WASPA appeals panel

Complaint 24395

REPORT OF THE APPEALS PANEL

Date of face-to-face hearing: 16 March 2015

Date of report: 26 March 2015

WASPA Member: Celerity Systems (Pty) Ltd t/a BulkSMS

Applicable Code versions: 12.4

Summary of finding:

Appeal in respect of Clauses 5.2.1, 5.2.2 and 5.3.1 upheld.

Appeal in respect of Clause 5.1.3 dismissed.

Sanction uplifted and replaced with a warning.

Partial appeal costs refund.

Background

1. This matter arises out of a complaint that was lodged on 19 August 2014 in respect of an SMS inviting the complainant to take part in a survey in exchange for a R2,00 airtime credit which would be paid by the message originator to the recipient (rather than the recpient paying to respond to the message).

2. The complaint revolved specifically around the fact that the complainant is on the Direct Marketing Association's do-not-contact register and therefore questioned how the WASP came to have his number. In the circumstances, he alleged that the message was spam. In addition, he pointed out that there was no opt-out option in the message sent.

3. The adjudicator found that the WASP had breached "Clause 5" of the Code and imposed a fine of R15000 on the WASP. The reasons for this finding will be referred to, insofar as they are relevant, below.

Appeal Grounds

4. The WASP appealed the adjudication. The central basis for the appeal was that the WASP contended that the adjudicator had confused commercial messages with direct marketing messages. The WASP's argument was that while the adjudicator had correctly found that the message in question is a commercial message, the adjudicator had then incorrectly applied sections of the Code meant for direct marketing messages only.

5. The WASP alleged that the basis of the adjudication was in terms of Clauses 5.2.1 and 5.1.3, and that this is clear from the wording of the adjudication, despite the adjudicator's failure to identify the specific sub-clauses that had been breached.

6. The details of the appeal will be discussed below.

Preliminary issues

7. It was agreed that version 12.4 of the Code is the correct version for consideration of this complaint.

8. While the adjudicator failed to clearly identify the sub-clauses in terms of which the finding was made, the Panel accepted the WASP's arguments that the adjudicator had in effect found the WASP guilty of breaching clauses 5.2.1, 5.2.2 (and therefore indirectly Clause 5.3.1) and 5.1.3. In addition, the WASP did not dispute that the appeal panel should consider Clause 5 in its entirety (and related definitions as used in clause 5).

9. The Panel notes that the adjudication was flawed as a result of the adjudicator's failure to specifically identify the clauses that were breached by the WASP. As the face to face hearing afforded the WASP an opportunity to address all relevant issues, the Panel does not believe that the WASP was prejudiced by this failure.

10. The Panel notes at this stage that clauses 5.2.1, 5.2.2 and 5.3.1 and their relationship must be properly understood. Clause 5.3.1 sets out the rule regarding spam and it is only this clause that can be breached. Clause 5.2.1 and 5.2.2 serve to supplement the definition of spam. This will be discussed in detail below.

11. The complainant objected to the failure to provide him with the appeal document in order to respond to it. While the Panel was sympathetic to the complainant's view, it is also satisfied that the procedure that has been followed is in line with the procedure set out in the WASPA Code as it stands. It is not for this panel to override that procedure but to act within it.

12. As a final aside, for the purposes of future clarity, the Panel notes that the correct version of clause 5.2 in version 12.4 of the Code is the HTML version on the WASPA web site and that the the PDF version of Code 12.4 which is also on the Web site is incorrect.

Issues before us

13. The following issues were identified:
    13.1 Whether the message in question could be classed as 'direct marketing' or whether it was simply a commercial message.
    13.2 Whether the message in question is spam.

14. Flowing from these questions, the Panel must determine whether any section of Clause 5 is breached, but more specifically whether 5.3.1 as read with Clauses 5.2.1 and 5.2.2 and/or 5.1.3 were breached.

The decision of the Panel

15. Clause 2.8 of the Code defines a "commercial message" as "…a message sent by SMS or MMS, NI USSD or similar protocol for commercial purposes." It was common cause between the WASP and the adjudicator that this message is a commercial message, and the Panel agrees.

16. Clause 2.13 defines "direct marketing message" as a commercial message "…that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient."

17. The importance of this definition lies in the fact that Clause 5.2.1, which is the clause in terms of which the adjudicator appears to have made the finding, refers specifically to direct marketing messages.

18. The WASP submitted, in essence, that the message did not promote any goods or services and therefore did not constitute a direct marketing message. The WASP also submitted details about market research surveys and the business structure of its client – the IP in this matter.

19. One member of the Panel was persuaded that the meaning of Clause 2.13 in this version of the Code is that the **message originator** must always be the party that stands to benefit from the flow of goods and services for a message to be "direct marketing". In this matter it is the recipient who stands to provide a service. The other two members of the Panel were not persuaded that the wording of this version of Code should be so restrictively interpreted. They argued that even in situations where the **message recipient** stands to be paid a message could still be classed as a "direct marketing message".

20. This disagreement of interpretation need not be resolved for two reasons. The first, and most germane, is that the Panel was unanimous that the situation actually before it was not

an example of a direct marketing message. The Panel considered that the survey was not related to any product or service and appeared to be a genuine attempt to access *bona fide* market insights. It carried no secondary marketing benefits. We considered the R2.00 payment a "sweetener" and not a payment for services rendered.

21. The second reason that the Panel considers it unnecessary to decide whether direct marketing always requires a flow of goods or services from the message originator is that this issue is clarified in version 13.6 (the current version) of the Code. According to this definition, "'Direct marketing' means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or (b) requesting the person to make a donation of any kind for any reason." Under this definition, with regard to the supply of goods or services, it is clear that the supplier of goods and services must stand to benefit from the direct marketing message, rather than the message recipient for the message to amount to direct marketing.

22. Given the above, the Panel found that this message is a commercial message but not a direct marketing message.

23. Clause 5.2.1 quite clearly applies only to direct marketing messages and not to commercial messages (whether spam or not). The message therefore does not fall within the ambit of Clause 5.2.1.

24. The next question that arises is whether the message could nonetheless be considered to be "spam"?

25. "Spam" is defined in clause 2.24 as "…unsolicited commercial communications including unsolicited commercial messages as referred to in clause 5.2.1". Therefore, the mere fact that the message is not considered to be direct marketing does not mean that it could not be considered to be spam.

26. Clause 5.3.1 states that, "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".

27. For this reason, the Panel had to carefully consider the definition of spam in the context of the Code as a whole. It therefore turned to the WASP's arguments on this point.

28. Essentially, the WASP argued that the definition of spam hangs on the word "unsolicited". There are two definitions of unsolicited in the Code. The first is in Clause 5.2.1 which states, "Any direct marketing message is considered unsolicited (and hence spam) if. . .". The second definition can be found in Clause 5.2.2 which states that: "Any commercial message is considered unsolicited after a valid opt out request". The Panel then considered whether a commercial message which is not a direct marketing message is **only** unsolicited (and hence

spam) if it falls within Clause 5.2.2, or whether the ordinary meaning of unsolicited should apply?

29. In grappling with this question, the panel considered that Clause 5.2.1 was changed from version 11 of the Code which referred to “commercial messages” and not “direct marketing messages”. In other words, the drafters of the Code took an active decision that the provisions of Clause 5.2.1 must no longer apply to all commercial messages and must apply **only** to direct marketing messages. Any interpretation of the Code must therefore be consistent with the fact that Clause 5.2.1 is not intended to be binding on commercial messages that are not also classed as direct marketing messages.

30. If one interprets Clause 5.2.2 to be simply an example of when a commercial message is unsolicited then one must apply the ordinary meaning of “unsolicited”. The Panel is of the view that the ordinary meaning of “unsolicited” aligns almost completely with the provisions of Clause 5.2.1. In other words, if one interprets the reference to “unsolicited commercial messages” in the definition of “spam” as going further than Clause 5.2.2, then one effectively brings commercial messages back within the requirements of Clause 5.2.1. This interpretation cannot be correct as the drafters of the Code specifically narrowed the reach of Clause 5.2.1 to direct marketing messages only.

31. Given this, the Panel was persuaded that Clause 5.2.2 reflects an exhaustive list of when a commercial message will be “unsolicited” and hence spam. In essence this means that a commercial message is only considered to be “spam” if a WASP sends a message after the consumer has opted out. In contrast a direct marketing message could – in terms of the WASPA Code of Conduct version 12.4 – be spam if no commercial relationship existed between the parties as set out in clause 5.2.1. It is common cause that the message in question was not sent after an opt out request.

32. **The message is therefore not an unsolicited commercial message and is therefore not spam. It is therefore not in breach of Clause 5.3.1**.

33. In plain language, this Panel is satisfied that the nature of this message is such that, in terms of the wording of the Code, the WASP does not have to show how and when the recipient consented to receive it.

34. The only remaining question before us is therefore whether the WASP complied with the provisions of Clause 5.1.3 in relation to the opt out function.

35. As the matter stood at the time, the WASP conceded that the first message stated “For help reply HELP”. If the recipient sent the “HELP” message, they would get the opt-out instructions. If they sent STOP at this point, they would be removed from the list.

36. The first part of Clause 5.1.3 states that: “For commercial messages, a recipient should be able to stop receiving messages from any service by replying with the word STOP”. We are satisfied that this part of the Clause was met.

37. However, the Clause goes on to read, “The reply STOP procedure should be made clear to the recipient at the start of any messaging service. . .”.

38. The WASP accepted that this was not a situation where it was impossible to do so, and illustrated by the fact that the amended survey message now does indicate that the consumer can send the message “STOP” in order to cease receiving further commercial messages from the WASP.

39. However, the WASP argued that the import of the words “at the start of any messaging service” is to limit this part of the Clause to services that involve ongoing messages, and not once-off messages such as the message in question.

40. The Panel disagrees. In the first place, the reach of the Clause is defined in the first words: “For **commercial messages**”. In the second place, the clause clearly reads “**any** messaging service”. In addition, the Panel noted that the Code itself allows only two exceptions for when a “STOP” instruction need not be heeded by a WASP. Those are set out in Clauses 5.1.7 and 5.1.8, and are for situations where the message is necessary to enforce a contract or necessary in terms of the law. The Panel is of the opinion that these exceptions are exceptions to Clause 5.1.3 and are the only exceptions to Clause 5.1.3. Moreover the WASP admitted that a subsequent message would be sent 30 days later if the consumer failed to respond to the initial message.

41. The WASP was therefore in breach of Clause 5.1.3.

Sanctions

42. The adjudicator imposed a fine of R15 000 in respect of the breaches but did not indicate which breach carried what weight.

43. This Panel upheld the Appeal in respect of Clauses 5.2.1, 5.2.2 and 5.3.1 and no sanction can remain for this aspect of the matter.

44. The Panel dismissed the Appeal in respect of Clause 5.1.3. That being said, the Panel felt that the WASP’s approach had not been one of flagrant disregard, but rather an application of its honest understanding of the Code. In addition, the Panel was influenced by:

- The fact that the STOP message nonetheless worked;
- The fact that the STOP instruction immediately followed the HELP message;
- The fact that both the STOP and HELP messages are *ex facie* free messages;
- The fact that the WASP has amended the message.

45. The Panel considers that an appropriate sanction in this respect is a warning to the WASP that future breaches of this Clause will take this ruling into account.

46. **The sanction of R15 000 is therefore uplifted in its entirety.**

Costs

47. In relation to costs, the Panel considered that the main motivation for the WASP in bringing the appeal was for clarification of the application of the Code to market surveys. The Appeal in relation to Clause 5.1.3 was in a manner incidental to the matter.

48. It can therefore be said that the WASP is successful on the main thrust of its appeal, and unsuccessful on the incidental issue. That being said, it was still partially unsuccessful.

49. **For that reason, we order the return to the WASP of two thirds of its appeal fee, the remaining third to be retained by WASPA.**