

IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Action No. HBJ 01 of 2019

IN THE MATTER of an Application for Judicial Review by
BENI NASAMU (Applicant)

AND

IN THE MATTER of the decision dated 21st February 2019 by the
COMMISSIONER OF POLICE whereby it purported to terminate the
employment of the Applicant from the Fiji Police Force.

BETWEEN

BENI NASAMU of Bulileka Village, Labasa.

APPLICANT

AND

THE COMMISSIONER OF POLICE of Police Head Quarters,
Vonod Patel Complex, Laucala Beach, Nasinu.

FIRST RESPONDENT

AND

SECOND RESPONDENT

Counsel : Mr. Sen A. for the Applicant
Mr. Pickering J. for the Respondents

Date of Hearing : 24th October 2019

Date of Ruling : 29th November 2019

RULING

(On the application for leave to file and application for Judicial Review)

- [1] The applicant filed this originating summons seeking the following orders:
- (a) An order that leave be granted to the applicant for judicial review of the decision of the 1st respondent to terminate the applicant vide letter dated 21st February 2019.
 - (b) An order that the execution of the 1st respondents decision on 21st February 2019 to be stayed and or suspended pending the determination of this application.
 - (c) Can order that cost on indemnity basis.
 - (d) Any other orders the court deem just and equitable.
- [2] The applicant, who was in the rank of Assistant Superintendent, while serving as the Divisional Crime Officer / Northern Division on 25th February 2019 received the letter of termination. In this application the applicant seeks lever to file and application for judicial review challenging the decision of the 1st respondent on the following grounds:

- i. Failure to refer the disciplinary proceedings to a proper disciplinary Tribunal for a Gazetted Officer.
- ii. Allowing the purported disciplinary proceedings against him to be heard in the purported Police Tribunal, such Tribunal did not have any jurisdiction to hear the charges.
- iii. Failure to interview him on the allegations by the complainant and to obtain his explanation.
- iv. Allowing a Gazetted Officer to preside over the purported Police Tribunal against him when he was of the same rank.
- v. Failure to obtain mandatory concurrence of the Police Service Commission before the termination.
- vi. Failure to allow him to be interviewed and respond to the allegation made against by the complaint.
- vii. Failure for the disciplinary charge to be read and explain to him and the right for legal representative.
- viii. Was induced by the Police Tribunal to plead guilty to the disciplinary charge against him and failure of the Tribunal to consider his mitigation and the withdrawal of the statement of the complaint.
- ix. Making a finding of guilt without written reasons and further which was in contravention of his constitutional right and based on incomplete evidence and was unconstitutional.
- x. Making a finding of guilt in breach of the rules and/or principles of natural justice when the Commissioner of Police failed to allow him to be heard and submissions to show cause.
- xi. Implementing a decision not made by a properly constituted body.
- xii. Unlawfully removing him from Fiji Police Force.

[3] In **Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations** [1998] FJCA 14; Abu0059u.97s (27 February 1998) the Court of Appeal held:

... 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).

In **State v Connors, ex parte Shah [2008] FJHC 64; HBJ47.2007 (7 April 2008)** it was held:

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”.

[4] Section 32(2) of the Police Act 1965 provides:

No police officer shall be convicted of an offence against discipline unless the charge has been read and investigated in his or her presence and he or she has been given sufficient opportunity to make his or her defence thereto.

[5] From the averments of the applicant's affidavit in support it is clear that the disciplinary charge has been informed to him and has been given sufficient time to defend the charge.

[6] The disciplinary charge against the applicant is that he had an extra-marital affair with another officer of the Fiji Police Force. The Fiji Police Force has conducted investigations which is supported by the report filed by the respondents in support of the affidavit in opposition. In the course of the investigation the investigators have recorded statements from witnesses.

[7] Section 3.0 and 4.0 of the Administrative Circular 11/13 provides:

3.0 It should be noted that Extra Marital Affairs (EMA) will not be condoned on any circumstances in the Fiji Police Force. Therefore, in any event where a

complaint made against any member of the Fiji Police involving in EMA must be investigated immediately.

4.0 Extra Marital Affairs means sexual intercourse / sexual relationship or fraternization between members of the Force (whether married or single), with the spouse of a service personal (whether married or single) or member of the public. This can be committed locally or whilst overseas (Leave, Tour of duty or attending training).

- [8] The applicant has not denied the allegation that he was involved in an extra marital affair with one Merewalasi Koroï who was married to Dite Leawere. His allegation is that the Tribunal induced him to admit the allegation and told him that it would not affect his employment. If he was not guilty for the act complained of, there was no reason for him to plead guilty relying on the undertaking of the Tribunal, if the Tribunal in fact made such a promise. He would have certainly known that, if he was not in any extra marital relationship as complained, there was no reason to rely on any such undertaking. He could have faced the inquiry without any fear.
- [9] One of the grounds on which the applicant seeks to challenge the decision of the 1st respondent is that the officer who presided over the Tribunal is of the same rank as the applicant which is not correct. The officer who presided over the Tribunal is a Senior Superintendent of Police whereas the applicant was an Assistant Superintendent of Police.
- [10] The applicant also says that removing him from office was wrong but he has not given any reason why the decision of the 2nd respondent to terminate the applicant from service was wrong. Under section 32(1)(A)(vii) of the Police Act 1965 the 2nd defendant has the power to dismiss an officer.
- [11] The applicant alleges that the 1st defendant was wrong in failing to obtain mandatory concurrence of the Police Service Commission before termination.
- [12] Section 129(7) of the Constitution provides:

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.

[13] Section 32(1) of the Police Act was last amended by Act No. 31 of 2016 which came to effect on 01st December 2106 and after the said amendment the power to punish any police officer is vested solely with the Commissioner.

[14] For the reasons set out above I see no issue to be determined if this court grants leave to file an application for judicial review.

ORDERS

1. Application for leave to file an application for judicial review is refused.
2. There will be no order for costs of this application.



29th November 2019


Lyone Seneviratne

JUDGE