

WASPA appeals panel
Complaint 15578

REPORT OF THE APPEALS PANEL

Date: 8 November 2012

Appellant and Information Provider (IP): Buongiorno SA

Complaint Number: 15578

Applicable versions: 11

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 17 October 2011, by an individual against Buongiorno.

1.2 The Appellant is a full member of WASPA.

1.3 The complaint related to the issue of subscription. The Adjudicator dismissed that complaint, but went on to find that the reminder message sent to the Complainant was not compliant with Clause 11.6.2.

1.4 The Appellant appeals only the finding on the reminder message both on procedural and merit grounds.

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 11.6.2 of the Code, which reads:

11.6.2 The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

Or

Reminder: 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 unsub, sms STOP [service keyword] to [short code].

2.2 Clause 11.6.2 must be read with Clause 12 of the Advertising Rules.

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:

Based on all of the information before me, I am unable to uphold the complaint of an alleged involuntary subscription.

However, I do find that the subscription reminder messages sent to the Complainant breached the strict requirements of the Code and Advertising Rules. Section 11.6.2 of the Code is clear in its requirement that reminder messages adhere "exactly" to the format, flow, wording and spacing prescribed by the Code. The reminder messages sent each month by the SP do not adhere exactly to the prescribed format, wording and spacing of the Code and Advertising Rules in the following respects:

1. The word "Ur" has been used instead of "You are" or "U r".
2. The words "Daily GIVEAWAYS" have been inserted between the name of the service and the cost of the service. This breaches section 12.1(g) quite clearly as "Daily GIVEAWAYS" is not the name of the service.
3. The word "Stop" has not been written in uppercase which clearly breaches

the capitalisation requirements of section 12.2 of the Advertising Rules.

The effect of these transgressions should be considered as a whole and in light of all relevant circumstances. In this regard, it is also relevant to note that, approximately 10 seconds before the sending of each monthly reminder message, the SP also routinely sent another message also headed “Reminder” which stated as follows:

Reminder: as a valued VIP member u could drive away in a brand new Polo! Plus Unlimited Downloads 4 hot MP3s, cool games & Fabulous Daily GIVEAWAYS!

The scheduled sending of an additional marketing message also headed “Reminder” immediately before the actual reminder message would have the effect of undermining the nature and importance of the second communication also headed “Reminder” and would have increased the likelihood of a consumer ignoring or deleting the second message without studying its contents. Even if opened, the repetition of the marketing phrase “Daily GIVEAWAYS” in the actual reminder message before the confirmation of the cost of the service would further detract from and undermine the nature and importance of the second message.

3.2 Sanctions

The following sanctions were given:

In the light of all relevant circumstances, the following sanctions are imposed:

1. A refund of R3 per day for each day that the Complainant was subscribed to the service between 17 July 2011 to 16 October 2011 is ordered to be paid to the Complainant by the SP.
2. For breach of sections 12.1(g) and 12.2 of the Advertising Rules and 11.6.2 of the Code the SP is fined an amount of R40 000.

4. **GROUND OF APPEAL**

Grounds of appeal for complaint 15578:

- 4.1 The Appellant is appealing only the decision relating to the reminder message.
- 4.2 The Appellant submitted that the matter was procedurally unfair as, in essence, it was at no time given an opportunity to respond to a complaint about the reminder message.
- 4.3 The Appellant addressed the merits of the reminder message. It conceded that certain aspects were not “exactly” in line with the Code, but submitted that the correct test is whether the core message has been successfully communicated.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

- 5.1.1 The complaint was made on 17 October 2011. Version 11.0 of the Code applied from 8 June 2011 to 17 November 2011 and is therefore the correct version for this matter.

5.2 Finding

- 5.2.1 It is noted that the Appellant is only appealing the finding on Clause 11.6.2 as read with the Advertising Rules, and it is for that reason that the discussion on this document is limited to the issues relating thereto.
- 5.2.2 The Appellant has firstly submitted that this matter is procedurally flawed. In essence, the complaint related only to the question of whether the complainant had subscribed to the service, and the related clauses. The Adjudicator at no time requested comment from the Complainant on the reminder message.
- 5.2.3 The Appellant addressed the Panel at great length on the requirements of administrative and natural justice.

5.2.4 The Panel agrees with the Appellant. It is a fundamental principle of natural and administrative justice that a respondent be clear on exactly what case it is that must be addressed, and is given an opportunity to address the case against them. This is encapsulated in the principle “*audi alterem partem*”. While this Panel makes no finding on the exact extent to which PAJA binds WASPA, it does agree that this fundamental principle needs to be applied in order to achieve equitable decisions.

5.2.5 In the matter at hand, the original complaint related to the question of whether the Complainant subscribed to the service, which he vigorously denied. He did not raise any concern with the reminder message, and, as the Appellant pointed out, was in fact allegedly effectively alerted to the problem by that very message.

5.2.6 The Appellant correctly pointed out that the Adjudicator is allowed to extend the scope of inquiry. It debated whether this would be the most appropriate process, but conceded, we believe, that it is possible.

5.2.7 The Appellant then, again correctly, pointed out that in terms of Clause 14.3.10, the Adjudicator must give the respondent an opportunity to respond to the extended complaint.

5.2.8 The relevant Clause reads:

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.

5.2.9 This Panel can find no record of such a query being sent to the Appellant in this matter.

5.2.10 In the circumstances, the Panel agrees that the requirements of *audi alterem partem* and WASPA's own Code were not met, and that the resultant decision is fatally flawed.

5.2.11 The decision relating to the reminder message, and the sanction is therefore overturned.

5.2.12 In the circumstances, it is unnecessary to consider the merits of the reminder message, and to do so would, in fact, pre-judge any future complaint lodged in this respect.

5.2.13 This having been said, the Appellant is strongly urged to carefully apply the WASPA rules relating to such messages, to avoid future breach allegations.

5.2.14 The cost of appeal is refundable.