

REPORT OF THE APPEALS PANEL

Date	18 December 2013
Appellant	Buongiorno
Complaint Number	12622
Code Version	V10.0

1 INTRODUCTION AND HISTORY OF THE COMPLAINT

1.1 This appeal arises from a complaint lodged in March 2010, more than three years prior to the consideration of the appeal by this panel.

1.2 The panel acknowledges that the delay has exacerbated consideration of the appeal, which is regrettable.

1.3 The complainant is a member of the public for whom it appears, English is not a first language, or for whom written English is not easy. What is clear from the information provided to the panel is that the complainant did not want the service for which he was charged some R3,000 between 06 December 2010 and 06 March 2011.

1.4 Simply put, the issue in this appeal concerns:

1.4.1 whether or not the complainant subscribed to the service provided by the Appellant; and

1.4.2 whether or not the Appellant complied with the WASPA Code of Conduct in dealing with the complaint.

1.5 The panel is left with the difficult task of seeking an equitable outcome in circumstances where there is little or no reliable evidence. It may well be that the complainant subscribed to the service, but unwittingly so. It may well be that the Appellant complied with the Code, but the panel has only the Appellant's version to rely upon.

2 DECISION OF THE ADJUDICATOR

2.1 Findings of the Adjudicator

2.1.1 The adjudicator considered the following sections of the Code;

2.1.2 section 4.1 - provision of information to customers;

2.1.3 section 5.2 - identification of spam;

2.1.4 section 5.3 - prevention of spam; and

2.1.5 section 11.3 - subscription initiated via web or WAP.

2.2 Sanctions imposed by the adjudicator

2.2.1 The adjudicator found that "part of the requirements of the Code were complied with" and imposed a "lenient" fine of R2,500 in relation to section 11.3 of the Code.

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- 2.2.2 In consideration of section 4.1 of the Code the adjudicator did “not feel that this particular section needs to be dealt with in any great detail”.
- 2.2.3 In consideration of section 5.2 and 5.3 of the Code the adjudicator states that there is no intention to “rule on the issue of spam” and the intention is “merely to have it (the point) noted”.
- 2.2.4 In consideration of section 11.3 the adjudicator held the view that the Appellant had not “strictly” complied with the requirements of the section. He did not cite reasons for this view nor, did he identify the sub-sections concerned.
- 2.2.5 The adjudicator's report records that there is “no proof available” as to the subscription process.
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3 GROUNDS OF APPEAL

- 3.1 The Appellant's attorneys, in a formal response addressed to WASPA, dated 23 August 2011, provide the grounds for an “appeal to review” the adjudication of complaint number 12622.
- 3.2 The panel has applied its mind to the full import of the information provided in the appeal record, and does not think it necessary to record verbatim, the contents of the response in this report. For ease of reference, a summary of the contentions made and the evidence provided is set out hereunder.
- 3.3 While the panel notes the Appellant's preference for version 11 of the Code to apply to the appeal, the panel will follow the customary approach of applying the same version, in this case version 10 of the Code, which is applicable to the adjudication, to the appeal.
- 3.4 The panel will not be drawn into a consideration of administrative justice which, while not specifically argued in this case, is inherent in the contentions made by the Appellant's attorneys (see 3.6 below).
- 3.5 In summary, the “appeal” consists in a request for a review of both the findings made and the sanction imposed by the adjudicator.
- 3.6 The grounds for the review are that the adjudicator's decisions were (i) based on incorrect facts, (ii) based on a tainted and procedurally flawed decision-making process, (iii) there is a failure to give reasons for findings and / or (iv) there is an incorrect finding on the merits. These are of course only grounds for a review, not an appeal.
- 3.7 The Appellant's attorneys summarise chronologically the record of events, commencing with the informal complaint on 15 March 2011, through conversion to a formal complaint on 11 April 2011, the Appellant's response on 14 April 2011 (which included a confirmation of cancellation of the subscription service but refusal to refund subscription charges), culminating in the adjudicator's report on 14 June 2011.

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- 3.8 The appeal summary is followed by a detailed response, the essence of which is the issue before the panel set out in 1.6 above.
- 3.9 The one fact acknowledged by the Appellant, through their attorneys, is that they did omit to send a subscription reminder message for the month of March 2011 (this being a reference to section 11.6 of the Code - reminder messages to all subscription service customers, which was a section not specifically considered by the adjudicator).
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4 FINDINGS AND DECISIONS OF APPEALS PANEL

4.1 The findings of the appeal panel

- 4.1.1 The panel deems it necessary only to consider section 11.3 of the Code for the purposes of this appeal. The adjudicator chose to exclude the application of the other sections considered.
- 4.1.2 The panel finds that there is insufficient evidence to show that the complainant did not subscribe to the service.
- 4.1.3 The panel finds that there is considerable evidence to show that the Appellant did comply with the double opt-in requirements of the Code.
- 4.1.4 The panel is of the view that the Appellant's (admitted) failure to provide the March reminder message is a breach of section 11.6 of the Code.
- 4.1.5 The panel is not convinced that the adjudicator's finding that "part of the requirements of the Code were complied with", was a reference to section 11.6 of the Code or not. We are in fact not sure of the adjudicator's application of the Code to the section at issue (section 11.3).
- 4.1.6 The panel cannot condone a breach of section 11.6 of the Code. We do however acknowledge that the failure to send a reminder message for the month of March is relatively minor in the circumstances, if the evidence provided by the Appellant can be considered to be reliable.
- 4.1.7 The panel cannot accept that the complainant neglected to attend to the reminder messages that he did receive in relation to the subscription (which are confirmed by the Appellant) and related billing for a period of 3 months before lodging the complaint. Some accountability lies here, despite any language limitations that the complainant may have.

4.2 The Decisions of the appeal panel

- 4.2.1 The panel finds the fine of R2,500 imposed on the Appellant equitable, and upholds the fine in relation to section 11.6 of the Code.
- 4.2.2 No refund is to be made to the complainant in the circumstances.
- 4.2.3 The appeal fee may be refunded.