



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#40355
Cited WASPA Respondents	Zed Media (Pty) Limited (1883)
Notifiable WASPA Respondents	Cellfind (Pty) Ltd (0019) / Mr Messaging South Africa (Pty) Ltd (1809) / Connect IT Systems Pty Ltd (1036).
Source of the complaint	Public
Complaint short description	Respondent knowingly disseminating information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
Date complaint lodged	2018-10-16
Date of alleged breach	2018-10-16
Applicable version of the Code	v15.9
Clauses of the Code cited	4.2; 4.3; 4.9 (b,c); 4.10; 5.1; 5.4; 5.5

Related complaints considered	n/a
Fines imposed	R50 000 for breach of clauses 4.2, 4.3, 5.1, 5.4 and 5.5 of the Code
Other sanctions	Termination of access to specific number
Is this report notable?	n/a
Summary of notability	n/a

Complaint

1. The complainant lodged a formal complaint with WASPA after receiving the following SMS from the Respondent:

*The position you APPLIED for has now become available, you meet all the criteria. If you still want to be interviewed Dial *120*489# s2out1.67/20s Rgrds HR.*

2. In the view of the complainant, the Respondent has contravened clauses 4.2, 4.3, 4.9(b) and (c), 4.10, 5.1, 5.4, and 5.5 of the WASPA Conduct by sending this SMS.
3. The complainant's reasons may be summarised as follows:
 - 3.1 The SMS sent by the Respondent constitutes unprofessional conduct because the complainant had not applied for a job in the last 10 years and the opt-out facility contained in the SMS was indistinguishable.
 - 3.2 The Respondent has acted unlawfully by offering a service based on a job application that does not exist.

- 3.3 The content of the message is dishonest in nature and unlawfully ensnares users based on a false representation.
 - 3.4 The sending of the SMS constitutes an invasion of privacy since the complainant had not applied for a job and it was not clear what information the Respondent held about the complainant.
 - 3.5 The SMS induces anxiety and preys on peoples' emotions and their desperation for a job.
 - 3.6 The SMS misrepresents the service offering.
 - 3.7 The Respondent is offering a service that it cannot provide since the complainant had not applied for any job, including the one referred to in the message.
 - 3.8 The Respondent is charging money based on a fictitious job application.
 - 3.9 The Respondent's dealings are totally dishonest in nature.
 - 3.10 The Respondent is knowingly disseminating information that is false and inaccurate;
 - 3.11 the pricing information in the message, i.e. "1.67/20s", is very difficult to distinguish; and
 - 3.12 the terms and conditions of the service and company details are only attainable if a user subscribes to the service, which would entail dialling the given number and incurring the relevant costs.
-

Respondent's response

4. The Respondent, who is an affiliate member of WASPA, provided a written response to the complainant's complaint.

5. After the complaint was referred to formal adjudication, further queries were referred to the Respondent, which it answered promptly.
6. The Respondent has advised that the SMS in question is used for or relates to its "Zed Media Mini CV" service.
7. The Respondent described this service as a platform for a prospective job seeker to create and save a short curriculum vitae (CV) via USSD. This "mini CV" is then made available by the Respondent to prospective employers.
8. In response to this particular complaint, the Respondent advised that the SMS in question was inadvertently sent to the complainant after their number had been included in the Respondent's database due to a data capturing error.
9. The Respondent advised that this does occur from time to time, but that its ratio of capture errors is 10 records out of 30000, which it avers is far below the industry standard.
10. The Respondent denied that it had acted unprofessionally since the SMS had been sent in error to the complainant. The Respondent also stated that format used in the SMS for opting out (i.e. "S2Out") was an industry standard used by multiple service providers and that no previous complaints had been made about this format.
11. However the Respondent did indicate that it would be considering other means to express the opt-out instruction.
12. The Respondent also denied that it had acted unlawfully and argued instead that the complainant's statements and accusations of lawlessness were baseless and without merit.
13. The Respondent stated that all job seekers who had opted in to use its service were credible candidates for job vacancies. The Respondent provided a video with various testimonials from job seekers who appear to have successfully used the Respondent's service.

14. The Respondent also denied that the SMS could cause anxiety to any person. The Respondent stated that it is a job creator and does not prey on people's emotions. The Respondent again argued that the complainant's statement in this regard was without any supporting evidence.
15. The Respondent stated that its intention is to facilitate candidates' data in a safe and secure environment and that it actually saves candidates from "*falling prey to job centre-based scams and other online scams*".
16. In response to the allegation that the pricing for the service is "*indistinguishable*", the Respondent stated that the relevant billing format used was an industry standard.
17. The Respondent also denied that the service in question was a subscription service and stated that candidates could update their details at their own discretion.
18. The Respondent also advised that its network operator had conducted a due diligence investigation on the service and had allowed it to continue operating.
19. In response to a particular query from this adjudicator about its opt-in process, the Respondent advised that its data capturers collect prospective job seekers' information from social media and job sites. These prospective job seekers are then messaged and offered the use of the Respondent's mini CV service via SMS.
20. The Respondent advised that it has a database of approximately 250 000 people, which includes the following personal information:
 - 20.1 First name and surname;
 - 20.2 Gender;
 - 20.3 Identity number (optional);
 - 20.4 Cell number;
 - 20.5 Province;
 - 20.6 Job description;
 - 20.7 Criminal record (yes or no); and
 - 20.8 Email address (optional).

21. The Respondent also confirmed that it uses a third party owned database which consists of approximately 100 000 people.
 22. The Respondent confirmed that the SMS which is the subject of this complaint was sent to every person listed on both the Respondent's own database and the third party's database which it uses.
-

Sections of the Code considered

23. The following clauses of the WASPA Code of Conduct were cited in the complaint and have been considered:
 - 23.1 Clause 4.2. *Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.*
 - 23.2 Clause 4.3. *Members must conduct themselves lawfully at all times and must cooperate with law enforcement authorities where there is a legal obligation to do so.*
 - 23.3 Clause 4.9. *Members must not provide any services or promotional material that:*
 - 23.3.1 *.... (b) results in any unreasonable invasion of privacy;*
 - 23.3.2 *.....(c) induces an unacceptable sense of fear or anxiety;*
 - 23.4 Clause 4.10. *A service must not be replaced on the same number by another service that might give offence to or might be inappropriate for customers reasonably expecting the original service.*
 - 23.5 Clause 5.1. *Members must not offer or promise or charge for services that they are unable to provide.*
 - 23.6 Clause 5.4. *Members must have honest and fair dealings with their customers.*

- 23.7 *Clause 5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.*
24. No further clauses were assigned by WASPA.
-

Decision

25. The Respondent has admitted that the promotional SMS sent to the complainant was unsolicited. The Respondent's explanation for this is that the complainant's number was captured on its database in error, thereby resulting in the SMS being sent inadvertently to the complainant.
26. The sending of unsolicited direct marketing messages, without consent and outside of a prior business relationship, is prohibited in terms of clause 16 of the WASPA Code.
27. The complainant did not cite clause 16 in their complaint and it was not assigned by WASPA before the matter was referred to formal adjudication. I am therefore precluded from ruling in that regard.
28. However the complainant did cite clause 4.9(b) of the WASPA Code of Conduct in their complaint and alleged that the promotional SMS sent by the Respondent resulted in an unreasonable invasion of their privacy.
29. The complainant has advised that it had not applied for a job and was therefore concerned about how and where the Respondent had obtained their details from, and/or whether the Respondent held other personal information about them.
30. This is a legitimate concern on the part of the complainant. However the complainant has other legal mechanisms available to them to find out where the Respondent sourced their personal information from and what other personal information was in the Respondent's possession or custody.

31. If the Respondent has unlawfully collected and/or processed other personal information about the complainant, or has otherwise infringed the complainant's constitutional right to privacy, the complainant would be able to lodge a further complaint with WASPA against the Respondent or otherwise avail themselves of the further legal remedies available under the relevant legislation.
32. For now I must accept the Respondent's unchallenged version that the SMS in question was sent to the complainant in error. I do not believe this constitutes an unreasonable invasion of the complainant's privacy and therefore, based on the evidence presented, I do not find that the Respondent has breached clause 4.9(b) of the WASPA Code of Conduct.
33. The complainant also alleged that the SMS sent by the Respondent induces an unacceptable sense of fear or anxiety.
34. I do not agree with the complainant's view in this regard. Firstly, the message does not contain any threat of harm to the person or property of the complainant or to a Respondent of their immediate family. Secondly, it is not apparent from the wording of the message that there may or would be other harmful or undesirable consequences for the receiver if they did not respond to or act upon the message.
35. Based on the evidence presented, I cannot make a finding that the Respondent has breached clause 4.9(c) of the Code.
36. The complainant also cited clause 4.10 in their complaint but did not provide any evidence that the Respondent had, by sending this SMS, replaced one service with another that might give offence to or might be inappropriate for customers reasonably expecting the original service.
37. I therefore do not find that the Respondent has breached clause 4.10 of the Code.
38. In order to deal with the remaining grounds of the complaint, I now turn to the actual content of the SMS sent by the Respondent and the impression created by the wording used.

39. The SMS contains the following statements:
 - 39.1 *"The position you applied for has now become available."*
 - 39.2 *"You meet all the criteria."*
 - 39.3 *"If you still want to be interviewed dial *120*489#."*
40. The wording used clearly suggests that this SMS is intended for a particular job applicant, i.e. someone who has previously applied for a specific position, with a specific employer, and who has now qualified for an interview after meeting all of the relevant criteria for that position.
41. The impression is created that all that is left for the recipient to do is simply dial the number provided to set up the interview.
42. However this is clearly not the case since the Member has confirmed that it sent this SMS to everyone on its database (which on the Member's own version is approximately 350 000 people).
43. Each of the statements contained in the SMS are therefore false and based on a fictitious job application, prospective employer, position, qualifying criteria, and interview opportunity.
44. The SMS also contains no reference to the actual service which the Respondent is purportedly offering to consumers, i.e. being able to create a "mini-CV" via USSD to ease the online job application process.
45. This is classic "bait and switch" marketing tactics.
46. The Respondent has provided video testimonials which purport to be from people who had used the Respondent's services to obtain employment.
47. However this evidence, even if credible, does not specifically refer to the Respondent's "Zed Media Mini CV" service and does not assist the Respondent in refuting the

allegations made by the complainant regarding the content and import of the SMS that was sent by the Respondent.

48. The sender of the SMS is not identified in the SMS. Instead, the message simply ends with the words *"Rgrds HR"*.
49. The opt-out instruction (i.e. *"S2out"*) is not clear and I do not agree with the Respondent's averment that this is an industry standard. I am not satisfied that the reasonable consumer, unfamiliar with services or promotions of this nature would understand how to action this instruction to opt out from receiving further messages from the Respondent.
50. The pricing format used (i.e. 1.67/20s) also does not state which currency the charges are stated in as required by the Code.
51. Based on the evidence presented by both parties, I am able to make the following findings:
 - 51.1 The job application referred to in the SMS is fictitious. It follows that there is no specific job interview available to each person who may respond to this SMS.
 - 51.2 The SMS contains no reference and bears no relation to the service offered by the Respondent.
 - 51.3 The Respondent is therefore offering or promising or charging for a service that it is unable to provide and by doing so is in breach of clause 5.1 of the WASPA Code of Conduct.
 - 51.4 Since there is no actual job application, or prospective employer, or available position, the statements made in the SMS are blatantly false.
 - 51.5 The SMS grossly exaggerates the recipient's chances of successfully applying for a job. There is no actual interview lined up for the recipient and this SMS is therefore also deceptive and/or misleading.

- 51.6 Furthermore, I am satisfied that the Respondent has sent this SMS knowingly and deliberately.
- 51.7 By doing so, the Respondent has failed to act honestly and fairly in its dealings with its customers (including prospective customers).
- 51.8 The Respondent is therefore in breach of clause 5.4 and 5.5 of the Code.
- 51.9 I am also satisfied that the Respondent has failed to conduct itself in a professional manner and is in breach of clause 4.2 of the Code.
- 51.10 Finally, these types of deceptive marketing practices are also expressly prohibited under the Consumer Protection Act, 2008. The Respondent's conduct is therefore also unlawful and as such is in breach of clause 4.3 of the Code.
52. To summarise the findings I have made:
- 52.1 The complaints in respect of clauses 4.9(b), 4.9(c) and 4.10 are dismissed.
- 52.2 The complaints in respect of clauses 4.2, 4.3, 5.1, 5.4 and 5.5 are upheld.
53. The complainant also referred in their complaint to a Facebook thread where similar complaints were made by other persons after receiving similar SMS's from the Respondent.
54. The allegation is made that when the number given in the SMS is dialled, it does not connect anywhere, but the caller is still charged for the call at the rate of R1.67/20s.
55. Unfortunately the complainant did not provide any direct evidence in this regard and the reference to third party complaints is heresay and cannot be relied on.
56. No further complaints have been lodged with WASPA relating to the same or similar contraventions of the Code. I am therefore not able to take this matter any further.
-

Sanction

57. In determining appropriate sanctions against the Respondent, I have taken into consideration that no previous complaints have been made against the Respondent (including any complaints of a similar nature) and that no loss was suffered by the complainant.
58. However, this does not detract from the false, deceptive and misleading nature of the SMS itself.
59. South Africa is currently experiencing very high unemployment rates. Within this context, the deliberate use of deceptive marketing tactics aimed at “baiting” aspirant job seekers with the promise of potential employment without being able to deliver on that promise must be viewed in a very serious light.
60. What is more alarming is that, on the Respondent’s own version, this SMS may have been sent to each of the 350 000 people that the Respondent has on its database. There is a real risk of widespread consumer harm if the Respondent is allowed to continue using these kinds of marketing tactics.
61. For the foregoing reasons, the following sanctions are imposed:
 - 61.1 The members who act as the Respondent’s aggregator/s are instructed to terminate the Respondent’s access to the number *120*489#.
 - 61.2 The Respondent is fined the sum of R50 000.00, which is payable immediately.