

Kos and Education Queensland

(S 43/95, 21 May 1998, Information Commissioner Albietz)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. The applicant, Mrs Kos, seeks to amend, under Part 4 of the FOI Act, matter contained in a document held by Education Queensland (the Department) to which she had earlier obtained access under the FOI Act. The one document which remains in issue in this external review is a statement by Mr D Gould dated 17 November 1992. At that time, Mr Gould was the Principal of Capalaba State High School, and the relevant document is a report by Mr Gould on a claim made by Mrs Kos for worker's compensation. Mrs Kos had been working at the Capalaba State High School as a cleaner prior to November 1992.
6. An initial decision in response to Mrs Kos' application for amendment (dated 9 November 1994) was made on behalf of the Department by Mr E Spring on 7 December 1994. Mr Spring refused to amend the document remaining in issue in the manner sought by Mrs Kos, but he was prepared to annotate that document in order to record the concerns raised by Mrs Kos. Mr Spring refused to amend one document nominated in Mrs Kos' application for amendment on the ground that it was a document that Mrs Kos had obtained from the former Workers' Compensation Board of Queensland, and not from the Department. (Section 53 of the FOI Act, which is reproduced at paragraph 9 below, permits an applicant seeking amendment of a document to apply for amendment only to the agency from which the document was obtained.)
7. By letter dated 19 December 1994, Mrs Kos applied for internal review of Mr Spring's decision. The internal review decision dated 2 February 1995 was made by Mr P Parsons, Manager, Administrative Law and Legislative Operations Branch, of the Department. The effect of Mr Parsons' decision was to vary Mr Spring's decision in part, in the sense that some of the annotations which Mr Spring proposed to make were expanded upon, but otherwise Mr Spring's decision was affirmed.
8. By application dated 22 February 1995, Mrs Kos applied to me for review, under Part 5 of the FOI Act, of Mr Parsons' decision.

External review process

9. As an initial question, it was necessary to determine whether I had jurisdiction to deal with a number of issues which Mrs Kos sought to raise by her application for review. Certain limitations on the right to seek amendment of information are inherent in the terms of s.53 of the FOI Act, which I have set out below, together with s.55 of the FOI Act:

53. If a person has had access to a document from an agency or Minister (whether or not under this Act) containing information relating to—

- (a) *the person's personal affairs; or*
- (b) *the personal affairs of a deceased person to whom the person is next of kin;*

the person is entitled to apply to the agency or Minister for correction or amendment of any part of the information if it is inaccurate, incomplete, out-of-date or misleading.

55. If an agency or Minister to whom an application is made under section 53 decides to amend the information to which the application relates, the agency or Minister may make the amendment by—

- (a) *altering the information; or*
- (b) *adding an appropriate notation to the information.*

10. In particular, some documents that Mrs Kos wished to amend were documents that she had obtained from the former Workers' Compensation Board. Under the terms of s.53 of the FOI Act, Mrs Kos was not entitled to apply to the Department for amendment of documents to which she had obtained access from an agency other than the Department, and I had no jurisdiction to consider her application for review in respect of those documents. The applicant would need to apply to WorkCover (as the successor to the former Workers' Compensation Board, the agency from which the applicant had obtained access) in order to seek amendment of those documents.
11. Mrs Kos also attempted to pursue, on external review, certain amendments which had not been the subject of her amendment application dated 9 November 1994. In other words, the applicant was seeking to "tack on" applications for amendment which had not followed the process required under the FOI Act, before the Information Commissioner acquires jurisdiction to review an agency decision under Part 5 of the FOI Act. I have no jurisdiction to conduct a review in respect of applications for amendment which were not made in Mrs Kos' application to the Department dated 9 November 1994.
12. In relation to the document remaining in issue in this external review, namely Mr Gould's statement dated 17 November 1992, most of the 20 items of information that Mrs Kos sought to amend comprise information that relates to her employment affairs rather than her personal affairs, and hence falls outside the scope of s.53 and Part 4 of the FOI Act.
13. In my decision in *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities (at pp.658-660), I expressed the following conclusion at p.660 (paragraph 116):

Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e., which does not stray into the realm of personal affairs in the manner contemplated in the Dyrenfurth case) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.

The general approach evidenced in this passage was endorsed by de Jersey J (as he then was) of the Supreme Court of Queensland in *State of Queensland v Albietz* [1996] 1 Qd R 215 at pp.221-222.

14. In reviewing relevant authorities in *Re Pope*, I had specifically endorsed the following observations, concerning s.33(1) (the personal affairs exemption) of the *Freedom of Information Act 1982* Vic, made by Eames J of the Supreme Court of Victoria in *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187:

The reference to the "personal affairs of any person" suggests to me that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character and those relating to or arising from any position, office or public activity with which the person occupies his or her time [emphasis added].

15. Of the 20 items of information which Mrs Kos sought to have amended in Mr Gould's statement dated 17 November 1992, 15 related to her employment affairs rather than her personal affairs, and Mrs Kos was therefore not entitled to seek amendment of those 15 items under s.53 and Part 4 of the FOI Act. That was explained to Mrs Kos in my letter to her dated 4 December 1995. Thus, only Mrs Kos' applications for amendment of items 1, 9, 10, 11 and 15 in Mr Gould's statement fell within my jurisdiction to conduct a review under Part 5 of the FOI Act.
16. In March 1996, Assistant Information Commissioner Sammon convened a conference, attended by representatives of the Department, in order to attempt to resolve the questions remaining in issue. The applicant was invited to attend, but declined the invitation.
17. As a result of that conference, the Department was asked to provide evidence in relation to some items in Mr Gould's statement. The Department was prepared to add additional annotations to other items. That concession was conveyed to Mrs Kos in the Deputy Information Commissioner's letter to her dated 20 March 1996. Specifically, concerning item 10, the Deputy Information Commissioner wrote:

Further, the Department has been prepared to annotate this item in accordance with your comments. It is therefore my preliminary view that you have not set out any ground which particularises why you believe that the information in this item is inaccurate, incomplete, out-of-date or misleading. I will therefore take it that the Information Commissioner need not take any further action concerning this item, unless you notify me in writing to the contrary.

18. Concerning item 15, the Deputy Information Commissioner wrote:

I note that in your letter dated 18 January 1995, hand-delivered to the Department on 2 February 1995, you set out an annotation you wish to have made to this item. Unfortunately, Mr Parsons did not receive that letter in time to take that annotation into account whilst preparing his internal review decision, which was made the same day.

The Department is prepared to make the annotation suggested, in respect of this item, in your letter dated 18 January 1995. I therefore take it that this

outcome is satisfactory to you in relation to this item, and that the external review will be finalised in relation to this item.

19. Mrs Kos did not indicate any dissent to the Department's proposals to annotate items 10 and 15, in a manner that Mrs Kos had previously indicated was acceptable to her. Accordingly, the Department was authorised to annotate items 10 and 15, which are no longer in issue in this review.
20. Both participants were given the opportunity to lodge evidence and submissions in support of their respective cases in this external review, and the evidence and submissions were exchanged between the participants, for response. The evidence and submissions lodged on behalf of the applicant comprised the following:
 - statutory declaration of Mrs Kos dated 31 May 1996
 - statutory declaration of [Mrs Kos' husband] dated 22 May 1996
 - statement by [Mrs Kos' son] dated 14 July 1994
 - letter by [a relative of Mrs Kos] dated 30 May 1994
 - letter by Dr Paul Komarowski dated 7 November 1991
 - letter by [Mrs Kos' husband] dated 30 June 1994
 - report signed by Mrs Kos dated 12 June 1990 concerning the National Injury Surveillance and Prevention Program
 - histopathology report dated 29 July 1992
 - handwritten document by [Person 1] dated 4 March 1992
 - letter from [Person 2] dated 2 June 1994
 - handwritten report by Dr A Masjakin dated 18 May 1994
 - written submission dated 29 August 1996.
21. In addition, during the course of the external review, the applicant referred to medical reports (in particular, reports by Dr M Pitney, Dermatologist) prepared for the purposes of litigation commenced by the applicant against the Department, copies of which had been provided to the Department. Mrs Kos provided my office with an authority to allow the Department to provide copies of those reports to me. The reports which I obtained from the Department and examined were:
 - letter dated 19 January 1993 from Dr Pitney to the Workers' Compensation Board
 - letter dated 2 November 1993 from Dr Pitney to the Workers' Compensation Board
 - letter dated 27 January 1995 from Dr Pitney to the Department.
22. For its part, the Department lodged:
 - a statutory declaration of David Norman Gould dated 18 April 1996
 - a further statutory declaration by Mr Gould dated 18 April 1996
 - a schedule of leave and workers' compensation taken by the applicant between 5 October 1987 and 11 July 1994
 - a staff transfer form dated 7 March 1990
 - a workers' compensation medical certificate dated 8 July 1992
 - a statement by [Person 3] dated 9 August 1996.

Application of Part 4 of the FOI Act

23. I will consider in turn the three items remaining in issue.

Item 1

24. Item 1 from Mr Gould's statement actually comprises only the second sentence reproduced below, but the sentence which precedes it is necessary for a proper understanding of the chronological context:

Zofia began work at the school in March of 1990, not 1991. When winter began she developed a [medical condition ("the condition")] and also did this when winter approached the following year.

25. Mr Gould's statement is a response by him to a claim by Mrs Kos for workers' compensation concerning an injury ----- which she alleges was caused by chemicals used in her employment by the Department as a cleaner. The applicant seeks amendment of this item because she believes that it suggests that her [condition] was caused by the onset of winter, as opposed to her use of cleaning chemicals, in September 1991.
26. The applicant has commenced litigation against the Department concerning the circumstances in which she sustained [the condition]. She has alleged that the Department was negligent in the handling and treating of cleaning chemicals, such that the chemicals caused the [condition]. A principle emerging from the decision of *Watts v Hawke and David Syme & Co Ltd* [1976] VR 707 is that a contempt of court is committed if a non-curial tribunal were to investigate and make findings on matters the same as those in issue in a pending civil action, and if such investigations and findings would create a real and definite tendency to prejudice or to embarrass the fair trial of the action.
27. In that case, Kay J of the Victorian Supreme Court issued an injunction to prevent the Judiciary Committee of the Australian Journalists' Association from conducting a disciplinary hearing which was also the subject of an action for defamation. Kay J found that the questions of fact which the Judiciary Committee would be required to investigate and determine would be the same as those in issue between the parties at the trial of the action, and the Judiciary Committee would thereby be pre-judging the same question of fact as those that were basic to the issues in the pending legal proceedings. In that case, there is an exception noted to this principle (at p.712 of *Watts*) in the decision of the High Court of Australia in *Lockwood v Commonwealth* (1954) 90 CLR 177 where Fullagar J denied an injunction to restrain a Royal Commission appointed under statute because the Royal Commission was required by statute to undertake the enquiry and what is expressly authorised by statute could not be a contempt. That principle may be relevant to the conduct of a review by the Information Commissioner under Part 5 of the FOI Act.
28. The Queensland case of *Burton v Harris* [1979] Qd R 548 concerned an apprehended clash between disciplinary proceedings before the disputes tribunal of a political party, and an action in defamation. Kelly J of the Supreme Court of Queensland found that as the question ultimately to be determined in each proceeding differed, there could be no contempt of court. *Watts v Hawke* was distinguished in that case. It was also found that the defendant had failed to show that there was any real risk of prejudice to the defendant on the trial of the action if the disciplinary tribunal should proceed with its hearing on the charge.
29. Applying *Burton v Harris* to the present case, I consider that there is no difficulty in my proceeding to determine whether item 1 should be amended under s.53 of the FOI Act, because the question that I must consider is different to the question which the relevant court has to determine in the action commenced by Mrs Kos, which is whether the Department's

negligence caused Mrs Kos' condition. Furthermore, the outcome of my external review concerning this item will not embarrass any court.

30. The real dispute in relation to item 1 concerns the timing of the onset of the [condition]. The applicant contends that the onset of the [condition] occurred in September 1991 during the school holidays, when there was a change of work procedure to commence "team cleaning". The version contended for by the Department is that set out in item 1. However, the wording of item 1 is ambiguous in not clearly stating the year in which Mrs Kos first developed [the condition] in winter. In its present form, it tends to suggest that the [condition] developed in winter 1990. Item 1 requires amendment at least for the purpose of removing the ambiguity. The Department contends that the winter in which Mrs Kos first developed the [condition] was the winter of 1991.
31. The Department's evidence in relation to item 1 is as follows:
- a statutory declaration by Mr Gould dated 18 April 1996 which really does no more than put on oath his observation that Mrs Kos developed [the condition] in winter 1991, and again the following winter. Strictly speaking, the season of winter is regarded in Australia as falling within the months of June, July and August. However, on a less strict view, the term "winter 1991" could be regarded as extended to something which occurred in September 1991 (when Mrs Kos says the [condition] first developed), still being in the cooler months of the year.
 - the Department also lodged a schedule of workers' compensation claims and sick leave taken by the applicant. This records the first workers' compensation leave, specifically in relation to [the condition], as having been taken between the period 8 July 1992 and 29 July 1992. This does not assist in establishing whether Mrs Kos first developed the [condition] in "winter 1991" or "September 1991".
32. The applicant's evidence on this issue is as follows:
- the statutory declaration dated 22 May 1996 by the applicant's husband, ----, who says on oath that the applicant first complained of [the condition], from chemicals at the Capalaba State High School, on 19 September 1991.
 - the handwritten statement of [Person 2], a workmate of Mrs Kos. The statement is not consistent with Mrs Kos' own case, since the statement indicates that Mrs Kos did not have any [such condition] during the years 1990 and 1991. Mrs Kos' case is that she developed the [condition] in September 1991.
 - a statement by ---- (Mrs Kos' son) dated 14 July 1994, which says that Mrs Kos did not have any [such condition] until after 19 September 1991.
 - a statement by ---- (apparently a relative of Mrs Kos) dated 30 May 1994 which says that Mrs Kos had no problems [of that type] from when [the relative] first knew her in January 1989, until September 1991, and that Mrs Kos first complained of [certain symptoms] in late September 1991.
 - a number of medical reports, which in my view cannot be relied upon to independently demonstrate the onset of [the condition] in September 1991, since most of the reports merely recite the history given to the medical practitioners by Mrs Kos herself.

33. Mrs Kos did not herself give any sworn evidence as to the timing of the onset of the [condition]. Item 1 certainly requires amendment. On its face, it could be construed as meaning that the [condition] commenced in winter 1990. There is no evidence that Mrs Kos developed [the condition] prior to winter 1991 (on Mr Gould's version, according to his statutory declaration dated 18 April 1996) or September 1991 (according to the witnesses for Mrs Kos). I consider that the following points emerge from an analysis of the available evidence:
- (a) Mrs Kos contends that the [condition] did not develop until September 1991 (she is supported by the evidence of her husband, her son and [a relative]).
 - (b) Mr Gould has said on oath that Mrs Kos developed the [condition] in winter 1991, although he does not use a more precise term than "winter 1991" in his statutory declaration on this subject.
 - (c) Mrs Kos' records of absences on workers compensation or sick leave do not record any absences attributed to anything connected with [the condition] until July 1992.
 - (d) The report of Dr Masjakin dated 18 May 1994 reports that the applicant saw the doctor on several occasions from 21 November 1990 to 14 February 1991 and there was no evidence of [the condition] in that period. For the purposes of the issue presented to me for determination, Dr Masjakin's report is inconclusive, since on both competing versions, there was no evidence of [the condition] at that time.
 - (e) It is certainly clear that the [condition] became chronic in 1992. That is clear from the record of workers' compensation absences, which indicates workers' compensation being taken on account of [the condition] from July 1992 onwards, and from the fact that Dr Pitney, Dermatologist, became Mrs Kos' treating specialist from that time.
 - (f) Dr Pitney's reports, insofar as they concern objective medical observation, are equally consistent with [the condition] appearing in winter 1991 (Mr Gould's version) or September 1991 (Mrs Kos' version).
34. In all the circumstances, I have decided that the proper course of action is to amend item 1 by deleting the sentence: "When winter began she developed a [medical condition] and also did this when winter approached the following year", and replacing it with the following:

Mrs Kos developed a [medical condition] in either winter 1991 (according to Mr Gould) or September 1991 (according to Mrs Kos) which Mrs Kos attributes to a cleaning chemical used at Capalaba State High School.

Item 9

35. Mrs Kos wishes to amend item 9 of Mr Gould's statement, which is as follows:
- [Person 3] *commented that Zofia may have been* [acting in a certain manner].
36. [Person 3] was also a cleaner at Capalaba State High School, and it has clearly emerged during the course of the external review that the relationship between Mrs Kos and [Person 3] was hostile. In her application to amend the information, Mrs Kos considered the comment contained in item 9 most insulting, and contended that at no stage did she [act in that

manner]. Thus, Mrs Kos challenges the substantive truth of the statement attributed to [Person 3], rather than the fact that [Person 3] made the comment. In fact, Mrs Kos accepts that [Person 3] made the statement that Mrs Kos was [acting in a certain manner] (see Mrs Kos' statutory declaration dated 31 May 1996). Thus, it cannot be said that item 9 is inaccurate, incomplete, out-of-date or misleading. For that reason, I do not consider it appropriate to amend item 9. However, given Mrs Kos' concerns, it is appropriate that an annotation be made to item 9, in accordance with s.55(b) of the FOI Act, setting out Mrs Kos' version of events. At the conference convened at my office on 13 March 1996, an appropriate form of annotation was discussed with the Department and was subsequently put to Mrs Kos.

37. I decide that an annotation in the following terms should be made to item 9:

Mrs Kos says that the comment made by [Person 3] may infer that Mrs Kos was [acting in a certain manner]. Mrs Kos says that at no stage did she [act in that manner]. She said that she had to assist the carpet cleaners by opening up buildings et cetera, a task which should have been done by the janitor or Registrar, but neither was present. Mr Gould has no knowledge that Mrs Kos was [acting in a certain manner].

Item 11

38. Mrs Kos wishes to amend item 11 of Mr Gould's statement, which reads as follows:

There was an incident where [Person 3 and the applicant engaged in certain behaviour].

39. In her application for amendment, Mrs Kos objected to this item on the basis that she had "[not acted as she is stated to have done]". During the course of the external review, the Department provided a statement by [Person 3] dated 9 August 1996. In that statement, [Person 3] recounts her version of the events which involved a confrontation between the two, but, significantly, [Person 3] says that during the course of the encounter she [Person 3] [acted in a certain way]. In other words, [Person 3] accepts that Mrs Kos did not [act in that way]. It is also common ground that there was some altercation which took place upon both Mrs Kos and [Person 3] commencing work.

40. I have decided that the appropriate course of action is to amend item 11 by deleting the words [deleted from the quote in paragraph 38 above], and in their place inserting the words:

where [Person 3] and Zofia Kos had an altercation at the commencement of work.

DECISION

41. I decide to vary the internal review decision made by Mr Parsons on 2 February 1995 by finding that -

- (a) item 1 of Mr Gould's statement should be amended in the manner stated in paragraph 34 above;
- (b) item 9 of Mr Gould's statement should be annotated in the manner stated in paragraph 37 above;

- (c) item 11 of Mr Gould's statement should be amended in the manner stated in paragraph 40 above.