IN THE FIJI COURT OF APPEAL

Civil Appeal No. 28 of 1986

Between:

DEO DUTT SHARMA s/o Brahmadin — Appellant

- and -

FIJI MEDICAL ASSOCIATION — Respondent

Appellant in Person.
F.G. Keil for the Respondent.

Date of Hearing: 8th July, 1986.

Delivery of Judgment: 18th July, 1986.

JUDGMENT OF THE COURT

Roper, J.A.

On the 31st May, 1985 the Executive Council of the Respondent Association passed a resolution suspending the Appellant's membership of the Association for a period of three months from that date. On the 10th June the Appellant issued proceedings challenging the suspension on the grounds that the Council members were biased; and had proceeded in breach of the rules of natural justice in that they had not given the Appellant the right to be heard. The matter was heard by Kermode J., who held that bias had not been proved. It is not clear from his judgment whether he found the audi alteram partem rule to have been breached but in any event he declined to make the orders sought in the exercise of his discretion. This is an appeal against those findings.

The Appellant is a senior and highly qualified member of the medical profession and a past president of the Association, and at the relevant time was a member of its Executive Council. He had been President in the preceding year and during that time there had been differences of opinion with certain Council members and at one stage he had to face a suggested vote of no confidence, but that came to nothing.

What triggered the events which led to his suspension was a heated exchange with another Council member at a meeting of the 12th April, 1985. The member was Dr. Iyer who became President later in the year. The reason for their difference of opinion is irrelevant. On the 16th April the Appellant wrote this letter:-

"The Secretary,
Fiji Medical Association,
G.P.O. Box 1116,
S U V A.

Dear Sir,

I do not agree with the way things are being done by the present Executive Council of the F.M.A. under the guidance of the present president. My view is that he is puerile, weak and ingratiating. Some members of the Council had brandished the image building, ethics maintaining bogey around, yet they had unashamedly indulged in unethical behaviour viz, advertising, themselves. The Council, as far as I know has not done anything about the continued downward trend in health care that the people receive in the hospitals, the drug shortages, the murders that are committed in the name of abortion and the improvement in the working condition of doctors in this country.

I do not want to be associated with the bunch of people on the present council and therefore am resigning from the Council and from the Editorial Board of the F.M.A. Journal, effective from the date of this letter.

Yours faithfully,

(Sgd) D.D. Sharma"

and received this reply:-

"

6.5.85.

Dr. D.D. Sharma,
P.O. Box 4303,
SAMABULA.

Dear Sir,

Your letter dated 16.4.85 is acknowledged and your resignation from the Council and the Editorial Board of the Fiji Medical Association Journal is recorded.

Your letter will be discussed in the next Council meeting and the decisions will be communicated to you.

You are instructed to return any items of the Association you may have acquired during your term in the office.

Yours faithfully,

(Sgd) B.K. Iyer
PRESIDENT"

The next Council meeting was held on the 31st May. The Appellant's letter of the 16th April was before the meeting, and also this letter from Dr. Iyer:-

"The Secretary,
Fiji Medical Association,
C/- Lautoka Hospital,
L A U T O K A.

10/5/85

Dear Sir,

Re: DR. DEO DUTT SHARMA

I wish to bring to the attention of the Council the repeated and continuing distraught conduct of the above doctor which has tarnished the image of the Association in the eyes of many people and has brought the name of the Medical profession into great disrepute.

You all remember that he took the Fiji Medical Association Council to the Supreme Court in November, 1983 out of personal grudge after having lost in the elections which was conducted by the Council at that time to the best of its ability. Through technical errors by the councils he unfortunately won the case and was later elected to the Presidency by a slim majority of one vote.

The saga that followed and most of which were published in our news papers are well recorded. There is no doubt that his actions were most deplorable and showed little respect for the noble profession he represented nor the honourable seat of the Association's President he held. I was informed of the chaotic manner in which the council meetings were conducted and trivial issues e.g. the postal box key possession were argued over great lengths. Consequently the Secretary resigned and the council members moved a motion of no confidence on the President but I believe the motion was later withdrawn out of pity. Most of the Council's correspondence remained unanswered and the files were in shambles.

His conduct in the Fiji School of Medicine Council meeting were extremely embarrassing for the other fellow members. His remarks in the Council meetings were rude and to the point of being abusive. You may recall the Chairman Dr. S. Tabua had informed the Council about his behaviour and even suggested a psychiatric assessment.

Dr. Sharma has been a member of the present Executive Council in his capacity as the immediate past President. Out of the five meetings so far he attended the first full meeting, came late for the second meeting and was absent for the last three meetings. He did not even have the courtesy of sending apologies. His contributions in the meetings he attended were negative.

He was appointed by the Council to be a member of the Editorial board of the Fiji Medical Journal. He made no contributions to the journal and also did not attend the Editorial Board meeting.

He is also a member of the Fiji Medical Council in which he was elected by the Fiji Medical Association members. In the last meeting of the Fiji Medical Council held on 12th April, 1985 he was appointed as the Chairman in the absence of Dr. Biumaiwai. Dr. Sharma conducted the meeting in a most shameful manner and in particular the way in which he treated a fellow colleague who was called by the Council for questioning and reprimanding

purpose. The situation was so embarrassing for the fellow council members that a point of order had to be raised twice in order to restrain him from prolonging his sleuth. After the interview he became abusive towards me and used indignified words. I was compelled to leave the meeting since I could not tolerate such humiliation and incompetent chairmanship.

It appears Dr. Sharma's barrage of episode insulting attacks on his fellow colleagues has become an entrenched symptom of his character. It is also evident from his recent letter of resignation to the council the venomous manner he views the activities of the members and the grave disrespect he has for the council members who were elected by the members of the Association. The choice of words he has used describing your President; labelling the council as a "bunch of people" and alleging that they are being misguided show that he casts doubts on the integrity of the qualified and respectable members of the Council. If these allegations are true then the members of the Association would have exercised their rights a long time ago.

There is no doubt that Dr. Sharma's irrational behaviour has been of concern to all of us and many have expressed that good sense may prevail on him one day. Unfortunately such 'a day' has not come and I strongly feel that it is a sad situation for the Association to continue to associate with a member of such unprofessional behaviour and malicious thinking.

I sincerely urge all the Council members to seriously think over this case and implement an appropriate course of disciplinary action against him.

Yours sincerely,

(Sgd) Dr. B.K. Iyer
P R E S I D E N T"

It is to be noted that when Dr. Iyer's letter came to be considered the minutes record that "most members of the Council spoke on this issue and agreed on the contents." It appears that some members favoured expulsion and others suspension but in the end there was a unanimous vote for suspension for three months. The minutes record that the suspension was on these grounds:-

"(1) Derogatory remarks concerning the President and council members who were all elected unanimously.

(2) Unprofessional behaviour by you in the episode involving Professor Lander which resulted in charges being laid against you.

(3) We note that of the five council meetings you fully attended one and came late in one and did not attend the other three nor submit your apologies for these meetings."

The Appellant was notified of his suspension by a letter of the 31st May which records the grounds as set out above.

The suspension was made under Rule 27 of the Association's rules then in force. It reads:-

"27. Expulsion or Suspension of Association Members -

If any member is proved, to the satisfaction of the Council, to have been guilty of conduct prejudicial to the interests of the Association the Council may -

(a) suspend member from the Association for a period not exceeding three months or

(b) expel such member from the Association.

Any member so suspended or expelled shall have the right to appeal to the Annual General Meeting or to an Extraordinary General Meeting."

The Appellant did not exercise his right of appeal under the Rule and Kermode J., dealt with that failure as follows:-

"Para 27 provided a remedy for Mr. Sharma if he wished to appeal against his suspension and that was to appeal to his fellow members in a general meeting of the FMA.

Mr. Sharma has given reasons why he did not appeal and that was because he did not have time to appeal to an Extraordinary General Meeting that was being held the afternoon of the day he received

the notice of his suspension. He could have had another meeting called but he did not request the Council to call one.

Had that meeting been called, at which no doubt the contents of his resignation letter would have been disclosed, it is very doubtful indeed whether Mr. Sharma would have won general support of his colleagues to the lifting of his suspension.

Where a member of a voluntary association has accepted rules which give the Executive powers to enforce domestic discipline and provides for penalties and provides for an appeal from a decision of the Executive that procedure should normally be followed."

It is not clear to what extent the Appellant's failure to appeal weighed with Kermode J., in refusing the relief sought although it seems to have had some influence. There is no rule requiring what is sometimes called the exhaustion of administrative remedies. An appeal on the merits, and judicial review of the legality of the whole proceeding, are two different things and failure to resort to a right of appeal is no bar to obtaining a declaration from the Court (see Lawlor v. Union of Post Office Workers (1965) 1 Ch. 712 at p.733 and the cases cited at p.593(3) of Wades Administrative Law, 5th Ed.).

Mr. Keil submitted that Rule 27 does not provide for a hearing, and that in any event as it was merely a question of suspension that was in issue, and not expulsion, a hearing at which the Appellant could give answer was not called for. We do not agree. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests, and therefore involves a duty to act judicially in accordance with Ridge v. Baldwin (1964) A.G. 40 and a host of other authorities; or simply because it automatically involves a duty to act fairly and in accordance with natural justice (referred to by Lord Denning M.R. in R. v. Liverpool Corporation (1972) 2 Q.B. (C.A.) as "the modern approach").

In the present case the Council was contemplating action which affected the Appellant's rights and interests, namely, his standing in the medical community, and his right to remain a member of the Association, for the minutes record that expulsion was considered. On that score alone he should have been given a hearing. As for the duty to act fairly the Council's enquiry was not limited to the Appellant's letter of the 16th April. It had before it the President's letter of the 10th May, which raised all manner of issues to the Appellant's disadvantage, and made the suspension order, at least in part, on grounds which the Appellant may have been able to explain away but of which he had no notice. It appears that the Dr. Lander incident had taken place about a year previously, and the Appellant may have been able to explain why he had not attended meetings. Kermode J., appeared to take the view that there was no way the Appellant could overcome the effect of his 16th April letter, but that conclusion is open to question. The Appellant could have apologised, or, as seems more likely, sought to justify his criticism.

This was clearly a case where the Appellant should have had notice of the charges to be made against him and been given the opportunity to be heard. That is not the end of the matter for even in the case of a breach of natural justice a remedy is discretionary. Kermode J., exercised his discretion in the instant case primarily on the basis that on the facts, and here he relied primarily on the 16th April letter, the suspension was fully justified and that a hearing would have served no good purpose. He relied on the case of Glynn v. Keele University (1971) 1 W.L.R. 487 for his decision to exercise his discretion and in particular on this passage from the judgment of Lord Pennycuick V.C. at p.496:-

> "I have, again after considerable hesitation, reached the conclusion that in this case I ought to exercise my discretion by not granting an injunction. I recognise that this particular discretion should be very sparingly exercised in

> that sense where there has been some failure in natural justice. On the other hand it certainly should be exercised in that sense in an appropriate case, and I think this is such a case. There is no question of fact involved, as I have already said. I must plainly proceed on the footing that the plaintiff was one of the individuals concerned. There is no doubt that the offence was one of a kind which merited a severe penalty according to any standards current even today. I have no doubt that the sentence of exclusion of residence in the campus was a proper penalty in respect of that offence. Nor has the plaintiff in his evidence put forward any specific justification for what he did. So the position would have been that if the vice-chancellor had accorded him a hearing before making his decision, all that he, or anyone on his behalf, could have done would have been to put forward some plea by way of mitigation. I do not disregard the importance of such a plea in an appropriate case, but I do not think the mere fact he was deprived of throwing himself on the mercy of the vice-chancellor in that way is sufficient to justify setting aside a decision which was intrinsically a perfectly proper one."

It is to be noted from that passage that the Court was dealing with a case where no question of fact was involved, nothing had been raised by the Plaintiff to justify his actions, where a severe penalty was warranted, and the decision was intrinsically a proper one.

The same considerations do not arise in the present case and on the facts before us we prefer the approach of Lord Wright in Wiseman v. Borneman (1971) A.C. 297. At p.308 he said:-

> "If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the principles of justice. The decision must be declared to be no decision."

The dangers of refusing relief in discretion were vividly expressed by Megarry J., in John v. Rees (1970) Ch. 345 at p.402. He said:-

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

We are satisfied that the suspension hearing was not in accord with the rules of justice and that the Appellant is entitled to the relief he sought. The appeal is allowed, the Councils' order of suspension is quashed and the Appellant's suspension declared to be unlawful.

We have not found it necessary to deal with the question of bias on the part of Council members, and indeed it would not be conducive to future harmony within the Association to do so, and we are not prepared to consider the question of damages which appears to be related to an allegation that the Council, or someone with its authority "leaked" the news of the Appellant's suspension to the media. The evidence is such that it is impossible to say how the media obtained the information.

The Appellant is awarded his disbursements on the appeal hearing to be fixed by the Registrar.

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Vice President

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Judge of Appeal

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Judge of Appeal