

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

Judicial Review Action No. 4 of 17

- BETWEEN** : **MAHENDRA SINGH** of Sarava, Ba, Nadi, Fiji Islands.  
**Applicant**
- AND** : **THE COMMISSIONER OF POLICE** Police Headquarters,  
Laulala Beach, Nasinu.  
**First Respondent**
- AND** : **ATTORNEY GENERAL OF FIJI** Suvavou House, Suva.  
**Second Respondent**

## **R U L I N G**

### **INTRODUCTION**

1. Mahendra Singh filed an Originating Summons dated 23 August 2017 seeking leave for judicial review of a decision of the Commissioner of Police.
2. The said decision was purportedly made vide a letter dated 18 May 2017.
3. Singh also seeks an Order that the execution of the Commissioner's decision be stayed pending determination of this application.

### **AFFIDAVIT IN SUPPORT**

4. Singh deposes as follows in his affidavit in support:

I MAHENDRA SINGH of Sarava, Ba unemployed make oath and say as follows:

[1] I am the applicant named herein. I depose this affidavit to the best of my knowledge, information and ability. This affidavit is to verify the facts as contained in my statement in the application for leave to the court for judicial review.

[2] That I joined the Fiji Police Force (the Force) in 1997. I served at the various departments in the Force and I was an authorized police driver for the last 18 years. Prior to my termination I served with the Western Division Highway Unit.

- [3] That I was doing 12 hours shift (High Way Operation ) commencing from 1600hrs on 13.02.17 until the next day at 0400hrs 14.02.17
- [4] In the early hours of such date whilst I was driving towards Tavarau Ba from Lautoka there was a heavy rain fall and water overflowing across the road. I was unaware of the strength of the current flowing across that portion of the road that pushed the police vehicle I was driving on the side causing it to overturn.
- [5] I was defaulted and or served with defaulter sheet serial no. 07/03/17 charged for Damaging by Neglect pursuant to Section 60 Regulation 12(16) of the Police Regulation Cap 86. I annex herein a copy of the defaulter sheet marked as annexure MS 1.
- [6] That I was called and appeared before ASP Jone alone in his office at Lautoka Headquarters. The charge was not read me.
- [7] I was told by ASP Jone in his office that if I plead guilty to the charge he would recommend that I paid for the damage to the vehicle and deduction of \$25.00 fortnightly from my salary. I then admitted to the charge to him.
- [8] That I was never asked by ASP Jone to mitigate and or the sentence/decision of the tribunal, if any, was read or told to me.
- [9] I was surprised to receive a show cause letter dated 06.04.17 from the Director Human Resources. I replied and submitted my show cause letter dated 4th May 2017. A copy of my show cause is enclosed marked as annexure MS 2.
- [10] By termination letter dated 18th May 2017 and I received on 19th May 2017, my employment with the Force ceased with effective from 17.05.17. I enclose herewith a copy of the termination letter marked as annexure MS 3.
- [11] I was informed by my solicitor and verily believed that the purported tribunal and the Commissioner of Police fails to comply with the specific provisions provided for in the Police Act specifically section 14 and 32 of the Police Act and Regulations 13 (vii) & (viii) of the Police Regulations. The Commissioner also fails to comply with the Constitution provision of Article 129 (7).
- [12] I verily believed that the Commissioner took into consideration irrelevant matters and failed to consider my show cause. I was not afforded natural justices when I was induced by ASP Jone to plead guilty to the charge without convening a proper tribunal.
- [13] That the decision to terminate my employment is harsh and excessive. That I was employed with the Force for the last 20 years and I have no previous conviction or being previously defaulted.
- [14] That such termination has affected my livelihood as I am the sole breadwinner in the family. I am paying for my child's university fees and accommodation in Suva. I also looked after my elderly parents and I pay for monthly hire purchasers with Courts (Fiji) limited.
- [15] I verily believe I was treated unfairly, unreasonably with irrelevant matters and without natural justice inclusive of failing to give adequate advice to the Commissioner to terminate my employment.
- [16] I therefore urge the Court to grant leave to make this application for judicial review.

## **AFFIDAVIT IN OPPOSITION**

5. An affidavit in opposition sworn by Sivoki Tuwaqa on 25 October 2017 was filed. Mr. Tuwaqa deposes as follows:

1. THAT I hold the position of Director Legal Services, at the Fiji Police Headquarters in Nasinu, Suva in the Republic of Fiji.
2. THAT by virtue of my aforementioned position, I am familiar with the facts herein deposed to which were derived by me in the course of my employment and a perusal of information from the relevant file relating to the matter therein.
3. THAT I depose to the facts herein within my own knowledge and that acquired by me in the course of my duties, save and except where stated to be on information and belief, and where so stated, I verily believe the same to be true.
4. THAT I crave leave of the Court to refer to the Affidavit (hereinafter referred to as "the Affidavit" unless otherwise stated) of Mahendra Singh, the Applicant, sworn on 15 October 2017.
5. THAT paragraphs 1 and 2 of the Applicant's affidavit is noted and requires no response.
6. THAT in reply to paragraph 3 of the Applicant's Affidavit, I agree with the first part of the Affidavit but refute the second limb of said Affidavit.
7. THAT in reply to paragraph 4 of the Applicant's Affidavit, I state that the Applicant admitted driving the vehicle across the road where the water was crossing as articulated in his caution interview at question 13. Annexed hereto and marked with the letter "A" is a copy of the Applicant's caution interview.
8. THAT paragraph 5 of the Applicant's Affidavit is noted and requires no response.
9. THAT paragraph 6 of the Applicant's Affidavit is denied and I put the Applicant to strict proof of his claim therein.
10. THAT paragraph 7 of the Applicant's Affidavit is denied and I put the Applicant to strict proof of his claim therein.
11. THAT I admit paragraph 8 of the Applicant's Affidavit.
12. THAT I admit paragraph 9 of the Applicant's Affidavit.
13. THAT I admit paragraph 10 of the Applicant's Affidavit.
14. THAT the Respondents disagree with paragraph 11 of the Applicant's Affidavit and state that the First Respondent terminated the Applicant on the grounds stated in his termination letter. The First Respondent acted within the powers vested in him under section 32 (1) A (vii) and Section 37 of the Police Act. Annexed herewith and marked with the letter "B" is a copy of said termination letter.
15. THAT the Respondents deny paragraphs 12, 13, 14 and 15 of the Applicant's Affidavit and put the Applicant to strict proof his claims therein.
16. THAT in lieu of the above, the Respondents pray before this honorable court to deny leave for judicial review and dismiss the Applicant's action with costs to the Respondents.

6. Written submissions were filed on 05 December 2017 and on 08 December 2017 respectively by the applicant and the respondent.

### **THE LAW**

7. The test for granting leave to issue judicial review is articulated in **Nivis Motors Machinery Company Ltd. v. Minister for Lands and Mineral Resources** (Civil Appeal No. ABU0017 of 1998, judgment 13 November 1998) following **Fiji Airline Pilots v. Permanent Secretary for Labour and Industrial Relations** (Civil Appeal No. ABU0059U of 1997, judgment 27 February 1998) in these words:

“...The basic principle is that the Judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application - per Lord Diplock in Inland Revenue Commissioners v. National Federation of Self Employed, [1982] AC 617 at 644. This principle was applied by this Court in National Farmers’ Union v. Sugar Industry Tribunal and Others (CA 8/1990; 7 June 1990).

8. All that this court need establish is that an applicant can establish ‘an arguable case’.
9. In **State v Connors**, ex parte Shah [2008] FJHC 64, the court stated:

“...as was said in Sitiveni Ligamamada Rabuka and Commission of Inquiry into the Deed of Settlement Dated 17 September 19923; In re Anthony Stephens v. Attorney-General of Fiji (JR No. 26 of 1993), 4 May 1995):

“This Court is not concerned with a review of the decision which the Commission reached at the Inquiry but simply with a review of the manner or process in which the decision was reached. It is the decision-making process employed by the Commission of Inquiry in reaching its decision which is the primary concern of this Court.”

## COMMENTS

10. There is not much in dispute about the basic facts. Mahendra Singh was terminated from his employment as a Police Officer *vide* a letter by the Commissioner of Police dated 18 May 2017.
11. Immediately prior to his termination, Singh had served in the Fiji Police Force for some twenty years or so with a clean disciplinary record.
12. At some point during the early hours of 14 February 2017, Singh was driving a Police vehicle in the course of duties along a stretch of the Kings Road at Tavarau in Ba when the said vehicle was swept off the road by strong water current caused by flooding as a result of heavy rain. The said vehicle actually overturned as a result. Singh was on a 12-hour shift on (High Way Operation) that had started at 4.00 p.m. the previous day.
13. Singh deposes in his affidavit that he was **“unaware of the strength of the current flowing across that portion of the road”**.
14. Following that incident, Singh was served with a “defaulter sheet” on 07 March 2017 and charged for Damaging by Neglect pursuant to Section 60 Regulation 12(16) of the Police Regulation Cap 86.
15. According to Singh:
  - [6] That I was called and appeared before ASP Jone alone in his office at Lautoka Headquarters. The charge was not read me.
  - [7] I was told by ASP Jone in his office that if I plead guilty to the charge he would recommend that I paid for the damage to the vehicle and deduction of \$25.00 fortnightly from my salary. I then admitted to the charge to him.
  - [8] That I was never asked by ASP Jone to mitigate and or the sentence/decision of the tribunal, if any, was read or told to me.
16. Singh said that he then received a show cause letter dated 06 April 2017 by the Director Human Resources to which he replied on 04 May 2017.

17. However, on 19 May 2017, Singh would receive a letter of termination dated 18 May 2017.
18. According to Singh, “the purported tribunal and the Commissioner of Police failed to comply with sections 14 and 32 of the Police Act and Regulations 13 (vii) & (viii) of the Police Regulations and Article 129 (7) of the 2013 Constitution.
19. Singh says he was induced by ASP Jone to plead guilty to the charge without convening a proper tribunal and that the decision to terminate his employment affected his livelihood and was both harsh and excessive. He says he was treated unfairly, unreasonably with irrelevant matters and without natural justice inclusive of failing to give adequate advice to the Commissioner to terminate my employment.
20. In his submissions, Mr. Maopa highlights that some basic cardinal principles for a fair disciplinary enquiry were lacking in the process by which Singh was terminated. He says there was no proper disciplinary enquiry held for Singh’s case. Even if the meeting with ASP Jone was to be regarded as a tribunal enquiry, Singh was not given reasonable notice of the time and place of that meeting.
21. Singh deposes also that he was never properly informed of the nature of the charge or charges against him, let alone, was he ever given a chance to seek proper assistance or representation at the so-called “session” with Inspector Jone.
22. According to Singh, because of the way ASP Jone manipulated him, there was no proper hearing which meant that the evidence was not properly introduced or refuted to prove or disprove the alleged misconduct by Singh.

23. Mr. Mainavolau pointed out that Singh's show cause letter was in fact a mitigation on the part of Singh. He also goes to great lengths to submit that the various provisions of the Police Act which the Applicant relies on had been amended over the years.

1. Reference was made at paragraph 34 of the Applicant's oral submissions to section 32 of the Police Act 1965 (hereinafter referred to as "Act").
2. The Applicant contends that the First Respondent's power under section 32 of the Act is subject to the concurrence of the Police Service Commission. The Applicant also contends his oral submissions that the decision to terminate made by the First Respondent was not in accordance with section 14(1) (c) of the Act which requires concurrence with the Police Service Commission. What the Applicant fails to realise is that the Act has been amended over the years.
3. The Police Service Commission which was established under the Constitution of 1990 continued in existence under the Constitution of 1997 but under the name of the Disciplined Services Commission. As a consequence, one such amendment to the Act came by way of the Police (Amendment) Act 1998. Sections 7 and 8 of the Police (Amendment) Act 1998 removed all references to the Police Service and substituted the same with "Disciplined Services".
4. In addition, section 34 and the Schedule of the Public Service Act 1999 also made amendments to the Act by deleting all references to the Police Service Commission and substituting the same with "Disciplined Services Commission".
5. However, the Disciplined Services Commission no longer continued under the 2013 Constitution of the Republic of Fiji (hereinafter referred to as "Constitution"). In other words, there is no Police Service Commission or Disciplined Service Commission.
6. In fact, we refer the honourable court to section 163 of the Revised Edition of the Laws (Consequential Amendments) 2016 which consequentially removed references to the Disciplined Services Commission in the Act and where it appeared in other laws.
7. In addition, section 163(h) of the Revised Edition of the Laws (Consequential Amendments) 2016 consequentially amended the Act by deleting section 32(1)(A) and substituting the following:

*"A. The Commissioner, who shall have power to impose any one or more of the following punishments in the case of any police officer-*

  - (a) admonishment;*
  - (b) reprimand;*
  - (c) sever reprimand;*
  - (d) confinement to quarters for any period not exceeding 14 days with or without extra guards, fatigues or other duty;*
  - (e) a fine not exceeding 7 days' pay;*
  - (f) reduction in rank;*
  - (g) dismissal."*
8. As such, the First Respondent is no longer required to have the concurrence of the Police Service Commission. The discretion to terminate a person's employment from

the Force lies with the 1<sup>st</sup> Respondent. Section 129 of the Constitution empowers the Commissioner of Police with the power to remove persons from the Force or to take disciplinary action against persons in the Force:

*"129. (7) The Commissioner of Police has the following powers in relation to the Fiji Police Force for all ranks, members and other employees, of the Fiji Police Force –*  
*(a) to appoint persons to the Fiji Police Force;*  
*(b) to remove persons from the Fiji Police Force; and*  
*(c) to take disciplinary action against persons in the Fiji Police Force,*  
*and all written laws governing the Fiji Police Force shall be construed accordingly."*

9. Of course it is agreed that the First Respondent's power under the Constitution is to be exercised in consideration of the relevant laws; this being the Act and the Police Regulations 1965 (hereinafter referred to as "**Regulations**"). It is submitted that the First Respondent's decision was made within the confines of both the Act and Regulations.
10. It is not disputed that the Applicant caused the accident himself. The honourable court should also note that the Applicant also admits to committing the offence in his affidavit of 16 August 2017, at paragraph 7.
11. What is being disputed by the Applicant is that proper procedures were not followed by the First Respondent. The Applicant makes specific reference to the procedures set out under regulation 13 of the Regulations. These procedures relate to procedures at trials for offences against discipline and are as follows:

*"Procedure at trials for offences against discipline*

13. *The following procedure shall apply to all proceedings heard by any tribunal under the provisions of section 32 of the Act –*
  - (i) the officer charged with an offence against discipline (hereinafter referred to as "the accused") shall be supplied with a copy of the charge prior to the hearing;*
  - (ii) no documentary evidence shall be used in any such proceedings unless the accused has been given access thereto prior to the hearing;*
  - (iii) the evidence of any witness taken during the course of the proceedings shall be recorded in the presence of the accused;*
  - (iv) the evidence given at the proceedings need not be taken down in full, but the substance and material points thereof must be recorded in writing and read over to the accused;*
  - (v) the accused shall have the right to cross-examine each witness giving evidence against him or her and after each such witness has given evidence he or she shall be asked if he desires to cross-examine such witness;*
  - (vi) the accused shall be asked if he or she desires to give evidence in his or her own reasonable opportunity to do so;*
  - (vii) the tribunal may, in its discretion, allow the accused to be assisted by a friend, being a gazetted officer, and, when such permission is given, his or her defence may be conducted by such friend.*
12. These procedures relate to trials conducted where allegations have been put to the officer that he or she is guilty of an offence against discipline. Offences against discipline are set out under regulation 12 of the Regulations. When an officer is alleged to have committed a disciplinary offence the tribunal (which is essentially the Commissioner of Police) is appointed to hear the case. Section 32(1)(B) allows



- investigations into the charges against the officer and if found to be guilty, recommendations are made to the Commissioner of Police.
13. In considering the procedures prescribed for the disciplining of the Force, it is evident that an accused officer must be given the charge and an opportunity of responding. Upon completion of the hearing the opinion of the tribunal will either be in the finding of guilt or otherwise; and if the former then the tribunal moves to determine the appropriate action to take.
  14. However, it is submitted that the circumstances surrounding the Applicant's situation would not render the need for a trial process under regulation 13 of the Regulations. This is because by admitting to the allegation of committing the offence of negligent execution of duties in causing the vehicular accident, the Applicant was indeed admitting to the fact that he was guilty of being negligent.
  15. There was no need to carry out investigations or to carry out a trial under regulation 13 because the Applicant had not complained about the finding of guilt, in fact he had admitted to the same and still admits to the same in his affidavit and various submissions in these proceedings.
  16. By doing so, the Applicant, it is argued, had given up his right to a trial under regulation 13 of the Regulations. There was no need to comply with regulation 13 of the Regulations but only a need to submit on the question of determining the appropriate action; which in any case the Commissioner of Police was empowered to do under section 129 of the Constitution and section 32 of the Act.
  17. The Applicant further argues in his affidavit filed on 16 August 2017 at paragraph 15 that the decision to terminate was made in breach of natural justice in failing to follow the procedure under the Act. He further states that he was never given any opportunity to plea or to defend or mitigate before the decision was made to terminate his employment. It could not be said that the Applicant did not have any opportunity to answer any allegations before a "tribunal" where the Applicant had admitted to the allegations in the first place. What was there to answer if the Applicant had already admitted to committing the offence.
  18. Therefore there was no need to comply with regulation 13 of the Regulations. It would be moot to expect the tribunal to carry out a trial where the Applicant had already admitted neglect by damage.
  19. We refer the honourable court to *State v Registrar of Trade Unions, ex parte Fiji Public Service Association* [1991] FJLawRp 8; [1991] 37 FLR 55 (17 July 1991) where the court stated as follows in relation to the right to a fair hearing:

*"In my judgment the case law establishes that the right to a fair hearing can be limited and that its extent depends on what Tucker LJ. called "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the special matter that is being dealt with ...." Russell v. Duke of Norfolk*[1949] 1 All E.R. 109 at p. 118. In *Rike v. Baldwin* [1964] A.C. 40 at pp. 64-65 Lord Reid said that the test is what a reasonable man would regard as fair procedure in particular circumstances. In the much later case of *Lloyd v. McMahon* [1987] 1 All E.R. 1118 at p. 1161 Lord Bridge said:

*"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirement of fairness demand when any body, domestic, administrative or judicial, has to make a decision which*

*will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."*

*In other words His Lordship was saying that the rules of natural justice are flexible and must depend on the circumstances of particular cases and the functions and responsibilities of the decision-maker. Thus in de Smith's Judicial Review of Administrative Action, Fourth Edition at p. 185 dealing with the Audi Alteram Partem Rule it is said:*

*"Thus the further removed from the judicial paradigm a particular function is, the weaker will be the analogy between the procedure appropriate for its exercise and that followed in a court of law. Although terminology is not always consistent, decision-making power is likely to be characterised as "administrative" when the court has decided that it may be reliably exercised pursuant to a procedure that deviates in one or more significant ways from that familiar in courts of law."*

20. The Applicant was given a chance to explain his actions as can be observed in the correspondence dated 6 April 2017 written on behalf of the First Respondent and addressed to the Applicant (see annexure 1 of Mr Singh's affidavit).
21. The Applicant did present his case to the First Respondent as can be observed in his response in the form of a letter dated 4 May 2017 (see annexure "1" of Mr Singh's affidavit).
22. After having considered the Applicant's response purporting to show cause why his employment should not be terminated, the First Respondent proceeded to terminate the Applicant's employment. This was relayed to the Applicant in a letter dated 19 May 2017.
23. In the present case, the Applicant was afforded the right to present his case as was reasonably possible given the circumstances.
24. Even after the First Respondent made the decision to terminate the Applicant's employment, the Applicant was able to make submissions to the First Respondent to reconsider the decision to terminate the Applicant's employment.
25. Therefore, the Applicant's presumption that he has an arguable case on the premise that the First Respondent had failed to follow and comply with the correct procedures under the Act and Regulations cannot be accepted. There has been no breach of rules of natural justice and the First Respondent has acted within his powers under the law when deciding to terminate the Applicant's employment. The Applicant has no arguable case and his reliefs of his originating summons would be moot if leave were to be granted.
26. We strongly suspect that the Applicant through these proceedings is trying to appeal the decision made by the First Respondent, which is not what judicial review is concerned with. In *Permanent Secretary for PSC v Lepani Matea (unreported) Court of Appeal Fiji, Civil Appeal No. ABU0016.1998S; 29 May 1998*, the court said (at p.12):

*"We think that it is important to remember what many cases of high authority have determined – and they have been emphasised in the past by this Court – that judicial review is what it says, namely, a judicial review and not an appeal. The function of the Court is to ensure that the body subject to the review has acted within its jurisdiction, has directed itself properly as to the law applicable and applied that law accordingly. It must, too, observe the requirements of procedural fairness to the extent that they apply in the particular case. What it*

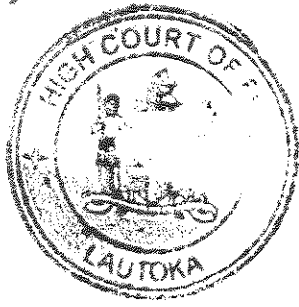
*must not do is to determine the merits of the matter, or substitute its opinion for that of the body concerned upon the merits. This means, of course, that it cannot substitute its opinion for that of the body concerned on the matter of penalty."*

27. Mitigation

The Applicant was given an opportunity for mitigation which he performed as evidenced in his letter (exhibit 1) which is annexed in his Affidavit. This was considered by the First Respondent in deciding to terminate him.

24. I note that the allegation by Singh that he was induced to plead guilty on a promise that he would be given the least punitive sanction for the offence is barely denied by the respondent. Mr. Tuwaqa merely puts Singh to "strict proof" of these allegations in his affidavit.
25. In my view, Singh has an arguable case if assuming he were able to establish these allegations.
26. Mr. Maopa argued that a proper mitigation would entail an oral hearing.
27. The purpose of proper mitigation in any disciplinary offence cannot be underestimated. The aim is to obtain the least punitive outcome in all the circumstances of the offending.
28. Mr. Maopa appears to argue that if termination was within the range of penalty options or sanction available to the Commissioner for Police for Singh's particular disciplinary offence, then Singh should have been given a further opportunity of putting forward facts in mitigation, and moreover, an opportunity to be heard orally, before the sanction was finally decided upon by the Commissioner.
29. As it is, Singh's admission of the offence appears to be an unequivocal one which was given on an assurance that if he did so, he would be given the least punitive sanction. The assurance was given by ASP Jone whom Singh, rightly or wrongly, believed had enough authority to assure him that.

30. I think Singh has an arguable case. Leave granted.



A handwritten signature in black ink, consisting of several stylized, overlapping loops and lines. A horizontal dotted line is drawn below the signature, and a long horizontal line extends to the right from the end of the signature.

Anare Tuilevuka  
**JUDGE**  
18 January 2018