

IN THE FIJI COURT OF APPEAL  
Appellate Jurisdiction  
Civil Appeal No. 55 of 1984

Between:

DEO DUTT SHARMA

APPELLANT

- and -

1. PUBLIC SERVICE COMMISSION

RESPONDENTS

2. THE MINISTER OF HEALTH

3. THE ATTORNEY-GENERAL

Mrs. A. Hoffman for the Appellant  
Dr. Ajit Singh & Miss P. Jalal  
for the Respondents

Date of Hearing: 14th & 23rd November, 1984

Date of Judgment: 24th November, 1984

JUDGMENT OF THE COURT

Casey, J.A.

The appellant, Mr. Sharma, is a highly qualified and experienced surgeon in private practice in Suva. For four and a half years prior to 1979 he had been employed as a senior consultant surgeon at the Colonial War Memorial Hospital and according to his counsel he resigned from that post after being threatened with disciplinary action as a result of his public criticism of the medical services and administration.

On the 5th February 1979 the Public Service Commission offered him a temporary part-time appointment as senior clinical tutor in surgery at the Fiji School of

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Medicine terminable by one week's notice on either side. Mr. Sharma accepted this and commenced his duties accordingly, involving his attendance for three hours a week. The appointment followed an exchange of letters between him and the Secretary for Health in which he suggested that he should have one operating session per week to teach Operative Surgery to the students. This was declined by the Secretary who pointed out that the staff of the surgical unit would be responsible for clinical demonstration. Accordingly, it cannot be disputed that Mr. Sharma knew before taking up the appointment that there would be no provision for him to teach Operative Surgery at the hospital.

On 25th April 1979 - a little over a month after his lectures started - he wrote to the Public Service Commission pointing out that it was unsatisfactory to teach medical students without being able to give them clinical and surgery demonstrations. He offered to do this free of charge provided he was allowed to admit five of his own patients per week to the hospital, on the basis that they paid the government the appropriate charges and he would also charge them for his services. To this the Commission replied on the 8th May that there should be no charge in the existing agreement. Mr. Sharma wrote on the following day indicating that it would be useless to carry on giving lectures because of the reasons set in his previous letter. He gave notice that he would discontinue them after 15th May and his resignation was accepted accordingly by the Commission on 16th May, 1979.

There appears to have been no further contact on this topic until 11th February, 1981 when Mr. Sharma wrote again to the Commission referring to the desirability of using specialists in private practice for surgical treatment in the hospitals, and he applied to use the operating facilities at the CWM Hospital. In return he offered to teach medical students in the theatre and to take one weekly

clinical demonstration. He suggested that up to four of his patients could be admitted at any one time on this basis, paying normal hospital charges as well as his operating fees, with special provision for those in public wards.

The Commission replied on the 4th March, 1981 acknowledging the interest this proposal had aroused and stated that the Secretary for Health had been asked to organise discussions between appropriate parties. In his letter of 11th March Mr. Sharma accepted that discussions were probably necessary, and pointed out that some doctors within the civil service were already enjoying such facilities and were providing vitally needed services to the community; the service he could provide would be of equal importance.

There is nothing in the record to indicate whether these discussions took place but Mr. Sharma was not given the facilities he sought, and on the 7th February, 1984 he applied to the Supreme Court of Fiji seeking a declaration against the three respondents that he was discriminated against "contrary to his rights as a citizen under the Fiji Constitution Cap.1." With the Summons he filed an affidavit detailing his appointment as senior clinical tutor and his resignation, and the subsequent correspondence in 1981. He deposed that an additional reason for his resignation was his view that he was being discriminated against by contrast with a Fijian specialist in private practice and named him and three Indian doctors who had been given hospital facilities. In this and in a supplementary affidavit he gave as further reasons for this belief his political activities and his criticisms of what might be loosely termed the medical establishment, leading to what he discerned as mounting discrimination.

The application was dismissed by Kermode J. in a reserved judgment of the 12th June, 1984. After

summarising the evidence which we have briefly outlined and the relevant regulations and hospital practice, he concluded that the decision refusing Mr. Sharma the privileges he sought was not discriminatory, but was a matter of policy which existed when he decided to go into private practice. He appeals from this judgment and in her wide ranging submissions Mrs Hoffman eventually made it clear that the case turned on the application of Section 15 of the Constitution which reads :-

"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."

The thrust of her argument was that the decision not to grant the facilities he sought was based wholly or mainly on a combination of his race, political opinions and creed, giving to these two latter terms a very broad interpretation which she felt appropriate to the circumstances of this case. We must say at once that any suggestion the Ministry was actuated by racial prejudice flies in the face of the undeniable fact that of the four consultants or specialists Mr. Sharma referred to, one was Fijian and three were Indian. We do not feel any need to discuss the meaning of the other terms relied

upon because we are satisfied that on the material before the Court Mr. Sharma has not proved that the decision (or failure to decide) was due to any improper discrimination contrary to these provisions of the Constitution.

At the hearing on 14th November Mrs. Hoffman became unwell at the end of her reply and could not continue. The appeal was adjourned to 23rd November but she still was unable to appear and Mr. Sharma then addressed us at some length, dealing not only with the final question from the Bench which she was in the process of answering, but also with other general matters. He mentioned additional items and information not included in the record. From his discussion with the Bench we have no doubt that he understands an Appellate Court has the limited function of deciding whether the Judge at first instance was correct, and is confined to the contents of the record before it. Should we take into account the additional material proffered, we run the risk of deciding the appeal on matters to which the respondents might have given an effective answer had they been properly put to the court below. We think it fair to say, however, that although we cannot agree Mr. Sharma has proved his allegations, we accept that he genuinely feels he has been unlawfully discriminated against.

The facts in the record speak for themselves. He resigned as a consultant following earlier criticism of the medical authorities, but this did not stand in the way of his subsequent appointment as a senior clinical tutor, on terms he knew and accepted as precluding him from conducting clinical or surgical demonstrations. As Kermode J. said, this was clearly a policy decision by the hospital administration, and it takes little imagination to think of a number of perfectly sound reasons for it, which have nothing whatever to do with the kind of discrimination referred to in the Constitution. The refusal of his subsequent request in 1979 accorded

with that policy and we note that Mr. Sharma said nothing at all about discrimination at the time he resigned. No reasons were given for the failure to respond to his second request for similar facilities in 1981, nor was the Ministry under any obligation to supply them.

Before the Court can make a declaration in his favour Mr. Sharma must satisfy it on balance of probability that the Ministry's refusal or failure to respond amounted to discriminatory treatment attributable wholly or mainly to his race, political opinion or creed. There is simply no evidence to this effect and it is impossible to draw any such inference from the material before us. We are satisfied that Kermode J. was correct in the conclusion he reached, and for the reasons he gave. The appeal must be dismissed with costs to the respondents to be agreed upon; if not, to be taxed.

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Vice President

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Judge of Appeal

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Judge of Appeal