Appeal Panel Report

Complaint number	20535
Cited WASPA members	Buongiorno South Africa (0002)
Notifiable WASPA members	*na*
Source of the complaint	Consumer
Complaint short description	Subscription service
Date complaint lodged	4 June 2013
Applicable version of the Code	*12.4*
Clauses of the Code Relevant to appeal	11.1.1 14.3.10
Related complaints considered	4677 et al
Outcome	Appeal upheld, appeal fee refunded.

Is this report notable?	Yes
Summary of notability	Consequences of a failure of natural justice.

1. This matter arises from a complaint that originally cited Clauses 4.1.1, 4.1.2, 6.3.3 and 6.2.6. The complainant went on to add clauses to the complaint, namely 11.1.1 and 11.2.2, as well as Advertising Rule 9.2.1.1.

2. The complaint related to 4 campaigns, three of which are irrelevant for our purposes as they were found to not be the responsibility of the WASP and therefore were not considered. However, what is germane to what follows is that the adjudicator was dealing with a number of matters.

3. The adjudicator then embarked on the matter, and addressed a number of questions to the WASP, separating his questions to each campaign. The WASP initially answered these questions but eventually stated that the questions “exceed all conceivable bounds of propriety and reasonableness” and refused to answer further questions. At the same time, in a letter dated 24 October 2014, they called for the recusal of the adjudicator.

4. The adjudicator proceeded to rule, finding that there were no grounds for his/her recusal and finding a breach of Clause 11.1.1 in respect of one campaign. The adjudicator imposed a sanction of R100 000 and a three month suspension of the WASP from WASPA. He also referred a number of concerns back to WASPA for further investigation.

5. The WASP appeals this decision, and the matter was heard in a face-to-face hearing on 7 October 2015. The WASP was represented by Mr Vlad Movshovich of Webber Wentzel.

6. The WASP raised a number of issues on Appeal:

    - An allegation that the adjudicator was either actually biased or apparently biased;
    - The question of whether the correct version of the Code was applied;
    - Whether an adjudicator was procedurally entitled to grant / refuse a request for a postponement;
    - The merits of the finding in relation to clause 11.1.1;
    - The procedural flaws of referral of other matters to WASPA; and

- Whether the sanctions were appropriate.

7. The core threnody of the Appeal was that the Adjudicator acted with bias, rendering the entire process procedurally unfair and consequently a nullity. We will begin with this issue.

8. Before we consider the Appellants submissions it is worth noting that nothing in the WASPA Code of Conduct (in any version including the most recent) deals with a situation where an adjudicator must consider his/her recusal from the matter as a result of a conflict of interest, bias (or apparent bias). There is, however, a practice where WASPA asks all adjudicators to disclose which of their clients are WASPs in order to avoid a conflict of interest and as a result there is tacit acceptance by WASPA that conflict of interest would or could result in the adjudicator's finding being procedurally unfair. We are satisfied that, while not entirely satisfactory, it is in line with normal legal practices that an application for the adjudicator's recusal be considered by that adjudicator.

9. The Appellant submitted a number of arguments to substantiate that the Adjudicator was biased, including the "harassing" nature of his questions.

10. The Panel firstly wishes to state clearly and for the avoidance of confusion in future matters that it is of the opinion that an Adjudicator is entitled to put questions to a WASP in terms of Clause 14.3.10, which states:

    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.

11. Indeed, in a number of Appeal Panel rulings, adjudicators are taken to task for their failure to revert to the WASP with appropriate clauses or requests for clarity (ref, for example, matter 4677 et al.) The Panel was of the opinion that the Adjudicator's questions were not indicative of a bias, but of a *bona fide* attempt to behave within the boundaries of correct procedure and to "get to the bottom" of what had occurred.

12. It is also noted that the Appellant raised a number of issues that could all, separately, point to potential or actual bias, and potential or actual failures of procedure. Some of these involve an analysis of the subtleties of the adjudicator's language and some of them involve a question of procedural policy. However, from the viewpoint of the mandate of this Panel – which is to determine the outcome of this appeal based on its

merits and not to act as policy and rule maker for WASPA - if one thread of the Appeal leads to the Appeal being upheld, it is unnecessary to interrogate the others.

13. This having been said, the Panel wishes to state that some of the reasons set out for the allegation of bias related to the adjudicator's consideration of the Appellant's request for an extension of the time periods. This inquiry led to, *inter alia*, the adjudicator prematurely considering the WASP's history, and making findings as to the nature of the WASP's behaviour before applying his or her mind to the merits of the matter. Without making a finding on whether or not this indeed rendered the adjudicator biased or was indicative of an existing bias, we do note that the procedure of having the adjudicator consider the application for condonation was incorrect. The Code at the time clearly states, "14.3.6. If the member fails to respond within this time period, it will be assumed that the member does not wish to respond. An extension to this time period may be given to the member at the discretion of the WASPA Secretariat." There are no other provisions relating to the extensions of time periods, and questions of condonation therefore fall squarely on the shoulders of the Secretariat. Having same considered by the adjudicator was a procedural error.

14. The panel now turns to the grounds of appeal and notes in this regard that there is a patent error in the Adjudication that is objectively ascertainable. It is unnecessary, as we set out later, to decide if this error was caused by bias or resulted in bias.

15. The error occurred as follows:

    15.1 On 14 June 2013, the WASP responded to the matters on the merits. In relation to the campaign in question in this appeal, it stated, *inter alia*, "We therefore accede to the fact that the banner in question is one of Buongiorno".

    15.2 On 9 April 2014, the Adjudicator addressed a number of questions to the WASP on each campaign. In each matter he asked "Does BSA act as a Service Provider (SP) for an information provider?"

    15.3 On 14 May 2014, the WASP responds to these questions, stating in response to the above question, in relation to the campaign at issue, that "For the sake of clarity, the iPad Landing page, which appears to form the last step of the "campaign" was created by BSA".

    15.4 On 24 July 2014, the Adjudicator puts further questions to the WASP, including the statement, "The adjudicator's understanding of the responses of BSA is that BSA is of the belief that some unauthorised third party has been

running adverts for the BSA service" and he asks, "Is BSA aware of the identity of the person causing promotional campaigns for BSA services to be published?"

15.5 On 1 September 2014, the WASP responds, and in relation to this states, "The banner was created by BSA, and published with its authority. The adjudicator is not correct in his/her understanding that, in this case, an unauthorised third party has been running adverts for BSA services".

15.6 In the Adjudicator's decision, he makes the following statements:

- "In essence, the member initially treated the 'Ringtones' advertising in the same way that it treated the other three campaigns that had been complained of i.e. by alleging that it was not responsible for any of the advertising and therefore was not obliged to answer questions regarding the advertising itself" (par 29)
- "The member eventually responded to these further questions on 2 September 2014 and, this time, finally admitted that 'the banner was created by BSA and published with its authority'." (par 31)
- ". . .the member initially claimed that questions relating to the "Ringtones" campaign advertising were also not applicable to it. However, in response to further questions raised, the member subsequently conceded that it had in fact created and published the campaign. If the further questions posed on 24 July 2014 had not been raised, this truth would not have come to light and the complaint regarding the "ringtones" campaign would not have been properly resolved. " (par 65)

15.7 The Adjudicator was therefore labouring under the impression that the WASP had denied responsibility for the "Ringtones" campaign until the 11th hour, revealing the truth only under repeated questioning. This is, however, incorrect. The WASP admitted liability for the campaign from the outset, as set out above.

16. The Panel is of the opinion that the Adjudicator's decision was coloured by this misapprehension, especially in relation to the Sanction and Referrals.

17. The Panel considered at length the error of the Adjudicator and the association, if any, with the grounds of appeal. Did the error (belief that the WASP had withheld information) have a causal link with a resulting bias against the WASP, which is what

the Appellant submits as having occurred? Alternatively, was there a simple error of fact culminating from the Adjudicator's skewed reading of the papers?

18. The Panel concluded that, as both bias and an error of fact are grounds for review, it is not actually necessary to determine which category the events fall into. What is clear is that the chain of events led to a situation where the decision was reached subsequent to a failure of natural justice and, if final, would be reviewable.

19. The question that then arises is whether a defect of this nature can be remedied on appeal. According to Baxter, in Administrative Law, this question cannot be answered definitively as it is influenced by the nature of the appeal, and the nature of the original hearing.

20. This position is succinctly stated in *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* (85/2004) [2005] ZASCA 11; [2005] 2 All SA 239 (SCA) (22 March 2005) where the Court said:

> *Finally, it is necessary to revert to an issue to which reference has been made previously in passing, ie the consequence of a procedurally fair appeal in the event of it being found that the DDG had failed to exercise his discretionary power himself ('the delegation issue') In Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 658A-G this court accepted as a general rule Megarry J's dictum in Leary v National Union of Vehicle Builders [1971] Ch 34 at 49F ([1970] 2 All ER 713 (Ch) at 720h) that –*
>
> *'a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.'*
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> *More recently however, in Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union 1995 (1) SA 742 (A) at 756D-757A, this court expressed the view that such a general rule was unjustified. In coming to that conclusion it relied on the statement of Lord Wilberforce in Calvin v Carr and others [1980] AC (PC) 574 at 592C ([1979] 2 All ER 440 (PC) at 447h) that no clear and absolute rule could be laid down as the situations in which the issue arises are too diverse and the rules by which they are governed so various. This approach has similarly been accepted by the House of Lords. See Lloyd and others v McMahon [1987] UKHL 5; [1987] AC 625 (HL) at 716C-D ([1987] 1 All ER 1118 (HL) at 1171g.)*

[34] Quite clearly, if the effect of whatever it was that vitiated the initial decision is perpetuated so as to taint the appeal process there can be no question of the latter serving to cure the former. If in the present case, for example, the process of streaming had been procedurally unfair, the decision on appeal would be equally affected. On the other hand, even if the appeal process were not intrinsically tainted by the earlier proceedings, the circumstances may be such that considerations of fairness demand that both the initial administrative decision and the appeal process, judged separately, be lawful and procedurally fair. No purpose would be served by attempting to formulate some all embracing rule. Each case will depend on its own facts.

21. The English case of *Leary v National Vehicle Builders* (1970 2 All ER 713) is often cited by our courts in support of the view that the defect in natural justice cannot be remedied by an internal appeal. In S*asman and Another v The Chairperson of the Internal Disciplinary Panel of the Windhoek International School and Others* (A 66/2013) [2013] NAHCMD 115 (4 April 2013) for example, The Namibian High Court said:

In any event I agree that 'a failure of natural justice in a trial body cannot be cured by a sufficiency of natural justice in the appellate body'[7] and as was pointed out by Megarry J in Leary v N.U. of Vehicle Builders[8]:

"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"[9]

22. It was also cited with approval in *Bordeaux South Residents Association (Association Incorporated under Section 21) v Seftel NO and Others* (10/45230) [2011] ZAGPJHC 88 (3 August 2011) where it was stated:

As a broad proposition, this submission is not sound. On the contrary - and although there exists no hard and fast rules - the ambit of an appeal curing defects of an initial hearing, is limited entirely to that where the appeal allows for a complete rehearing de novo, totally superseding the original decisional process and where the appeal tribunal – by observing the precepts of natural justice, gathers completely fresh evidence in a fair manner and to weigh it

objectively and impartially.[8] *I was not told that this was the case in casu and the papers do not make out such a case.*

As Baxter points out further, a complainant is entitled to fairness at all stages of the decision-making process.[9] *The learned author refers to the following dictum by Megarry J:-*

"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"[10]

This approach – with respect - should be the preferred approach in our Law; especially with the advent of our Constitutional dispensation.

I cannot, on the facts before me find that the appeal cured the initial defective decision. I also do not agree that this decision "fell away" as a result of the second decision. Its continued existence – if I leave it unattended – will have consequences;[11] *even if I review and set aside the second decision.*

23. In *Semenya and Others v Commission for Conciliation Mediation and Arbitarion and Others* (JA26/2003) [2006] ZALAC 2 (23 March 2006) the Labour Appeal Court stated:

In Turner v Jockey Club of South Africa 1974(3) SA 633 (A) it was held that an appeal hearing held in accordance with the rules of the respondent club had not cured the deficient hearing of first instance that had been afforded the appellant. It may be important to emphasise that in Turner's case the right to a hearing and an appeal was provided for in the rules of the club. At 655D the Court had this to say: "(W)here the decision of an inquiry board is vitiated by a disregard of the fundamental principles of justice, the matter cannot be corrected by a remittal or by further evidence, or in any other manner short of a hearing de novo;". Through Botha JA the Appellate Division said at 658 that, where the first hearing had been tainted, "(w)hat was necessary, as was pointed out by Megarry, J, in Leary v N. U of Vehicle Builders, (1970) 2 All E.R. 713 at p.719, was, 'a venire de novo not the process of appeal, whereby the person aggrieved may be treated as bearing the burden of displacing an adverse decision which, for lack of natural justice, ought never to have been reached."

24. What appears from these decisions is that a failure of natural justice in the first instance can only possibly be remedied on internal appeal by a hearing *de novo*. Baxter disputes even this, stating that the failure at the first instance robs the subject of the hearing of the "advantage of the double instance" (the advantage rendered by being able to appeal a decision) and the importance of a fair hearing at all levels of decision making.

25. We are of the opinion that the WASPA Appeal process shows some elements of a hearing *de novo*. The matter is heard *vive voce* (in this instance) for the first time, the Appellant is free to address the merits anew and in any depth that it considers necessary, and the Panel is an independent panel of arbitrators who are presumably uninfluenced by potential institutional bias.

26. That having been said, version 12.4 of the Code which governs this matter also says, "14.6.7. The appeals panel **must** consider the evidence provided to the adjudicator, the adjudicator's decision and any additional information provided by the service provider." In this sense, there is an inevitable muddying of the waters. It is almost impossible to imagine an internal appeal remedy that does not furnish the appeal panel with the record – indeed, the very finding that there was a failure of natural justice would be impossible without the record. For example, in the Advertising Standards Authority, which has a two tier appeal system, the Final Appeal level is considered a hearing *de novo* despite the fact that the Panel is provided with a full record. (ref ASA Final Appeal Committee decision *Protex/Unilever/ 22517* (17 June 2014)).

27. Historically, however, WASPA Appeals have not been regarded as hearings *de novo*. For example, clauses that have not been ruled on or have been dismissed by the adjudicator are never reconsidered by the Appeal Panel. Similarly, the Appeal Panel has usually regarded a failure of natural justice as nullifying the decision in its entirety. Examples of this can be seen in the Second finding of the Appeal Panel in matter 4677 et al, with statements such as:

> *In these cases there is a failure to investigate the complaint on its own merits and therefore a patent failure of natural justice. Consequently, the appeal in respect of the following Rulings are upheld and the decision of the adjudicator is set aside. . .*

28. Therefore, it would be inconsistent for this panel to find that we can revisit a decision after a failure of natural justice, even in the event that we find that the WASPA Appeal process has characteristics of a hearing *de novo*.

29. We also consider that it would be unrealistic and artificial for this Panel to attempt to separate aspects of the decision that were affected by the failure of natural justice from those that were arguably not affected.

30. In the circumstances, the Appeal is successful, the decision of the Adjudicator is set aside, and the Appellant's appeal fee is refunded. No further consideration of the remaining grounds of appeal is therefore necessary.