

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Judicial Review Action
No. HBJ No. 03 of 2020

BETWEEN : **MAHENDRA SINGH** of Sarava, Ba

[APPLICANT]

AND : **THE COMMISSIONER OF POLICE, POLICE HEADQUARTERS,**
LAUCALA BEACH, NASINU

[1ST RESPONDENT]

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

[2ND RESPONDENT]

Appearance : **Mr Eroni Maopa for the applicant**
Mr Josefa Mainavolau for the respondents

Hearing : **Friday, 16th October, 2020 at 9.00 a.m**

Decision : **Friday, 26th February, 2021 at 9.00 a.m**

DECISION

[A] INTRODUCTION

(01) By Originating Summons filed in the High Court at Lautoka on 19th May, 2020 the applicant Mahendra Singh applies pursuant to Order 53, r.3 of the High Court Rules for leave to apply for judicial review of a decision of the Commissioner of Police.

(02) The said decision was purportedly made via a letter dated 30-03-2020.

- (03) The applicant also seeks an order that the execution of the Commissioner's decision be stayed pending determination of the application.
- (04) The application is supported by an affidavit of the applicant sworn on 15-05-2020 setting out the background to the dispute.
- (05) I did grant leave to issue judicial review on 19-05-2020 pursuant to Order 53, Rule3 (3) b. The application for judicial review is opposed by the respondents and both parties rely on the same affidavits they filed at leave stage.

[B] AFFIDAVIT IN SUPPORT

The applicant deposes as follows in his affidavit in support;

- (1) *I am the applicant named herein. I depose this affidavit to the best of my knowledge, information and ability. This affidavit is true and to verify the facts as contain 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 department of the Force and I was an authorised police driver for the last 20 years or so. Prior to my termination on 17th May 2017 I served with the Western Division Highway Unit (Traffic Department). I was reinstated to the Force on 23rd April 2019 by the Order of the High Court of Fiji.*

Initial incident

- (3) *That on 13th February 2017 I was rostered for 12 hours shift (High Way Operation) commencing from 1600hrs (4pm) on 13.02.17 until the next day at 0400hrs (4am) on 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 King's Road that pushed the police vehicle I was driving on the side causing it to overturn.*

Initial defaulter/charge

- (5) *I was defaulted/charged and or served with defaulter sheet serial no. 07/03/17 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 pleaded guilty to the charge before the Tribunal ASP Jone and submit my show cause as to why I should not be terminated from the police force.*

Decision to terminate

- (7) On 19th May 2017 I was called before the Divisional Police Commander Western and served with termination/dismissal letter, dated 18th May 2017, with effective from 17th May 2017. I enclose herewith a copy of the termination letter marked as annexure MS 2.

Judicial Review

- (8) I applied for Judicial Review to the High Court of Fiji in Lautoka being Judicial Review Action No.4 of 2017 filed on 15th August 2017 and the High Court granted the order that I be reinstated with full salary and benefit. I annex herein a copy of the sealed order marked as annexure MS 3.

Reinstate of employment

- (9) I resumed official duty with the Force on 18th July 2017. I annex herein a copy of letter confirming my reinstatement marked as annexure MS 4.

Re-defaulter/charge

- (10) That I was again served with a defaulter/charge for the offence of Damaging by Neglect being serial no. 18/6/19. This was the same defaulter/charge served to me in 2017 being defaulter/charge serial no. 07/03/17 annex in MS 1 above. I annex herein a copy of defaulter/charge serial no. 18/6/19 marked as annexure MS 5.

Proceeding before the Tribunal

- (11) That on 12th July 2019 I appeared before the Tribunal and pleaded not guilty. The Tribunal refused to allow me to be represented by a senior police officer by my own choice. That during the Tribunal the witnesses did not give evidence in chief but was vigorously examined by the Tribunal. I was denied to cross examine the witnesses on the answers given to the questions asked by the Tribunal. The Tribunal failed to read out to me the summary of the evidence adduced by the witnesses that being recorded.
- (12) I informed the Tribunal that I was defaulted/charged twice for the same offence and I was terminated as a result, the first was defaulter being serial no. 07/03/17. I produced and tendered a letter from my solicitor in that regard marked as annexure MS 6.
- (13) The Tribunal did not consider or give decision on the said letter from my solicitor and he proceeded with the hearing on 4th December 2019. I was not allowed to give evidence in chief but I was vigorously questioned by the Tribunal. I was told by the Tribunal that I could not examine the witness on his answers to the questions the Tribunal asked or reply an answer to his questions. I felt I was unfairly treated by the Tribunal.

Finding of the Tribunal

- (14) *On 8th December 2019 I was verbally informed by the Tribunal that I was found guilty for speeding, driving at 60 to 70 km/p/h. I was never served with any written decision from the Tribunal.*

Mitigation

- (15) *I submitted my mitigation dated 11th December 2019. I annex herein a copy of my submission marked as annexure MS 7.*

Termination/Dismissal

- (16) *By letter dated 30th March 2020 the Acting Superintendent of Police Mr J. Kaitutu Coordinator Human resources Management signed the termination/dismissal letter on behalf of the Commissioner of Police marked as annexure MS 8.*

Non Compliance of the relevant law

- (17) *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 (1) and 32 (2) (B) and 32 (2) of the Police Act and Regulations 13 (iv), (v), (vi) & (vii) of the Police Regulations. The Commissioner also fails to consider Article 14 (1) (b) and to comply with the Article 129 (7) of the Constitution.*
- (18) *I verily believed that the Commissioner, his servants and agent took into consideration irrelevant matters and failed to consider my mitigation. I was not afforded natural justices and being unfairly treated when I attended the Tribunal. I was exercising my right to defend the defaulter/charge against me. The Tribunal fails to recommend to the Commissioner the appropriate punishment and sentence. That the punishment of dismissal shall be subjected to the concurrence of the Discipline Service Commission, which in my case was never done. Thus such punishment is too harsh.*

The effect of such termination

- (19) *That the decision to terminate my employment is harsh and excessive. That I was employed with the Force for the last 20 years or so and I have no previous conviction or being previously defaulted. That was never being considered. That I lost the only source of income. I annex herein my fortnightly salary slip marked as annexure MS 9.*
- (20) *That such termination has affected my livelihood as I am the sole bread winner in the family. I am still paying for my child's university fees and accommodation in Suva. I also looked after my elderly parents and my family. The termination of my employment has caused and continue to cause me financial hardship and has affected my family and our daily needs.*

- (21) *I verily believe I was treated unfairly, unreasonably with irrelevant matters being considered against me and without natural justice being afforded. I was told by the Tribunal "who was I to challenge the decision of the Commissioner".*
- (22) *I therefore seek and urge the Court to grant leave for my application for Judicial Review.*

[C] AFFIDAVIT IN OPPOSITION

Rajesh Krishna, the Director Legal, at the Police Headquarters deposes as follows in his affidavit in opposition;

- (1) *THAT I hold the position of Director Legal Unit, 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 derive by me in the course of employment;*
- (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 in support (hereinafter referred to as "the affidavit" unless otherwise stated) deposed by Mahendra Singh, sworn on 15th day of May, 2020;*
- (5) *THAT the Respondents have taken note of the averment contained in Paragraph 1 of the affidavit which does not require any response;*
- (6) *THAT the Respondents have taken note of averments contained in Paragraph 2 to 9 of the Affidavit and do not wish to respond as all the issues have been discussed in Judicial Review Action Number 4 of 2017 at the Lautoka High court;*
- (7) *THAT the Respondents admit the averment contained in Paragraph 10 of the Affidavit;*
- (8) *THAT the Respondents admit the averment contained in paragraph 11 of the Affidavit to the extent that the Applicant had appeared before the Tribunal on 12/07/2019 and state that the Applicant was given the opportunity to arrange for a Gazetted Officer (Friend) to assist him in the defence. Furthermore, the Tribunal, in exercise of discretionary authority had twice adjourned proceedings to allow the Applicant to arrange for a friend (Gazetted Officer) to represent him in the defence. The hearing commenced on the third adjournment and all witnesses gave evidence in presence of the applicant. The Applicant was given the opportunity to cross examine the witnesses and the Tribunal questioned witnesses only after Prosecution and the Applicant had examined the witnesses;*
- (9) *THAT the Respondents have taken note of averments contained in paragraph 12 and 13 of the Affidavit and state that the 1st Respondent is constitutionally not subject to the*

direction or control by any other person or authority, therefore not obliged to consider the letter of the Applicant's Solicitor;

- (10) *THAT the Respondents admit the averments contained in paragraph 14 of the Affidavit to the extent that the Applicant was informed as stipulated in the Defaulter Proceedings in Force Standing Order which need not to be written. The Applicant was informed that he was found guilty of "Damaging by Neglect" and not speeding;*
- (11) *THAT the Respondents admit the averments contained in paragraphs 15 and 16 of the Affidavit;*
- (12) *THAT the Respondents have taken note of averments contained in paragraphs 17 and 18 of the affidavit and state that the 1st Respondent had complied with all legal authorities and legal Procedures when the Applicant was dismissed. The Respondents state further that "Disciplined Services Commission" is non-existent and that the 1st Respondent is constitutionally responsible for the appointment and removal of persons from the Fiji Police Force for which no concurrence is required;*
- (13) *THAT the Respondents have taken note of averments contained in paragraphs 19 to 22 of the Affidavit and state that the decision to dismiss the Applicant was not excessive or harsh and that natural justice was accorded to the Applicant. The Respondent further state that the Police Force had lost the operations capability of vehicle usage which was damaged beyond repair due to the negligent act of the Applicant;*
- (14) *THAT the Respondents herein annex the following documents, for the court's reference as follows:*
 - (i) *Annexure "RA1" Minute by ASP Semi Waqavonovono dated 17 December 2019.*
 - (ii) *Annexure "RA2" Tribunal Judgment dated 12 December 2019*
 - (iii) *Annexure "RA3" Fiji Police Force Defaulter's Sheet*
 - (iv) *Annexure "RA4" Guide to Disciplinary Proceeding*
 - (v) *Annexure "RA5" Defaulter's Submissions dated 20 August 2019*
 - (vi) *Annexure "RA6" Letter by Babu Singh Lawyers dated 30th July 2019*
 - (vii) *Annexure "RA7" Copy of Tribunal Proceeding Compilation*
 - (viii) *Annexure "RA8" Land Transport Authority Traffic Infringement Notice, including accident sketch dated 24 February 2017.*
 - (ix) *Annexure "RA9" Niranjem Motors Service Quotations*
 - (x) *Annexure "RA10" copy of Police Disciplinary Proceeding containing Commissioner of Police's endorsement for Applicant's dismissal.*
- (15) *Wherefore and in view of the above, the Respondents pray before this honourable Court that leave for Judicial Review not to be granted to the Applicant.*

[D] AFFIDAVIT IN REPLY

The applicant deposes as follows in his affidavit in reply;

- (01) *That I am the Applicant in this action and depose this affidavit to the best of my knowledge, information and belief.*
- (02) *The affidavit in response by Rakesh Krishna was shown and read to me. I crave leave to reply to the same.*
- (03) *As to paragraphs 1 – 7 of the Affidavit of Rakesh Krishna (herein after called the said Affidavit), I have no issue.*
- (04) *As to paragraph 8 of the said Affidavit, I deny that I was fully given the opportunity to cross examination the witnesses.*
- (05) *As to paragraph 9 of the said Affidavit, I state that the letter from my solicitor to the Tribunal informing him that I was charged/defaulted twice for the same offence based on the same facts and that is against the Constitution.*
- (06) *As to paragraph 10 of the said Affidavit, I denied the same and state that I was informed that I was found guilty of Damaging by Neglect and a copy of the Judgment was never handed to me.*
- (07) *As to paragraph 12 of the said Affidavit, I was informed by my Solicitor and verily believed that before the Commissioner act on the Constitution he must comply first with the relevant provision of the Police Act.*
- (08) *As to paragraph 13 of the said Affidavit, I reiterate that my punishment is excessive ie. (Termination). The recommendation by the Tribunal that I pay the excess to the damages, to be fined 5 days' pay and removed from driving with Commissioner for Police final warning letter be issued.*
- (09) *I deny the Police force has loss of vehicle as I remembered that vehicle is insured by the lessor. The Police Force is only leasing such vehicle and if any damage done is fully covered by the misuser.*
- (10) *That the affidavit of Rajesh Krishna is not consistent with the procedure and the minutes of the Tribunal during the hearing.*

[E] CONSIDERATION AND THE DETERMINATION

- (01) There is not much in dispute about the basic facts.

(02) The applicant was terminated from his employment as a Police Officer vide a letter by the Commissioner of Police dated 30-03-2020 by virtue of Article 129(7) of the 2013 Constitution, following the finding of guilt by the disciplinary tribunal for damaging by neglect contrary to Section 60, Regulations 12(16) of the Police Act, 1965 and recommendation. The applicant deposes that;

(*) *That I joined the Fiji Police Force (the Force) in 1997. I served at the various department of the Force and I was an authorised police driver for the last 20 years or so. Prior to my termination on 17th May 2017 I served with the Western Division Highway Unit (Traffic Department). I was reinstated to the Force on 23rd April 2019 by the Order of the High Court of Fiji.*

Initial incident

(*) *That on 13th February 2017 I was rostered for 12 hours shift (High Way Operation) commencing from 1600hrs (4pm) on 13.02.17 until the next day at 0400hrs (4am) on 14.02.17.*

(*) *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 King's Road that pushed the police vehicle I was driving on the side causing it to overturn.*

Initial defaulter/charge

(*) *I was defaulted/charged and or served with defaulter sheet serial no. 07/03/17 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.*

(*) *That I pleaded guilty to the charge before the Tribunal ASP Jone and submit my show cause as to why I should not be terminated from the police force.*

Decision to terminate

(*) *On 19th May 2017 I was called before the Divisional Police Commander Western and served with termination/dismissal letter, dated 18th May 2017, with effective from 17th May 2017. I enclose herewith a copy of the termination letter marked as annexure MS 2.*

Judicial Review

(*) *I applied for Judicial Review to the High Court of Fiji in Lautoka being Judicial Review Action No.4 of 2017 filed on 15th August 2017 and the High Court granted the order that I be reinstated with full salary and benefit. I annex herein a copy of the sealed order marked as annexure MS 3.*

Reinstate of employment

(*) *I resumed official duty with the Force on 18th July 2017. I annex herein a copy of letter confirming my reinstatement marked as annexure MS 4.*

Re-defaulter/charge

- (*) *That I was again served with a defaulter/charge for the offence of Damaging by Neglect being serial no. 18/6/19. This was the same defaulter/charge served to me in 2017 being defaulter/charge serial no. 07/03/17 annex in MS 1 above. I annex herein a copy of defaulter/charge serial no. 18/6/19 marked as annexure MS 5.*

(03) The applicant alleges that;

Proceeding before the Tribunal

- (*) *That on 12th July 2019 I appeared before the Tribunal and pleaded not guilty. The Tribunal refused to allow me to be represented by a senior police officer by my own choice. That during the Tribunal the witnesses did not give evidence in chief but was vigorously examined by the Tribunal. I was denied to cross examine the witnesses on the answers given to the questions asked by the Tribunal. The Tribunal failed to read out to me the summary of the evidence adduced by the witnesses that being recorded.*
- (*) *I informed the Tribunal that I was defaulted/charged twice for the same offence and I was terminated as a result, the first was defaulter being serial no. 07/03/17. I produced and tendered a letter from my solicitor in that regard marked as annexure MS 6.*
- (*) *The Tribunal did not consider or gave decision on the said letter from my solicitor and he proceeded with the hearing on 4th December 2019. I was not allowed to give evidence in chief but I was vigorously questioned by the Tribunal. I was told by the Tribunal that I could not examine the witness on his answers to the questions the Tribunal asked or reply an answer to his questions. I felt I was unfairly treated by the Tribunal.*

Finding of the Tribunal

- (*) *On 8th December 2019 I was verbally informed by the Tribunal that I was found guilty for speeding, driving at 60 to 70 km/p/h. I was never served with any written decision from the Tribunal.*

Non Compliance of the relevant law

- (*) *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 (1) and 32 (2) (B) and 32 (2) of the Police Act and Regulations 13 (iv), (v), (vi) & (vii) of the Police Regulations. The Commissioner also fails to consider Article 14 (1) (b) and to comply with the Article 129 (7) of the Constitution.*
- (*) *I verily believed that the Commissioner, his servants and agent took into consideration irrelevant matters and failed to consider my mitigation. I was not afforded natural justices and being unfairly treated when I attended the Tribunal. I was exercising my right to defend the defaulter/charge against me. The Tribunal fails to recommend to the Commissioner the appropriate punishment and sentence. That the punishment of dismissal shall be subjected to the concurrence of the Discipline Service Commission, which in my case was never done. Thus such punishment is too harsh.*

(04) On the other hand, in opposition to the application, Rajesh Krishna, the Director Legal, says that; (reference is made to paragraph 08, 09, 10, 12 and 13 of the affidavit in opposition)

(08) *THAT the Respondents admit the averment contained in paragraph 11 of the Affidavit to the extent that the Applicant had appeared before the Tribunal on 12/07/2019 and state that the Applicant was given the opportunity to arrange for a Gazetted Officer (Friend) to assist him in the defence. Furthermore, the Tribunal, in exercise of discretionary authority had twice adjourned proceedings to allow the Applicant to arrange for a friend (Gazetted Officer) to represent him in the defence. The hearing commenced on the third adjournment and all witnesses gave evidence in presence of the applicant. The Applicant was given the opportunity to cross examine the witnesses and the Tribunal questioned witnesses only after Prosecution and the Applicant had examined the witnesses;*

(09) *THAT the Respondent have taken note of averments contained in paragraph 12 and 134 of the Affidavit and state that the 1st Respondent is constitutionally not subject to the direction or control by any other person or **authority, therefore not obliged to consider the letter of the Applicant's Solicitor;***

(10) *THAT the Respondents admit the averments contained in paragraph 14 of the Affidavit to the extent that the Applicant was informed as stipulated in the Defaulter Proceedings in Force Standing Order which need not to be written. The Applicant was informed that he was found guilty of "Damaging by Neglect" and not speeding;*

(12) *THAT the Respondents have taken note of averments contained in paragraphs 17 and 18 of the affidavit and state that the 1st Respondent had complied with all legal authorities and legal Procedures when the Applicant was dismissed. The Respondents state further that "Disciplined Services Commission" is non-existent and that the 1st Respondent is constitutionally responsible for the appointment and removal of persons from the Fiji Police Force for which no concurrence is required;*

(13) *THAT the Respondents have taken note of averments contained in paragraphs 19 to 22 of the Affidavit and state that the decision to dismiss the Applicant was not excessive or harsh and that natural justice was accorded to the Applicant. The Respondent further state that the Police Force had lost the operations capability of vehicle usage which was damaged beyond repair due to the negligent act of the Applicant.*

(05) As I understand the submissions of Mr Maopa, counsel for the applicant, the precise nature of the complaint is that;

- The disciplinary tribunal (**the tribunal**) refused to allow the applicant to be represented by a senior police officer.
- That during the tribunal hearing the witnesses did not give evidence in chief but was vigorously examined by the tribunal.
- The applicant was deprived of the right to cross-examine the witnesses on the answers given to the questions asked by the tribunal.

- The applicant was charged twice for the same offence.
 - The applicant was not allowed to give evidence in chief.
 - The applicant was not given a written decision.
- (06) The disciplinary tribunal proceedings (annexure RA-7) show that the tribunal had twice adjourned the hearings, i.e. 12-06-2019 and 14-07-2019 to give an opportunity to the applicant to arrange a Gazetted Officer to represent him in the defence. The tribunal record also shows that the applicant has given evidence in chief under oath in support of his defence. Accordingly, I find that it was not right to say that; (1) “*the Tribunal refused to allow the applicant to be represented by a senior police officer*” (2) “*the applicant was not allowed to give evidence in chief*”.
- (07) The tribunal proceedings also show that the prosecution witness number (2) was vigorously examined by the tribunal and the applicant was not given an opportunity to cross-examine witness no. (2) on the answers given to the tribunal. In my view, the applicant was disadvantaged by this unfair and irregular examination of witness no. (2) by the tribunal. The applicant has a right to cross-examine witness no- (2) on the answers given to the tribunal and he has been deprived of his right to put his defence by cross – examining witness number (2). It seems to me a substantial wrong has been occasioned because this matter raises questions of breach of natural justice and procedural unfairness. The applicant has been treated unfairly and in a manner contrary to the principles of natural justice. The decision of the tribunal did not accord with the standard of fairness that should have been observed. Therefore, the impugned decision of the first respondent to dispense with the services of the applicant on the basis of the finding of guilt by the tribunal is void.
- (08) The pleadings further pinpoint and as was pointed out by Mr. Maopa in the course of argument, the applicant was verbally informed by the tribunal that the tribunal has found him guilty for “Damaging by Neglect” and he was never served with written reasons for that finding of guilt. In my judgment, the decision of the tribunal is entirely opaque – it gives the tribunal’s conclusion, but not its reasons for reaching that conclusion. Accordingly, in my judgment, the tribunal was under a duty to give reasons and did not do so. Without such reasons, the tribunal conclusion is not transparent and the applicant cannot know whether the rules of **Wednesbury**¹ have been observed. This is surely enough to vitiate the impugned decision of the first respondent to dispense with the services of the applicant on the basis of the finding of guilt by the tribunal.
- (09) The applicant vigorously sought to resist the proceedings before the tribunal by raising the double jeopardy claim at the commencement of the hearing before the tribunal. I note that the tribunal has failed to rule on the applicant’s preliminary objection based on the constitutional prohibition against double jeopardy. The tribunal is obliged to rule on the applicant’s objection to the proceedings because it is the province of the tribunal to deal

¹ Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680

with that matter. The applicant is clothed with all the rights to have a coherent reasoned written decision of the tribunal on the refusal of the preliminary objection. The tribunal's failure to rule on amount to refusal of a fair hearing established by the decision of a full court in **Priddle v Fisher & Sons**². The tribunal disregarded the preliminary objection of the applicant and decided to proceed with the hearing on the instructions and the opinion of the Solicitor General. The preliminary objection has been orally disallowed not by a decision of the tribunal but solely on the instructions and the opinion of the Solicitor General. In these circumstances, the question arises whether the tribunal has only acted as conduit conveying the instructions of the Solicitor General. The tribunal says that because of the legal opinion of the Solicitor General the preliminary objection raised by the applicant could not be allowed. In such a situation, the arguable is whether the tribunal has taken a decision at all on the applicant's objection to the proceedings before the tribunal on the ground of constitutional prohibition against double jeopardy. In administrative law, it is often the case that if a respondent takes a decision by submitting to the wishes or instructions of a third party, the resulting decision is said to be *ultra vires* and *void*.³ Therefore, this issue looms as large as life and there has been a surrender of discretion which is disavowed in administrative law. The tribunal did not produce for perusal of the applicant the opinion of the Solicitor General which the tribunal refers to as an instruction in its proceedings. Therefore, the opinion of the Solicitor General is not transparent and the tribunal proceedings do not tell us that the crux of the advice proffered by the Solicitor – General is premised on which articles of the Constitution.

- (10) I now find upon a further survey that the applicant has not given an opportunity to be heard in mitigation by the Commissioner of Police (first respondent) before he was terminated from his employment as a Police Officer vide a letter by the Commissioner of Police dated 30-03-2020 and it appears that the decision has been made in the absence of the applicant and also in breach of the principles of natural justice. **He was given no opportunity to offer one word of mitigation before he was terminated and thereby deprived of his livelihood. It is a breach of natural justice. The applicant was given no chance to speak in mitigation before he made up his mind to put an end to the applicant's twenty two years unblemished tenure of office as a police constable.** 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 civilized 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 void⁴. The inescapable fact is that the Commissioner of Police misunderstood the extent of his discretion. It seems to me that the decision – making process was therefore defective. The matter is even clearer when one realizes here that the applicant was unaware of the existence of any recommendation by the disciplinary tribunal to the Police Commissioner for a punishment to be imposed on the applicant. **There is also no evidence that the Police Commissioner had taken into account the applicant's written mitigation before the disciplinary tribunal before he made up his mind to put an end to the applicant's twenty two years unblemished tenure of office as a police constable. The decision of the Police Commissioner to**

² (1968) 3 All.E.R. 506.

³ Wade and Forsyth –Administrative Law, page 269.

⁴ The Permanent Secretary for the Public Service Commission and another v Lagiloo, Civil Appeal 38 of 1996

dispense with the applicant's services is not fair and reasonable. The decision itself must be fair and reasonable. That is the protection afforded to every servant who is employed under a contract of service. There is no doubt in my mind that the applicant has suffered a grievous wrong. It should not be beyond the power of the court to provide a suitable remedy. The applicant is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power.

- (11) A decision reached in breach of the principles of natural justice is outside the jurisdiction of the decision-making body, and so is void in exactly the same way as if the body had acted outside its statutory jurisdiction. In the House of Lords decision in **Ridge v Baldwin**⁵;

.....there was considerable argument whether in the result the watch committee's decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in Wood v Wood. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.

- (12) The breadth and scope of the obligation to give effect to natural justice is touched on in these words from Lord Loreburn in **Board of Education v Rice**⁶:

In the present instance.....what comes for determination, is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen carefully to both sides, for that it a duty lying on everyone who decides anything.

- (13) There is no evidence that the Commissioner of Police had taken into account the applicant's twenty two years unblemished record, or even that the vehicle in question had been in three previous accidents and whether that may have contributed to the applicant's inability to negotiate the flood water on the occasion in question. These would be matters for the Commissioner of Police before the final decision is taken based on the finding of guilt by the disciplinary tribunal. The decision of the Police Commissioner is not fair and reasonable. The first respondent's decision to dismiss the applicant was vitiated by his erroneous assumption that he had an absolute constitutional discretion and by his failure to observe the rules of natural justice in not giving the applicant a chance to say anything in mitigation. The first respondent's constitutional discretion [Article 129 (7)] , although wide, is not absolute. The Police Commissioner should have given a chance to the applicant to speak in mitigation in accordance with the appropriate principles of natural justice before the final decision is taken. This was not done here. In my view, common prudence should dictate that the report (annexure RA-10) by the delegated officer, in this case the Director Legal, or at least its substance , should be shown to the officer the

⁵ [1963] 2 All ER 66 Lord Reid said (at page 82):

⁶ [1911] AC 179

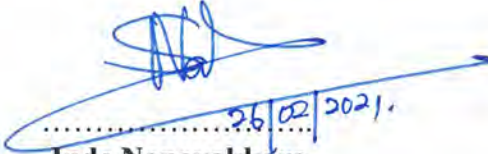
subject of the review and an opportunity afforded him to comment on it before the final decision is taken by the Commissioner of Police. This was not done here.

ORDERS:

- (1) I declare that the decision of the first respondent of 30-03-2020 to dispense with the services of the applicant from the Fiji Police Force with effect from 26.03.2020 is unfair, invalid, unjust, arbitrary, void and of no legal effect and in any event, was in breach of the rules of natural justice.
- (2) I issue an **order of Certiorari** quashing the decision of the first respondent of 30-03-2020 to dispense with the services of the applicant from the Fiji Police Force.
- (3) I make an Order that the applicant be paid full salary together with all benefits and entitlements (if any) for the period between 26-03-2020 and 26-02-2021.
- (4) I issue an **order of Mandamus** directing the first respondent to reinstate and or to renew the applicant's employment contract on existing terms and conditions **OR** in the alternative, pay compensation to the applicant on a generous scale.
- (5) **The matter is remitted to the first respondent under Order 53 rule 9(4) of the High Court Rules 1988 to comply with the orders of this Court within seven days from the date of this decision.**
- (6) I make an Order that the first respondent pay the costs of this action to the applicant which is summarily assessed in the sum of \$2000.00. The costs to be paid to the applicant within seven (07) days from the date of this decision.



High Court - Lautoka
Friday, 26th February 2021


26/02/2021.
Jude Nanayakkara
[Judge]