



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2012 No: 295

IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

BETWEEN:-

SUSANN O SMITH

Appellant

-v-

MINISTER OF THE ENVIRONMENT

Respondent

JUDGMENT

(In Court)

Date of hearing: 23rd January 2013, 8th April 2013

Date of ruling: 7th May 2013

Dr Susann O Smith, the Appellant, in person

Mr Charles Richardson, Compass Law Chambers, for the Respondent

Introduction

1. By a notice of appeal dated 22nd August 2012, the Appellant, Dr Smith, appeals against the decision dated 25th July 2012 of a Board of Inquiry (“the Board”) appointed under the Human Rights Act 1981 (“the 1981 Act”) dismissing her complaint against the Respondent, the Minister of the Environment, that the Minister had discriminated against her on grounds of colour and national origin because she was a black Bermudian. There were two limbs to her complaint.
2. First, Dr Smith alleged that the refusal by the Minister to employ her in the capacity of Government Veterinary Officer (“GVO”) was because of her colour and national origin and constituted a breach of section 6(1)(a), (e) and (g) as read with section 2(2)(b) of the 1981 Act.
3. Secondly, Dr Smith alleged that the refusal of the Minister to grant a licence to her to practise veterinary science in Bermuda under the provisions of section 8(1) of the Agriculture Act 1930 (“the 1930 Act”) was because of her colour and national origin in breach of sections 5(1) and 6(1)(b) of the 1981 Act as read with section 2(2)(a)(i) of that Act.
4. In approaching this appeal I have been assisted by the full and detailed written reasons which the Board gave for its decision. I have also been assisted by the submissions of Dr Smith in person and Charles Richardson for the Minister.
5. In the course of this judgment I shall have occasion to criticise people who were not called as witnesses before the Board and did not have the opportunity to defend themselves. Had they been called to give evidence, this might have caused me to view their words and actions differently.

Statutory framework and approach on appeal

6. Section 2 of the 1981 Act is headed “*Interpretation*”. The relevant parts of the section provide:

“For the purposes of this Act a person shall be deemed to discriminate against another person—

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—

(i) of his race, place of origin, colour, or ethnic or national origins;

.....

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—

(i) which is such that the proportion of persons of the same race, place of origin, colour, ethnic or national origins, sex, marital status, disability, religion, beliefs or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the race, place of origin, colour, ethnic or national origins, sex, marital status, disability, religion, beliefs or political opinions of the person to whom it is applied; and

(iii) which operates to the detriment of that other person because he cannot comply with it.”

7. Section 5 of the 1981 Act is headed “*Provision of goods, facilities and services*”. The relevant parts of the section provide:

“(1) No person shall discriminate against any other person in any of the ways set out in section 2(2) in the supply of any goods, facilities or services, whether on payment or otherwise, where such person is seeking to obtain or use those goods, facilities or services, by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.

(2) The facilities and services referred to in subsection (1) include, but are not

limited to the following namely—

.....

facilities for education, instruction or training;

.....

the services of any business, profession or trade or local or other public authority.”

8. Section 6 of the 1981 Act is headed “*Employers not to discriminate*”. The relevant parts of the section provide:

“(1) Subject to subsection (6) [which was not engaged] no person shall discriminate against any person in any of the ways set out in section 2(2) by—

(a) refusing to refer or to recruit any person or class of persons (as defined in section 2) for employment;

(b) dismissing, demoting or refusing to employ or continue to employ any person;

.....

(e) establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in section 2) from employment or continued employment;

.....

or

(g) providing in respect of any employee any special term or condition of employment”.

9. When in this judgment I refer to discrimination, I mean unlawful discrimination within the meaning of the 1981 Act on grounds of race, place of origin, colour, or ethnic or national origins.

10. This appeal is brought under section 21 of the 1981 Act as amended. I dealt with the history of the amendments in an earlier ruling and need not repeat it. Section 21(3) of the 1981 Act provides:

“An appeal under this section may be made on questions of law or fact or both and the Court may affirm or reverse the decision of order of the board or the Court may substitute its own order for that of the board.”

11. The procedure on the appeal is governed by Order 55 of the Rules of the Supreme Court 1985, which applies to all appeals to the Supreme Court save as otherwise provided in the Order. Order 55, rule 3(1) provides that the appeal is by way of rehearing. In Caines v The Public Service Commission [2008] Bda LR 25 in the Supreme Court, Ground CJ summarised at para 12 the approach which the Court should take on such an appeal:

“There are also well established principles governing the approach of an appellate court. Such a court will not interfere with the exercise of a discretion unless it can be shown that the person to whom that discretion was entrusted erred in principle, and it will not lightly interfere with findings of fact by a decision maker who has had the benefit of hearing the witnesses and seeing them cross-examined.”

12. I accept this as an accurate statement of the relevant case law. However at the hearing before the Board the Minister did not call any witnesses. Moreover, Dr Smith’s case was heavily dependent on documents, and she produced 199 documents or bundles of documents. I am as well able to assess these documents as was the Board.
13. I bear in mind that the 1981 Act must be given such fair, large and liberal interpretation as will best ensure the attainment of its objects. See the judgment in the Supreme Court of Mr Justice Kawaley (as he then was) in Smith v Minister of Culture and Rehabilitation [2011] Bda LR 7 at paragraphs 22 and 23, approving paragraph 8 of the judgment of the Supreme Court of Canada, given by Mr Justice La Forest, in Robichaud v Canada [1987] 2 SCR 84.

Allegation that the refusal by the Minister to employ Dr Smith in the capacity of GVO was because of her colour and national origin

14. The post of GVO was advertised in 1993 and again in 1997. Dr Smith applied for the post on both occasions but was unsuccessful.

1993 application

15. The advertisement for the post in 1993 stated that the successful applicant must be a graduate veterinarian from an accredited university with a minimum of three years of appropriate postgraduate experience. Previous advertisements for the post in 1985 and 1987 were expressed in the same or similar terms.
16. Dr Smith graduated from Tuskegee University in the United States with a degree of Doctor of Veterinary Medicine in May 1991, having previously obtained a Bachelor of Science degree in Animal Science from the same University. The term “*veterinarian*” is ambiguous. It could mean someone who has a degree in veterinary medicine or alternatively it could mean someone who is licensed to practise veterinary medicine. I shall assume for the sake of argument that it means the former, and that when Dr Smith applied for the post she was therefore a graduate veterinarian from an accredited university. Dr Smith accepted before me that the requirement of a minimum of three years of appropriate postgraduate experience was reasonable. She did not have that experience in 1993 as she had only graduated two years previously. The Board was therefore justified in finding that the Minister’s decision not to offer her the post was not in breach of the 1981 Act.
17. However Dr Smith’s application was also unsuccessful on the ground that she had not passed the North American Veterinary Licensing Examination set by the National Board of Veterinary Examiners (“the Boards”),¹ and could therefore not be certified to practise veterinary science in Bermuda under the provisions of the 1930 Act. She had also taken and failed an examination set by the Royal College of Veterinary Surgeons (“RCVS”) for veterinarians trained outside the United Kingdom who wished to practise there.

¹ Not to be confused with “the Board”, ie the Board of Inquiry against the decision of which Dr Smith has appealed.

18. Dr Smith submits that there had never previously been a requirement that the GVO should be certified to practise veterinary science in Bermuda. She alleges that the reason why it was imposed in this case was as a further obstacle to prevent her from getting the job. I accept that the fact that she was not qualified for the post does not preclude the possibility that her application was nonetheless dealt with in a discriminatory way.
19. Dr Smith relies on a telephone interview which she had for the post in July 1993 with John Barnes, the Director of Agriculture. Mr Barnes' notes show that Dr Smith said that she was not currently registered anywhere but that she intended to sit the Board examination in December 1993.
20. Dr Smith alleges that it was only after Mr Barnes elicited this information from her that he and Dr Neil Burnie, who was the incumbent GVO, imposed the certification requirement. An alternative explanation, which I think more likely, is that Mr Barnes raised the issue because, so far as he was concerned, certification was a requirement of the post. I will consider later in this judgment whether such a requirement was discriminatory.
21. Dr Burnie is not Bermudian. Prior to the date of the telephone interview he had reapplied for the post. He was the only applicant apart from Dr Smith and his application was successful. Although he did not carry out the telephone interview with Dr Smith, he was involved in the selection process in that he made telephone calls to the Assistant Dean of Admissions at Tuskegee University and to the University of Edinburgh with respect to Dr Smith's application.
22. This is not an application for judicial review. If it had been, Dr Smith would have had a good arguable case that the selection process was procedurally unfair. Irrespective of whether the certification requirement was discriminatory, if certification was a requirement for the post then the advertisement should have said so in unambiguous terms. I do not accept that the need for certification was necessarily implicit in the term "*veterinarian*". Moreover, it would have been better if the Universities of

Tuskegee and Edinburgh had been contacted with respect to Dr Smith's application by someone other than a rival candidate.

23. Dr Smith submits that her application should be considered in context, and that the relevant context is what she characterises as a history of discrimination against black Bermudian applicants for the post of GVO. She relies in particular on a letter dated 21st May 1987 from Edward Manuel, who was then Director of Agriculture, to Dr Burnie, who was applying for the vacant post of GVO. Having expressed his support for Dr Burnie, the Director continued:

“On Tuesday, I received an application for the position from a Bermudian who only graduated last year. The past year he has worked in a Clinical Pathology Lab and really doesn't have any field experience which is essential to this position. Also his undergraduate experience is virtually with small animals thus not much exposure to large animals which is also important to this post. The fact that he is Bermudian could present a problem what with Government's policy to Bermudianize the service. I will continue to support you before the Public Service Commission.

I phoned this morning and spoke to Judy. I asked that you forward a resume as soon as possible and in particular put a lot of emphasis on the experience factor.”

24. Dr Smith's attorney – she was represented before the Board although she appeared in person before me – submitted to the Board that the letter was “*a crystal clear example of a prima facie case of direct discrimination at work by a non-Bermudian against a black Bermudian*”. The Board disagreed, stating that the letter was “*no more than a normal piece of correspondence from a Director who is in the process of filling a vacancy in his Department to the applicant to whom the Director wishes to offer the post*”. I find that the truth lies somewhere in between.
25. It was not discriminatory for Mr Manuel to prefer a non-Bermudian candidate whom he considered on reasonable grounds was appropriately qualified for the post over a Bermudian candidate whom he considered on reasonable grounds was not. Mr Manuel did not suggest that the fact that a candidate was Bermudian was a reason why he should not be appointed, but

rather expressed concern that a candidate who was not appropriately qualified might be appointed because he was Bermudian.

26. The letter was nonetheless highly improper. The Minister, and so Mr Manuel, owed both candidates a duty of confidence with respect to the information that they had supplied during the application process. Mr Manuel breached that duty by divulging information to one candidate that had been supplied by the rival candidate. Moreover, he did so for an improper purpose, namely to assist the candidacy of the one at the expense of the other. Mr Manuel was entitled to nominate a preferred candidate to the Public Service Commission. But fairness required that in his interactions with the candidates he remained neutral. His failure to do so seriously compromised the fairness of the selection procedure.
27. Dr Smith also relies on two affidavits from Dr Derek Norford. He is a black Bermudian who graduated from Tuskegee with a degree of Doctor of Veterinary Medicine and passed the Boards in 1987. He applied for the post of GVO in 1990 but his application was unsuccessful. He was interviewed by Mr Manuel in an airport lounge as Mr Manuel was on his way back to Bermuda from interviewing other candidates.
28. The interview lasted about 20 minutes. Dr Norford found it hurried. Mr Manuel said that Dr Norford was well educated but light on experience. At the end of the interview Dr Norford rightly concluded that he would not be shortlisted for the post.
29. To add insult to injury, the letter from the Public Service Commission advising Dr Norford that his application had been unsuccessful was addressed to “*Miss*” Norford rather than “*Dr*” (or even “*Mr*”) Norford.
30. The fact that the salutation in the rejection letter was incorrect was sloppy and discourteous. However I cannot properly conclude from Dr Norford’s evidence that he was treated in a discriminatory way. Indeed he does not claim that he was.

31. The Board was also referred to some letters written by Dr Burnie in the late summer and autumn of 1990 to a veterinarian practising in the United Kingdom and to the United States Department of Agriculture. This was with a view to arranging employment overseas for another black Bermudian veterinarian, Dr Jonathan Nisbett. Dr Smith submits that Dr Burnie was thereby seeking to impose expensive and unnecessary requirements on Dr Nisbett so as to hinder his prospects of becoming GVO. I prefer the Board's view that Dr Burnie was trying to help Dr Nisbett acquire the experience necessary for the GVO post. Dr Nisbett, who was tendered as a witness by the Minister before me but did not give evidence to the Board, did not disagree.
32. Dr Nisbett graduated from Tuskegee with a degree of Doctor of Veterinary Medicine in 1986 and passed the Boards soon after. He had applied for the post of GVO in 1987 – he was the Bermudian candidate mentioned by Mr Manuel – and 1990, but was unsuccessful due to lack of experience. For example, he lacked experience with large animals. Dr Nisbett said that when he applied for the post on those occasions he had not expected to be successful as he was still very green, meaning inexperienced. He said that he did not believe that he had been discriminated against. Dr Nisbett applied again in 1997 and was successful. He is the current GVO.
33. In summary, I agree with the Board that Dr Smith was not discriminated against with respect to the 1993 application. I am not satisfied that there was a history of discrimination against black Bermudians within the Department of Agriculture. However I find that the way in which the selection process was carried out in relation to Dr Smith in 1993 and Dr Nisbett in 1987 was procedurally unfair, although I am satisfied that in neither case did the procedural unfairness affect the result.

The supernumerary post

34. When Dr Smith's 1993 application was dismissed she was offered and accepted a supernumerary post as Trainee GVO. She submits that the purpose of the post was not to benefit her but to provide political cover for the reappointment of Dr Burnie to the post of GVO. She further submits that she was set up to fail in that her future appointment to the post of GVO was made conditional on her passing the Boards.
35. The creation of a supernumerary post was proposed by Mr Barnes in a memorandum to the Public Services Commission dated 4th August 2013.

“At the present time, Ms. Smith is not a practising veterinarian but she has indicated that she intends to sit the requisite board examination in the U.S.A. in December 1993. Assuming that she passes this examination, she could then be registered as a practising veterinarian. However, the description of the Government Veterinary Officer post requires a minimum of 3 years of appropriate postgraduate experience.

In view of the foregoing and having consideration for the importance of maintaining continuity in this post, it is respectfully recommended that a supernumerary post be created that will allow Ms. Smith to understudy the present veterinary officer and to gain the requisite experience through an integrated programme which can be developed by the Department of Agriculture, Fisheries and Parks in coordination with the Department of Personnel Services.

It is further recommended that the incumbent's contract be renewed for a further three year period as that time will permit the supernumerary to acquire the necessary experience and allow for a smooth transition at the end of the training period.”

36. Dr Smith was offered the post in a letter from the Department of Personnel Services dated 14th December 1993. The offer letter stated that the appointment would be effective when she passed the Boards in December 1993. Dr Smith failed the Boards on that occasion. A further offer letter followed dated 18th March 1994,² which made no mention of the Boards. A revised offer letter was issued on 29th March 1994, which Dr Smith

² The letter was in fact dated 18th March 1984, but this was obviously a typographical error.

accepted. The letter stated that the appointment would be for a maximum of three years and that the post was in practice a designate role for the post of GVO. The letter also stated:

“It is anticipated that at the end of your temporary appointment, you will wish to be considered for the appointment to the substantive post of Government Veterinary Officer. However, your appointment to the substantive post will not follow automatically, but will be in accordance with normal procedures of the Public Service Commission.

In particular, the Public Service Commission will be informed of:

- a. the results of the requisite Board examinations which you will be taking in April and your status with regard to being able to practice as a Veterinarian in Bermuda;*
- b. your progress and work performance throughout your appointment;*
- c. the extent of your training programme and exposure to relevant veterinary disciplines and situations.”*

37. I reject the allegation that the purpose of the supernumerary appointment was to provide political cover for the reappointment of Dr Burnie. There was no need for such cover as he was the only appropriately qualified candidate to apply for the post.
38. Moreover, I read the letter of appointment to mean that, provided that Dr Smith passed the Boards and that her progress was satisfactory, she would be the preferred candidate when the post next became vacant. Any unfairness in this arrangement operated not against Dr Smith but against other black Bermudians who had qualified as Doctors of Veterinary Medicine, such as Dr Norford and Dr Nisbett, who were not given the opportunity to compete for the supernumerary post as the post was not advertised.
39. The crux of Dr Smith’s complaint, however, was the requirement that she pass the Boards. I shall consider the merits of that complaint later in this judgment. This requirement created real difficulties for her. She had not only failed the Boards in December 1993, but had taken and failed them

three times previously. There is no evidence that anyone in the Department of Agriculture was aware of her previous failures when the supernumerary position was created. Dr Smith failed the Boards again when she retook them in December 1995. She protested against the requirement at a meeting with Mr Barnes and Dr Burnie in October 1993. But to no avail.

40. At first sight Dr Smith's difficulties with the Boards are surprising. The evidence before the Board was that 98 per cent of candidates pass on the first or second attempt. But Dr Smith explained that she was later diagnosed as having had (as at the date of diagnosis) a medical condition which affected her ability to concentrate and focus at the relevant times. Although there was no expert medical evidence before me, I accept that this condition may well go far to explain her failure to pass the Boards. But neither Dr Smith nor anyone in the Department of Agriculture was aware of any such condition when she applied for the post of GVO in 1993 and 1997.
41. Dr Smith's employment as a supernumerary commenced on 4th April 1994. She was confirmed in the post after a six month probationary period. Her probation report, prepared by Kevin Monkman, the Assistant Director of Agriculture, rated her performance as "*very good*". On 23rd November 1994 the dairy farmers of Bermuda signed a letter to the Minister expressing their appreciation for her "*excellent work*". Throughout her employment her progress, performance and training were satisfactory in all but one respect, namely her repeated failure to pass the Boards. That failure was to prove her undoing.
42. On 11th April 1997 the Public Service Commission wrote to inform Dr Smith that in light of that failure, and the need to fill the post of GVO, which had been vacant since 13th September 1996, her employment as a supernumerary would cease with effect from 25th April 1997.

1997 application

43. The advertisement for the post of GVO in 1997 stated that the post holder should be a qualified veterinarian and certified to practise veterinary science in Bermuda. In a letter dated 19th September 1996 Ms Judith Hall-Bean, the Director of Personnel Services, had written to advise Dr Smith that:

“The registration of Veterinarians in Bermuda has had, as a prerequisite, the licensing of an individual to practice veterinary medicine.

It is, therefore, incumbent upon you to pass the required licensure examinations prior to the Commission considering your application for the substantive post of Government Veterinary Officer.”

44. The Department received Dr Smith’s application for the post on 18th July 1997. By a letter dated 30th September 1997, the Public Service Commission advised her that her application had not been successful.
45. As mentioned earlier, the successful applicant was Dr Nisbett. He was offered the post in November 1997 and took up his duties in January 1998. Although he had not gained any further experience with large animals since his previous application, he had been in private practice for seven years gaining experience with small animals and exotics. Dr Nisbett was not certified in Bermuda prior to his appointment, but as he had passed the Boards he was eligible for certification, and was certified upon his appointment.
46. I have no doubt that Dr Nisbett was well qualified for the post. As Dr Nisbett and Dr Smith are both black Bermudians, it is not credible for Dr Smith to argue that his appointment discriminated against her on the ground of characteristics that were common to them both.
47. Dr Smith puts her case more persuasively when she argues that, by reason of what she submits was the discriminatory requirement that the GVO should be certified, she was deprived of the opportunity to compete for the post. As she had failed to pass the Boards, and was therefore not considered eligible

for registration in Bermuda, her application was bound to fail. Bearing in mind the fair, large and liberal interpretation to be given to the 1981 Act, I find that, put in this way, Dr Smith's complaint still falls within the rubric of the complaint before the Board that the Minister refused to employ her as GVO.

48. Dr Smith submits that the 1930 Act does not require the GVO to be certified. I agree. In fact the 1930 Act says very little about the post. It was therefore necessary for the Department of Agriculture to formulate the duties that the post involved and the criteria that the post holder must satisfy. These criteria would not fall foul of the 1981 Act provided that they did not discriminate against applicants for the post directly, contrary to section 2(2)(a) of the 1981 Act, or indirectly, on grounds which cannot be shown to be justifiable, contrary to section 2(2)(b) of the 1981 Act.
49. I am satisfied that the requirement that the GVO should be licensed to practise veterinary medicine did not discriminate directly against Dr Smith in that she was not by reason of the requirement treated less favourably because she was black and/or Bermudian. In other words, I am satisfied that the requirement was not imposed because Dr Smith was black and/or Bermudian in order to prevent her from applying successfully for the post. It was imposed because the Director of Agriculture and the Public Services Commission justifiably concluded that it was appropriate.
50. Their conclusion was supported by the written advice dated 27th March 1997 that Mr Barnes obtained from the Attorney General's Chambers.
51. Mr Barnes asked whether the GVO would be considered to be practising for a fee as certification by the Minister was a prerequisite for doing so. Philip Holder, a Senior Legal Advisor for the Attorney General, advised that strictly the GVO would not, but that as he was practising for one client, namely the Government, he should be qualified in a comparable manner.

52. Mr Barnes also asked whether the various references to the GVO in the 1930 Act and other statutory material indicated that he should be a veterinary practitioner. Mr Holder advised:

“6. Furthermore, I think it should be noted that it is function of your Minister under section 4(i) of the 1930 Act to exercise a general supervision and control over the practise of veterinary science in Bermuda. If the Minister is to undertake that function in a responsible manner then, I would assume, that he or she will require advice from a reliable and qualified practitioner.

7. ... [With respect to the GVO giving evidence for the Department in legal proceedings,] I would emphasise the point with regards to competency in giving evidence to a court of law. A judge will be very reluctant to rely on evidence from an unqualified person who would be the subject of serious challenge by a qualified practitioner appearing for the other side.

.....

iii) having regard to the statutory duties and responsibilities, I am of the opinion that the Legislature expected the office holders to be qualified so as to protect the public interest and support the Minister whose foremost duty is the promotion of the public interest.

9. A further consideration is the liability of Government if there is a negligent act by an unqualified officer. The Government would have great difficulty in defending a claim and also any insurance cover could well be invalidated or rendered ineffective by an unqualified person performing the statutory duties.”

53. I am also satisfied that the requirement did not discriminate indirectly against Dr Smith. Her difficulties in passing the Boards were peculiar to her and had nothing to do with the fact that she is black and Bermudian. There is no evidence from which I can properly conclude that such difficulties would be experienced by black Bermudians generally. They were not experienced by Dr Norford or Dr Nisbett, who have both passed the Boards.

54. There remains, however, the possibility that although the requirement of certification was not in itself discriminatory, the manner in which it was applied to Dr Smith was discriminatory. This I shall now consider.

Statutory provisions as to certification

55. At all material times, the procedure under the 1930 Act was that certification was issued by the Minister, acting on the advice of a Committee. Section 8 of the 1930 Act provided:

“(1) No person shall practice veterinary science for fee in these Islands without a certificate from the Minister entitling him to do so.

(2) All such applications shall be made to the Director [of Agriculture].”

56. Section 9 of the 1930 Act provided:

“(1) The Minister shall appoint a Committee consisting of the Director and two veterinary practitioners.

(2) Such Committee shall examine all applicants for certificates; and investigate their qualifications.”

57. These sections have since been repealed.

58. As will by now be apparent, in this judgment I have used the terms “*certification*”, “*licensing*” and “*registration*” interchangeably.

First application for certification

59. By a memorandum dated 27th February 1997, Dr Smith requested that the Minister convene a Committee to examine her as an applicant to become a certified veterinary practitioner. The Committee met on 20th March 1997. It comprised Mr Barnes as Director and two veterinary practitioners, Dr T James and Dr M Ware. Dr Smith was also in attendance, as was Mr Monkman as secretary to the meeting.

60. Dr James explained that, “*in the past, applicants for certification had been certified in another country before coming to Bermuda*”. The meeting ascertained from Dr Smith that she was not certified in another country, having failed to pass both her Boards and the RCVS exam. In the

circumstances, neither veterinary practitioner was presently prepared to support Dr Smith's application.

61. Both veterinarians indicated that they would be willing to help Dr Smith to get the help she needed to pass the Boards. Dr Ware stated that, if Dr Smith could be registered as a practitioner for the limited purpose of filling the GVO post, she would be comfortable with that. However she doubted whether that was an option. She also suggested that the need for the GVO to be certified as a practitioner in Bermuda could be done away with by changing the job description.
62. Dr James suggested that before reaching a final position they should meet with the other vets on the Island to discuss Dr Smith's application, and the meeting was adjourned for that purpose. I am satisfied that there was nothing improper in the two practitioners consulting their professional colleagues, provided that they did not surrender their decision making powers to them.
63. On 23rd March 1997 Dr James and Dr Ware wrote to Mr Barnes with the result of the consultation. The letter recorded that as Dr Smith did not meet the qualifications commonly accepted for registration, "*ie proof of certification adequate to allow practice in an overseas jurisdiction*", the veterinary members of the Committee did not feel able to make a decision without consulting other Bermudian members of the profession. Following that consultation, Dr James and Dr Ware had decided to agree to a temporary and partial registration for Dr Smith.
64. The registration would be partial, in that it would have allowed Dr Smith to perform only those duties required of her as a GVO. She would be required to re-apply for full registration in order to practise privately. The registration would be temporary in that Dr Smith would be required to reapply in three years for its renewal. She would be expected during that period to take steps to fulfil the requirements for full registration.

65. Mr Barnes sought advice from the Attorney General's Chambers as to whether the 1930 Act permitted the Minister to grant a partial or temporary certificate. Mr Holder, in his written advice dated 27th March 1997, advised that it did not. Under the statute, one was either a veterinary practitioner or one was not. I agree with this advice. What might otherwise have seemed like a reasonable compromise was thus frustrated by the provisions of the 1930 Act.
66. The upshot was that in a memorandum dated 3rd April 1997, Mr Barnes advised the Minister that the Committee was unable to support Dr Smith's application as she could not fulfil the prerequisite of practical proficiency "*as demonstrated by overseas registration*".
67. By a letter dated 11th April 1997, Mr Barnes advised Dr Smith that the Minister had considered her application for a certificate to practise veterinary science, but that, on the advice of a Committee called for that purpose, her application had been declined.
68. The reason for the requirement of licensing in an overseas jurisdiction was explained in the report of the Committee convened on 30th September 1998 to hear Dr Smith's second application for registration. As the "pool" of Bermudian born veterinarians was quite small, it would have been difficult to administer a local licensing exam without being accused of bias or favouritism. Thus the Committee looked to overseas jurisdictions to establish licensing standards.
69. Different jurisdictions establish licensing standards in different ways. In the United Kingdom, the Royal College of Veterinary Surgeons ("RCVS") has a statutory duty to set and monitor the standards of veterinary degrees and undertakes formal visitations to universities to ensure that standards are maintained. In the United States, quality control is maintained through professional examinations set by the National Board of Veterinary Examiners ("NBVE"). The requirement of overseas registration, although it

could therefore be met in different ways, was nevertheless common to all candidates. I am satisfied that it was not discriminatory.

70. There is one thing more. The Committee was not, or at least ought not to have been, a “rubber stamp”. It had a statutory duty to investigate the qualifications of all applicants for certificates. The Committee might have found, after carrying out an appropriate investigation, that the certification process in a particular jurisdiction was so seriously flawed that it ought not to be granted recognition. It might also have found that an applicant who satisfied the requirement of overseas registration ought not to be recognised for some other reason, eg because he met one of the criteria in section 10 of the 1930 Act for cancellation of a certificate. However, as the Committee had established a policy of recommending certification of applicants registered in overseas jurisdictions, there would have to be a good reason in any particular case for departing from that policy. Any such departure would invite careful scrutiny from the Court.
71. Be that as it may, I am satisfied that, as Dr Smith did not meet the requirement of overseas registration, the Minister did not discriminate against her by refusing her first application for certification.

Second application for certification

72. By a letter dated 19th May 1997, followed by a chasing letter dated 27th May 1997, Dr Smith requested that Mr Barnes organize a meeting of the Committee at his earliest convenience for the purpose of registering her in Bermuda as a veterinary practitioner. She enclosed a copy of her registration to practise veterinary medicine in another country. At a meeting of the Jamaican Veterinary Board (“JVB”) on 14th May 1997, based on an interview with Dr Smith, members of the Board had agreed to accept her application for registration to practise veterinary medicine in Jamaica.
73. The background to Dr Smith’s registration was as follows. In August 1993 a black Jamaican veterinarian, Dr Rosemary Murray, had successfully applied

for a locum position from 1st October 1993 to 14th October 1993 at the Hannover Veterinary Hospital (“the Hospital”) in Bermuda. The Hospital was run by Dr Ware and Dr Jan Cieters. They needed a locum because they were going away for a conference and had been unable to find locum cover in Bermuda. Dr Cieters knew Dr Murray from when they had been working together in Jamaica. Indeed they had been friends.

74. Dr Murray gave evidence to the Board. She said that in 1983 she had qualified as a Doctor of Veterinary Medicine at Tuskegee University, but did not take the Boards as she intended to return home to practise in Jamaica. On applying for a licence to practise veterinary medicine in Jamaica, she was interviewed by members of the Veterinary Board. They asked her some questions about large animal medicine, which was the area in which she wished to practise, and some personal questions. The purpose of the interview was to assess whether she was a fit and proper person, not whether she had the necessary medical expertise. That was taken as a given because she had graduated from an accredited medical school.
75. There was no written examination. Dr Murray said that when she was certified an examination was not generally required for graduates in Jamaica as at that time they all came from accredited schools in North America, Britain and Western Europe. I note that in a letter to Dr Smith dated 27th March 1997, the Registrar to the JVB stated that after the interview candidates might be subjected to oral or written examinations. However it is not clear to me whether that was the case when Dr Murray was certified. By the date of the hearing before the Board, all applicants for certification in Jamaica were required to take a written examination.
76. Dr Murray explained that before a veterinary school is approved, ie accredited, it is visited by members of the Jamaican Government and the JVB, who examine the curriculum. Not every veterinary school was approved, nor every veterinary programme. For example, no programme in Cuba was approved because, officially at least, the veterinary schools there were not permitted to teach small animal medicine.

77. Dr Murray gave unchallenged evidence to the Board that, when applying for the locum position, she had submitted a copy of her résumé to the Hospital. She was also required by the Department of Immigration to complete an Initial Questionnaire Form (“IQF”). I am satisfied, from both her evidence and a written application dated 2nd September 1993 from the Hospital to the Department of Immigration, that Dr Murray sent the IQF to the Hospital for onward transmission to the Department of Immigration. Both documents set out her qualifications. Neither states that she had passed the Boards. It was therefore clear from both documents that she had not. Dr Murray stated that Dr Cieters would have known that in any event from their conversations in Jamaica.
78. The Minister convened a Committee to examine Dr Murray as an applicant to become a certified veterinary practitioner. She was duly certified following a meeting that seemed to her to be a formality. She was not asked at the meeting whether she had passed the Boards. One of the practitioner members of the Committee was Dr Ware. I agree with the Board that Dr Ware should not have sat on the Committee as she had a financial interest in the certification of an applicant whom she intended to employ.
79. Dr Smith met Dr Murray while the latter was working at the Hospital. She knew that Dr Murray had not passed the Boards – indeed she mentioned this at her interview on 20th March 1997. When Dr Smith’s first application for certification proved unsuccessful, she contacted Dr Murray to ascertain the requirements for licensing in Jamaica. It was as a result of this enquiry that she applied to the JVB.
80. Meanwhile, on 5th May 1997 Dr James forwarded to Mr Barnes a letter dated 1st May 1997 which was signed by all the registered veterinarians practising on the Island. Dr Smith’s first application for certification had evidently prompted veterinary practitioners in Bermuda to reflect upon the requirements for certification. This letter bore the fruits of their reflection.

81. The letter of 1st May 1997 noted that the requirements for registration as a practising veterinary surgeon in Bermuda had recently been challenged. It stated that under the 1930 Act the makeup of the Committee appointed to examine the qualifications of applicants for registration was such that the responsibility for determining what qualifications were required lay with the existing veterinary practitioners on the Island as represented on the Committee. A more accurate statement would be that under the 1930 Act such responsibility lay with the Minister acting on the advice of the Committee. The letter continued:

“The hitherto accepted custom and practice – at least for the past 35 years – has been that any applicant must have acquired a standard of training and expertise that entitles them to practice in an overseas jurisdiction. Those jurisdictions finding acceptance in the past have been the USA, Canada and Europe (EU). It is the unanimous opinion of the currently registered Bermudian veterinarians, in practice on the Island, that this standard has served us well and should continue to apply.”

82. I accept that historically the requirement for certification in Bermuda was registration to practise in an overseas jurisdiction. This is the requirement that was applied to Dr Smith when she first applied for certification.

83. I am also satisfied that since at least 1981, and with the sole exception of Dr Murray, all applicants for local registration were certified to practise in North America or the United Kingdom prior to certification in Bermuda. I make this finding on the basis of a review of the relevant government files carried out by Dr Nisbett, as recorded in a letter to Dr Smith dated 8th July 2004. Dr Nisbett had been unable to find evidence of full licensure in North America or the United Kingdom of one other applicant, but based on his résumé I am satisfied that he was licensed to practise in the United States before being admitted to practise in Bermuda.

84. I am not, however, satisfied that there was ever a requirement that applicants be certified in Canada, the United States, or the European Union, as opposed to other jurisdictions. It was simply the case that, with the exception of Dr

Murray, those were the overseas jurisdictions in which applicants happened to be certified.

85. I acknowledge that, in a memorandum to the Director of Personnel Services dated 9th September 1996, Mr Barnes stated that:

“The registration of veterinarians in Bermuda has had, as a pre-requisite, the licensing of an individual to practise veterinary medicine in another recognised jurisdiction.”
[Emphasis added.]

86. However, if certification in one of the above named jurisdictions had been necessary, then I would have expected that requirement to have been communicated and applied to Dr Murray and, on her first application for certification, Dr Smith. But in neither case was any such requirement mentioned. The Committee accepted Dr Murray’s Jamaican certification without demur.

87. The letter of 1st May 1997 went on to state:

“Furthermore, persons training in jurisdictions other than the above listed, would be expected either to have passed board examinations in one of those countries or otherwise be in possession of such qualifications as would entitle them to registration in one of the above jurisdictions (it is accepted that applicants may not be able to practice in these countries for immigration reasons in spite of the professional qualifications.)”

88. This suggested requirement is new. That does not mean that it is unreasonable or discriminatory. But in order to avoid those pitfalls the requirement would have had to be restated as requiring merely that persons training in other jurisdictions had passed a certification process of an equivalent standard to the certification processes in North America or the European Union. This is because whether a person qualified in one jurisdiction is entitled to be registered in another may be governed by factors other than the quality of the certification process through which they have passed.

89. For example, Dr Nisbett gave evidence before me that in 1997 there was no reciprocity with respect to certification between the United Kingdom and the

various States within the United States, even though it was at that time (and still is) accepted in Bermuda that the certification processes in these jurisdictions were of an equivalent standard.

90. The letter concluded by asking that the Department keep it on file, both for future reference and the information of aspiring candidates.
91. By a letter dated 7th May 1997, Mr Monkman as Acting Director acknowledged receipt of Dr James' letter. He stated that the Department would review the recommendation in the letter and would in all probability need to meet with representatives from the veterinary community to discuss the matter further. No doubt that is because the requirements for registration were a matter for the Committee, not the veterinary profession alone. Until such time as the Committee adopted the new requirements, what I am satisfied was the existing requirement, ie overseas registration, remained in force.
92. The signatories to the letter of 1st May 1997 included Dr Ware and Dr Andrew Madeiros. They were the veterinary practitioners on the Committee that had recommended the registration of Dr Murray. On 2nd May 1997 they wrote to the Minister and Mr Barnes applying to have her registration rescinded. The letter stated:

“It was brought to our attention for the first time on 20 March 1997, that Rosemary Murray had not in fact passed her US State Board Exams for the purposes of registration as a practitioner at the time of her application for the job of Locum Veterinarian in Bermuda. It must be stressed that, this fact was not disclosed to us by the applicant – neither to her employers, nor to the members of the Examining Committee. We do not wish to suggest that this information was intentionally withheld, and indeed, on the basis of her 10 year history of employment in various practices, including the SPCA in Jamaica, no one ever thought to question her eligibility for registration.

It should however be noted, that, had we been aware of her particular circumstances, it is very unlikely that we should have recommended her for local registration. This was a genuine oversight, and we would appreciate your understanding and co-operation in this matter.”

93. Section 10 of the 1930 Act deals with cancellation of certificates. It provides:

“If any veterinary practitioner registered under this Act is convicted of any indictable offence, or after due inquiry is considered by the Committee to have been guilty of infamous conduct in any professional respect or to have become by reason of his mental condition or of his addiction to alcohol or drugs unfit to continue in professional practice, then the Committee may, if they think fit, in the case of conviction, and shall, in the case of infamous conduct or professional unfitness, inform the Minister thereof, stating the particulars of the case in full; and the Minister may thereupon, if he thinks fit, cancel the certificate of the veterinary practitioner:

Provided that such certificate may be re-issued at the request of the Committee.”

94. Dr Ware and Dr Madeiros had no standing to make the application as they were writing in their private capacity and not on behalf of the Committee, which had not met to consider the issue. It is surprising that they did not see fit to copy the letter to Dr Murray. Moreover, section 10 did not cover their allegations, even if well founded. But they were not well founded.
95. As noted above, Dr Murray stated her qualifications in her résumé and her IQF. They did not include the Boards. From this, Dr Ware knew or ought to have known that Dr Murray had not passed them. It was therefore incorrect to state that Dr Murray did not disclose this information. As Dr Murray was not practising in the United States, neither her employer nor the Committee would have had any reason to assume that she had passed the Boards. If they had considered the matter relevant, no doubt they would have asked her.
96. I am therefore satisfied that the Committee would have recommended Dr Murray for local registration irrespective of whether its members were aware of her particular circumstances, as Dr Ware at least may well have been. I do not accept that Dr Murray’s registration was an oversight.
97. Having obtained advice from the Attorney General’s Chambers, Mr Monkman rightly took the application to de-register Dr Murray no further.

98. On 6th June 1997, Dr Madeiros wrote to Dr Smith. He noted that a meeting had recently been held of all the veterinarians currently registered to practise on the Island. It is reasonable to infer that that is when the letter of 1st May 1997 was signed. Dr Madeiros noted that much of the meeting was spent discussing Dr Smith and her situation.
99. By now Dr Smith had made her second application for certification. The meeting was aware of this, as Dr Madeiros mentioned that the veterinarians were being asked to make an evaluation of her eligibility for licensing. As I have already noted, licensing was in fact a matter for the Committee. Admittedly the Committee did include two practitioner members, and they were free to consult their professional colleagues. However Dr Madeiros had no standing, whether writing on his own behalf or on behalf of veterinary practitioners generally, to make licensing policy.
100. Thus Dr Madeiros spoke out of turn when, in the letter, he stated that in order to be registered it was necessary for Dr Smith to pass the Boards. As noted above, the Committee had not yet adopted the recommendations in the letter of 1st May 1997. As matters stood, the requirement for registration in Bermuda was simply registration overseas.
101. Dr Madeiros went beyond the requirements set out in the letter of 1st May 1997 when he wrote:
- “The local licensing committee looks at the requirements of licensing in the candidate’s country of graduation. As you have not been successful in completing these requirements we cannot recommend you for local licensing.”*
102. It had never been a requirement that the applicant was licensed in her country of graduation. For example, the Committee (which included Dr Madeiros) stated in the report of its meeting convened on 30th September 1998 to examine Dr Smith that she would have satisfied the local licensing requirements if she had passed the RCVS exam in the United Kingdom. This is notwithstanding that her country of graduation was the United States.

103. The letter concluded with an offer on behalf of the local practitioners to offer Dr Smith their assistance should she seek it. This was the second time that such an offer was made. On neither occasion was it taken up.
104. On 11th June 1997, Mr Barnes wrote to Dr Smith acknowledging receipt of her application. He informed her that the newly formed Veterinary Association was of the view that the qualifications which she had presented were inadequate, and summarised the contents of the veterinarians' letter of 1st May 1997. I have seen no evidence to suggest that any investigation was carried out into the adequacy of the certification process in Jamaica before that letter was written.
105. The Minister did not convene a meeting of the Committee to consider Dr Smith's application until 30th September 1998, and then only under threat of an application for judicial review. By that time she had lost the opportunity to compete for the post because the new GVO had already been appointed.
106. If Dr Smith had challenged the Minister's delay in convening the Committee by way of judicial review, she would have had a good arguable case that by reason of the delay the Minister was abdicating his statutory duty.
107. The Committee's report of the meeting was dated 10th December 1998. It was their unanimous recommendation that Dr Smith was not eligible for receipt of a veterinary licence in Bermuda. They were unimpressed by her Jamaican licence:
- "The licensing Committee believes that Dr Smith is using her Jamaican licence as a means to by-pass normal licencing procedures. We feel that Dr Smith has always known that she needed her US Boards to be successfully licensed locally. Why else would she have taken them so many times?"*
108. This is unfair. Dr Smith took the Boards so many times because until recently she had never considered becoming licensed in any jurisdiction other than the United States. However at her previous interview the Board had told her that the requirement was licensing in a jurisdiction overseas.

She was aware that Dr Murray's Jamaican licence had proved acceptable to the Board and sought to pursue registration through the same route.

109. Therefore Dr Smith was not seeking to by-pass "*normal*" licencing procedures but rather to meet the requirement of licencing in a jurisdiction overseas that was in force at the date of her second application. The Committee should not have applied a new requirement, namely licensing in North America or the European Union, with retrospective effect.

110. The Committee addressed the grant of a Bermudian licence to Dr Murray, stating that the circumstances were somewhat different:

"Dr Murray was sponsored by a local practice to which she was known. She had ten years' experience as a practitioner in Jamaica and was being employed as a locum with diminished responsibilities for a period of 2 weeks. Had her licensing history been properly disclosed, she would not have been licensed under the general conditions required locally."

111. Dr Murray's experience would have been relevant if she was licensed on the basis that her experience justified the licensing authority in making an exception in her case to a general rule that a Jamaican licence was not adequate for licensing in Bermuda. But there is no evidence that the Committee did recommend Dr Murray's registration in Bermuda on that basis.

112. It was irrelevant that Dr Murray was employed for a short time with, allegedly, diminished responsibilities as there is no provision in Bermuda for partial or temporary registration. Moreover, it was factually inaccurate to assert that Dr Murray had "*diminished responsibilities*". Dr Murray's unchallenged evidence to the Board was that if she had a difficult case she had to handle it herself. I have already found that her licensing history had been properly disclosed but that she was licensed in Bermuda nonetheless.

113. The Committee also considered the adequacy of the certification process in Jamaica:

“Our investigation of requirements for Jamaican licensing has revealed that little effort is made to assess the candidate’s abilities. The only requirement is that the candidate has graduated from a veterinary programme. No requirement of licensing in the country of study is necessary. No written or standard testing is carried out at the ‘informal and casual’ interview. ... The Jamaican licensing board made no attempt to contact Dr Smith’s previous employer to obtain any information relevant to her licensing. This concerns the local Committee as a veterinarian’s ‘standing’ is important in issuing a licence”.

114. The Board made similar observations, stating:

“With due respect to the Jamaican authorities of that time they entirely omitted the quality control provided by the North American Boards or the UK supervision.”

115. Both sets of remarks overstate the case. As noted earlier in this judgment, the requirement in Jamaica was that the candidate had graduated from an accredited veterinary programme. The accreditation process involved a visitation to the institution concerned. I have no evidence as to how that visitation differed from the visitations conducted by the RCVS in the United Kingdom. Neither did the Board and neither did the Committee.

116. Put in more concrete terms, there is no evidence from which I could properly conclude that Dr Smith was any less well qualified to become a veterinarian after studying for eight years to obtain a Bachelor of Science degree in Animal Science and a Doctorate in Veterinary Medicine at a well-respected university in the United States than she would have been if she had studied for five years to obtain the degree of Bachelor of Veterinary Medicine in the United Kingdom, a degree which would automatically have qualified her for registration in the latter jurisdiction.

117. As to written or standard testing, I have noted earlier in this judgment that, in Jamaica, after the interview candidates might be subjected to oral or written examinations.

118. It is a fair point that if the JVB was assessing whether Dr Smith was a fit and proper person to be a veterinarian, which is what I take “*standing*” to mean,

they might reasonably have been expected to contact the Department, which was until recently her employer. On the other hand, there was no evidence before the Board that the RCVS or the NBVE would have done so had Dr Smith been seeking overseas registration by either of those routes. Such contact would have had limited relevance to an assessment of Dr Smith's technical competence – the issue which professedly troubled the Committee – as she had not been employed as a veterinarian.

119. In the circumstances, I am not satisfied that the Committee carried out sufficient investigation into the licensing requirements in Jamaica properly to conclude, had they addressed their minds to the question, that the registration process in Jamaica was so flawed that it failed to comply with the requirement of registration in an overseas jurisdiction. Moreover, neither they nor the Board were in a position to make an informed comparison between the licensing requirements in Jamaica and the licensing requirements in North America and the European Union. There had of course been no suggestion in the case of Dr Murray that registration in Jamaica was inadequate to justify registration in Bermuda.
120. On the other hand, the Committee did identify reasonable grounds for concern about Dr Smith's application. In particular, that she had little practical experience of veterinary work since attending veterinary school seven years previously. Moreover, she had repeatedly failed to pass the Boards, and failed to pass the RCVS exam. I do not agree with the Board that in the circumstances it would have been negligent to recommend her certification in Bermuda. But these were matters that the Committee could properly have taken into account, provided that they did so on the correct basis. Namely, given that Dr Smith had met the requirement of overseas registration, whether there was nonetheless good reason why they should not recommend her certification.
121. The Committee instead proceeded on the erroneous basis that Dr Smith had not met the requirement of registration in North America or the European Union. They should have proceeded on the basis that she had met the

requirement of registration overseas. The Committee went on to consider whether in all the circumstances they could nevertheless recommend her certification, but concluded that they could not.

122. Moreover, when considering the certification of Dr Murray in Bermuda, and the certification process in Jamaica, the Committee's reasoning was based in part on information that was inadequate, inaccurate, or irrelevant.
123. The chain of reasoning which led the Committee to recommend that Dr Smith should not be certified was therefore deeply flawed.
124. Nevertheless, I am not satisfied that the Committee's conclusion was not arrived at in good faith. That is to say, I am not satisfied that it should not be taken at face value, or that it was motivated consciously or unconsciously by Dr Smith's colour or national origins.

“The Committee believes that by accepting Dr Smith for licensing we will be opening the door for graduates who are below the level required to maintain the public's confidence in the profession. For this reason we cannot, with clear conscience, recommend Dr Smith for licensing at this time.”

125. Under cover of a memorandum dated 14th December 1998, Mr Barnes forwarded the Committee's report to the Minister. The Minister did not give an immediate decision. Over the next few years, Dr Smith spoke with successive Ministers in person and by telephone about her application. By a letter dated 18th March 2004 from the Ministry she was informed that the Minister of the day, after reviewing the Committee's report, had refused her application. The time elapsing from the date of the application to the date of the letter communicating the Minister's decision to her was six years and ten months.

Decision on certification

1981 Act, section 2(2)(a)(i)

126. I am satisfied that the Minister treated Dr Smith less favourably than he treated or would have treated other applicants generally by:
- (1) Failing to convene a Committee to consider Dr Smith's second application for certification until after a new GVO had been appointed; and
 - (2) Subsequently refusing the application.
127. Dr Smith had complied with the requirement for certification that was in force at the date of her application, namely overseas registration. The jurisdiction in which she was registered, Jamaica, had previously proved acceptable to the Committee.
128. The Minister has not shown a good reason, whether relating to the licensing process in Jamaica or to Dr Smith personally, which justified him in failing to convene the Committee or refusing the application.
129. The Minister failed to convene the Committee because Dr Smith was not certified in North America or the European Union and he was advised that the Veterinarian's Association was of the view that such certification was necessary.
130. The Minister, acting on the Committee's recommendation, refused Dr Smith's application for certification for the same reason, and because the Committee was in all the circumstances not satisfied as to Dr Smith's technical competence.
131. The Minister and the Committee should have applied the requirement of overseas registration, not registration in North America or the European Union. Moreover, I have expressed concern at the Committee's flawed reasoning as to Dr Smith's technical competence.

132. However, I bear in mind that Dr Murray, whose certification in Jamaica had been accepted by the Committee, was, like Dr Smith, black. All previous applicants for registration other than Dr Murray and Dr Smith, at least since 1981, had been registered in North America or the European Union. Some of these applicants were, like Dr Smith, Bermudian. One, Dr Nisbett, was both black and Bermudian.
133. In the circumstances, I am not satisfied that the reason why Dr Smith was treated less favourably was because of her colour or national origin. The requirement of registration in North America or the European Union was adopted because the Minister, acting on the recommendation of the Committee, believed that it was in the public interest, and not in order to frustrate Dr Smith's application.

1981 Act, section 2(b)

134. I am satisfied that the Committee applied the requirement of certification in North America or the European Union, and that it would have done so to other persons generally. This was a new requirement which was not in force at the date of Dr Smith's first or second applications or the date of Dr Murray's application.
135. I have been referred to no evidence from which I can properly conclude that the proportion of persons of the same colour or national origins as Dr Smith, namely black Bermudians, who could comply with that requirement is considerably smaller than the proportion of persons not of that description who could do so. Dr Smith's difficulties in meeting that requirement were peculiar to her.

Conclusion

136. I am therefore satisfied that, as Dr Smith did not meet the new requirement of registration in North America or the European Union, the Minister did not discriminate against her by refusing her second application for certification.
137. However, had Dr Smith sought judicial review of the Minister's decision to refuse her second application for certification, she would on account of the Committee's flawed approach have had a good arguable case that the decision should have been quashed. If her application for judicial review had been successful, the Court might either have directed that the Minister issue a certificate or alternatively have remitted her application for certification to a differently constituted Committee for reconsideration.

Allegation that the refusal of the Minister to grant a licence to Dr Smith to practise veterinary science in Bermuda was because of her colour and national origin

138. I have already dealt with this allegation in the context of the complaint under section 6 of the 1981 Act that the Minister refused to employ Dr Smith as GVO. However I should like to record my agreement with the Board that the activity of a licensing authority in considering and either granting or denying a particular licence, consent or approval is not a service within the meaning of the 1981 Act. I therefore agree that as a matter of law the Minister cannot have discriminated against Dr Smith under section 5(1) of the 1981 Act.

Conclusion

139. The Minister did not refuse to employ Dr Smith in the capacity of GVO because of her colour and/or national origin.

140. The refusal of the Minister to grant a licence to Dr Smith to practise veterinary science in Bermuda was not because of her colour and/or national origin.
141. Had she applied for judicial review, Dr Smith would have had a good arguable case:
- (1) For a declaration that the way in which her first application for the post of GVO was treated was procedurally unfair, although the procedural unfairness did not affect the outcome of her application.
 - (2) For an order compelling the Minister to convene the Committee to consider her second application for certification (if the application was brought before the Minister convened the Committee).
 - (3) For an order that the Minister's refusal to grant a licence on her second application for certification should be quashed due to the flawed reasoning by the Committee in the report on which the Minister's decision was based.
142. I shall hear the parties as to costs.

Dated this 7th day of May, 2013

Hellman J

Afterword

Due to changes in the local licensing requirements introduced by the Veterinary Practitioners Act 2008, which came into force on 9th July 2010, Dr Smith has been registered to practise in Bermuda since 2010 as she is eligible to hold a licence in a member country of the Caribbean Economic Community (“CARICOM”). Contrary to the fears of the Veterinary Association, the sky has not fallen. I have no doubt from the evidence before me that, had Dr Smith been appointed as GVO, she would have been successful in the post. The Court wishes her well.