

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 20/2023

BETWEEN

LAU TAK LUN

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr Johnny Ma Ka-chun, SC (Deputy Chairman)
- Mr Sy Ming-yiu (Member)
- Dr Tsang Sze-chun (Member)

Date of Handing down Written Decision with Reasons: 25 April 2024

DECISION

Background

1. By a Notice of Appeal dated 3 October 2023 lodged by the Appellant (“**the Notice of Appeal**”) with the Administrative Appeals Board (“**the Board**”), the Appellant appealed against a decision (“**the Decision**”) dated 11 September 2023 made by the Respondent (“**the Appeal**”). By the Decision, the Respondent decided that she would, in exercise of her discretion under

section 39(2)(ca) and (d) of the Personal Data (Privacy) Ordinance (Cap. 486) (“**the PDPO**”), not to carry out an investigation initiated by a complaint made by the Appellant (“**the Complaint**”).

2. By a letter dated 18 October 2023, the Respondent informed the Board that she had “decided to withdraw” the Decision, and that she would “continue to handle the Appellant’s complaint”. The Respondent further stated that she had invited the Appellant to consider withdrawing the Appeal.

3. By letter dated 4 November 2023 to the Board (enclosing therewith the Respondent’s two letters to the Appellant respectively dated 18 September 2023 and 6 October 2023, and the Appellant’s letter dated 19 October 2023 to the Respondent), the Appellant submitted that unless the Respondent consented to the conditions set out by the Appellant as per the Appellant’s said letter dated 19 October 2023, the Appellant would ask the Board to exercise its power pursuant to section 21(1)(h) of the Administrative Appeals Board Ordinance (Cap. 442) (“**the AAB Ordinance**”) to determine the Appeal summarily in favour of the Appellant and provide directions on costs. By letter dated 14 November 2023 to the Board, the Appellant forwarded to the Board the Respondent’s letter dated 8 November 2023 to the Appellant and the Appellant’s reply dated 10 November 2023 to the Respondent.

4. As to the subsequent and latest development, by letter dated 27 November 2023, the Respondent informed the Board that the Respondent “will not proceed with the [Appeal] and would respectfully leave the matter to the Board for an appropriate order as the Board sees fit”. By letter dated 30 November 2023, the Appellant asked the Board to “make an order in terms of the prayer set out in the Grounds of Appeal and direction on costs”. For completeness’ sake, it is hereby recorded that subsequent thereto, the Appellant wrote further to the Board by letter dated 23 December 2023

(thereby forwarding to the Board the Respondent's letter dated 15 December 2023 to the Appellant, and the Appellant's reply letter dated 22 December 2023 to the Respondent), and more recently by letter dated 15 February 2024.

5. In the present case, the Appellant has not abandoned the Appeal in accordance with section 19 of the AAB Ordinance. Accordingly, the Appeal continues to be an appeal before the Board.

Summary Determination

6. However, the fact is that the Respondent has withdrawn the Decision and as such in effect reversed the same, wherefor the subject matter of the Appeal is no longer in existence and the Board has power to make a determination of the Appeal summarily in favour of the Appellant without a hearing pursuant to section 21(1)(h) of the AAB Ordinance which provides as follows:

“(1) For the purposes of an appeal, the Board may-

...

(h) if it appears to the Board that the respondent has reversed the decision appealed against, determine the appeal summarily in favour of the appellant without a hearing and without calling on anyone to attend or to appear before it.”

7. In the circumstances, the Board would accordingly exercise the power under section 21(1)(h) of the AAB Ordinance to make a determination of the Appeal summarily in favour of the Appellant without a hearing. As the exercise of this power is made consequential upon the Respondent having reversed or withdrawn the Decision, it is exercised without consideration of the merits of the Appeal, and without hearing the parties.

8. Accordingly, the Appeal is allowed and the Decision is formally set aside.

9. As the present decision is made without consideration of the merits, apart from formally setting aside the Decision, it is inappropriate for this Board to grant any other relief as sought by the Appellant in the Notice of Appeal. For the same reasons, it is also inappropriate for this Board to make any comments on the merits of the Complaint, or to speculate on the possible outcome of the Respondent's re-consideration of the Appellant's Complaint (or complaints) – and we will not do so.

Costs

10. The Appellant asked the Board to “provide directions on costs”. In light of the aforesaid and the absence of a hearing, by letter dated 20 February 2024, the Presiding Chairman of the Board gave directions for the Appellant and the Respondent (if she so wished) to lodge written submissions on costs each not exceeding 4 pages. The Appellant lodged his submissions with statement of costs dated 4 March 2024, and the Respondent lodged her submissions dated 18 March 2024.

11. Thereafter, by letter dated 22 March 2024 the Appellant put forward further submissions in reply (with appendices), notwithstanding that the said directions did not contemplate for the same, and by the same letter the Appellant sought the Board's indulgence in this regard. The Appellant contended, *inter alia*, that the Respondent's submissions (sent to him on 18 March 2024 by registered post and received by him only on 21 March 2024) were served late and exceeded the page limit (when the authorities are taken

into account), in non-compliance with the said directions.

12. The Respondent's submissions do not exceed the page limit – authorities do not count towards the same. Such submissions were lodged with the Board on 18 March 2024, even though the Appellant only received the same on 21 March 2024. Even assuming that there was any delay in the service as the Appellant contended, the Appellant had put in further submissions in reply (even though he had not been directed or expected to do so). The Appellant has not been deprived of the opportunity to put in authorities if he so wished. The Board considers that there was no real prejudice suffered by the Appellant in this regard. Having considered the Appellant's contentions, the Board decides to allow the Appellant to put in his further submissions in reply dated 22 March 2024, and has considered all the submissions received including the Respondent's submissions and authorities.

13. The Appellant sought costs against the Respondent in respect of the Appeal. Section 21(1)(k) the AAB Ordinance provide as follows:

“(1) For the purposes of an appeal, the Board may-

...

(k) subject to section 22, make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal.”

14. Section 22(1) of the AAB Ordinance provides as follows:

“(1) The Board shall only make an award as to costs under section 21(1)(k)-

(a) against an appellant, if it is satisfied that he has conducted

his case in a frivolous or vexatious manner; and
(b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.” [emphasis added]

15. Hence, costs do not automatically follow the event. The Appellant is not entitled to costs merely because the Appeal is allowed (whether summarily or otherwise). In Apple Daily Ltd v Privacy Commissioner for Personal Data, AAB No. 5 of 1999 (1 February 2000), the Board therein said as follows in respect of section 22(1)(b):

“... it clearly does not envisage that a successful appellant is entitled to the costs of the appeal as of right. It is so only entitled if it is unjust and inequitable to refuse it. These are strong words and a high burden is imposed on the Appellant to show that it should be entitled to costs in the circumstances of the cases. The fact that it has incurred legal expenses in the appeal will not by itself entitle it to a costs order. Further, the fact that the Respondent had erred in law in making the decision cannot be the decisive factor. There must be something more.”

16. The Appellant contended that the Respondent’s conduct was “evasive and uncooperative” and that the Respondent had conducted the proceedings “in an unreasonable and disproportionate way”, wherefor the Board should impose costs against the Respondent “as a mark of disapproval” of her conduct. Having considered the parties’ submissions and information available, the Board does not agree with the Appellant’s contentions.

17. Regarding the Appellant's contentions that the Respondent had breached her duty and her grounds for the Decision were "devoid of merit", the Board refers to paragraph 9 above and reiterates that the Appeal is allowed summarily without consideration of the merits. The Board is not in a position (and will not attempt) to assess the merits of the parties' respective position in respect of the Complaint and the Appeal merely for the sake of determining costs in such circumstances.

18. The Appellant contended that the Respondent "refused to engage in settlement discussions". The Respondent disagreed, contending that she has engaged in discussions with the Appellant with a view to resolving the Appeal amicably at an early stage, and such discussions fell through as she was not in a position to agree to the Appellant's demands "on the manner of complaint handling, which impose preconditions for the exercising of the Respondent's powers under the PDPO, which the Respondent could not accept as a matter of law". The Board has considered the relevant correspondence in this regard, and is not satisfied that the circumstances surrounding such discussions were such as to justify an award of costs against the Respondent in the Appellant's favour.

19. The Appellant accused the Respondent of suppressing relevant information which was "deliberate to conceal the true picture", and of deploying "deception and underhand conducts" which amounted to "an abuse of process". These are serious accusations which should not be lightly made, and must be substantiated by evidence with such cogency as would commensurate with the seriousness of such accusations. The Board is of the view that the Appellant's accusations are unsubstantiated and unfounded.

20. The Appellant then contended that the Respondent failed to withdraw

the Decision by his stipulated deadline, and only provided a response on 6 October 2023 which was 3 days before the deadline for the Appellant to lodge an appeal against the Decision (and the Appellant in fact lodged the Notice of Appeal on 3 October 2023 before such deadline). Yet, according to AAB No. 5 of 1999 (*supra*), which the Board respectfully agrees and adopts, the fact that the Appellant had incurred legal expenses in preparing the Notice of Appeal (and thereafter taking the further steps in these proceedings), and the fact that the Appeal has been allowed, will not by themselves entitle him to costs.

21. In the premises, in view of the requirements under section 22(1)(b) of the AAB Ordinance, the Board is not satisfied that this is an appropriate case to award costs against the Respondent in the Appellant's favour under section 21(1)(k), and does not accede to the Appellant's application for costs. As such, it is not necessary for the Board to consider the parties' respective submissions on quantum of costs.

Order

22. The Board allows the Appeal summarily in favour of the Appellant without a hearing pursuant to section 21(1)(h) of the AAB Ordinance and the Decision is formally set aside, there being no order as to costs.

(signed)

(Mr Johnny Ma Ka-chun, SC)

Deputy Chairman

Administrative Appeals Board

Appellant : Acted in person

Respondent : Represented by Ms Stephanie Chau, Legal Counsel