

BETWEEN: **AVEN DUUVU**
First Appellant

AND: **JEAN MICHEL SUMU**
Second Appellant

AND: **COMMISSIONER OF POLICE**
First Respondent

AND: **REPUBLIC OF VANUATU**
Second Respondent

Date of Hearing: 6 February 2024

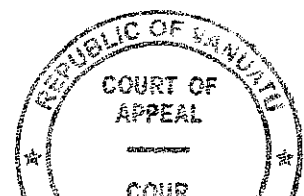
Coram: Hon. Chief Justice V Lunabek
Hon. Justice R White
Hon. Justice R Young
Hon. Justice V M Trief
Hon. Justice E P Goldbrough
Hon. Justice W K Hastings

Counsel: E Molbaleh for the Appellant
L Huri for the Respondent

Date of Judgment: 16 February 2024

JUDGMENT OF THE COURT

1. The appellants Aven Duvu and Jean Michel Sumu were appointed as probationary constables on 25 November 2019 for a period of two years under s.14(1) of the Police Act [CAP 105]. Their appointment letters referred to s.14(2) and stated "*during the period you are on probation, you are liable to be discharged at any time by the Commissioner of Police if he considers you are unlikely to become an efficient member of the Police Force.*" On 19 December 2019 each appellant signed his acceptance of the appointment "*on the terms and conditions set out above*".
2. On 8 November 2021, the Commissioner of Police wrote to each of the appellants saying that "*you have been allegedly suspected to be involved in a criminal offence in breach of the Dangerous Drugs Act*" and discharged them under s.14(2) of the Police Act. Although saying that the appellants were "*allegedly suspected*" of involvement in a criminal offence, the Commissioner went on to say that their conduct "*displays unprofessionalism, unethical and criminal behaviour*" and could not be tolerated.



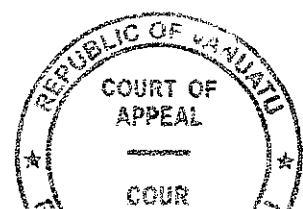
3. The evidence at trial indicated that the Commissioner was relying on the hearsay reports of two detainees in Police cells that, on 22 October 2021, they had seen two Police Officers whose descriptions matched the appellants smoking marijuana behind a restroom at the Police Station at which the appellants were serving. In addition, a forensic report of a butt found in that area confirmed the presence of marijuana.
4. On 26 May 2023, the appellants brought a claim in the Supreme Court asking to be reinstated as probationary constables to complete what was left of their probationary period. In the alternative, they sought damages for loss of income and opportunities.
5. In their sworn statements, both appellants denied the allegation that they smoked marijuana at the end of their shift on 22 October 2021. More importantly, both said that they were served with the letter of 8 November 2021 without having been given the opportunity to address the allegation made against them.
6. The Commissioner's evidence confirmed that the appellants had not been informed of the allegation of marijuana smoking and that they first learnt of it when they received the Commissioner's letter of discharge on 8 November 2021.

Supreme Court Judgment

7. At trial the appellants submitted that the Commissioner could not discharge them until they had been convicted of criminal or disciplinary charges. They submitted the Commissioner should have suspended them pending the outcome of any criminal or disciplinary charge.
8. The primary judge disagreed. He was of the view that it was not Parliament's intention that probationary constables appointed under s.14(1) should be subject to disciplinary provisions prior to being discharged because those provisions applied only to "*members*" and not probationary constables. He found the Commissioner had sufficient information to consider each was unlikely to become an efficient and effective member of the Police Force and that, the Commissioner had lawfully discharged them. He also found that, under the Employment Act [CAP. 160], they were entitled to damages equivalent to three months' salary in lieu of the notice required under s.31(3) of the Police Act.

Submissions

9. The appellants appeal against the judgment. The essence of Mr Molbaleh's submissions was that the Commissioner did not give notice of the allegations to the appellants and did not give them an opportunity to respond before he exercised his discretion to discharge them.
10. The first and second defendants cross-appealed the primary judge's decision to award the claimants damages equivalent to three months' salary in lieu of the notice required under s.31(3).



They submitted that the judge's reliance on the Employment Act was in error because s.76(3) of the Employment Act states that it does not apply to members of the Police Force.

Discussion

11. We consider first whether or not the Commissioner of Police exercised his power to discharge the appellants lawfully.
12. In *Michel v President of the Republic of Vanuatu et al* [2015] VUCA 14, this Court said at paragraph 26:

"It is now widely recognised in the field of public administration, and employment that procedural fairness, often referred to as natural justice, requires that a reason and an opportunity to be heard be given before a decision affecting personal rights is made. ... The extent of that requirement will depend on all the circumstances of the case and will include the nature of the inquiry, the rules or statute under which the decision maker is acting, and the subject matter; Kioa v. West [1985] HCA 81; (1985) 159 CLR 550 at 584 – 5; Durayappah v. Fernando [1967] 2 AC 330 at 349."

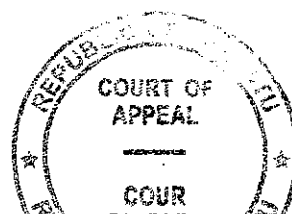
These observations were confirmed by this Court in *Minister of Education and Training v Tabi* [2023] VUCA 30 at para 31.

13. Turning to the circumstances of this case, including the relevant statute and the subject matter, s.14 of the Police Act provides as follows:

"14. Appointment on probation

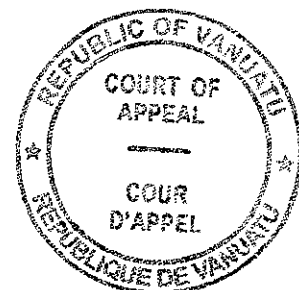
- (1) *A successful candidate shall be appointed as a probationary constable for a period of 2 years by a letter of appointment signed by the Commissioner.*
- (2) *The Commissioner may at any time discharge a probationary constable if he or she considers that such constable is unlikely to become an efficient and effective member of the Force."*

14. Section 1 of the Police Act defines "*member*" as "*any member of the Force regardless of rank*". A probationary constable is included as a "*member*" in the discharge provisions of s.31(1). Section 14 however only applies to probationary constables. They are candidates to become efficient and effective members of the Police Force at the end of their two year probation. The Commissioner is given a broad discretion to discharge a probationary constable "*at any time*" within that period if the Commissioner considers that the probationary constable is "*unlikely*" to become an "*efficient and effective*" member of the Police Force.
15. The provision does not specify what the Commissioner must take into account when considering the likelihood or otherwise of the probationary constable becoming an efficient and effective



member. One of the purposes of probation is to assess, within a defined period, the probationer's suitability to become a permanent member of the organisation. The Police Force is a hierarchical organisation that requires its members to be orderly and disciplined in order to discharge its functions and to maintain public confidence. Accordingly, the circumstances in which the Commissioner might properly conclude that a probationary constable is unlikely to become an efficient and effective member of the Police Force are likely to be various. In some circumstances the obligation to provide procedural fairness may require little, if any, notice to the probationary constable. For example the commission of undoubted criminal conduct may indicate clearly that a probationary constable is unlikely to become an efficient and effective member of the Police Force. In other cases, the requirement of procedural fairness before the Commissioner exercises the s.14(2) discretion may require more.

16. In this case, hearsay allegations of a specific single criminal act were made against the appellants. They did not have knowledge that the allegations had been made. The allegations were made when the appellants had almost completed, it seems without incident, their periods of probation and could have expected re-engagement as permanent Police Officers pursuant to s.19 of the Police Act. As the allegation of marijuana smoking was the sole matter on which the Commissioner relied, belief that that conduct had actually occurred was seemingly critical to his considering that the appellants were unlikely to become "*efficient and effective*" members of the Force. All these circumstances, coupled with the serious consequences of the decision for each appellant, indicate that the Commissioner did have obligations of procedural fairness to the appellants. Those obligations required the Commissioner to give them notice of the allegations made against them, and an opportunity to address them, before exercising the s 14(2) discretion.
17. That did not occur. For these reasons we must disagree with the primary judge that the Commissioner of Police lawfully discharged the appellants. The Commissioner should have given them notice of the allegations and an opportunity to address them.
18. In reaching this conclusion, we do not wish to be understood as agreeing with Mr Molbaleh's submission at first instance that the Commissioner may not discharge a probationary constable suspected of committing a criminal offence or misconduct before there has been a criminal trial or disciplinary hearing. On the contrary, the Commissioner is entitled to make his or her own assessment, after assessing any procedural fairness requirements, when considering whether a probationary constable is unlikely to become an efficient and effective member of the Force.
19. The decision of the Police Commissioner to discharge the appellants is set aside. The effect of this order is that the appellants may resume their positions as probationary constables. It will then be up to the Police Commissioner to determine if he wishes to revisit his decision to discharge the appellants in a procedurally fair manner, or to proceed to the s.19 consideration of the appellants' re-engagement.



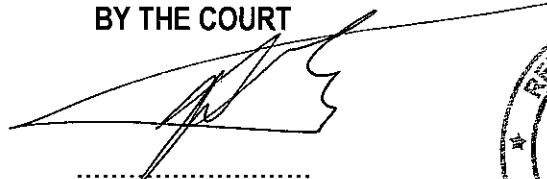
20. As the Commissioner's decision to discharge the appellants has been set aside, no damages are warranted because the appellants are no longer discharged. The cross-appeal must therefore be allowed because there is no longer any basis on which the appellants are entitled to three months' pay in lieu of notice. We note in any event, that the Police Force is exempt from the provisions of the Employment Act by virtue of s.76(3) of that Act.

Result

- 21. The appeal is allowed.
- 22. The decisions of the Commissioner of Police to discharge each appellant are quashed.
- 23. The cross-appeal is allowed.
- 24. The orders of the Judge with respect to the payment to each appellant of three months' notice in addition to interest are set aside.
- 25. Costs of VT50,000 are awarded to the appellants.

DATED at Port Vila this 16th day of February, 2024

BY THE COURT



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Hon. Justice Chief Justice Vincent Lunabek

