Federal Court

BLEICHER v AUSTRALIAN CAPITAL HEALTH AUTHORITY

Decided: 13 August 1990 by Wilcox J.

Amendment of personal records – whether documents of an agency – whether used for an administrative purpose – whether relating to personal affairs – comments on work capacity – s.48.

References in brackets are to (1990) 12 AAR 246.

In 1982, the appellant was unsuccessful in an application she made for appointment to a permanent position in the respondent agency. In the words of Wilcox J, '[i]t appears that, in considering Ms Bleicher's application . . . the employer had regard to a minute paper on her work history which contained some unfavourable observations and opinions' (247). The appellant sought the amendment of that minute under s.48, which led to an appeal to the AAT. The formal decision of the AAT of 23 May 1984 embodied an agreement between the parties that two documents furnished by the appellant be attached to the minute.

On 29 September 1985, the appellant applied to the respondent for access to four documents used at the AAT hearing: two affidavits and two witness statements. The respondent had only copies, but gave the appellant access to them. On 5 November 1985, the appellant requested amendment of these documents. The respondent refused to make amendment, and this decision was upheld by the AAT.

Section 48 of the Act provides:

> 48. Where a person (in this Part referred to as the 'claimant') who is an Australian citizen, or whose continued presence in Australia is not subject to any limitation as to time imposed by law, claims that a document of an agency or an official document of a Minister to which access has been lawfully provided to the claimant whether under this Act or otherwise, contains information relating to his personal affairs –
>
> (a) that is incomplete, incorrect, out of date or misleading; and
>
> (b) that has been used, is being used or is available for use by the agency or Minister for an administrative purpose,
>
> he may request the agency or Minister to amend the record of that information kept by the agency or Minister.

Wilcox J found errors of law in the reasons of the AAT, and remitted the matter for re-hearing by the member who constituted the Tribunal (252).

1. The AAT was in error in finding that the documents were not documents of the respondent agency. It had simply overlooked the definition of document of an agency in s.4 of the Act, viz. that it is 'a document in the possession of the agency . . . whether created in the agency or received in the agency'.
2. The AAT also found that 'none of the documents . . . is being used or is available for use by the respondent agency for an administrative purpose', (and thus the condition of an application under s.48(b) was not satisfied). Wilcox J appears to have dealt with this argument when he said that –

   > the applicant is concerned that anybody reading the respondent's file would obtain an incorrect understanding of her professional capacity and the documents on the file were copies (249).

3. The AAT also erred in its view that since the documents dealt with the vocational competence of the applicant, the matters noted could not be regarded as personal affairs. Wilcox J noted that the decision of the AAT was given before the decision of the Full Court in *Department of Social Security v Dyrenfurth* (1988) 8 AAR 544, which was to the effect that on some occasions, documents relating to work performance may contain information of a personal nature (250-251). Thus '[t]he document's contents must be considered; it is not enough merely to characterise it as dealing with a person's work performance or capacity' (251). Thus, the AAT had applied a wrong test.

Comments

1. The reasoning of Wilcox J in respect of the point which arose under s.48(b) is not very convincing (unless it be the fact, which is not revealed, that the appellant was still employed by the agency). It might have been more relevant to point out (as the AAT overlooked) that s.48(b) also refers to a document 'that has been used . . . for an administrative purpose'. The question would then have been whether preparation for the AAT proceedings was an administrative purpose.
2. The AAT was concerned that the s.48 procedure not be used for a collateral attack on the decision of an AAT. The member said that if the witnesses' statements could be amended, 'the effect of such an alteration might be to allow those proceedings to be reopened' (cited at 248). This, it was said, would 'obviously' 'not be in conformity with the legislative intention of Part V of the Act nor of s.43 of the *Administrative Appeals Tribunal Act*'. It was not explained just how there could be collateral attack, nor how the supposed intention was obvious.

[P.B.]