

Employment Update

Liability of an Organisation for Data Protection Breaches Committed by ANY person “in the Course of Employment”¹.

- *3 compelling reasons to read Executive Coach International Pte. Ltd [2017] SGPDPC 03.*

I. Introduction

Pursuant to Section 53(1) of the Personal Data Protection Act 2012² (“PDPA”), an employer is deemed to have committed the act, which in fact was committed by a person if that person does so in the course of his employment. This is even though that act was committed without the employer’s knowledge or approval. Therefore, an employer can be found liable for an offence under the PDPA for the actions of another person. What amounts to “in the course of employment” has previously not been elaborated upon.

On 21 March 2017, the Personal Data Protection Commission (“PDPC”) rendered its first decision on what constituted “in the course of employment”, in the case of Executive Coach International Pte. Ltd [2017] SGPDPC 03 (“Decision”). This is the first of subsequent cases touching on Section 53 of the PDPA.

Organisations should note this Decision and react accordingly for two further compelling reasons:

- 1) The person committing the breaching act was actually a director of the company; and
- 2) The breaching act occurred in a work-related closed instant messaging chat group (i.e. a WhatsApp chat group), which is commonly used by employees these days.

Briefly, the PDPC issued a warning to Executive Coach International Pte. Ltd. (“Company”) for the action of its director in disclosing the personal data of an employee (“Complainant”) in a work-related WhatsApp group chat without seeking her consent or notifying her of the purposes of such disclosure, as required by the PDPA.

II. Summary of the Case Facts

The Company is in the business of life and career coaching. The Complainant was the personal assistant to the director of the Company (“Person”) and both the Complainant and the Person were part of a WhatsApp group chat that included the Company’s other staff, volunteer and trainees (“WhatsApp Group”).

Due to allegations that the Complainant had committed acts detrimental to the Company, the Person disclosed highly sensitive personal history of the Complainant to the participants of the WhatsApp

¹ The writer would like to extend his heartfelt gratitude to Tan Siew Ann for her assistance with this article.

² No. 26 of 2012.

Group. This information was namely the Complainant's past drug problem and issue with infidelity in her amorous relationship ("Information"). Prior to disclosure, the Complainant's consent was not sought and she was not notified of the purpose of such disclosure.

The Complainant represented to the PDPC that the Information to the Person in the context of the Person being her employer, teacher and coach. Meanwhile, the Company, while not disputing that the Information constitutes personal data, represented that the Person had disclosed the Information to the WhatsApp Group's participants in his personal capacity and not as an employee of the Company. The Company further contended that the Information was known only to the Person and not the Company, and that the Company also had not authorised the Person to disclose the Information.

III. Holdings of the Decision

The issues to be determined in this case were³:

- A) Whether the Company was responsible for the Person's disclosure of the Information; and
- B) If the Company was liable for such disclosure, whether the Company was in breach of the PDPA for the said disclosure.

In brief, the PDPC held that:

- 1) The Information disclosed (for ease of reference, the past drug problem and issue of infidelity) did amount to personal data⁴ as defined under the PDPA.⁵
- 2) The Person was acting in the course of his employment when he disclosed the personal data.⁶ This was because the disclosure was made in the context of an ongoing dispute between an employer and its ex-employee, with the intent to discredit the ex-employee⁷. This arose from the unamicable departure of the Complainant from the Organisation's employment.⁸
- 3) The fact that the Company did not authorise the Person to disclose the Information was irrelevant due to Section 53(1) of the PDPA.⁹
- 4) The fact that this Information was not known to the Company was also irrelevant due to the same.¹⁰

IV. Analysis and Thoughts

This Decision illustrates the PDPC's readiness to find that an action of a person, who *prima facie* is not an employee of the organisation, amounts to an action done in "his course of employment" with the organisation for Section 53(1) of the PDPA to apply. A company's director is strictly not an employee of a company and therefore the director's relationship with the company should not be described as that of an employment. While the PDPA defines "employment" to include "working under an unpaid volunteer work relationship",¹¹ there is no direct correlation between volunteering and directorship to suggest that directorship is therefore included in the definition of "employment".

³ Paragraph 8 of the Decision.

⁴ Paragraph 9 of the Decision.

⁵ Section 2 of the PDPA.

⁶ Paragraph 11 of the Decision.

⁷ IBID.

⁸ IBID.

⁹ Paragraph 12 of the Decision.

¹⁰ Paragraph 12 of the Decision.

¹¹ Section 2 of the PDPA.

In this case, the Decision did not set out clearly if the Person has another employment contract with the Company. Instead, it interestingly describes him as a senior member of the Company, which term is normally used to refer to shareholder instead. It is therefore inconclusive as to whether he is an employee.

It appears that emphasis is instead placed on the broad context that led to the breach of the PDPA, which relates to the resignation of the Complainant from her employment and the managing of the Company's staff morale by the director. The fact that the Complainant had been hired to be the *Person's personal assistant*, though not by the Person but by the Company, is also likely to have been an influencing factor. Unfortunately (and with regret), making a finding that a director's actions amount to that in the course of employment, without more, departs from the common understanding that directorship is not an employment.

Consequently and analogously, actions of independent contractors can potentially be also caught by Section 53(1) of the PDPA. In today's employment scene, where there is an increasing number of independent contractors augmenting the on-site workforce of an organisation, this translates to a new and additional front where an organisation needs to be careful. To avoid this added exposure, organisations are advised to apply any preventive or mitigative measures against PDPA breaches that are meant for employees to independent contractors as well.

In respect of the medium in which the breach took place, organisations should be alive to the prevalence of such work-related instant messaging chat groups being created by all levels of employees nowadays to facilitate workplace communication. The fact that such chat groups are usually closed is irrelevant as to establishing an organisation's liability for PDPA breaches. At the same time, the informal nature of these chat groups only adds to the ease of inadvertent disclosure of personal data in them. Organisations should undertake steps to manage such risks and in order to rely on the prescribed defence against this deeming provision.

V. Conclusion

Arising out of this Decision, it is likely that the PDPC will adopt a broad-based contextual analysis when determining whether a person's act is one committed in the course of his employment for the purposes of attributing it to the organisation, pursuant to Section 53(1) of the PDPA. This is even if there is no outright employment relationship between the organisation and the person. Organisations' PDPA breach prevention efforts should therefore extend not just to volunteers, but also to directors and independent contractors. Such preventive measures should also consider unofficial electronic information-sharing mediums such as WhatsApp.

This article is solely to evaluate the decision of the Personal Data Protection Commission in Executive Coach International Pte. Ltd [2017] SGPDP 03 and its likely implications. This article is not intended to be comprehensive nor should it be construed as legal advice. Please contact the solicitor below if you need legal advice or you wish to discuss the above article. This article is written on 3 April 2017.

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