

Corrigendum

“Yuen Oi Yi Lisa” in the first line of paragraph 1 on page 1 of the “Reasons for Decision” dated 19 July 2006 in respect of the appeal AAB No. 59/2005 should be replaced by “Yuen Oi Yee Lisa”.



(Ms Anna Chan)
Secretary
Administrative Appeals Board
3 August 2006

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 59 of 2005

BETWEEN

YUEN OI YEE, LISA

Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 19 June 2006

Date of Decision : 19 July 2006

Date of handing down Reasons for Decision : 19 July 2006

DECISION

On 15 October 2002, the appellant Yuen Oi Yi Lisa was employed by Heath Company Ltd ('HCL') as Finance and Administration Manager. During the recruitment exercise which resulted in her employment, the appellant submitted to HCL reference letters from her seven ex-employers. They were later returned to the appellant after the Human Resources Officer of HCL, Miss Sally Chong had photocopied them.

2. From 17 to 23 February 2003, the appellant was sent to HCL's Head Office in USA on company business. During the appellant's absence, Miss Chong contacted three of the appellant's seven

ex-employers for the appellant's references without first obtaining consent from the appellant and without authority from HCL. However, no such references were supplied to Miss Chong by the appellant's ex-employers.

3. On 6 March 2003, the appellant was dismissed by HCL.

4. On 2 June 2003, the appellant made a formal complaint to the Privacy Commissioner for Personal Data ('Commissioner') against HCL for breach of the Personal Data (Privacy) Ordinance ('PDPO'). Three areas of complaint are set out in her details of complaint which may be briefly repeated as follows:

(a) 'Unlawful and unfair collection' – she did not give consent to HCL or its officers to contact her ex employers for her references or past employment records. She did not sign any form of "Personal Information Collection Statement" in relation to her employment.

(b) 'Inappropriate use of personal data or purpose of collection' – Miss Chong's act was not for employment purpose and without HCL's authority. It was to 'dig out some defects from my (her) past records so as to threaten my (her) position in future'. Miss Chong's act had affected her job future.

(c) 'Unavailability of access to personal data' – she was entitled to know which two other of her ex-employers Miss Chong had contacted and was worried about HCL making defamatory statements against her to these ex-employers.

5. In the meantime, the appellant through her solicitors, wrote to HCL on 12 April 2003 alleging that Miss Chong under the instruction of the managing director of HCL Mr. Lai, had made defamatory statements against her causing damage to her. The appellant demanded HCL to make a written apology and restrain its staff from making such defamatory statement and pay costs.

6. After a number of exchanges of letters between the appellant's solicitors and HCL's solicitors, the matter was finally settled when it was

agreed that HCL would publish a letter of apology and pay the appellant's legal costs. The letter of apology was published on 24 May 2003. The last paragraph of the letter reads as follows:

“The payment of legal costs is made and this letter is delivered in full and final settlement of any claim which you have or may have against us.”

7. On 24 July 2003, the Commissioner wrote to HCL referring to the appellant's complaint and asked HCL to furnish information to assist the Commissioner in his inquiry on the matters of complaint. The Commissioner on the same date informed the appellant that investigation into her complaint was in progress.

8. On 18 September 2003, the appellant issued a writ in the District Court (DCCJ 5441/2003) against HCL and its holding companies in USA claiming damages for defamation and damages under s. 66 of the PDPO for breaches of the PDPO. The alleged breaches were the same as those alleged in the appellant's complaint to the Commissioner on 3 June 2003.

9. On 31 October 2003, the appellant informed the Commissioner that she had taken out civil action for damages under s. 66 of the PDPO. She asked the Commissioner to suspend investigation of her complaint.

10. On 11 November 2003, the Commissioner informed the appellant in the following terms:

“You confirmed that after taking legal advice from various parties in respect of the court action (number DCCJ 5441/2003) you commenced against the defendants, you decided to pursue only the court action regarding your claim under section 66 of the Personal Data (Privacy) Ordinance, and would therefore request this Office to suspend all our actions or investigation for the captioned complaint case with effect from 31 October 2003.

Accordingly, we inform you that no further actions would be taken by this Office in respect of the captioned complaint case.”

11. On 26 November 2003, the Commissioner informed HCL that investigation into the complaint had been suspended at the request of the appellant and no further actions would be taken in respect of the complaint. This means that the Commissioner had discontinued the investigation of the complaint and the matter was then closed.

12. In the meantime, the appellant started a series of civil actions in defamation and malicious falsehood against various parties including Miss Chong and HCL at the District Court and the High Court. Suffice to say, these actions were either struck out or dismissed for being vexatious, frivolous or an abuse of the process of the court or entirely devoid of merit. Details of these proceedings are set out in the chart annexed to the judgment of Cheung J in Yuen Oi Yee Lisa and Heath Company Ltd (HCA 96/2005). Cheung J in that case, not only dismissed the appellant's claim against HCL but also considered making a restricted proceedings order against the appellant.

13. The appellant's District Court action (DCCJ 5441/2003) was struck out on by Judge C.B. Chan on the ground that it was vexatious and an abuse of process since the matter had already been fully settled between the parties.. The appellant's application for leave to appeal against the decision of Judge Chan was refused by the Court of Appeal on 18 March 2005. Tang JA in his judgment, after referring to the correspondences between the parties' respective solicitors which finally led to the settlement and the letter of apology of 24 May 2003, said this:

“We are satisfied that the settlement evidenced by the letters referred to above covered any claim which the plaintiff had or might have had against the 1st defendant in relation to the contact made by or on behalf of the 1st defendant to all three ex –employers.”

14. On 13 June, 2005, the appellant wrote to the Commissioner and asked the Commissioner to reopen her complaint against Miss Chong. The areas of complaint were:

- (a) Miss Chong did not have proper authority to contact her ex-employers for references and she did so to ‘dig out some defects

from my past records so as to threaten my position in future'. The use or the purpose of collection of personal data by Miss Chong was inappropriate.

(b) Miss Chong stole her personal data from her personal files while she was not in Hong Kong and identified the names of her three ex employers from her CV which was given to HCL for the purpose of her employment.

(c) The way in which Miss Chong obtained her personal data was inappropriate.

15. We note that this complaint was made by the appellant against Miss Chong and not a re-opening of her complaint against HCL. This was a new complaint made in June 2005. The inappropriate acts complained of i.e. contacting ex employers and theft of personal data, happened before June 2003. The appellant had actual knowledge of them for more than two years before making this complaint. The Commissioner could have discontinued his investigation of this complaint under section 39(1)(a) of the PDPO.

16. Nevertheless, the Commissioner did not do so and proceeded to deal with this complaint and on 22 August 2005 informed the appellant that he was not prepared to carry out a full investigation of her complaint. In his reasons for decision, the Commissioner stated that Miss Chong being the human resources officer of HCL was authorized by HCL to have access to the appellant's CV which the appellant had given to HCL. Since the appellant's ex-employers did not disclose the appellant's personal data to Miss Chong, there was no evidence that she had collected the appellant's personal data. As to the appellant's complaint that Miss Chong had stolen her CV from the cabinet, the Commissioner advised the appellant that she might consider reporting the theft to the police for investigation. Regarding the complaint that Miss Chong used the appellant's personal data to make defamatory statements against the appellant, the Commissioner considered that he should make no decision in this respect because this was a matter pending a court action. In any case, issues of defamation were not within the ambit of the PDPO.

17. The appellant appealed to this board against the Commissioner's decision. In her grounds of appeal, the appellant maintained that Miss Chong stole her personal data from her CV and used it to get rid of her as her overhead superior. That was done without HCL's instructions and not for the purpose of employment. This was collection of personal data by unlawful means and therefore contravened Data Protection Principle 1(1). The appellant also maintained that Miss Chong used her personal data from her CV to contact her ex employers for her references. This was not for employment purposes and therefore contravened Data Protection Principle 3. These are the appellant's main grounds of appeal. The rest is no more than references to her defamation claims and evidence in support thereof.

18. Miss Chong in her statement of response submitted that the appellant was attempting to re-litigate matters that were clearly part of the subject matters of her previous actions and the present appeal was a collateral attack on the judgments and orders made against her by the courts in those actions. Therefore there was no reason or merit for the Commissioner to conduct a full investigation into the appellant's complaint

19. We wish to mention first that the history of the appellant's civil actions arising out of her dismissal by HCL and the subsequent contacts made by Miss Chong to the appellant's ex-employers, shows that the appellant's claims for damages for defamation and under section 66 of the PDPO were settled before trial and the appellant's subsequent actions were held by the courts as re-litigation on settled issues and were vexatious litigation and an abuse of process. The court on its own motion had considered making a restrictive proceedings order against the appellant and the Department of Justice had applied to the court to declare the appellant a vexatious litigant. Be that as it may, an appeal under the Administrative Appeals Board Ordinance is not civil proceedings and the appellant's appeal cannot be regarded as attempting to relitigate on matters which had been finally determined in the court. The defamation actions are not relevant to this appeal. We mention them simply because of Miss Chong's statement of response. We will consider the appeal on its merits in accordance with the AAB Ordinance and the PDPO regardless of the way in which the appellant had conducted her

civil litigation and whether or not she had been declared a vexatious litigant.

20. Dealing first with the appellant's allegation of theft, we note that there is no evidence to show that Miss Chong had stolen the appellant's personal data. The fact that Miss Chong had contacted the appellant's ex employers for reference is no evidence that she had stolen the appellant's personal data. She could have obtained these particulars legitimately from other sources or through other means than by theft from the appellant's CV. HCL in response to the Commissioner's enquiry explained that Miss Chong being a Human Resources Officer had access to the appellant's CV which "was collected for employment/ human resources purposes". The names of the appellant's ex employees were ascertained by Miss Chong from the appellant's CV but their contact details were obtained through PCCW's telephone hotline. There is nothing to contradict HCL's explanation. That being the case, there was no reason why the Commissioner should not accept this explanation to come to the view that Miss Chong in her job position was able to have access to the CV of the staff of HCL, including that of the appellant. The Commissioner considered that the allegation of theft was no more than a bare allegation and there was no *prima facie* case for him to continue his investigation into this issue.

21. We see no reason to differ from the conclusion of the Commissioner. Indeed, investigation of theft is essentially criminal in nature and it is not for the Commissioner to conduct criminal investigation. Of course, if theft of the appellant's personal data was established and the stolen data were used by HCL or Miss Chong for a purpose outside that for which they had been collected by HCL, then it would be for the Commissioner to investigate whether there was contravention of the PDPO. In *Lau Kai Ming v Privacy Commissioner for Personal Data* (AAB Appeal No. 32/2004), we said that unless there is *prima facie* evidence and grounds to support a complaint, the Commissioner should not lightly embark on an investigation against the person complained of, otherwise it would be indirectly condoning abuse of the complaint mechanism. As there is no more than a bare allegation of theft by the appellant in the present case, the Commissioner had rightly refused to continue his investigation on the issue.

22. The next question is whether it is a contravention of the PDPO when Miss Chong used the names of the appellant's ex-employers she obtained from the appellant's CV to contact them for references about the appellant.

23. Data Protection Principle 1 ("DPP1") deals with collection of personal data. Paragraph (1) requires that the personal data collected should be for a lawful purpose directly related to a function or activity of the data user who is to use the data and the collection is necessary for that purpose and the data should be adequate and not excessive in relation to that purpose. Paragraph (2) requires the means of collection must be lawful and fair in the circumstances of the case.

24. "Personal data" means data relating directly or indirectly to a living individual, from which the identity of the individual can be ascertained and in a form in which access to or processing of the data is practicable.


25. We note that this principle deals with "collection" of "personal data". The facts in the present case as we have set out at the beginning of this decision do not show contacts made by Miss Chong to the appellant's ex-employers had resulted in Miss Chong obtaining any references about the appellant. They had refused to supply Miss Chong with the data. Since no collection of data had occurred, DPP1 is not applicable.

26. Since there was no evidence that Miss Chong had stolen the appellant's CV and it was accepted by the Commissioner that Miss Chong in her position of Human Resources Officer, could legitimately hold the appellant's CV which was collected for human resources/employment purpose, the appellant's CV was collected by Miss Chong fairly and by lawful means. There is no contravention of paragraph (1) and (2) of DPP 1.

27. The use by Miss Chong of the appellant's ex-employers names to contact them does not amount to use of personal data of the appellant. We know for certain (as revealed by the appellant) that one of her ex employers to whom contact had been made was a limited company and not an individual. We do not know if the other two are individuals and it

is for the appellant to satisfy us that they are so. In any case, the appellant is not the data subject of the names of the ex-employers. Section 37 of the PDPO requires that the subject matter of a complaint under that section must relate to the personal data of which the complainant is the data subject. Thus, no complaint can be made by the appellant under section 37 in respect of the use by Miss Chong of the names of her ex-employers, albeit Miss Chong had made such contact without authority from HCL. DPP3 is not applicable here.

28. Section 39 of the PDPO gives the Commissioner discretion not to continue his investigation into a complaint if he considers it for any reason unnecessary to do so. For the reasons we mentioned above, we conclude that in the circumstances of the present case, the exercise by the Commissioner of his discretion under s. 39 not to investigate the appellant's complaint was not unreasonable. The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'A. Leong', is positioned above the printed name.

(Arthur Leong)

Chairman

Administrative Appeals Board