

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBJ No. 4 of 17

BETWEEN : **MAHENDRA SINGH** of Sarava, Ba, Nadi, Fiji Islands.
Applicant

AND : **THE COMMISSIONER OF POLICE** Police Headquarters,
Laucala Beach, Nasinu.

First Respondent

AND : **ATTORNEY GENERAL OF FIJI** Suvavou House, Suva.
Second Respondent

Counsel : Mr. E Maopa for the Applicant
Mr. J Mainavolau for the Respondents

Date of Hearing : 25 May 2018
Date of Decision : 22 February 2019

R U L I N G

INTRODUCTION

1. The Commissioner of Police now has the ultimate power under Fiji's 2013 Constitution to dismiss any police officer of whatever rank. In the past, any officer who committed a disciplinary offence could only be dismissed by the Commissioner if the Police Services Commission (later the Disciplinary Services Commission) concurred with such a decision. Our current Constitution does not make provision for a Police Services Commission or for a Disciplinary Services Commission (see further discussion below).
2. This is an application for judicial review. I did grant leave to issue judicial review on 18 January 2018. The Applicant, Mahendra Singh ("**Singh**") is aggrieved by a decision of the Commissioner of Police to dismiss him from the Fiji Police Force. Singh was dismissed on 18 May 2017 after having served the Force for some twenty years or so with no previous disciplinary record. He was dismissed on account of an accident involving a police car (GP 742) which he was driving. Apparently, prior to the accident in question, GP 742 had been involved in three previous accidents. Notably, GP 742 had a mileage of more than 259,000 kilometres at all material times. I gather that GP 742 was completely written off following the accident by the assessors of New India Assurance Limited ("**NIAL**").

3. In a show cause letter which Singh wrote on 04 May 2017 (see below), Singh would disclose the following details:
- (i) that GP 742 was on lease by the Fiji Police Force from Niranjans Autoport Ltd (“NAL”).
 - (ii) that GP 742 was insured by NIAL
 - (iii) that GP 742 had a pre-accident value of \$30,000.
 - (iv) GP 742 had been involved in 3 previous accidents in the past.
 - (v) GP 742 had a mileage of more than 259,000 kilometres
 - (vi) that following the accident, and after having its assessors fully write off GP 742, NIAL would pay full indemnity on the pre-accident value of GP 742 to the total sum of \$30,000. This was paid to NAL.
 - (vii) NIAL has since taken GP 742.
 - (viii) at the time of the accident, GP 742 was nearing the end of its lease term with the Fiji Police Force.
4. At the time of his dismissal, Singh was forty-nine years of age. He had only six more years to serve before retirement.

BACKGROUND

5. Singh was an “*authorised Police Driver*”. On 13 February 2017, he was detailed to Highway Operations. He was to work a 12-hour shift which would begin at 4.00 p.m. on 13 February and end at 4.00 a.m. on 14 February. Accompanying him on that shift, was one PC Ashnal. The accident happened during the early hours of 14 February. There had been a heavy downpour of rain. As a result, a section of the Kings Highway in Tavarau became flooded. It was dark¹, the water was only ankle-deep, and was clear and not muddy². Singh was unaware of the situation on that section of the road when he approached it³. Singh was also “unaware of the strength

¹ See Singh’s Show cause letter.

² Singh says in his caution interview that was not muddy at all and was only ankle deep. In his Caution Interview in response to Q.17. Caution Interview is set out above in the Ruling.

³ Singh said that the water was about ankle deep. He said that he did not see the water as he approached that section because the water was clear and not muddy at all.

Qst 18: When you was driving did you saw the water coming the road?

Ans: No.

Qst 19: When did you know that water was there?

Ans: When I was crossing it.

Qst 20: How come did you not able to see the water?

Ans: It was heavily raining and the was clear, not muddy water.

of the water-flow”⁴. He only realised the gravity of the situation after he had begun to drive onto that section. The flow was strong enough to make it extremely difficult for Singh to negotiate the flooded road. In the result, GP 742 was swept off the road and actually overturned. The accident happened towards the end of Singh’s 12-hour shift. He was driving in the course of his duties. There is no suggestion that he had been out on a frolic of some sort.

THE DECISION

6. The Commissioner’s decision was conveyed to Singh vide the following letter dated 18 May 2017.

1. By virtue of powers vested upon me by the President of the Republic of Fiji Islands under the 2013 Constitution, you are hereby terminated from the Fiji Police Force with effect from 17.05.17.
2. You are terminated for Damage by Neglect contrary to **Section 60, Regulation 12(16) of Police Act Cap 85** where you on 14.03.17 drove Police vehicle registration number GP742 in a careless manner lost control of the vehicle resulting in damages amounting to \$20,706.39.
3.
4.

Sgd Commissioner of Police.

7. Section 60 (c) gives power to the Minister to prescribe offences against discipline punishable under the provisions of the Act. Regulation 12(16) sets out the prescribed offences against discipline for the purposes of section 30 of the Act. It provides *inter alia* that any officer who loses by neglect any public property committed to his charge shall be guilty of an offence against discipline for the purposes of section 30 of the Act⁵. Section 30 provides that any police officer who commits any of the offences in Regulation 12(16) shall be liable to be punished under the Police Act⁶. This section was further amended by section 163(g)⁷ of the

⁴ He deposes at paragraph [4] of his affidavit that:

[4]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 This section provides:

Offences against discipline

12. Any inspectorate or subordinate officer who commits any of the following offences:-

(16) pawns, sells, loses by neglect, makes away with, willfully or by neglect damages, or fails to report any damage to, any arms, ammunition, equipment, clothing or other appointment supplied to him or any other public property committed to his charge;

shall be guilty of an offence against discipline for the purposes of section 30 of the Act.

⁶ This section provides:

Offences against discipline

30. Any police officer, other than a gazetted officer, who commits any offence against discipline as may be prescribed under the provisions of this Act shall be liable to suffer punishment in accordance with the provisions of this Act:

Revised Edition of the Laws (Consequential Amendments) Act 2016 to consolidate and bring into uniformity the Commissioner's disciplinary powers over all officers irrespective of rank.

THE COMMISSIONER'S POWERS TO DISCIPLINE

8. The Commissioner has general powers under section 129(7)(b) and (c) of the 2013 Constitution, respectively, to remove persons from the Fiji Police Force, and, to take disciplinary action against persons in the Force⁸. These general powers must be read together with section 32(1) and (2) of the Police Act and also Regulation 13 of the Police Regulations. Section 32(1)A of the Police Act gives the Police Commissioner power to impose various punishments (including dismissal) in the trial of any disciplinary offence against any inspectorate officer⁹ or any subordinate officer¹⁰. Section 163(h)¹¹ of the Revised Edition of the Law (Consequential

Provided that-

(a) nothing in this connexion shall be construed to exempt any such officer from being proceeded against for any offence by any other process of law;

(b) save as is expressly provided under the provisions of this Act, no such officer shall be punished twice for the same offence.

⁷ Section 163(g) provides as follows:

163. The Police Act (Cap. 85) is amended by—

(g) in section 30, deleting "other than a gazetted officer,"

The words "other than a gazetted officer" as underlined above, have been removed from section 30 by operation of section 163(g) of the Revised Edition of the Laws (Consequential Amendments) Act 2016. In effect, this means that the Commissioner may exercise the same disciplinary powers to all officers irrespective of whether they are gazetted officers or not.

⁸ This section provides:

(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 Section 32(1)A(a) applies:

32.-(1) For the purpose of the trial of offences against discipline under the provisions of this Act there shall be the following tribunals:-

A. The Commissioner, who shall have power to impose any one or more of the following punishments:-

(a) in the case of any inspectorate officer-

(i) admonishment;

(ii) reprimand;

(iii) severe reprimand;

(iv) a fine not exceeding seven days' pay;

(v) reduction in rank;

(vi) dismissal.

¹⁰ Section 32(1)A(b) applies:

32.-(1) For the purpose of the trial of offences against discipline under the provisions of this Act there shall be the following tribunals:-

A. The Commissioner, who shall have power to impose any one or more of the following punishments:-

(a)

(b) In the case of any subordinate officer-

(i) admonishment;

(ii) reprimand;

(iii) severe reprimand;

(iv) confinement to quarters for any period not exceeding fourteen days with or without extra guards, fatigues or other duty;

(v) a fine not exceeding seven days' pay;

Amendments) 2016 amends section 32(1)A by consolidating the old section 32(1)A(a) with section 32(1)A(b)¹².

9. Under section 37 of the Police Act, the Commissioner has power to dismiss or reduce in rank any police officer convicted by any court¹³. This section has been amended by section 163(i) (i) and (ii) respectively¹⁴ with effect that the Commissioner now has powers to dismiss even a convicted gazetted officer and also giving the Commissioner the final authority to dismiss.
10. Notably, section 32 contained a similar proviso that, in the event that the Commissioner were to decide to dismiss any officer, of either rank, no dismissal shall occur unless the Police Service Commission had concurred to the decision to dismiss.

Provided that the punishment of dismissal shall be subject to the concurrence of the Police Service Commission,

Police Services Commission/Disciplined Services Commission

11. In the past, the Police Services Commission (PSC) which later existed under the name Disciplined Services Commission (DSC), was an independent body set up under our Constitutions to review any decision of the Commissioner to dismiss any officer. Fiji's 1990 Constitution made provision for a PSC. This body would

(vi) reduction in rank;
(vii) dismissal:

¹¹ This section provides as follows:

The Commissioner, who shall have power to impose any one or more of the following punishments in the case of any police officer—

- (i) admonishment;
- (ii) reprimand;
- (iii) severe reprimand;
- (iv) confinement to quarters for any period not exceeding 14 days with or without extra guards, fatigues or other duty;
- (v) a fine not exceeding 7 days' pay;
- (vi) reduction in rank;
- (vii) dismissal.

¹² (cf. footnotes above)

¹³ This section provides:

Dismissal and reduction in rank of police officers convicted by any court

37. The Commissioner may reduce in rank, or may dismiss from the Force, any police officer, other than a gazetted officer, who has been convicted by any court in respect of any offence, whether against the provisions of this Act or otherwise, unless such officer has successfully appealed from such conviction:

Provided that the Commissioner shall not dismiss from the Force any such police officer without the concurrence of the Police Service Commission.

¹⁴ Section 163(i)(i) and (ii):

163. The Police Act (Cap. 85) is amended by—

(i) in section 37—

- (i) deleting ", other than a gazetted officer,"; and
- (ii) deleting " : Provided that the Commissioner shall not dismiss from the Force any such police officer without the concurrence of the Disciplined Services Commission";

continue in existence under the 1997 Constitution but as the DSC. However, the 2013 Constitution makes no provision for either of these bodies. The result is that the power to dismiss any officer of any rank now rests ultimately with the Commissioner.

No Conviction Unless Charge Read & Investigated In Officer's Presence

12. Section 32(2) of the Police Act makes provision for a fundamental principle to govern police disciplinary proceedings. This section provides that no police officer shall be convicted of an offence against discipline unless the charge has been read and investigated in his presence and he has been given sufficient opportunity to make his defence¹⁵.

Gazetted Officer To Hear & Investigate Charges

13. Section 32(1) B provides that any gazetted officer shall have power to hear and investigate charges. If the said gazetted officer finds the accused person guilty of a disciplinary offence, the gazetted officer shall then make recommendations to the Commissioner as to the punishment to be imposed¹⁶.

Procedure At Trials

14. Regulation 13 of the Police Regulations sets out the following procedure for any hearing conducted pursuant to section 32 of the Police Act.

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;**

¹⁵ This section provides:

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

¹⁶ This section provides:

B. Subject to the provisions of section 33, any gazetted officer shall have power to hear and investigate charges, and if he finds the accused person guilty of an offence against discipline, to make recommendations to the Commissioner as to the punishment to be imposed.

- (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 and after each such witness has given evidence he shall be asked if he desires to cross-examine such witness;
- (vi) the accused shall be asked if he desires to give evidence in his own defence and to call witnesses and, if he does so desire, shall be given a 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 defence may be conducted by such friend.

SINGH'S APPLICATION

15. Singh seeks the following relief from this Court:
- a. a Declaration that the decision of the 1st Respondent vide letter dated 18th May 2017 is unfair, invalid, unjust, arbitrary, void and of no legal effect.
 - b. a Declaration that, in any event, the 1st Respondent breached the rules of natural justice and/or abused its discretion and/or exceeded its jurisdiction.
 - c. an Order for Certiorari to remove into the High Court the decision of the 1st Respondent vide letter dated 18th May 2017 be quashed forthwith.
 - d. AN ORDER OF MANDAMUS directing the 1st Respondent and the persons named in 1.2 & 1.3 above to reinstate and or renew the Applicant's employment contract on existing terms and conditions.
 - e. special damages for one month's pay in lieu pursuant to section 14(2) of the Police Act.
 - f. general damages;
 - g. cost on indemnity basis: and
 - h. such other or further orders the Court deems just.
16. Both parties rely on the same affidavits they filed at leave stage (for the Applicant, the Affidavit of Mahendra Singh sworn on 15 August 2017 and for the Respondent, the Affidavit of Sivoki Tuwqa sworn on 25 October 2017¹⁷).

¹⁷ Tuwqa deposes as follows:

- 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.

COMMENTS ON THE AFFIDAVITS

17. Tuwaqa's affidavit is a collection of bare denials, "*putting the Applicant to the strictest proof thereof*", and some admissions. I see not even the slightest attempt in his affidavit to bring any perspective to the discussion. The extent to which the maker of an administrative decision should participate in judicial review challenges to their decisions can, at times, be a vexed question. Limited participation would simply deprive a review court of any perspective which the decision-maker could bring to the discussion. Yet, active participation may imperil public perception of the decision-maker's impartiality¹⁸. In this case, given the lack of participation of the Commissioner, I accept the facts which Singh alleges.
18. In my view, even if the facts are not in dispute in a judicial review application, the manner in which a decision maker has interpreted the relevant law, and how he or she has acted accordingly - is a mixed question of fact and law and should be deposed in an affidavit, rather than just be canvassed in legal submissions.

HOW SINGH'S CASE WAS HANDLED BY THE POLICE?

19. The first thing that happened following the accident was Singh's caution-interview on 24 February 2017 (see full interview below). Three days later, on 27 February 2017, he was charged for the traffic offence of careless driving when he was served with a Traffic Infringement Notice (TIN). Singh would settle the related TIN fine on the same day at the office of the Land Transport Authority in Lautoka. Just a little over a week later, on 07 March 2017, the Police Department would serve Singh with a Defaulter Sheet (see below). On the very same day, one Assistant Superintendent (ASP) Jone would call Singh to his office (see below). Singh would oblige and appear before ASP Jone. There is no record of what transpired in ASP Jone's office. All I have is Singh's account, which I now accept as the truth. Exactly a month after the meeting with ASP Jone, on 06 April 2017, Singh was served with a letter to show

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.

¹⁸ See comments in the Supreme Court of Canada decision in Northwestern Utilities Ltd. and al. v. Edmonton, [1979] 1 SCR 684.

letter (see below)¹⁹. Neither counsel raised any discussion about whether this had any bearing on the decision to terminate. The fact that he paid the TIN fine promptly outside court means that no conviction was entered in any court.

DEFAULTER SHEET & MEETING WITH ASP JONE (TRIBUNAL) – 07/03/17

23. Just a little over a week after Singh had settled his TIN fine out of Court, he was served with a “Defaulter Sheet” by the Police on 07 March 2017. The Defaulter Sheet, I gather, is the formal document which contains a statement of the disciplinary charge. The Defaulter Sheet served on Singh stated that he was being charged for the disciplinary offence of Damaging by Neglect pursuant to Section 60 Regulation 12(16) of the Police Regulation Cap 86. The defaulter sheet is annexed to his affidavit and marked MS 1. Below I reproduce it in part:

FIJI POLICE – DEFAULTER SHEET

Lautoka Police Station

Defaulter’s Register Serial No. 07/103/17

Tribunal ASP JONE
POL 910

No.	Rank	Name	Charge	Result of Hearing
3441	PC	MAHENDRA SINGH	<p><u>DAMAGING BY NEGLECT:</u></p> <p>Under Section 60, Regulation 12(16) of Police Regulation, Cap 85.</p> <p>In that you on the 14th day of February, 2017 at Kings Road Tavarau Ba being the driver of vehicle registration No. GP 742 (F/45) which was committed to your charge without due care and attention lost control of the said vehicle by crossing to the opposite lane which ended up in the drain, causing damages to the Police vehicle with a total estimated cost of \$20,706.39.</p> <p><u>WITNESSES</u> PC 5140 Ashnal</p>	<p>Plea</p> <p>Findings:</p> <p>Recommendation:</p> <p>Signed Tribunal</p> <p>Commissioner of Police</p>

24. Tuvoki’s affidavit does not mention that a statement was ever taken from PC 5140 Ashnal concerning the accident, let alone, what the contents of the statement are, of whether the statement was taken into account in the decision to dismiss Singh.

¹⁹ As he states in his show-cause letter:

I was later charged with the offence of Careless Driving and was served with a TIN [Sri#:3015960]. I have paid the fine at LTA as per the receipt # 6840037 on 27/02/17 as I didn’t wish to argue and waste unnecessary time of the judicial system.

25. Notably, Ashnal's name is recorded on the Defaulter Sheet as a witness. This tends to suggest that Ashnal had already given a written statement. There is no evidence before me that Singh was ever served with any statement by Ashnal.
26. The Defaulter Sheet that Sivoki attaches to his affidavit does not have the fifth Column filled. This means that there is no formal account of the plea entered by the Tribunal, the findings of the Tribunal, the Tribunal's recommendations to the Commissioner of Police, nor has the Tribunal signed the Sheet.

WAS THERE EVER A TRIBUNAL HEARING?

27. Section 32(1)B of the Police Act provides that any gazetted officer shall have power to hear and investigate charges. If the said gazetted officer finds the accused person guilty of a disciplinary offence, the gazetted officer shall then make recommendations to the Commissioner as to the punishment to be imposed²⁰. One can only assume that ASP Jone, by virtue of his rank, was a gazetted officer at all material times.
28. Mr. Maopa appears to treat the meeting between Singh and ASP Jone as the "tribunal hearing". He submits that at this hearing, the charge was not formally read to Singh²¹, nor was Singh ever informed of the "sentence or decision of the tribunal".
29. Singh deposes in his affidavit that he was called by, and appeared before, ASP Jone. Only the two of them were at that meeting. At their meeting, ASP Jone told him that if he pleaded guilty to the charge, ASP Jone would recommend that he paid the damage to the vehicle at the rate of \$25 per fortnight. He said ASP Jone never asked him to mitigate²².

²⁰ This section provides as follows:

B. Subject to the provisions of section 33, any gazetted officer shall have power to hear and investigate charges, and if he finds the accused person guilty of an offence against discipline, to make recommendations to the Commissioner as to the punishment to be imposed.

²¹ At paragraph [8] of his submissions, Mr. Maopa submits:

On 07th March 2017 the applicant appeared before the Tribunal ASP Jone. The charge was never read to him or asked to mitigate. He was never told of the sentence or decision of the tribunal.

²² Singh deposes as follows:

[6] called and appeared before ASP Jone alone in his office at Lautoka Headquarters. The charge was not read to me.

[7] 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] never asked by ASP Jone to mitigate and or the sentence/decision of the tribunal, if any, was read or told to me.

30. There is no evidential material before me which sets out ASP Jone's account and perspective of what had transpired in the meeting. Did he read the charge to Singh? Did he promise Singh of the lesser punitive sanction of a fine if Singh were to plead guilty? I find that it is uncontested that Singh did appear before ASP Jone on 07 March 2017, that Singh was served the Defaulter's Notice on the same day, and that the charge was not read to Singh at the meeting, that ASP Jone did tell Singh that if he pleaded guilty, ASP Jone would recommend a mere fine for Singh, and that Singh did plead guilty on that promise. I also accept that the meeting with ASP Jone was intended by the Respondent to be the Tribunal hearing.

GIVEN THAT SINGH HAD PLEADED GUILTY – WAS THERE A NEED FOR A HEARING?

31. The Respondents submit as follows at paragraphs 25 to 28:
25. 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.
 26. 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 option 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.
 27. 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 allegations of committing the offence or negligent execution of duties in causing the vehicular accident, the Applicant was indeed admitting to the fact that he was guilty of being negligent.
 28. 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.
 29. 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.

32. In short, the Respondents submit that the trial procedures set out under Regulation 13 is only appropriate where an officer has not pleaded guilty to a disciplinary charge. In this case, because Singh had pleaded guilty, the procedures are not necessary.
33. This logic is a circumvention of natural justice. Firstly, the Respondents induce Singh to plead guilty on a promise that he would be given the least drastic sanction of a mere fine. Once Singh had pleaded guilty, the Respondents then renege on that promise, and then proceed to impose the most drastic of all sanctions, a dismissal. Then, in these proceedings, when Singh's counsel asserts that Singh was not given a hearing, the Respondents then assert that he was not entitled to the Regulation 13 procedures on account of his guilty plea, which plea they had induced by a false promise.

LETTER TO SINGH TO SHOW CAUSE – 06/04/17 & SINGH'S RESPONSE – 04/05/17

34. Following Singh's meeting with ASP Jone on 07 March 2017, Singh would receive a show cause letter dated 06 April 2017 from the Director Human Resources. The said show cause letter is not annexed to his affidavit. It is not annexed to the Respondent's affidavit either. Singh did respond with a show cause letter addressed to the Commissioner of Police. His letter (see below), I observe, was written almost a month after his meeting with ASP Jone:

Sir,

.....

..... I was driving Police Vehicle Registration GP 742 [Fleet 45] with crew namely Police Constable 5140 Ashnal Seth We were heading towards Ba from Lautoka and whilst approaching Tavarau, there was heavy flow water flowing across the road after heavy down pours. I couldn't just judge the strength of the flow as it was dark, I continued driving but the flow of water pushed the vehicle to the side after the vehicle had floated onto the water, which had caused the vehicle to overturn on the other side of the road.

Show Cause

..... I was not careless and the water on the road had receded whilst we were covering Lautoka area. I had no deliberate intention to take the vehicle into the water knowing the consequences of it (my emphasis)

I was later charged with the offence of Careless Driving and was served with a TIN [Srl#:3015960]. I have paid the fine at LTA as per the receipt # 6840037 on 27/02/17 as I didn't wish to argue and waste unnecessary time of the judicial system.

With my knowledge and experience as a Traffic Man, I was not at any time Careless whilst driving the Police Vehicle as the cause of the accident was not directly done by me as the other circumstances were implicated and in this case which was flooding which is clearly shown on the rough sketch plan drawn by the officer attending the scene. I was never involved in any Police vehicle accidents in the past years and this is the first incident on (sic) which I am caught up with (my emphasis).

Mitigation

- I have been in the force from Year 1997 and have served various Formations and Units before serving in Traffic and Highway.
- I have never been involved in any disciplinary proceedings or neither has (sic) served with any warning letter regarding my performance in the Fiji Police Force.
- An authorised Police Driver for the past 18 years and never has been involved in any Police vehicle accidents in the past years of service.
- We perform additional task of driving unlike other police officer who do not have any input towards the Police mobility.
- The Western Division Highway Unit operates on 12 hours shifts on which were on the verge of completion which had resumed from 1600 hrs on 13/02/17 d would complete on 0400 hrs 14/02/17.
- I am the sole bread winner in the family with my son attending the FNU at Suva.
- I also look after my elderly parents at home who solely rely upon my earnings.

Moreover, the said vehicle GP742 (F/45) has been involved in 3 incidents previously and has the pre-accident value of \$30,000 and the mileage of more than 259,00 , and was nearing the completion of its lease term this year.

The vehicle was written off by the assessors of New India Insurance and the total sum of \$30,000 was paid by the insurance company to Niranjans Autoport Ltd and the vehicle has been taken by the Insurance Company.

[All relevant documents are attached for your ease of reference].

Finally, we have been doing Highway Coverage during the tour of my duty and also I have been served various units and formations, to my knowledge I have never been implicated in any wrong doing or acts of any nature that will tarnish my career. This incident has left me in an awkward position on which there was no level of carelessness or not any negligence on my part on such incident. I have been driving on the same road for the past many years but never had involved in any act of this nature. If I would have the knowledge of such circumstances on which high level of water was overflowing onto the road: I affirm that I would never have driven the Police vehicle into it on any situation to damage the vehicle.

Sir, the above are my testimonies and confirmation which is made by me which I think is correct to the best of my knowledge.

I strongly look upon your good office to consider my situation on which I was on the time of incident, and upon a fair and favourable response from your good self in the prospects of my future ahead with the Fiji Police Force.

You're obediently (Sic)

Mahendra Singh
Police Constable
3341

35. Notably, Singh asserts throughout his show-cause letter that he was not careless. Mr. Mainavolau submits that it was already too late for Singh to be denying the charges at show-cause stage given that he had already pleaded guilty before ASP Jone on 07 March 2017. I do not accept this argument. As I have said, Singh's guilty plea was not voluntary and unequivocal. It would seem that the motive behind inducing Singh to plead guilty was to truncate the proceedings. It would seem also that the Respondents wanted to truncate the proceedings because they had already formed the view that Singh was guilty. It seems that the only reason why SP Jone had called Singh into his office was to urge him to plead guilty. Had ASP Jone not induced Singh by that promise, a Regulation 13 hearing would have followed, in which Singh would have been read the charge and be given adequate time to prepare for his defence and exercised his right to be represented by a gazetted officer - before giving an unequivocal plea. One would expect that following a hearing, the Tribunal would then make a finding of guilt or not guilt. If the finding was to be one of guilt, the Tribunal would then begin to hear mitigation. After mitigation, the Tribunal would then make a recommendation to the Commissioner of Police.
36. Apart from the above, Singh's plea, in my view, was not an informed one. He was not aware that a dismissal would be the consequences his guilty plea. As I have said, he was promised the least drastic sanction of a fine if he were to plead guilty.
37. Once it became clear that Singh was refuting the disciplinary charges against him, the Respondents should then have reviewed his earlier plea which was certainly not voluntary and not unequivocal. In the circumstances, in the interest of justice, the Respondents should have permitted Singh to withdraw the guilty plea, and then direct ASP Jone to reconvene and comply with Regulation 13.

COMMENTS

38. A cornerstone of natural justice is 'the hearing rule'. The Police Act and the Police Regulations make provisions founded on this rule. The rule commands that an officer facing disciplinary charges be told the case that he or she is to meet. This rule is embodied in Regulation 13(i)²³. The rule also commands that an officer be

²³ Regulation 13(i) says:

afforded a reasonable chance to answer that case before any decision is made that will negatively affect his or her right, or an existing interest or legitimate expectation. This is set out in Regulation 13(vi)²⁴ and also in section 32(2) of the Police Act. This rule was also stated by the Fiji court of Appeal in **Talawadua v Commissioner of Police** [2002] FJCA 7; ABU0054U.2001S (31 May 2002):

Only in rare cases is relief refused

In a case such as this where the fundamental right to be heard before an adverse decision is made (especially one affecting livelihood) has been denied, only in the rarest of circumstances will relief be refused. First because the Court's function on Judicial Review is to ensure that the rules of natural justice are observed and not to substitute its own opinion on the merits. Secondly because of the inherent danger that in the absence of explanation wrong decisions may be reached and injustices done. These two points are illustrated in the judgments of this Court and the Supreme Court in the case of (the) **Permanent Secretary for Public Service Commission and the Permanent Secretary for Education, Women and Culture v. Pani Matea** of the 29th of May 1998 and 10th March 1999 respectively. In this Court at page 12 of the Judgment having referred to a view expressed in the High Court to the effect that the respondent's dismissal was too harsh a punishment the Court said:

"..... it is important to remember what many cases of high authority have determined - and they have been emphasized in the past in 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 review has acted within its jurisdiction, has directed itself properly as to the law applicable and applied the law accordingly. It must, too, observe the requirements of procedural fairness to the extent that they apply to the particular case. What it must not do is to determine the merits of the matter, or substitute its own opinion for that of the body concerned upon the merits."

(emphasis added)

In the Supreme Court at the end of the Judgment upholding the Court of Appeal's decision the pen-ultimate paragraph reads:

"There is regrettably one other aspect on which we must comment. Counsel for the appellant included in his written submission to this Court suggestions that a hearing by the Commission would serve no useful purpose, as the Commission would still give the same decision. Wisely he withdrew those suggestions when their gravity was pointed up to him. The case is obviously not one of those rare ones in which the outcome as to penalty is a foregone conclusion. On the contrary, after this lapse of time a fair-minded Commission could reasonably decide to take no action. And, if there were reason to infer that the Commission had approached the issue of penalty with closed minds any decision adverse to the respondent would be vulnerable to Judicial Review on that ground."

The gravity or danger referred to in the decision of the Supreme Court was vividly articulated by Megarry J. in **John v. Rees** (1970) Ch. 345 at 401 when he said:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

(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;**

²⁴ Regulation 13(vi) says:

(vi) the accused shall be asked if he desires to give evidence in his own defence and to call witnesses and, if he does so desire, shall be given a reasonable opportunity to do so;

39. The case to be met must include a description of the possible decision, the criteria for making that decision and information on which any such decision would be based (see **Naiveli v State** below).
40. Any information, negative or positive, which the Police has about the officer must be disclosed to the officer. This is embodied in Regulation 13(ii),(iii) and (iv)²⁵.
41. The decision-maker needs to be fully aware of everything written or said by the person, and give proper and genuine consideration to that person's case.
42. The decision-maker also needs to be fully aware of everything written or said by the person, and give proper and genuine consideration to that person's case.
43. The person concerned has a right to have his or her reply received and considered before the decision is made. He or she also has a right to receive all relevant information before preparing their reply.
44. I accept that, in general, there are some instances where even a non-compliance with the "hearing rule" will not necessarily be fatal to dismissal if misconduct is of serious nature. Mr. Mainavolau submits as follows:

30.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.
31. 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.
32. 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 judgement the case law establishes that the right to a fair hearing can be limited and that its extent depends on what tucker L.J 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 page 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:*

²⁵ Regulation 13(ii),(iii) and (iv) say:

- (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;

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.

33. The Applicant was given a chance to explain his actions as can be observed in the correspondence dated 6 April 2017....
 34. 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....
 35. After having considered the Applicant’s response purporting to show cause why his employment should not be terminated, then First Respondent proceeded to terminate the Applicant’s employment. This was relayed to the Applicant in a letter dated 19 May 2017.
 36. In the present case, the Applicant was afforded the right to present his case as was reasonably possible given the circumstances.
 37. 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.
45. Where does one draw the line between the above and section 32(2) of the Police Act²⁶? In my view, the line is drawn by the following comments of the Fiji Court of Appeal in **Naiveli v State** [2002] FJCA 52; ABU0059E.99S (1 March 2002). The Court, in that case, was considering whether the Disciplined Services Commission had power to summarily dismiss a gazetted Police Officer who had been convicted of a criminal offence in the absence of a prior disciplinary hearing in accordance with Part VIII Police Service Commission Regulations. Although the Court there was dealing with some disciplinary provisions which are not applicable in this case, the sentiments expressed are fundamental:

It cannot be in doubt that, although the Commission is given a discretion to decide whether an inquiry will be held, it must institute an inquiry when dismissal is a possible result of the

²⁶ Section 32 provides that no police officer shall be convicted of an offence against discipline unless the charge has been read and investigated in his presence and he has been given sufficient opportunity to make his defence.

proceedings. Regulation 26 intends that a gazetted officer will not be dismissed for the commission of a disciplinary offence without receiving the protection which it provides. The discretion not to hold an inquiry is conferred on the Commission so that it may deal speedily with those cases which, in its view, although not that of the Commissioner, do not warrant dismissal.

46. In **Pal v PSC** [2000] FJCA 33; ABU0072U.98S (1 December 2000) , the Fiji Court of Appeal said:

The judgments in the cases of **The Permanent Secretary for the Public Service Commission and another v Lagiloa**, Civil appeal 38 of 1996, and **The Permanent Secretary for the Public Service Commission and another v Matea**, Civil appeal 16 of 1998, have stated that, where the person's livelihood is at stake, it is a breach of natural justice if he is not given the right to be heard.

It was summarised by this court in **Matea's** case;

"The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilised legal system that it is to be presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instrument setting up the deciding body requiring that such a person be heard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or displace the rule it must be done clearly and expressly by words of plain intendment. The intention must be made unambiguously clear. Finally we add that what is a fair hearing will depend on the circumstances of each case; it does not mean that in every case right of personal appearance must be given."

On appeal by the PSC, the Supreme Court held:

"...the appeal on such a question is virtually hopeless. There are numerous authorities establishing, at common law, that where someone's livelihood is at stake that person is entitled to a fair opportunity of a hearing unless the relevant legislation has clearly excluded it."

The question in the present case therefore is not whether there was a right to be heard but whether such a right was provided.

Counsel for the respondent points out that the appellant was able to put his case to the tribunal. Moreover, the lawyer representing him clearly anticipated the possible need to mitigate the penalty at that stage and, at the conclusion of his written submission, referred to sentence. It is suggested that this provided a reasonable opportunity to be heard.

47. In this case, there was no inquiry held, let alone, was Singh ever told that dismissal was a possible result if he was to be found guilty following a trial or if he were to plead guilty. Rather, the Respondents urged Singh to plead guilty on a promise of a sanction which, in the mind of Singh, would rule out dismissal as a possible result. Singh was induced.

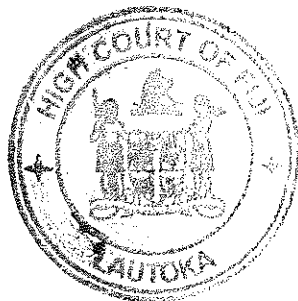
48. Although Singh did get to write a show-cause letter, I agree with the submissions of Mr. Maopa that Singh was “unaware of the existence of any decision or recommendation or penalty by the disciplinary [tribunal] that requires his mitigation” . The fair thing for the Tribunal (ASP Jone) to do was to let Singh know of what he was recommending to the Commissioner to enable Singh to mitigate effectively against any recommendation of dismissal.
49. There is also no evidence that the Respondent had taken into account Singh’s unblemished record, or even that the vehicle in question had been in three previous accidents and whether that may have contributed to Singh’s inability to negotiate the water on the occasion in question.
50. Furthermore, in the circumstances of this case, it appears that the Commissioner of Police did not take into account at all the facts that Singh had stated in his letter of show cause.
51. The procedure set out under Regulation 13 was simply not followed in the following way:
- (i) Singh was supplied with a copy of the charge on the same day of the hearing before ASP Jone.
 - (ii) the so-called “ hearing” was rather farcical in the following regards:
 - (a) the disciplinary charge which was served on Singh on the same day was never even read to him by ASP Jone.
 - (b) Singh was never asked to consider whether or not he understood the charge and if so, whether or not he pleaded guilty to it.
 - (c) ASP Jone did not put to Singh that he (Singh) did have a choice to be assisted by a gazetted officer friend, and, to have his defence (if he had pleaded not guilty) conducted by such friend.
 - (d) no written statement of PC 5140 Ashnal was ever given to Singh prior to the meeting with ASP Jone, let alone, was any statement of PC Ashnal read over to Singh;
 - (e) since there was no hearing proper, PC 5140 Ashnal’s evidence was never formally taken during the course of the proceedings before ASP Jone in the presence of Singh;
 - (f) let alone, was Singh given an opportunity to cross-examine PC Ashnal if, in fact PC Ashnal’s statement was prejudicial to Singh’s case;

- (g) Singh was never asked if he desired to give evidence in his own defence and to call witnesses and, if he did so desire, was not given a reasonable opportunity to do so (he could have called PC Ashnal – if assuming PC Ashnal was going to confirm his observations and assessment of the flood level and the risks involved).

ORDERS

52. Singh was terminated and thereby deprived of his livelihood. The procedure set out under Regulation 13 was not followed. The relief to be granted in an application for judicial review is always in the Court's discretion. In light of my observations above, I exercise my discretion in favour of the following orders:

- (i) I declare that the decision of the 1st Respondent vide letter dated 18 May 2017 is unfair, invalid, unjust, arbitrary, void and of no legal effect and, in any event, was in breach of the rules of natural justice.
- (ii) an Order for Certiorari removing into the High Court the decision of the 1st Respondent vide letter dated 18 May 2017 be quashed forthwith.
- (iii) an Order that Singh be paid full salary together with all benefits and entitlements if any for the period 18 May 2017 to 25 February 2019.
- (iv) an Order of Mandamus directing the 1st Respondent to reinstate and or renew Singh's employment contract on existing terms and conditions, OR, in the alternative, pay general damages to Singh.
- (v) the matter is remitted to the 1st Respondent under Order 53 Rule 9(4) of the High Court Rules 1988 to reconsider it and reach a decision in accordance with the findings of this Court
- (ix) an order that the 1st Respondent pay the costs of this action to Singh to be taxed if not agreed.



Anare Tuilevuka
JUDGE
Lautoka

25 February 2019