

**WASPA appeals panel
Complaint 7842**

REPORT OF THE APPEALS PANEL

Date: 22 April 2011

Appellant and Service Provider (SP): Rate n Date

Complaint Number: 7842

Applicable versions: 8.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 15 October 2009, by an individual against Rate n Date.

1.2 The SP is a South African company and an affiliate member of WASPA.

1.3 The complaint relate to subscription services.

1.4 The complaints, the findings of the Adjudicator, the SP'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 complaint relates to alleged breaches of sections 11.1.5, and 11.1.8 of the Code, which reads:

2.1.1 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.

2.1.2 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:

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

2.2 In this appeal, the panel will be guided also, by the general provisions and purpose of the Code:

2.2.1 1.2 The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.

2.2.2 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.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated: "It is my decision after careful consideration of both the code and the intention behind the drafting thereof that the WASPA member/service provider has fallen foul of the abovementioned sections either partially or in whole.

The rational for my decision is as follows:

1. Although the service provider sets out that the complainant would have had to click on a banner add and then subsequently a "subscribe" button in order to be subscribed to the service, this process was not wholly transparent and was in part automatic. I refer to the notification of subscription message above (as provided by the WASPA member), namely- "<http://pocketflirt.com> as a Bookmark! **Go now 2 finish reg!** 1st wk FREE then R7/week. 2 unsub call 0861127283 or sms stop to 31477".
2. The message set out above requires a further action in my view in order for registration to the service to be completed (see bolded text above). The complainant asserts that they did not take this further action and the WASPA member has not provided us with details of this further action. Failing the WASPA member demonstrating that there was no automatic element to this subscription, this in my mind falls foul of the provisions of 11.1.5 of the Code of Conduct.
3. I also feel that to a user who did not intend to subscribe that the notification email could be misleading and be construed as an advert for Pocket Flirt and not a notification of subscription but merely a call to subscribe which could be ignored as spam.
4. It is my opinion that notwithstanding the fact that the WASPA member promptly unsubscribed the complainant from the service and readily refunded all sums deducted in error, the process for subscription falls foul of the Code of Conduct."

3.2 Sanctions

In giving sanctions, the Adjudicator stated the following:

"As this appears to be the first complaint the sanction I propose is not overly burdensome. However, due to the fact that the subscription process is automatic and consumers may not have complained because they may not be aware that they have been subscribed I feel that the partially automatic nature thereof should be reviewed.

The WASPA member should amend the subscription process so that failing the further process as set out in the notification email. Subscription should not be able to occur without this further step being taken notwithstanding potential accidental clicking on the “subscribe” link.

The WASPA member is further fined an amount of R5000 which is suspended for a period of six (6) months from date of notification of the member of this Adjudication subject to the member not being found to have breached the abovementioned sections of the Code of Conduct or its future equivalent during that period.”

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 8725:

- 4.1.1 In its appeal the Appellant disagrees with the contention that there was any aspect of automatic subscription and provided examples as to what it argues constitutes “automatic”.
- 4.1.2 It further contended that it did provide more than sufficient information to render itself compliant with section 11.1.8 of the Code.
- 4.1.3 The appeal is attached hereto.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

- 5.1.1 The complaint was made on 15 October 2010. Version 8.0 of the Code, in use from 13 October 2009 to 31 March 2010, applies.

5.2 Finding

- 5.2.1 This Panel has reviewed both the Adjudication and the Appeal thereto.
- 5.2.2 In reviewing these, the Panel has found that it would be ill-founded to suggest that the Complainant in this matter was automatically subscribed due to the fact that the welcoming message required a so-called “further action”.
- 5.2.3 Such a deduction is founded on wording within the Appellant’s welcoming message and not due to inaction on behalf of the Complainant.
- 5.2.4 However, the Panel does concede that the welcoming message might lead to confusion, and prompt the “subscriber” to believe that a further action is required to complete registration.

5.2.5 It does not however, in the opinion of the Panel amount to automatic subscription, since the user or Complainant in this matter, has already subscribed by an overt action on his part.

5.2.6 **The ruling based on section 11.1.5 is overturned.**

5.2.7 However, it could be contended that the insertion of “bookmark” and “2 finish reg” read together, might create the feeling of an advert or marketing, and create an impression that one still has the option not to complete the registration.

5.2.8 The Panel suggests that these insertions should be removed to create better clarity and remove any confusion that might be created.

5.2.9 With regards to the information provided or that was supposed to be provided in terms of section 11.1.8, the Panel agrees that the Appellant in this matter has not breached any aspects of section 11.1.8 and has complied with the required information.

5.2.10 **The Adjudication is overturned.**

5.2.11 The cost of appeal is non-refundable.