

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 113 OF 1984.

Between:

DEO DUTT SHARMA PLAINTIFF

- and -

PUBLIC SERVICE COMMISSION FIRST DEFENDANT
THE MINISTER OF HEALTH SECOND DEFENDANT
THE ATTORNEY GENERAL OF FIJI THIRD DEFENDANT

Mrs. A. Hoffman for the plaintiff.
Dr. Ajit Singh for the defendant.

J U D G M E N T

The applicant is a highly qualified specialist surgeon holding the degrees of M.B.B.S. (Bombay) F.R.C.S. (England) F.R.C.S. (Edinburgh) F.R.A.C.S. (Australia) and at present is engaged in private surgical practice at Suite 3, Nina House, Suva.

He seeks a declaration that he has been discriminated against by the defendants contrary to his rights as a citizen under the Fiji Constitution Cap.1.

A fundamental right of an individual which is protected by section 15 of the Constitution is protection from discrimination of the nature set out in subsection (2) of that section. Subsections (1) and (2) are as follows :

"15.- (1) Subject to the provisions of this section -

- (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
- (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

It was suggested to counsel for the parties that two legal issues should first be argued before the defendants are called upon (if required) to answer the applicant's allegations. The issues are :

- (1) Accepting the facts stated by the applicant, whether the discriminatory treatment he alleges is contrary to or in breach of section 15 of the Constitution and if so;
- (2) Whether the Court can grant the second declaration sought by the applicant namely :

"AN ORDER that the Plaintiff's patients be admitted to the C.W.M. Hospital and that the Plaintiff be given full use of the surgical and allied services available at that hospital and at Lautoka Hospital."

Mrs. Hoffman now concedes that the second order is in the form of a mandatory injunction which the Court is not empowered to grant (Section 15 Crown Proceedings Act).

In January, 1979, the applicant was requested by the Ministry of Health to give lectures in surgery at the Fiji School of Medicine. He agreed to do so and he was appointed in February, 1979, Senior Clinical Tutor in Surgery. He agreed to give three one hour lectures a week at a fee of \$40.00 an hour.

On the 25th April, 1979, the applicant wrote to the Ministry of Health offering, at no charge to Government, to give one clinical demonstration and one operative surgery session each week on condition that he be permitted to admit five of his private patients a week to the Colonial War Memorial Hospital and to have full use of operating facilities and normal hospital care in the wards to which his patients were admitted. The applicant undertook to ensure that his patients pay the usual hospital charges for ward care, drugs and facilities. In his affidavit filed in support of his application the date of this letter is stated as being 25th April, 1983, four years later than the correct date.

The applicant's offer was not accepted and that gave rise to the applicant's alleged first complaint of discriminatory treatment mentioned in his affidavit. He said his offer was rejected notwithstanding a then existing arrangement at hospitals referred to in a Ministry circular dated 11th June, 1974, a copy of which is annexed to his affidavit.

The circular refers to "a loose arrangement" which had existed on an "ad hoc basis" between the Senior Clinical Tutors of the Fiji School of Medicine and Consultants in charge of Clinical Units of the C.W.M. Hospital.

The circular purported to lay down certain guidelines. There is reference therein to Senior Clinical Tutors being given a number of beds - the number to be

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decided by the Consultant in charge. The applicant has chosen to interpret this circular as making arrangements for beds to be set aside for patients of the Senior Clinical Tutors. That is not my interpretation. Under the arrangement Senior Tutors "took over certain responsibilities in the units concerned under the overall jurisdiction of the Consultants of the units".

Senior Tutors were to have "teaching material" and they were "to have a given number of beds set aside in each unit".

The applicant interprets this, quite incorrectly in my view, as reserving beds for specialists private patients. I consider it was intended that beds for patients in the hospital seen and admitted by the tutor were made available to the Senior Tutor for teaching his students. There is reference also to an operating session to be provided where applicable for Senior Clinical Tutors "for teaching purposes. The circular states quite clearly that Senior Clinical Tutors do not have the privilege of consulting practice and this was to remain the position.

I do not consider Government's refusal to accept the applicant's offer can be construed as discrimination. His offer if accepted would have committed Government to admitting five of the applicant's private patients to the Hospital each week and permitting him full use of operating facilities. That went very much further than the loose arrangements then pertaining which the hospital authorities could vary at any time to suit their own arrangements.

While there was an offer to give demonstrations which the applicant stated would be without charge, the proposed arrangement was designed to overcome a situation faced by private doctors in Fiji where no private hospitals are available into which a doctor's private patients could

be admitted and be treated or operated on by that doctor. The hospital was in fact being asked by the applicant to pay a price not in money terms which the Ministry decided it could not accept.

Overseas surgeons do have access to operating theatres in hospitals and what the applicant was asking for was the same facilities in Fiji. The Medical Department for reasons which are not stated was not prepared to accept the applicant's offer.

The applicant after being informed that his offer was not acceptable gave one week's notice that he was discontinuing lecturing medical students. This was by letter dated 9th May, 1979.

In his affidavit the applicant gave additional reasons for his resignation. He said he felt he was being discriminated against in relation to other specialists in private practice. He mentions four specialists who had been given (presumably prior to or about the time of his resignation in May 1979) use of facilities which were denied him. One of the four is a Fijian - the other three are Indians.

Only the Fijian specialist is in private practice. He is also employed part time as a cardiologist at the C.W.M. Hospital and it is alleged he uses hospital facilities, whether for private or hospital patients is not stated. The applicant states there is a full time cardiologist at Labasa Hospital who could do the work in Suva if transferred to Suva. The other three specialists are apparently Government specialists who Mr. Sharma (he is a specialist and entitled to be addressed as Mr. and not as Doctor) says also do private work for which they charge. They are entitled to do such work with permission.

Section 26 of the Mental and Dental Practitioners Act Cap. 255 provides as follows :

"26. No medical or dental practitioner in the employ of the Government of Fiji shall be entitled to or accept any fee, remuneration or reward in respect of any services performed by him relating to the practice of medicine, surgery or dentistry other than his emoluments as an officer of the Government of Fiji except as may be stipulated by the senior professional medical officer of the Ministry concerned with health matters with the approval of the Minister."

Regulation 6 of the Public Hospital and Dispensaries Regulation states :

"6.-(1) The Permanent Secretary may at his discretion and subject to such conditions as he may deem fit to impose, permit any registered medical practitioner, not in the employ of the Government, to continue to attend any private patient after the admission of such patient to a public hospital.

(2) The Permanent Secretary may at any time without notice withdraw any permission granted by him in accordance with the provisions of paragraph (1)."

Under this regulation Mr. Sharma could seek permission to continue to attend a private patient after admission to a public hospital. The intention is clear that private patients when admitted to a public hospital are taken over by Government doctors.

The Fijian specialist who is alleged to be seeing patients in the C.W.M. Hospital if the allegation is correct, presumably has the Permanent Secretary's permission to do so.

None of the four specialists are private surgeons.

On the 11th February, 1981, Mr. Sharma wrote to the Secretary for the Public Service Commission in which he again applied for use of the operating facilities at

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the C.W.M. Hospital. It was more or less a similar offer on similar terms to those he had referred to in his letter of the 25th April.

He prefaced his further offer by pointing out that in the two and a half years since he had been in private practice he had seen a number of surgical cases which had been treated at the three major hospitals who were not any better and were in need of further surgical treatment. He said he could not help those unfortunate people for one very simple reason and that was the unavailability to him of operating facilities. This letter would not have endeared him to the surgical staff of the public hospitals or won him many friends in the Medical Department.

He drew attention to the Maraj Committee of Enquiry into Health Services and one of its recommendations that the services of specialists in private practice be utilised by the Ministry of Health for the benefit of patients and the specialists.

On the 4th March, 1981, the Secretary, Public Service Commission, replied stating that Mr. Sharma's suggestions had aroused considerable interest and it was felt that discussions between interested parties would be necessary before any decisions could be given. He stated that the Permanent Secretary for Health had been asked to organise discussions. Mr. Sharma does not mention whether any such discussions took place and what if anything happened in the two years which have elapsed since. It can be assumed however, that his further offer was also rejected.

Subsection (2) of section 15 of the Fiji Constitution referred to earlier defines "discriminatory".

The facts stated by Mr. Sharma do not support his allegation that there has been a breach of this section

so far as he is concerned. He has not been discriminated against because of his race, place of origin, political opinions, colour or creed. He has not been subjected to disabilities or restrictions to which persons of another race, origin or political opinion are not made subject.

No surgeon, apparently has been granted the privileges he seeks or Mr. Sharma would not have failed to mention it. Other specialists he mentions are either employed full or part time by Government.

It is apparent that Mr. Sharma's real complaint is that as a private surgeon specialist his practice is severely restricted because no proper operating facilities are available to him. His patients, when they are hospitalised, are taken over by Government doctors with lesser qualification than he has.

That is not discrimination. It is a policy matter which existed when Mr. Sharma decided to go into private practice.

The facts alleged by Mr. Sharma do not establish that his rights protected by the Fiji Constitution have been infringed.

His application is dismissed with costs to the defendants.

R.G. Kermod
(R.G. KERMODE)
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S U V A,

12TH JUNE, 1984.