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ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 33 OF 2008 and 35 OF 2008

BETWEEN

YUNG MEI-CHUN, JESSIE	Appellant
and	
PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

Coram: Administrative Appeals Board

Date of Hearing : 18 March 2011

Date of Last Submission after the Hearing : 8 April 2011

Date of Handing down Written Decision with Reasons : 24 August 2011

DECISION

The Appeal

1. The appeal in AAB No. 33/2008, as appeared on the materials before us, was made on the basis that the employer of the Appellant, ML (as defined below) having failed to comply with the Appellant's data correction request in relation to a termination letter of 24 September 2007. The Decision of the Respondent appears in a letter dated 9 September 2008. We are not concerned with the other data correction request which concerned with a credit check report prepared by one First Advantage.

2. The appeal in AAB No. 35/2008, again on the materials before us, was made on the basis of the same employer, ML, of the Appellant having failed to comply with the Appellant's data correction request in relation to a Form 5 submitted by ML to the Securities and Futures Commission ("SFC") giving the reason why the Appellant ceasing to act as a licensed representative.

3. These two appeals are heard together before us. In substance these two appeals concern the question on the extent to which the jurisdiction of the Board should be exercised, in the context of whether an amendment should be made to matters concerning personal data, in particular when there could be an implication on other on goi ng litigation or disputes, either between the parties or between a party and some other person(s) (or bodies) who are not a party to these proceedings.

4. More specifically, there seems to be two questions or matters the outcome of this appeal might affect the Appellant *directly*, if what the Appellant alleged is right, namely, her personal data was wrongly recorded :

(a) whether her dismissal by her previous employer, Merrill Lynch (Asia Pacific) Limited ("**ML**"), was wrongful ;

(b) whether she is a fit and proper person to be licensed by the Securities and Futures Commission ("**SFC**").

5. More explanation will be provided below.

6. The Appellant submitted throughout the hearing that the present appeal is irrelevant to these two matters. We do not agree. We emphasize that an appeal like the present two cases should normally not decide the outcome of the questions stated under Paragraph 4 above, as and especially when the Board does not have sufficient materials to make an informed decision.

7. On the evidence before us and the factual matrix as stated above, we can see there are three reasons why the two appeals must fail :

(a) The scope of a data correction request under the Personal Data (Privacy) Ordinance does not cover requests for correction of the content of a dismissal notice such as the Termination Letter nor Form 5 which is a letter which the employer is under a duty to provide to a third party (namely, the Securities and Futures Commission);

(b) The reasons given for the dismissal are not personal data of the employee which may be corrected under a data correction request;

(c) There are in any case insufficient materials before this Board to adjudicate the reasons for the dismissal of the Appellant as this was not the issue in this appeal. If we were to adjudicate the appeals this should await the outcome of any proceedings between the Appellant and ML in Labour Tribunal proceedings in the case of AAB No. 33/2008, and between the Appellant, ML and possibly the SFC in the case of AAB No. 35/2008.

I. Scope of data correction request

8. We drew assistance from the decision of AAB No. 22 of 2000. In that case the appellant was an ex-employee of an organisation. He was given notice of dismissal. He insisted that the content of the termination notice was incorrect, in that there was a reference that he had engaged in personal business during office hours and had allegedly abused the time spent during office hours. He asked for amendment by deletion of the relevant passage regarding that reference.

9. The AAB (decision rendered by the Honourable Mr Justice Cheung (as he then was)) said :

"條例不適用於這類案件

張先生要求更改的個人資料，並不是一般常見的個人資料，例如姓名、年齡、地址、學歷、經驗和身分證號碼等等，他現在要求更改的個人資料是一份解僱通知書的內容。通知書說明解僱張先生的理由，雖然在內容上，該份通知書是有涉及個人資料的，但就一份解僱通知書而要求修改其內容，本上訴委員會認爲並不是條例第 22、23 及 24 條的立法原意，因爲這類形的文件，肯定是涉及僱主對僱員在工作表現上的評估，雙方對這些評估的內容亦會各持己見，一般來說，僱主解僱僱員是因爲對他的工作表現不滿，如果僱員要求僱主更改對他工作的評估，這是一項不切實際的要求。如果僱員認爲通知書的內容不準確，他應該根據其他法律途徑，例如在勞資審裁處提出訴訟來解決雙方的爭執。上訴委員會認爲基本來說條例第 22、23 及 24 條是不適用於這類的案件。"

Translation :

"The Ordinance is not applicable to this type of cases

The personal data involved in Mr. CHEUNG's data correction request were not common personal particulars such as name, age, address, academic qualifications, experience or identity card number, etc. but content of a notice detailing the reasons for Mr. CHEUNG's dismissal. Though personal data are involved in the notice, the Board is of the view that it is not the original legislative intent of Sections 22, 23 and 24 of the Ordinance to cover requests for correction of the content of a dismissal notice as this type of documents will without doubt contain an employer's assessment of an employee's performance. In a notice of dismissal, one party's view will inevitably contradict that of the other's assessment of performance in work. As an employee is usually dismissed on grounds of unsatisfactory performance, it will be unrealistic to request an employer to change his/her assessment of the performance of an employee. If an employee wishes to dispute the accuracy of the content of a notice of dismissal, he/she may seek other remedies such as initiating legal proceedings at the Labour Tribunal. In general, the Board is of the view that Sections 22, 23 and 24 of the Ordinance do not apply to the request concerned."

10. We agree entirely with the above statement that "*it is not the original legislative intent of Sections 22, 23 and 24 of the Ordinance to cover requests for correction of the content of a dismissal notice*" and "*in general ... Sections 22, 23*

and 24 of the Ordinance do not apply to the request concerned". In the case of AAB No. 33/2008, the dismissal notice is the Termination Letter. In the case of AAB No. 35/2008, the Form 5 submitted to the SFC is in similar nature as the dismissal notice in AAB No. 22 of 2000.

II. Reasons for dismissal not personal data of Appellant

11. Secondly, we would only humbly add that given the fact that it was the assessment of work performance by the employer, this part of the data did not constitute the personal data of the employee. In fact it was only the data of the employer, not the employee. The employer may be proved wrong if there were very clear and binding decision(s) by the relevant authorities (either the court, or an appropriate tribunal or competent authority). However, it normally remains part of the employer's data but not the employee's.

12. Similarly, whether the Appellant is a fit and proper person to be licensed under the relevant regime of the SFC cannot be determined by this Board under the context of personal data correction.

13. In the present case, it was clear to us that the statement said to be personal data of the Appellant in both the Termination Letter and Form 5 was in fact **not** personal data of the Appellant, and this finding will be sufficient to dismiss her appeal.

III. Not a dispute before this Board

14. Thirdly, we do not consider that in the presence of a pending litigation before the Labour Tribunal, this Board should decide on a matter which substantially overlaps with the outcome of the dispute in the Labour Tribunal or any SFC proceedings.

15. This is because that this Board was simply not provided with all the materials to suggest one way or the other whether the dismissal of the Appellant was wrongful.

16. On the other hand, the request made by the Appellant, for amendment by way of deletion of the relevant statement, with respect, has the clear implication that (a) her dismissal was wrongful, and also that (b) her licence with the SFC was valid because she is a fit and proper person. Such is a result that this Board should emphatically avoid, to prevent collateral challenges being used by litigants.

17. The reason why we say there were insufficient materials before us can be examined by looking at the present allegations of the Appellant.

AAB No. 33/2008

18. In her Grounds of Appeal in her letter of 4 October 2008, in AAB No. 33/2008, elaborated at the hearing, and supplemented with additional documents before and after the hearing, the Appellant made the following complaints :

(a) ML had deliberately made incorrect statements about its discovery of two court cases (HCA 4726/2003 and HCA 4594/2002) after meetings on 23 and 28 August 2007, when ML had such knowledge before then because there was a report by one First Advantage dated 6 July 2007 which apparently ML had received before 28 August 2007.

(b) The Appellant had disclosed HCA 4594/2002 to SFC in 2005, as an appendix to the SFC Form 3. A copy of this form was provided to ML well before 23 August 2007.

(c) The Respondent's view that it was trivial on when ML had knowledge of the two court cases in (a) is wrong.

Ground 1 : Deliberately making incorrect statement

19. This is a serious allegation and should not be seriously made without proper foundation. The controversy giving rise to this appeal was what apparently took place on 23 and 28 August 2007 when the Appellant attended meetings with the representatives of her then employer, ML.

20. According to ML's solicitors' letter dated 13 June 2008 to the Respondent, during the meeting on 23 and 28 August 2007 there was non disclosure of two court cases involving the Appellant as a party :

> *"[the Appellant] was specifically asked whether there was other litigation which involved her as a party, but she said no and added that she had disclosed all her past litigation records to [ML]. However after [ML's] review of the two background reports relating to [the Appellant] prepared by First Advantage Quest Research ... on 24 August 2007, [ML]* ***discovered further litigation****, namely HCA*

4726/2003 and HCA 4594/2002, which involved [the Appellant] as a party but which she failed to disclose to [ML]

During the meeting with [the Appellant] on 28 August 2007, [ML] sought an explanation from [the Appellant] as to her non-disclosure of the other litigation. [The Appellant] admitted that she should have disclosed these cases, but she had forgotten to do so."

...

Subsequent to the meetings dated 23 and 28 August 2007, our client did discover two other actions, namely HCA 4726/2003 and HCA 4594/2002, which involved [the Appellant] as a party and which she failed to disclose to our client".

21. It is the interpretation of those words *"discovered two other actions"* that caused problem as those words may mean :

(a) whether there were other actions already in place *before*, but which were discovered *after* 28 August 2007, or

(b) whether there were further actions *initiated after* 28 August 2007 and they were then discovered.

22. We are of the view that the language used by the solicitors of ML in their letter was unfortunate. The statement *"on 24 August 2007, [ML]* ***discovered further litigation****, namely HCA 4726/2003 and HCA 4594/2002"* would appear to us to refer to discovery by ML of the two court cases on 24 August 2007. That was after 23 August but before 28 August 2007. So it could not be after 28 August 2007 when the discovery of the two cases took place.

23. This statement suffers the further problem that it might not even be correct as there was a report prepared by First Advantage dated 6 July 2007 evidently showing the existence of the two cases. Therefore ML might have received the information about the existence of HCA 4726/2003 and HCA 4594/2002.

24. No explanation nor evidence was given by ML or their solicitors why the statement was apparently not correct.

25. However, it remains uncertain whether ML or their solicitors had just inadvertently made a mistake, or such mistake was deliberate. It is not for us to speculate, as the dispute is not whether ML or their solicitors had deliberately lied about the matter in order to dismiss the Appellant. Such charge of dishonesty must be fully particularised and cannot be dealt with in the present case.

26. We have some doubt that even if ML or their solicitors had made a mistake, this cannot by itself determine the answer to the question whether the Appellant had failed to disclose the existence of the two actions during her meetings with representatives on either or both of 23 and *28 August 2007.*

27. First of all, it was the duty of the Appellant to disclose, as an honest employee, the existence of the two actions. It was not the duty of the employer (ML) to disclose the existence of the two actions when the employer was trying to test the honesty (or the lack of it) during the two meetings on 23 and 28 August 2007. This aspect assumes ML does have knowledge of the existence of the two actions but deliberately failed to disclose them at the two meetings on 23 and 28 August 2007.

28. If the two actions *HCA 4726/2003 and HCA 4594/2002* were indeed not disclosed, prima facie the Appellant was not honest with her employer, and the employer (subject to any other grounds the Appellant may have) might have a good reason to, or may be entitled to dismiss the Appellant.

29. In this regard we have to emphasise that we are not here to judge the outcome of any question whether there was wrongful dismissal by ML of the Appellant. This is a matter for Labour Tribunal proceedings that the Appellant may wish to institute, if she had not already done so. We are merely stating a provisional view whether it was arguable that the employer ML might be entitled to dismiss the Appellant.

30. Secondly, the Appellant said she had disclosed the existence of the two actions on 23 and 28 August 2007. This was not evidenced by contemporary documents before us. May be there were such documents, may be there were none. In any case this Board was not assisted.

31. Thirdly, we note that the mistake in ML's solicitors' letter dated 13 June 2008 to the Respondent may be explained by the fact that ML's solicitors misreading ML's letter dated 24 September 2007[1], when ML terminated the employment of the Appellant.

32. The Termination Letter contained the following statement:

> *"Following meetings on 23 and 28 August 2007 attended by yourself, OGC and OMT, you were requested to make full and frank disclosure of your past and present personal litigation issues. Subsequent to those meetings,* ***further litigation was discovered*** *which involved you as a party and which you failed to disclose to us."*

33. Again, we do not think we should speculate the reasons for ML's solicitors seemingly getting it wrong in their letter dated 13 June 2008. It might or might not be the negligence of the solicitors of ML. But to draw inference of dishonesty would be too speculative.

Ground 2 : Form 3 is sufficient disclosure ?

34. We have examined the Form 3 which is at page 276 to 290 of the Appeal Bundle. We regret to say we could not find any reference to the words "HCA 4594 of 2002" or "HCA 4726 of 2003" or words of similar effect. What was examined was a descriptive reference of some of the litigation the Appellant said she was a party. With respect we do not believe this can be said to be sufficient disclosure. However, we are not here to judge the requirement of the SFC whether they had been fulfilled. We are here to consider whether those statements appearing in Form 3 had specifically and therefore sufficiently disclose the existence of a civil litigation in "HCA 4594 of 2002" or "HCA 4726 of 2003". In my view there was no sufficient disclosure by looking at Form 3 alone.

Ground 3 : Respondent's view that the timing of discovery was trivial

35. The timing when ML discovered the existence of the two civil actions may or may not be significant. However we tend to agree that the timing of discovery is relevant to whether ML was intending to dismiss the Appellant on a false or proper premise. This is a question which goes directly to the question of whether the Appellant was wrongfully

[1] Appeal Bundle Page 217

dismissed. Again we are not dealing with this issue in this appeal.

AAB No. 35/2008

36. On 3 October 2007, ML filed the *"Securities and Futures Commission – Form 5"* ("the Form 5") to the Securities and Futures Commission ("SFC") as notification to SFC about the termination of employment with the Appellant.[2] Details given for the termination was:

> *"Termination of employment by contractual notice as a result of* ***material non-disclosure****."*[3]

37. The Appellant first of all complained against the Respondent's decision on whether the Form 5 was supplied by ML under a data request was a decision which was "in haste and ridiculous". We do not see, if the Respondent was wrong, how this will affect the question whether the Form 5 was wrong. It requires multiple accusations against ML as a dishonest employer who would try every means to ridicule the Appellant. This approach is far fetch and has no foundation.

38. Secondly, the Appellant said she "complained ML for not complying with [her] data correction request. This includes the inaccuracies in the termination letter, that is the reason given by ML to terminate the employment contract". The foundation of this accusation is again following from the Appellant's attack on the Termination Letter, a contention which for the reasons stated above we have rejected, and we do not repeat those reasons here.

39. No doubt whether there was indeed "material non-disclosure" by the Appellant would depend on whether the Appellant had failed to disclose all the actions in which she was a party at the two meetings on 23 and 28 August. This is clearly a factual dispute which we have heard no evidence and are in no position to decide.

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[2] Appeal Bundle Page 538-541

[3] Appeal Bundle Page 541

Conclusion

40. The Appeal is dismissed. We would like to thank parties for their assistance and submissions.

(Mr Andrew Mak)
Deputy Chairman
Administrative Appeals Board