



Report of the Appeals Panel

Complaint number	52819
Cited WASPA members	BN REV (1824)
Notifiable WASPA members	N/A
Appeal lodged by	BN REV (1824)
Type of appeal	Written Appeal
Scope of appeal	<input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	16.2
Clauses considered by the panel	5.4; 5.7; 5.14; 8.2 and 15.27.
Related complaints considered	41010; 49150 and 50284
Amended sanctions	None
Appeal fee	Appeal fee not to be refunded.
Is this report notable?	Not notable.
Summary of notability	N/A

Initial complaint

This complaint was lodged by the WASPA Compliance Department after tests conducted by the complainant on the Member's system at various times on 13 and 14 April 2021 identified that the Member had breached various provisions of the Code of Conduct.

Member's Response

The Member responded that it had “resolved most of the issues” as follows:

1. Price Point changed to reflect the correct format
2. Terms and conditions updated on all pages
3. Support number included
4. My Account page modified to reflect the terms and conditions

With regards to “Unsub request from SMS to Short Code”, the Complainant stated that: “This is an operator related issue to our short code. We have sent an email to Cell C twice this week and awaiting a response. This is beyond our control at this stage.”

Adjudicator’s findings

The Adjudicator found as follows:

1. In respect of clause 15.27, the failure to process service termination requests, the Adjudicator found that while the Member does not deny that this occurred, it seeks to shift the blame to Cell C. In this regard, the Adjudicator had reference to complaint 49150 and concurred with the Adjudicator in that complaint that Member’s must ensure that its suppliers and service providers comply with the requirements of the Code. The Adjudicator accordingly found the Member liable for breaching clause 15.27.
2. As to Clauses 5.4 and 5.5, the Adjudicator found no evidence to suggest that the Member knowingly disseminated information that was false or deceptive, or that was likely to mislead by inaccuracy, ambiguity, exaggeration, or omission. The complaint relating to the alleged breach of clauses 5.4 and 5.5 was dismissed.
3. As to the remainder of the allegations, the Adjudicator found a breach of the following:
 - 3.1 Members must not offer or promise or charge for services that they are unable to provide (clause 5.1).
 - 3.2 A web page containing the full terms and conditions of a service must be readily available to current and potential customers of that service (clause 5.7).
 - 3.3 Members must have a procedure allowing customers to lodge complaints regarding the services provided (clause 5.14).
 - 3.4 Non-provision of pricing information (clause 8.2).

Appeal submissions

In their appeal the Member raised various arguments as set out below.

1. The informal complaints procedure was not applied in this instance without any justified response from WASPA. In this regard, we include the following extract:

“Informal complaint procedure

24.16. *In the case of a complaint for which it is feasible for the member to provide a prompt remedy and where no material breach of the Code seems to have occurred, the following informal complaint procedure will be followed.*

24.17. *WASPA will forward the complaint to the member concerned. The member has five (5) working days to effect an appropriate remedy and inform WASPA thereof.*

24.18. *Once the member has informed WASPA of the steps taken to remedy the complaint, WASPA will attempt to confirm that the complainant is satisfied with the steps taken. If the complainant is satisfied, then the complaint will be considered closed, and no further action is taken. If the complainant is not satisfied with the informal resolution, WASPA will determine if the complaint should be closed or escalated to the formal complaint procedure.*

24.19. *WASPA will maintain a record of any complaints resolved through the informal complaint procedure, for a minimum period of three years after the complaint is closed.”*

2. The adjudication process and the punitive sanctions applied have failed to consider the material fact that the Company voluntarily subscribed to an affiliation with WASPA. This by its very nature confirms the intention of the Company and its representatives to abide by the guidelines as set out in the code. We emphasise guidelines, as many of the contraventions in WASPA'S view and detailed in the attached formal complaint relate to semantics and gives an impression of blatant disregard of the code when the contrary is applicable. The options applicable to the consumer have been outlined in the attached document for your ease of reference.
3. In a determination of a sanction, despite in this instance no opportunity been afforded to the Company to comply with the recorded 5 days in terms of the informal complaint's procedure, the adjudicator must consider and make available to the Company its decision based on the following:

“24.34. If the adjudicator determines that there has been a breach of the Code, then the adjudicator must determine appropriate sanctions. In determining any appropriate sanctions, the adjudicator must take into consideration:

- (a) any previous successful complaints made against the respondent in the past three years;*
- (b) any previous successful complaints of a similar nature;*
- (c) the nature and severity of the breach;*
- (d) the loss suffered by the complainant;*
- (e) any efforts made by the respondent to resolve the matter; and*
- (f) any other factors that the adjudicator considers material.”*

4. We note that this was the first complaint against the Company. For this, a punitive measure of R27500 was imposed and a further R10 000 for the Appeal to be granted and heard. Extortive in our view, given the nature of the alleged transgression of the code by a WASPA complaint (WASPA has no mandate in this regard), and this is a duplicity of process as the consumer has access to legislated avenues with regards to customer complaints. In any event, we are attending to the determination of the sanction.

- A. No previous complaint was made against the Company of a similar nature.
 - B. The breach of guidelines relates to semantics and fails to accept the alternate opportunities available to the customer. This was rectified on notice with immediate effect in compliance of the guidelines.
 - C. There was no loss suffered by the complainant. This was an initiative of WASPA and not by a customer.
 - D. The matter was resolve before the 5 days offered in terms of the informal complaint process and hence our disappointment that this was not the first port of call as subscribed to.
 - E. We are unaware of any of the factors considered by the adjudicator in making this punitive imposition. This unilateral decision is the fertile grounds of this Appeal and an urgent need to call for amendments to the code in line with fairness and neutrality, as subscribed to in the objectives of the WASPA mandate.
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Deliberations and findings

Our findings are simple in that much of the argument raised by both the Member and the adjudicator have no bearing on the facts in this matter.

Regarding the issue raised by the Member that the informal complaints process was not utilised, the WASPA Complaints Department was justified in not utilising this process and instead proceeding to use the formal complaints process due to the serious nature of the alleged breaches. It is not mandatory that the informal complaints process is used in every complaint.

Regarding the Member's point raised about voluntary subscription to the Code, it is important to note the following. Although membership is voluntary, members are required to abide by the Code of Conduct as a condition of their membership.

The provisions of the Code of Conduct do not serve as mere guidelines for the conduct of members, but are prescriptive.

In addition, the fact that a consumer could approach other forae to address an issue does not mean that the Code does not need to be followed by the Member. Only if the matter had already been referred to an alternative forum could WASPA decline to refer the matter to the complaint resolution process. This was not the case in this instance.

Finally, in respect of the quantum of the sanctions and the manner in which the Adjudicator arrived at such quantum it is important to note the following:

Although this was the first complaint of a similar nature it was not the first successful complaint against the Member. In addition, the complaint does not turn on semantics but on actual breaches of the Code. Although there was no loss suffered, the potential for loss to be suffered was there. In addition, the Code does not require actual loss in order for a fine to be levied. Although the Member took immediate steps to rectify the breaches and resolved them quickly, this indicates that the difficulty or barrier to remediating the issues was low and as such the breaches should never have occurred in the first place. The provisions which were breached were not difficult to understand or obtuse but were straightforward. As such the Member could reasonably be expected to comply with the provisions in the first instance.

Finally, the Adjudicator was very clear in their Adjudication how they came to their decision as to the quantum of the fine. Several factors were considered by the Adjudicator in arriving at the sanction.

Namely:

1. Previous successful complaints against the Member;
2. Successful complaints against the Member of the same nature;
3. The nature and severity of the breach; and
4. Mitigating factors: The Member's timeous response and remedying the breaches referred to in the complaint; and the fact that it was possible to cancel the service on the Cell C USSD self-help portal.
5. Previous precedent set by WASPA adjudicators and appeal panels. In this regard previous adjudications have fined Members as follows:
 - a. R10 000.00 for a breach of 15.27;
 - b. R 10 000.00 for a breach of 5.7;
 - c. R 5 000.00 for a breach of 5.1;
 - d. R 5 000.00 for a breach of 5.14;
 - e. R 2500 - 5 000.00 for a breach of 8.2.

The panel agrees with the sanctions awarded by the Adjudicator but does not agree with all the factors considered in mitigation, in particular the fact that the Member responded to the complaint and resolved the breaches timeously. As stated earlier in the report the ability of the Member to resolve the breaches so rapidly indicates that the difficulty or barrier to remediating the issues was low and as such the breaches should never have occurred in the first place

Amendment of sanctions

1. In looking at the sanctions and the quantum thereof we looked at the Code, the Member's response, the Adjudication and Appeal as well as the cases referenced by the Adjudicator.
2. The appeal was in respect of the quantum of the sanctions. We find the quantum of the fine to be fair.
3. No amendment of sanctions.

Appeal fee

No refund.
