

WASPA appeals panel
Complaint 15183

REPORT OF THE APPEALS PANEL

Date: 8 November 2012

Appellant and Information Provider (IP): Buongiorno SA

Complaint Number: 15183

Applicable versions: 11

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 26 September 2011, by an individual against Buongiorno.

1.2 The Appellant is a full member of WASPA.

1.3 The complaint related to various aspects of the Code. For the purposes of this Appeal, the Adjudicator applied Clause 3.1.1 of Version 10 of the Code, which relates to professional conduct.

1.4 The Appellant appeals a finding of breach of the above clause and the subsequent "reprimand".

1.5 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 section 3.1.1 of the Code, which reads:

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

In the findings which are relevant to this appeal, the Adjudicator stated:

“One final issue raises a critical eyebrow. In its response to the complaint, the member stated the following:

We can however confirm a refund of R93, due to a failed reminder message not having been sent to the complainant in June 2011. Should the complainant agree to withdraw the formal complaint, we would be more than happy to process this refund in an informal setting.

30. The member is making payment of a refund, which it submits is due to the complainant, subject to the complainant withdrawing this complaint. This constitutes interference with the WASPA complaints procedure, and is unprofessional at best. In the circumstances I have no option but to find that the member has infringed clause 3.1.1 of the Code by making itself guilty of unprofessional conduct.

3.2 Sanctions

The following sanctions were given:

The member is to refund the amount of R93.00 to the complainant, as there is a significant chance that she would have unsubscribed if she had received the reminder message.

31.2. The member is to ensure that its subscription reminder messages are being properly sent for all its services, and

31.3. I request that the WASPA Monitor should test the member's subscription services in this regard starting 30 days from the publication of this report.

32. I do not believe that the member was acting maliciously in infringing clause 3.1.1, but in all probability the employee concerned was being overly zealous.

Nonetheless, this conduct is unacceptable and must be shown to be so. I accordingly issue the member with a formal reprimand.

4. GROUNDS OF APPEAL

Grounds of appeal for complaint 15183:

4.1 The Appellant is appealing only those sections of the adjudication as described above.

4.2 The Appellant gave detailed background as to why it offers refunds in certain circumstances.

4.3 The Appellant alleged that no prejudice was suffered as the result of the offered refund.

4.4 The Appellant alleged that the correct version of the Code is Version 11.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaint was made on 26 September 2011. The Panel accepts that the correct version of the Code for consideration of the complaint is that which was in place at the time the offer of refund was made, which was on 13 October 2011. Version 11.0 of the Code applied from 8 June 2011 to 17 November 2011 and was therefore in fact the correct version for both the merits and the issue at hand. That having been said, it is of no material relevance to the finding, as Clause 3.1.1 did not change (and has not changed since the Code was first ratified in 2005).

5.2 Finding

5.2.1 It is noted that the Appellant is only appealing the finding on Clause 3.1.1. and it is for that reason that the discussion on this document is limited to the issues relating thereto.

5.2.2 The Appellant appears to address the reasons for offering a refund. The Panel accepts these and agrees that the offering of a refund will often address the complainant's concerns and bring the matter to finality quickly. This panel encourages this approach.

5.2.3 However, it is NOT the offering of a refund that offended the Adjudicator. It was the offering of a refund **subject to the withdrawal of the complaint**.

5.2.4 The relevant paragraph read:

We can however confirm a refund of R93, due to a failed reminder message not having been sent to the complainant in June 2011. Should the complainant agree to withdraw the formal complaint, we would be more than happy to process this refund in an informal setting.

5.2.5 In the Appeal documents the Appellant talks about its understanding that the acceptance of a refund will result in the matter being referred back to informal status. However, this is not what it communicated in the response. What was communicated in the response was that the refund was offered ONLY IF the COMPLAINANT withdrew the complaint. There would have been no harm in the Appellant communicating its understanding of what would happen next in terms of Waspa procedure. The problem was the offering of a conditional refund.

5.2.6 It is this that offended the adjudicator, and resulted in a finding of unprofessional conduct in terms of Clause 3.1.1.

5.2.7 This Panel believes that the transgression may simply have been one of careless, alternatively overly legalistic drafting.

5.2.8 That having been said, it is unfortunate that the Appellant took this slightly threatening tone, especially given the age and apparent frustration and confusion of the complainant.

5.2.9 Had the Adjudicator imposed a severe sanction, this Panel would have been inclined to give the Appellant the benefit of the doubt in relation to its drafting style. However, the sanction imposed was the mild one of a “formal reprimand”.

5.2.10 This Panel also considers it an important principle that WASPA members understand that a refund cannot be offered as a threat or a bribe. A refund, when offered, must be offered with no strings attached. The acceptance of such an offer will trigger the relevant WASPA procedure.

5.2.11 Given the above, the finding of the Adjudicator stands, including the formal reprimand.

5.2.12 The cost of appeal is non-refundable.