



Wireless Application Service Providers' Association

Appeal Panel Report

Complaint number	20858
Cited WASPA members	Buongiorno South Africa (0002)
Notifiable WASPA members	<i>na</i>
Source of the complaint	Competitor
Complaint short description	Subscription service
Date complaint lodged	18 June 2013
Applicable version of the Code	12.4
Clauses of the Code cited	11.1. – 11.10
Related complaints considered	none
Outcome	Appeal successful

Is this report notable?	Not notable
Summary of notability	

Background

The Appeal before us arises from the following situation:

- The Adjudicator considered a complaint in terms of Clauses 9.1.1, 11.2.1, 11.2.2 and 11.2.3 in respect of the material in this complaint.
 - In considering this material, the Adjudicator became aware that there might be a breach of Clauses 3.3.1, 4.1.1. and 4.2.1.
 - The Adjudicator found in favour of the WASP in relation to the cited clauses and made a ruling.
 - He referred the matter back on the new clauses, purporting to be acting in terms of Clause 14.3.10 of the Code.
 - The WASP refused to respond on the merits, citing the same procedural concerns as they cite on appeal, and which we will canvas below.
 - The matter was referred back to the same adjudicator who made a finding on the merits, finding a breach of Clauses 3.3.1, 4.1.1. and 4.2.1.
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Appeal

In essence, the Appellant raises several main points of argument in relation to the wording of Clause 14.3.10:

- The new clauses must relate to the original complaint;
- The new clauses must be raised before making a finding on the complaint before him;
- The adjudicator was *functus officio* after the original decision;
- In ruling on the new clauses, the adjudicator was biased;
- It is unclear what material the finding was made on and whether it relates to the WASP.

The WASP also made substantive argument on the clauses which are unnecessary to traverse given the outcome of the appeal.

Clauses

The relevant clause for the subject of this appeal is Clause 14.3.10, the clause under which the adjudicator purported to act:

14.3.10. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

Decision

We are in agreement with majority of the points raised by the Appellant in relation to the interpretation of Clause 14.3.10.

It is not the mandate of this Panel to comment on whether this procedure – which has subsequently changed – is the most legally desirable procedure. It is this Panel's mandate to consider whether the adjudicator acted within his mandate.

This clause, in this Panel's opinion, creates a two legged test:

- That the adjudicator may ask for additional information relating to the complaint;
- That the adjudicator may request that the member respond to **any** additional breaches of the Code **discovered during** the investigation of the complaint, but which were **not specified** in the original complaint. (our emphasis).

We are of the opinion that the second leg of the test is not limited to the scope of the complaint, and is in fact completely clear that it may relate to breaches NOT specified in the complaint.

However, this becomes moot in this matter as we agree that the raising and consideration of additional clauses **must** occur “during the investigation of the complaint”. In this matter the Adjudicator made a decision on the complaint and effectively lodged a new complaint on the additional clauses. In other words, presuming that he was entitled to raise a new area of

complaint, that new area should have been raised and considered in his original ruling. Instead, he ruled (in favour of the WASP) on the original clauses, and then undertook a new investigation.

While we are of the opinion that there is nothing in the Code that prevents an Adjudicator from lodging a complaint, and even from lodging a complaint that relates to a matter he has considered, we are in absolute agreement that to then allow the Adjudicator – who now wears the hat of the complainant – to adjudicate the entirely new complaint is contrary to the principles of natural justice. (It is for this reason that we also consider the wide interpretation of Clause 14.3.10 mooted above to be undesirable, although arguably correct). In the first place – as raised by the Appellant – the adjudicator is *functus officio*, having made a ruling on the complaint before him. In the second place, he is unavoidably biased.

The Appeal therefore succeeds and the Adjudicator's decision is overturned. The Secretariat is directed to refund the appeal fee to the Appellant.