

ADMINISTRATIVE APPEALS BOARD

APPEAL NO.10 OF 1998

BETWEEN

MOU PUI HONG

Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of hearing : 20th November 1998

Date of delivery of decision : 1st December 1998

D E C I S I O N

The appeal

This is an appeal by Mr Mou Pui Hong ("Mr Mou") against the decision of the Privacy Commissioner for Personal Data ("the Commissioner"). Mr Mou was a postal officer of the Aberdeen Post Office. On 28th September 1997 he discovered that a video camera was placed on the top of a shelf at his work place at the Aberdeen Post Office. The video camera was facing him and it was placed in a concealed place

on the top of the shelf. He thought the camera was operating because he saw a red light on the camera. After discovering the camera, he immediately asked who was video-recording him. His supervisor, Mr Lo Siu Ming (“Mr Lo”), admitted that he was video-recording his activities. Mr Mou made a complaint to the Commissioner against Mr Lo for collecting his personal data by video-recording his images without his knowledge or consent. He also made a complaint against the Aberdeen Post Office when he was told by an officer of the Commissioner that the Aberdeen Post Office should be a necessary party in the complaint.

The Commissioner carried out the investigation but decided not to issue an Enforcement Notice under the *Personal Data (Privacy) Ordinance* (“*the Ordinance*”).

The Ordinance

Under s.4 of the *Ordinance*, it is provided that :

“ A data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this Ordinance.”

A data user is defined in s.2 as :

“‘data user’ (資料使用者), in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data;”

Personal data is also defined in s.2 as :

“personal data’ (個人資料) means any data —

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable;”

Principle 1 of the Data Protection Principles in Schedule 1 of the *Ordinance* provides, *inter alia*, that :

“1. Principle 1 — purpose and manner of collection of personal data

- (1) Personal data shall not be collected unless —
 - (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
 - (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
 - (c) the data are adequate but not excessive in relation to that purpose.
- (2) Personal data shall be collected by means which are —
 - (a) lawful; and
 - (b) fair in the circumstances of the case.”

Recording by video camera

If someone (“the 1st person”) uses a video camera to record the activities of another person (“the 2nd person”), the 1st person is a data user within the meaning of the *Ordinance* because he controls the collection of the data. The video tape used in the camera constitutes a

personal data within the *Ordinance* because the tape relates directly to a living individual, namely, the 2nd person; it is practicable to ascertain the identity of the 2nd person from the tape and the tape is in a form in which access to or processing of the data is practicable.

Reasons of the Commissioner

The reason why the Commissioner refused to issue the Enforcement Notice was because in his opinion there was not enough evidence to substantiate a possible breach of Data Protection Principle 1(2) ("DPP1(2)") by Mr Lo or the Aberdeen Post Office. The reasons for the decision are set out in the Commissioner's letter of 29th May 1998 to Mr Mou :

- (1) DPP1(2) of the Ordinance provides that personal data shall not be collected except by means which are lawful and fair in the circumstances.
- (2) You alleged that on 28 September 1997, you discovered that a video camera facing at you was placed on the top of a cabinet at your workplace. You further alleged that on enquiry, Mr LO, your supervisor in Aberdeen Post Office, admitted to you that he had recorded your image.
- (3) However, Mr Lo denied to us your allegation that he had recorded your image. He explained that he took his video camera to the office for the purpose of viewing a video tape which recorded his son's graduation ceremony. He produced to us the video tape on which we could not find your image recorded thereon.
- (4) You claimed that some of your colleagues heard of Mr LO's verbal admission that he had deliberately recorded your image for the purpose of collecting evidence that you were working slow. Although some of your colleagues confirmed that they heard of Mr LO's

admission, in forming my opinion I cannot rely on such evidence which is purely hearsay in nature.

- (5) The Postmaster General indicated to this Office that neither the management of Hongkong Post nor the Superintendent of Aberdeen Post Office had ever given any instruction or permission to Mr LO or any other person to record the image of any staff at Aberdeen Post Office. He further indicated that he had no prior knowledge of the alleged incident.
- (6) As there was no evidence which supported a view that Mr LO had recorded your image, I am unable to find a contravention of the requirements of DPP1(2) of the Ordinance on the part of Mr LO. Similarly, there was not enough evidence to substantiate contravention of the requirements of the Ordinance on the part of Aberdeen Post Office.”

The issue

Mr Mou was not legally represented in the appeal, but as we see it, the issue in this appeal is whether the Commissioner was justified in refusing to issue the Enforcement Notice. To answer this question, it is necessary to see if the Commissioner had properly discharged the duties imposed on him by the *Ordinance*.

Statutory duty

The starting point is that the Commissioner is required by the *Ordinance* to carry out the investigation where a complaint has been received. This is clear from the terms of s.38 of the *Ordinance* :

“Where the Commissioner —

- (a) receives a complaint; or

- (b) has reasonable grounds to believe that an act or practice —
- (i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user;
 - (ii) relates to personal data; and
 - (iii) may be a contravention of a requirement under this Ordinance,

then —

- (i) **where paragraph (a) is applicable, the Commissioner shall, subject to section 39, carry out an investigation** in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under this Ordinance;
- (ii) where paragraph (b) is applicable, the Commissioner may carry out an investigation in relation to the relevant data user to ascertain whether the act or practice referred to in that paragraph is a contravention of a requirement under this Ordinance.” (emphasis added)

The position is to be contrasted with the discretion imposed on the Commissioner where an act which may be a contravention of the *Ordinance* is drawn to the attention of the Commissioner.

The Commissioner is given very wide powers in his investigation. Under s.40, the Commissioner may carry out or continue the investigation initiated by a complaint notwithstanding that it is subsequently withdrawn. Section 42 (1) enables the Commissioner to carry out an inspection in non-domestic premises or domestic premises subject to the consent of the person resident in the domestic premises.

Under s.42(2), the Commissioner may carry out an investigation in a domestic premises occupied by the data user subject to the consent of the occupier. Under s.43, the Commissioner may hold a hearing for the purpose of the investigation and require a person to furnish him with information or documents. Under s.44, the Commissioner may, for the purpose of investigation, summon a person who may be able to give any information relevant to the investigation and may examine the person and require him to provide information or documents.

What the Commissioner did in this case

What had happened in this case is that the Commissioner, after receiving the complaint, carried out the investigation in the following manner :

- (1) Telephone enquiries were made with other postal workers who were present when the video camera was discovered. The enquiry with them was to ascertain whether they had seen the video camera and whether they had heard Mr Lo admitting that he video-recorded the activities of Mr Mou.
- (2) Written enquiries with the Hongkong Post.
- (3) Written enquiries with Mr Lo.

This is all the Commissioner did in this case.

Investigation below the required standard

How the Commissioner should carry out the investigation in a case should generally be left to be decided by the Commissioner.

However, in the present case, we have to say that the steps taken by the Commissioner were far below the required standard of investigation that one would expect the Commissioner to reach in order to arrive at a reasoned decision.

Admissions by Mr Lo

Mr Lo, in his written reply to the Commissioner on 23rd October 1997 and 8th January 1998 denied that he had video recorded Mr Mou. However, three of the postal workers who were present at the time of the incident had informed the Commissioner that they had heard Mr Lo said he had video-taped Mr Mou at the office. Mr Tsang Kam Hee's response to the Commissioner's enquiry was recorded as follows :

“LO admitted and told MIU (i.e. Mr Mou) that he could give the tape to MIU subject to some conditions. But LO did not say what the conditions are.”

Mr Wan Chi Kwan's response was as follows :

“LO admitted that he had video-taped MIU. But WAN did not see the tape.”

Mr Lai Kwok Wah's response was as follows :

“LAI saw that a video camera was put on the letter-sorting table. LO admitted. LO also said that he video-taped MIU because of his bad working attitude.”

Another co-worker, Miss Angela Mak's response was as follows :

“LO said that he wanted to collect evidence to Post Master to show that MIU was working very slow. But MAK did not hear direct admission from LO.”

According to the internal enquiry of the Hongkong Post, Mr Yuen Yat Keung who at the time was the Assistant Controller of Posts of Hong Kong East, telephoned Mr Lo on 29th September 1997 and enquired what he had done on 28th September 1997. Mr Lo's reply was that :

“ (Mr Mou) performed sorting duty unsatisfactorily on that day. Therefore, he purposely took video recording on him to record his poor performance. He admitted that he did not seek any prior approval from any of his supervisors. I (i.e. Mr Yuen) further asked him if he still possessed the video tape and whether he could provide me the video tape concerned. SPO Lo opined that he still kept the video tape but he did not know if there was any content inside the tape and he would check it up.... Later, he replied that the video tape was blank and nothing was recorded. He also refused to surrender the video tape to me....” (Extract of minute prepared by Yuen on 25th October 1997.)

On 29th September 1997, Mr S.K. Tsang, the Superintendent of the Aberdeen Post Office, also enquired with Mr Lo about the accident. It was recorded by Mr Tsang in his memo dated 7th October 1997 that “He (i.e. Mr Lo) confessed that he had purposely taken video recording yesterday as an evidence on Mr P.H. Mou's working performance.”

Mr Yuen and Mr Tsang's written minute and memo were supplied by the Hongkong Post to the Commissioner.

Hearsay evidence ?

The Commissioner in his letter of 29th May 1998 stated that he could not rely on the evidence of the employees of the Post Office on the admissions of Mr Lo because the evidence was hearsay in nature. With respect to the Commissioner, admissions or confessions by the one who uttered them are exceptions to the hearsay rule on the simple basis that they constitute an admission against the maker's own interest and therefore are admissible evidence. Furthermore, while in legal proceedings, hearsay evidence is generally not admissible, there really is no indication in the *Ordinance* that in carrying out the investigation, the Commissioner must necessarily follow the rules of evidence and exclude from his consideration evidence of a hearsay nature. But what is more important is that the admissions are admissible and relevant evidence for the Commissioner's consideration.

Conflict of evidence

The mere fact that there is a conflict of evidence between what Mr Lo now said and what he had previously admitted does not enable the Commissioner to say that there was not enough evidence to

substantiate a breach of the *Ordinance* by Mr Lo. To begin with, the Commissioner must satisfy himself with whether what the co-workers and senior officers of the Post Office said they had heard from Mr Lo was correct or not. Were they mistaken in what Mr Lo had told them, or were they deliberately concocting a case against Mr Lo? The Commissioner has to bear in mind that they were independent witnesses. An opportunity must be given to Mr Lo to respond to their allegations. If Mr Lo had indeed made admissions to Mr Mou and his co-workers, were they said in jest or bravado or were they in fact true? How did he account for his admissions to his supervisors?

At the end of the day, the Commissioner must resolve the conflict of evidence and come to a decision whether Mr Lo had admitted that he had, and also indeed he had, video-taped Mr Mou without the approval of the Post Office. If this will involve the hearing of oral evidence, then this must be done. Clearly it is not sufficient in a case like this, to rely solely on telephone inquiry or written inquiry. It is no answer to say, as submitted by Mr Pun, Counsel for the Commissioner, that there is no provision in the *Ordinance* for the Commissioner to take evidence under oath. Whether oath is taken or not is irrelevant. The duty of the Commissioner in the inquiry is to satisfy himself whether the witness is telling the truth or not.

Furthermore, had the Commissioner considered an inspection or investigation in Mr Lo's home? It is true that inspection or investigation in domestic premises may require the consent of the occupier but what was there to preclude the Commissioner from seeking the consent of the occupier?

It is also no answer to say that because of the workload of the Commissioner, he must proceed cautiously, particularly in a situation involving conflict of evidence : the statutory duty imposed on him demands that he carries out a proper investigation.

Existence of the video tape

It is submitted that the Commissioner did not even have the video tape of the incident. The existence of the video tape is only one of the evidence that the Commissioner should consider in deciding whether Mr Lo had in fact contravened the *Ordinance*. We do not accept the proposition advanced by Mr Pun that because there was no video tape and it was unclear whether the tape had actually recorded the image of Mr Mou, therefore, the definition of personal data or data user had not been fulfilled so as to bring the case within the *Ordinance*. Mr Lo had certainly not suggested, until his retraction, that somehow the camera did not capture the image of Mr Mou.

Mr Lo was present at the appeal and he informed the Board that at the time of the incident he was only charging the battery of the video camera and when he was confronted by Mr Mou, he had told Mr Mou that the tape contained the graduation ceremony of his son, but if it in fact contained the image of Mr Mou then he would erase it. None of this was referred to by him when he responded to the enquiries of the Commissioner and the Post Office. These are all matters for the Commissioner's consideration.

No doubt the Commissioner must be fair to both Mr Mou and Mr Lo, but in our view, fairness is not achieved by not pursuing a proper investigation when the evidence before the Commissioner appeared to suggest an overwhelming case of contravention of the *Ordinance* by reason of Mr Lo's own admission.

No useful purpose in carrying out further investigation?

The duty of the Commissioner is not merely to carry out the investigation but also to make a determination whether a breach of the *Ordinance* has been committed. Unless proper investigation had been carried out, we fail to see how the Commissioner could have arrived at a considered and rational decision in this case.

In the course of the submissions, we enquired whether the Commissioner was prepared to carry out a further investigation. The response was no because no useful purpose would be achieved by a further investigation. What the Commissioner was in effect saying is that even with a further investigation, he would not issue the Enforcement Notice. With respect to the Commissioner, this is simply not sufficient. In **Building Authority v. Head Step Ltd.** [1996] 6 HKPLR 87 the issue in a judicial review was whether the Building Authority had properly exercised the discretion imposed on it under the *Buildings Ordinance*. The Building Authority stated on affidavit that it would not in any event exercise its discretion in favour of the applicant. The Court of Appeal held that this was not sufficient nor was it a proper way of dealing with the matter because a discretion was imposed on the Building Authority which should be properly exercised. The facts of **Head Step Ltd.** are, of course, different from the present case, however, the principle must be the same. The present case is even stronger because it is not concerned merely with the exercise of discretion by the Commissioner, but a statutory duty imposed on him to investigate a complaint. Unless the investigation was properly carried out, the Commissioner had not discharged his statutory duty. In the present case, we are of the view that his statutory duty had not been discharged.

Our decision

In the circumstances, we will allow the appeal and set aside the decision of the Commissioner that he would not issue an Enforcement Notice. We will order the Commissioner to carry out the investigation and to determine whether Mr Lo had acted in contravention of the *Ordinance* and whether an Enforcement Notice should be issued against Mr Lo.

Position of the Post Office

As far as the Post Office is concerned, it informed the Commissioner that it had never authorized the video-recording of an employee. This is not challenged. In the circumstances, it is not necessary to pursue further investigation with the Post Office. Our decision is confined to that of Mr Lo.



The Hon Mr Justice Cheung
Deputy Chairman
Administrative Appeals Board