

WASPA appeals panel
Complaint 10062

REPORT OF THE APPEALS PANEL

Date: 16 July 2011

Service Provider: Buongiorno South africa

Appellant and Service Provider (SP): Buongiorno South Africa

Complaint Number: 10062

Applicable versions: 9.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 23 July 2010 for an unsubscribed request against Buongiorno South Africa, a Service Provider (SP).

1.2 The SP is a member of WASPA and based in South Africa.

1.3 The complaint relates to an unrequested subscription.

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 following clauses of the Code were considered:

2.1.1 Section 11.5. Reminder messages

2.1.1.1 Section 11.5.1. 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.

2.1.1.2 Section 11.5.2. The reminder messages 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 [short code].

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 [short code]. 11.5.3. The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.5.2.

2.1.1.3 Section 11.5.4. The content/service description must be text describing the content, promotion or service (e.g. “tones” or “poems”). This text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service.

2.1.1.4 Section 11.5.5. The cost of service and frequency of billing must use the format “RX/day”, “RX/week” or “RX/month” (or RX.XX if the price includes cents). No abbreviations of “day”, “week” or “month” may be used.

2.1.1.5 Section 11.5.6. The text “(VAS)” must be included after any VAS-rated phone number. It does not need to be included after phone numbers which are not VAS-rated.

2.1.1.6 Section 11.5.7. Members must test reminder messages on a range of phones to ensure that all characters and lines are displayed identically.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of part of the Adjudicator’s Report)

3.1They did not however provide any proof of a monthly reminder message nor can I ascertain whether one was sent from the itemised billing provided.

3.2 I therefore cannot rule on whether a refund should be offered until such time as I receive proof of the monthly reminder message sent in compliance with 11.6 of the Code.

3.3 If this cannot be provided I feel that the complainant should be refunded.

3.4 Claim partly upheld.

3.5 Sanctions Imposed

3.5.1 Should the SP not provide satisfactory proof of the sending of a monthly reminder message in compliance with the Code within 7 (seven) days of this ruling the SP is to refund the complainant within 5 (five) days of receiving this report.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 10062

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

4.1.2 It summarised its appeal as resting on 3 legs:

- A procedural irregularity
- An incorrect finding on the merits
- The sanctions imposed were unreasonable under the circumstances

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The Adjudicator applied Version 10.0 of the Code.

5.1.2 The Appellant has objected to this.

5.1.3 The relevant date is 23 July 2010, when the unsubscribe request was lodged, and the alleged breach occurred over the April to May period of 2010.

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

5.1.5 The Appellant has, however, been unable to identify how the wrong version of the Code might prejudice them and has concurred as such. Similarly, this Panel is unable to pick up any potential prejudice from the error.

5.1.6 This having been said, any potential prejudice would in any event now be addressed by the Panel applying the correct version of the Code.

5.2 Decision

5.2.1 The Appellant only had issue with the reminder messages and vehemently denied any wrongdoing by stating in its paragraph 34.8 that it had indeed submitted such logs as proof to WASPA and annotated its proof in an attachment in its appeal referred to as “AR2”.

5.2.2 It has come to the attention of this Panel contrary to what is alleged by the Appellant, that no such log was provided by the Appellant in its formal response, and if so claimed, that no such attachment was received by the Secretariat in the Appellant’s formal response to the complaint.

5.2.3 It has also come to the attention of this Panel that if the Appellant indeed did provide the Secretariat with such information, that such information was not brought to the attention of the Adjudicator.

5.2.4 The Panel assumes that this was due to an oversight on the part of the Appellant or the WASPA Secretariat, and want to remind the Appellant in this matter that WASPA would not tolerate fraudulent actions should the opposite come to light.

5.2.5 The Appellant also raised the issue of not being afforded the opportunity to review the Complainant’s logs and therefore claimed that its rights to be heard and treated fairly in the process were infringed.

5.2.6 It is not the intention of this Panel to make a finding on the extent to which the provisions of PAJA and the rules of natural justice are applicable to the WASPA process.

5.2.7 The Panel does however want to refer the readers of its report to the WASPA Code of Conduct’s procedure with regard to formal complaints by highlighting the following sections:

5.2.7.1 Section 14.3.9. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish

additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

5.2.7.2 Section 14.3.11. Where a complaint involves any interaction with a customer, **when requested to do so**, a member must, within five working days, **provide clear copies of all relevant logs of that interaction.**

5.2.7.3 Section 14.3.13. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

5.2.8 The Panel is of the opinion that the SP in this matter actually raised the matter of reminder messages in its formal response and that it was raised as proof that the complainant in the disputed matter was indeed subscribed.

5.2.9 This in itself could have raised the awareness by the Adjudicator of potentially an additional breach of section 11.5.1 as referred to herein as paragraph 2.1.1.1.

5.2.10 The Panel is of the opinion that the Adjudicator in this matter should have requested additional information, or required proof of the reminder messages through the workings of section 14.3.9 as referred to herein as paragraph 5.2.6.1 especially in the absence of WASPA requesting the Appellant to provide further information.

5.2.11 The Panel therefore finds it illogical that the Adjudicator could partially uphold a complaint when such finding is subject to the Appellant providing further evidence, which it already had or had not produced.

5.2.12 A better resolve would have been to request the logs, prior to making a finding, which procedurally would have been more sensible.

5.2.13 At this point, the concern falls away. In addressing the Appeal, the Appellant has now had the opportunity to address the logs, and these submissions have been considered by this Panel.

5.2.14 The Panel reviewed the logs and are satisfied that the reminder messages were in fact sent.

6. The finding of the Appeals Panel is:

6.1 The Adjudicator's decision is overturned and the Complaint related to the reminder messages is dismissed.

| The cost of appeal is refundable.
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