

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA (WESTERN DIVISION)**

**JUDICIAL REVIEW ACTION NO. 02 of 2022**

**IN THE MATTER** of an Application for leave to apply for  
Judicial Review by Asenaca Maqanatagane (Applicant)

**AND**

**IN THE MATTER** of the decision dated the 09<sup>th</sup> December ,  
2021 by the Commissioner of Police for terminating /dismissing  
the employment of the Applicant from the Fiji Police Force

**BETWEEN** : **ASENACA MAQANATAGANE** of 99 Browning Street Raiwaqa,  
Suva.

**APPLICANT/PLAINTIFF**

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

**1<sup>ST</sup> RESPONDENT**

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

**2<sup>ND</sup> RESPONDENT**

Counsel Appearing : Mr. Eroni Maopa for the Applicant  
Mr. Josefa Mainavolau for the Respondents  
Date of Hearing : 26 October 2022  
Date of Ruling : 21 February 2023

**R U L I N G**

*(Under Slip Rule - Order 20 Rule 10 High Court Rules 1988)*

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA (WESTERN DIVISION)**

**JUDICIAL REVIEW ACTION NO. 03 of 2022**

**IN THE MATTER** of an Application for leave to apply for  
Judicial Review by Simone Tuivanuavou (Applicant)

**AND**

**IN THE MATTER** of the decision dated the 09<sup>th</sup> December ,  
2021 by the Commissioner of Police for terminating /dismissing  
the employment of the Applicant from the Fiji Police Force

**BETWEEN** : **SIMIONE TUIVANUAVOU** of Lot 263 Vomo Street, Lautoka.

**APPLICANT/PLAINTIFF**

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

**1<sup>ST</sup> RESPONDENT**

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

**2<sup>ND</sup> RESPONDENT**

Counsel Appearing : Mr. Eroni Maopa for the Applicant  
: Mr. Josefa Mainavolau for the Respondents

Date of Hearing : 26 October 2022

Date of Ruling : 21 February 2023

**R U L I N G**

*(Under Slip Rule - Order 20 Rule 10 High Court Rules 1988)*

## **BACKGROUND**

1. This is my Ruling on two separate but closely related Judicial Review proceedings. Both were filed on 04 March 2022. The first of these two is HBJ 02 of 2022 where the applicant is one Ms. Asenaca Maqanatagane. The second of these is HBJ 03 of 2022 where the applicant is one Mr. Simone Tuivanuavou (“Applicants”).
2. The Applicants each received a letter dated 09 December 2021 from the Commissioner of Police. That letter communicated the Commissioner’s decision to dismiss them from the Fiji Police Force.
3. At the time of the termination of their services, the Applicants were both holding senior positions in the Police Force. Ms. Maqanatagane was holding the rank of Assistant Superintendent of Police (ASP) at the time. Mr. Tuivanuavou was holding the high but slightly lower rank of Inspector of Police (IP). Each of them had served the Force for a considerable number of years with a relatively clean disciplinary record.
4. The Commissioner made the decision to terminate them based on a recommendation from the Disciplinary Tribunal which had heard their case. The case against them was based on an allegation that they were in an extra-marital affair between 2019 to 2020.
5. It appears that the Fiji Police had received a complaint from Mr. Tuivanuavou’s spouse against Ms. Maqanatagane’s calls and texts to his phone. This then prompted an internal investigation, and, ultimately, to the laying of disciplinary charges against them.
6. In due course, the Applicants were tried before the Disciplinary Tribunal in question. That Tribunal was duly convened and presided over by a gazetted officer – as required by law.
7. At the end of the trial, the Tribunal concluded as follows (in a written ruling with reasons given):

The evidence in this proceeding suggests that this case is not of sexual intercourse or sexual relationship but more of fraternization however it falls within the definition of Extra Marital Affairs (EMA).

Therefore I find first and second defaulters guilty for (sic) a count each of Conduct Prejudicial to Good Order and Discipline of the Force and therefore convict first and second defaulters accordingly
8. Following the Tribunal’s written Ruling, the Applicants were given an opportunity to submit a written mitigation, and a little while later, an opportunity to show cause why they should not be dismissed. They did so respectively. Notably however, they were not afforded an opportunity to be heard orally on these.
9. A short while later, the Applicants received their respective termination letter from the Commissioner of Police.

**RELIEF SOUGHT**

10. The Applicants both seek the following relief:
- (a) a Declaration that the decision of the Commissioner of Police vide the letter dated 09 December 2021 is unfair, unreasonable, invalid, unjust, arbitrary, void and of no legal effect.
  - (b) a Declaration that, in any event, the Commissioner of Police breached the rules of natural justice and/or abused his discretion and/or exceeded his jurisdiction.
  - (c) an Order for Certiorari to remove into the High Court the decision of the Commissioner of Police vide letter dated 09 December 2021 be quashed forthwith
  - (d) an Order for Mandamus directing the Commissioner of Police and the Attorney-General to reinstate and or renew the Applicant’s employment contract on existing terms and conditions.
  - (e) reinstatement of full salary and benefits from the date of interdiction to the date of judgement.
  - (f) General Damages
  - (g) Costs
  - (h) such further or other Orders as the Court deems fit

**THE CHARGE (DEFAULTER SHEET)**

11. As stated above, the complaint from Mr. Tuivanuavou’s spouse prompted an investigation in 2020. Initially, a **Board of Inquiry** was convened on 30 November 2020 to look into the complaint. However, the Board cleared the Applicants of the allegations and informed them vide a letter dated 13 January 2021 that no further action would be taken<sup>i</sup>.
12. However, some seven (7) months or so later, the Applicants were each served with a Defaulter Sheet. The Charge stated on the Sheet which one received was the same in wording as the Charge which the other received. They were worded as follows:

**CONDUCT PREJUDICIAL TO GOOD ORDER & DISCIPLINE OF THE FORCE:**  
Contrary to Section 60© (d) of Police Act 1965 and Regulation 12[37] of Police Regulations 1965.

In that you, sometimes between 2019 to 2020, whilst being legally married to ....., were having an extra marital affair with ..... who is legally married to ..... Your action has brought disrepute to this organization, which construed (sic) to an act prejudicial to good order and discipline of the force.

13. Eleven days after being served with the above Defaulter Notice, on 20 August 2021, the Applicants were each served with a letter<sup>ii</sup> directing them to proceed on forty-five working days of annual leave from 18 August 2021 to 21 October 2021. This was to allow investigations to proceed. The applicants were told in the letter that, at the end of their annual leave they would be interdicted from duty with fifty-per cent salary effective from 14 January 2022 pending the outcome of investigations.

## TRIBUNAL PROCEEDINGS

14. As stated, a Tribunal was duly convened and was presided over by Superintendent Anil Prasad. At the trial, both Applicants, by choice, appeared in person and were unrepresented. The prosecution called five witnesses altogether. Three of them were employees of the Town House. The other two were Police Officers, one of whom was the officer who actually received the complaint from Mrs. Tuivanuavou. The other was the investigating officer. These witnesses were all cross-examined by Ms. Maqanatagane and Mr. Tuivanuavou.
15. The three Town House employees all testified having seen Ms. Maqanatagane and Mr. Tuivanuavou at the Town House on various occasions. On these occasions, Ms. Maqanatagane would be visiting Mr. Tuivanuavou in his room and would stay there for quite sometime. He would be booked there for Official Police purposes.
16. I observe that the Tribunal was careful to caution itself at various points of the proceedings. At the outset, it did warn itself of the Applicants' right to fair trial. At the close of the prosecution case, the Tribunal warned itself that it must apply an objective test rather than a subjective test when considering whether there is a case to answer. It then went on to rule that there was a case to answer.
17. Ms. Maqanatagane gave sworn evidence. Mr. Tuivanuavou chose not to.
18. Ms. Maqanatagane said she was the Administration Officer of the Fiji Police Force. She held the position of Manager Assets at all material times. Her job entailed *inter alia* overseeing the administration of the Force. She would go to the Town House in an official capacity because that was where the Fiji Police would book its officers visiting from out of Suva on official business e.g. workshops, investigations etc. She refuted all the evidence of the prosecution witnesses. While she did not deny visiting Mr. Tuivanuavou on occasions, her cross-examination of the prosecution witnesses focused on whether any of them had ever witnessed her having sexual intercourse with Mr. Tuivanuavou to which the answer was a *No!* She maintained that line in her evidence.
19. The Tribunal did warn itself that, whilst the test at the no case to answer stage was an objective test, the ultimate test at the close of trial is a subjective one.
20. In its reasoning, the Tribunal took into account (i) the definition of "*extra-marital affairs*" as defined in the Commissioner of Police Administrative Directive 11/13 and in Commissioner's Directive 06/2021 and (ii) the definition of "*fraternization*" and (iii) how fraternization may undermine the integrity of the official relationships in an organization and (iv) that while fraternization is often associated and applied to romantic liaisons, it may also apply to close friendships, business relationships or even certain financial exchanges between members of the force regardless of rank or gender.
21. The Tribunal then remarked that it had considered the demeanor of all witnesses and found the town house employees who gave evidence for the prosecution as credible witnesses. It also warned itself that the test is balance of probability and not proof beyond reasonable doubt.

## **TRIBUNAL FINDINGS**

22. The Tribunal did provide a full written decision dated 09 November 2021. In that decision, it concluded as follows after reviewing the evidence:

The evidence in this proceeding suggests that this case is not of sexual intercourse or sexual relationship but more of fraternization however it falls within the definition of Extra Marital Affairs (EMA).

Therefore I find first and second defaulters guilty for (sic) a count each of Conduct Prejudicial to Good Order and Discipline of the Force and therefore convict first and second defaulters accordingly

## **MITIGATION & SHOW CAUSE**

23. Following the Ruling, both Ms. Maqanatagane and Mr. Tuivanuavou submitted their mitigation. Ms. Maqanatagane submitted hers on 10 November 2021. Mr. Tuivanuavou also submitted his although it is undated and he does not depose as to the date he submitted it.
24. Both however received a Show-Cause letter dated 26 November 2021 from SSP Sateki, the Director Human Resources Management. Their letters both state the following:
- (a) that she/he, briefly, sometimes in 2019 to 2020, whilst married to their respective spouse, was having extra marital affairs with the other
  - (b) she/he was defaulted and appeared before a Tribunal as a result
  - (c) the Commissioner demands she/he shows cause as to why her/his services should be retained
  - (d) the show-cause must be received no later than Friday 03rd December 2021 at 1600hrs
  - (e) if she/he fails to adhere to the above deadline, a recommendation will be made to the Commissioner of Police for her/his dismissal.
25. Ms. Maqanatagane submitted her Show Cause dated 02 December 2021. Mr. Tuivanuavou submitted his Show Cause dated 30 November 2021. A week or so later, they received the 09 December letter of dismissal from the Commissioner of Police.

## **COMMENTS ON THE TRIBUNAL PROCEEDINGS UP TO THE FINDINGS**

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

13. The following procedure shall apply to all proceedings heard by any tribunal under the provisions of section 32 of the Act:-

- (i) the officer charged with an offence against discipline (hereinafter referred to as "the accused") shall be supplied with a copy of the charge prior to the hearing;

- (ii) no documentary evidence shall be used in any such proceedings unless the accused has been given access thereto prior to the hearing;
  - (iii) the evidence of any witness taken during the course of the proceedings shall be recorded in the presence of the accused;
  - (iv) the evidence given at the proceedings need not be taken down in full, but the substance and material points thereof must be recorded in writing and read over to the accused;
  - (v) the accused shall have the right to cross-examine each witness giving evidence against him 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.
27. In terms of natural justice, I cannot find fault in the manner in which the Tribunal proceeded up to the point when it pronounced its findings. I do think that the Tribunal deserves an applause for that. However, I do have some misgivings on (i) whether the Applicants were given a fair chance to be heard on their mitigation and show cause after the Tribunal delivered its Ruling (ii) whether the Tribunal had misdirected itself on Regulation 12(37) and on the *Force's Administrative Directive – 11/13 – No Drop Policy on Extra Marital Affairs and Immoral Activities* and whether that misdirection led it to recommend the harshest of sanctions available to the Commissioner.
28. Section 32(1)B of the Police Act provides that any gazetted officer shall have power to hear and investigate charges. If he finds the accused guilty of an offence against discipline, he shall then make recommendations to the Commissioner as to the punishment to be imposed.

#### **WHETHER THE TRIBUNAL'S FINDINGS WERE AN ERROR OF LAW?**

29. There is, at the heart of this case, a policy against extra-marital affairs in the police force (see below discussion on the *Force's Administrative Directive – 11/13 – No Drop Policy on Extra Marital Affairs and Immoral Activities*). It appears that this policy played a major part both in the manner in which the Tribunal approached the case and also in the sanction it recommended to the Commissioner.
30. That said, I start by saying that an administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law. An error is relevant if it (the error) actually affected the decision made (**R v Hull University Visitor, ex parte Page** [1993] AC 682, 702C-D)).
31. An error in interpreting policies would be material only if there is a real possibility that the determination might, but for the error, have been different (see **Tesco Stores Ltd v Dundee City Council** [2012] UKSC 13 [2012]).

### ***Power to Discipline & Punish for Offences Against Discipline***

32. The Commissioner of Police is given general powers under section 129(7)(b) and (c) of the 2013 Constitution to take disciplinary action against persons in the Fiji Police Force and to remove persons from the Force<sup>iii</sup>.
33. These general powers must be read together with section 32(1)A of the Police Act as amended by section 163(h) of the Revised Edition of the Laws (Consequential Amendments) Act 2016, section 32(1)B, section 32(2) and Regulation 13 of the Police Regulations.
34. Section 60 (c) gives power to the Minister to prescribe offences against discipline punishable under the provisions of the Act<sup>iv</sup>.
35. Section 30 as amended by section 163(g) of the Revised Edition of the Laws (Consequential Amendments) Act 2016 provides that any police officer guilty of an offence against discipline, shall be liable to be punished in accordance with the provisions of the Act<sup>v</sup>.
36. Regulation 12 of the Police Regulations sets out thirty-seven (37) prescribed offences against discipline for the purposes of section 30 as amended by section 163(g).
37. The Applicants in this case were charged and found guilty under Regulation 12(37). This reads as follows:

12(37). Any inspectorate or subordinate officer who ....is guilty of any other act, conduct, disorder or neglect to the prejudice of good order or discipline,  
shall be guilty of an offence against discipline for the purposes of section 30 of the Act.

### ***What Act Did They Commit?***

38. The Tribunal, as I have said, found that there was no evidence to suggest that the Applicants were in a sexual relationship. However, the Tribunal considered the definition of “extra-marital” affair to be broad to include fraternization which is not necessarily sexual in nature. The Tribunal then found that the Applicants were guilty of fraternization – and might I add for emphasis, of a non-sexual nature.
39. I do note that the definition of *extra marital affair* which the Tribunal relied on is based on the one in the Commissioner of Police Administrative Directive 11/13 and in Commissioner’s Directive 06/2021, Wikipedia, and the Uniformed Code of Military Justice (UCMJ) under Article 134 of the Manual for Court-Martial (MCM).
40. There has always been in place in the Police Force, a policy against officers engaging in extra marital affairs between them. At the time of the offending, the relevant policy in force was embodied in the *Force’s Administrative Directive – 11/13 – No Drop Policy on Extra Marital Affairs and Immoral Activities*<sup>vi</sup>.



41. As stated above, the Minister is the one who is empowered under section 60(c) of the Police Act to prescribe offences against discipline punishable under the Act. There appears to be nothing in the Act which gives the Commissioner similar powers. The Commissioner's powers, rather, are confined to taking disciplinary action and giving punishment.
42. That said, I observe that nowhere in the provisions of Regulation 12, is "extra-marital" affair or "fraternization" mentioned as an offence against discipline. If they were to be added as an express specific offence against discipline under Regulation 12, it is the Minister who would prescribe these acts, expressly, as specific acts against discipline pursuant to his powers under section 60.
43. Neither counsel highlighted to me whether there is in fact a Ministerial Order or directive in place which has the effect of making extra-marital affairs or fraternization a specific offence against discipline per se.
44. In this case of course, because there is no express provision under Regulation 12 to cover extra-marital affairs or fraternization - the Applicants were charged (and found guilty) under the more robust "catch all" provision of Regulation 12(37).

***An Act, Conduct, Disorder or Neglect to the Prejudice of Good Order or Discipline?***

45. For any alleged offence to be caught under Regulation 12(37), two things must be established.
46. Firstly, the act or conduct or neglect must be established as a matter of fact. Once that is established, the second question is – whether that act or conduct or neglect was prejudicial to good order or discipline within the Fiji Police Force.
47. As Lord Carswell said in the House of Lords in **R (Green) v Police Complaints Authority** [2004] UKHL 6, at paragraph 78:

“Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner of which we regard as appropriate in our polity. If citizens feel that improper behavior on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded”.
48. As noted above, fraternization is the act or conduct which the Tribunal found that the Applicants were engaged in. Once the Tribunal had established that, the next thing which the Tribunal ought to have directed its mind to was – whether that fraternization was prejudicial to good order or discipline within the Fiji Police Force?
49. It appears from the Ruling that after finding that the Applicants were engaged in fraternization, the Tribunal immediately concluded *ipso facto* that their conduct was prejudicial to order and discipline in the Police Force.
50. It appears to me that in taking that approach, the Tribunal was influenced by the *Force's Administrative Directive – 11/13 – No Drop Policy on Extra Marital Affairs and Immoral Activities*. The said Policy (see footnotes) lays emphasis on the following points:

- (a) extra marital affairs in the Police Force “relates to morality and conduct unbecoming of a Police Officer which brings disrepute to the Fiji Police Force”
- (b) police officers hold positions of trust and should at all times be guided by the principles of discipline in the Police Act and Regulations, Force Standing Orders and Code of Conduct & Ethics
- (c) Extra marital affairs will not be condoned in any circumstances.
- (d) Therefore, where a complaint is made against any member of the Fiji Police Force involving EMA must be investigated immediately.
- (e) The aim of this policy is to provide guidance in handling complaints against a member of the Fiji Police Force involving EMA

### *The Moral Question*

- 51. Extra-marital affairs are frowned upon in almost all societies the world over. They are widely considered to be an immoral activity.
- 52. However, in my view, the *Force’s No Drop Policy on Extra Marital Affairs* is not intended by the Commissioner to be used as the foundation for any Disciplinary Tribunal to adopt a high-handed moral approach against extra marital affairs. If that had been the intention, it would amount to a policy based on an error of law.
- 53. In my view, the policy is intended to alert the members of the Police Force (i) that any allegation of extra marital affair will be taken seriously – and (ii) that the allegation will be investigated promptly – and (iii) if the act or conduct involved is found to prejudice discipline in the force, or bring disrepute in the force, then the officer concerned will face the appropriate sanction allowable under the Act and Regulations.
- 54. As I have said above, nowhere in any provision of Regulation 12 of the Police Regulations, is “extra-marital” affair expressly stated as an offence against discipline – nor is fraternization listed anywhere as such. If Regulation 12 had an express provision stating that these conducts were as such – then Regulation 12 would be punishing offenders directly for the immorality of the conduct.
- 55. Also, if the policy were to be interpreted and applied by a Disciplinary Tribunal as authority that an extra-marital affair per se is an offence against discipline, then the Tribunal would have misdirected itself on the policy – which would be an error of law.
- 56. In my view, the policy’s only concern is about the effect of such conduct on discipline within the force. Otherwise, it would be an error of law for a Disciplinary Tribunal to apply the policy as the basis for a moral crusade against extra marital affairs - as Byrne J appears to say in **State v Public Service Commission, Ex parte Laladidi** [1995] FJHC 127; Hbj0017j.1992s (19 July 1995)
- 57. In **Laladidi**, the Applicant held a very Senior Position as a Prison Officer. He was involved in a sexual extra marital affair with a junior female officer. He was charged and found guilty by the Public Service Commission under Regulation 36(+) of the Public Service Commission (Constitution) Regulations 1990. As a result, he was demoted in rank and his pay was reduced accordingly.

58. The charge had read as follows:

That you, Oveti Laladidi, Assistant Commissioner of Prisons have engaged in immoral conduct by having an extra - marital affair with a female prison officer Leata Saua since late November 1986 and thus committed a disciplinary offence under Regulation 36(+) of the Public Service Commission (Constitution) Regulations 1990.

(my emphasis)

59. The Applicant succeeded in his argument that the charge against him was defective and a certiorari and mandamus were ordered to restore him to his former position and pay – amongst other relief granted. However, Byrne J went further to comment on the impropriety involved in the authorities being concerned about the immorality of the Applicant’s conduct. He said as follows:

There is also another reason why I grant the Applicant the relief he seeks. This is because the decision must be regarded as tainted by the three factors or grounds on which administrative action is subject to control by judicial review. These were set out concisely and clearly by Lord Diplock in Council of Civil Service Unions and others v. Minister for the Civil Service [1983] UKHL 6; (1984) 3 ALL E.R. 935 at pp 950 - 951. They are:

- (i) illegality;
- (ii) irrationality;
- (iii) procedural impropriety.

In my judgment the conduct of the Respondent falls within all three of Lord Diplock's categories. In my view it would be rarely if ever that immoral conduct such as that alleged against the Applicant could ever constitute improper conduct within the meaning of Regulation 36(t).

There was no evidence given before this Court that even if the Applicant had an extra marital affair as alleged this had adversely affected the performance of his duties or was likely to bring the Public Service into disrepute or be prejudicial to the conduct of the Public Service. In my view it would be a bad day for the law and our society if any employer, be it private or public were allowed to be the judge or arbiter of the morals of its employees. If that occurred then truly we could say that Big Brother in the sense used by George Orwell had arrived. So far, mercifully he has not as far as I can gather but if allowed to go unchecked, actions similar to those taken by the Respondent against the Applicant could be the first step in that course. I am also satisfied on the evidence that the Respondent's action in charging the Applicant and in later convicting and demoting him was so unreasonable that no reasonable authority in the person of the Respondent would have made the decision.

### *Comments*

60. I apply the same rationale in Laladidi . In my view, Regulation 12 and the entire Police Disciplinary mechanism is not so much concerned about the moral or immoral aspects of the activity. Rather, they are concerned primarily about the reputation of the Police Force.

61. Hence, while I accept that there is a widespread view that an extra marital affair is morally wrong, *per se* – it is something else to say that every extra-marital affair is an offence against discipline because they are morally wrong. This is not what Regulation 12(37) is about. It would be an error of law to say that once an extra marital affair is established – *a fortiori* – that the officers in question are guilty of an offence against good order or discipline against the force under Regulation 12(37). That applies even to extra marital affairs of a sexual nature.
62. As Byrne J said:
- There was no evidence given before this Court that even if the Applicant had an extra marital affair as alleged this had adversely affected the performance of his duties or was likely to bring the Public Service into disrepute or be prejudicial to the conduct of the Public Service.
63. Applying Byrne J’s reasoning, once an extra-marital affair is established as a fact, a Disciplinary Tribunal should then be directing its mind to see if the affair is actually prejudicial to good order and discipline. This is a question of fact. It is not to be drawn as a foregone conclusion from a finding of an extra marital affair.
64. An extra-marital affair that might be prejudicial to good order and discipline is one where a police officer has sexual relations with the spouse of an officer who is deployed overseas – or - where two married officers in the same unit are openly having an affair in the office place – or where a married Police Officer investigating a sexual offence case preys on a vulnerable victim and develops extra-marital sexual relations with her.
65. Once the Tribunal has found that there was an extra marital affair, and that it was prejudicial to good order and discipline within the force, it should then consider the range of punishment set out in section 32(1)A of the Police Act as amended by section 163(h) of the Revised Edition of the Law (Consequential Amendments) 2016. Is the conduct so serious that it should warrant a dismissal? Or is a lesser sanction more appropriate in the circumstances of the offending?
66. In **R v Barnsley Metropolitan Borough Council Ex p. Hook** [1976] 3 All ER 452 two judges of the 3 of the Court of Appeal held that punishment which was altogether excessive and out of proportion to the occasion could be quashed on that ground and the court had jurisdiction to interfere by certiorari in such a case. The excessive penalty was the cancellation of a stall holder’s licence the applicant having urinated in the street.
67. In **Lepani Matea** cited by Mr. Justice Gates (as he then was) **in State v Commissioner of Police, Ex parte Ram** [2004] FJHC 85; HBJ0014J.1998L (5 April 2004) the Court commented (p.13):
- “But the penalty has to be so severe and so out of proportion that no reasonable body could impose it. Short of that standard the Court cannot interfere. We do not think that can be said of the penalty in this case.”
68. The Tribunal of course has a discretion. In some jurisdictions, there is a clear Guideline on how that discretion to sentence might be exercised, although the Guideline does not override or fetter the discretion, and does not purport to prescribe the outcome for every case (see In **Chief Constable of West Midlands Police v Police Misconduct Panel** [2022] EWHC 3076 (Admin)<sup>vii</sup>; In **Chief**

**Constable of Greater Manchester Police) v Police Misconduct Panel** 13 November 2018, per HHJ Pelling QC at paragraph 14)).

## **CONCLUSION**

69. There are many factors which the Tribunal ought to have taken into account in considering whether an extra marital affair is prejudicial to good order and discipline. It appears to me that, in this case, the Tribunal only directed its inquiry into whether or not the Applicants were engaged in an extra-marital affair. It found that they were, albeit their liaison was not of a sexual nature.
70. Once the Tribunal found that there was an extra marital affair, it then concluded straight away that their affair was prejudicial to good order and discipline within the force. That, in my view, is a misdirection on the policy in question. It amounts to an error of law.
71. As I have said, an extra marital affair will only be an offence under Regulation 12(37) if it is established to be prejudicial to good order or discipline. There was no evidence placed before the Tribunal that the non-sexual affair in this case was such.
72. The Tribunal did not direct its mind to this aspect of the charge laid. It misinterpreted both Regulation 12(37) and also the policy embodied in the *Force's Administrative Directive – 11/13 – No Drop Policy on Extra Marital Affairs and Immoral Activities*.
73. The consequence of that misdirection was that the Tribunal would recommend dismissal to the Commissioner, which is the most serious of the sanctions available under section 32(1)A of the Police Act as amended by section 163(h) of the Revised Edition of the Law (Consequential Amendments) 2016 (the range of punishment available are admonishment, reprimand, severe reprimand, a fine not exceeding seven days pay, reduction in rank, dismissal).
74. In other words, it would seem that the Tribunal simply failed to bear in mind that the focus of the charge and of the inquiry was not to criminally punish the Applicants for the immorality of their actions (which by the way, the Tribunal had found to be non-sexual in nature). Rather, the focus should have been on the impact of their affair on the police force. Was it prejudicial to good order and discipline within the force? Did it undermine public confidence in the Police? Was the conduct so serious that it should warrant a dismissal? Or was a lesser sanction more appropriate in the circumstances of the offending?
75. I am of the view that the mitigation and the Show Cause shown by the Applicants were not properly considered at all because of that misdirection on the law and on the policy.
76. I am of the view that, but for the Tribunal's error in the interpretation of the policy, and in the application of the policy *vis a vis* Regulation 12(37), the Tribunal would have reached a different conclusion in (i) the finding of guilt and/or (ii) in its recommendation to the Commissioner as to the appropriate sanction to be applied.
77. The result of all that is that the Applicants were found guilty of fraternization under Regulation 12(37) without evidence of how their conduct was prejudicial to good order and discipline in the

force and (ii) were handed a sanction which was all out of proportion with their offending – even if assuming there was no error of law in how the Tribunal found them guilty without evidence of prejudicial effect to good order and discipline.

## **ORDERS**

78. I grant the following Orders:

- (a) I declare that the decision of the Commissioner of Police vide letter dated 09 December 2021 was unfair, unreasonable, unjust, arbitrary
- (b) Certiorari granted to remove to the High Court the decision of the Commissioner vide letter dated 09 December 2021 to be quashed forthwith
- (c) A Mandamus directing the Commissioner of Police and Attorney-General to reinstate the applicants and to renew their respective employment contracts on existing terms and conditions
- (d) Reinstatement of full salary and benefits lost from the date of interdiction to the date of this judgement
- (e) Costs to the Applicants which I summarily assess at \$2,500 (two thousand five hundred dollars each)



A handwritten signature in blue ink, consisting of stylized, overlapping letters, positioned above a horizontal dotted line.

Anare Tuilevuka  
JUDGE

21 February 2023

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<sup>i</sup> on 13 January 2021, the Applicants each received a letter signed by Acting Senior Superintendent of Police A. Singh to inform them that the Bol has been finalized and that they have been cleared and that no further action would be taken.

<sup>ii</sup> signed by Acting Senior Superintendent of Police V. Waqavesi.

<sup>iii</sup> This section provides:

129. (7) The Commissioner of Police has the following powers in relation to the Fiji Police Force for all ranks, members and other employees, of the Fiji Police Force—

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- (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

<sup>iv</sup> Section 60 provides:

**60.** The Minister may make regulations .....:-

- (c) prescribing offences against discipline punishable under the provisions of this Act;

<sup>v</sup> Section 30 provides:

30. Any police officer who commits any offence against discipline [i.e. any offence under Regulation 12] as may be prescribed under the provisions of this Act shall be liable to suffer punishment in accordance with the provisions of this Act.....

<sup>vi</sup> The said policy stated as follows:

**Introduction**

Recently, Police Head Quarters has been inundated by complaints from spouses, members of the force and community of the involvement of police officers in extra marital affairs. This is a matter of grave concern and borders on ...relating to morality and conduct unbecoming of a Police Officer which brings disrepute to the Fiji Police Force.

We, as members of the Fiji Police Force hold positions of Trust and .....and at all times we should be guided by the principles of discipline ....in the Police At & Regulations, Force Standing Orders and Code of Conduct & Ethics.

It should be noted that Extra Marital Affairs (EMA) will not be condoned in any circumstances in the Fiji Police Force. Therefore, in any event where a complaint is made against any member of the Fiji Police Force involving EMA must be investigated immediately.

**Interpretation**

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

**Aim**

The aim of this policy is to provide guidance in handling complaints against a member of the Fiji Police Force involving EMA

**Directive**

In ensuring that investigation relating to EMA is completely dealt with, I now direct the following:

- i. Upon receipt of an allegation of EMA, it is the duty of the DPC and CO's concerned to conduct a thorough investigation to ascertain the truth of the matter.
- ii. There shall be a "NO DROP POLICY" in as far as EMA is concerned
- iii. The DPC's and CO's shall at no time be allowed to promote reconciliation on allegation of EMA.
- iv. Upon the conduct of the investigation, if there are elements of ...ascertained, the officer concerned must be dealt with accordingly without delay

.....

Sgd. I. Naivalurua  
Commissioner of Police

<sup>vii</sup> <https://www.judiciary.uk/wp-content/uploads/2022/12/CO047602020-Approved-Judgment.-as-published-02.12.2022-002.pdf>