

WASPA Appeals Panel

Complaint 22254

REPORT OF THE APPEALS PANEL

Date of report: 18 March 2015

WASPA Member: US Cellcom

Complaint Number: 22254

Applicable versions: 12.4

Background

1. The Complaint was filed by the WASPA Media Monitor ("Complainant") who received a commercial message on her mobile phone without any solicitation on her part or without any former contact with the WASP. This number had never previously been used for testing purposes nor ever used to download content in a private capacity.
2. The Complainant in response ran a subscription test on a test phone which resulted in a number of additional problems and possible transgressions being detected. All of these problems and possible transgressions were apparently resolved either informally or in other proceedings and were accordingly not dealt with in the Report and Findings of the Adjudicator dated 7 July 2014. The Complainant also did not persist with those complaints.
3. The only complaint left and dealt with by the Adjudicator was that the message received by the Complainant was spam, ie that it was unsolicited as she had never consented to receiving marketing communications from the WASP.

4. Although the Adjudicator considered a number of sections of the Code, only the following section remained relevant according to him/her:

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

a. the recipient has requested the message;

b. the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications;

i. at the time when the information was collected; and

ii. on the occasion of each communication with the recipient; or

c. the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5. The WASP explained that it makes use of the bulk messaging service provided by www.globallists.eu and that the number in question was part of a database provided by this marketing company. that the WASP failed to provide any proof that the company in question obtained such consent from the Complainant.

6. The adjudicator in held as follows in regard to this complaint:

6.1. WASP failed to provide any proof that the company in question obtained such consent from the Complainant;

6.2. that the original "wrong" may have been committed by the marketing company, but there remains a duty on WASPs who buy databases to ensure that the database is legally compiled and that the requirements of the WASPA Code are met;

6.3. the WASP was in contravention of section 5.2.1(c) of the Code.

Appeal

7. There was little cogent argument presented as to the particular findings but rather to the sanctions imposed. Much of the appeal document is also taken up in raising issues about the way in which the complaint had been handled and the issues that the Adjudicator clearly did not consider. We will not deal with these irrelevant matters in the appeal.
8. The main points raised against the finding dealing with spam was that the WASP was not allowed sufficient time to provide proof of consent before the matter was brought to an emergency panel hearing and sent to adjudication. It is alleged that an extension was requested from WASPA which was ignored.
9. The WASP provided additional information about the consent which it has now obtained from its partner Global Lists. According to this information the relevant MSISDN was obtained by Global Lists in 2007 (2009 according to the attached document) via personal contact in Amanzimtoti with a Ms [redacted] who provided all of her personal details when entering a competition ran by Global Lists and SPAR. According to Global Lists the only verification checks that they perform is 'an annual HLR lookup of our numbers to ensure that they are still live.'

Deliberations and finding

10. The Adjudicator only considered section 5.2.1 which deals with the identification of spam. It contains no positive or negative duties that are placed on WASPs. Rather the duties are contained in section 5.3 which deals with the prevention of spam. It reads as follows:

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

In our view, nothing turns on this apparent inaccuracy as the complaint made to the WASP clearly indicated the nature of the complaint even if the wrong section was quoted. The WASP also did not raise this issue in its appeal.

Rather the appeal indicated that the WASP accepted its culpability in sending spam but requested a reduction of the fine imposed.

11. As indicated above we will not deal with the irrelevant matters raised about various other possible transgressions which were not part of the finding of the Adjudicator. We will focus only on the actual infringement found by the Adjudicator and the submissions on that issue.
12. The WASP in its appeal has now presented additional information on how the consent was obtained by their information supplier in South Africa, Global Lists. This information was not provided at the time of the adjudication although it was clearly required. The complaint by the WASP that it was not afforded sufficient time to provide this information at the time of the adjudication lacks particularity as it provides no timeline on when it first became aware of the spam complaint, the emergency panel hearing and the eventual adjudication. The emergency panel hearing took place on 2 December 2013 but was concerned with other complaints, including some of the original complaints of the Complainant. The complaint in this matter was, however only escalated to adjudication in February 2014. The Adjudicator delivered his/her decision in July 2014. There seems therefore to have been ample time for the WASP to have submitted this information to WASPA before the decision in July 2014. The information seems relevant and will therefore be considered, but the fact that it was not presented earlier, will be reflected in our discretion regarding refunding of the appeal fee.
13. From the additional information provided it seems that the number provided to Global Lists in 2009 is the same number now used by the Complainant. On the facts before us it is open to speculation on how this may have arisen and the following possibilities present themselves:
 - 13.1. The number previously belonged to the person who consented to the marketing information and the number was subsequently awarded to the Complainant;
 - 13.2. The number provided on the consent form was in error;
 - 13.3. The document provided by Global Lists deliberately misrepresents the actual facts or is fabricated.

14. We have insufficient information to come to a positive conclusion on which of the three possibilities is correct. The additional information should have been provided at the time of the adjudication and cannot be considered at this time as there is insufficient opportunity at this stage of the proceedings to obtain additional information to verify this information. This would be prejudicial to the process in this instance. There was ample opportunity for the WASP to have provided this information in a timely fashion at the time of the adjudication allowing the Adjudicator to request additional relevant information from the Complainant.
15. On the information before the adjudicator, it is clear that there was no proof of consent and that there has therefore been an infringement of section 5.3 read with section 5.2.

Sanctions

16. The main issue that the WASP has raised in relation to the sanctions forming part of this appeal was the question of whether the sanctions are too broad and excessive. The Adjudicator did not indicate whether there had been similar transgressions by the WASP in the past and this must therefore be regarded as a first infringement of these provisions. In the light of this consideration, the fine is reduced to R25,000 and suspended for one year provided that the WASP does not transgress section 5.3 read with 5.2 within this period.
17. Due to the fact that the WASP only provided the relevant proof of consent at the time of appeal and that such facts were, due to its own fault, not available at the time of the adjudication, the appeal fee is not refundable.