ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 16/2012

BETWEEN

YUEN OI YEE, LISA	Appellant
and	
PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

Coram: Administrative Appeals Board

Date of Hearing: 2 May 2013

Date of Handing down Written Decision with Reasons: 23 August 2013

DECISION

BACKGROUND

1. In 2011, the Appellant's husband Mr. Lee commenced proceedings to make a claim ("the Claim") against his ex-employer ("the Company") at the Labour Tribunal (under LBTC 588/2011).

2. On 10 October 2011 the Claim was dismissed with costs of HK$130,353 ("the Costs") awarded to the Company against Mr. Lee.

3. Mr. Lee applied to the Labour Tribunal for a stay of the Costs order, and the Company stated its grounds of objection to such application by its letter dated 27 October 2011 ("Letter 1").

4. The Company stated in Letter 1 that: "The Claimant has evidently no problem with paying the costs awarded as his wife has informed us in her email dated 24th Oct 2011 circulated to the directors and employees of the Defendant that: (a) their daughter "... is rich enough to pay ... HK$130,353.00"; and (b) both their son and daughter are sponsoring the lifestyle of the Claimant and herself ... while they enjoy their life "very much" with food & wine tastings during their retirement and the "legal games" which she is training the Claimant to enjoy ...". The Appellant complained to the Privacy Commissioner that the Company's use of the aforesaid contents ("Contents 1") of her said email dated 24 October 2011 was not for a purpose or a related purpose for which the data Contents 1 were collected by the Company, and thus contravened Data Protection Principle 3 ("DPP 3") set out in Schedule 1 of the Personal Data (Privacy) Ordinance ("the Ordinance").

5. Mr. Lee applied for legal aid in relation to the aforesaid stay application. The Company by a letter dated 2 November 2011 to the Legal Aid Department objected to Mr. Lee's application, and quoted the contents of the Appellant's previous communications with the Company's staff on 16 May, 7 June, 12 and 24 October 2011 and the Appellant's letter to the Judiciary Administrator dated 11 October 2011 ("Contents 2") in which the Appellant stated that (1) the Appellant and the Appellant's husband had nothing to lose and the Appellant was financially sponsored by the Appellant's son and daughter to continue the Appellant's lifestyle; (2) the Appellant enjoyed playing her endless "legal games" and the Appellant was training Mr. Lee to play the same; (3) Mr. Lee could play his "legal games" free of charge with the granted legal aid; (4) there was no way the Company could apply for a bankruptcy order against Mr. Lee; and (5) the Appellant told the Company that, with the Appellant's assistance, a landlord who sued Mr. Lee was counterclaimed by him and relevant legal proceedings had dragged on for nearly 2 years.

6. The Appellant complained to the Privacy Commissioner that the Company's use of the aforesaid Contents 2 was not for a purpose or a related purpose for which the data Contents 2 were collected by the Company.

7. The Privacy Commissioner decided not to continue investigation of the 2 said complaints on the, inter alia, ground that there was no contravention of DPP 3. The Appellant now appeals against such decision by the present Appeal.

DECISION AND REASONS

8. The Appellant did not appear at the hearing but submitted a written submission for the consideration of this Appeals Board.

9. There is a question as to whether Contents 1 and 2 are data collected by the Company. They were in unsolicited communications volunteered by the Appellant herself. However, as this Appeal will be disposed of against the Appellant (for reasons set out further below) even assuming that they were data collected by the Company, the analysis below shall proceed on the assumption that Contents 1 and 2 are data collected by the Company, without actually deciding the same.

10. The first issue is whether Contents 1 and 2 were used by the Company for a purpose for which they were collected by the Company, or a directly related purpose (see DPP 3).

11. Contents 1 were sent to the Company through the Appellant's letters, which, both from the sender's viewpoint and the recipient's, were to influence the legal proceedings in the Claim. The Company's use of Contents 1 was to oppose Mr. Lee's application for stay, which was part and parcel of the legal proceedings in the Claim. Contents 1 were clearly used for a purpose directly related to the purpose for which they were collected.

12. Contents 2 were sent through the Appellant's communications which were to influence the conduct of the legal proceedings in the Claim. The Company's use of Contents 2 was to oppose Mr. Lee's application for legal aid for the same legal proceedings, and thus was part and parcel of the same legal proceedings in the Claim. Again, Contents 2 were clearly used for a purpose directly related to the purpose for which they were collected.

13. Thus, the Privacy Commissioner was plainly correct in refusing to proceed with the 2 complaints in respect of the Company's aforesaid use of Contents 1 and 2. There is no merit at all in this Appeal.

14. The aforesaid reasons are sufficient to dispose of this Appeal (in dismissing the same).

15. Two further reasons for dismissal of the Appeal in relation to the complaint against use of Contents 1 are as follows.

16. On a proper construction of the Ordinance, and considering the legislative purpose of the Ordinance, section 4 and DPP3 of the Ordinance should not receive a strict and narrow interpretation as to prevent collected data to be used in a court or tribunal to ensure a fair proceedings therein, when Article 10 of the Bills of Right Ordinance guarantees such right to a fair trial.

17. Alternatively, the Appeals Board is of the view that section 60B of the Ordinance should have retrospective effect so that the use of Contents 1 in the legal proceedings in the Claim is exempt from DPP3, as being "required in connection with any legal proceedings in Hong Kong" (s.60B(b)).

18. In general the presumption is against retrospectivity in the effect of a new legislation: see e.g. *L'Office Cherifien des Phosphates and another v. Yamashita-Shinnihon Steamship Co. Ltd.; The Boucraa* [1994] 1 AC 486. Whether a new amendment or legislation should be construed as having retrospective effect depends on a number of factors, well analysed by Lord Mustill: "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was

enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say." (*L'Office Cherifien des Phosphates and another v. Yamashita-Shinnihon Steamship Co. Ltd.; The Boucraa at* 525F).

19. Under the aforesaid analysis, and employing the principle of fairness, and particularly in view of the consideration in paragraph 16 above, the Appeals Board would respectfully opine that s.60B should have retrospective effect, so that the use of Contents 1 is exempt from DPP3 even though its use was before the enactment of s.60B.

20. For the aforesaid reasons the Appeal is unanimously dismissed.

COSTS

21. The Privacy Commissioner asked for costs at the hearing on 2 May 2013 pursuant to s.22(1)(a) of Cap 442 Administrative Appeals Board Ordinance. The Appeals Board has jurisdiction to "award costs of and relating to the appeal" under s.21(1)(k). The relevant sections provide:

> "Section 21(1) For the purposes of an appeal, the Board may-
>
> ...
>
> (k) subject to section 22, make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal;...
>
> Section 22(1) The Board shall only make an award as to costs under section 21(1)(k)-
>
> (a) against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner; and
>
> (b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so."

22. From the 2 sections above, it is apparent that the threshold for awarding costs against the Appellant is high. Her conduct must be "frivolous or vexatious" if costs were to be awarded against her.

23. The Privacy Commissioner relies on 3 aspects of the Appellant's conduct to support the contention that the Appellant's conduct were "frivolous or vexatious":

(1) the applications to vacate the hearings and the reasons provided therein, together with her absence from the hearing on 2 May 2013;

(2) the application for extensions of time for her Written Response/Statement to the Privacy Commissioner's Statement filed on 31 August 2012, and to the Written Submission of the Privacy Commissioner filed on 9 May 2013; and

(3) the application to subpoena 7 individuals.

24. The Privacy Commissioner, by a letter dated 2 July 2013 addressed to the Appeals Board and served on the Appellant, further relies on a fact revealed from the judgment ("the Judgment") by G Lam J in HCMP2829/2012 between the Appellant and 2 parties unrelated to this Appeal. The Judgment was concerned with a hearing on 2 May 2013 (i.e. the same day as the hearing of this Appeal) of a matter unrelated to the present Appeal. The Appellant submitted a written submission dated 9th July 2013 replying, inter-alia, to the 2 July 2013 letter.

VEXATIOUS

25. The Appeals Board finds that this Appeal was not brought to ventilate a genuine complaint but brought with the intention of causing nuisance to the Privacy Commissioner, the Company and those representing the Company.

26. There is ample evidence of such of the Appellant's ulterior motive. It is analyzed as follows.

27. The Appellant's letter dated 5 April 2013 to the Office of Privacy Commissioner (as attached to her letter to the Appeals Board on 22 April 2013) stated that she "must

abandon the hearing of appeal to be held on 2nd May, 2013 for AAB16/2011...if your enforcement notice against [the Company] under this file [i.e. 201107263] may be issued on or before 2nd May, 2013 in order to save all parties' time and costs". It would appear that the "if" in the quote above should instead be read as "unless".

28. She also stated that if the Privacy Commissioner did not accede to this request, she would be "forced to attend the hearing...on 2nd May, 2013 in order to do either one of the followings: 1. To adjourn the hearing...with my intended appeal against...201107263 [if enforcement notice is refused]; or 2. To change the parties being complained..."

29. The issue in Case No. 201107263 was set out in the Appellant's letter dated 14 February 2013 to the Appeals Board. It was her complaint lodged against the Company, complaining of her personal data being stolen by 2 individuals of the company from the laptop left by her husband on 4 November 2010 in the conference room after his employment had been terminated. Thus, Case No. 201107263 is entirely irrelevant and cannot assist the Appellant in this Appeal. Rather, the Appellant was using this Appeal to exert improper pressure on the Privacy Commissioner to resolve Case No. 201107263 expeditiously. This is evidenced by the letters dated 13 December 2012, 23 January 2013, and 14 February 2013 (to the Appeals Board and copied to the Privacy Commissioner) whereby she requested extensions of time to file her written response. One of the grounds she relied on was the lack of outcome in Case No. 201107263.

30. Regarding the nuisance to the Company and its representatives, a strong evidence is the subpoena application on 25 February 2013. 6 individuals of the Company and 1 from the solicitors' firm which represented the Company were sought to be called in this Appeal. One of the reasons given was about her personal data being stolen when her husband's laptop was left in the conference room on 4 November 2010 (i.e. the complaint in Case No. 201107263). The only relevant reason is at paragraph 3 which in essence said that she doubted why a director/officer of the Company (named by the Appellant, whom the Appeals Board will simply refer to as "MC" to preserve his anonymity) copied her personal data to third parties without consent "but not passing those dirty jobs to" the solicitors' firm acting for the Company, this ground only relates to 2 of the 7 individuals in the subpoena application.

31. The intention to cause nuisance is further evidenced by the letter to the solicitors' firm on 1 March 2013. At page 3 paragraph 4 it is said that she "want to take away the mask of [MC] in front of [TS]" and she "decide to subpoena [the wife of MC] too to be appeared for this appeal when I must ask her to share my hard feeling if her letters and emails were circulated to her husband without her consent". MC and TS (both of the Company) were 2 of the 7 individuals in the subpoena application while the wife of MC was not.

32. It is clear that the subpoena application was intended by the Appellant solely to further her persecution of the alleged misconduct of some of the individuals. Such application clearly cannot assist her in this Appeal, and she must have known it.

33. The Appellant also made various totally unwarranted derogatory remarks on individuals of the Company in the correspondences with the Appeals Board. For example, in the letter to the solicitors' firm dated 1 March 2013 (attached to her letter to the Appeals Board of the same date), she said MC "acted worse than a bloody bitch when the word 'bitch' used to describe on women only". Also in the letter dated 27 March 2013 to the Appeals Board she said "I had no relationship with all devils and idiots nor their mothers, grandmothers or great grandmothers of [the Company] at all".

34. It is more than clear that the Appellant was launching a personal vendetta against the Company, its directors and officers, and those representing it. The Appellant's conduct was way beyond hostility in an ordinary litigation sense. She was maliciously using this Appeal to tarnish the image of those who incurred her disliking.

FRIVOLOUS

35. The Appellant also had no genuine intention of prosecuting the Appeal on its merits (other than conducting it for the improper purposes as discussed herein). She made no attempt to address the reasoning of the Privacy Commissioner, pertaining to the merits of the Appeal. The gist of her contention, as shown in the late written submissions on 30 April 2013 was that the Appeal ought to be heard after the outcome of Case No. 201107263 was known. That outcome cannot be relevant to the decision of the Privacy Commissioner nor relevant to the merits of the Appeal, and thus her contention is wholly untenable.

36. Her absence from the hearing on 2 May 2013 also shows her lack of intention to prosecute the Appeal on its merits. By a letter dated 27 March 2013 she applied to move the hearing of the Appeal from 30 April 2013 to 2 May 2013. She did not then mention that if Case No. 201107263 was not resolved by then she would not attend the Appeal: in fact there was no mention of Case No. 201107263. The application was granted and the hearing date was moved to 2 May 2013. However, by a letter dated 22 April 2013, the appellant stated that she had "decide[d] to cancel (not abandon) the...hearing...on 2nd May, 2013 pending an outcome" of Case No. 201107263, allegedly in order to save costs and time.

37. By a letter dated 26 April 2013 the Appellant repeated once again her complaint regarding Case No. 201107263. Additionally she mentioned that the outcome of Case No. 201100051 would be released within a few days. But, it is difficult to see how she could argue that the outcome in that other case could be relevant to the Appeal. More importantly she stated that she was to attend a hearing in HCMP2829/2012 on 2 May 2013. She relied on the "above" (i.e. Case Nos. 201107263, 201100051, and hearing of HCMP2829/2012) to support her application to vacate the hearing of the Appeal on 2 May 2013.

38. The judgment of HCMP2829/2012 dated 5 June 2013 is pertinent to this Appeal:

> "3. The plaintiff [i.e. the Appellant] did not appear at the hearing on 2 May 2013. Apparently she had another matter to attend to at the Administrative Appeals Board on that morning. Her previous applications for adjournment of the hearing in these proceedings had been refused by Au-Yeung J. The plaintiff delivered written submissions to this Court on the morning of 2 May 2013 indicating that she was content for the hearing to proceed in her absence and asking the Court to take into account her written submissions. Accordingly, at the hearing, the 1st defendant made oral submissions to me on the above matters. I have taken into account the plaintiff's written submissions."

39. The Appellant did attempt to explain her absence in her written submission dated 9 July 2013 referred to in paragraph 24 above ("the Costs Reply"). She asserted that she did go to the High Court Building in the morning of 2 May 2013, and was there "even after 8:45 am", and she checked with the Clerk of G Lam J as to whether her written

submissions for that hearing, filed by her in person at around 8:50 am that morning, had been received by the Clerk. After such checking, it was "just after 9:00 am" and thus, she alleged, she was "unable to attend" the Appeal. She did not explain why she did not file before that day, knowing that she had to leave the High Court Building and to attend the Appeal at 9:30 am that morning. She did not explain why she did not call the Secretary of the Appeals Board at "just after 9:00 am" that she was on her way to attend the Appeal, scheduled at 9:30 am at a site ("the Tamar") not far away from the High Court Building, and why she did not attend the High Court hearing when she thought at "just after 9:00 am" it was too late to attend this Appeal.

40. She also stated in her aforesaid written submissions that if costs is granted against her, she "must apply for leave to a Judicial Review under no choice when I am eligible to apply for a legal aid certificate same as my husband who has received his two legal aid certificates for [two appeals] recently".

41. The various applications for extension of time (in this case, for filing the written response and for filing the Costs Reply) may or may not be sufficient by themselves to amount to frivolous or vexatious conduct warranting an order against an appellant to pay cost, depending on the factual context and overall circumstances. Indeed, at the time, to err on the side of caution or to give her the benefit of doubt, many of such applications had been granted as per her requests, or granted to some extent. However, now that the whole of the Appeal is disposed of, the Appeals Board is in a much better position to assess her conduct in making such applications in the light of her whole course of conduct, as done in the analysis herein.

42. The aforesaid conduct clearly showed that the Appellant had no genuine intention of prosecuting the Appeal on its merits. The Appeal was only a means to her ulterior motives of causing nuisance to the Privacy Commissioner, the Company, its officers, and its representatives. She used every arsenal available to extend the life of this Appeal so that she can hang it on the concerned parties.

APPELLANT APPEARING IN PERSON

43. The Appeals Board bears in mind that the Appellant was acting in person. However, having considered all the above, the Appeals Board is firmly of the view that

the reason behind her conduct was her malicious intention to cause nuisance and for her personal vendetta as aforesaid, and not because of the lack of legal representation.

QUANTUM OF COSTS

44. The Appellant, in the Costs Reply, did not raise any argument against any of the items or quantum as set out in the Statement of Costs submitted by the Privacy Commissioner. The Appeals Board has considered the same carefully and is of the view that the costs (in the total sum of HK$22,240.30) as claimed are all necessary or proper, and that such sum should be ordered.

CONCLUSION ON COSTS

45. The Appeals Board therefore awards costs of this Appeal to the Privacy Commissioner in the sum of HK$22,240.30, to be paid by the Appellant.

(signed)

(Mr Chan Chi-hung, S.C.)
Deputy Chairman
Administrative Appeals Board