



Appeal Panel's Report

Complaint/s on appeal	24081
Appellant/s	Big Cat Entertainment (affiliate member)(IP)
Date appeal lodged	
Appeal decision date	January 2016
Relevant Code version	12.4
Clauses considered	2.24; 2.25; 3.1.1; 5.2; 3.9.2; 3.9.3; 3.9.4; 11.1; 11.6: 11.6.1-11.6.5; 11.10.2; 14.1.1; 14.1.2; 14.4.4; 14.4.6; 14.9.1; 14.9.2.
Relevant Ad Rules version	N/a
Ad Rules clauses	N/A

1. This appeal

1.1. The Appellant is Big Cat ("the Appellant"). The Appellant has appealed against the adjudicator's finding that it breached clauses 3.1.1, 5.1.2, 11.6.2, 11.6.3, 11.6.4, and 11.6.5 of the Code. The adjudicator ruled as follows:

"There is no contention between the IP and the complainant regarding the nature of the service which is clearly characteristic of a subscription service. Notwithstanding the IP's claim that the complainant had in fact subscribed to the service and the reference to available logs, in the absence of logs or additional evidence such as the promotional material for the service, from the IP to substantiate this claim,

I find that the IP has breached 3.1.1 of the Code and 5.1.2 of the Code in that:

(a) The IP has engaged in unprofessional conduct in subscribing the complainant to services that the complainant has not requested; and

(b) that the IP has not satisfied any of the exceptions to the identification of unsolicited commercial communications.

Furthermore, the IP has not complied with 11.6 of the Code in that the reminder message:

*Reminder ur (sic) subscribed to NuDigits. 1 updates (sic) waiting
http://bzm.tv/s/BEO5D96EF 2 read cost R7/sms max 28 sms/m help? 0213002327. To
unsub sms stop to 41489.*

violates:

(a) 11.6.2 for the reason that it does not adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description].

Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

nor

*Reminder: You are subscribed to [name of service provider] [content/service description].
Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].*

(c) 11.6.3 for the reason that the entire reminder message includes any additional characters other than those specified in 11.6.2.

(d) 11.6.4 for the reason that the content/service description does not describe the content, promotion or service (e.g. "tones" or "poems").

(e) 11.6.5 for the reason that the cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/month" (or RX.XX if the price includes cents). Specifically, no abbreviations of "day", "week" or "month" may be used and the IP's message uses abbreviations.

Hence, the IP has acted in breach of the Code as set out above.

I have evaluated the sections of the Code pertaining to the SP's conduct in governance of the IP relationship visavis the primary grievances of the complainant and conclude I have no cause to

find a violation of the Code by the SP.

Regarding the additional complaints, I am bound by 14.1.1 of the Code and cannot make any determination visavis the network operator, Vodacom.

Regarding the additional complaints against the IP and SP, and the complainant's call for additional action by WASPA, the adjudicator is bound by the parameters of this complaint and the associated subscription service".

The IP was instructed to refund the complainant the amount of R266.00 and was also fined an amount of R25 000.00.

2. Issues raised on appeal

2.1. As the WASPA Affiliate Member (Big Cat) was the only entity sanctioned (rather than Mira Networks), naturally it fell to Big Cat (the "Appellant") to lodge the present appeal.

2.2. Within this appeal submission the following points were raised:

2.2.1. The appellant disputed that clause 3.1.1 of the WASPA Code of Conduct ("CoC") was breached in that the complainant had subscribed via the 'Double Opt-in process' which was confirmed by Vodacom MESH. Essentially the appellant submitted that it would not be able to subscribe the complainant to the service without the complainant completing both steps of the Double Opt-in process.

2.2.2. The appellant disputed that any unsolicited commercial message was sent as the only messages sent to the complainant were the welcome and reminder messages. For ease of reference they have been reproduced in Annexure A. As these are mandatory messages the Appellant was unsure as to why the adjudicator could consider these to be commercial messages.

2.2.3. The Appellant also disputed that the reminder message was not compliant with clause 11.6.2. It is helpful to reproduce the entire section:

(1) Reminder **(2)** ur subscribed to NuDigits. **(3)** 1 updates waiting <http://bzm.tv/s/BE05D962EF> 2 read **(4)** cost R7/sms max 28sms/m **(5)** help?0213002327. **(6)** To unsub sms stop to 41489

Now please check the disclosure layout of the Reminder message as per WASPA Code of Practice clause 11.6.2:

(1) Reminder: **(2)** You are subscribed to [name of service provider] **(3)** [content/service description]. **(4)** Cost [cost of service and frequency of billing]. **(5)** For help call [call centre number + “(VAS)” if applicable]. **(6)** To unsub, sms STOP [service keyword] to [short code].

As you can see, the structure of our reminder message complies with the layout required by the Code of Practice in terms of format, flow, wording and spacing. With regard to section (2) of our layout, the abbreviation “*ur*” used for “*You are*” complies with the requirements of clause 11.1.8 of the WASPA Code of Practice.

2.2.4. The breach of clause 11.6.3 was also disputed as – the Appellant submitted – there are no carriage returns or line breaks or additional characters.

2.2.5. The Appellant also disputed the breach of clause 11.6.4 as they contended that the sentence “1 updates waiting <http://bzm.tv/s/BE05D962EF> 2 read” is actually a description of the “content/service” and that an “update” is as much a content item as a “ringtone” or “poem”.

2.2.6. Clause 11.6.5 was also not breached, the appellant submitted, as the price information disclosure of “R7/sms max 28sms/m” was agreed upon by the Mobile Network Operators and WASPA. The reason for the R7/sms was that it was possible to send several sms’ per day and each one was charged at R7. As a result a R7/day message would be inaccurate. The second section of “28sms/m” means there is a maximum of 28 sms’ per month. The appellant indicated that Vodacom had specifically requested that the R7/sms be replaced with R7/day while Vodacom was resolving the issue.

2.2.7. Finally the Appellant referred to the “blatant extortive nature of the complaint aptitude (sic)” and questioned why the adjudicator did not provide an opinion on this.

2.3. The complainant was also provided with an opportunity to submit further comments to be considered by this appeal panel. However the complainant did not do so as he indicated that the full documentation needed to be provided to him before he would be in a position to respond to the Appellant. The complainant indicated that the failure to provide this information was a failure of natural justice and put him in a position where he was unable to make a submission. As a result no formal submission from the complainant was made.

3. Decision

- 3.1. The following issues will be addressed by this appeal panel:
- 3.1.1. Did the complainant validly subscribe to the subscription service? (Clause 3.1.1)
 - 3.1.2. Was any message sent by the IP considered to be an unsolicited commercial message? (Clause 5.1.2)
 - 3.1.3. Did the reminder message:
 - 3.1.3.1. Comply with the exact wording as required? (Clause 11.6.2)
 - 3.1.3.2. Include any additional spaces / lines? (Clause 11.6.3)
 - 3.1.3.3. Omit a description of the content/service? (Clause 11.6.4), and/or
 - 3.1.3.4. Use unapproved abbreviations for price? (Clause 11.6.5)
 - 3.1.4. Was the adjudicator obliged to provide an opinion on the lawfulness of the complainant's demand for money or 'solatium'?
- 3.2. Regarding the complaint that the complainant never subscribed to the subscription service no proof was provided supporting the Appellant's contention that the complainant was validly subscribed either in the original adjudication or in the present appeal. Instead the Appellant relies on the argument that the complainant must have been validly subscribed as it is impossible to subscribe via Vodacom's double opt-in system. Although an example of the welcome and reminder message were provided (noticeably omitting any details of the complainant's cell phone number / MSISDN). Moreover the explicit request by MSISDN and this was apparently provided by Vodacom to the Appellant. Bearing all of this in mind it is difficult to understand how the Appellant considered it acceptable not to provide the proof that was asked for by the adjudicator. Instead this appeal panel is required to believe that every subscriber to a subscription service must have been validly subscribed (i.e. electronic glitches are impossible). It is worth noting that as the subscription to the service is alleged by the Appellant (and denied by the complainant), the Appellant bears the onus of proof to satisfy this appeal panel that the complainant did in fact validly subscribe. This could hardly be a surprise to the Appellant as not only was it stated in the adjudication but it also exists in clause 11.10.2 of the WASPA Code of Conduct. On the basis of the information before the adjudicator and before this appeal panel we find that this onus has not been discharged and so the original finding that the IP contravened section 3.1.1 of the WASPA Code of Conduct is confirmed.

3.3. In the adjudication the adjudicator indicated that the IP had breached clause '5.1.2' although only clause 5.2 was referred to in the clauses that were considered. From the context of the finding in the adjudication it is clear that this is a typographical error on the part of the adjudicator and the adjudicator intended to refer to section 5.2.1, rather than section 5.1.2. The complainant in question denied having any prior relationship with the Appellant and denied subscribing to the service. There is no allegation on the part of the complainant that he received an unsolicited sms. Rather the sms' that were sent were required by the WASPA Code of Conduct under what appears to be the incorrect impression that the complainant had subscribed to the subscription service. Clearly the Appellant was of the impression that the complainant had validly subscribed and as such the Appellant was obliged to provide the Welcome and Reminder message in terms of the WASPA Code of Conduct. A quick look at clause 5.2.1 makes it clear that a message that is commercial in nature (as this clearly is) will not be considered to be spam if the complainant had requested the message. Had the complainant actually subscribed to the service then obviously the complainant would have (if not explicitly, then implicitly) consented to receiving the Welcome and Reminder messages. However if we accept – as we do - that insufficient evidence was provided by the Appellant to prove that the complainant was validly subscribed to the service then this consent falls away and the message is an unsolicited commercial message. We agree with the adjudicator that clauses 3.1.1 and 5.2.1 should have been considered as a single event as the Welcome and Reminder messages are automatically generated and so – for the purposes of determining a sanction – we do not find that the Appellant intended to breach clause 5.2.1. That said, intention is not a pre-requisite to breach clause 5.2.1 and so we, nevertheless, find that clause 5.2.1 has been breached. We place no further weight on the finding that the message breached clause 5.2.1.

3.4. Clause 11.6.2 sets out a very specific format that the Appellant is required to use for the reminder messages. While the Appellant argues that this format was followed this is patently untrue in that:

3.4.1. The double colon after the word “reminder” was excluded,

3.4.2. “ur” was used instead of “You are”,

3.4.3. There is a full stop after “Nudigits”.

3.4.4. The “C” of “Cost” is not capitalised,

3.4.5. “help” is used instead of SMS HELP” or “For help call”.

3.4.6. A question mark is used immediately after the word help,

3.4.7. No comma is used after the abbreviation “unsub”,

3.4.8. the word “STOP” is not capitalised.

Although it can be argued that some of these omissions are irrelevant, taken together they show a lack of an attempt to comply with clause 11.6.2 of the WASPA Code of Conduct and so the adjudicator’s finding that the format was not adhered to is confirmed.

3.5. Clause 11.6.3 was also breached as the additional full stop (see above) and question mark are “additional characters”.

3.6. Clause 11.6.4 requires that the IP have text reminding the subscriber of the service to which they are subscribed. The IP was adamant that the line “*1 updates waiting http://bzm.tv/s/BE05D962EF 2 read*” was in fact text describing the service. This is, once again, patently untrue and we are assisted by the remainder of clause 11.6.4 which reads: “This text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service.” It is impossible for the reader to know what the name of the subscription service is from this text as the only possible title could be ‘1 updates waiting’ which cannot by any stretch of the imagination be considered to be a description of a content service. Moreover the call to action (“2 read”) further muddies the water for the reader making it highly unclear what the nature of the subscription service is. For these reasons we also confirm the adjudicator’s finding that clause 11.6.4 was breached by the Appellant.

3.7. Clause 11.6.5 is an interesting issue. We agree with the Appellant that the use of the word “day” would be inappropriate where the subscriber is billed per SMS, rather than per day. Unfortunately clause 11.6.6 is also of little assistance to the Appellant as this clause also presumes that billing is on some kind of time frame, rather than calculated according to an event (in this case the event is an SMS). For this reason the WASPA Code of Conduct as it stands provides insufficient assistance to the Appellant in order to determine how to inform a subscriber of the way in which they would be billed. As this problem has been resolved in more recent versions of the WASPA Code of Conduct we do not consider it necessary to deal with this in any substantive way. For the sake of this

appeal we find that clause 11.6.5 has been breached but for the above reasons we do not attach weight to this breach for the purposes of the sanction.

3.8. The Appellant has asked why the adjudicator did not provide an opinion on the 'blatant extortive nature of the complainant aptitude (sic)'. Neither the appeal panel nor the adjudicator are in a position to make a finding on alleged illegal behaviour nor to impose a sanction on the complainant even if a finding were possible. As a result any opinion on whether the complainant's behaviour is illegal or not is entirely irrelevant for the purposes of this appeal.

4. Sanctions and Result

4.1. The Appellant has been unsuccessful in this appeal. The only factors supporting mitigation for the sanction relate to the inability to correctly state the price of the subscription service due to a deficiency in clauses 11.6.5 and 11.6.6 and the unintentional spamming of the complainant by the Appellant.

4.2. This appeal panel will only interfere with the original sanction of the adjudicator if there are substantial and compelling reasons to do so. In this appeal we find no such substantial and compelling reasons.

For this reason the appeal is dismissed and the appeal fee is forfeited to WASPA.

Annexure A

>>	2014-03-05 13:18:47	Sent	41489 Mainstream	Welcome:NuDigits http://bzm.tv/s/BE05D962EF Pass56166547 help@nudigits.com subscription service R7/sms max 28sms/m unsub sms stop to 41489 help0213002327
>>	2014-04-03 21:10:50	Sent	41489 Mainstream	Reminder ur subscribed to NuDigits. 1 updates waiting http://bzm.tv/s/BE05D962EF 2 read cost R7/sms max 28sms/m help?0213002327. To unsub sms stop to 41489