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[Note: Office of the Privacy Commissioner for Personal Data has edited this Decision. Please see the remark for details.]

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 48 of 2002

BETWEEN

SIU SEK KIN

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 17 February 2003 & 30 June 2003

Date of Decision : 30 June 2003

Date of Handing down Written Decision with Reasons : 18 July 2003

DECISION

Introduction

This is an appeal by Mr Siu Sek-kin ("the Appellant") pursuant to

s.39(4) of the Personal Data (Privacy) Ordinance, Cap. 486 (“the Ordinance”) against the decision of the Privacy Commissioner for Personal Data (“the Commissioner”) refusing to serve an enforcement notice on the University of Hong Kong (“the University”) under s.50 of the Ordinance in relation to complaints made by the Appellant.

Background

The Appellant joined the University in August 1982 as a Library Assistant II and was appointed an Architectural Assistant III in January 1983. He was promoted to Architectural Assistant II in 1991 and Architectural Assistant I in 1996. His record of employment suggests a steady and consistent career advancement. The Appellant had been on sick leave from April 2000 suffering from major depressive disorder as a result of stress of work. His service was terminated in February 2001 on ground of redundancy. The case of the Appellant is that he was dismissed because of his illness and not on account of redundancy that the University contended. Whether the Appellant was dismissed by reason of redundancy or otherwise is not a matter with which this Board is concerned. The main bone of contention of this appeal is the accuracy of a reference letter dated 20 February 2001 issued by the University.

The Reference Letter

The full content of this letter is as follows:-

“TO WHOM IT MAY CONCERN

Mr SIU Sek Kin (HKID No. _____ * _____) (see remark below)

This is to certify that Mr. SIU Sek Kin joined the University on

August 18, 1982. He was transferred to this Office as an Architectural Assistant III on October 1, 1983. Mr SIU was promoted to the post of Architectural Assistant I on June 1, 1996.

Mr SIU's major duties were to handle minor projects ranging from design, budget estimate, tender documentation to project management. Mr SIU's expertise is building services installation in building alteration works.

In general, Mr SIU was able to maintain a good working relationship with our user departments.

Mr SIU's last day of service with the University was February 8, 2001.

H.S. So

Senior Assistant Director"

The Complaint

Not satisfied with what the letter said, the Appellant lodged a complaint with the Commissioner on 3 September 2001. His objections, in so far as they relate to the appeal, were:

- (1) the date of his transfer to the Estates Office as Architectural Assistant III on "October 1, 1983" was inaccurate. It should be 10 January 1983.
- (2) the description of his major duties as handling "minor" projects was inaccurate; and
- (3) the description of his last post as "Architectural Assistant I" was

inaccurate.

Investigation and Decision of the Commissioner

The Commissioner carried out an investigation in accordance with s.38 of the Ordinance. In relation to the first complaint, the Commissioner accepted the University's explanation that the mistake was a typographical error as the staff might have misread or mistyped the date "10/01" as 1 October. The Commissioner also accepted the explanation given by the University as regards the second and third complaints that the term "handling minor projects" was not a wrong description of the Appellant's job duties and lastly "Technical Manager" was only a working title given to the Appellant as a result of a major reorganisation of the Estates Office in 1998. The Commissioner therefore found that there had been no contravention of the Ordinance or the Code of Practice by the University and declined to issue an enforcement notice pursuant to s.50 of the Ordinance. The Appellant was informed of his decision on 6 September 2002.

New Reference Letter

During the course of investigation, the University issued, on a "without prejudice" basis, a new reference letter dated 4 June 2002 to replace the one which is being appealed against. The new reference letter is important and helpful in the sense that it provides useful groundwork for the resolution of the problems that the Board faces. It is necessary to set it out in full context:-

“To Whom It May Concern

Mr Siu Sek-kin (HKID No. _____ * _____) (see remark below)

This is to certify that Mr Siu Sek-kin joined the University on August 18, 1982. He was transferred from the Main Library to the Estates Office on January 10, 1983 to work as Architectural Assistant III. Mr Siu was promoted to the post of Architectural Assistant I on June 1, 1996. Mr Siu was given a working title of “Technical Manager” as a result of re-organisation in 1998.

Mr Siu’s major duties were to handle works ranging from design, budget estimate, tender documentation and project management for projects involving alteration of existing systems. Mr Siu was also involved from time to time in the preparation of details and supervision of contractors for projects involving selection of building services systems and their original design. Mr Siu’s expertise is building services installation in building alteration works.

In general, Mr Siu was able to maintain a good working relationship with our user departments.

Mr Siu’s last day of service with the University was February 8, 2001.

Yours faithfully,

H.S. So
Senior Assistant Director”

The Grounds of Appeal and Hearing of the Appeal

The written grounds of appeal lodged by the Appellant were precisely the same as those listed in this decision under the heading of "Complaint". The Appellant challenged the findings of the Commissioner on all three complaints. But in the light of the revised reference letter of 4 June 2002, the appellant appeared to accept during the hearing of the appeal on 17 February 2003 that the first two grounds of appeal had been resolved and he could no longer advance any argument in support of his case. The only outstanding issue is the third ground which concerns the proper description of his last post and that is whether it was Architectural Assistant I or Technical Manager. On this aspect of the case, the evidence is unsatisfactory. It is for this reason that the Board decided to hear further evidence and arguments from the parties and the hearing took place on 30 June 2003. The Board regrets to say that the hearing had not achieved the result that was hoped for. The position is no better than at the end of the hearing on 17 February 2003. The case of the University is that there was a major reorganisation of the Estates Office in 1998 and as a result staff with the rank of Architectural Assistant I were given the working title of Technical Manager. The Board is surprised that there had been nothing in writing for such an important event in a large organisation like the University such as minutes of meetings of the reorganisation and letters or memos informing those who were affected. All the University could produce was a letter from Mr. Kenneth P K Wong, Director of Estates to Professor S. P. Chow, Pro Vice-Chancellor part of which read:-

"Background

The Estates Office undergone a major reorganisation

started in 1998. As part of the reorganisation, the roles, duties and responsibilities of middle and senior management were reorganised. The Architectural Assistant I was renamed as Technical Manager, charged with a more complete range of project responsibilities from design, contract documentation, contract administration and post contract follow-up. Mr Siu is one of eleven in this group. This had been a shift from partial responsibility to full responsibility and full control of projects. It was felt that this group of colleagues would be able to take up this level of responsibility and their salary scale warranted such reorganisation.”

This letter was dated October 17, 2000 with the heading of Mr Siu Sek Kin - Technical Manager, Estates Office. In another context, the Appellant was described as Technical Manager throughout the staff enquiry on 12 July 2000 which eventually led to his dismissal. The Appellant was also given new visiting name cards bearing the title of Technical Manager to replace visiting name cards with the title of Architectural Assistant I.

Findings of the Board

On the evidence available which is not entirely satisfactory, the Board can only draw the conclusion that following the reorganisation, if there was a reorganisation, of the Estates Office in 1998, the post of Architectural Assistant I was renamed Technical Manager, or might even have been merged with that office. There are no record, minutes, correspondence or documentary evidence to indicate this important change. By this, the Board means contemporaneous record etc and not something written some two years later. The Board disagrees

with the Commissioner and takes the view that the University has failed to take all practicable steps to ensure the accuracy of the appellant's last job description and is therefore in contravention of the Ordinance.

What Is To Be Done

In order to fully reflect the state of the situation, the Board takes advantage of the new reference letter of 4 June 2003 and proposes an amended reference letter in the following terms:-

“To Whom It May Concern etc.

This is to certify that Mr Siu Sek-kin joined the University on August 18, 1982. He was transferred from the Main Library to the Estates Office on January 10, 1983 to work as Architectural Assistant III. Mr Siu was promoted to the post of Architectural Assistant II in 1991 and to Architectural Assistant I in June 1996. The post of Architectural Assistant I was renamed Technical Manager as a result of reorganisation in 1998. Mr Siu's last job title was Technical Manager.

Mr Siu's major duties were to handle works ranging from design, budget estimate, tender documentation and project management for project involving alteration of existing systems. Mr Siu was also involved from time to time in the preparation of details and supervision of contractors for projects involving selection of building services systems and their original design. Mr Siu's

expertise is building services installation in building alteration works.

In general, Mr Siu was able to maintain a good working relationship with our user departments.

Mr Siu's last day of service with the University was February 8, 2001.

H.S. So etc”

This proposed amended reference letter was put to the parties for comment. The Appellant accepted it without objection while the legal representative of the University suggested to change the sentence in the last two lines of the first paragraph by deleting the words “was renamed” and instead adding the words “carried the additional title”. The complete sentence would read “The post of Architectural Assistant I carried the additional title Technical Manager.” In the same evening after the hearing, Messrs Johnson Stokes & Master, acting for the University, sent two documents to the Board by means of facsimile transmission. The first document purported to be the notes of a meeting of the Monitoring Committee for the Implementation of Estates Office Review held on 21 September 1998 in which Mr K.P.K. Wong who wrote the letter of 17 October 2000 to Professor S.P. Chow, Pro Vice-Chancellor was a member of the Committee. The other document is purportedly an extract from the staff payroll of the Estates Office with the date of 15/01/01. In that document, the name of Siu Sek Kin appeared and his grade was described as Architectural Assistant I. The Board considered this although the information

had come at the eleventh hour. Mr K.P.K. Wong was present at the hearing on 30 June 2003 as the representative of the University and had been advised long before the hearing to bring along any relevant documents in relation to the post of Technical Manager. Nothing had been done until hours after the hearing. This naturally raised suspicion in our mind as to the authenticity of these two documents. In his letter to Professor Chow, Pro Vice-Chancellor of 17 October 2000, Mr Wong made it abundantly clear that the post of Architectural Assistant I was renamed Technical Manager following a major reorganisation in 1998. He could not have been mistaken or told an untruth to the Pro Vice-Chancellor.

Conclusion

In our view, it is not important whether Technical Manager is an additional or a concurrent title or the new name of the post of Architectural Assistant I, the fact remains that the Appellant had been discharging the duties of Technical Manager at the relevant times and he is entitled to be described as such. The description used by us in the amended reference letter is factually correct. In the circumstances, the Board allows this appeal to this extent. The Commissioner is directed to issue an enforcement notice under s.50 of the Ordinance to secure compliance in the terms of the amended reference letter that we have proposed and approved.



(Mr Michael Wong)
Chairman

Administrative Appeals Board

* The Appellant's Hong Kong Identity Card number was edited out.