

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 40 OF 2009

BETWEEN

FORTIS INSURANCE COMPANY
(ASIA) LIMITED

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 17 August 2010

Date of handing down Written Decision with Reasons: 30 December 2010

DECISION

Background

1. On 14 and 15 of July 2008, the Regional Director of the Appellant, Mr Cheng, in a training session held in Mainland China, disclosed to fifty five of his subordinate agents the personal data of one Ms Wong, her family members and her ex-husband. They were all holding current insurance policies with the Appellant and the data disclosed were those normally collected from the insured.

2. Ms Wong had been the Regional Manager under the supervision of Mr Cheng. Her agency contract was terminated on purported ground of inappropriate practice relating to issuing policies to those persons mentioned in the last paragraph. Ms Wong strenuously denied all allegations of impropriety on her part. Whether Ms Wong was guilty or not was not a relevant issue before the Privacy Commissioner for Personal Data (“the Commissioner”) and is definitely not a relevant issue before this Board.

3. On learning the disclosure, Ms Wong made a complaint to the Commissioner which conducted an investigation. As a result, the Commissioner found that the disclosure was a contravention of the requirement of Data Protection Principle 3 (“DPP3”) in Schedule 1 to *the Personal Data (Privacy) Ordinance* (“the Ordinance”) by the Appellant, vicariously through its agent Mr Cheng. The Commissioner was also of the opinion that the contravention had been committed in such circumstances that make it likely that the contravention will continue or be repeated. Accordingly the Commissioner decided to serve an Enforcement Notice on the Appellant.

4. The Appellant is not satisfied with the decision of the Commissioner and is now appealing against his decision to serve an Enforcement Notice. A number of arguments were raised initially during the course of investigation and in these proceedings. All of them have now been abandoned except one. While the Appellant now accepts that the disclosure of the data of the insured in the circumstances, though to their own agents and in Mainland China, constituted a contravention of the requirement in DPP3 under the Ordinance, and that it is within the jurisdiction of the Commission to conduct an investigation and to issue an Enforcement Notice, it contends that the Commissioner should not have issued the Enforcement Notice.

Grounds of Appeal/Arguments of the Appellant

5. Generally, having found there has been a contravention of a requirement under the Ordinance, the Commissioner has to be further satisfied with other matters as laid down in the Section 50 of the Ordinance. In the instant appeal, the Appellant's contention is about these other matters which the Appellant alleges that the Commissioner, and the Board, should not be satisfied with. Specifically, the main theme of arguments raised is that the Commissioner should not come to the conclusion that the contravention is likely to continue or be repeated in the circumstances and the issuance of Enforcement Notice cannot therefore be justified.

6. The main, if not the only, reason the Commissioner gave for his conclusion that the contravention is likely to be repeated is in para. 53¹ of his Statement Relating to the Decision when he said,

“In view of the circumstances of the case, in particular those set out in paragraph 44 above, the Respondent did not see any indication that the Appellant would stop using or prohibit its agents from using policyholders’ personal data for training purposes. The Respondent was therefore of the opinion that the contravention will likely to (sic) continue or be repeated and decided to serve the Enforcement Notice on the Appellant pursuant to s.50(1) of the Ordinance.”;

and in paragraph 44², when he noted,

“In any event, throughout the investigation, the Appellant has been maintaining that the Meeting was confidential training for its agents and has raised no objection whatsoever to Mr.

¹ page 339 of the Appeal Bundle

² page 337 of the Appeal Bundle

Cheng's act of showing the Information to the attendees at the Meeting. There is no evidence whatsoever to suggest that Mr. Cheng's act was something that the Appellant prohibits or tries to prevent."

7. The "circumstances of the case" the Commissioner could possibly allude to are materials provided by the Appellant's staff members and agents, and Ms Wong. These materials formed the basis of the conclusion of the Commissioner. Both the Appellant and the Respondent rely on these materials for their argument. There is no factual dispute about these materials, except that the Appellant stresses the point that Mr Cheng's evidence is not credible.

8. Mr Cheng's credibility forms the basis of the Appellant's first challenge to the Commissioner's decision. As to this point, Ms Zhuang of Kennedys Solicitors for the Appellant, submits that Mr Cheng bore a grudge against the Appellant because his contract was terminated in consequence of this incident. This might well be the case but it is not a sufficient reason by itself to discredit him. Equally the fact that he gave his statement well knowing there was criminal sanction for giving a false statement is not a good reason to accept his evidence in its entirety. Other matters have to be taken into account, especially those occasions and matters as pointed out by Ms Zhuang when he was shown not to be credible.

9. Ms Zhuang rightly submits a number of criticisms about Mr Cheng's evidence, for instance, that he did not confess to his act of disclosing personal data of Ms Wong and others at the first opportunity, that he did not hand over to the Appellant, when he could, the materials used in the training session. Firstly it should be noted, however, that what Mr Cheng confessed to have done was not in dispute before the Commissioner then, and is not in dispute before this Board now. Secondly, his initial denial and withholding incriminating

evidence are something which Ms Zhuang wants to turn to the advantage of the Appellant's case. She argues that these attempts to hide the truth indicate a guilty mind tending to show that Mr Cheng knew what he did was something the Appellant tried to stop and prohibited. Ms Zhuang merely wants to discredit that part of evidence which shows the Appellant in a bad light. In his statement, Mr Cheng said, in paragraph 3³:

“During my employment in Fortis, I was not given any guidelines or training on the handling of personal data. Therefore, Fortis did not give me any guidelines as to whether and how I should use documents containing personal data in the course of staff training. As I was familiar with the operation of insurance business, Fortis did not specifically provide me with any training.”

and in paragraph 10⁴

“My main purpose of mentioning Peggy's insurance policies was to warn my staff that her conduct caused harm to the company's interest and it was incorrect, but I did not mention the content of the insurance policies. Though Fortis did not know this in advance, as Fortis had authorized me to train my staff, my act was approved by Fortis. Moreover, Fortis (i.e. Johnny) had praised me for my act, considering my act was correct.”

Matters complained of by Ms Zhuang were contained in the above two paragraphs. She submits that it is not true that Mr Cheng was not given any

³ page 789 of Appeal Bundle

⁴ page 790 of Appeal Bundle

training or guidelines on handling personal data. In the strict and literal sense, she is right. Looking at the entirety of his statement and the circumstances of the investigation, this Board find it necessary to interpret his claim in the context. He might be a little bit exaggerating but what he actually meant to convey by those words is that no specific training or guidelines were given in relation to the use of personal data in training sessions. Ms Liu, for the Respondent, pointed out that the Commissioner made no findings on fact that Mr Cheng received no training or guidelines. This is besides the point. In view of voluminous materials, it is difficult for the Board to perceive the Commissioner could have found otherwise than that Mr Cheng had received training and guidelines in general. The Commissioner has made it clear that it was the lack of specifics that prompted him to make his decision. The other complaint Ms Liu has is that there is no evidence to corroborate the allegation that Johnny approved the act of Mr Cheng. There is merit in this submission. If the Commissioner chose to rely on this allegation, he should, as suggested by Ms Zhuang, make some further enquiry, or to allow the Appellant an opportunity to deal with it. However, the Commissioner did not rely on Mr Cheng's allegation, and he chose to rely on the stance the Appellant made through its then solicitors and other materials. This he was entitled to do.

10. The allegation that Johnny praised the act of Mr Cheng played no part in the Commissioner's decision. Apart from the credibility of Mr Cheng, it is also unclear if Johnny praised specifically the mishandling of personal data. For these reasons, this Board, also would not rely on the allegation that Johnny praised Mr Cheng for his act.

11. The basis of the Commissioner's decision is inference drawn from the materials before him. There are two challenges. Firstly, the Appellant contends that the contravention is an isolated incident, and similar contravention

is not likely to be repeated. Further or in the alternative, the relevant personal handling policy, training, practice and disciplinary sanction in place would be reasonably sufficient to prevent similar contravention from occurring.

Circumstances of the Case---Isolated Incident

12. Ms Wong was the subordinate of Mr Cheng. It is reasonable to expect that he was to some extent embarrassed by the alleged malpractice of Ms Wong. The circumstances smacked of a personal vendetta when Mr Cheng decided to disclose the personal data of Ms Wong. Ms Wong confirmed that she was definitely of the same view. Mr Cheng himself said this was the first time that he used personal data of policy holders in a training session. There is no evidence that there had been any similar incident. For these reasons, Ms Zhuang submits that this is an isolated incident. While the contravention was the first of its kind, and looking at the motivation of Mr Cheng, one may be justified in calling it an isolated incident, in a general and loose sense. It was an isolated incident in the past. What the Commissioner should be concerned with is not only the past record of the Appellant, but the future occurrence. Ms Zhuang complains about the finding that "*there is not even a hint that the matter Ms Wong complained about is a single isolated incident and would not be repeated.*" The Commissioner could have chosen better expressions to avoid misunderstanding or misinterpretation. The Board is of the view, however, that the language he chose, is reasonably clear in the light of what he said in the above two paragraphs of his Statement Relating to the Decision. The Commissioner was merely saying that there was not a hint that the incident would not be repeated in the future. He was not making a finding that it was not an isolated incident, in so far the term 'isolated incident' is restricted to past events. What Ms Zhuang is in effect contending is that the fact that the incident is first of its kind, by itself, tends to show it is not likely to be repeated.

However, without evidence that all the training sessions conducted by the Appellant were recorded and that these records had been thoroughly checked with the result that in fact no personal data was used in reach of DPP3 in any of these training sessions prior to this incident, Ms Zhuang's proposition that there were no other cases of a similar nature is no more than a bare assertion. In any event, even if so, for what it is worth, it is only one of the factors which should be taken into account, in determining whether the Commissioner is justified in coming to his conclusion.

Circumstances of the Case---Company Policies and Guidelines and Personal Training

13. Apart from the assertion that the contravention is the first one, there are other factors which the Appellant relies on. These other factors can be conveniently categorized into two. Firstly, they are the Appellant's various data handling policies and guidelines, and, disciplinary rules and policies, and secondly, the training organized for its staff members and agents.

14. The Commissioner had gone into details of the materials of the first category. He came to the conclusion that they were too general. Indeed they are. Ms Zhuang does not dispute that. She argues, there is no need to provide specific guidelines and policies dealing with similar situations.

15. As to the personal training aspect, again it is not in dispute that agents and staff members all have the opportunity of studying various Data Protection Principles both before and after joining the Appellant. Ms Zhuang submits that individual agents should take its share of responsibility.

Ruling

16. The provisions of the Ordinance relevant to this appeal can be found in the following subsections of Section 50 which provides that :

(1) Where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user-

(a) -----; or

(b) has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated,

then the Commissioner may serve on the relevant data user a notice in writing-

(i) ---;

(ii) --- ;

(iii) directing the data user to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period specified in subsection (7) within which an appeal against the notice may be made) as is specified in the notice; and

(iv) ---.

(3) The steps specified in an enforcement notice to remedy any contravention or matter to which the notice relates may be framed-

(a) *to any extent by reference to any approved code of practice;*

(b) *so as to afford the relevant data user a choice between different ways of remedying the contravention or matter, as the case may be.*

17. It can be seen from these provisions of the Ordinance, the Commissioner in the instant case had to consider the likelihood of the contravention repeating itself under Section 50(1) (b) and the steps he was to direct the data user to take under Section 50(1)(iii) and (3). The Ordinance does not give any definition, or expressly qualify or quantify the meaning of the term 'likely'. One rule of interpretation in these circumstances is to resort to its ordinary meaning. The application of this rule would beg the question. Where the Commissioner is to draw a line before he can be justified to say it is likely to be repeated? It is not possible at all. If he thinks the repetition of contravention is daily, weekly, or monthly, he would certainly be justified to find the contravention likely to be repeated. What about once every 6 months, or once every year, or once every three years or even longer. As this literal approach is not satisfactory, a purposive approach should be adopted in interpreting Section 50.

18. The intent of the legislature is clear. The purpose of serving the Enforcement Notice on data user is a practical one. It is intended to provide an effective remedy having regard to the circumstances of the case. In other words it is intended to reduce the likelihood of repetition of the contravention. The decision process should not be a two-step process. The Commissioner is not intended by the legislature to determine the likelihood of repetition first, even if he can, before he considers what remedy he can propose in the Enforcement Notice. Rather he should consider all circumstances to see if

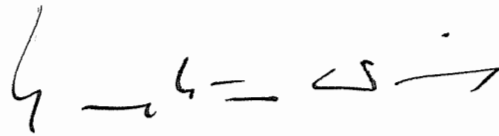
there is any deficiency in the data user's practice and procedure of handling personal data. If there is such deficiency and which deficiency has contributed to the contravention, to properly perform his duty he has to consider if there is any effective remedy to reduce the likelihood of repetition. If there is one such remedy, he is entitled to find that the contravention is *likely* to repeat itself without the remedial steps he directs the data user to take.

19. In the instant case, the Commissioner was of the view that the Appellant did not try to prohibit or prevent the contravention. His view should not be criticized at face value. He meant that there was no such specific prohibition or specific guidelines in handling personal data in training sessions. The Appellant relied heavily on the self-discipline of the agents and its disciplinary action on them. Ms Zhuang argues that specific prohibitions or guidelines are therefore not necessary. These general measures, or circumstances had been in place at the time of the contravention. It did not prevent the contravention by Mr Cheng. In this regard, Ms Zhuang advances a forceful argument that a similar event could not be prevented. Be that as it may, the remedial steps directed by the Commissioner would certainly reduce the likelihood. If there had been simple, specific guidelines or prohibitions or both at the time, Mr Cheng would certainly think twice before he committed any breach of such simple, easy-to-follow, and specific company rules. It was because he would have had no excuse of not understanding simple rules and guidelines. While simple, specific rules can still be fouled by the deliberate, and the reckless, the rules would have great benefit for the unwary.

20. Furthermore this Board is of the same view as the Commissioner with regard to the significance of the stance adopted by the Appellant. Their stance bears witness to the fact that agents and their superiors of the Appellant might not have fully understood the law relating to handling personal data.

Therefore it is not sufficient to leave the matter to their self-discipline. Simple and specific guideline and rules should be in place.

21. For the above reasons, this Board is of the view that the steps directed by the Commissioner can provide a simple and ready remedy to reduce the likelihood of repeating the contravention in training sessions. That being the case, the Commissioner is entitled to come to the conclusion that the contravention would likely be repeated within the meaning of Section 50. The Commissioner is entitled to issue the Enforcement Notice and the Board has no reason to interfere with his decision and thus the Appeal is dismissed.



(Mr Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board