Appeal Panel Report

Complaint number	20857
Cited WASPA members	Buongiorno South Africa (0002)
Notifiable WASPA members	*na*
Source of the complaint	Consumer
Complaint short description	Subscription service
Date complaint lodged	18 June 2013
Applicable version of the Code	*12.4*
Clauses of the Code Relevant to appeal	*4.1.2* *11.1.1*
Related complaints considered	16313/ 17007 4677 et al
Outcome	Appeal unsuccessful on 11.1.1; successful on 4.1.2. Sanction reduced to R75 000.

Is this report notable?	Yes
Summary of notability	Note Clause 4.1.2 requirement of “knowing”. Clause 11.1.1 interpretation of material. Clause 14.3.10 addition of clauses.

Background

This is a matter where the original complainant raised clauses 11.2.1, 11.2.2, 11.2.3, 4.1.1 and 4.1.2.

The Adjudicator subsequently raised certain clauses, including, *inter alia*, clause 11.1.1, to which the WASP responded.

The Adjudicator then ruled on Clause 11.1.1. and Clause 4.1.2.

Appeal

In essence, the Appellant raised several issues on appeal:

- That a failure to consider the Original Page in full is fatally defective to the matter;
- In citing Clause 11.1.1 the Adjudicator acted contrary to Clause 14.3.10 in that it forms an entirely new basis of complaint;
- In citing a new basis of complaint, the Adjudicator is inevitably biased as to the outcome;
- The Appeal addresses the substantive finding on Clause 11.1.1;
- Clause 4.1.2 has an element of “intention” that has not been met;
- The sanction is unduly harsh and punitive.

The WASP also made substantive argument on the clauses which are unnecessary to traverse given the outcome of the appeal.

Clauses

The relevant clauses for this appeal is Clause 4.1.2 and 11.1.1:

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

Decision

We start by noting that we agree, and it appears to be common cause, that the relevant material to this complaint is the original page and not the amended page.

The first issue before us is whether the failure to consider a complete copy of the Original Page in this matter renders the decision defective. This relates to the fact that the matter involved the page as it originally appeared, and an amended version. The adjudicator rightly only considered the Original Page which was the subject matter of the complaint, but which was only partially before the adjudicator.

This ground of Appeal finds little traction with the Panel. This view is for the following reasons:

- The Appellant was aware that the Adjudicator was considering Clause 11.1.1 from his/her letter of 9 April 2014, and was given ample opportunity to respond, which they did. In this process, they could put any further evidence that they wished before the Adjudicator, including a "full" version of the page in question. This Panel refuses to make a decision that will condone or encourage the withholding of information in order to paralyse an Adjudicator;
- The Appellant addressed full argument on the relevant clause;
- The Adjudicator *ex facie* had the correct version of the amended page before him/her, that illustrated the point that the Appellant was making.

This ground of Appeal is therefore dismissed.

The second issue is whether the citing of Clause 11.1.1 was procedurally correct.

Clause 14.3.10 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.

It is not the mandate of this Panel to comment on whether this procedure – which has subsequently changed – is the most legally desirable procedure. It is this Panel's mandate to consider whether the adjudicator acted within his mandate.

This clause, in this Panel's opinion, creates a two legged test:

- That the adjudicator may ask for additional information relating to the complaint;
- That the adjudicator may request that the member respond to **any** additional breaches of the Code **discovered during** the investigation of the complaint, but which were **not specified** in the original complaint. (our emphasis).

We are of the opinion that the second leg of the test is not limited to the scope of the complaint, and is in fact completely clear that it may relate to breaches NOT specified in the complaint. We are therefore satisfied that the adjudicator acted within his mandate.

We also note that the Appellant itself in fact raised the issue of the communication around "subscription service" in its initial response dated 4 July 2013. We therefore note that, although not in our opinion a requirement before the adjudicator can raise a new clause, the clause nonetheless was directly connected to the Appellant's defence of its position and therefore to the original complaint.

As stated above, it is not the mandate of this Panel to decide whether this process was the most legally desirable process and the Panel is of the opinion that the question of whether raising a new clause renders the adjudicator inherently biased vis-à-vis that clause, falls within the scope of the enquiry. In the matter at hand, the adjudicator acted as instructed to do so by the Code, and in response to an argument raised in the response. The panel is of the opinion that the potential bias arguably created by the process is not evident in the matter before it.

We therefore move on to the merits of the decision that the adjudicator made on Clause 11.1.1.

In essence, while traversing a number of clauses and advertising rules in his/her finding, the adjudicator found that the "subscription service" communication may have been explicit in the original page, but it was not prominent.

The Appellant has, in its submissions, traversed its double opt-in process and relied on an Appeal Panel decision in matters 15187/15567. That matter dealt, however, with Clause 11.2.2. While Clause 11.2.2 has, at the centre of its enquiry, the question of whether the consumer had the intention of subscribing, Clause 11.1.1 involves no such enquiry. The question in Clause 11.1.1 is a simple one: was the "subscription service" communication prominent and explicit on the promotional material.

The Panel is of the opinion that the requirement applies to each piece of promotional material. The clause states:

> 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". **This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.**

The material under consideration promotes, *inter alia*, a Facebook Chat app. (We note at this point that although the Adjudicator traversed the issues in Clause 11.2.2 and appeared to indicate a breach, he made no finding of same, and this issue is therefore not live before us.)

To get the Facebook App (the "service. . . promoted in the material") a "subscription is required". The material therefore falls squarely into the requirements set out by Clause 11.1.1.

In Appeal matter 16313/ 17007 we find a useful discussion of the issue which is on all fours with the issues raised in this matter:

> *In the second place, and more pertinently, the size of the font cannot be the only measure of "prominence" (and we are in agreement with the appeal papers that it is "prominently" rather than "explicitly" that is in question. We are of the opinion that explicitly goes to the wording, and prominently goes to the design.)*

The adjudicator referred to a quote from decision 16559, but both the adjudicator and Appellant appear to have missed that this quote is in fact from the Advertising Rules introduction. It states, inter alia, that ". . .WASPs may not seek to circumvent these criteria in any way by attempting to exploit any potential loopholes in the rules where by doing so they may deprive the consumer of the minimum information required. . .". The Appellant has quite correctly pointed out that a loophole can occur when there is no rule. The fact that there is only a rule about the size of the font and not the placement cannot be interpreted to allow the WASP to place information in a manner that compromises its prominence.

The relevant definition of prominent, as found on www.oxforddictionaries.com, is "Situated so as to catch the attention; noticeable". In this respect, we are in agreement that the adjudicator erred. However, that error lay in his reference to Clause 9.2.1.1 of the Advertising Rules as the only measure of prominence for Clause 11.1.1 of the Code.

The question before this panel is therefore whether the communication around the subscription service is situated so as to catch the attention, and noticeable.

We find that it is not. Whether this situation should be remedied by an increase in font size or a change in the placement of the information is not within the mandate of this Panel to recommend. The information must, however, be communicated with sufficient prominence that a reasonable consumer would inevitably notice same. This is not the case on the landing page in question.

As in that matter, we are in agreement that the question before us is of prominence. As in the above matter, we agree that the question of technical specifications and font size are minimal requirements that do not detract from the overarching requirement of prominence.

As in that matter, we agree that the question before us is whether the subscription service communication is situated so as to catch the attention and is noticeable.

We therefore turn our attention to the actual material. For this purpose, we accept that the original material had the terms and conditions at the bottom, as seen in the amended material.

The words “SUBCRIPTION SERVICE R5 / DAY” appears in the top left corner in black against grey font. It is, in fact, almost identical in appearance to that in matter 16313/17007. The next reference is in the terms and conditions some way under that call to action.

The Appellant has argued that separating the text from the body of the advertisement makes it MORE prominent. While it is possible that in certain circumstances separating the “Subscription Service” communication from the copy may be more prominent – if it is housed in a large red box, perhaps, with a bold large font – this is not one of them.

The matter is on all fours with the matter in 16313/17007, and the communication on the top left corner against a grey background, and in the terms and conditions found well below the call to action, can be missed. **The Panel finds that this communication is not prominent and is therefore in breach of Clause 11.1.1. The Appeal in this respect fails**.

Turning to Clause 4.1.2 which reads:

> Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

We are in agreement with the submission that this clause has an element of “intention” required to be shown before it can be breached. In matter 4677 *et al*, the Appeal Panel said:

> *Clause 4.1.2 of the Code similarly requires an element of deliberate misconduct – “knowingly”. The Panel is satisfied that regardless of a potential breach, the complaint does not meet the very strict requirements of these clauses.*

While there are circumstances where the breach is so overt that the element of “knowingly” can be inferred, the Panel does not consider this to be one of them. **The finding in respect of Clause 4.1.2 is therefore overturned.**

The final issue before us is therefore the appropriateness of the sanction.

The Appellant has submitted that a fine of R150 000 is unnecessarily punitive, especially in light of the mitigation of the amended page.

We are in agreement that the amendments, which *ex facie* appear to show a grasp of what was at issue in the complaint, and were effected prior to the adjudication, do have some mitigating weight.

We also note that in the matter of 16313 / 17007, which we have noted is on all fours with this matter, a fine of R75 000 was imposed despite findings of breaches of a number of clauses.

We note, however, that the Adjudicator before us gave sound reasons for his sanction – having regard to the previous breaches of a similar nature, and having regard to only those breaches that arose prior to this incident.

In the matter before us, we have overturned part of the Adjudicator's finding – the very egregious Clause 4.1.2. We are therefore of the opinion that it is appropriate to lower the fine, as this breach must *ex facie* have carried some weight in the mind of the Adjudicator.

We are therefore guided by the amount in matter 16313/ 17007 where the material was similar, and reduce the fine from R 150 000 to R 75 000.

The Appellant has been substantially unsuccessful in its appeal and therefore forfeits the appeal fee.