

**IN THE MANDATORY PROVIDENT FUND SCHEMES
APPEAL BOARD**

IN THE MATTER OF a Decision made by the
Mandatory Provident Fund Schemes Authority
under section 34ZW of the Mandatory
Provident Fund Schemes Ordinance, Cap. 485

AND IN THE MATTER OF section 35(1) of
the Mandatory Provident Fund Schemes
Ordinance, Cap. 485

BETWEEN

SHEK WAI YAN

Appellant

and

MANDATORY PROVIDENT FUND SCHEMES AUTHORITY

Respondent

Appeal Board : Mr William D Stone, QC, Chairman

Ms Lau Yuk-kuen, Member

Ms Ng Wai-yee, Member

Date of hearing : 4 July 2016

Date of decision : 11 August 2016

DECISION ON APPEAL

Background

1. Ms Shek Wai Yan is a registered subsidiary intermediary under the Mandatory Provident Fund Schemes Ordinance, Cap. 485 ('the Ordinance').

2. In December 2014 she was convicted and fined HK\$9,200 at the Kwun Tong Magistrates' Court on the charge of making a statement to the MPF Schemes Authority ('the Authority') that was false or misleading in a material respect.

3. On 3 December 2015 the Enforcement Division of the Authority sent to Ms Shek a letter entitled 'Proposed disciplinary order under section 34ZW of the Ordinance (Cap. 485)'.

4. This notification set out the disciplinary action which the Authority proposed to take against Ms Shek. Paragraph 14 of this letter expressed the view that Ms Shek had acted in a manner in which, in the Authority's opinion, was prejudicial to the public interest, and had brought a negative impact to the public confidence in the MPF intermediaries profession.

5. Accordingly the Authority proposed to suspend the registration of Ms Shek as a registered intermediary for two (2) months pursuant to section 34ZW(3)(b) of the Ordinance.

6. Under the heading 'Issuance of Press Releases', paragraph 15 of the same letter referred to the fact that if the Authority decided to impose a disciplinary order upon Ms Shek, and that it intended to issue a press release under section 34ZW(9) of the Ordinance, which release was to give details of its decision to impose this disciplinary order, including when it was to take effect, the reason for it, and any material aspects of the case; paragraph 15 concluded "In order to send a strong deterrent message to the industry, we consider that it is in the public interest to issue a press release along the lines of the draft enclosed."

7. Ms Shek was informed of her right to be heard, and the date of close of business on 4 January 2016 was set for Ms Shek to make any representation/objection to the proposed course of action.

8. To this Notice of Proposed Disciplinary Action Ms Shek made no response, and as a consequence, on 20 April 2016, the Authority issued a 'Decision Notice of Disciplinary Order' under sections 34ZW and 34ZZH of the Ordinance.

9. Paragraph 5 of this Decision Notice referenced Ms Shek's earlier conviction and the fact that no appeal had been lodged against that conviction, and concluded:

"...after considering all the circumstances of the case and the need for consistency, fairness, proportionality and the extent to which a deterrent effect should apply, the Authority hereby decides to make a disciplinary order against you ... that:

The registration of you as a subsidiary intermediary under the MPFSO be suspended for a period of two (2) months"

10. This Decision Notice stipulated that Ms Shek had the right to appeal against this Order on or before 20 June 2016.

11. Attached to this Notice was a draft of a press release (with Chinese translation attached) which the Authority intended to send out regarding the disciplinary order imposed, and further informed Ms Shek that the Authority would inform the frontline regulator, the Insurance Authority, of this disciplinary action, and of the fact that, pursuant to section 34S(1)(d) of the Ordinance, a record of every disciplinary order would be kept "on the Register of Intermediaries maintained by the Authority and made available to the public through the internet for inspection".

12. On 20 June 2016 Ms Shek lodged an appeal to the Appeal Board.

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Scope of this appeal

13. The Letter of Appeal, dated 20 June 2016, and written in Chinese by Ms Shek, is short. It consists of three paragraphs. Ms Shek stated that she had learned her lesson, and recognised that the mistake for which she was punished in magistrates' court was caused by her own negligence. She emphasized the mental strain that the magistrates' conviction and consequent MPFA investigation had caused to her, but stated that she has been willing to take responsibility for her faults, that she had taken the initiative to report the case to the Hong Kong Federation of Insurers, and that since this event she has been working in the industry in a professional manner and had not been the subject of any complaints. She asked for compassion and the opportunity to turn over a new leaf, and stressed her concern about the intended publication by the Authority of the details of her case; this Letter concluding with the following sentence:

"I hereby lodge an appeal with the Mandatory Provident Fund Schemes Appeal Board, requesting the MPFA not to publicise my case with my full name on its website and not to destroy my future."

14. The issue of publication is *the sole issue* in this appeal.

15. Ms Shek does **not** dispute or complain about the two month suspension handed down by the Authority; the only point she wishes to advance on this Appeal, which she confirmed to the Board during argument, is that she does not wish her name and the name of her company to be published either in a press release or on the website of the Authority.

16. It follows that this appeal is in very narrow compass indeed. Ms Shek did not wish to put in any further documentation, nor to call any witnesses, and it was for this reason, at the sensible suggestion of Mr Chang, counsel for the Authority, that the date initially fixed for the preliminary hearing was utilized for the substantive appeal.

Decision

17. Ms Shek as the applicant/appellant appeared in person and was unrepresented during this hearing. She prayed in aid her Letter, as augmented by her oral remarks made when addressing the Board.

18. By contrast the Authority was represented by Mr Jonathan Chang of counsel, who in turn was assisted by in-house legal counsel from the Authority.

19. As a result of Mr Chang's submissions, two issues arose for consideration:

first, that of the jurisdiction of the Board to hear this appeal; and second, whether on the merits the Authority was justified in its decision to publish the disciplinary order, and thus whether there should be any interference by the Board with the exercise of its discretion in this regard.

(i) *Jurisdiction*

20. This was Mr Chang's first, and we apprehend, his primary submission.

21. His argument was that this Appeal Board had no jurisdiction under the Ordinance to hear an appeal not against the disciplinary sanction itself, but against the *publication* of that sanction.

22. Mr Chang contended that the sanction in the present factual matrix was that of the two month suspension of Ms Shek as a subsidiary intermediary, no more and no less.

23. He submitted that the publication itself, whether on web-site or in the form of a press release, essentially was a collateral act which was *not* part of the punishment imposed upon the applicant, Ms Shek.

24. His starting point was subsection 34ZW(2) of the Ordinance, which provides that the Authority may make a disciplinary order against a regulated person under subsections (3) and (4) if the regulated person is convicted of an offence under the Ordinance; in this particular instance the suspension order as made against Ms Shek, a registered intermediary, was made pursuant to subsection (3)(b), which provides that the Authority may order that the registration of such person be suspended for a period determined by the Authority.

25. The analysis then moved to subsection 34ZW(9), which provides that if the Authority exercises a power under subsections (1) and (2) to make a disciplinary order against a regulated person, "the Authority

may disclose to the public details of the decision, including the reasons for it and any material facts of the case”.

26. Thus, argued by Mr Chang, the publication of a decision was not in itself a punishment or disciplinary order, and clearly all that subsection (9) achieved was to give the Authority the discretion to make disclosure to the public of the order(s) as made, orders which could only be made within the statutory parameters of subsections (1)-(6) of section 34ZW, these being the subsections setting out the specific disciplinary orders which were open to the Authority to make.

27. In this context Mr Chang also sought assistance from Schedule 6 of the Ordinance, entitled ‘Decisions which may be the Subject of an Appeal’, section 16 of which specifies ‘A decision of the Authority under section 34ZW to make a disciplinary order.’

28. It followed, counsel submitted, that since the only disciplinary orders that could be made by the Authority were those orders specified in subsections (1)-(6) of section 34ZW, and since Schedule 6, section 16 specifically referred to ‘a disciplinary order’, there thus was no jurisdiction to hear an appeal wherein (as in the present case) the sole issue related to the power of the Authority, under section 34ZW(9), to make public disclosure of a decision to make a disciplinary order against a regulated person.

29. Unsurprisingly, since Ms Shek was unrepresented (and apparently had been so throughout, both in these disciplinary proceedings and before magistrates’ court), she had nothing to say on the point and no doubt assumed, perhaps not unreasonably, that having filed her Letter of Appeal that the Board then would be permitted to and would proceed to consider her case.

30. In circumstances wherein the Board has not had the benefit of full argument on the jurisdiction issue, the Board is disinclined now to render a final decision on this point, nor does it need to do so in order to decide this case: we intend to resolve this appeal on the merits and **not** on the basis of this preliminary jurisdictional objection.

31. Suffice to say that whilst we see force in the analysis proffered by counsel for the Authority, the Board is not instinctively attracted to the suggestion that an interpretative wedge can (or should) be driven between the specific power (under subsection (3)(b)) to suspend the registration of an intermediary, and the correlative power vested in the

Authority, under subsection (9), to make public disclosure of the details of such disciplinary order.

32. The disciplinary order made by the Authority against Ms Shek is made under the general purview of section 34ZW, which is a comprehensive section dealing with salient aspects relating to the making of such orders.

33. The proposition, confirmed in argument by counsel on behalf of the Authority, that publication of the order as made 'is not part and parcel of the punishment', strikes us as problematic – such publication clearly forms a material element within the punishment regime capable of exercise by the Authority, the wording of subsection (9) specifically endowing the Authority with the specific discretion ("may disclose to the public") to make such publication. Thus, in light of the inclusion within section 34ZW of this express discretionary power, it might be thought odd in principle if only the disciplinary order itself could be the subject of appeal to this Board, whereas concomitant publication of that order, which itself forms part of the statutory punishment scheme, could not.

34. There is no need, however, to dwell further on the point or to finally decide it; as indicated, we intend to decide this appeal on the merits.

(ii) Merits

35. In our view it is this aspect of the case which should have formed the primary focus of this appeal.

36. Reference earlier has been made to the manner in which Ms Shek has advanced her case. She has relied on the terms of her Letter of Appeal, as supplemented by the short further observations she has made to the Board in the course of this hearing. It is clear, both from the terms of her Letter and from her demeanour, that Ms Shek has found this whole episode, culminating in this Appeal, to have been greatly distressing, and that she bitterly regrets the error she accepts that she has made which has resulted in her conviction, and latterly in the disciplinary order of the Authority.

37. Her appeal before us is solely focused on the issue of the Authority's intention to publicise her name and the name of her company, whether such publication be on the Authority's web site or in a separate

press release; her motivation in pursuing this appeal is to preclude further damage to her reputation and future in the industry and, as she says in her Letter, to provide her, as a young person, with an opportunity to turn over a new leaf.

38. In substance, therefore, Ms Shek's submissions, brief as they are, take the form of special pleading, no more and no less – she admits her carelessness and makes a fervent request that the Board grant her compassionate treatment and to preclude her public identification: as she commented in argument, she did not cavil at the issuance of a press release so long as this was non-specific: "I do not wish them to publish the press release but if they insist on publishing the press release I would like them not to publish my name and the name of my company."

39. For the Authority, having led with his jurisdictional objection, Mr Chang treated this main aspect of the case as little more than an afterthought: he stated that his "fall-back position" was that even if the Tribunal did not accept his jurisdictional argument, and thus moved to consider the issue of publication of the disciplinary order, in the circumstances of this case the Authority is "well justified in doing so".

40. It is unclear why the Authority has chosen to treat this focal aspect in such relatively dismissive manner, given the strength of well-established legal principle relating to interference with the exercise of a statutory discretion.

41. In deciding to issue a press release in the form appended to the Notice of Decision dated 20 April 2016, it is not possible to suggest – nor has it been suggested – that the Authority is doing anything other than legitimately exercising a power specifically granted to it by the Legislature under the Ordinance: no doubt it was necessary formally to specify this power given the emphasis on confidentiality elsewhere in the Ordinance, and in fact we note that in paragraph 10 of the Notice of Decision of 20 April 2016 Ms Shek is advised that, pursuant to section 42AB(3) of the Ordinance, she is not to disclose anything about this matter to any other person without the consent of the Authority.

42. As a general proposition, for there to be interference by this (or any similar) Board with the exercise by the Authority of a statutory discretion, something in the decision-making process must be shown to have gone badly wrong or to have been fundamentally in error, a situation which may occur when a statutory discretion is exercised on the basis of matters which should not have been taken into account, or, conversely,

when exercise of the discretion failed to take account of matters which should have been considered, or when, for example, there has been a clear breach of natural justice.

43. It is in such situations that an appellate Board is justified in stepping in and in setting aside and/or varying an administrative decision: it certainly would not be justified in so doing if it were to be thought by the Board that the Authority decision the subject of appeal was a decision which, on the particular facts, the Board itself might not have chosen to make.

44. This Board is not a regulator, and has neither the qualifications nor experience to be such. The Legislature has granted the Authority the power to act in the manner specified in the Ordinance, and as long as the Authority exercises its statutory powers in proper manner - and there is no evidence that in this instance the situation is otherwise - there is and can be no basis for appellate interference.

45. It follows that whether individual members of the Board might or might not personally have acted as the Authority has acted in terms of the intended publication of Ms Shek's case is nothing to the point; in a case such as this, wherein the Authority has come to a conclusion legitimately open to it, the Board is in no position to substitute its own predilections for those of the regulator, although it is fair to record that within the Board there is a degree of personal sympathy with the position in which Ms Shek now finds herself, and the distress that the conviction and subsequent disciplinary action has caused her.

46. We do not, of course, know the full details, but on the information presently available to us we are minded to observe that we do not think that Ms Shek necessarily should be castigated or regarded as dishonest, although negligent and misguided she undoubtedly was in submitting a form to the Authority (the purpose of which was to retrieve the particular account holder's MPF information), containing a declaration that she had obtained the permission of an MPF account holder so to do when in fact this was not the case, such permission having been granted to an associate of Ms Shek, whom she appears to have been assisting in this process.

47. Moreover we wonder whether in acting as she did that Ms Shek appreciated the implication of remitting this form under her own name, which in turn has led to the magistrates' court conviction for making a false and misleading statement to the Authority, and which

thereafter has led to the Authority, pursuant to section 34ZW, to rely upon this conviction for the purpose of making the suspension order in question.

48. Nevertheless, this conviction remains an indisputable fact, and for this sad and undoubtedly stupid error Ms Shek now has reaped the criminal and disciplinary whirlwind. And at the end of the day, however, any residual sympathy with the personal plight of Ms Shek is of no consequence when it comes to the discharge by the Board of its statutory function.

49. That this is a case which the Authority now considers it to be in the public interest to publicise via a Press Release is unsurprising given that in the operation of the MPF Scheme the Authority sees it as its duty to stress the importance of accuracy and veracity in terms of representations contained in such forms sent to it by intermediaries; clearly therefore the motivation for this intended publication is that of *'pour encourager les autres'*, the draft Press Release being entitled 'First MPF intermediary suspended for making a false statement', with paragraph 4 of the draft recording that this "is the first time the MPFA imposed a disciplinary order on an MPF intermediary since the statutory regulation for MPF intermediaries came into effect in November 2012".

50. The Authority, as the body statutorily charged with the proper administration of this MPF Scheme, in the legitimate exercise of its discretion is entitled to conclude that it is not only necessary to discipline Ms Shek in terms of a two month suspension, but to publicise this fact in terms of the projected press release, and in our view that must be the end of this matter.

51. This is the central issue in this appeal, which if we may say so makes it the more surprising that in argument the Authority chose to spend the bulk of its attention on a preliminary jurisdictional argument which, if successful, would have preclude consideration of the essential point.

52. It follows from the foregoing, therefore, that this appeal by Ms Shek must fail.

Costs

53. We do not think that the circumstances of this case merit an extended consideration of costs, and it was in the interest of neither party to attend an additional hearing for this purpose.

54. Suffice to say that Mr Chang on behalf of the Authority asked for costs in the event that the appeal was unsuccessful on the accepted basis that costs normally follow the event.

55. In this regard Mr Chang canvassed a range of possibilities.

56. First, that if successful the Authority should pay the costs not only of counsel but also of the several representatives of the Authority sitting behind him. This struck the Board as unacceptable, not least given the stark disparity between the overly-full representation on the part of the Authority on the one side and that of the lone and somewhat forlorn figure of Ms Shek on the other; this position was quickly abandoned.

57. Mr Chang's second option was that his costs only, and not of the Authority officials sitting behind him, should be the subject of any costs' order; when pressed as to the quantum of such costs he posited a sum of HK\$50,000, although, after this was questioned he compromised by asking for a sum in the lesser range of HK\$20-30,000.

58. We are unsure if Ms Shek understood fully the argument on costs, and she had little to say about it – we go so far as to say that we doubt if she even had appreciated that advancing an unsuccessful appeal usually has attendant costs' consequences.

59. In any event, we must now grasp the costs' nettle: it would be the height of absurdity if further expenses were to be incurred solely to argue this question.

60. This was not a complex case; to the contrary, on its facts it was absurdly simple.

61. In this connection Mr Chang had the good grace to acknowledge that his attendance as counsel was not essential ("I cannot pitch it as high as no-one sitting behind me can do the same job"), but sought to justify payment of a proportion of counsel fees on the basis that this appeal "concerns matters of jurisdiction and questions of law" justifying the engagement of counsel both to advise and to prosecute the

appeal on behalf of the MPFA “since this may be a precedent case for the future”.

62. The Board finds it difficult to accept the requirement for counsel’s attendance in this case, which Mr Chang accepted “is not the most serious of its kind in terms of gravity”, nor do we think, as he suggested, that in the particular circumstances that the ‘jurisdiction point’ provided compelling reason to instruct counsel. In short, it strikes us that this appeal could and should have been handled by the undoubtedly competent MPF Authority in-house counsel who also attended this hearing, which of course would very significantly have minimized costs.

63. This is not to say that we have not been assisted by Mr Chang, but that is nothing to the immediate point, which is whether and by how much Ms Shek should be responsible for costs now incurred as a result of this appeal.

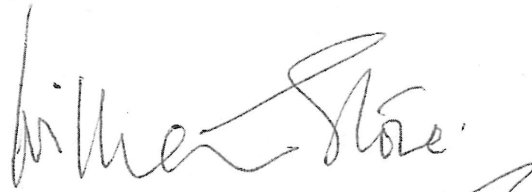
64. That she should be responsible for some element of costs is clear, there being no sufficient reason in the present case for departure from the rule that costs are to follow the event. The question, therefore, is for how much should she be liable?

65. After some reflection, in the exercise of our discretion we have come to the view that Ms Shek should be required to pay the sum of HK\$10,000 in costs of this appeal: we consider that to award any greater sum would be disproportionate to the circumstances and level of difficulty posed by this case.

Order

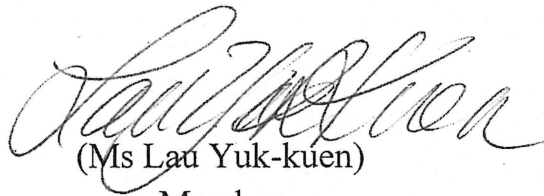
66. Accordingly, after hearing this appeal, the Board makes the following Order:

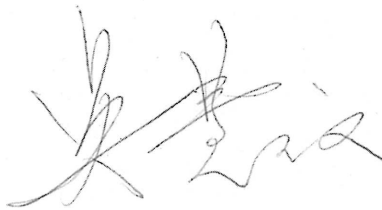
- (i) That this appeal be dismissed;
- (ii) That the appellant, Ms Shek Wai-yan, do pay costs to the Respondent Authority in the sum of HK\$10,000.00.



(Mr William D Stone, QC)
Chairman

Mandatory Provident Fund Schemes Appeal board


(Ms Lau Yuk-kuen)
Member



(Ms Ng Wai-yee)
Member

The Appellant in person

Mr Jonathan Chang, Counsel,
instructed by MPFA for the Respondent