



Appeal Panel's Report

Complaint/s on appeal	16493
Appellant/s	Buongiorno SA
Date appeal lodged	2012-09-21
Appeal decision date	2014-11-24
Relevant Code version	11
Clauses considered	11.2.1, 11.10.2 and 14.3.14
Relevant Ad Rules version	Not considered for the purposes of this appeal report
Ad Rules clauses	Not applicable
Related cases considered	The appeal decision regarding complaints 11258, 11582, 11626, 13038 and 13039 (" the 11258 appeal decision ¹ "); The appeal decision regarding complaints 15477, 15722, 16851, 16977, 17184 and 17236 (" the 15477 appeal decision ² ")

1. This appeal

- 1.1. The Appellant is Buongiorno SA ("the Appellant").
- 1.2. The adjudicator who considered the complaint against the Appellant found against the Appellant, in a fashion, and sanctioned the Appellant as follows:

¹ http://old.waspa.org.za/code/download/11258_appeal.pdf

² http://old.waspa.org.za/code/download/15477_appeal.pdf

In determining an appropriate sanction, the following factors were considered:

The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct; and

The SP's subsequent response.

The SP is instructed to reimburse the Complainant in full.

The SP is fined R 15 000-00 which must be paid to the WASPA Secretariat within 7 (seven) days are being notified hereof.

- 1.3. The adjudicator raised sections 11.2.1, 11.10.2 and 14.3.14 although focused primarily on section 11.10.2 of the Code and 11.10.2(a) in particular. This section of the Code states the following:

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.

- 1.4. Section 11.2.1 states the following:

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.

- 1.5. Lastly, section 14.3.14 states the following:

14.3.14. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

2. Issues raised on appeal

2.1. The Appellant has appealed against the decisions on the following grounds:

2.1.1. “the adjudicator’s decision making process was tainted by fundamental procedural flaws and was therefore irregular; and/or,

2.1.2. “the adjudicator made incorrect findings on the merits”.

2.2. This appeal was lodged around the same time as appeals against decisions regarding complaints 11258, 11582, 11626 and 11863 which were decided and reported as the 11258 appeal decision.

2.3. Many of the issues raised in this appeal were dealt with in the 11258 appeal decision so we have referred to portions of that report in this report where appropriate.

2.4. *Procedural concerns*

2.4.1. The Appellant raised a procedural concern in its grounds for appeal against the adjudicator’s decision in 16493, namely a failure to apply the Promotion of Access to Justice Act (“PAJA”), alternatively the principles of natural justice, specifically the right to a fair hearing.

2.4.2. It is unclear how the Appellant’s legal arguments relating to PAJA’s application to the Code relate to this specific matter although, having regard to the adjudicator’s report, we have formed our own view on the relevance of this procedural concern to the decision in complaint 16493.

2.5. *Substantive appeals*

2.5.1. The Appellant appealed against apparent findings on the basis of sections 11.2.1, 11.10.2 and 14.3.14 of the Code.

3. Appeal Panel's Decision

3.1. *Procedural concerns - fair hearing*

- 3.1.1. The question of PAJA's application to WASPA's adjudication process was addressed in the 11258 appeal decision and we reiterate the appeal panel's decision on that question.
- 3.1.2. Both the 11258 appeal decision and the 15477 appeal decision affirmed that the principles of natural justice govern WASPA adjudications and, in particular, that members are entitled to a fair hearing by adjudicators. Where members are not afforded a fair hearing, decisions taken against them may be set aside on the basis that they are procedurally irregular.
- 3.1.3. In this matter, the Appellant seems to have included a series of legal arguments regarding PAJA's application which it has included in other appeals without indicating how these arguments relate to this appeal in particular.
- 3.1.4. Leaving that aside, the issue that stands out for us in this matter is that the adjudicator arrived at a number of conclusions regarding the logs the Appellant produced (after a fashion) to substantiate its arguments that its subscription mechanism was compliant with the Code.
- 3.1.5. The adjudicator questioned the logs' credibility and found that the Appellant had failed to submit logs that met the requirements in section 11.10.2(a) of the Code and provided "proof that the customer has opted in to a service or services".
- 3.1.6. Critically, the adjudicator seems to have arrived at this conclusion without referring his or her doubts regarding the logs' veracity to the Appellant for further submissions, or indeed basing it on any firm evidence. The adjudicator seems to have relied on section 14.3.14 of the Code as a justification for arriving at this conclusion without requesting further input from the Appellant.
- 3.1.7. The Appellant addressed the logs' veracity in its appeal submissions from paragraph 31 of the Appellant's appeal submissions and, having regard to the Appellant's arguments in the ensuing paragraphs, we see no reason to doubt the Appellant's explanation of why it produced Excel spreadsheets from the source

SQL database of its interactions with the complainant or why the Appellant's Excel formatted logs should "raise suspicion on the authenticity thereof".

- 3.1.8. The logs' authenticity and the adjudicator's concerns about whether the logs proved that the complainant subscribed to the service in question were central to the ultimate finding against the Appellant. This Panel is more concerned about the fact that the logs show only outgoing messages and not incoming messages which is what we would usually rely on to show that the consumer did in fact subscribe. However, the adjudicator's failure to invoke section 14.3.10 (as the Appellant suggested in its appeal submissions) amounts to a failure to respect the Appellant's right to a fair hearing. We therefore have no choice but to set the adjudicator's findings against the Appellant aside on the basis that these findings were fatally defective on procedural grounds.

3.2. *Substantive appeal*

- 3.2.1. Our finding that the decision against the Appellant was procedurally defective makes it unnecessary for us to consider the substantive merits of the appeal.
- 3.2.2. That said, we make the following observations:
- 3.2.2.1. The adjudicator purported to find the Appellant in breach of section 11.2.1 but this finding was unmotivated and appears to stem only from the rejection of the logs. The enquiry in terms of section 11.2.1 is a valid one in an issue where a consumer claims not to have subscribed but is a separate enquiry to that of factual subscription. It must be properly put to the WASP and properly considered. . Even if we had not found in the Appellant's favour on procedural grounds, we would have set aside the adjudicator's apparent finding in respect of section 11.2.1 for this reason, despite the fact that s we have doubts that the Appellant's campaign was compliant with the Code.
- 3.2.2.2. As we noted above, the adjudicator seemed to rely on section 14.3.14 as a justification for his or her failure to request further submissions from the Appellant regarding the logs' authenticity and veracity. Section 14.3.14 can't be a justification for disregarding a member's right to a fair hearing and adjudicators must find a balance between adjudicating complaints on the basis of information before them and not making further reasonable

enquiries which would afford the members concerned an opportunity to exercise their right to a fair hearing.

3.2.2.3. We refer adjudicators to the 12588 appeal decision and the 15477 appeal decision for further guidance on this issue.

3.3. *Conclusions*

3.3.1. We uphold the Appellant's appeal against the decision against it on the basis of the procedural defects in the adjudicator's decision for the reasons set out above.

3.3.2. The Appellant is, therefore, successful and we direct the Secretariat to refund the Appellant's appeal fee.