

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 4 OF 2013
(ON APPEAL FROM HCAL 125/2012)**

CHAN HUI MAY KIU

Applicant

Before: Hon Cheung CJHC, Lam VP and Kwan JA in Court

Date of Hearing: 29 January 2014

Date of Judgment: 29 January 2014

Date of Reasons for Judgment: 21 February 2014

REASONS FOR JUDGMENT

Hon Cheung CJHC:

1. At the conclusion of the hearing, we dismissed the applicant's appeal from the judgment and order dated 24 December 2012 of Andrew Chan J refusing the applicant leave to apply for judicial review. We also ordered that there be legal aid taxation of the applicant's own costs. We now give our reasons.

The facts

2. The applicant used to work as a supporting service staff at St Paul's Hospital. She was said to have slept whilst on duty on more than one occasion. On being confronted by her supervisor, she denied the allegation and demanded for proof. One day in July 2010, whilst the applicant was on night shift duty, she was found taking a nap in the nurses' work station. Her supervisor (Lam) asked a subordinate (Mak) to use a mobile phone to video record the incident.

3. On 18 September 2010, Lam had a job performance review with the applicant. Lam told her that she had slept whilst on duty. The applicant denied it. Lam then played the video recording to the applicant. Later, the hospital decided to terminate the applicant's employment. The applicant chose to leave by tendering her resignation. She left in the end of September 2010.

4. The applicant then made a complaint to the Office of the Privacy Commissioner for Personal Data ("the Commissioner") about the video recording of her whilst she was taking a nap, and the showing of the video recording to 9 nurses, without her consent.

5. By a letter dated 12 April 2011, the Commissioner informed the applicant that he had decided not to continue with the investigation of the complaint as it was unnecessary to do so. Essentially, the Commissioner had formed the view that the video recording was not unlawful or unfair in the circumstances of the case, and therefore there was no breach of data protection principle 1(2) set out in Schedule 1 of the Personal Data (Privacy) Ordinance (Cap 486) ("the Ordinance").

6. Dissatisfied with the Commissioner’s decision, the applicant appealed to the Administrative Appeals Board (“the Board”). By a decision handed down on 20 January 2012, the Board agreed with the Commissioner and dismissed the appeal.

7. After obtaining legal aid, the applicant applied for leave to apply for judicial review on 4 October 2012. The application came before the judge on 30 November 2012. By a judgment handed down on 24 December 2012, the judge refused leave on the basis that the intended challenge was not reasonably arguable. Hence, this appeal.

The arguments

8. Ms Lorinda Lau, for the applicant, argued that the Board was wrong in concluding that the collection of personal data by way of video recording in the present case was lawful both in terms of purpose and manner. She emphasised that the hospital, in a subsequent letter to the Commissioner, stated that it never authorised the video recording of the activities of its employees, and counsel therefore argued that Lam had no power to instruct Mak to video record the applicant whilst taking a nap. Counsel also argued that Lam never gave the applicant any prior warning about the possibility of video recording her whilst at work. That was unfair and contrary to data protection principle 1(3). Ms Lau also suggested it was possible that the video recording took place during the 45-minute break during which the applicant was entitled to take a nap. She further complained that the video recording was shown to 9 other nurses who had no reason to watch the recording. In this connection, Ms Lau complained that the Board failed to exercise its discretion to call the 9 nurses, who had by written statements to the Commissioner denied

that they had watched the video recording, to give evidence before the Board regarding the matter.

My views

9. Data protection principle 1 provides, amongst other things, that personal data shall not be collected unless the data is collected “for a lawful purpose directly related to a function or activity of the data user who is to use the data”, and “the collection of the data is necessary for or directly related to that purpose”. Furthermore, principle 1(2) provides that personal data shall only be collected by means which are “lawful” and “fair in the circumstances of the case”. There is no dispute that this principle relevantly gives effect to the right to privacy protected under the Hong Kong Bill of Rights.

10. The video recording of the applicant in the present case was obviously for a “lawful purpose”, that is, the hospital’s employment of the applicant, and in particular, the monitoring of her performance during night shifts. As for the means of collection, given that the video recording took place within the premises of the hospital itself, there can be no question of the data being unlawfully collected. It is one thing to say that the hospital as a matter of policy does not allow the video recording of the activities of its employees; it is another to say that any such video recording by the hospital is “unlawful”.

11. The crux of the case therefore turns on whether the manner of collection was “fair in the circumstances of the case”. I bear in mind, of course, that one is only dealing with a leave application here. However, it is quite beyond argument to the contrary that the collection of data in the

present case was fair in the circumstances. The sleeping incident took place in the work station of the nurses. It was not an enclosed area. Rather, it was a semi-public area, open to the view of all, including doctors and nurses, patients and visitors. Anyone nearby could see what the applicant was doing in the work station. Indeed for security purposes, there were already CCTV cameras installed inside the hospital. The applicant had challenged her supervisor before to come up with hard evidence to show that she had slept whilst on duty. What the supervisor was doing was exactly to collect such evidence to prove her allegation against the applicant. There was nothing unfair about what she did. As mentioned, what she did was for a lawful purpose, directly connected with the hospital's employment of the applicant.

12. As for Ms Lau's reliance on data protection principle 1(3) to argue that a prior warning of possible video recording should have been given to the applicant, this was a new point not raised before the Commissioner or the Board. In any event, any such prior warning would have prejudiced the purpose of the whole exercise, namely, to collect "hard evidence" of the applicant's sleeping on duty for the purposes of the hospital's employment of the applicant and its monitoring of her performance. The case therefore falls within the exception to principle 1(3): see also section 55(2)(a)(i)(B) and (C) of the Ordinance.

13. As for the 9 nurses, they had given statements to the Commissioner that they had not watched the video recording. The Commissioner was quite entitled to accept what they said in their statements. And the Board was equally entitled not to pursue the matter any further. We see no scope for interfering with the Board's decision.

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Disposition

14. For these reasons, the intended application for judicial review was without merit. Leave to make the application was rightly refused. Accordingly, the appeal was dismissed.

Hon Lam VP:

15. I agree and have nothing to add.

Hon Kwan JA:

16. I agree with the Reasons for Judgment of the Chief Judge.

(Andrew Cheung)
Chief Judge of the
High Court

(Johnson Lam)
Vice President

(Susan Kwan)
Justice of Appeal

Ms Lorinda Lau, instructed by Hon & Co, for the applicant