



Adjudicator's Report

Complaint reference	24453
WASPA member(s)	Buongiorno South Africa (0002)
Complainant	WASPA Secretariat
Type of complaint	Subscription service
Date complaint lodged	2015-03-10
Date of alleged offence	2011-09-22
Relevant Code version	13.6
Clauses considered	24
Related cases considered	16493 (including the appeal decision dated 2014-11-24)

Complaint

This matter is, essentially, a resubmission of complaint 16493 which was adjudicated, appealed and brought to a conclusion on appeal. The appeal panel deciding the appeal ("the 16493 appeal panel") upheld the appeal on the basis of a fatal procedural defect in the adjudication. The appeal panel did not make a ruling on the substantive merits of the appeal against 16493; only an observation regarding an aspect of the matter.

This is the text of the complaint, as it is before me:

Complainant : WASPA

Email : complaints@waspa.org.za

Date : 2015-03-10

Wasp_Service : Buongiorno SA

Clauses identified:

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.10.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

(a) proof that the customer has opted in to a service or services; (b) proof that all required reminder messages have been sent to that customer; (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and (d) any record of successful or unsuccessful unsubscribe requests.

Description : This is a complaint linked to 16493. In the appeal decision for that matter, the panel found that the adjudicator had made a procedurally defective ruling, rather than one which had no substantive merits.

The complainant has, on this basis, requested that an adjudicator review the original complaint again. WASPA's Head of Complaints has been consulted and has agreed with the complainant's request, and instructed the Secretariat to lodge this complaint as a follow up on 16493.

A copy of the original complaint 16493 is attached.

Other relevant documents are available as follows:

- <http://www.waspa.org.za/code/download/16493.pdf>

- http://www.waspa.org.za/code/download/16493_appeal.pdf

Special note: Although complaint 16493 does not fall within the six month time period as set out in clause 24.6 of the code, the original complaint was logged by the complaint within this time frame.

Member's response

The member's attorneys filed extensive submissions on both procedural and substantive aspects of the present complaint. I agree with the following submissions in particular:

34. At the outset, it must be noted that the Code (both version 13.6 and version 11) does not permit for a reinstitution of any complaint which has served before the appeal panel. There is no empowering provision in either version which permits a reinstitution and reconsideration of a spent complaint, which has already been before the appeal panel. In addition, there is no mechanism which affords the complainant any further say in the matter after the appeal panel has made a decision.

35. As WASPA derives its powers from the applicable Code of Conduct (as this "complaint" was lodged on 10 March 2015, the relevant version of the Code is version 13.6 ("**the Code (v.13.6)**"); in the absence of an express empowering provision for reinstitution of a complaint, such "complaint" is vitiated in its entirety. The full complaint adjudication process as envisaged in version 11 of the Code has been fully followed in respect of the complaint lodged in 2011 and that process has now been completed and it does not avail a disgruntled complainant to attempt to resuscitate it. It is procedurally unfair and incompetent to institute the complaint again. If it were otherwise, one could become embroiled in an endless cycle of re-referrals every time an appeal panel deals with one aspect or argument which is wholly dispositive of the matter, but not with all others. It is important to note that there has never been a requirement for an appeal panel (or any appeal court) to set out or even consider every conceivable basis on which the complaint or case should be dismissed. One ground is sufficient and is dispositive of the matter. Once the complaint goes through the disciplinary process, that is, and necessarily must be, the end of the matter (barring, of course, approaches to Court if necessary).

36. Indeed, as elaborated upon below, no complaint is formally before WASPA. The very definition of a "complaint" (as per clause 24.2) is that it is a "new complaint" or a "complaint of breach of a previous WASPA adjudication". In this instance, the purported complaint is neither, does not fall within the ambit of the Code (v.13.6) and, accordingly, WASPA has no jurisdiction to entertain a complaint which has already been before, and decided by, the appeal panel. Similarly, the complainant has no ability to reinstitute a complaint, and it is unclear how WASPA can purport to entertain such resubmission.

37. Moreover, through the revival of a spent complaint and an immediate referral of such complaint to a formal complaints adjudication process, BSA is denied the procedural rights embodied in the Code (v.13.6) to have the complaint disposed of informally, at far less cost to BSA. Given that BSA previously offered a complete refund to the consumer, it is submitted that this complaint, which is historic and clearly has no relevance to the current operations of BSA, could have been resolved informally. Even if the complainant does not like or favour such resolution, she/he/it can no longer abuse the Code and push through complaints to formal complaint procedure, which is now in the

sole discretion of WASPA.

38. *The appeal panel in this case made a final finding in this matter and it is not competent for WASPA (or the complainant) now to resubmit the complaint many years after the original complaint was lodged. There is no provision of the Code which allows a complainant, unhappy with a ruling by the appeal panel, to attempt to reinstate the matter before WASPA.*

39. *The fact that the complainant disagrees with the appeal panel's finding is irrelevant; WASPS should not be subjected to the expense of participating in a formal complaints process and appeal hearing, to succeed therein, only to face the same complaint arising years later.*

40. *Members should be able to rely on the fact that final decisions will remain final and complaints will not be reinstituted against them on the insistence of a complainant, WASPA or any party. BSA, and other WASPs expend enormous human and financial resources in dealing with complaints. Further, additional information that may be required for a reinstituted complaint may not be available years after the original complaint and employees previously involved in such matters may have since left the company, which would unfairly prejudice members in preparation of their responses to such resubmitted complaints. BSA submits that reinstituting complaints is not provided for by the Code (v.13.6) and is unfair to members who must then again argue complaints in which they have previously been successful. In this case, BSA does not have all the material information which is relevant to this complaint which it had when this complaint was originally instituted in 2011.*

The member's submissions succinctly address the fundamental challenges facing this present complaint as the reincarnation of complaint 16493. I have highlighted the key principles in these extracts.

For the sake of completeness and clarity, note that my agreement with the arguments in these extracts from the member's submissions don't signify my agreement with all of the member's submissions. It is not necessary for me to deal with the balance of the member's submissions for the purposes of this report.

Sections of the Code considered

This complaint is governed by version 13.6 of the Code which is a redraft of the Code. The complaint also references several clauses in version 11 of the Code which governed complaint 16493. For the reasons which I set out below, I have limited myself to version 13.6, specifically the following clauses:

24.2. A **"complaint"** means a new complaint or a complaint of a breach of a previous WASPA adjudication.

...

24.6. A complaint must be made within six months of the date of alleged breach of the Code. WASPA may, at its discretion, accept a complaint after this six month window, if the complainant provides a compelling reason for the delay in lodging the complaint.

Decision

I agree with the member's submissions regarding the procedural irregularities of this "follow-up" to a decided complaint. In amplification, if I expand clause 24.6 of the Code to include the definition of "complaint" then it reads as follows:

24.6. A [new complaint or a complaint of a breach of a previous WASPA adjudication] must be made within six months of the date of alleged breach of the Code. WASPA may, at its discretion, accept a complaint after this six month window, if the complainant provides a compelling reason for the delay in lodging the complaint.

This complaint is, essentially, complaint 16493 which has been resubmitted to me on what may be an implicit request that I decide the substantive aspects of that original complaint, perhaps because the substantive aspects of 16493 were not decided by the 16493 appeal panel. I use vague wording here because the present complaint has no real substance or indication of relevant Code infringements.

This complaint, 24453, is defective for two reasons:

1. This present complaint is not a "new complaint or a complaint of a breach of a previous WASPA adjudication".
2. The complaint before me has no real substance other than the reference to this complaint being a "follow-up" to 16493. As the member's lawyers pointed out, this is not an option the Code caters for, procedurally.

Complaint 16493 was adjudicated and the appeal against the adjudicator's decision was decided by a panel of three appeal panelists. Even though the appeal panelists upheld the appeal on the basis of procedural irregularities in the 16493 adjudication, that matter was nevertheless concluded.

It is not procedurally correct for me to re-open a complaint which has been finalised and which is not a "complaint" in terms of the Code. In the circumstances, I dismiss this complaint.