IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT, FIJI ISLANDS

CIVIL APPEAL NO. ABU 0054 OF 2001
{High Court Civil Action No. HBJ 26/98}

BETWEEN:

SEMI TALAWADUA

Appellant

AND:

THE COMMISSIONER OF POLICE

1st Respondent

AND:

ATTORNEY-GENERAL OF FIJI

2nd Respondent

Coram: Sheppard JA, Presiding Judge
Tompkins, JA
Smellie, JA

Hearing: Wednesday, 22nd May 2002

Counsel: Mr. A.K. Singh for the Appellant
Mr. K. T. Keteca for the Respondents

Date of Judgment: Friday, 31st May 2002

JUDGMENT OF THE COURT

Introduction

The appellant joined the Fiji Police Force in or about August of 1980. On the 23rd of September 1998 he was dismissed by the Commissioner of Police without notice of the grounds or an opportunity to be heard. The appellant's solicitor wrote formally on the 17th of October 1998 asking the Commissioner to reconsider but received no reply.

On the 5th of November 1998 the Disciplined Services Commission concurred in the Commissioner's decision to dismiss the appellant and on the 12th of November the appellant was advised for the first time that he had been dismissed pursuant to Section 14(1) of the Police Act (Cap 85) effective from the 23rd of September 1998.

On the 1st of December 1998 the appellant applied for a stay and for leave to apply for Judicial Review. Those applications were heard on the 11th of December 1998 and the 8th of January1999 with Judgment being given granting leave and the stay on the 18th of June 1999. On the 23rd of July 1999 the summons seeking Judicial Review and relief in the form of Certiorari Mandamus and Declaration plus damages and costs was filed. There were hearing dates on the 24th of February 2000 and 29th of June 2000 with Judgment being given on the 24th of April 2001 refusing relief. This appeal is in respect of that decision.

The Facts Chronologically

The following are taken from the Appellants's Police Conduct Register which dates from August 1980 when he joined the Force. It records as follows:

18.01.83	Severe reprimand for conduct prejudicial to good order and discipline of the Force.

18.07.83	Severe reprimand absent without leave.
17.04.84	Fined 3 days pay for drunkenness.
18.11.85	Reprimanded for conduct prejudicial to the good order and discipline of the Force.
06.06.87	Fined 1 day's pay and forfeit 1 day's pay for absence without leave on 1.5.87.
06.06.87	Fined 1 day's pay and forfeit 1 day's pay for absence on 3.5.87, 3.8.87, reprimand, absent without leave.

All the above appeared to have been cancelled with the notation SRO4587. Counsel were unable to tell us what that meant but we required enquiries to be made. An explanation was then forthcoming. It is now clear that the reference is to "Routine Order Serial No. 45/87" issued by the Acting Commissioner of Police on 6th November 1987. Paragraph 3 of the Order under the heading "Service Records - Disciplinary Offences" reads as follows :

> ***"With immediate effect disciplinary record of officers more than 5 years old shall not be taken into consideration against any police officer. Officers holding Service Record will immediately amend Service Record by deleting disciplinary offences of more than 5 years old. The Service Record of officers should now be brought to-date annually."***

This was a rather dramatic disclosure because it meant of course, that as at the time of dismissal (23/9/98) no disciplinary offences prior to 23/9/93 could be taken into account. As will appear shortly there was only one subsequent to 23/9/93. But as will emerge later also, throughout this matter until the present, some 14 earlier disciplinary offences have been relied upon (it is now clear improperly) by the Commissioner, the Disciplined Services Commission and the Judge in the High Court whose decision is the subject of this appeal.

After 6/6/87 there is a gap of over three years, (until 27th February 1991), when the record continues :

27.02.91	Fined 4 day's pay for 2 offences, conduct prejudicial to good order and discipline of the Force and neglect of duty.
29.10.91	Fined 1 day's pay and forfeit 2 day's pay for wilful disobedience of lawful order
29.10.91	Fined 2 day's pay and forfeit 1 day for conduct prejudicial to the good order and discipline of the Force.
06.01.92	Absent without leave. 2 offences on the 29th of November 1991 and one on the 24th of December 1991. Demoted to Constable with effect from 6.1.92 (it appears that prior to that date the appellant had held the rank of Corporal).
13.09.94	Fined $9.57 for conduct prejudicial to the good order and discipline of the Force.

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The Conduct Register contains no further entries after the 13th of September 1994. It appears, however, that throughout his career the appellant was warned several times about his conduct and counselled by the Assistant Chaplain to the Police Force.

Then in November of 1996 the appellant was charged with assault occasioning actual bodily harm. Those proceedings were terminated in the Magistrate's Court on 16th January 1997 pursuant to Section 163 of Criminal Procedure Code (Cap. 21). Counsel were unable to refer us to any decision in which that Section is discussed but on the face of it a termination although perhaps not an acquittal is certainly not a conviction.

On the 24th of January 1997 the Commissioner of Police wrote formally to the appellant referring to the charge he had faced on the 10th January 1997 and it's termination pursuant to the above section and stating :

> ***"...... this letter will be my first and final warning to you in addition to the address I gave you in my office on the 2nd of January 1997. The main purpose of this letter therefore is to warn you that should you come out again for any breach of discipline or commit a criminal offence within the next twelve months I will discharge you from the Force."***

Then on the 2nd of September 1997 the appellant was charged with assault occasioning actual bodily harm whereupon he was effectively suspended from the Force

without pay. On the 2nd of September 1998 however the complaint was withdrawn and the appellant was acquitted.

Some seven weeks later on the 23rd of September 1998 the appellant's commanding officer received a formal notice that the appellant had been dismissed from the Fiji Police Force with effect from the 23rd of September 1998. The commanding officer was asked to take appropriate action. The appellant was shown the communication received by his commanding officer a copy of which is at page 18 of the record, but it says nothing about the grounds for dismissal and was not addressed to the Appellant.

What happened after that in time sequence is recorded in the introduction to this Judgment.

The Decision Under Appeal

The decision the subject of this appeal commenced by rehearsing the granting of leave and what was said in the Ruling. It was then recorded that the submissions filed in respect of the substantive application resulted in the Court reaching the conclusion that the Appellant should not be granted Judicial Review. The Cinnamond Case (Infra) was then referred to and passages from the judgments of Lord Denning M.R. and Shaw L.J. were quoted. From Shaw L.J's judgment at page 592 of the report the following was recorded :

> *"As to the suggestion of unfairness in that the drivers were not given an opportunity of making representations, it is clear on the history of this matter that the drivers put themselves so far outside the limits of tolerable conduct as to disentitle themselves to expect that any further representations on their part could have any influence or relevance."*

The pen-ultimate paragraph of the judgment again refers to the submissions filed and continues :

> *"I am no longer left with any nagging doubt about the fairness of the applicant's dismissal on the 23rd of September 1998. I am satisfied that in the light of his history as a policeman that as a matter of common sense and practicality nothing more could be said on behalf of the applicant to induce the Commissioner to change his mind. The applicant was given more chances than he might normally have expected to improve his behaviour and he ignored these chances. It is vital that as far as possible members of the Police Force must be above reproach both in their public and private lives. They are the custodians of the law and order and the public is entitled to see that they always uphold the high standards which as members of the Force the public is entitled to expect from them."*

The Application was then dismissed but there was no order as to costs.

<u>Opposing Submissions</u>

The appellant's first ground is that the Judge in the High Court had relied on the English authority <u>Cinnamond v. British Airport Authority 1980</u> [1WLR 582] when leave was granted then used the same authority to justify refusing relief. There is no substance in this ground which is why the respondent was not called upon to address it. Ground 2 was that the Judge in the High Court failed to consider that the appellant had the right to

be heard before dismissal. That the appellant was entitled to be heard was not challenged by the respondent. There is ample authority both in this Court, the Supreme Court and in other common law jurisdictions to support the proposition. The real issue, as the Court pointed out to counsel for the appellant, is whether the conclusion that even if the appellant had been afforded a hearing it would not have made any difference, was one open to the Judge in all the circumstances.

The appellant submitted that it was not.

The final ground to the effect that the Judge in the High Court erred when he failed to consider that there was no notice given to the appellant was not really pursued. It was recognized at that stage of the case that the appeal would succeed or fail on the central issue which emerged, (as recorded above), during the appellant's submissions in respect of the second ground.

For the respondent it was argued on the authority of the Cinnamond Case (Supra) that this was one of those rare cases when the Court was entitled to conclude that even though the law required the appellant to be given notice and an opportunity to respond, nonetheless relief should be denied because he would have been dismissed in any event. Counsel for the respondent conceded that there had been no convictions in respect of the two charges of assault in 1997 but argued nonetheless that the fact the charges had been laid could be taken into account. That they were matters relative to efficiency because

of the high standing that officers of the Force should have within Fijian society.

Only in rare cases is relief refused

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

> ***"..... it is important to remember what many cases of high authority have determined - and they have been emphasized in the past in this Court - that Judicial Review is what it says, namely, a Judicial Review and not an appeal. The function of the Court is to ensure that the body subject to review has acted within its jurisdiction, has directed itself properly as to the law applicable and applied the law accordingly. It must, too, observe the requirements of procedural fairness to the extent that they apply to the particular case. What it must not do is to determine the merits of the matter, or substitute its own opinion for that of the body concerned upon the merits."***
>
> ***(emphasis added)***

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

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

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

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

Was this one of those rare cases?

We have reached the conclusion of that it was not. First, the two assault charges, neither of which resulted in convictions, ought not, in our view, to have been taken into account. It appears very much as though they were, at the time the decision was made

to dismiss the appellant, because the Acting Assistant Commissioner of Police Administration) in his affidavit of the 8th December 1998 said in paragraph 13 :

> ***"The Applicant did not deserve to be heard prior to dismissal for he had been previously warned by the Commissioner of Police on the 26th of January 1997 and the Applicant committed the criminal offence on the 3rd of September 1997 which was within the probationary period of the warning letter."***

As earlier recorded Counsel for the respondent was obliged to concede that in fact the appellant had not committed a criminal offence, the charge had not been proved, he had been acquitted and was entitled to the presumption of innocence.

Secondly, the ground relied upon for dismissal pursuant to Section 14 (1)(c) of the Police Act although mentioned in paragraph 11 of the aforesaid affidavit first appears in the official documentation in the advice to the Commissioner of Police from the Disciplined Services Commission dated the 5th November 1998. And it was not until the 12th of November that the appellant received formal notice in the following terms :

> ***"This is to advise you that the Commissioner of Police has awarded the sentence of discharge from the Force, subsequent to your disciplinary action and conduct under Section 14(1)(c) of the Police Act (Cap 85) for ceasing to become an efficient police officer.***
>
> ***The Disciplined Service (sic) Commission has concurred with the decision of the Commissioner of Police to discharge you from the Service with effect from 23.9.98."***

All that sits uncomfortably with the true facts. The last disciplinary charge was in September of 1994 four years earlier. There had been nothing subsequent which could properly be taken into account in relation to the appellant ceasing to be an efficient police officer. And of course it is now clear that that last charge was the only one which could be taken into account because of "Routine Order Serial No. 45/87". Also it is noteworthy that Section 14(1)(c) provides another ground for dismissal namely "that it is desirable in the public interest". That was not the ground put forward as justifying the dismissal but the closing remarks in the Judgment under appeal suggest, albeit unconsciously, that the public interest ground was being taken into account. Thirdly, it must be questioned whether even if domestic discord was established associated with violence on the part of the appellant that could qualify as something which caused him to cease to be an efficient police officer.

Finally, we consider that the notice given on the 12th of November 1998 was wholly inadequate. The appellant had already been dismissed by then. As was observed by this Court in the Beniamino Naiveli v. State Disciplined Services Commission (Civil Appeal ABU0059 of 1999 judgment 1st March 2002) page 3 of the Judgment :

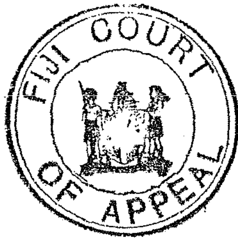
> ***"A fundamental principle of the disciplinary proceedings is stated in Section 32 subsection 2 which provides "no police officer shall be convicted of an offence against discipline unless the charge has been read and investigated in his presence and he has been given sufficient opportunity to make his defence thereto.""***

In that case the Court said that it would be surprising if gazetted officers were to receive less natural justice in respect of disciplinary offences then was accorded under the Act to lesser

ranks. So here it would be surprising if dismissal from the Force could be effected by a procedure which accords less natural justice than applies in relation to disciplinary proceedings.

Decision

The appeal succeeds. As to remedy we are of the view that the appellant now having been out of the Police Force for some four and half years Certiorari or Mandamus would not be appropriate. The appellant however is entitled to a Declaration that he was wrongly dismissed from the Police Force and there will be an Order accordingly. The claim for damages was not pursued. But the appellant is entitled to costs in the High Court both on the application for leave and stay and upon the substantive application and in this Court on this appeal. In the High Court the costs are to be taxed by the Registrar and to include filing fees and reasonable disbursements. In this Court the appellant will have costs of $2,000.00 plus filing fees and reasonable disbursements as fixed by the Registrar.



Sheppard JA, Presiding Judge

Tompkins, JA

Smellie, JA

Solicitors:

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Office of the Attorney General Chambers, Suva for the Respondents

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