ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 51 of 2003

BETWEEN

PRISCILLA SIT Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram : Administrative Appeals Board

Date of Hearing : 15 July 2004

Date of Decision : 15 July 2004

Date of handing down Reasons for Decision : 27 July 2004

DECISION

The Appellant Priscilla Sit was employed on 9 September 1996 by the Equal Opportunities Commission (EOC) as a Director of the Gender Division.

2. On 24 September 1997, at a special meeting of the Administration and Finance Committee of the EOC (A&FC), the Chairperson of the EOC (Chairperson) presented to the Committee a report on the Appellant's performance. The Committee was asked to consider whether the Appellant was suitable to remain in her employment. At the end of the meeting, the Committee agreed that the Appellant's employment should be terminated with immediate effect.

3. On 25 September 1997, at the 9th Meeting of the EOC, members of the Commission accepted the recommendation of the A&FC and agreed to terminate the Appellant's employment with immediate effect. After the meeting, the Chairperson saw the Appellant and gave her the choice of mutual termination of employment or to be dismissed by the EOC. The Appellant wanted to take legal advice first. However, on the following day, 26 September 1997, the EOC terminated her employment with effect from that day.

4. On 29 September 1997, the Appellant through her solicitors asked the EOC for the reasons for termination of her employment. The EOC replied that the Commissioner was not obliged to give reasons for the termination and any data access request should be made in accordance with the Personal Data (Privacy) Ordinance. (PDPO)

5. On 12 November 1997, the Appellant through her solicitors asked the EOC for a copy of the report made by the Chairperson and the recommendation made at the 9th Meeting of the EOC. The EOC replied that the minutes of the 9th meeting had already been provided to the Appellant and the recommendation was made orally, that is to say, there was no written record of the recommendation.

6. On 25 November 1997, the Appellant's solicitors wrote to the EOC and asked for a detailed record of what was said by the Chairperson on 24 September 1997. In paragraph 3 of the letter from the Appellant's solicitors to the EOC, it stated that "Even if the report made by Dr. Fanny Cheung was only verbal, which we are unable to accept, she presumably referred to specific files or incidents and /or senior staff's appraisal or memoranda concerning our client's work performance ... which directly or indirectly resulted in the purported dismissal. These documents must be disclosed." The EOC replied repeating that the recommendation was made orally.

7. On 20 December 1997, the Appellant's solicitors wrote to the Convenor of the A&FC (Mr. Charles Lee) stating that the Appellant would apply for judicial review to quash the EOC's decision on termination of her employment and asked the EOC to provide copies of documents relating to her performance deficiencies. Mr. Lee wrote back

saying that the Appellant should refer the matter to the EOC.

8. On 9 February 1998, the Appellant herself wrote to Mr. Lee and asked him to require that the EOC to consider her complaint in accordance with established procedures. There was no reply from Mr. Lee. Instead the EOC wrote to the Appellant's solicitors stating that since the matter had been dealt with and closed, no response would be made to the Appellant's letter.

9. On 15 March 1999, the Appellant complained to the Privacy Commissioner (Commissioner) that the EOC had breached the provisions of the PDPO by failing to comply with her requests for personal data and to keep a log book of complaints. She also complained that the EOC had committed breaches of the Data Protection Principles (DPP) (1st complaint).

10. After an investigation, the Commissioner found that the EOC had only breached principle 5 of the DPP, but he decided not to issue an enforcement notice.

11. On 30 March 2000, the Appellant appealed to the Administrative Appeals Board (the Board) against the decision the Commissioner. The appeal was heard on 17 November 2000.

12. In the judgment delivered on 7 December 2000, the Board found the Appellant's request of 25 September 1996, the Appellant's letters of 20 December 1997 and 9 February 1998 were not data access requests and the requests in her letters of 12 November 1997 and 25 November 1997 had been complied with by the EOC. The Board said that the Commissioner had inspected the office of the EOC and found that, apart from the documents already supplied to the Appellant, there was no recorded information relating to the Appellant's termination of employment. The Board said that the EOC had maintained that there was no record or note of the report made to the AF&C special meeting on 24 September1997 nor any record of that special meeting. The Board concluded that "there really is no contrary evidence which may cast doubt on the EOC's statement that there were no such documents." The Board agreed with the decision of the Commissioner and dismissed the appeal.

13. In the meantime, the Appellant took out a writ in September 1999 in the District Court against the EOC, the then Chairperson Dr. Cheung and the Chief Executive Ms Angela Ho. This is a discrimination action in which the Appellant alleges sex discrimination and disability discrimination. The writ was not served on the other parties until September 2000. In the process of discovery, the Appellant obtained from the EOC the List of Documents on 28 December 2000.

14. On 2 April 2002, the Appellant complained to the Commissioner that the documents in the List of Documents contained her personal data. The EOC had failed to supply these documents to her in 1997 to comply with her data access requests. She also complained that the EOC had misled the Commissioner by stating that there were no such data. She asked the Commissioner to investigate whether the EOC had committed any offence under the PDPO (2nd complaint).

15. The Commissioner found that none of the documents in the List of Documents obtained by the Appellant in the course of discovery contained the Appellant's personal data falling within the scope of the Appellant's data access requests in 1997. The Commissioner decided not to carry out an investigation. The Appellant did not appeal against this decision of the Commissioner.

16. Since discovery is a continuing process, a Supplemental List of documents was served by the EOC on the Appellant on 23 May 2003. On 12 July 2003, the Appellant lodged her 3rd complaint to the Commissioner.

17. Her 3rd complaint is this: the documents in the Supplemental Lists contained her personal data. Despite her requests for personal data in 1997, the EOC did not supply these documents to her even though they were in its possession. During the investigation of her lst complaint, the Chairperson told the Commissioner that the Appellant "was not denied the personal data she requested and... there was no other recorded information relating to the termination of her employment". The existence of the documents in the Supplement List showed that the Chairperson and the Legal Adviser had lied. She asked the Commissioner to investigate if they had committed an offence under s.64 of PDPO (3rd

complaint).

18. In her complaint letter, the Appellant listed out the documents she said containing her personal data and these included a memo from officers of the Gender Division to the Chief Executive dated 11 September 1997. (911 Memo). All the documents listed, except the 911 Memo, were attached to her complaint letter for the Commissioner's consideration.

19. On 1 August 2003, The Commissioner wrote to the Appellant informing her that no investigation of her complaint would be carried out. The Commissioner said:

> "In respect of your present complaint, I have considered the information you provided in your letter dated 12 July 2003. Having regard to all the circumstances of the case, and pursuant to sections 39(2)(a) and 39(2)(d) of the Ordinance, I hereby inform you that I do not propose to carry out an investigation of the complaint."

20. In his reasons for decisions, the Commissioner told the Appellant that her 3rd complaint was substantially similar in nature to her previous complaints which had been considered and her appeal against the Commissioner's decision had been dismissed. The Commissioner also told her she had not shown that the documents she relied on contained her personal data falling within the scope of her data access request. In addition, because the time limit for prosecution had expired, it would not be possible, even if it were justified, to have the parties she complained against prosecuted.

21. On 9 August 2003, the Appellant replied to the Commissioner. She enclosed a copy of the 911 Memo stating that this would serve as proof of her complaint. She also argued that prosecution was not time barred.

22. We observe at this stage that the 911 Memo was not sent to the Commissioner until after he made the decision not to investigate. The decision was therefore made in the absence of the Memo.

23. On 28 August 2003, the Appellant appealed against the Commissioner's decision. In her statement of appeal, she referred to the documents in the List of Documents and the Supplement List of Documents, in particular the 911 Memo. The 911 Memo is a complaint jointly signed by officers of the Gender Division about the Appellant's work performance and incompetence. They claimed that she was not fit to be their supervisor. The Appellant said she produced these documents to show they existed at the time of her data access requests. This would also show that the Chairperson and officers of the EOC were lying when they said there were no such documents. The Commissioner should investigate if an offence under s. 64 of PDPO had been committed.

24. The relevant part of s. 64 of the PDPO is as follows:

> "s.64 (9) Any person who –
>
> (c) makes a statement which he knows to be false or does not believe to be true, or otherwise knowingly misleads the Commissioner or any other person in the performance of his functions or the exercise of his powers under that Part,
>
> commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months."

25. The EOC as a party bound by the outcome of this appeal, applies to us to expunge the documents the Appellant referred to from the appeal bundle. Mr. Leung, counsel for the EOC, submits that these documents were received by the Appellant during discovery in her action against the EOC and the Appellant is bound by an implied undertaking not to use them for a purpose other than in that action unless she has consent from the EOC or leave from the District Court. Mr. Leung refers to a number of authorities on discovery of documents and implied undertaking. He submits that since there is no such consent or leave, the Appellant should not be allowed to put these documents before us.

26. These authorities make interesting reading but we do not propose to go into a detailed analysis of their legal niceties. Suffice to say, there is no question that in law, the Appellant would be in breach of the implied undertaking if she uses the documents she obtained in the discovery

process for a collateral purpose without the consent of the EOC or leave of the court. However, there is a distinction between using a document for a collateral purpose (such as to found the basis of other proceedings as in Riddick v Thames Road Mills [1977]1QB 881 where the plaintiff sought to use such documents as the basis of an action in defamation) and producing it as proof that such a document exists. We do not think producing these documents to prove their existence would be a breach of the Appellant's implied undertaking. But the Appellant must show these documents are relevant to her appeal.

27. We have gone through these documents. We observe that apart from the 911 Memo, these documents are no more than internal documents of the EOC which do not relate to the Appellant's termination of employment and witness statements which only came into existence after the Appellant commenced her action. They are not relevant to this appeal. In any case, the EOC had made no assertion to the Commissioner that there were no such internal documents and witness statements.

28. Mr. Spicer, Counsel for the Appellant, very wisely agrees that the documents referred to by the Appellant, apart from the 911 Memo, should be excluded for the purpose of this appeal.

29. In respect of the 911 Memo, we think there should be different considerations. The Memo, as we have mentioned before, is a complaint from the Appellant's subordinates, essentially that the Appellant was incompetent and not fit to be their supervisor. Baker and McKenzie, solicitors for the EOC, in their letter to the Board on 2 October 2003 stated that the memorandum had no bearing on the EOC's decision to terminate the employment of the Appellant since the decision was already made when the complaint was lodged. The relevant paragraphs of the letter are as follows:

> "7. The Complaint Memo was lodged by the officers within the Gender Division of the EOC against Ms Sit (the former Director of that Division) at a time when both Angela Ho and Dr. Cheung had already made the decision to recommend the termination of Ms Sit's employment. Angela Ho was Ms Sit's immediate supervisor. Dr. Cheung was Angela Ho's superior. Both of them, through their

dealings with Ms Sit and through observing and commenting on her work, had formed the view that Ms Sit was not fit for the job for which she had been employed. They had both expressed their views to Ms. Sit regarding her work. However, Ms Sit simply became defensive or hostile and refused to accept her shortcomings. As a result, Ms Ho and Dr. Cheung could see no prospect for improvement in Ms Sit's work performance and conduct and agreed to make the recommendation that Ms Sit's contract be terminated.

8. As the Complaint Memo was a formal complaint, it was to be dealt with confidentially. Angela Ho did not therefore show it to anybody except Dr. Cheung. Ms Ho opened a separate file for it and started conducting an investigation by interviewing each of the officers individually to ensure that each of the officers agreed with the content of the Complaint Memo and had signed it of their own free will. However, as a Special Meeting had been scheduled on 25 September 1997, so that the EOC members could consider whether Ms Sit's employment should be terminated the investigation was put on hold until after the Special Meeting.

9. Of course, because the content of the Complaint Memo had not been fully investigated at that stage, it was not referred to or tabled at the Special Meeting. It is therefore very clear that it did not have, and could not have had, any bearing whatsoever on the joint and unanimous decision of the EOC members to terminate Ms Sit's contract of employment. We are instructed that, other than Ms. Ho and Dr. Cheung, the members of the EOC had no knowledge of the Complaint Memo.

10. On Monday, 29 September, Angela Ho informed the officers of the Gender Division at a meeting with them that Ms Sit had left the EOC. However, she made it clear to them that the Complaint Memo was not the basis of the termination of Ms Sit's employment. As there was no point in continuing with the investigation of the officers' complaint against Ms Sit, the officers of the Gender Division informed Angela Ho at that meeting that they wished to withdraw the complaint. A decision was therefore made by Angela Ho and Dr. Cheung to destroy the file on the investigation of

the Complaint Memo because it was no longer necessary to keep the information."

30. From the above, it is quite clear that the Chairperson and the Chief Executive had in their possession the 911 Memo before and at the Special Meeting on 24 September 1997 and at the EOC meeting the following day, where the recommendation to terminate the Appellant's employment was made. It is asserted by the EOC that the Memo played no part in the decision to terminate the Appellant's employment and no mention was made of it at the two meetings. Though at that time, the contents of the Memo were being investigated, the Memo was nevertheless a document on the Appellant's work performance and it would not be unreasonable to infer the Chairperson would have it in mind when she made the recommendation to terminate the Appellant's employment. There is no record of either the recommendation made by the Chairperson or what was said by her during those meetings. It there were, we would have been in a position to find out if the Memo had indeed played no part in the decision to terminate the Appellant's employment. To our mind, it is more likely than not that the Memo had directly or indirectly, influenced the Chairperson's decision. There is no evidence to the contrary. That being so, it is a document directly or indirectly relating to the Appellant's termination of employment and is relevant to the appeal before us.

31. We note from Baker & Mc Kenzie's letter of 2 October 2003 that after a meeting with the officers of the Gender Division on 29 September 1997, the Chairperson and the Chief Executive decided to destroy the complaint file because the Appellant had left the employ of the EOC and the complainants indicated they wished to withdraw their complaint. The memo was therefore destroyed. There is no evidence of when it was destroyed. We are not in a position to decide whether this is true or not. However, we observe that it is the EOC's policy to keep documents for at least two years. The destruction of the 911 Memo appears to be inconsistent with that policy.

32. Mr. Leung refers us to s. 26 of the PDPO which requires erasure of personal data held by a data user when the data is no longer required. He submits that the destruction of the 911 Memo was entirely in

accordance s.26 and not inconsistent with the EOC's policy regarding retention of documents.

33. Bearing in mind that the EOC dismissed the Appellant for bad performance while the Appellant claimed that the dismissal was unfair, in our view, the Appellant taking legal action to redress her grievance would not be unlikely and in that event, the document could be of assistance to the EOC. We are surprised that in these circumstances, the Chairperson the Chief Executive would have chosen to destroy the file containing the 911 Memo so soon after the Appellant's dismissal without waiting for further development of the matter.

34. We conclude that 911 Memo is relevant to the appeal and the Appellant producing it for our consideration does not breach her implied undertaking. It should be included in the bundle for the purpose of this appeal.

35. Ms Cheung, Counsel for the Commissioner, submits that the substance of the Appellant's 3rd complaint is similar to her lst complaint which has been fully considered and it would not be appropriate for the Commissioner to investigate the same matter again. And even if an offence under s.64 of the PDPO has been committed, no prosecution would be possible since the time limit of 6 months for prosecution of the offence has long expired. It would be futile to carry out any investigation in that respect.

36. Counsel for the Commissioner further submits that the Commissioner made the decision based on the information in the Appellant's letter of 12 July 2003 without the benefit of the 911 Memo, since it was not included in the documents attached to that letter. Even if the Commissioner was aware of the Memo at the time, the result would still be the same since the whole matter is about the Appellant's grievance over her dismissal by the EOC and not about the EOC failing to comply with the Appellant's data access requests. The Appellant is using the appeal to pursue her personal vendetta against the EOC and the Board should not allow that to happen. In any case, now that the Appellant has obtained what she sought in her data access requests, albeit through other means, the result of this appeal has become meaningless.

37. In these circumstances, Counsel submits, the Commissioner was entitled to exercise his discretion under s.39 (2) of the PDPO not to investigate the complaint.

38. Mr. Leung for the EOC supports the decision of the Commissioner and submits that having regard to the history of the Appellant's employment with the EOC, the Appellant was seeking to invoke the Commissioner's power to investigate for a collateral purpose or ulterior motive. The Appellant may obtain other documents she wants by a proper data access request.

39. Mr. Leung also submits that the 911 Memo does not fall within the scope of the Appellant's original data access requests since the memo is not personal data within the definition of "personal data" in the PDPO. He submits that a data access request has to be specific so that a data user knows how to comply with it. He submits that on a strict construction of the requests in the letter dated 25 November 1997 from the Appellant's solicitors, the requests do not cover a document such as the 911 Memo. The EOC was not bound to supply the Memo to the Appellant even if it had the Memo in its possession. In these circumstances, under s. 39 of the PDPO, the Commissioner was entitled to exercise his discretion not to investigate and such exercise of discretion is entirely reasonable.

40. Mr. Spicer refers us to the 3rd paragraph of the letter of 25 November 1997 which we have already taken note at the beginning of this judgment. He draws our attention to these words in particular: "... memoranda concerning our client's work performance ...which directly or indirectly resulted in the purported dismissal.." He asks us not take a pleading approach in interpreting these words. He submits that having regard to the purpose of the PDPO, we should give to these words a liberal and wide interpretation. If we take this latter approach, it would be obvious to us that the 911 Memo falls within the scope of the data access requests.

41. In view of what we have said above relating to the 911 Memo and the relevant wording in the letter of 25 November 1997, we have no difficulty in concluding that the 911 Memo falls within the scope of the request on 25 November 1997 and should be supplied to the Appellant if

it were in the possession of the EOC. Whether it was in the EOC's possession and whether the EOC's assertion that it was not is true is a question to be investigated. We are not in a position to do so. The investigation must be carried out by the Commissioner.

42. As regards the question of similarity between the complaints, in our view, the lst complaint required an investigation on breach by the EOC of s. 19 of the PDPO whereas the 3rd complaint required an investigation on possible offences committed by the EOC under s.64 of the PDPO. The nature of these complaints is different. We do not agree with the Commissioner's conclusion that they were substantially similar in nature.

43. On the question of prosecution, we agreed that the time for prosecution has expired and it would not now be possible to take out a prosecution against the Chairperson and the Legal Adviser even if there was an offence under s. 64. But if there is indeed prima evidence of an offence having been committed, should the Commissioner refrain from an investigation on the ground that he sees no prospect of a successful prosecution? We think not. Whether to prosecute is a matter for the Secretary of Justice and the purpose of investigating whether a data user has contravened a penal provision of the PDPO is not solely for the purpose of prosecution. Where an offence is discovered after investigation but no prosecution is possible, the Commissioner may still take other steps, such as issuing a warning, to deter the offender from repeating the offence and in that manner achieve the purpose of the Ordinance.

44. Both Counsel for the Commissioner and Counsel for the EOC submit that the Appellant is making use of these proceedings to pursue her personal vendetta against the EOC. They urge us not to allow her to make use of the appeal for that purpose. We say that we do not find evidence in that respect. The mere fact that the Appellant made three complaints in succession to the Commissioner against the EOC is not such evidence.

45. Mr. Spicer agrees that the 911 Memo was not among the documents attached to the Appellant's letter of complaint so that the

Commissioner reached his decision not to investigate without the benefit of this document.

46. Indeed, at the time of his decision, the Commissioner only had those documents which attached to the letter to consider. These documents, as we found, do not relate to the Appellant's termination of employment. The Commissioner had no evidence before him that the EOC had in its possession documents which related to the Appellant's termination of employment. There was nothing to arouse the Commissioner's attention that the statements of the Chairperson and the Legal Advisor that there was no such document could be untrue. There was no basis for the Commissioner to investigate whether an offence under s. 64 had been committed.

47. Despite the conclusions we reached above, having regard to all the circumstances existing at the time the Commissioner made his decision, we find that his exercise of the discretion under s. 39(2) (d) not to carry out an investigation was not unreasonable and cannot be faulted.

48. We wish to comment in passing that the Commissioner when considering the Appellant's letter must have noticed her reference to the 911 Memo and its absence in the attachments. We do not know why no clarification as to its absence had been sought from the Appellant. In our view, if the 911 Memo were before the Commissioner but he nevertheless refused to investigate, then in view of the conclusions we have reached above, the result might have been different.

49. Mr. Spicer asks us, if we dismiss the appeal, to consider referring the case back to the Commissioner for re-consideration in the light of the 911 Memo. He refers us to s.21 (3) of the Administrative Appeals Board Ordinance which is as follows:

> "(3) The Board, on the determination of any appeal, may order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order."

Mr. Spicer submits that we have jurisdiction under this section to remit

the case back to the Commissioner and this would do justice to the Appellant.

50. While we sympathise with the situation of the Appellant, the provisions of s. 21(3) does not allow us to remit the case back to the Commissioner for consideration since we have found that he was correct in his decision and there is nothing else for him to consider. That said, we wish to add that if the Appellant wishes to lodge another complaint based on the 911 Memo, there is nothing to prevent her to do so. While we have no intention of encouraging or discouraging her from embarking on this course of action, we think the Appellant should bear in mind that in the end, no practical purpose may be achieved and her efforts may be in vain.

51. For the reasons stated above, we dismiss the appeal. We leave the question of costs open.

(Arthur Leong)
Chairman
Administrative Appeals Board