

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 14/2020

BETWEEN

CHUN, PETER ZHEN FEI Appellant

and

PRIVACY COMMISSIONER Respondent
FOR PERSONAL DATA

Coram: Administrative Appeals Board
Mr Derek Chan Ching-lung, SC (Deputy Chairman)
Mr Chan Kam-man (Member)
Mr Tsang Mo-chau (Member)

Date of Hearing: 20 November 2020

Date of Handing down Written Decision with Reasons: 11 August 2021

DECISION

Judgment of Mr Derek Chan Ching-lung, SC, and Mr Tsang Mo-chau:

I. INTRODUCTION

1. The Appellant appeals to the Administrative Appeals Board against the decision of the Privacy Commissioner for Personal Data (the

“**Respondent**” or “**PCPD**”) of 9th April 2020 exercising his power under sections 39(2)(ca) and 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486) (“**PDPO**”) to discontinue the investigation into the Appellant’s complaint against the Hongkong and Shanghai Banking Corporation (the “**Person Bound**” or “**HSBC**”).

II. FACTUAL BACKGROUND

The Appellant’s Job Application at HSBC

2. The Appellant was an employee of Robert Half Hong Kong Limited (“**Robert Half**”) between 14th November 2016 and 15th January 2018. He was contracted out to work at HSBC as a Senior Business Analyst.

3. In around September 2017, the Appellant applied for a post of Lead Digital Analyst with HSBC (the “**New Role**”), being a permanent employee as opposed to an outside contractor under his employment with Robert Half. On 12th December 2017, HSBC offered the Appellant the job contingent on his passing of the background check to be conducted by First Advantage Corporation (“**First Advantage**”), which was appointed by HSBC.

4. On 1st November 2017, the Appellant signed an Acknowledgement (the “**Acknowledgement**”) of HSBC Group Notice to Job Applicants, Employees and Non-Employees Relating to the PDPO (the “**Notice**”).

5. The Notice provides, *inter alia*, that:

“Collection of Data

(a) *It is necessary for job applicants of, and potential non-employees providing services (the “Services”) to, any member of the HSBC Group, wherever situated, to supply the HSBC Group with certain personal data about themselves in connection with their application or proposed provision of Services...*

...

(c) *Data may be collected from you directly, from someone acting on your behalf or from another source, and combined with other data available to members of the HSBC Group.*

...

Use of Data

(e) *We will use data for the following purposes or any of them (which may vary depending on the nature of your relationship with us):-*

(i) **considering and processing your present and/or future employment application(s) including pre-employment checks and background screening/vetting;**

...

(iii) **conducting background screening/vetting prior to your provision of Services and whenever appropriate during the period of your provision of Services;**

...

(iv) **managing your provision of Services** including granting of access to HSBC Group systems and premises;

...

(xvii) administering any other human resources related matters;

...

Disclosure of Data

(f) Data held by us or a member of the HSBC Group will be kept confidential but we or a member of the HSBC Group may provide data to the following parties or any of them (whether within or outside Hong Kong) for the purposes set out in para (e) above:-

...

(ii) any agents, contractors, sub-contractors, insures/insurance brokers, professional advisers or associates of the HSBC Group (including their employees, officers, agents, contractors, sub-contractors, service providers and professional advisers);

(iii) any third party service providers (including their employees and officers) who provide services to any member of the HSBC Group in connection with the operation or maintenance of our business (including but not limited to performance of pre-employment checks or background screening/vetting, provision or administration of benefits and services entitled by employees, and share scheme administration;

...” (**emphasis added**)

6. In addition, the Acknowledgement expressly provides that “*due to business operation requirements, it may be necessary to disclose certain personal data to internal and external parties from time to time as set out in the Notice as well*”, to which the Appellant agreed by signing the same.

7. As part of HSBC’s recruitment procedures, the Appellant also signed a Letter of Authorization to authorize First Advantage to conduct a

background check, and a Declaration and Authorization Form on around 15th December 2017, which states, *inter alia*, that:-

“I acknowledge that HSBC Group reserves its position with regard to any steps which it may take in relation to any material adverse findings which arise either when the checks are first carried out as part of this recruitment exercise, and/or if relevant, on an ongoing basis. I also acknowledge and agree that I will not be given any reason should I fail any of the above checks, and that any offer of employment may be withdrawn without a reason being given prior to the commencement date.”

8. In pursuance of the authorization, the Appellant submitted the Background Verification Form (“**BVF**”) to First Advantage. Upon the receipt of the Appellant’s BVF, First Advantage requested the Appellant to provide supporting documents regarding his previous employments on 20th December 2017. As a result, the Appellant provided to First Advantage on the same day, *inter alia*:-

- (a) A letter titled “Termination of Employment Contract” by Accentrix Company Limited (“**Accentrix**”) dated 24th June 2015;
- (b) A letter titled “Re: Variation to your Employment Contract” by Practicus Limited (“**Practicus**”) dated 12th January 2016; and
- (c) An email with subject “Termination of contract” by Practicus dated 29 September 2016.

9. On around 3rd January 2018, an HSBC employee circulated the extract of the Background Verification Report conducted by First Advantage (the “**Report**”) internally, in particular with the Human Resources Department (“**HR**”). In the email, an HSBC employee identified “*major discrepancy for*

3 employments”, and “the employer ... have verified in writing that there is discrepancy in Reason in Leaving, and stated they will not eligible (sic) for rehire”. The Report extracted in the email referred to the following:

- (a) In the employment with Accentrix (seconded to NTT Com Asia Ltd) from 12th January 2015 to 24th June 2015, the reason for leaving provided by the Appellant was “*Contract terminated*”, whereas Accentrix verified by stating “*No (dismissed with poor performance feedback from our client)*”;
- (b) In the employment with Practicus (seconded to Bupa (Asia) Limited) from 12th October 2015 to 29th January 2016, the reason for leaving provided by Practicus was “*Contract was not extended due to poor performance*” as opposed to “*Contract completed*” provided by the Appellant; and
- (c) In a subsequent employment with Practicus (this time seconded to AXA Hong Kong) from 1st August 2016 to 14th October 2016, the reason for leaving being “*his project was not extended due to poor performance*” provided by Practicus as opposed to “*Contract terminated*” provided by the Appellant.

10. Upon the discoveries of such discrepancies, HSBC disclosed the extract of the Report to Robert Half on 5th January 2018 (the “**Disclosure**”). HSBC’s HR subsequently sent an email to Robert Half and recommended Robert Half to terminate the Appellant’s assignment with HSBC with immediate effect on the basis that the Appellant could not pass the HSBC background check in the application for the New Role.

11. Robert Half then contacted the Appellant forthwith and asked him to provide references from the past employments in order to conduct a reference check on the Appellant (the “**Reference Check**”). The Appellant provided relevant contacts of his previous employers to Robert Half on the next day for the purpose of conducting the Reference Check.

12. Shortly after the collection of feedback in conducting the Reference Check, Robert Half met with HSBC on 9th January 2018 to discuss the material adverse findings in the Report (the “**Meeting**”). On the same day, the Appellant forwarded the email chain with First Advantage to Robert Half and HSBC with the supporting documents attached. In particular, they have both received the documents in relation to the terminations of contracts by Practicus and Accentrix, which supported the Appellant’s claim of “*Contract terminated*”.

13. On 10th January 2018, the Appellant sent an email to Robert Half and HSBC to give an account of the alleged “*poor performance*” as shown in the Report, with certain email correspondence with Accentrix attached. The Appellant explained in the email that the reason leading to his poor performance was “[i]n short, poor leadership lead to low morale which lead to infighting, and the regional director did nothing to mitigate the situation”.

14. After conducting the Reference Check, Robert Half sent the result of the Reference Check to HSBC on 10th January 2018 and asserted that:

- (a) The Appellant did not hide the fact that his previous employment contracts were terminated on two occasions;
- (b) He was rehired by Practicus after a previous assignment; and

- (c) Robert Half had re-conducted reference checks on the Appellant regarding the assignments contracted by Practicus and Accentrix, whose results were positive.

15. In reply, HSBC commented that the Reference Check appears to be positive. However, HSBC requested for the original reference checks conducted by Robert Half, as there were missing references from certain persons and there were references made to the Appellant's underperformance. In addition, HSBC highlighted the reference made by Accentrix regarding the Appellant's job performance that "[i]t is very difficult to comment on this as we worked together quite briefly".

16. As of 10th January 2018, the information before HSBC in respect of the Appellant's application for the New Role included:-

- (a) The BVF submitted by the Appellant to First Advantage;
- (b) The Report from First Advantage;
- (c) The supporting documents provided by the Appellant in relation to the terminations of contracts by Practicus and Accentrix respectively;
- (d) The Reference Check conducted by Robert Half; and
- (e) The correspondence between the Appellant and Accentrix provided by the Appellant.

17. On 16th January 2018, an HSBC employee expressed in an internal email a preliminary view on the Appellant's application, stating that "[t]he

business is not willing to take the risk of having Peter Chun on board because of the discrepancy. Please advise further.”

18. On 24th January 2018, further internal HSBC email correspondence with the subject “RE: Withdrawal of Offer- Peter Chun” noted that:-

- (a) The Report “*came back with negative results*”;
- (b) The Appellant did declare that his previous contracts were terminated;
- (c) The Reference Check conducted by Robert Half was done “*directly with the named references*” whereas First Advantage’s reference checks were done via the respective human resources departments;
- (d) “*the performance feedback from HSBC line managers from RBWM Transformation has been positive however*”; and
- (e) The decision as to whether to proceed with the Appellant’s application “*lies with the business and their risk appetite*”.

19. On 25th January 2018, HSBC withdrew the conditional offer. The Appellant then wrote to HSBC to explain the alleged “*poor performance*” and asked HSBC to reconsider the withdrawal.

Data Access Request and the Complaint made by Appellant

20. On 29th January 2018, the Appellant wrote to HSBC and submitted a Data Access Request. HSBC replied on 30th January 2018 acknowledging the receipt of the request.

21. Subsequently, the Appellant lodged a complaint with the PCPD on or about 31st January 2019

22. The Appellant formally submitted a signed Data Access Request Form on 16th March 2018 and requested the following :-

- (a) The Report;
- (b) A copy of HSBC's offer of employment as a Lead Digital Analyst;
- (c) Details and results of the investigation into the Report, including factors disqualifying the Appellant from employment at HSBC as a contractor and permanent employee; and
- (d) A copy of HSBC's policies and practices regarding why the Appellant is not qualified or eligible to work for HSBC.

Data Correction Request made by the Appellant

23. On 15th March 2018, the Appellant submitted the Data Correction Request to HSBC and requested the Report to be "*revisited*" so that the references can be shown as "*Verified Clear*" instead of "*Verified – Major Discrepancy*". HSBC replied on 21st March 2018 stating that HSBC was merely the recipient of the Report, and thus was unable to correct the Report. HSBC suggested that the request of the Appellant be made to First Advantage instead.

24. Following up on a data correction request made to it by the Appellant, First Advantage sent an email to HSBC and the Appellant on 29th March 2018 updating the latest findings from the Appellant's previous employers as follows:-

- (a) As opposed to the previous reason for leaving provided by Accentrix, which stated "*No (dismissed with poor performance feedback from our client)*", the updated response from Accentrix was that "*We confirmed the reason for leaving is "Contract Terminated" (indicated by candidate, Peter)*"; and
- (b) Practicus withdrew his previous reference and email in First Advantage's record. Practicus's latest reply was that "*In following with my email, the withdrawal of this reference from Practicus is much appreciated. We wish Peter the best of luck.*".

25. In reliance on the latest responses from the previous employers, First Advantage informed HSBC and the Appellant regarding the impact of the update in the same email that:

- (a) "*Please note this information when considering the impact of these responses on our final report and the usage of our final report*";
- (b) "*I have now closed our investigation into the data correction request from Peter Chun*"; and
- (c) "*All records of our investigation and the evidence provided by Peter Chun have been recorded in our records*".

26. Upon the receipt of this email, the Appellant on 6th April 2018 further emailed HSBC requesting for an update on the status of his data correction request, and also requested to “*reinstate my offer to HSBC Digital*”. HSBC replied on 9th April 2018 stating that pursuant to the Appellant’s request, HSBC had requested First Advantage to provide an updated vetting report regarding the Appellant’s Data Correction Request.

27. On 10th April 2018, the Appellant sent HSBC another Data Access Request on the updated vetting report from First Advantage.

28. On 12th April 2018, First Advantage informed HSBC that “[t]here was no intention to update the record in First Advantage systems. The information provided by First Advantage’s original final report was accurate at that time.” In addition, with regard to the claimed inaccuracy of personal information, First Advantage stated that “*In terms of section 24(3)(b) of the [PDPO], in our view the information provided to you was not inaccurate at the time it was supplied. If you, as data user, wish to update your records to comply with section 24 of the Personal Data (Privacy) Ordinance using our email below, you can do so.*”

29. On 5th August 2018, the Appellant followed up on the matter of requesting HSBC to provide a copy of the updated vetting report. HSBC later confirmed via email that the Appellant’s “*background check status with HSBC is clean*”.

III. THE DECISION BY PCPD

30. The Appellant's complaint to the PCPD was premised *inter alia* on two main grounds:-

- (a) The Appellant had never authorized Robert Half to handle his application for the New Role, hence HSBC had no reason to disclose any information in the Report to Robert Half without his consent. There was also a related assertion that HSBC rescinded the offer on the basis of inaccurate information, but there is no dispute that this was unrelated to personal data privacy and therefore not within the jurisdiction of the PCPD; and
- (b) HSBC did not attempt to ascertain the correct information directly from the Appellant, who was the data subject.

31. PCPD's reasons for terminating the investigation can *inter alia* be summarized as follows:-

- (a) HSBC's disclosure of the Report to Robert Half was directly related to the original purpose of collection and therefore it was not necessary to obtain consent from the Appellant; and
- (b) HSBC had taken a practicable step in verifying with Robert Half the discrepancies between the Report and the reasons for leaving the previous employments as provided by the Appellant. It was within HSBC's own discretion as to whether to contact the Appellant or Robert Half and that fell outside the jurisdiction of PCPD.

IV. THE ISSUES IN THIS APPEAL

32. The Appellant relied on two grounds of appeal which can be summarized as follows:-

- (a) HSBC contravened Data Protection Principle 3 (“**DPP3**”) in disclosing the Report to Robert Half without his consent since the disclosure was made for a new purpose, in that:
 - i. The original purpose for collecting the Appellant’s personal data, including the Report, “*was for HSBC to internally consider the same in relation to [the Appellant’s] job application, as standard vetting procedure before onboarding to HSBC.*”; and
 - ii. HSBC then used the Report to question “*the reliability of the pre-employment check [Robert Half] had previously performed on [the Appellant] and demanded [Robert Half] to provide an explanation for the adverse findings*”, and therefore HSBC had “*shifted the original purpose of conducting the background check to validating a third-party service provider instead of an external job applicant*”.
- (b) HSBC contravened Data Protection Principle 2 (“**DPP2**”) in failing to take all practicable steps to ensure the personal data that it held was accurate. In particular HSBC failed to verify the discrepancies identified in the Report with either the Appellant, his previous employers, or First Advantage.

33. The Respondent's submissions can be summarized as follows:-

(a) HSBC did not contravene DPP3 because:

(i) HSBC's disclosure of the Report to Robert Half was "*to examine the reference checks previously conducted by Robert Half and better assess the past work performance, credentials and integrity etc. of the Appellant before confirming the New Role*"; and

(ii) Additionally, "*HSBC's disclosure of the extract of the Report to Robert Half, as a contractor/third party service provider related to human resources matters, for managing the provision of the Appellant's services to HSBC was consistent with the collection purposes and classes of transferees as set out in [the Notice]*".

(b) HSBC did not contravene DPP2 since:

(i) The information in the Report (in particular the references from previous employers) was accurately collected and recorded by First Advantage, which was then passed onto HSBC. There was nothing inaccurate about the Report as reflecting the information collected by First Advantage at the time. Insofar as "*a data user's obligation under DPP 2(1) and the purpose of a pre-employment background report are concerned, HSBC should only be obliged to ensure that the information provided by a former employer is accurately collected and recorded in the Report at the material time.*"; and

- (ii) In any event, HSBC did not fail to take all reasonable steps to ensure data accuracy. HSBC's verification with Robert Half "*did lead to the verification by Robert Half with the Appellant and clarification/supplemental information was provided by the Appellant via Robert Half to HSBC for consideration.*" Further, upon knowing the revision and withdrawal of reference by Accentrix and Practicus, HSBC added a marker in its system to state that the Report should not be relied upon in its system. HSBC had therefore "*taken the practical step to avoid the 'outdated' data in the Report being relied on subsequently and ensure that the overall data concerning the Appellant in its system is accurate*".

34. HSBC's (as the Person Bound) submissions can be summarized as follows :-

(a) There is no contravention of DPP3 since:-

- (i) The Report had been "*commissioned by HSBC for the purposes of obtaining the pre-employment information of the Appellant and managing his provision of services as a contractor employed by [Robert Half]*". The disclosure of the Report to Robert Half "*for re-checking and verification of the Appellant's background against Robert Half's own screening report*" was consistent with the data collection purposes as stated in the Notice, which the Appellant had signed; and
- (ii) "*Specifically, the use and disclosure of the Appellant's data in the Report was to verify the Appellant's credentials,*

integrity, conduct and character, and ancillary to this, to manage his provision of the Services”.

- (b) There is no contravention of DPP2 since:-
- (i) The Report contained no inaccuracies, since it accurately reflected *inter alia* the information that First Advantage collected from the Appellant’s previous employers at the time;
 - (ii) HSBC in the present case did take all practicable steps to verify by contacting Robert Half in order to get more information about the Appellant. Additionally, HSBC subsequently liaised directly with First Advantage to clarify whether there were any errors in the Report;
 - (iii) The suggestion by the Appellant to verify the information with the Appellant himself would flout the very rationale of having background checks in the first place; and
 - (iv) In any event, HSBC have put a marker in the system to the effect that the Report should be read together with the updated email from First Advantage dated 12th April 2018.

35. In essence, the issues before the Board are that:-

- (a) In respect of DPP3, whether HSBC had used the Appellant’s personal data (i.e. the Report) for a new purpose when disclosing the same to Robert Half (i.e. the Disclosure) without the Appellant’s consent;

- (b) In respect of DPP2, whether HSBC had taken all practicable steps to ensure the accuracy of the Appellant's personal data; and
- (c) In light of the above, whether the PCPD was correct in terminating the investigation.

V. RELEVANT PROVISIONS IN PDPO

DPP3 – Use of personal data

36. DPP3 is set out in Schedule 1 of the PDPO, which provides that:-

“ (1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose. (Amended 18 of 2012 s. 40)

...

(4) In this section—

new purpose (新目的), in relation to the use of personal data, means any purpose other than—

(a) the purpose for which the data was to be used at the time of the collection of the data; or

(b) a purpose directly related to the purpose referred to in paragraph (a).”

37. The definition of “*use*” in relation to personal data is defined in section 2 of the PDPO, and includes the disclosure or transfer of the data.

38. The definition of “*prescribed consent*” is set out in section 2(3) of the PDPO as follows: -

“(3) Where under this Ordinance an act may be done with the prescribed consent of a person (and howsoever the person is described), such consent—

(a) means the express consent of the person given voluntarily;

(b) does not include any consent which has been withdrawn by notice in writing served on the person to whom the consent has been given (but without prejudice to so much of that act that has been done pursuant to the consent at any time before the notice is so served).”

39. In essence, to comply with DPP3, the use of personal data must be for a purpose:

- (a) That is the same as the purpose for which the data were to be used ***at the time of the collection of the data***; or
- (b) ***Directly related*** to the original purpose of collection; or
- (c) For any other purpose, the prescribed consent of the data subject must be obtained.

DPP2 – Accuracy and Retention of personal data

40. Under Principle 2 of Schedule 1 of the PDPO, it is stipulated that:-

“(1) All practicable steps shall be taken to ensure that—

- (a) personal data is accurate having regard to the purpose (including any directly related purpose) for which the personal data is or is to be used ...”*

41. The word “*practicable*” is defined in section 2(1) to mean “*reasonably practicable*”. As for the meaning of the word “*accurate*”, this can be inferred from the definition of “*inaccurate*” in section 2(1) which means personal data that is “*incorrect, misleading, incomplete or obsolete*”.

42. It is also important to note that DPP2(1)(a) also mentions personal data being accurate “*having regard to the purpose for which the personal data is or is to be used*”. Context is therefore critical when assessing the accuracy or otherwise of the personal data.

43. Further, the requirement under DPP2(1) is not an absolute one, which is understandable given the inevitability of human error. In AAB No.12/2008, which concerned a complaint by an employee about the inaccurate personal records provided by her employer in compliance with her data access request, the Board in that case considered that:-

“The requirement of DPP2(1)(a) does not mean that data held by data user must be correct in all aspects. The requirement is this: provided that the data user has taken all practicable steps to ensure the personal data kept by him are accurate, it is no breach of this requirement if the data are subsequently found to be incorrect by the data subject. If that happens, the data subject may pursuant to section 22 of the Ordinance ask the data user to correct the inaccuracies. Thus, there is no contravention of a requirement of the Ordinance where the personal data kept by the data user are inaccurate but it would be a contravention if the data user refused to correct the inaccuracies when the data subject lodged a data correction request with him.” (emphasis added)

VI. DISCUSSION AND ANALYSIS

DPP3 – the Disclosure

44. In assessing whether the Disclosure by HSBC to Robert Half had contravened DPP3, it is necessary to first determine what the original purpose(s) was/were as to the use of the Appellant's data at the time when his data was collected.

45. This Board has no doubt that the First Advantage background check, and HSBC's collection of the Appellant's corresponding personal data in that respect, were triggered by the Appellant's application for the New Role. That does not however mean that the *use* of the data collected during this process must be limited to the New Role, given the Appellant's ongoing role as non-employee service provider to HSBC through his employment with Robert Half.

46. The *use* to which the Appellant's data was to be put at the time of collection of this data was clearly and expressly set out in the Notice, which the Appellant signed on 1st November 2017. We consider the following to be important for the present purposes:

- (a) In setting out a total of 19 possible uses of personal data collected under paragraph (e) of the Notice, it is expressly stated the uses "*may vary depending on the nature of your relationship with us*". As already mentioned above, the Appellant's relationship with HSBC was not *only* a potential job applicant, but *also* an ongoing non-employee service provider.

(b) In addition to using the Appellant's personal data for consideration of his application for the New Role, paragraphs (e)(iv) and (xviii) of the Notice expressly stated that the uses would include managing the Appellant's provision of services (which was ongoing at the time), and administering any other human resources related matters.

(c) Under paragraph (f)(iii) of the Notice, it was again expressly stated that the Appellant's personal data may be provided to HSBC's third party service providers (this category would include Robert Half) for the purposes set out in paragraph (e) of the Notice.

47. The Appellant submitted that when he signed the Notice, he was signing the same in the "capacity" of an external job applicant, and presumably in no other capacity. We do not consider that the Appellant's "capacity" can be delineated in this artificial way when there cannot be any dispute that he was also an existing service provider to HSBC.

48. After receiving the Report from First Advantage, the Disclosure of parts of it to Robert Half on 5th January 2018 was by way of an email. The HSBC employee who wrote the email stated *inter alia* two matters:

(a) Firstly, that "*we would recommend that the business have Robert Half terminate Peter's assignment with HSBC with immediate effect ...*". It is self-evident that the first stated purpose of the disclosure was to manage the Appellant's provision of services which was ongoing at the time.

- (b) Secondly, that “*Robert Half will also need to provide HSBC with an explanation as to how Peter could have passed their vetting process*”. Again, Robert Half’s vetting standards must be related to the administration of HSBC’s human resources, since the Appellant’s services were contracted to HSBC via Robert Half.

49. The Disclosure of the Appellant’s personal data to Robert Half was done for purposes which came directly within the Notice, a document provided to and signed by the Applicant prior to collection of his personal data. Therefore no prescribed consent from the Appellant was required before HSBC disclosed extracts of the Report to Robert Half. In these circumstances the Board is satisfied that there was no contravention of DPP3.

DPP2 – All reasonably practicable steps

50. The “inaccuracies” focused upon by the Appellant concern the “reason for leaving” of the Appellant’s previous engagements. As already described in paragraph 9 above, there were discrepancies between the reasons as provided by the Appellant, and the reasons provided by the previous employers Accentrix and Practicus (as then obtained by First Advantage).

51. The majority of the Board take the view that the personal data in the possession of HSBC at the time was not inaccurate. The differing perspectives of an employer and an ex-employee can possibly give rise to different descriptions of the “reasons” for the conclusion of an employer/employee relationship. The personal data in the possession of HSBC at the time was accurate insofar as it represented ***both*** the Appellant’s version ***and*** the version obtained by First Advantage from the Appellant’s

previous employers; HSBC was clearly not in a position to adjudicate on the “accuracy” or credibility of the differing descriptions between the Appellant and his previous employers for the purposes of data accuracy.

52. The majority of the Board is therefore of the view that there is no question of HSBC not taking all practical steps to ensure that the Appellant’s personal data was accurate since there was no inaccurate personal data in the first place.

53. In the event that we are wrong on the issue of accuracy, we have also considered whether HSBC had taken all practical steps to ensure the data’s accuracy. In the circumstances of the present case, the supposed inaccuracies concerned the *ex-employers’* part of the response on the Appellant’s “reason for leaving” – i.e. whether the ex-employers have correctly provided the reasons. There was no suggestion that the inaccuracy might have arisen because First Advantage incorrectly recorded the responses, or that First Advantage contacted the wrong entity. In those circumstances, we consider that it was impractical at the first instance for HSBC to contact either the Appellant or First Advantage as to the *substance* of the ex-employers’ response. A response from the Appellant disagreeing with how his ex-employers described his reasons for leaving would not have advanced HSBC’s position in respect of data accuracy, since HSBC would still be left with two sets of differing responses from two different sources. A request to First Advantage for obtaining the same information again would also be meaningless if there was no reason to believe that First Advantage had made a mistake in the first place.

54. We are of the view that it was reasonable and practical for a check to be done against a *previous* similar exercise that Robert Half should have done before, directly involving the Appellant's same previous employers, and presumably from the same source or at least expected to be from a source within the same organisations.

55. As events unfolded, the Appellant's ex-employers ultimately withdrew or amended the references that they had previously provided to First Advantage. Upon further email correspondence with First Advantage in April 2018, HSBC ultimately confirmed to the Appellant that its records indicated that the Appellant's background check status with HSBC was clean. In addition, HSBC added a marker in its system to the effect that the Report should be read together with the email correspondence with First Advantage in order to reflect the latest update in the HSBC's record. In the particular circumstances of the present case, the majority of the board take the view that HSBC had taken all practical steps to ensure that the Appellant's personal data held by it was accurate.

56. It follows from the above that the PCPD was correct in terminating the investigation.

Mr Chan Kam-man: (dissenting)

A. INTRODUCTION

57. I have had the advantage of reading in draft the decision of the majority (the "**Decision**"). Save as set out below, I gratefully adopt the

detailed account of the primary facts and background of this case stated therein. I shall also continue to use the same abbreviations.

58. With respect, for reasons stated hereinbelow, I have reached a different conclusion in relation to the question as to whether there was a breach of DPP2. Save and except for this, I respectfully concur in everything decided by the other members of this Board.

B. BREACH OF DPP2

59. For the sake of further discussion, it would be useful to set out the relevant paragraph under DPP2:

“2. Principle 2—accuracy and duration of retention of personal data

(1) All practicable steps shall be taken to ensure that—

(a) personal data is accurate having regard to the purpose (including any directly related purpose) for which the personal data is or is to be used;

(b) where there are reasonable grounds for believing that personal data is inaccurate having regard to the purpose (including any directly related purpose) for which the data is or is to be used—

(i) the data is not used for that purpose unless and until those grounds cease to be applicable to the data, whether by the rectification of the data or otherwise; or

(ii) the data is erased;

[...]”

60. In section 2(1) of the Ordinance, the word “practicable” is defined to mean “reasonably practicable”. It follows that the duty of a data user under DPP2(1) is to take *all reasonably practicable* steps in ensuring the accuracy of the personal data held by it. Therefore, if there are more than one reasonably practicable steps, it would not be sufficient for the data user to merely take one of them. Instead, the data user should take **all** these reasonably practicable steps.

61. In determining whether there is a breach of DPP2, two questions need to be asked: (1) whether the personal data in question is accurate; (2) if not, whether the data user has taken **all** reasonably practicable steps to ensure that the personal data is accurate.

(a) Whether the personal data is accurate

62. With regard to the issue of accuracy, the crux is whether the “reason for leaving” obtained by First Advantage in the Report in relation to employment with Accentrix was accurate.

63. In relation to Accentrix, the Report set out the following discrepancies:

- (a) For employment with Accentrix from 12 January 2015 to 24 June 2015, the reason for leaving Accentrix as provided by the Appellant in the BVF was “*Contract terminated*”. This was supported by a reference letter issued by Accentrix in relation to contract termination dated 24 June 2015 (the “**Termination Letter**”), which was provided by the Appellant to First

Advantage on 20 December 2017 in response to a request for further supporting documents.

- (b) However, when Accentrix was asked by First Advantage to confirm the reason for leaving as provided by the Appellant aforesaid (i.e. “*Contract terminated*”), Accentrix stated “*No (dismissed with poor performance feedback from our client)*”.

64. In my view, it is plain and obvious that on the question of “reason for leaving”, Accentrix’s version and the Appellant’s version are directly and completely contradictory. Accentrix unequivocally said “*No*” to the Appellant’s version of “*Contract terminated*”. Further, Accentrix added that “*(the Appellant was) dismissed with poor performance feedback from our client*”. It is therefore not purely a matter of differing perspectives between employers and ex-employees commonly observed in workplace. It is clear that either Accentrix’s version or the Appellant’s version is correct, and one of them should be incorrect.

65. After having noticed the clear discrepancies in the reason for leaving employment with Accentrix in the Report, on or about 5 January 2018, HSBC approached Robert Half for clarification and a second reference check. On or about 10 January 2018, Robert Half replied to HSBC with a neutral result (“**Re-Check Result**”). In essence, the Re-Check Result also aligned, and was consistent, with the Termination Letter and the Appellant’s version. In an internal HSBC email correspondence dated 24 January 2018 with the title “RE: Withdrawal of Offer- Peter Chun” (the “**Internal Email**”), it was noted that Robert Half and First Advantage had adopted different approaches in conducting the reference checks. In contrast to First Advantage’s

approach of contacting the HR, Robert Half carried out the reference checks directly with the named references.

66. Bearing in mind that before making the decision of whether to withdraw the conditional offer on 25 January 2018, HSBC possessed in hand the Report, the Termination Letter and the Re-Check Result. HSBC therefore had full knowledge that two sets of directly contradictory responses over the question of the “reason for leaving” were given by Accentrix at different points in time. In short, at the material time, HSBC were and had been put on enquiries or reasonable notice that there were indeed inaccuracies in the personal data of the Appellant held by HSBC.

67. Subsequent to a data correction request submitted by the Appellant on 15 March 2018, in an email from First Advantage to both HSBC and the Appellant dated 29 March 2018 with the title “RE: Data Correction Request – Peter Zhen Fei Chun”, First Advantage expressly confirmed that after having reviewed the subsequent responses from Accentrix, the reason for leaving Accentrix was “*Contract terminated*” as **correctly** indicated by the Appellant. Nonetheless, in another email from First Advantage to HSBC dated 12 April 2018, First Advantage refused to update its record on the ground that the Report was accurately recorded at that time. In light of the said emails, HSBC subsequently added a marker in its internal system to indicate that the Report should not be relied upon.

68. In my view, the facts that:- (i) First Advantage subsequently confirmed that the Appellant’s reason for leaving Accentrix was “*Contract terminated*” as correctly indicated by the Appellant at the outset (thereby in essence withdrawing its relevant findings in the Report as extracted in

paragraph 63(b) hereinabove); and (ii) HSBC putting a marker in its internal system that the Report should not be relied upon, all point to and reinforce the existence of inaccuracies of the personal data of the Appellant in the Report.

69. It must also be emphasized that the inaccuracies were material since they were *directly* related to the purpose for which the data was obtained and used, that is, to determine whether the Appellant had passed the background check and was eligible for the New Role.

70. In the premises, I am of the view that there were inaccuracies in the Appellant's personal data regarding reason for leaving Accentrix in the Report.

(b) Whether all practicable steps have been taken to ensure the personal data is accurate

71. I agree with paragraphs 53 and 54 of the Decision in that it may be impractical at the first instance for HSBC to contact either the Appellant or First Advantage for clarification of the ex-employer's responses. I also agree that a request to Robert Half for a re-check was a practical step taken by HSBC. However, in my opinion, HSBC had not taken *all* reasonably practicable steps in ensuring the data was accurate *after* receiving conflicting responses from Robert Half on 10 January 2018.

72. As a matter of common sense, a reasonable person would expect to receive *consistent* reference check responses from the *same* ex-employer. When HSBC was faced with two conflicting and contradictory responses (as

obtained by First Advantage and Robert Half respectively) from the same previous employer, there were reasonable grounds to suspect that there might have been mistakes in one of the reference check results. As a reasonable employer (and also a data user), it would therefore be prudent for HSBC to take steps to resolve the apparent inconsistencies or inaccuracies, especially in view of the fact that the background check was directly relevant and material to HSBC's decision of whether to employ the Appellant or not.

73. Unfortunately, prior to withdrawing the conditional offer to the Appellant on 25 January 2018, HSBC had not taken any step to seek clarification from First Advantage (including but not limited to, drawing First Advantage's special attention to the conflicting responses received from Robert Half or the potential inaccuracies, asking First Advantage for its explanation, clarification or taking further step to clarify with the relevant ex-employer). What HSBC had done was to merely note the differences in the reference check results and the approaches adopted by Robert Half and First Advantage in the Internal Email. Regrettably, HSBC then proceeded to take into account and use the Appellant's personal data as contained in the Report and the Re-Check Result (one of which undoubtedly, and is apt to, contains inaccurate personal data of the Appellant) for making its decision to withdraw the conditional offer.

74. In conclusion, HSBC contravened DPP2(1)(a) and (b) in the following manner:

- (a) After knowing the Re-Check Result, it had failed to take *all* reasonably practicable steps in ensuring that the reference check results were accurate, including but not limited to, drawing First

Advantage's special attention to the conflicting responses received from Robert Half or the potential inaccuracies, asking First Advantage for its explanation, clarification or taking further step to clarify with the relevant ex-employer;

- (b) Despite having reasonable grounds for believing that there were inaccuracies in the relevant personal data, it had failed to refrain from using the same when assessing whether the Appellant had passed the background check until the data was rectified. As mentioned in paragraph 67 hereinabove, the act of rectification only took place upon a data correction request by the Appellant, which was subsequent to the withdrawal of the conditional offer.

C. CONCLUSION

75. For the reasons stated above, I am of the view that there is contravention of DPP2 by HSBC. I would therefore allow the appeal to such limited extent.

Mr Derek Chan Ching-lung, SC:

76. By a majority of 2:1, the Appellant's appeal is dismissed.

77. The Board takes the preliminary view that the Appellant conducted his appeal in a reasonable manner, and the Board considered both his written submissions and the oral submissions presented by Ms Lee on his behalf to

be helpful. We therefore make a costs order nisi that there be no order as to costs. This order nisi will become absolute within 14 days unless an application is received from any party within this 14-day period to vary the same.

(signed)

(Mr Derek Chan Ching-lung, SC)

Deputy Chairman

Administrative Appeals Board

(signed)

(Mr Chan Kam-man)

Member

Administrative Appeals

Board

(signed)

(Mr Tsang Mo-chau)

Member

Administrative Appeals Board