

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 11 of 2004

BETWEEN

DR AUSTIN PAN

Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 28 October 2004

Date of handing down Decision with Reasons : 10 November 2004

D E C I S I O N

The Appellant Dr. Austin Pan was a lecturer in the Engineering Department (the Department) of the University of Hong Kong (the University). On 27.2.2003, he complained to the Privacy Commissioner (the Commissioner) that the University did not release to him certain “supplementary comments” pursuant to his data access request and he was deprived of his right to obtain information. He also complained that the Chairman of the Review Committee for Selection and Academic Re-titling of Assistant Professors (CSARAP) released to Committee members personal data from his employment files without his consent.

2. On 6.5.2003, the University following the suggestion of the Commissioner, forwarded a copy of the “supplementary comments” to the appellant’s solicitors. These included a copy of the comments on the appellant’s research, teaching and administration, a copy of “Course

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Evaluation Ratings – Dr. A.D.E.Pan” and a copy of “Form for Summative Staff Progress Review (Teachers)” (the Form). Part I of the Form relates to self assessment and was completed by the appellant. Part II relates to assessment of performance and achievements and was completed separately by 3 reviewers - Professor JHW Lee, Professor YK Cheung and Professor CF Lee, and Part III which records the discussion between the appellant and the 3 reviewers was signed by all four of them.

3. The Appellant’s first complaint was thus satisfactorily dealt with by the Commissioner.

4. On 27.10.2003, the Appellant made a second complaint to the Commissioner against the University. He complained that student ratings concerning him had been disclosed by the Department to the Review Committed without his consent. The appellant said that a note in the Form which reads : “provision of student ratings is not obligatory. In no case will such data be used as the sole criterion in assessing teaching effectiveness” (the Note) prohibited such disclosure. He complained that this was a breach of the Personal Data (Privacy) Ordinance (the Ordinance). In support of his complaint, the appellant submitted a copy of his first complaint and a copy of the University’s letter dated 6.5.2003 and the “supplementary comments”.

5. The Commissioner carried out a preliminary enquiry of the complaint and obtained the University’s response to the complaint. The response may be summarised as follows:

- (1) The University Senate Teaching Quality Committee (STQC) recommended that all courses should undergo evaluation at least once a year, using an approved questionnaire with processing being handled centrally, following guide lines laid down by the STQC. This recommendation has been approved by the Senate.
- (2) The Department of Engineering collected the student ratings in accordance with the procedure and guidelines set out in the Manual on Teaching and Learning Quality Processes in the Faculty of Engineering and the Student Evaluation of Teaching (SET) Handbook. The collection was for the purpose of monitoring and

evaluating the teaching quality of the teachers including the appellant.

- (3) The Student ratings were collected for the use of the Head of Department and for the appellant as course teacher.
- (4) The Head of Department was in possession of the student ratings of the appellant and those in respect of other teachers for use in the process of monitoring and evaluation of teaching quality.
- (5) The Note in the Form served to remind reviewers and reviewees that student ratings were not to be used as the sole criterion in assessing teaching effectiveness.
- (6) The student ratings in respect of the appellant had not been circulated to members of the Committee and the Registry had not kept them

6. On 16.12.2003 the Commissioner informed the appellant's solicitors that there was no prima facie evidence of any contravention of the Ordinance by the University and an investigation of the appellant's complaint was considered unnecessary.

7. The Commissioner was of the opinion that the student ratings were collected for the purpose of monitoring and evaluating individual course teacher's quality and all teachers including the appellant accepted this as a norm of the Department. The disclosure of the student ratings to the Review Committee was for the purpose of evaluating the appellant's teaching quality and that was a purpose directly related to the original purpose of collection. The Note in the Form does not prohibit the Department from supplying the student ratings to the Review Committee or the reviewers from referring to them so long as their use was for or directly related to the original purpose of collection.

8. On 5.3.2004, the appellant appealed to this Board against the decision of the Commissioner on the following grounds:

- (1) The purpose of collection of the student ratings was for the

benefit of the teacher as one type of feedback/communication from student and not for monitoring and evaluating individual course teachers' teaching quality.

- (2) He was not informed that the student ratings would be disclosed for Summative Review and the Review Committee. The disclosure was not related to the original purpose of collection and prior consent by him was necessary.
- (3) The University admitted that the student ratings were not circulated to members of the Committee and were not kept by the Registry. They were sent to teachers under cover marked "confidential". These showed that the student ratings were confidential in nature. Even if they related to the original collection purpose, his consent was still required for their disclosure.
- (4) The Note states that provision of student ratings is not obligatory. This indicates that the University has left it to the teacher to decide whether to disclose the student ratings. From the University's refusal to release the supplementary documents and from the reviewers' comments, it is evident that the student ratings had been unlawfully disclosed to the Review Panel and the full Committee.

9. Counsel for the appellant Mr. McLeish in his skeleton arguments has raised two other grounds: firstly, the Commissioner's preliminary enquiry of the complaint was not authorised by the Ordinance and was ultra vires and secondly, the Commissioner had failed to give the appellant an opportunity to reply to the University's response to the complaint and this was contrary to the requirements of procedural fairness.

10. These grounds are not in the notice of appeal and no application has been made to amend the grounds of appeal. As a matter of procedure, new grounds should not be introduced, especially at the last minute before the hearing, without the leave of this Board. Mr. McLeish asks this Board to grant leave to add them to the grounds of appeal. He

submits that the new grounds had not been included in the notice of appeal because they involved legal issues not appreciated by the appellant. However, they were raised in July 2004 in the appellant's response to the Commissioner's statement relating to the decision. The Commissioner was therefore aware of them at least a few months ago. Miss Cheung for the Commissioner submits that although she is able to argue these grounds orally, because of such short notice, no written submission on them has been prepared. She asked for an adjournment. Mr. Stock for the University has prepared a skeleton argument which includes arguments on these new issues. He has no objection to their introduction at the hearing today. However, he seeks to introduce new affidavits by Professor CF Lee and Professor JHW Lee and a Ms Rebecca Leung to support the case of the University.

11. On the question of new grounds of appeal, since all parties are able to argue them now, we grant leave for them to be included as part of the grounds of appeal to be argued before us.

12. The question of accepting new evidence is another matter. In our opinion although under s. 21(b) of the Administrative Appeals Boards Ordinance, we may receive and consider any material whether admissible in evidence or not and under s. 21(j) we may "confirm, vary, or reverse the decision that is appealed against or substitute therefor such other decision or make other order as it may think fit", an appeal before us is not a trial of the issues between the parties to the complaint. We are here to decide, having regard to all the materials that were before the Commissioner at the time, whether his decision is correct. If it has been properly made, we will confirm it; if it has been made not in accordance with the law or contrary to established principles or accepted policy, we may vary or reverse it, in which case we may substitute our decision for it or to make an appropriate order. For that purpose no new evidence would be necessary. That we may receive evidence does not mean that we should receive new evidence. The affidavits Mr. Stock now seeks to introduce were not before the Commissioner. They should not be accepted for the present purposes.

13. On the question of preliminary enquiry, Mr. McLeish submits that subject to s. 39 of the Ordinance which gives the Commissioner the

discretion to refuse to carry out an investigation or to discontinue an ongoing investigation, the Commissioner is obliged to carry out an investigation when he receives a complaint. Before he carries out an investigation, he is required under s. 41 of the Ordinance to serve a notice on the parties to be investigated. The Commissioner is not empowered under the Ordinance to carry out a preliminary enquiry as he did in the present case.

14. Mr. McLeish submits that the Commissioner was obtaining evidence when he wrote to the University on 5.11.2003 and 25.11.2003 asking the University to respond to the complaint and to provide further information. This was in substance an investigation. No statutory notice under s. 41 had been served. The Commissioner's investigation was not in accordance with the law. His decision is invalid and if that be the case, it is immaterial whether there was any contravention of the Ordinance by the University.

15. Independent of this ground, Mr. McLeish submits that the Commissioner's enquiry was one sided. The Commissioner requested information only from the University and reached his decision on one sided evidence only. The appellant was deprived of a fair hearing.

16. Mr. McLeish submits that the Commissioner's decision should be set aside by reason of any of these two grounds.

17. Mr. Stock submits that the Commissioner has wide discretion to refuse to carry out or to discontinue an investigation on grounds stated in s. 39 of the Ordinance. The section contemplates the Commissioner to make some enquiry as to within which of the grounds specified a complaint falls before exercising that discretion. In any case, s. 8 of the Ordinance provides that the Commissioner may do "do all such things as are necessary for, or incidental or conducive to, the better performance of his functions." In the circumstances, it cannot be said that the Commissioner was acting ultra vires when he made the enquiry.

18. Mr. Stock also submits that the appellant was free to submit whatever evidence in support of his complaint and he had done so. The Commissioner was in possession of both the appellant's evidence and the

University's evidence when he made his decision. This was not a one sided decision.

19. Miss Cheung relying on s. 8 and s.39 of the Ordinance submits that these provisions give the Commissioner wide discretion to conduct the preliminary enquiry and there was no question of the Commissioner acting outside his powers and his decision was ultra vires. In any case, the Commissioner's enquiry did not amount to an investigation as contemplated by s. 38.

20. In our judgment, s.8(2) of the Ordinance empowers the Commissioner to do all such things as are necessary for, or incidental or conducive to, the better performance of his functions and s.39 gives Commissioner wide discretion to refuse to carry out an investigation, in particular, he may do so if for any reason an investigation is unnecessary. Under these two sections, the Commissioner may decide in what manner he should perform his functions or excise any of his powers in respect of a complaint received by him. Thus to have a preliminary enquiry before exercising his power to decline an investigation is well within the powers conferred on him by the Ordinance provided that he takes into consideration all the circumstances of the case and acts reasonably. In the present case, the appellant had provided evidence in support of his complaint and it is only fair that the University should be given an opportunity to respond to the complaint before the Commissioner decided on the next step. In our opinion, what the Commissioner did was no more than inviting the University to respond and asking the University to clarify the response. This did not come anywhere near an investigation as contemplated by the section. We do not see how the Commissioner can be faulted by taking this step. We do not agree that the Commissioner had acted in disregard of the requirements for fair hearing. The Commissioner's decision was not invalid.

21. Before we proceed to consider the merits of the Commissioner's decision, it would be convenient to set out first the relevant provisions in the Manuals and Handbook.

22. The purpose of the Manual on Teaching and Learning Quality Processes in the Faculty of Engineering (the Manual) is set out in the

Introduction. The relevant paragraphs are:

- “2. To provide guidelines and references to staff and Departments in the Faculty as to how various processes and procedures work to develop, evaluate and maintain quality in teaching and learning in the Faculty of Engineering.
3. To establish a more uniform approach in the process of teaching and learning quality assurance, as well as in the documentation of the process.”

23. Section 2.4 of the Manual relates to Output Quality Assurance. This provides as follows:

“There are two aspects of quality assurance: the teaching and the learning. To monitor and evaluate the quality of teaching, all courses are evaluated by the student at the end of the semester or the academic year. The Faculty has a standardized procedure for student course evaluation, and starting in 1995-96, a standard questionnaire has been drawn up for the whole faculty...”

24. Section 3.2 of the Manual relates to Student Evaluation of Courses. This provides as follows :

“All Departments conduct on a regular basis standard evaluation of courses, and since late 1995, the set of standardized procedures at Appendix J for student evaluation of course were adopted across the Departments.... Results of the evaluation are considered by the Faculty Teaching Quality Committee, Faculty Board and the Senate.”

25. Section 3.3 of the Manual relates to Staff Academic Activities Report and Summative Staff Progress. This provides as follows:

“All academic staff in the Faculty are required to submit to the Head of Department an annual Academic Activities Report. Staff progress review is normally done by the Head

of Department. The Head of Department may meet individual teaching staff to discuss teaching quality and the results of students' course evaluations, and to review the staff's achievements in the year..."

26. This section also provides for the matters that the Summative Staff Progress Review will consider. These are mainly matters relating to the staff's employment contract and appointment to a higher post.

27. The following paragraphs in Chapter 1 of the Manual on Staff Progress Review for Teachers (Summative Review) are relevant:

"2. Staff progress review is of two types. One type emphasises professional development, while the other is concerned with making judgements for personnel related purposes such as contract renewal, substantiation and promotion."

3. The former type of review ...

4. The latter type... usually known as summative review, ... is concerned with judging the effectiveness and quality of an individual's work, for the purposes of making a decision affecting the career progression of the individual.... a summative review contributes to quality assurance processes."

28. Paragraph 7 of Chapter 2 of this Manual sets out the steps in the review process. These include completing the review form and compiling a dossier of evidence by gathering input from student or peers etc as appropriate, discussion between the reviewer and the reviewee, and subsequent passing of the report to the Head of Department for his comments and recommendations.

29. The Criteria for Evaluating Teaching are set out in Appendix II of the Staff Progress Review Manual and use of student evaluation of teaching is one of the criteria .

30. The above provisions clearly set out the purpose for collection of student ratings and their use which is for monitoring and evaluating teaching quality. Collecting student ratings for such use has been practised in the Department for many years. In our opinion, all academic staff including the appellant are aware of those provisions and the practice. They know the part played by the student ratings in the University's Quality Assurance Process and that their progress in professional development and quality of work which involves quality of teaching is subject to review by the Summative Review Committee. They know the results of the student ratings may be taken into account at the review, the outcome of which would affect their employment. Although section 3.2. of the Manual does not mention the Summative Review Committee, it is implicit from the above provisions that the results of the student ratings would be disclosed to the Committee, otherwise they could not be taken into account by the Committee. Implicitly, the academic staff have consented to the use of the student ratings at the Summative Review. Alternatively, their use at the Summative Review was for a purpose directly related to the original collection purpose.

31. Mr. McLeish submits that the Note in the Form gives the appellant a choice to provide student ratings and there is no provision in the manuals for disclosure of such ratings without the appellant's consent. Therefore the Note is a prohibition against disclosure of student ratings.

32. It should be noted that the Note is in the self assessment part of the Form. Part of the review process is that the appellant compiled a dossier of evidence to be submitted with the Form to support his self assessment. What evidence he wished to provide is up to the appellant to choose and student ratings would be some such evidence. The Note also serves as a reminder to the reviewer that student ratings are not the sole criterion of assessment. The Note does not mean that where such ratings have been provided, they should not be disclosed to the Review Committee. We do not accept the Note is a prohibition as submitted by Mr. McLiesh.

33. In our judgment, the fact that student ratings were sent to teachers under cover marked 'confidential' does not mean they could not be disclosed to the Review Committee without the appellant's consent,

provided that such disclosure was for the purpose for which they were collected or for a directly related purpose. Such disclosure is allowed under DPP3 while the student ratings may remain confidential. In short, confidentiality and protection under DPP3 are not mutually exclusive.

34. Where it is plain from the materials submitted by the appellant and University that there is no case of contravention of the Ordinance, the Commissioner was entitled to consider that an investigation into it was unnecessary. As we said earlier, on the materials that were before the Commissioner at the time, it is plain that disclosure of the student ratings to the Summative Review Committee was no contravention of DPP3. In our opinion, the appellant had not made out a case of contravention of the Ordinance against the University.

35. We might mention, the appellant and the University are in dispute as to whether the Registry was in possession of the student ratings and whether they had been circulated to members of the Review Committee. This is a question of fact. But having regard to the conclusions we have reached above, it would not be necessary for us to decide this factual issue. The fact remains, as we have concluded above, that the student ratings could properly be disclosed to the Review Committee without contravening the Ordinance and that question of fact is no longer relevant.

36. For these reasons we have no hesitation in finding that the Commissioner was correct in deciding not to investigate the appellant's case. We dismiss the appeal.



(Arthur Leong)

Chairman

Administrative Appeals Board