



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	39143
Cited WASPA members	Worldplay (0015)
Notifiable WASPA members	None
Appeal lodged by	Worldplay (0015)
Type of appeal	Panel
Scope of appeal	Review of decision and sanctions imposed by the adjudicator.
Applicable version of the Code	15.5
Sections considered by the panel	4.11(a), 24.33 and 24.34
Related complaints considered	39138
Amended sanctions	None
Appeal fee	No refund
Is this report notable?	No
Summary of notability	No

Initial complaint

This complaint related to a failure of the Member to implement one or more of the measures set out in section 2.3 of the WASPA Fraud Detection and Mitigation (version 2.1) and accordingly comply with the requirements of clause 4.11(a) of the WASPA Code of Conduct.

The Formal Complaint was lodged by the WASPA Compliance Department after a test was conducted on the Member's system and it was identified that the Member had failed or omitted to implement one or more of the measures set out in section 2.3 of the WASPA Fraud Detection and Mitigation (version 2.1).

Adjudicator's findings

In brief, the Adjudicator found as follows:

1. That there was no precedent on which to rely for this matter.
 2. That fraud detection and mitigation was a serious issue for the WASP industry and led to the publication of the WASPA Fraud Detection and Mitigation requirements (version 2.1).
 3. That a 302 HTTP status code was rendered on the relevant header which was a breach of clause 2.3 of the WASPA Fraud Detection and Mitigation requirements.
 4. That there was no actual fraud, and if there had been fraud then a higher sanction would have been imposed.
 5. The member was thus found in breach of clause 4.11(a) of the WASPA Code of Conduct as read with clause 2.3 of the WASPA Fraud Detection and Mitigation v2.1.
 6. A sanction of R100 000 fine with a further fine of R50 000 which was suspended for a period of 6 months from the date of the adjudication (presumably on condition that the member is not found guilty of the same offence within that six month period).
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Appeal submissions by Member

The Member appealed both the decision and the severity of the Adjudicator's sanctions.

In brief the Member's submissions are:

1. Due process was not followed in this matter and that the process was procedurally unfair which breaches section 6 of the Promotion of Administrative Justice Act, 2000 ("PAJA"),
2. The Member did in fact comply with the requirements of clause 2.3 of the WASPA Fraud Detection and Mitigation v2.1 in that the WASPA Media Monitor and the adjudicator did not correctly identify the correct record when evaluating whether the requirements of clause 2.3 had been complied with.
3. The Member had implemented additional anti-fraud measures over and above the requirements of the WASPA Fraud Detection and Mitigation v2.1.
4. The Member makes issue with the following comment by the adjudicator:

- a. *'I do concede and concur with the respondent that, they have, in good faith ensured that there is the correct fraud implementation and functionality within their system, and it is for that reason that I find that there is no actual fraud that occurred while their headers were incorrectly set.'*
5. The Member further objected to being held to a 'super standard' which was unilaterally imposed by the adjudicator outside of the WASPA Fraud Detection and Mitigation requirements.
6. The Member indicated that the email response that was provided by WASPA and the adjudicator and provided the correct version which contains information demonstrating that the Member had complied.
7. The Member alleged that substantial compliance with the WASPA Fraud Detection and Mitigation was required, as opposed to strict compliance and the purpose of the WASPA Fraud Detection and Mitigation must be considered when determining whether the Member had breached clause 4.11(a) of the WASPA Code of Conduct.
8. Moreover the requirement in the WASPA Fraud Detection and Mitigation must be 'reasonably practicable' as required by section 29(2) of the South African Constitution and not subject to impossibility of performance,
9. The Member further alleged that it was open to resolving the matter informally, but it was unable to get any feedback to assist it with what it had done incorrectly.
10. The Member further alleged that the adjudicator was biased based on the language and contents of the adjudication and that a mere apprehension of bias was sufficient to invalidate the decision and to take the decision on review.
11. In addition, the Member alleged, the alleged breach of the WASPA Fraud Detection and Mitigation requirements was unclear and it was only clear after the adjudication was finalized as to which page the adjudicator and the WASPA media monitor were referring to (which in turn resulted in a failure to accord the Member with a right of reply).
12. The Member then concludes that the sanctions imposed by the adjudicator are disproportionate as there was no evidence that fraud had actually occurred, and no allegation of consumer harm and the profit related to the service is exceeded by the fine by a factor of over 150.

Appeal response by WASPA

WASPA responded to the various arguments presented by the Member in detail, including obtaining a view from a technical expert. However, the panel does not feel it is necessary to go into the detail thereof as all parties are privy to the documentation.

In essence, WASPA stated that although the Member had taken steps to comply with the spirit of the Code of Conduct, they had failed to comply with the letter of the Code, namely that the fraud protection measures must be on the page immediately before the network confirmation page. The Member had failed to do this and thus was in breach of the Code of Conduct.

Deliberations and findings

The panel considered the arguments posed by the Member and the response provided by WASPA and has concluded as follows:

1. In respect of the appeal as to the findings of a breach, although the panel has heard the arguments of the Member, the fact stands that the Member failed to comply with the Code of Conduct in that the required WASPA Fraud Detection and Mitigation requirements were not in the correct place. The requirement to comply with the Code of Conduct is one of strict compliance. It is not up to members of WASPA to determine how to interpret the requirements of the Code. There is no ambiguity in the WASPA Fraud Detection and Mitigation requirements and as such no interpretation is required. Should the Member feel that the Fraud Detection and Mitigation requirements are incorrect, they need to take this up with the WASPA Code Committee and not themselves choose to amend the manner in which the requirements are implemented.
 2. In respect of the appeal as to the sanction, although the adjudicator raised the issue of no fraud having occurred, this is not a requirement for a high sanction to be levied. The sanction amount relates to several factors, actual fraud and consumer loss being only one of them. A far greater issue at hand with matters such as this is the impact on the WASP industry as a whole. Fraud is a prevalent and pervasive problem which has resulted in many WASP industries around the world being closed down. The Fraud Detection and Mitigation requirements are intended to protect both the industry and the consumer.
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Amendment of decision and sanctions

No amendment of the decision or sanctions.

Appeal fee

The appeal was unsuccessful and accordingly there will be no refund of the appeal fee.
