IN THE FIJI COURT OF APPEAL

Civil Appeal No. 35 of 1986

BETWEEN:	PUBLIC SERVICE COMMISSION	First Appellant
A N D :	THE ATTORNEY-GENERAL OF FIJI	Second Appellant
A N D :	FIJI PUBLIC SERVICE ASSOCIATION	First Respondent
A N D :	AMINA BASHA	Second Respondent

Date of Hearing: 4th November, 1986.

Delivery of Judgment: 14th November, 1986.

Counsel: Ratu Jone Madraiwiwi for Appellants
Mr. V. Maharaj for Respondents

JUDGMENT OF THE COURT

O'Regan, J.A.

The proceedings in the Supreme Court were instituted by the first respondent. The second respondent was added as a plaintiff at the conclusion of the hearing. She is a dentist by profession and was at all material times an employee of the C.W.M. Hospital in Suva and, as such, a public servant with a contract of service with the first appellant, to which we will hereafter refer as "the Commission". She was also at material times a member of the first respondent to which we shall henceforth refer to as "the association".

During late 1980 and early 1981 Dr. Basha was an in-patient of the C.W.M. Hospital, suffering from a kidney disease. In early April 1981, the consultant physician at the

hospital formed the opinion that she needed treatment that was unavailable in this country and considered that she should go overseas to obtain such treatment. The question then arose as to whether she was entitled, under terms and conditions of employment of civil servants, to have the costs involved in having such treatment paid by the commission. The association took up the matter on her behalf. Her condition was such that it was necessary for her to proceed overseas before the issue could be resolved. She was admitted to Concord Hospital in Sydney on 30th April, 1981. Whilst there she underwent Kidney transplant surgery. She was finally discharged from the hospital on 9th April 1982. The cost of treatment was $28,719.82.

Application has been made on Dr. Basha's behalf on 11th April 1981 for the commission's approval to her being sent overseas for treatment. For various reasons, which we find it unnecessary to canvass, the decision was delayed, but in the end, the commission declined to accept financial responsibility for the total expenditure. Instead, it approved a payment of $1000 towards the costs. To avoid the delay that would be occasioned if they proceeded against the appellants by writ, the respondent took out an originating summons seeking declarations which, it was hoped, would determine the matters in controversy. The declarations which the Court was originally asked to make, were:-

> a) That on true construction of S.1000 and S.1007 of the General Orders Dr. Amina Basha is entitled to free medical attention in respect of treatment she received at Concord Hospital in Sydney, Australia during the period April, 1981 to April 1982.
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> in the alternative
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> b) That in terms of S.1000 and S.1007 of the General Orders the 1st Defendant is under legal obligation to meet the medical expenses incurred by Dr. Amina Basha during the course of her treatment at Concord Hospital in Sydney, Australia between April, 1981 - April 1982.

c) The 1st and or the 2nd Defendants acted ultra vires its powers conferred to it by the General Orders in prescribing that the total cost of Dr. Amina Basha's medical expenses overseas should be limited to a maximum of $1,000.00".

The orders referred to in paragraphs (a) and (b) were General Orders made by the first appellant pursuant to powers conferred by S.17 of the Public Service Act - and which came into force on 1st August 1981. The learned Judge held that Dr. Basha was not entitled to free medical treatment overseas under these orders but, in his judgment, indicated that he considered the commission liable under the General Orders made in 1969.

Immediately after his judgment was read in the Court below, the respondent's application for amendment of the originating summons by the addition of a paragraph seeking a declaration "that the Government is liable under the 1969 edition of General Orders to discharge the full costs of the second plaintiff's medical treatment overseas from the 29th April 1981 to 5th April 1982", was granted.

In the result, the learned Judge made the declaration sought by the amendment. He refused the applications contained in paragraphs (a) and (b) but made the declaration sought in paragraph (c).

Both appellants have appealed against the decision insofar as it related to the declarations which were made and both respondents have appealed against the decision insofar as it related to the declarations which were refused.

In the court below an issue arose as to the date on which the 1981 General Orders took effect. The learned Judge held that they came into force on 1st August 1982. As Mr. Maharaj indicated from the bar, the respondents now accept

that to be so. It seems to us to follow that, even if the appellants are now generally liable under Order 1000 or Order 1007 or a combination of them for the costs of overseas medical treatment of a public servant taken ill in Fiji, they are not liable to the appellant thereunder, for the reason that the necessity for her treatment overseas arose before those orders came into force. It was not submitted that the General orders had a retrospective effect. In our view, they are clearly prospective. On this short ground alone the decision of the learned Judge not to grant the declarations sought in paragraphs (a) and (b) of the summons must be upheld.

Turning to the declaration sought in paragraph (c) of the summons, the basis upon which the $1000 was offered to Dr. Basha is unclear. That is abundantly demonstrated by the review of the evidence and the correspondence which passed between the Commission and the Assoication which is set out and discussed in the judgment in the court below on page 36 and the three following pages. The evidence adduced on behalf of the Commission and its letters to the Association display a pronounced ambivalence. With one breath it was said that the payment was ex gratia in nature, at the discretion of the Ministry of Finance; in the next, that it became operative by reason of an agreement between the Permanent Secretary of Health, the Permanent Secretary of Finance and the Commission. That was disclosed in a letter dated 7th August 1981 from the Secretary of the Commission to the association which stated:

> "You will recall that the time Dr. Basha's case came up I was having discussions with the Permanent Secretary for Health and the Permanent Secretary for Finance on how Government could assist Civil Servants proceeding overseas for medical treatment on the recommendation of the Ministry of Health. As a general guide and based on the merits of each case, it was agreed that Civil Servants proceeding overseas for medical treatment on the recommendation of the Ministry of Health may be assisted up to a maximum of $1000".

If the offer of payment was an ex gratia basis the question of vires does not arise. When a payment is made or offered 'ex gratia' it is implicit in the offer that the offeror is proceeding on the basis that he is not liable to make any payment under his contract. Speaking generally, if the commission decides to make an ex gratia payment to any employee it does not require statutory authority so to do. The occasions when it would be proper for such a payment to be made are many and various. Often the circumstances giving rise to such a payment would not be within contemplation. If then, the offer was ex gratia without more, no declaration was necessary.

If, on the other hand, the payment had its genesis as stated by the Secretary of the Commission in the extract from the letter of 7th August 1981 quoted above, different considerations apply. Assuming for the moment that there was in existence a general order made by the Commission pursuant to section 16 which differed from what was so agreed upon, the agreement referred to in the letter would not legally vary or revoke such an order. If, of course, the commission were to make an amending order in the precise terms of the agreement, the situation would be different. As matters stood at the time of hearing, the agreement was not a term of Dr. Basha's contract of employment for the reason that it was neither the subject of a regulation made pursuant to subsection 3(e) of section 16 (which empowers the commission to prescribe "the terms and conditions of service and employment of employees" or of a general order made pursuant to section 17.

In summary then, if the payment was ex gratia, then no question of vires is involved. If it was offered on authority of the agreement, then it was illegal. We think, in the circumstances it suffices merely to say that it was not binding on Dr. Basha. In the circumstances obtaining, a formal declaration would permanently enshrine

the confusion. We, accordingly, think it preferable that a declaration should be not made.

The relevant part of the 1969 General Orders is paragraph 1600(a). It reads:

> "Whilst in Fiji, all officers are entitled to free medical attention by the staff of the medical Department, provided that the need for attention does not arise from an officers own indiscretion or negligence and subject to the conditions set out in the following general orders".

The provision is followed by eight paragraphs dealing with matters of detail which do not bear in the problem thrown up by this case.

Paragraphs 1610 and 1611 have to do respectively with the rights as to medical treatment of officers "proceeding on leave overseas" and "officers overseas". The learned Judge examined these provisions in great detail but found in them no aids to the interpretation of paragraphs 1600(a) and ended his careful analysis of them by saying:

> "There is no general order specifically covering the present situation, that is, where the officer does not wish to proceed overseas on leave, or has not taken ill whilst overseas on leave, but instead has taken ill in Fiji and is in need of treatment overseas".

We agree with that view. And with respect, we think it concludes the matter against the respondents.

Earlier in his judgment, the learned Judge dealing with a submission by Counsel for the present appellants that the words "whilst in Fiji -" in General Order 1600, limited the operation of that Order to officers in Fiji - in other words they meant precisely what they said -, had this to say:

> "That seems to me to be the interpretation intended. I do not see, however, that the paragraph should necessarily be construed to mean that the Government will not provide free medical attention overseas. As I see it, deals solely with the situation in Fiji, specifying the condition pertaining to Fiji and is neutral as to treatment elsewhere...."

We take no issue with the reasoning in that passage but with respect we think it begs the question. The reality of the situation is that there is no provision in the 1969 General Orders making provision for treatment in situations such as Dr. Basha unfortunately found herself.

The learned Judge, despite his findings, went on to consider submissions made by learned Counsel for the respondents that by reason of certain provisions in the constitution the commission was under a duty to act fairly, a duty which he said encompassed "the obligation not to discriminate". He after referring to the provisions for free medical treatment overseas for officers on leave overseas he said:

> "....If some officers may enjoy free medical treatment overseas because they chance to be going on leave or to be on leave overseas, then in view of the extended medical leave provisions in General Order, I do not see why an officer cannot be sent overseas, on medical leave, for medical treatment not available in Fiji at the additional expense (relatively speaking) if no more than the passage involved. To do otherwise, would be unfair and unreasonable. As I see it, where the General Orders are not clear and specific, it is the courts duty to place on them a construction which renders them non-discriminatory and hence fair and reasonable. In my judgment therefore, by necessary implication, I construe the 1969 Edition of General Orders as casting upon the Government the duty of arranging for and providing to public officers free necessary medical treatment overseas which is not available in Fiji".

There are several matters in this passage which give us concern.

First, the statement that "the General Orders are not clear and specific.....". That, we think, is contrary to the earlier finding of the learned Judge to which we have referred. If, as it would seem, there was no intention to make such provision, there was no requirement to make provision in the General Orders excluding it.

Secondly, the resort to necessary implication.

Here the learned Judge has, by the process of implication extended the ambit of the 1969 orders to meet a case provision for which has clearly not been made.

In R. v. Wimbledon Justices ex p. Derwent (1953) 1 Q.B. 380 Lord Goddard said:-

> "Although in construing an Act of Parliament the Court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed if, it cannot add words to a statute or read words into which are not there....."

Construction by implication is permissible if the meaning of a statute is not plain. "But the general rule is not to import into statutes words that are not there" - see Craies on Statute Law 6th Edition at p. 109 and King v. Burrel (1840) A and E 460 at p. 468.

Third, the importation of notions of fairness and non-discrimination.

In James Miller v. Whitworth Estates (1970) 1 All E.R. 796 Lord Reid had this to say:

> "I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise, one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later".

And, so it is here. If this contract were to be given a meaning in a case in which there is no element of discrimination or unfairness, it could well have a different meaning from the meaning given to it in another case where those factors were present and taken cognisance of in the construction process. To permit the later course would, of course, be to allow the introduction of subjective elements into the construction of the provisions of a statutory provision (we use that expression to encompass regulations and orders made pursuant to power conferred by statute). There is no rule of construction which permits such a course. Indeed the whole tenor of the rules of construction preclude it.

Finally, the learned Judge held that, as far as Dr. Basha was concerned an estoppel arose. The commission or some other agency of Government had paid Dr. Basha's fare to Australia, they had authorised a medical officer in their employ to accompany her and had paid his fares there and back. Whilst we have not seen anything in the record to warrant it, we have the concession from learned counsel for the appellants that the commission had approved the matter. The association gave a guarantee of payment of expenses up to $3000 to the Australian High Commission. It seems to us improbable that it would have so done had it not had a firm assurance or indication that payment would be ultimately authorised. Against that background the Judge held that the test profounded by Oliver, L.J. in Habib Bank v. Habib Bank A.G. Zurich (1981) 2 All E.R.

650 at p. 666 was met, the test being :

> "Whether in particular individual circumstances it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly. he had allowed or encouraged another to assume".

That finding throws up the question whether or not estoppels bind the Crown. In Robertson v. Ministry of Pensions (1949) 2 KB 227 the War Office had; in response to his inquiry, told the plaintiff that his case had been considered and that his disability had been accepted as attributable to military service. On faith of the assurance, he did not take steps he otherwise would have taken, to get an independent medical assessment. Later, the Ministry of Pensions, which should have dealt with the matter in the first place, decided that the injury was not so attributable and its decision was upheld by the Pensions Appeal.

In his appeal to the Court, he contended that the Crown was bound by the War Office letter. Denning J., as he then was, upheld the submission. He said:

> "Whenever government officers in their dealings with the subject take on themselves to assume authority in the matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume....."

The view, however, did not find acceptance by the House of Lords in Howell v. Falmouth Boat Construction Ltd. (1951) A.C. 837 and has not since been generally accepted. The preferred view is that estoppel cannot be permitted to, in effect, give a power to a public body beyond the powers it has been given by statute - see Ministry of Agriculture v. Mathews (1950) 1 K.B. 148.

In our view, there can be no estoppel against the appellants here. Having said that we feel constrained to observe that, instead of being an agent or an arm of the Crown, the employer had been a private citizen not cloistered by the ultra vires doctrine, he would have been in grave peril of having a finding made against him on the basis of an estoppel of the nature spoken of by the learned Judge. That consideration, in our view, merits a deal of consideration by the appellants or indeed higher authority.

With a deal of regret, we hold that the appeal must be allowed. It is allowed accordingly. The cross appeal is dismissed. There will be no order for costs on either appeal.

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VICE-PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL