ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 3 of 2007

BETWEEN

CATHAY PACIFIC AIRWAYS LIMITED Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram : Administrative Appeals Board

Date of Hearing : 27 February 2008

Date of handing down Decision with Reasons : 2 May 2008

DECISION

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1. The Appellant Cathay Pacific Airways Limited is an air operator employing over 6800 cabin crew. As an air operator, the Appellant is required to comply strictly with the requirements in Civil Aviation Department Directive CAD 360 to maintain its Air Operator's Certificate. Chapter 7 paragraph 1.1.3 of CAD states the medical requirements applicable to cabin crew include "good general health and freedom from any physical or mental illness which might lead to incapacitation or inability to perform cabin crew duties." While cabin crew members who are unable to report for duty due to sickness would be allowed sick leave by the Appellant in accordance with its Sick Leave Policy, the Appellant is concerned that high levels of absence amongst cabin crew would affect the effective operation of the business and have a detrimental effect on other colleagues.

2. The Conditions of Service 2003 (CoS) for cabin attendants issued by the Appellant require each cabin attendant to read the CoS in conjunction with his/her appointment letter. The letter and the CoS form the contract of employment between the Appellant and the cabin attendant. The CoS also require cabin attendants to comply with Company Policy in addition to their duties and obligations. The policies which cabin attendants are required to comply with include the Sick Leave Policy and the Disciplinary and Grievance Policy.

3. Under the Sick Leave Policy, a cabin crew who is unfit for work on account of sickness or injury will receive paid sick leave but he/she must report to the Company and obtain and produce a medical certificate to that effect from a medical practitioner or Company Designated Doctor, if required. A cabin crew who is certified unfit for work for any period through sickness or injury may be required to provide or sign consent to the release of details relating to his/her medical condition and/or to be periodically examined by a Company Designated Doctor. The cabin crew may be required to disclose the medical results relating to the examination to the Appellant for determining his/her medical condition and fitness for flying duties in compliance with safety standards or ability to carry out the inherent requirements of the job.

4. A cabin crew must carry at all times the Medical Record Booklet or medical certificate and it must be endorsed by a medical practitioner to provide details of medical consultation such as the date and time of consultation, name of the doctor, description of the diagnosis, the treatment prescribed and the prognosis together with the number of sick leave award. A cabin crew is required to have his/her medical report book verified by the Leave and Attendance Management Team in person within 14 days of resumption of duty.

5. Failure by a cabin crew to comply with the policy (such as failure to supply a medical certificate covering the period of absence or refusal to sign the consent form supplied by the Appellant for release of relevant medical information to the Appellant for assessment of the cabin crew members medical condition and estimated time for recovery) may result in disciplinary action against him/her in accordance with the Appellant's Disciplinary and Grievance Policy which includes loss of sickness

allowance.

6. Under the Disciplinary and Grievance Policy, the Appellant may take disciplinary proceedings against a cabin crew in order to enquire and determine if there has been misconduct in performing his/her duties and to determine the appropriate action to be taken if it is satisfied that there has been such misconduct. The Policy sets down the standard of conduct required of a cabin crew. This includes compliance with Company policies and procedures to an acceptable standard. The actions that may be taken against a cabin crew for misconduct range from a verbal warning to termination of employment or summary dismissal.

7. On 24 October 2005, the Appellant in a special edition of its Cabin Crew Newsletter (CCNL) announced that a new Attendance Monitoring Programme (AMP) would start on 1 November 2005. The AMP is to monitor and manage absence from work by cabin crew and assist those with underlying medical conditions to return to full flying duties. The Appellant emphasized in the AMP that cabin crew are required to report to work according to their roster and failure to do so may result in actions, including termination of employment by the Appellant. The objectives of the AMP are to: –

(i) ensure fair, equitable and reasonable management of cabin crew work attendance;

(ii) establish an efficient tracking mechanism to enable ISD to effectively manage cabin crew attendance;

(iii) improve attendance amongst cabin crew;

(iv) identify instances of malingering; and

(v) facilitate the earliest possible return to work for cabin crew through management support, monitoring and rehabilitation as appropriate.

8. Under the AMP, a cabin crew whose level or pattern of absence is a cause for concern to the Appellant would be advised that his/her

attendance would be monitored. The cabin crew concerned may be asked to attend an interview with a member of the In flight Services Department (ISD) management team to enable the Appellant to understand the circumstances of and the reason behind his/her absence, so that support may be provided to him/her to enable him/her to return to regular flying duties and improve his/her attendance record. The cabin crew's attendance record and absence pattern would be discussed at the meeting and he/she is encouraged to suggest measures to improve attendance.

9. Under Section 3.2 – Medical Information and Assessment – of the AMP, a cabin crew whose level of absence is being monitored is required (i) to provide all medical and other information that has been used to support his or her absence which the Appellant considers necessary; (ii) to attend a medical evaluation by a doctor designated by the Appellant; (iii) to consent to the disclosure of any medical results that relate to such examination and/or any other medical records for the past 12 months as deemed relevant by the Appellant for the purpose of ascertaining whether there is any underlying medical condition preventing regular attendance and whether he/she is receiving appropriate treatment and (iv) to consult a designated doctor for future treatment to ensure appropriate care and monitoring of progress.

10. If during the course of monitoring, the Appellant determines that the cabin crew concerned has an underlying medical condition preventing regular attendance, he/she may be referred to the Appellant's Company Medical Department (CMD) for further evaluation. If there is no underlying medical condition or a condition that would prevent his/her regular attendance, his/her attendance will continue to be monitored and appropriate assistance may be offered to him/her.

11. Paragraph D of section 3.2. states:

> "Any Cabin Crew member who refuses to co-operate and participate in the attendance monitoring process stated in this programme (the AMP) may be subject to disciplinary action under the Company (the appellant's) Disciplinary and Grievance Policy. The Company will also consider reducing the sickness allowance of the cabin crew

concerned in accordance with the Employment Ordinance."

12. It appears from Paragraph D that cabin crew are required to cooperate and participate in the attendance monitoring process which includes consenting to release personal medical information for the previous 12 months or to face disciplinary actions and loss of benefits.

13. In implementing the AMP, a standard letter is sent to a cabin crew to whom the Appellant has written regarding his poor attendance and whose absence record has not significantly improved. The cabin crew concerned is asked to attend an interview with the Leave Management Executive to discuss the reasons for his/her absence. The letter states:

> "As part of this interview process, it is strongly recommended that you agree to undergo a medical evaluation by a Company Designated Doctor ("CDD"), consent to the release of all medical information relating to this evaluation and consent to release all relevant medical information for the past 12 months. The purpose of undergoing a medical evaluation is to ascertain whether you have an underlying medical condition preventing your regular attendance...
>
> If you choose to forego the medical examination and/or refuse to provide signed consent and/or fail to provide relevant medical information for the past 12 months, the Company will make a decision regarding your future employment based on the available information."

14. The letter further states that since the cabin crew's future employment with the Appellant is under consideration, it is in his/her interest that he/she should provide the required medical consent.

15. The consent is provided by the cabin crew signing a standard Medical Consent Form addressed to his/her doctor and other medical providers authorizing them or consenting to the release by them of the necessary medical information to a person designated by the Appellant. The relevant parts are as follows:

"I...hereby authorize and grant consent to the above to release my (the cabin crew member's) medical summaries, relevant medical records and other relevant information...in connection with:

"(a) any medical condition which has caused me to be absent from work in the past 12 months and any related consultation, examination and treatment; and

(b) the medical examination scheduled to take place on...any adjournment of such examination and any further examination arising therefrom insofar as these relate to any medical condition which has caused me to be absent from work for the past 12 months, or my suitability for accommodation or my ability to carry out the inherent job duties/requirements of my employment,

to any person designated to request such information on behalf the Company.

I understand that such information may be used by the Company as relevant for purposes relating to my employment to which such information is relevant, including assessment of my medical condition (if any) as it impacts upon and relates to my fitness to perform inherent job duties/requirements and consideration for workplace accommodation. I understand that if I do not provide consent to the disclosure of such records and information, the Company may have to make such assessments without the information..."

16. It should be noted that both the letter and the Medical Consent Form advise the cabin crew that the Appellant would assess whether he/she is able to satisfy the inherent requirement of regular attendance and make decisions on his future employment based on the information currently available to the Appellant.

17. The CCNL of the Appellant has a Q & A section devoted to explaining that the AMP is not punitive and that it is introduced to provide support and assistance to crew members with high unscheduled absence on an individual basis to enable them to return to full flying duties. Regarding the consent, the Appellant states on page 7 of the CCNL that it believes that it is a reasonable request to seek the crew member's consent to provide the necessary medical information and if he/she is not willing to comply with the request, the Appellant would treat it as a "D and G matter". Further the Appellant states: "If a decision needs to be made about a crew's continued employment and consent has not been provided, we will have to make a decision based on the information available."

18. Although the Appellant has a Disciplinary and Grievance Policy that applies to Cabin Crew, the CCNL does not explain what "D and G matter" means and whether it is connected with the Appellant's Disciplinary and Grievance Policy.

19. On 1 November 2005, the SCMP reported that the Appellant announced to cabin crew the revised AMP. Under the AMP, flight attendants who took long or frequent sick leave would be required to see the company doctor for assessment and to sign a letter authorizing disclosure of their medical records to the Appellant. It also reported that the Cathy Pacific Airways Flight Attendants Union (FAU) considered the move an infringement of privacy rights and discriminated against the sick and they might complain to the Equal Opportunities Commission, the Privacy Commissioner or the Labour Department.

20. On 11 November 2005, the FAU lodged a complaint under the Personal Data (Privacy) Ordinance (the Ordinance) with the Privacy Commissioner (Commissioner). Since under the Ordinance, a complaint must be made by the data subject, the Commissioner advised the FAU accordingly.

21. On 16 January, 2006, Ms S. Chow and Ms. E. Chan, both FAU members and cabin crew of the Appellant, complained to the Commissioner that they were forced by the Appellant to give consent to their doctors to release their past medical records to the Appellant. As a

result of the report and the complaints, the Commissioner commenced an investigation into the Appellant's practice of collecting past medical data of cabin crew under its AMP.

22. On 13 May 2006, the Appellant through their solicitors Simmons & Simmons wrote to the Commissioner in response to the Commissioner's enquiry. In relation to the consequences of failure to provide consent and the meaning of "D & G matter", the Appellant explained:-

> " "D & G matter" refers to a "disciplinary and grievance" matter (the abbreviation is well known to employees). The Company has a Disciplinary and Grievance Policy applicable to all cabin crew which sets out required standards of conduct, the procedures to be followed to ascertain whether a crew member ahs engaged in misconduct and the consequences of contravening the required standard of conduct. ...
>
> As already stated, given the nature of the Company's business, the Company is under a very strict obligation pursuant to civil aviation safety requirements to ensure the physical and mental fitness of cabin crew. If the Company has a legitimate basis for believing that a crew member is not physically or mentally fit for duty, it is under an obligation to seek a medical clearance before it can allow the employee to fly. Accordingly, disciplinary action could be imposed in circumstances where the crew member's refusal to provide consent means that medical clearance is not able to be given to the crew to return to flying duties, thus resulting in a situation where the crew member is not performing his or her duties and the Company has no details as to why the crew member is unable to return to flying.
>
> It is the case that instances could occur in the future whereby a crew member will be disciplined for failing to provide consent to the release of relevant medical information. (Crew members are advised of the potential for disciplinary action in the AMP Policy.) This is not however, automatic or applicable in all cases, and will depend on all the relevant circumstances of the case...

> In circumstances where a crew member refuses to provide consent to the disclosure of medical records, one potential consequence is that the Company may reduce the sickness allowance of the relevant crew member in accordance with the Employment Ordinance...
>
> In the majority of case, the only consequence of a crew member refusing to provide consent to the disclosure of medical records is and will be that the Company can only assess the crew member's ability to carry out the inherent requirements of the job or suitability for workplace accommodation on the basis of older or limited medical and other information previously provided by the cabin crew member. As explained above, crew members are advised of this consequence in the AMP Policy and the letter requesting consent to the release of medical information."

23. On 13 November 2006, the Commissioner in the course of his investigation wrote to the FAU asking for information on the number of FAU members who had approached the union regarding the AMP and their reasons for doing so.

24. On 13 December 2006, the FAU replied that their members felt that their right to privacy was substantially infringed by the Appellant requiring them to sign the Medical Consent Form and because of the wording in the Form, they feared that refusal to give consent could provide a convenient excuse to the Appellant to take disciplinary action against them which included termination of employment. There were also instances of cabin crew being dismissed under the AMP.

25. On 18 January 2007, the Commissioner informed the Appellant the result of his investigation. The Commissioner told the Appellant that its practice of collecting past medical data of cabin crew under the AMP was collecting personal data by unfair means and contravened Data Protection Principle 1(2) of the Ordinance but there was no contravention of Data Protection Principle 1(1).

26. By way of the letter, the Commissioner served an enforcement

notice on the Appellant directing the Appellant to take such steps as are specified in the notice to remedy the contravention of Data Protection Principle 1(2) and/ or matters occasioning therein.

27. The relevant part of the Commissioner's Enforcement Notice is as follows: –

> "Pursuant to section 50 of the Ordinance (see enclosure (1)), I HEREBY DIRECT YOU, by this enforcement notice, to –
>
> 1. cease the practice of collecting past medical data of cabin crew under the arrangement of the current AMP whereby cabin crew are required to give consent to the release of their personal medical history under the threat of a disciplinary process;
>
> 2. destroy all the medical records of the cabin crew so collected under the AMP; and
>
> 3. confirm to me in writing the steps taken by you to comply with paragraph 1 and 2 above.
>
> AND you are required to comply with the above directions within 21 days after the date of service of this enforcement notice on you. "

28. The Commissioner in his results of investigation said that he accepted that the collection of medical data of cabin crew who are subject to the AMP due to long or frequent sick leave taken is necessary and directly related to the Appellant's function and activity as an operator of aircraft and he found no evidence suggesting that the Appellant collected the medical data other than for a purpose directly related to its function and activity. He also did not find sufficient evidence that the medical information so collected by the Appellant was excessive for assessing the cabin crew's overall medical condition and/or providing appropriate support for him/her to return to work. Hence there was no contravention of Data Protection Principle 1(1).

29. As regards Data Protection Principle 1(2), the Commissioner did not find the means of collection illegal or unlawful. However, he found that having regard to all the circumstances, the means of collection was unfair. He said the Appellant informed the cabin crew that if they were not willing to provide consent to release of their medical data, the Appellant would consider treating this as a D & G matter, which meant disciplinary action under the Appellant's Disciplinary and Grievance Policy. The Commissioner was of the opinion that medical information of an individual being extremely sensitive demanded a high level of protection and any act of collection of such data must be fully justified in the particular circumstances of the case. In the present case, the Appellant sought to collect its employees' past medical data from their private doctors with their consent but the Appellant failed to provide to them all necessary information which would enable them to choose freely whether to give their consent or not. They were made to give their consent under threat or for fear of disciplinary action for failure to cooperate. The Commissioner considered that this means of collection could not be regarded as fair in all the circumstances.

30. The Appellant appealed against the decision and the enforcement notice. The grounds set out in the Notice of Appeal may be stated as follows: –

1. (i) The Commissioner erred in law in finding the Appellant's collection of past medical data of cabin crew under and for the purpose of the AMP was by "unfair means"...within the meaning of paragraph 1(3)(b) of Schedule 1 of the Personal Data (Privacy)Ordinance.

   (ii) Having found that there was no contravention of law with regard to the collection of past medical data and that it was "necessary and directly related to the Appellant's function and activity as an operator of aircraft"...the Commissioner must necessarily have concluded that it was reasonable and proper for the Appellant to require the provision of such medical data from an employees.

   (iii) In those circumstances the Commissioner erred and/or it

was irrational, illogical and "Wednesbury" unreasonable for the Commissioner to make the said finding in that the consequences of the same was that the appellant would have no means of enforcing and/or compelling compliance with such request made of its employees.

2. (i) (a) In making the said finding, the Commissioner failed to take into account the Appellant's rights as an employer.

(b) An employer is entitled to issue reasonable direction to its employee and the employee is obliged to obey such direction. An employer also has a right to expect an employee is capable of carrying out the inherent requirements of the job one of which is to attend work on a regular and consistent basis.

(c) The AMP is designed to assist individual cabin crew members who fail to attend regularly because of an unusually high level of absence or prolonged absence due to illness and/or sick leave.

(ii) The Commissioner failed to take into account the Appellant was required by law to comply with CAD directives. CAD 360 requires the Appellant to ensure cabin crew are in good general health and free from physical and mental sickness which might lead to incapacitation or inability to perform cabin crew duties. The Appellant cannot so ensure unless it is satisfied on a properly informed basis, that the cabin crew member complies with CAD health requirements. Only cabin crew members with unusually high levels of absence or prolonged absences from work due to illness and /or sick leave may be the subject of a request for the provision of past medical data.

3. The Commissioner took into account information provided by the FAU which the Appellant was not informed of and to which the Appellant was denied the opportunity of responding. The

Commissioner was in breach of the rules of natural justice.

4. (i) The Commissioner's finding that the cabin crew members were unaware of the Appellant's Disciplinary and Grievance Policy was wrong as the said policy is set out in full on the Appellant's intranet site and the term "D & G" is widely known by cabin crew members as referring to the Disciplinary and Grievance Policy.

(ii) The Commissioner was wrong to find the basis of possible disciplinary action against a cabin crew was unknown to cabin crew as they all knew the health requirements for flying duty and the purpose of requiring them to provide past medical data was to enable the Appellant to ensure that they are fit for flying duty.

(iii) The Commissioner was wrong to find that cabin crew believed that disciplinary action would be taken against them for refusing to give consent because the AMP states that disciplinary action may be taken and whether that ultimately results in a detrimental disciplinary action requires review of all the circumstances and entry to D & G process or disciplinary process is not automatic.

(iv) The Commissioner was wrong to find that inadequate information regarding possible disciplinary action was available to cabin crew since employees of the Appellant were at all times available to discuss with cabin crew questions regarding the AMP and cabin crew were expressly advised of that fact.

(v) As an employer concerned in proper time keeping by its employee, and in the circumstances of an unusually high level of absence or prolonged absence from work due to illness and/or sick leave, it is entirely fair and reasonable for the Appellant to request past medical data of cabin crew and to enforce these requests via a reminder of the possibility of disciplinary proceedings and the Appellant's

right to impose such proceedings if necessary.

5. If the Commissioner was entitled to find that the Appellant had not informed the cabin crew of the basis upon which they could be subjected to disciplinary proceeding when requesting the provision of past medical data and the omission rendered the request "unfair", then Direction 1 of the Enforcement Notice was unnecessary and lacking in proportionality. This is because all that was needed was for the Commissioner to require the Appellant when requesting past medical data and reminding its employees of the possibility of disciplinary action, to explain to them that there was an unusually high level of absence or prolonged absence due to illness and/or sick leave or other reason related to safety of operations of the Appellant.

6. Direction 2 of the Enforcement Notice namely that the Appellant destroy all the medical records of the cabin crew so collected under the AMP was irrational, illogical and "Wednesbury" unreasonable in that it was inconsistent with the Commissioner's finding that the collection and use of the past medical data was not excessive for assessing the crew member's overall medical condition and/or providing appropriate support for him or her to return to work and/or necessary and directly related to the Appellant's function and activity as an operator of aircraft. It failed to take into account the necessity of retaining the data for so long as the same were needed to monitor and to assess adequately any improvement or decline, on an informed basis, the health and circumstance of the cabin crew member concerned. It also failed to take into account paragraph 2 of Schedule 1 of the Ordinance which provides that personal data shall not be kept longer than is necessary for the fulfillment of the purpose for which the data was to be used and it was never alleged that the Appellant had or might contravened paragraph 2.

31. Notwithstanding the lengthy grounds set out in the Notice of Appeal, Mr. Bleach SC for the Appellant submits that in summary the Appellant's position is this: –

A. It is clear from the DPP themselves, particularly DPP 1(3) that a data subject may be under an obligation to provide the data requested and that the data user is required to inform the data subject of the obligation and of any consequences for failure to provide the data.

B. Accordingly, there is no requirement that data be provided as matter of free will in order to be fair under DPP 1(2), otherwise DPP(3) could not be satisfied.

C. The meaning of "fair in the circumstances" for the purposes of DPP1(2) requires an objective analysis of the factual and legal context in which the data is requested.

D. The Appellant provided its employees with all necessary information in respect of the request for medical data under the AMP and the consequences of failure to consent to provide the same.

E. The Appellant's practice of data collection under the AMP was fair in the circumstances.

32. The main question for us is whether there was a contravention of DPP1(2) by the Appellant in implementing their AMP which requires cabin crew who are considered by the Appellant to have a high level or pattern of sick leave, to give consent to their medical doctor or medical provider to release to the Appellant their past medical data. Secondly, if there was such contravention, whether the Commissioner was justified to issue the Enforcement Notice and whether the Directions in the Enforcement Notice are proportional and reasonable in the circumstances of the case.

33. DPP1 addresses the purpose and manner of the collection of personal data. It contains three separate concepts: Paragraph (1) deals with whether the personal data should be collected in the first place. It requires (a) the purpose for which the data are collected must be lawful and relate directly to a function or activity of a data user who is to use the

data; (b) the collection is necessary for or directly related to that purpose and (c) the data are adequate but not excessive in relation to that purpose. Paragraph (2) regulates the manner of collection. It requires that the collection of data must be by lawful and fair means. Paragraph (3) sets out the information that should be provided to the person from whom the data are sought.

34. Paragraph (1) is the threshold issue. If the collection is for an unlawful purpose or a purpose otherwise not related to the function or activity of the data user who is to use the data, or is not necessary for that purpose, the data should not be collected at all. In that case, no issue on whether the manner of collection complies with paragraph (2) arises. The fact that the collection complies with paragraph (1) does not mean the manner of collection is not subject to regulation under paragraph (2). The separate paragraphs of DPP1 are not mutually exclusive. It would be absurd to suggest that once it is established the collection of data is necessary and directly related to the function or activity of the data user who is to use the data, the collection could be made by whatever means, irrespective of whether it is lawful and fair. "Necessity for collection" is incongruous with "collection by fair means".

35. It may well be that the Commissioner, having concluded that collection of past medical data of cabin crew was necessary and directly related to the Appellant's function as an operator of aircraft, had also concluded, as suggested by the Appellant, that it was necessary and proper for the Appellant to require such medical data from cabin crew. However, such conclusions are only relevant to compliance with DPP1(1) and not DPP1(2). It would be far fetching to suggest that they are conclusions on the means of collection. We do not think that the Commissioner's decision that the Appellant was in breach of DPP1(2) is inconsistent with his decision that there was no breach of DPP1(1). The Appellant cannot rely on this to say that the Commissioner's decision is irrational or unreasonable in the Wednesbury sense.

36. Paragraph (2) requires the means of collection to be fair in the circumstances of the case. On the question of fairness, there is no definition in the Ordinance as to what amounts to fair or unfair in the context of DPP 1(2). Generally, if the data subject has consented to the

collection, it may be regarded as fair. It is trite law that to amount to a valid consent, it must be given freely. Consent in the context of processing of personal data (which includes collection) has been said to mean "any freely given and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed". Thus consent given under pressure or on the basis of misleading information will not be a valid consent.

37. It is not disputed that there is no statutory requirement that for data collection to be fair, a data subject's agreement to disclose data must be entirely voluntary or a matter of free will. Nevertheless, where a data subject is under no legal obligation to disclose his personal data, he must be able to decide whether or not to disclose the data before he can be said to have agreed to the disclosure. Where he is given no choice but to agree to disclose personal data which he would not otherwise have disclosed, not only is the agreement not freely given, the data so disclosed to the data user cannot be said to have been obtained in a fair manner.

38. In any case, fairness in this context must be "judged by reference to the circumstances of the case. The circumstances of the case must be regarded as including the reasonableness of the data user's belief that the means employed by him to collect are fair." (Eastweek Publisher Ltd and Eastweek Ltd v The Privacy Commissioner of Personal Data HCAL 98/98 per Keith JA).

39. Mr. Bleach's submission is that under DPP1(3) "a data subject should be advised of the nature of the request whether voluntary or obligatory, and consequences of non disclosure". He submits that a distinction should be drawn between provision of information about potentially serious consequences and undue pressure or threats. The information provided to cabin crew to whom the AMP applies are set out in the CCNL, the AMP, the D & G Policy, the Sick Leave Policy, the standard letter requesting an interview and consent to disclose past medical data and the Medical Consent Form. These in effect inform them that refusal to give the consent requested under the AMP would be a matter to be dealt with under the D & G Policy. That is to say that such refusal would warrant an inquiry as to whether there had been misconduct. This is not the same as refusal would automatically result in a penalty or

termination of employment. The Commissioner has failed in his investigation to draw this fundamental distinction between the two.

40. Mr. Bleach also submits that the Commissioner has accepted that the Appellant has a genuine need for the medical data from cabin crew in the AMP and the only practical way to obtain such data is to require consent from the crew member to release them. The only practical method to ensure that an employee complies with the request is to impose a disciplinary sanction for unjustified non-compliance. In any event, the cabin crew as an employee has a common law duty of obedience to a reasonable and lawful request. Disciplinary sanction is an entirely appropriate and fair response to a breach of this duty.

41. A cabin crew has an obligation to comply with requests for medical data relevant to an employee's fitness for duty. The data protection legislation recognizes that a data subject will sometimes be under an obligation to provide personal data. There is nothing inherently unfair about the cabin crew being unable to exercise their free will in deciding whether or not to provide the data and perceiving termination of employment to be a possible consequence of an unreasonable refusal to disclose data. The Appellant would not be able to ensure fitness of cabin crew for flying duties if there was no disciplinary sanction for refusal to comply with the request.

42. Mr. Bleach further submits that the Appellant had provided the cabin crew with all necessary information relating to provision of past medical data and the Commissioner's view that employees were not aware that treating refusal as a D & G matter did not necessarily mean that there would be disciplinary action or sanction is incorrect and unsupported by any objective reading of the D & G Policy.

43. The Enforcement Notice should have required the Appellant to provide further explanation of D & G matter rather than to require the Appellant to cease collection of past medical data under threat of disciplinary process, Mr. Bleach so submits. It would not be right to require destruction of all such data collected under the AMP. There should be further investigations as to whether individual data subject had been provided with adequate information.

44. Mr. Lee for the Commissioner on the other hand submits that the circumstances the Commissioner took into account include –

a. cabin crew who are directly affected by the AMP, took no part in its drafting and execution and had no choice but to accept it and thus in a weaker bargaining position than the Appellant;

b. past medical data of the cabin crew are sensitive in nature and need particular concern for protection;

c. requirements under CAD 360 that the Appellant should ensure the fitness of cabin crew for flying duties and the Appellant had a legitimate interest to require the medical data;

d. materials and information provided by the Appellant to the cabin crew to understand the AMP and how it would operate with the Appellant's other policies; and

e. information provided by the Appellant on consequences of refusing to provide the required consent including the AMP being made available on the Appellant's intranet and newsletter to all cabin crew.

45. Mr. Lee says that the Appellant has explained that disciplinary action is not automatic or applicable to all cases of refusal. It depends on the circumstances of the case including the impact of the refusal and the reason given by the cabin crew to refusal. Such information was not given in the AMP and the newsletter and neither were the reasons the Appellant would accept as reasonable ground to refuse consent. The AMP and the newsletter, Mr. Lee so submits, explicitly make it obligatory for a cabin crew to give the requested consent or to face disciplinary proceedings. They do not reasonably enable a cabin crew to appreciate that he has a choice to refuse consent without being subjected to immediate disciplinary process. Whether consent is freely given is relevant to the issue of fair means of collection. If there is no free consent, the other circumstances for consideration would be whether there are other justifications, such as mandatory requirement of disclosure of the

data.

46. Mr. Lee submits that although medical data including a medical certificate specifying the diagnosis relating to the cabin crew member's absence from work should be provided to the Appellant in claiming sick leave pay, there is no legal requirement that the cabin crew member should provide the past medical data requested by the Appellant under the AMP nor any circumstances justifying such request against the cabin crew's free will. The Appellant may take disciplinary action against a cabin crew for his unfitness or inability to undertake his duties but to discipline a cabin crew for such refusal is a different matter.

47. The lack of consent and hence the past medical data, does not prevent the Appellant from assessing the cabin crew's fitness and ability to fulfill his duties based on other information available to the Appellant.

48. In these circumstances, the Commissioner was entitled to conclude that the cabin crew to whom the AMP applies were not fully informed of the consequences of refusal and that they were left with no choice but to submit under pressure to give consent to release their past medical data. Based on such conclusions, it was not unreasonable or irrational for the Commissioner to find the means of collection of past medical data by the Appellant under the AMP not fair in the circumstances of the case.

49. Finally, Mr. Lee submits that the Appellant is not prevented by Direction 1 in the Enforcement Notice to collect past medical data of cabin crew. Direction 1 only requires the Appellant to cease using the threat of disciplinary process as a means of collecting the necessary data. As to Direction 2, the Appellant should not be allowed to retain and benefit from medical data collected in contravention of DPP 1(2). The Commissioner is empowered by section 50(1)(iii) of the Ordinance to direct the Appellant to remedy the contravention and Direction 2 is not an unreasonable remedial step having regard to the circumstances of the case.

50. Mr. Lui for the FAU agrees with the contentions of Mr. Lee. He adds that it was obvious that the means of collecting the past medical data by the Appellant was unfair as it left the crew members with no real

choice but forced to give their consent for fear of disciplinary action including termination of employment for failure to cooperate.

51. We have examined the AMP and the CCNL together with the Medical Consent Form and the standard letter of request in particular the information contained therein regarding the consequences of refusal to give the required consent. We note that although no mention is made in the letter of request and the Medical Consent Form of possible disciplinary action for non-compliance with the request, when these are read together with Section 3.2 paragraph D of the AMP, the Q & A explanation in the CCNL, the message conveyed to the cabin crew is clearly that a crew member who fails or refuses to comply with the request for consent to disclose his or her previous medical information would face disciplinary proceedings that could jeopardize their continued employment with the Appellant. The Disciplinary and Grievance Policy has made it clear that disciplinary proceedings may result in actions against the cabin crew. These actions include termination of employment or summary dismissal. This message, call it threat or information about serious consequences, puts pressure on the cabin crew to consent to release his/her personal data which he/she would not otherwise agree to release. In these circumstances, an employee would not be in a position to refuse the request that is dictated by his employer. That cannot be said to be fair.

52. The Appellant contends that a cabin crew is under an obligation to give the consent requested. The obligation arises from their conditions of service that require them to comply with company policy. The AMP as well as the Sick Leave Policy and the Disciplinary and Grievance Policy are company polices. The Sick Leave Policy requires a cabin crew to give consent to release data relating to his medical condition after he is certified unfit for work and failure to do so is a disciplinary matter. The Disciplinary and Grievance Policy specifies failure to comply with company policy is misconduct. The Appellant also contends that it is a condition of employment that a cabin crew has to obey lawful and reasonable order of the Appellant. To advise the cabin crew of these likely sanctions for failure to give the requisite consent is perfectly appropriate in particular when without such sanction, consent would not be forthcoming. Otherwise, the Appellant would not be in a position to

assess whether the cabin crew is fit to return to flying duties. That cannot be said to be collecting data in an unfair manner.

53. We do not agree with this contention for these reasons. Firstly notwithstanding the past medical data of a cabin crew member with long and frequent sick leave are necessary to the Appellant in assessing his/her fitness for flying duties, there is no obligation, contractual or otherwise, for the cabin crew to provide his/her past medical data. The obligation to give consent to release medical data under the Sick Leave Policy is limited to the data relating to the medical condition of a cabin crew on the occasion when he/she is certified by a doctor to be unfit for work. This does not extend to his/her medical condition in the 12 months period prior to the request under the AMP. Secondly, the Medical Consent Form and the letter of request clearly state that if consent is refused, the cabin crew's medical condition would be assessed on the information currently available to the Appellant. That being so, the lack of the crew member's past medical data does not prevent the Appellant from carrying out assessment on his/her fitness for duty. Thirdly, the Appellant is entitled under the Sick Leave Policy to require a cabin crew who is certified as unfit for work to be periodically examined by a Company Designated Doctor. The cabin crew is under an obligation to consent to make the medical data of his/her examination available to the Appellant for assessment of his/her fitness to return to flying duties. That being so, the absence of the cabin crew's past 12 months medical data does not render the Appellant without recourse to medical data for making such assessment. In these circumstances, we do not agree that to impose disciplinary sanction to force a cabin crew to consent is the only practical method available to the Appellant to obtain medical data that would assist the Appellant to discharge its obligation under CAD 360.

54. The Appellant contends that the request is a lawful and reasonable order that a cabin crew, as an employee of the Appellant must obey. As a matter of employment law, where the request is unlawful or unreasonable, the duty of obedience ceases. The 4th edition of Labour Law by Simon Deakin and Gillian S Morris, Chapter 4 paragraph 4.85, an authority relied on by the Appellant, has this to say in relation to the duty at common law of an employee to obey a lawful and reasonable order: "It is arguable that the duty of obedience is now circumscribed by

Convention rights under the HRA 1998; hence, if the employer issued an instruction which amounted to breach of such a right, such as the right to respect for private life under ECHR Article 8, special justification would be needed".

55. Article 8 of the European Convention on Human Rights (ECHR) corresponds with Article 17 of the International Convention on Civil and Political Rights (ICCPR) which provides:

> "no one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence not to unlawful attacks on his home or reputation."

56. Although Article 8 refers to "private life" and Article 17 refers to "privacy", it is now recognized that the former includes the latter.

57. Article 39 of the Basic Law of the HKSAR provides that:

> "The provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedom enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article".

58. The ICCPR imposes on the HKSAR Government an obligation to adopt legislation or other measures to give effect to the prohibition against interference with the right to privacy. The Bill of Rights Ordinance and the Ordinance are measures to this effect. An employee's right to privacy is therefore protected against interference by his employer unless there is special justification for the employer to do so.

59. In our view, the Appellant's contention involves the proposition that it is an implied term of the cabin crew's contract of employment that he/she should accept an order to disclose his/her past medical data or to

face dire consequences for disobedience of a lawful and reasonable order which may result in summary dismissal or termination of contract. This proposition is untenable. In our opinion, the Appellant's request is tantamount to ordering the cabin crew to relinquish his/her right to withhold disclosure of personal data. This is interference with the cabin crew's right to privacy under the ICCPR. There is no special justification for the Appellant to make such request. The cabin crew is not obliged to comply with such instructions and is fully entitled to refuse to relinquish his/her right against their wish.

60. For the reasons stated above, we are of the opinion that the means of collection of the past medical data of cabin crew by the Appellant under the AMP cannot be fair in the circumstances of the case. As we see it, notwithstanding the Commissioner may have referred to the FAU's letter in his decision which he is entitled to, the letter being part of his investigation into the complaints, such reference would not render the Commissioner's final conclusion that there was a breach of DPP1(2) unreasonable or irrational. We agree with the Commissioner's decision.

61. Section 50 of the Ordinance provides for the Commissioner's power to issue an enforcement notice. The following subsections of section 50 are relevant:

> "(1) Where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user –
>
> (a) is contravening a requirement under this Ordinance; 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) stating that he is of that opinion;
>
> (ii) specifying the requirement as to which he is of that opinion and the reasons why he is of that opinion;

(iii) directing the data user to take such steps as are specified in the notice to remedy the contravention ...

(iv) accompanied by a copy of this section.

(2) In deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention or matter to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention or matter, as the case may be, relates.

(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."

62. It is within the Commissioner's power to serve an enforcement notice on a data user after an investigation, if he is satisfied that the data user has contravened a requirement of the Ordinance and the contravention has not ceased or is likely to be repeated. The Commissioner having found the collection of past medical data of cabin crew under the AMP contravened DPP1(2) and that it is unlikely that the Appellant would discontinue this practice, the Commissioner is entitled to serve on the Appellant an enforcement notice requiring the Appellant to remedy the contravention by way of ceasing the practice under the AMP and to destroy all data collected by such unfair means. We note that Direction 1 of the enforcement notice only requires the Appellant to cease the practice of collection of data by requesting the cabin crew to give consent to release the data under threat of disciplinary proceedings. It does not prevent the Appellant from making such request without using

threats or undue pressure. We do not agree that the threat of disciplinary sanction is the only practical method the Appellant could adopt in collecting such data. Having regard his findings to which we have not disagreed, the Commissioner is entitled to required destruction of the data collected by means which are not found to be fair. In our opinion, the enforcement notice and its directions are not unreasonable in the Wednesbury sense or irrational.

63. The appeal is accordingly dismissed.

(Mr Arthur LEONG Shiu-chung, GBS)
Chairman
Administrative Appeals Board