

AUSTRALIA / JUDGMENT

Wavell-Smith, B. v Mussared, P. & Ors [1987] FCA 367

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QUEENSLAND DISTRICT REGISTRY) QOLDGOS of 1987 GENERAL DIVISION)

BETWEEN: BRIAN WAVELL~SMITH Applicant

AND: P, MUSSARED

First Respondent

AND: J. ROACHE

Second Respondent

AND: K. CONWAY Third Respondent

MINUTES OF ORDER

JUDGE MAKING ORDER: PINCUS J. DATE OF ORDER: 7 JULY 1987 WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

The application for interlocutory relief made 6 July 1987 be dismissed.

NOTE: Settlement and entry of orders 1s dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)

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BETWEEN: BRIAN WAVELL-SMITH Applicant AND: P. MUSSARED

First Respondent AND: J. ROACHE

Second Respondent

AND: K. CONWAY

Third Respondent

PINCUS J. 7 JULY 1987

EX TEMPORE REASONS FOR JUDGMENT

This is an ex parte application but, in view of the careful argument addressed to me, I have thought it right to give my reasons for decision in some detail. The applicant is employed by ASIO under determination 4/85. Clause 55 of that document contemplates that in certain circumstances likely to result in some officers of a functional unit being identified as excess officers, a Personnel Assessments Committee is to be appointed - cl.55(3). Its purposes are to identify the excess officers and recommend to the Chief Officer as to which of them should be declared in excess of requirements. Under cl.55(5) the criteria to be applied by the Personnel Assessments Committee in identification of excess officers are to be, in the present circumstances, the order of relative efficiency. It will be noted that the power of the Personnel Assessments Committee as to a declaration in excess of requirements is merely recommendatory under cl.56. It is the Chief Officer who may declare an officer eligible for redeployment and that seems to follow on a recommendation that they be declared in excess of requirements. It is unnecessary to consider in detail the fate of the declared officers, dealt with in cl.57 and cl.58. The applicant says he may well be transferred interstate and I decide this application on the assumption that that is so. Under cl.60 there is a right of appeal against a declaration of eligibility for redeployment, where it results from a recommendation under power 55(3)(b), i.e. a recommendation that the officer be declared in excess of requirements. The grounds of appeal are greater efficiency than officers not so declared and other grounds not necessary to be mentioned in detail. Under cl.60(4)(c) the appeal is to be referred to a Redeployment and Retirement Review Committee. Under cl.61(3) that Committee as to enquire into the merits and under sub-cl.(4) its proceedings -

"... shall be conducted with as little formality and technicality and with as much expedition as a proper consideration of the matter before it permits and the Committee may inform itself on any matter in such manner as it thinks appropriate."

The Committee is to report to the Director-General recommending whether the appeal should be allowed and the Director-General is then empowered to confirm or revoke the declaration.

The applicant has been an officer of ASIO for more than 20 years. In May 1987 a Personnel Assessments Committee met to identify officers in excess of those required for the operation of the Queensland Regional Office and to recommend those officers who should be declared in excess of requirements. In the applicant's classification - Intelligence Officer Grade 1 - six

(including the applicant) were identified as excess to requirements and three not. That was done on the basis of interview, answers to questionnaires, review of files and staff assessments and the like. On the basis of that information "summary assessments" were prepared. The applicant was provided on 1 July with a copy of the section of the Committee's report regarding himself, together with

a copy of the section relating to the successful officers.

As I read the report concerning the applicant, no allegation of misconduct or the like is made against him. An example of the sort of praising remark made was that he "remains loyal to the organisation and holds a strong conviction regarding

its functions and responsibilities." A contrary example is that

he is "generally disorganised and hesitant in his approach to work and lacks precision and incisiveness". Comments of the latter

sort prevail.

On 3 June 1987 the applicant was sent a memorandum, of which I have no copy, apparently advising him of the adverse result. On 17 June he sent in a notice of appeal and asked that the principles of natural justice be complied with and in particular that he be personally heard and represented, that he be

able to call witnesses and tender documentary evidence, and be

able to cross-examine any person giving evidence or tendering documentary material before the Committee, and that he or his legal advisers be given access to any and all departmental correspondence files, reports and the like relevant to the ground of appeal. On 1 July 1987, the chairman of the R.R.R.C. sent a telex setting out the procedures of the Committee. The principal features were that parties might nominate referees to determine their relative efficiency; written references in advance of the

Committee hearing were requested. They were not to call witnesses

and challenges to the findings of the P.A.C. were to be made in writing before the hearings. Appellants were invited to submit supporting statements elaborating on the grounds of their appeal. On 2 July the applicant and others replied to the chairman

complaining of the restrictions on the hearing notified in the telex of 1 July and asking for more time to prepare the case. On 3 July the Review Committee replied and said, with particular reference to the time for preparation, that the appellant should have had four weeks to prepare the appeal. A telex of 3 July in

reply to that substantially restated the applicant's position.

In his affidavit in support of this application, the applicant says, among other things, that the only way for him properly to contest the adverse findings relating to him "is to cross-examine the person or persons who made them or who provided the information which allegedly supports them". In a further affidavit, the applicant says that he is incapable of properly representing his own interests in the matter and pursuing the

points that would be relevant to his appeal.

In my view, the most important authority relating to the

duties of such a body as the Review Committee is the decision of

the Full Court in *Ansell v. Wells* (1982) 43 A.L.R. 41. That concerned a promotion appeal and it had in common with the present case that the task of the appeal committee was to grade people in accordance with their respective efficiencies. I should have thought the right to natural justice would be rather more evident

in the present case than in *Ansell v. Wells*, because here an

adverse result could ultimately lead to retrenchment. So far as

the statute was concerned, the provisions were much the same in that there was no express right to legal representation and regulation 109F required the tribunal "... to make its enquiries without regard to legal forms or solemnities". Franki J. was of opinion that "the requirements of natural justice applicable in proceedings before a committee do not necessarily extend beyond making certain that each party is aware of the substance of the case against him (including the case for the other party) and giving each party an opportunity to put his case to the

committee". His Honour also had some difficulty in visualising

any case before the committee "where the requirement to observe

principles of natural justice would necessarily require a committee to allow cross-examination of witnesses or cross-examination by one party of the other party." Davies J. said that the task of the committee had "traditionally ... been

achieved through interview of the contending officers and inquiry rather than through the weighing up of evidence adduced". He

thought a process of separate interview of the parties and inquiry of referees might be the most appropriate means by which the

committee could fulfil its function and expressed himself in terms

which would not encourage the thought that those providing adverse opinions had to be unmasked. His Honour emphasised the discretion the committee had as to what it did and did not disclose. Lockhart J. expressed himself opposed to the idea that the committee had to "conduct a formal hearing at which the parties are entitled to be present when they and others give evidence relevant to the appeal, to cross-examine persons who give evidence, to be

represented by solicitors or counsel, to adduce evidence, and to put their respective cases to the committee". He did not think that importation of the adversary system into that Situation was warranted and stressed the "aim of fostering harmonious relations between fellow officers who must work or continue to work together and not of promoting discord between

then. "

It appears to me that the general tenor of the observations in *Ansell v. Wells* is not easy to reconcile with the approach of *Ellicott J. in Finch v. Goldstein* (1981) 36 A.L.R. 287 and two of the judges in the Full Court implied that there might be some inconsistency with the earlier decision.

One point on which the Full Court was clear was that, at least in general, the appellant had a right to be made aware of the substance of the case against him and the case for the other party. It appears to me possible that it was reference to that authority which induced the Review Committee, somewhat belatedly,

to cause copies of the relevant documents to be sent to the applicant.

It is that delay which has most troubled me. It may seem rather hard on the applicant that he will have had only six days' notice of the allegations against him when he goes before the Review Committee. On the other hand, the general subject matter - relative efficiency - has been known to him, as the Review Committee says, for some weeks longer, and one would have expected that if he had prepared material relating to it, that could not have required any drastic revision when he had the rather general terms of the praise and dispraise relating to himself and the successful officers. Although my mind has fluctuated on the question, and I think it unfortunate that the necessary information was supplied rather late, it does not seem appropriate in the exercise of discretion to prevent the review committee from dealing with the matter. It appears to me, however, that they might well be wise to consider giving the applicant a further opportunity to place additional material before them, if it appears that the fairly short time available since he received the details of the P.A.C. assessment has been insufficient. I do not think I should assume against them, however, that they will act unfairly in that respect. They have given an assurance that they will stay in Brisbane until all parties have had an opportunity to be heard, and no doubt if that turns out to be inconvenient, they will consider receiving further submissions within a reasonable time after their departure from

this city.

One reason for my conclusion that it is inappropriate to prevent the hearing is that the principal thrust of the

applicant's complaints is not that he has been unable in the time

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available to prepare a case on relative efficiency, but rather that there is no intention of conducting just that sort of adversarial hearing which, as I read Ansell v. Wells, is not required. I think I should apply Ansell v. Wells to the present situation. It would seem to me unlikely that, if this matter went to trial, it would be held that there is a right to have legal representation, to cross-examine anyone who has provided information relevant to the applicant's efficiency, to review all

the departmental papers relevant to the issue and so forth.

It might be thought rather harsh, in view of the applicant's long service, to dispose of his position in a hasty way, but this Court has no jurisdiction to make such orders as will, in its opinion, make for fair dealing between the applicant and his employer. Its only relevant power is to look into the question of observance of the rules of natural justice. In the grading of the relative efficiencies of these officers, the ultimate responsibility of the Review Committee is to give a fair hearing and a fair chance to the applicant to put his case. In my opinion, despite the able argument put forward, he has not advanced grounds of sufficient strength against the legality of the mode of proceeding which is outlined in the Review Committee's telexes to warrant the grant of an interim injunction. In accordance with the principles laid down by the Full Court in Ansell v. Wells, the application must be refused.

t certify that this and the 7 preceding

Pages are a true copy of the reasons for judgment herein of His Honour

Mr. Justice Pincus etn Associjata

Dated 7 July 97

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Prepared on 26 October 2026 · Esheria