ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 1/2019

BETWEEN

VINCENT LEUNG Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram: Administrative Appeals Board
- Mr Robert Pang Yiu-hung, SC (Deputy Chairman)
- Mr Hassan Ka-chun (Member)
- Miss Rebecca Lee Mo-kit (Member)

Date of Hearing: 8 July 2020

Date of Written Decision with Reasons: 21 October 2022

DECISION

Background

1. By Notice of Appeal dated 28 December 2018, the Appellant appeals to this Board the decision of the Respondent dated 20 November 2018 not to further pursue the Appellant's complaint (**"the Decision"**)

pursuant to s.39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486) ("**the Ordinance**"). The circumstances which give rise to the complaint are as follows.

2. At the material time, the Appellant was a student member of the Chartered Institute of Management Accountants ("**CIMA**"), an entity incorporated in England and Wales providing examinations and awarding professional qualifications in management accountancy. On 10 June 2016, the Appellant took CIMA examinations at "Pearson Professional Centres - Hong Kong" (**"Pearson HK"**), one of the designated test centres for CIMA examinations. On 2 July 2016, the Appellant first lodged a complaint to the Respondent, the gist of which is the excessive collection and retention of candidates' personal data at the test centre.

The Decision

3. After investigation, as per the Statement relating to the Decision, the Respondent made the following findings of fact:-

(a) CIMA sub-contracted Pearson Professional Assessments Ltd ("**Pearson VUE**"), a company incorporated in England and Wales, for test delivery services.

(b) Pearson HK is not a legal entity but a trading name and an internal business unit within Pearson VUE.

(c) Pearson Education Asia Limited (**"Pearson Asia"**) is a company incorporated in Hong Kong and an associate company of Pearson VUE. Pearson Asia is sub-contracted by Pearson VUE to operate the Hong Kong test centre and it

acts solely in accordance with the instructions of Pearson VUE.

(d) Before the test, staff employed by Pearson Asia would collect two forms of identification images of the candidate, namely, a head shot photograph and a digital signature ("**the ID Images**"). Pearson Asia would also compare them with previously recorded ID Images of that candidate (if any), which could be retrieved by Pearson Asia staff via Pearson VUE's test administrator portal during the test session of that particular candidate. This procedure is followed each time a candidate takes a test.

(e) Staff of Pearson Asia would also visually inspect the identification documents of the candidates without retaining any copies.

(f) Visual and audio recording would be conducted during the whole of the examination session by CCTV cameras situated right above each candidate's head (**"the CCTV Recordings"**). The CCTV Recordings are stored by Pearson Asia on Pearson VUE's behalf for a maximum period of 30 days after the completion of the test sessions, after which it will be automatically overwritten. The CCTV Recordings could only be accessed by Pearson VUE if there exists a ground for investigation of a candidate's conduct during the examination.

4. It is undisputed that the ID Images and CCTV Recordings are personal data of the Appellant for the purpose of the Ordinance.

5. Based on the facts above, the Respondent made the following

findings:-

(a) Pearson Asia is not a data user under s.2 of the Ordinance, as it is only a data processor within the meaning of s.2(12), who does not hold, process or use the personal data of candidates taking the CIMA examinations in Hong Kong for any of its own purposes, but solely on behalf of Pearson VUE.

(b) As there is no provision in the Ordinance which confers any jurisdiction over the act of collection, holding, processing and use of personal data that takes place wholly outside Hong Kong, Pearson VUE and/or CIMA lies outside the territorial jurisdiction of the Ordinance.

6. The Respondent then terminated the investigation of the complaint, citing s.39(2)(d) of the Ordinance, that is, "any investigation or further investigation is for any other reason unnecessary" and paragraph 8(f) of the Complaint Handling Policy ("**the CHP**"), that is, the data protection principles ("**DPP**") are seen not to be engaged at all in that there has been no collection of personal data.

The Grounds of Appeal

7. Mr Kok on behalf of the Appellant conveniently summarized the grounds of appeal:-

(a) The Respondent erred in finding that the complaints were made only against Pearson Asia, even though they were also made against Pearson VUE and/or CIMA.

(b) The Respondent erred in finding that Pearson Asia was not a data user (whether on its own or jointly with Pearson VUE and/or CIMA), pursuant to s.2(1) and (12) of the Ordinance.

(c) The Respondent erred in failing to find that there is *prima facie* evidence of contravention of the Ordinance by Pearson Asia (whether on its own or jointly with Pearson VUE and/or CIMA), and in turn erred in deciding not to pursue the investigation of the Appellant's complaint.

Complaints against Pearson VUE and/or CIMA

8. The real issue at the heart of this ground is whether the Respondent erred in excluding Pearson VUE and/or CIMA from its scope of investigation due to the lack of extra-territorial jurisdiction.

9. The parties made extensive submissions on whether the Ordinance has extra-territorial effect. Mr Kok on behalf of the Appellant raised the interesting proposition that the Respondent would not have been granted a discretion to discontinue an investigation of a data user that has no connection with Hong Kong under s.39(1)(d) of the Ordinance, if there is no jurisdiction in the first place. Mr Kok says that this overrides the general presumption that a statute has no extra-territorial effect.

10. Mr Ng on behalf of the Respondent relied on paragraph 17.12 of the LRC Report 1994. It is hard to see the relevance of this paragraph as it specifically addressed the limited legislative power accorded to Hong Kong as a colony. Mr Ng also referred us to Proposal No.6 in PCPD's Information Paper in Review of the PDPO. However, the focus of the

discussion there was situations akin to that in *Shi Tao v PCPD* (AAB No.16/2007), where a data user present in Hong Kong has control of a data cycle that is wholly outside Hong Kong. The present case is the opposite in that the data users are overseas entities whilst at least the collection of data took place in Hong Kong. Therefore, Proposal No.6 as well as the Shi Tao case could not assist us.

11. In our view, it is not necessary for us to form any view on the extra-territorial effect of the Ordinance, as the problem does not arise in the circumstances of the case.

12. We are of the view that an entity could well have exerted control in jurisdictions other than its place of incorporation, for instance, by personnel and/or offices situated in that jurisdiction. If the acts of control physically occurred in Hong Kong, we do not see the reason why it must be artificially attributed to another jurisdiction. Analogy may be drawn to the example of a foreigner who comes to Hong Kong to commit crimes. The jurisdiction of Hong Kong Courts is triggered by the perpetration of the relevant acts in Hong Kong territory, irrespective of the perpetrator's nationality.

13. The Respondent submitted that it has been their long-standing practice to not investigate overseas data users based on the assumption that they have no jurisdiction. Frankly, the practice of the Respondent is not a relevant consideration for this Board and it may well be erroneous. A distinction solely based on the nationality or place of incorporation of the data user is overly simplistic. As discussed earlier, jurisdiction is triggered by the doing of the relevant acts in Hong Kong, which is a fact

sensitive issue that should be properly investigated in each case.

14. In the present case, it appears that Pearson VUE, at the very least, has stationed an office and some personnel in Hong Kong. The involvement of CIMA is less clear. Contrary to the Respondent's findings, in a letter dated 24 July 2018, Pearson VUE asserted that Pearson HK, a business unit within Pearson VUE, is actually responsible for on-site verification including the taking of ID Images [HB/p. 541]. If true, this would be an overt example of the exertion of control by Pearson VUE over the data collection process and an act done in Hong Kong territory. This Board is not in a position to find out which version is true or what might be the position regarding CIMA. Therefore, it is incumbent upon the Respondent to make proper inquiries, say, about the exact role of Pearson VUE's Hong Kong office in running the test centres, if any, and whether the office, being physically present in Hong Kong, exerted any control within the meaning of s.2 of the Ordinance. Unfortunately, the Respondent has not put his mind to these matters. Investigation in this respect is obviously lacking.

15. The Respondent also submitted that it might face practical difficulties in respect of overseas entities. However, this is not a case where the relevant acts and the presence of the entities are entirely outside Hong Kong. In any event, it seems that Pearson VUE was responsive to the Respondent's requests without the latter deploying enforcement measures. One could not jump to the conclusion that further investigations are bound to be futile.

16. By reason of the above, we are of the view that the Respondent has

wrongfully failed to properly investigate the complaints against Pearson VUE and/or CIMA.

Whether Pearson Asia was a Data User

17. This arises because the Respondent considered s.2(12) of the Ordinance was applicable to the present case. S.2(12) of the Ordinance provides that a person is not a data user if he holds, processes or uses data solely on behalf of another person but not for his own purposes. Mr Kok submitted that the exception in s.2(12) of the Ordinance is narrower and it does not apply where a party has *collected* personal data. Reference to data collection was intentionally omitted to preclude the application of s.2(12) of the Ordinance. We agree with Mr Kok's interpretation.

18. Mr Ng submitted that there was no data collection in the first place. Mr Ng relied on *Eastweek Publisher Limited & Anor v PCPD* [2000] 2 HKLRD 83 where it was said that there is no collection if the individual and/or organisation did not compile the information about an identified person or about a person whom the data user intends or seeks to identify. Mr Ng argued that Pearson Asia had no intention to ascertain the Appellant's identity and his identity is completely indifferent to other candidates.

19. We do not agree with this submission. The purpose of the data collection was precisely to ascertain the identity of a particular candidate. The identity of the Appellant could not have been indifferent in the eyes of Pearson Asia, as it is crucial for them to make sure that he is the very candidate enrolled in the examination. The collection of CCTV

recordings, similarly, constitutes the compilation of information about an identified person. It is clear that each recording relates to one particular candidate. It is dissimilar to the situation in *Eastweek* in which photographer does not know and has no means to find out the identity of the person in the photograph. We do not think the matter turns on whether Pearson Asia views the CCTV recordings or not.

20. Mr Kok also submitted that s.65(2) of the Ordinance has the effect of attributing Pearson VUE's wrong as a principal to Pearson Asia as an agent. Therefore, if Pearson VUE is a data user, Pearson Asia would be a data user as well. We are not convinced that the wordings of s.65(2) of the Ordinance can be so construed. Given its natural meaning, the section only attributes the acts of an agent to his principal. It is thus irrelevant in the current analysis.

21. On whether Pearson Asia is a data user by reason of the collection of the Appellant's data, Mr Ng made the point that the focus should be on the control exercised by the "ultimate entity" and Pearson Asia merely conducted the technical act of collection without any control.

22. We do not consider the concepts of "ultimate entity" or "technical act of collection" helpful. Control could well exist at multiple levels, albeit with different levels of generality. At least when collection is concerned, no instruction could deal with all trivialities and some degree of control must be left in the hands of the party who carried out the collection. This is in the spirit of s.2 of the Ordinance in that control could be joint or in common with others. If Mr Ng's line of reasoning is to be followed, one could well assert that ultimate control only lies in in the

directors and shareholders of the ultimate entity.

23. Mr Ng also relied on the Shi Tao Case where it was said that YHHK had control of the data as it wholly owned Beijing Yahoo!. We think that the case does not assist the Respondent. In paragraph 82 of the Board's decision, it appears that the Board has found that Beijing Yahoo! and YHHK both had control. YHHK is also wholly owned by Yahoo! Inc, a US company. Clearly, it is not the correct approach to focus only on the ultimate entity.

24. In the present case, CIMA controls the types of personal data collected and Pearson VUE controls how they are to be processed. These entities exercised control at a more general level. It is Pearson Asia that has control of the on-site work. An obvious example of matters that Pearson Asia may exert control is the quality of the photographs taken. It is Pearson Asia that feeds the information into Pearson VUE's database. We opine that this suffices for the purpose of "control".

25. Assuming the facts stated above are correct, we would have agreed with the Appellant that Pearson Asia is a data user. However, as we have said before, there are contradictions in the accounts given by the Respondent and the Pearson entities. Who exactly is responsible for the on-site collection of data? If it is in fact Pearson VUE's internal unit, Pearson HK, that is responsible for the collection, Pearson Asia's role may be as limited as storing the CCTV Recordings at the test centre without access to them. One might argue that this role is akin to that of a telecommunications services provider.

26. We are unable to conclude whether Pearson Asia is a data user due to these uncertainties. By the same token, neither should the Respondent have been able to do so. We consider it premature and wrongful for the Respondent to terminate the investigation before properly establishing the facts that are to form the basis of its decision.

Whether There is *Prima Facie* Evidence

27. We accept the Respondent's submission that the Appellant bears the burden to put forward *prima facie* evidence of contravention. We note that this Board is not required to make any definitive findings on the merits of the complaints.

28. The Appellant's substantive complaints are for contravention of DPP 1, 2 and 5.

29. In relation to DPP1, the Appellant says that the collection of multiple versions of ID Images for the same candidate as well as the use of CCTV Recordings were excessive and disproportionate. This is to be contrasted with less privacy intrusive measures adopted by comparable bodies such as ACCA and HKICPA. In response, the Respondent says that these procedures are necessary, proportionate and not excessive to deter fraudulent exam practices. The Respondent relied on examples of fraudulent exam practices provided by Pearson VUE.

30. In our view, the Respondent has correctly identified a legitimate purpose, but has failed to elaborate on why these measures are not excessive to achieve that purpose. One might ask what additional benefit

may be gained by taking photographs in addition to visually comparing the candidate's appearance with the photograph on the candidate's identification documents. What is the justification for these enhanced verification measures, when comparable bodies, supposedly with similar concerns, have not seen fit to do so? This Board is not in a position to say there is none. All we are saying is that these are proper matters for investigation. Added to the above is the conflicting accounts we have pointed out earlier as to who exactly collected the data at the test centre and thus should be accountable for excessive collection.

31. In relation to DPP2, it is helpful to summarise what appears to be the relevant retention periods as per the privacy policies and statements of the entities concerned:-

(a) Pearson Asia retains the CCTV Recordings for 30 days.
(b) Pearson VUE retains the ID Images for the life of its contract with CIMA for the purpose of carrying out a subsequent visual comparison with new ID Images.
(c) CIMA retains the candidate's personal data as long as the candidate's account is active or possibly longer to deal with outstanding matters such as overdue payments.

32. The Appellant says that the 30 day retention period of the CCTV Recordings is excessive and it is unnecessary to retain the entire history of ID Images. The Appellant also complained that he was given conflicting accounts regarding the period of retention of the ID Images.

33. The Respondent submitted that they do not prescribe any specific

retention period, instead, they would consider whether there are reasonable explanations offered by the data user. We note that the Respondent itself in an email to Pearson VUE stated that the retention period of the CCTV Recordings appears to be arbitrary and suggested a reduction. As to the other kinds of personal data, Mr Ng informed us that not much consideration has been given to whether the retention period is no more than necessary, as the Respondent did not treat the entities as data users or data users within their jurisdiction.

34. In our view, since we have previously concluded that it is within the Respondent's jurisdiction to investigate Pearson Asia, Pearson VUE and CIMA, the Respondent could have at least raised a few more inquires. As to Pearson VUE, if visual comparison is only conducted with the last collected ID Images, what is the justification for retaining the entire history of ID Images? What personal data does CIMA itself retain? Would it be necessary to retain all the data until the closure of the candidate's account? Why was the retention period of the CCTV Recordings set at 30 days and what is the justification for it? Again, these entities might have full justifications for their policies, but the Respondent has not elicited explanations from them. Despite the assertion that it has done all that could have been done, the deficiency in the Respondent's investigation is obvious.

35. In relation to DPP5, the Appellant says that he was orally informed by exam administrators that the relevant retention period was 3 months. Pearson Asia, Pearson VUE and CIMA failed to take all practical steps to ensure that the Appellant could ascertain their data policies and practices, as the retention period of 3 months was not reflected in their privacy policy

statements.

36. The Respondent submitted that DPP5 does not require a data user to have a written privacy policy statement or prescribe the matters that the data user must inform the data subject. The data users have duly complied with the requirements of DPP5 by making available the relevant privacy policy statements.

37. We agree with the Respondent that DPP5 does not prescribe what exactly needs to be done. However, it is still incumbent upon the data user to take "all practical steps", whatever form they may be in. We were informed that the data retention period of Pearson VUE and CIMA are the life of the contract with CIMA and the life of the candidate's account with CIMA, respectively. Whether, under what circumstances and by whose staff the Appellant was informed that the retention period is 3 months is a matter of concern. One could argue that it has made it more difficult for him to ascertain what is the real position of Pearson Asia / Pearson VUE / CIMA's data policy and thus potentially in breach of DPP5. Again, no determination could be made until the true facts are ascertained. In addition, assuming Pearson Asia indeed collected the Appellant's data, thereby making it a data user, we are unaware of any step that it has taken to comply with DPP5. It is another matter for the Respondent to investigate.

38. By reason of the above, we find that the Appellant has put forward sufficient evidence for a prima facie case of contravention. We have already pointed out that the Respondent's investigation is inadequate in several aspects, therefore, any qualitative assessment that the complaints

are unmeritorious must be flawed.

39. There is a residual matter we need to deal with, that is, whether further investigation is unnecessary due to voluntary remedial actions taken by Pearson VUE and CIMA. We noticed that Pearson VUE has voluntarily placed notices to notify candidates of the existence of CCTV surveillance. Other than that, it is unclear what other remedial actions have been taken and whether they address the three kinds of contravention complained of. Second, if these remedial actions indeed rendered further investigation unnecessary, we would expect them to be clearly communicated to the Appellant, otherwise it is only natural that the Appellant would be unconvinced and choose to resort to this Board. We, therefore, would not consider the said remedial actions.

Conclusion

40. Pursuant to s.21(2) of the Administrative Appeals Board Ordinance (Cap.442) ("**the AABO**"), this Board is required to have regard to the CHP if at the time of the making of the Decision, the Appellant was or could reasonably have been expected to be aware of the CHP. We accept that the Appellant was aware of it. However, for the reasons above, we are convinced that the Respondent could not have reasonably concluded that further investigation is unnecessary or that there has been no contravention of the DPP. In his oral submission, Mr Ng also referred us to paragraph 18 of the CHP. We have in mind the limitation of the Respondent's resources and the need to efficiently allocate them. Nevertheless, we think that the Respondent should not be absolved from the duty to, at the very least, carry out a proper investigation in a prima facie case.

41. We accordingly allow the Appellant's appeal and, pursuant to s.21(1)(j) of the AABO, order that the Respondent shall continue with the investigation of the complaints against Pearson Asia, Pearson VUE and CIMA.

Costs

42. The Appellant is the only party that applied for cost.

43. Pursuant to s.22(1)(b) of the AABO, this Board may only make an award as to costs against the Respondent if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

44. In Apply Daily Limited v PCPD (AAB No. 5 of 1999), the Board stated:-

> "...s.22(1)(b)...clearly does not envisage that a successful appellant is entitled to the costs of the appeal as of right. It is so only entitled if it is unjust and inequitable to refuse it. These are strong words and a high burden is imposed on the Appellant to show that it should be entitled to costs in the circumstances of cases. The fact that it has incurred legal expenses in the appeal will not by itself entitle it to a costs order. Further, the fact that the Respondent had erred in law in making the decision cannot be the decisive factor. There must be something more."

45. In A v PCPD (AAB No. 17 of 2015), the Board Stated:-

"The provisions of section 22(l) of the AABO, especially the opening words "the Board shall only make an award as to costs ...", make it quite clear that the legislature did not intend that the Board should simply apply the principle that costs follow the event. There has to be something more before the Board should exercise its discretion to make an award of costs."

46. Mr Kok's submission on costs says no more than that costs should follow the event. This is insufficient for the purpose of s.22(1)(b) of the AABO.

47. We make no order as to costs.

(signed)
(Mr Robert Pang Yiu-hung, SC)
Deputy Chairman
Administrative Appeals Board

Mr Martin Kok, instructed by Angela Wang & Co Solicitors, for the Appellant

Mr Dennis Ng, Senior Legal Counsel of the Office of the Privacy Commissioner for Personal data, for the Respondent

Mr Hugo Chow, Trainee Solicitor of Hogan Lovells, for the persons bound by the decision appealed against