by the complainant to service;
- (iii) that the SP has not met its obligation to provide a reminder message to the complainant each month in that the SP did not send the complainant a reminder message in June;
- (iv) should the complainant have subscribed to the Sexy Cherry Lesbian service, that only one reminder message was sent in this respect of this service;
- (v) that the reminder messages sent in respect of the Fun Club service following the introduction of Version 9.0 of the Code on the 30th of March 2010 do not comply with the requirements of the Code of Conduct;

The cell-phone billing records of the complainant provide further insights. I find:

- (i) that the fees levied by the SP on the complainant are irregular, inconsistent and curiously, do not correlate with the logs produced by the SP regarding the fees that should have been levied per month for the services to which the complainant was meant to subscribed.

Hence, whilst the SP's response on the 17th of September intends to depict an accurate and thorough system in use by the SP to ensure proper procedures in compliance with the Code of Conduct, the billing records produced by the complainant are less convincing of the accuracy of the SP's internal processes. Read with the failure to follow proper subscription processes in respect of the Sexy Cherry Lesbian service, I find the SP's practices fall short of the requirements of the Code of Conduct to an unacceptable extent. Further, on the basis of the conflicting information presented by the parties and the inference drawn that the complainant has in fact no interest in the service, I question the integrity of the SP's records. I find that the complainant did not legitimately subscribe to any of the services."

2.4 Sanctions

The following sanctions were given:

“Having reviewed numerous other complaints against the SP and the issue of the questionable content of the records and logs produced by the SP, the SP is:

- (i) *Ordered to refund the complainant in full in respect of the Fun Club service and the Sexy Cherry Lesbian service send proof of the refund to the WASPA Secretariat within 7 (seven) days of receiving notice of this Report;*
- (ii) *Fined an amount of R 30 000.00 payable to the WASPA Secretariat within ten (10) days of receipt of this report;*
- (iii) *Ordered to ensure that all future reminder messages sent to the SP’s customers are compliant with the requirements of the current Code of Conduct;*

Further, the WASPA Secretariat is to instruct the WASPA Monitor to investigate and report to the Secretariat regarding the accuracy of the logs produced by the SP in this complaint. In this regard, the SP shall:

- (i) *Provide the WASPA Monitor with access to all logs and information necessary for the WASPA Monitor to determine to the Monitor’s satisfaction the accuracy or inaccuracy of the logs produced by the SP in this complaint.”*

3. **GROUND OF APPEAL**

3.1 Grounds of appeal for complaint 10533

3.1.1 Attorneys DLA Cliffe, Dekker, Hofmeyr, on behalf of the Appellant submitted detailed grounds of complaint which will not be recanvassed in full here.

3.1.2 It summarised its appeal as resting on 3 legs:

- A procedural irregularity
- An incorrect finding on the merits
- That the sanction was “grossly unreasonable”

4. FINDINGS OF APPEAL PANEL

4.1 Version of the Code

4.1.1 Version 9.0 of the Code, in use from 31 March 2010 to 13 October 2010, applies.

4.2 Finding

4.2.1 The Appellant indicated that it believed there was a procedural irregularity, in that it was never given an opportunity to see the Complainant's telephone records and comment on them.

4.2.2 This Panel has now afforded the Appellant this chance. The Appellant took issue with the fact that the records were in an excel format created by the Complainant and were therefore not verifiable.

4.2.3 This Panel considers that this matter is in danger of degenerating into an exchange of documentation backwards and forwards in perpetuity. It is therefore our desire to bring this matter to finality on the facts before us.

4.2.4 The facts before us are as follows:

- 4.2.4.1 The Complainant denies subscribing to this service;
 - 4.2.4.2 The Appellant's logs show that the Complainant did subscribe to the service through a double opt-in mechanism;
 - 4.2.4.3 Reminder messages were sent to the Complainant in every month from the alleged subscription on 10 September 2009, until August 2010, except for June 2010 when a system error occurred;
 - 4.2.4.4 The Complainant was sent a reminder message for another service – Sexy Cherry Lesbian – in error, in March;
 - 4.2.4.5 The Complainant does not appear to ever have been billed or subscribed to the Sexy Cherry service;
 - 4.2.4.6 The Complainant, on his own version, had varying charges in respect of the service on his phone bill.
- 4.2.5 It is our opinion that the Adjudicator attached too much weight to the errors that occurred and the Complainant's telephone records.
- 4.2.6 In regard to the errors, while non-compliant in themselves, they are not indicative that ALL the Appellant's procedures and logs are incorrect.
- 4.2.7 While not condoning the errors, this Panel is of the opinion that it is a reality of the service type and size that occasional errors may occur.
- 4.2.8 This Panel also questions why, when on the Complainant's own version of events he received strange usage bills, he failed to query the situation for almost a year.
- 4.2.9 He also received a number of reminder messages in that time which he failed to act on. He has confirmed that he did receive these messages in his email dated 5 October 2010. He claims that the wordings were not according to the guidelines and therefore did not look like legitimate notifications to him.
- 4.2.10 Clause 11.5.2 requires the following wording for a reminder message:

11.5.22 The reminder message specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are 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 [shortcode].

or

You are 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 [shortcode].

4.2.11 The wording in the reminder message is:

U r subscribed to Fun Club. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 31194.

U r subscribed to Sexy Cherry Lesbian. Cost R6/ day subscription service. For help call 0214178001. To unsubscribe sms STOP L to 31191. HOT new items EVERY DAY.

4.2.12 **We find that the reminder messages do materially comply with the requirements of Clause 11.5.2. In this respect we disagree with the Adjudicator.**

4.2.13 We most certainly do not agree with the Complainant that these messages are so obscure that he should have ignored them. Presuming that the Complainant indeed did not subscribe, or subscribed in error, his failure to take any action on receipt of his phone bill and reminder messages means that the fault for his continued subscription lies at least partly with him.

4.2.14 The Panel's initial thought was to refund the Complainant for the first few months of subscription, allowing that he may have ignored one, or possibly two, reminder messages in good faith. However, it appears that through an

error, he was not in fact charged for the first 3 months of subscription. This accounts for why the charges seem to suddenly “go up” in February 2010.

4.2.15 The Complainant’s version of his cell phone bill shows “content charges” in the months that he was not billed by the Appellant. We are forced to reasonably conclude that while the Complainant may not have intended to subscribe to this service, he does subscribe to other services, or download single item content. While not pivotal to our finding, it provides some explanation as to how he may have subscribed by mistake.

4.2.16 **We therefore find that the Adjudicator erred in finding that the Appellant had not complied with the subscription processes and messages.**

4.2.17 **We overturn the finding of the Adjudicator in its entirety, including the sanction.**

4.2.18 We do, however, caution the Appellant that small errors such as those made can create an impression of a sloppy and unethical provider. The Appellant is urged to ensure that stronger system checks are in place.

4.2.19 The cost of appeal is not refundable.