

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBJ 2 of 2022

IN THE MATTER of an application by **REMESIO RAIKOSO**, for a Judicial Review under Order 53 of the High Court Rules 1988.

AND

IN THE MATTER of the decision made on the 23rd of December 2021 by **THE COMMISSIONER OF POLICE**.

BETWEEN : **REMESIO RAIKOSO** of Lot 28 Powell Crescent, Nasevou Street, Lami, Unemployed.

APPLICANT

AND : **THE COMMISSIONER OF POLICE** Police Headquarters, Vinod Patel Complex, 4 Miles, Nasinu.

1ST RESPONDENT

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

2ND RESPONDENT

Counsel : **Applicant: Mrs. Raikaci N**
Respondents: Ms. Faktaufon M

Date of Hearing : **08.07.2022**

Date of Judgment : **03.05.2023**

JUDGMENT

INTRODUCTION

1. Applicant filed this application seeking judicial review the decision of first Respondent's decision in reviewing in terms of Section 33(2) of Police Act 1965. Applicant was charged

with conduct prejudicial to good order and discipline in terms of Section 60(c), (d) of Police Act 1965 and Regulation 12(37) of Police Regulation 1965. The allegation against him was that he obtained \$400 cash during the course of investigation of a matter, which brought disrepute to Police. Applicant pleaded not guilty and a hearing before a Tribunal appointed in terms of Section 32 of Police Act 1965, (the Tribunal). Applicant was not given the proceedings and or decision and or recommendations of the Tribunal but he was terminated from service. He sought review Tribunal's decision by first Respondent in terms of Section 33 of Police Act 1965. First Respondent refused to review the Tribunal proceeding. Respondent object to the leave being granted on the basis that statutory review power was granted to first Respondent hence decision of the Tribunal cannot be reviewed by the court in exercising judicial review. Applicant is alleging statutory violations, and also constitutional violations in terms of Section 14 (1)(d) of the Constitution of the Republic of Fiji. There are statutory underpinnings that needs to be judicially determined including constitutional provisions. In the circumstances leave is granted for judicial review of the decision of first Respondent.

FACTS

2. Applicant was a regular member of Fiji Police Force (Police) from 1990 and was with Criminal Investigation Department.
3. He was served with two letters stating that he was interdicted with effect from 10.12.2021 pending outcome of the investigation against him.
4. On 2.9.2021 Applicant was served with 'Defaulter Sheet' for 'conduct prejudicial to good order and discipline of the Police'. (the charge). This was acknowledged by Applicant and annexed as VC5 to affidavit in Response filed on 20.5.2022.
5. Applicant in the affidavit in support stated he received the charge on 30.9.2022 requesting him to appear before Tribunal on 5.10.2022 and in the affidavit in reply filed on 31.5.2022 evaded answering to annexed VC5 where his signature and person who served it was mentioned clearly.
6. The allegation against Applicant was receipt of \$400, from a named person, in the cause of investigation and using said money for personal expenses.
7. Applicant denied the charge, and a Tribunal was appointed to hear the charge against him on 30.9.2021. Particulars of the charge was amended prior to this and he had acknowledged the receipt of amended charges, and hearing was adjourned 5.10.2021.

8. Applicant stated that his charges were amended for the first time on 30.9.2021 in the affidavit in support and his reply had evaded to answer to paragraph 9(c) of affidavit in response for Respondents filed on 20.5.2022. According to Respondent Applicant had received the amended charges before 30.9.2021.
9. On 5.10.2021 Applicant came for the hearing with his legal representative to represent him at the Tribunal, and he was told only gazette officer could represent him at Tribunal in terms of Regulation 13(vii) of Police Regulation 1965.
10. Applicant had sought an adjournment but this was refused as the witnesses had come for the hearing.
11. Applicant had informed that he would represent himself, after he was informed that he could be assisted by a gazette officer.
12. Hearing of the charges against Applicant proceeded on the amended charges which were served previously. He appeared in person and cross examined the witnesses.
13. Before Applicant was given an opportunity for leading evidence the time period was amended with change of month stated in the charge was amended from November to September. This was objected but overruled.
14. According Respondent Fiji Police Force Standing Order (FSO) 64(32) this could be done. The amendment was done before prosecution closed the evidence.
15. Applicant elected to give unsown statement to the Tribunal and also oral mitigation.
16. Applicant was directed to file written submissions by the Tribunal and he had done so on 8.10.2021.
17. 13.10.2021 Applicant was found guilty. The ruling was orally pronounced by the Tribunal and given time for mitigation through written submission and adjourned for 15.10.2021.
18. According to Applicant he had requested a copy of the said ruling but this was not provided and told that for that approval of Director of Internal Affairs required. He did not get a copy.
19. This was denied by affidavit in response at paragraph 12(g) and this was not responded, by Applicant.

20. On 15.10.2021 Applicant was not present and when inquired he had sought time till 12pm and this was granted but he had not come before the Tribunal at 12pm.
21. According to Respondents FSO 64(33) provides when a defaulter was found guilty the Tribunal's proceedings to be forwarded to first Respondent with its recommendations. Hence, the Tribunal was unable to give its recommendation to Applicant.
22. 9.11.2021, Director of Human Resource informed that first Respondent had requested a 'show cause' as to why his 'services to be terminated no later than 15.11.2021.
23. Applicant was told to submit Show Cause why he should not be terminated and he submitted 'show cause' for not to terminate him on 9.12.2021.
24. 23.11.2021 first Respondent amended earlier interdiction letter to interdict Applicant without salary in terms of Section 28(3) of Police Act 1965

ANALYSIS

25. The main contention for the Respondent is that this court cannot exercise jurisdiction for Judicial Review in terms of Order 53 of High Court Rules 1988 (HCR) due to following reasons
 - a. Tribunal proceedings are reviewable by first Respondent pursuant to Section 33 of Police Act 1965.
 - b. Applicant is seeking leave for judicial review relating to decision taken on 23.12.2021 to dismiss him by first Respondent. This is the decision sought to quash.
 - c. Applicant had failed to seek leave to quash the decision of the Tribunal, hence it cannot be questioned in this proceedings.
 - d. Alternatively, the Tribunal decision can only be reviewed by first Respondent as it is a statutory provision.

Is the court precluded from Reviewing the Tribunal proceedings.

26. Section 33 of Police Act 1965 states,

“Review by the Commissioner

33.-(1) The Commissioner shall review all proceedings heard by any tribunal, other than proceedings heard by himself.

(2) Upon such review, the Commissioner may-

(a) quash the finding;

(b) alter the finding, find the offender guilty of another offence and punish him in accordance with his powers under the last preceding section;

(c) confirm the finding and punish the offender in accordance with his powers under section 32;

d) remit the proceedings to the tribunal which heard them or to another tribunal, for re-hearing.”

27. There is no restriction placed by legislation as to judicial review of the decision of first Respondent. The fact the review power of the decision of the Tribunal, is granted to first Respondent is to allow the Applicant to seek a review from first Respondent which is easy and economical.
28. Similar reviewing powers through administrative decisions are granted in statutory provisions for number of reasons. Respondents' contention is when a decision can be administratively reviewed, it is excluded from judicial review of the court.
29. Respondent in the written submission relied *on Re N* (an infant) High Court decision decided on 22.3.1994 , but this is not a an action for judicial review and it is an originating summons seeking declarations and orders to adopt an infant.
30. Respondent had relied on number of decisions in the said *Re N* (supra) case. These relate to judicial review decisions in UK. The principles stated in such decisions can be applied locally, but one has to be careful about the legislative provisions applicable in Fiji;
31. Considering the authorities submitted by Respondent at the hearing there is an arguable ground for such an ouster but at this stage I am not going to deny Applicant's application considering the statutory interpretations sought and also constitutional provisions relied on.
32. Respondent is not precluded from making the contention at hearing of judicial review, but at the moment it cannot be decided conclusively from the material submitted to me.
33. In *R v Civil Service Appeal Board, ex parte Bruce* (1988) 3 All E.R. 686 May L.J said at p 691:

“The first issue in this case, therefore is whether the board's decision on the applicant's appeal against his dismissal is capable of challenge in this court by means of judicial review. This will only be if there was a **public or administrative element in the board's jurisdiction to hear and decide such an appeal, in other words, whether an issue of public law was involved. The test is relatively simple to state, but by no means easy to apply.** As Sir John Donaldson MR said in *R V*

Panel on Takeovers and Mergers exp Datafin plc [1986] EWCA Civ 8; (1987) 1 All ER 564 at 577,(1987) QB 815 at 838:

‘In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all of those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms...’ (emphasis is added)

34. So any special Tribunal created for a specific purpose can be subjected to judicial review if there is an ‘issue of public law was involved’ , hence the contention that specific tribunals created by a statute and their decisions are immune from judicial review is not correct.
35. The issue is whether there is public law element and in this instance Applicant is relying on constitutional provisions as grounds. He is also relying on statutory provisions and failure to comply with the said statutory provisions by the Tribunal.
36. I do not have to consider the contentions by either party finally in this decision to grant leave for judicial review.
37. Applicant had satisfied that this application is not frivolous and arguable.
38. Ministry and the Permanent Secretary for the Ministry of Education and the Attorney General v Amrit Prakash (unreported) Court of Appeal Fiji Islands Case Number 0032 of 2009, held,

“The principles invoking public law remedy in relation to employment are well settled. An employee of a public authority is entitled to invoke a public law remedy in relation to his employment depends on whether there were special **statutory restrictions governing the employment or whether there are Regulations or statutory underpinning** to the conditions of employment. If not the relationship between the employee and the public authority **is only a master and servant relationship** and it is governed by the respective contract of employment. In this instant case the **Respondent’s employment is not made under any statutory provision or governed by any regulation**. He was appointed as a Primary Teacher by the Ministry of Education with the concurrence of the Public Service Commission in terms of the letter of appointment issued to him. The Respondent has entered into a contract of employment in terms of the letter of appointment. Any breach of the terms and conditions stipulated in the letter of appointment would fall under realm of private law. Hence I reject the submission of the Appellants that

the remedy that is available to the Respondent in the given circumstances is by way of judicial review.” (emphasis added)

39. In *R. v. East Berkshire Health Authority, ex parte Walsh* [1984] EWCA Civ 6; (1984) 3 All E.R. 425 it was held by the Court of Appeal that whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee’s position and **not on the fact of employment by a public authority per se or the employee’s seniority or the interests of the public in the functioning of the authority**. Sir John Donaldson M.R. in his judgment discussed the question of statutory underpinning in relation to three of the most well-known cases in this area, *Vine v. National Dock Labour Board* (1956) 3 All E.R. 939, *Ridge v. Baldwin* [1963] UKHL 2; (1963) 2 All E.R. 66 and *Malloch v. Aberdeen Corp* (1971) 2 All E.R. 1278, and said at p. 430:

“In all three cases there was a special statutory provision bearing directly on the right of a public authority to dismiss the plaintiff. In *Vine*’s case the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismissal was conferred by statute (s. 191(4) of the Municipal Corporations Act 1882). In *Malloch*’s case again it was statutory (s.3 of the Public Schools (Scotland) Teachers Act 1882). As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a ‘higher grade’ or is an ‘officer’. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient”, (emphasis added)

Applicant has not sought to review the Tribunal proceedings.

40. Applicant had filed a statement in terms of Order 53 rule 3(2) of HCR and it states,

“.....in respect of the decision of the **COMMISSIONER OF POLICE** made on 23rd day of December 2021, whereby the **COMMISSIONER OF POLICE** upon the finding of guilt by the Tribunal for the offence of **Conduct Prejudicial to Good Order and Discipline of the Force**, terminated the Applicant's employment with the Fiji Police Force with effect from 20th December 2021.

1. The Reliefs, which the Applicant is seeking, are as follows: -

- i. **An Order of CERTIORARI** to remove the said decisions of **THE COMMISSIONER OF POLICE** made on the 23rd day of December 2021 into this Honorable Court and the same be quashed.
- ii. **DECLARATIONS** that:-
 - a) The decision of the **COMMISSIONER OF POLICE** dated the 23rd day of December 2021, unconstitutional, irrational, unfair, invalid, arbitrary, unjust, void and of no effect.
 - b) The **COMMISSIONER OF POLICE** acted in breach of the Applicant's Legitimate Expectation in the continuation of his employment in the Fiji Police Force.
 - c) The **COMMISSIONER OF POLICE** acted arbitrarily and/or unreasonably and failed to take into account relevant considerations when exercising his power under Section 32 (1) (A) of the Police Act - Cap 85(as amended by Section 163 (h) of the Revised Edition of the Laws(Consequential Amendment) 2016 and Section 129 (7) of the 2013 Constitution.
 - d) The **COMMISSIONER OF POLICE** exceeded his jurisdiction in punishing the Applicant without the Tribunal's recommendations and/or consideration of the Tribunal recommendations as to the punishment to be imposed contrary to Section 32 (1) **B** of the Police Act 1965.
 - e) The **COMMISSIONER OF POLICE** acted in violation of Section 33 (1) and (2) of the Police Act when he failed to review the Tribunal proceedings and to quash the findings when there is no evidence adduced by the Prosecution to prove that the conduct complained of is "**prejudicial to good order and discipline of the Force**", an ingredient of the offence charged.
 - f) The **COMMISSIONER OF POLICE** has violated Section 16 (1) (b) of the Constitution when he failed to give the Applicant written reasons for his decision to dismiss the Applicant from the Force. **THE COMMISSIONER OF POLICE** had acted unfairly and in breach of the principles of natural justice when he failed to consider the issues raised in the Applicant's mitigation in writing and/or Show Cause

dated the 9th day of December 2021.

- g) The **COMMISSIONER OF POLICE** failed to endorse the Applicant's Dismissal Letter with his original signature instead two different copies (one being undated) of the so-called dismissal letters were served on the Applicant twice on separate occasions on the public road.

- h) The **COMMISSIONER OF POLICE** acted arbitrarily, unfairly and unconstitutionally when he failed to consider the plea by the Applicant before the Tribunal proceedings to be represented by a lawyer of his own choice pursuant to Section 14 (1) (d) of the Constitution. Thereafter, the Applicant was also denied to be represented by a gazetted officer (a friend) of the rank of Senior Superintendent contrary to Regulation 13 (vii) of the Police Regulations.

- i) The Tribunal acted unfairly and arbitrarily when he failed and/or refused to give a copy of his ruling on request of the Applicant soon after the delivery of the Tribunal ruling.

- j) **The COMMISSIONER OF POLICE** acted unfairly, arbitrarily and unconstitutionally when he failed and/or refused to furnish the Applicant with the written ruling of the Tribunal with record of its proceedings when requested by the Applicant.

- iii. **A MANDAMUS** directing the **COMMISSIONER OF POLICE** to reinstate the Applicant to his former position in the Fiji Police Force with its ensuing salaries, benefits and privileges.

- iv. **DAMAGES** for:
 - a) Humiliation, mental distress & anxiety and

 - b) Pain and suffering from the oppressive, arbitrary and unreasonable acts of the **COMMISSIONER OF POLICE.**

- v. **Costs of this action.**

- vi. **AND** such other or further Orders and/or Declarations and/or other Reliefs as this Honorable Court may deem just.

2. **THAT** the grounds upon which the Applicant is seeking reliefs against the **COMMISSIONER OF POLICE** are as follows: -
- (i) That the decision made by **THE COMMISSIONER OF POLICE** on the 23rd day of December 2021 is procedurally unfair, improper and irrational because he failed to exercise his own discretion in good faith when reviewing the Tribunal proceedings; and took into account irrelevant considerations and failed to take into account relevant considerations, in that:
 - a) The Tribunal had erred in its finding of guilt of the Applicant in the absence of any evidence to prove that the alleged conduct of the Applicant is *prejudicial to good order and discipline of the Force*.
 - b) The Tribunal failed to give reasons for disallowing legal representation upon request by the Applicant since Tribunal proceedings must be open to the public in accordance with Section 15 (4) of the 2013 Constitution.
 - c) The Tribunal failed to read back the recorded evidence of the three witnesses including his unsworn evidence and mitigation to the Applicant as required under Regulation 13 (iv) of the Police Regulations.
 - d) The Tribunal failed upon request by the Applicant to hand him a copy of its ruling after its delivery at the conclusion of the Tribunal hearing.
 - e) That the Commissioner failed to consider the absence of the Tribunal's recommendations as to the punishment to be imposed in accordance with Section 32 (1) (B) of the Police Act.
 - (ii) That **THE COMMISSIONER OF POLICE** failed to give written reasons for his decision to dismiss the Applicants on the 23rd day of December 2021, hence abusing the powers conferred upon him by Section 16 (1) (b) of the 2013 Constitution of the Republic of Fiji.
 - (iii) That **THE COMMISSIONER OF POLICE** decision on 23rd December 2021 is *ultra vires* in that he contravenes or exceeds the powers conferred upon him by Section 16 (1) (a) and (b) of the Constitution, Sections 33 of the Police Act and Regulation 13 of the Police Regulations respectively, and therefore, his decision to dismiss the Applicant from the Force is null, void and of no legal effect.
 - (iv) That the **COMMISSIONER OF POLICE** failed to consult and/ or to give the Applicant a chance to be properly heard and also had failed to properly consider and/or failed to consider the content of the Applicant's Show Cause before he

dismissed the Applicant. This is in contravention of the principle of natural justice; the Latin phrase **audi alteram partem rule** meaning "listen to the other side" or "let the other side be heard as well".

- (v) The decision made by **THE COMMISSIONER OF POLICE** is irrational insofar that it is unreasonable and lacks proportionality considering the offence purportedly committed by the Applicant in comparison with the punishment given.
- (vi) The **COMMISSIONER OF POLICE** had breached the Applicant's "legitimate expectation" by finding him guilty when there is no evidence to prove that the alleged conduct is *prejudicial to good order and discipline of the Force*.
- (vii) In dismissing the Applicant on 23rd December 2021, the **COMMISSIONER OF POLICE** had failed to ensure that the Applicant is served with the original Dismissal Letter bearing his original signature in a decent place other than on a public road. The Applicant received unfair, inhumane and degrading treatment upon his dismissal by the **COMMISSIONER OF POLICE**.

.....”

41. Order 53 rule 4 of HCR states

“Without prejudice to its powers under Order 20, Rule 8, the Court hearing an application for leave **may allow the relief sought** and the **grounds thereof to be amended**, whether by specifying different or additional grounds or relief or otherwise, on such terms if any as it thinks fit.”(emphasis added)

42. So there is no rigid rule at the stage of granting leave to refuse leave to the relief sought in the ‘motion’ but can allow them to be amended.

43. In this instance Applicant is seeking to quash the decision of first Respondent on the basis stated in ‘notice in Form 32 in Appendix 1’. It is clear from that the in terms of the said ‘notice’ particulars of ‘judgment order, decision or other proceeding in respect of which judicial review is being sought’ were given in detail.

44. According to above ‘statement’ in terms of Order 53 rule 3(2) of HCR, Applicant is seeking declarations regarding the Tribunal proceedings in (d),(e) as the said reliefs refer to absence of recommendations by the Tribunal and also lack of evidence before the Tribunal for first Respondent to exercise his power of review.

45. Applicant is also challenging first Respondent’s review of the Tribunal and also decision to dismiss him on the grounds stated in the said ‘statement’.

46. So I cannot see merits in the contention of Respondents, that Applicant had not sought orders to review, hence leave should be refused.

CONCLUSION

47. Applicant had complied with the requirements contained in HCR for seeking judicial review. The application cannot be considered as frivolous, considering the statutory provisions and constitutional provisions relied. Accordingly leave for judicial review granted to review first Respondent's decision to terminate the Applicant made on 23.12.2021 and also decision regarding exercising his power to review Tribunal proceedings and or decision and or recommendation. No order as to cost.

FINAL ORDERS

- a. Leave of Judicial Review granted for the Applicant for
 - a. Review of the Decision of First Respondent
 - i. To dismiss the Applicant (23.12.2021).
 - ii. Failure to Review the Tribunal's decision.
 - b. Review of the Tribunal's proceedings, including
 - i. Decision of finding guilty.
 - ii. Recommendation to first Respondent.
- b. No cost ordered considering circumstances of the matter.

Dated at Suva this 3rd day of May, 2023.




.....
Justice Deepthi Amaratunga
High Court, Suva