IN THE HIGH COURT OF FIJIAT SUVA
CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HBJ 03 of 2022

IN THE MATTER OF an application by **SHYMAL SHESH KUMAR** for Judicial Review under Order 53 of the High Court Rules 1988

AND

IN THE MATTER of a decision made by the **COMMISSIONER OF POLICE** on or about the 11th of May 2021

BETWEEN: **SHYMAL SHESH KUMAR**

APPLICANT

AND: **THE COMMISSIONER OF POLICE**

RESPONDENT

Date of Hearing	**:**	**12 August 2024**
For the Applicant	**:**	**Mr Karunaratne J.**
For the Respondent	**:**	**Mr Ram V.**
Date of Decision	**:**	**13 June 2025**
Before	**:**	**Waqainabete – Levaci, SLTT Puisne Judge**

JUDGEMENT

(*APPLICATION FOR JUDICIAL REVIEW*)

PART A – BACKGROUND

1. The Applicant had sort for Judicial Review under Order 53 of the High Court Rules against the Decision of the Commissioner of Police, based on recommendations from the Police Disciplinary Tribunal, to dismiss the Applicant from the Fiji Police Force on 6 May 2021.

2. On 11 October 2022, on application for leave, leave was granted to be heard out of time stating there was an arguable case because:

   (i) There were no disclosures served to the Applicant and false assurances was given to him to plead guilty;
   (ii) The penalty was the most severe penalty i.e. and that no opportunity was given to address the Commissioner on the penalty, hence natural justice was breached;
   (iii) There was no proper oral hearing on mitigation given to the Applicant.

3. The reliefs sort as Orders in this application for Judicial Review are as follows:

   (i) **An Order** of Certiorari to remove the said decision of the Respondent dismissing the Applicant from the Fiji Police Force and the same be quashed;

   (ii) **A Declaration** in any event that the Respondent exceeded and/or did not properly exercise his jurisdiction and/or acted ultra vires and/or made errors of law and/or abused its discretion and/or acted unreasonably and/or irrationally and/or acted in breach of Natural Justice and/or acted in breach

of the legitimate expectations of the Applicant in dismissing the Applicant from the Fiji Police Force;

(iii) Granting of leave shall operate as a Stay notwithstanding the Applicants

PART B: AFFIDAVITS AND SUBMISSIONS

4. Both parties opted to rely on their Affidavits filed on the Leave application and made oral as well as written submissions.

APPLICANTS AFFIDAVIT AND SUBMISSIONS

5. In the Applicants Affidavit, he deposed that he joined the Fiji Police Force on 11 July 2014 based at Nasinu Police Department and later at the Criminal Investigation Department.

6. In March 2021 he was issued with two default notices dated 3 March and 4th March alleging incidences that occurred in November of 2020.

7. In March 2021 he was indicted before the Police Tribunal where on the day of hearing, he pleaded guilty. He deposes he was never served with disclosures nor represented by a senior officer.

8. The Applicant deposes he was later dismissed from the Police Force on 6 May 2021. He re-wrote asking the Police Commissioner Tudravu in June 2021 to be re-employed which was later rejected by a response dated 14 July 2021.

9. On 12 August 2021 a letter to Police Commissioner Qiliho was hand delivered to the headquarters and received by an orderly. To date he has received no response.

10. On request for a meeting with Police Commissioner in a letter dated 10 November 2021, he was later informed that due to Covid 19, he was unable to meet the Police Commissioner and that in the alternative a request for a zoom meeting could be organized. The Police Commissioner was on leave and representations were made for the deponent to write to Director Internal Affairs Mr Talib.

11. The Applicant deposes he wrote another letter on 15 November 2021 addressed to Director of internal Affairs Mr Talib and hand delivered to the officers. Despite numerous follow ups, the Internal Affairs indicated they were awaiting the file from CID in order to consider a re-trial.

12. On visitation at the Police Headquarters, deponent was told to apply for judicial review.

13. In the Applicant's oral submissions, Counsel submitted that there was breach of natural justice as the Applicant was not allowed to mitigate or explain the reasons for the allegation against him during the Tribunal Hearing after he pleaded guilty.

14. Despite the Police Force stating there were minor offences, he was ultimately dismissed.

15. Further clarification was sort from the Applicant in Court on which reliefs they relied upon. The Applicant submitted they solely relied upon the opportunity to be heard.

RESPONDENT'S AFFIDAVITS AND SUBMISSIONS

16. The Respondent deposes that the Applicant was charged for two counts for the charge of Conduct Prejudicial to Good Order and Discipline of the Force" and interdicted under section 28 of the Police Act 196 and pleaded guilty of his own free will, with no influence from the Tribunal.

17. The Respondent admits that the Applicant was restricted from appointing a 5azette officer to represent him by the Tribunal in accordance with regulation 13 (vii) of the Police Regulations 1965 (Police Regulations).

18. The investigation dockets for both charges were in the office of the DPP for legal analysis and advise and the decision whether or not to pursue criminal charges had no bearing on the administrative decision of the Respondent in his findings.

19. The Respondent admits that the Applicant was dismissed in accordance with the Police Act and Regulations.

20. The Respondent deposes that he is unaware of the visits and correspondences by the Applicant and there is no obligation for the Respondent to consider re-employing the Applicant.

21. Counsel for the Respondent argued that on lodgment of a report in November of 2020, the matter was reported as a disciplinary offence prejudicial to good order and to the discipline of the Fiji Police Force.

22. The Applicant was tried by the Police Tribunal and pleaded guilty of his own free will. The Tribunal made its recommendation as required under the Police Standing Orders and the Police Act 1965 to the Commissioner. The Commissioner exercised

his powers under section 32 (1) (a) of the Police Act and Section 129 of the Constitution to dismiss the Applicant after reviewing the Recommendations by the Tribunal.

23. The Respondent argued that Judicial Review did not challenge the decision of the Tribunal but the Minister's revisionary powers under section 33 of the Police Act.

24. The Respondent also argued that natural justice was observed by informing the Respondent in writing the reasons for their dismissal. Furthermore the Applicants was allowed time to give his mitigation. He failed to do so.

25. Lastly the decision to have a friend or representative present with the Applicant at the Tribunal was decided by the Respondent and not the Tribunal itself as the Respondent exercised his discretion considering the written responses by the Applicant to the Tribunal.

PART C: LAW ON AN APPLICATION FOR JUDICIAL REVIEW

26. In Order 53 of the High Court Rules provides:

> "(1) An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.
> (2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to-
>
> (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and

(c) all the circumstances of the case, it would be just and convenient for the declaration for injunction to be granted on an application for judicial review.'

27. In the Supreme Court Practice 1988 (Vol 1, Sweet and Maxwell, London) page 794 para 53/1-14/6 states:

'**Nature and Scope of Judicial Review –** The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. 'It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question (Chief Constable of North Wales Police -v- Evans [1982] 1 WLR 115, p 1160; [1982] ALL ER 141 p 143 per Lord Hailsham L.C)Thus a decision of of an inferior court or a public authority may be quashed (by an order of certiorari made on an application for judicial review) where that court or authority acted without jurisdiction, or exceeded jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the case of the record, or the decision was unreasonable in the Wednesbury sense (see para 53/1-14/12). The Court will not however, on a judicial review application act as a "court of an appeal'' from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not with in the body's jurisdiction, or the decision is a Wednesbury unreasonable. The

function of the court is to see the lawful authority is not bused by unfair treatment. If the court were to attempt itself the task entrusted to lawful authority by law, the court would, under guise of preventing the abuse of power, be guilty itself of usurping power Chief Constable of North Wales Police -v- Evans [1982] 1 WLR 115, p 1160; [1982] ALL ER 141 p 143 per Lord Hailsham L.C) That applies whether or not there is some avenue of appeal against the decision on the merits. If there is no avenue of appeal on the merits, it follows that the decision of the body concerned, is meant to be final, provided that the decision-making process was properly carried out. If on the other hand, an appeal on the merits does lie, the avenue of appeal should be pursued, and resort should only be had to an application for Judicial Review if the decision making process itself was improperly carried out. Normally even where there are grounds for judicial review, the court will not allow an applicant to proceed by way of judicial review until he has availed himself of an alternative remedy. There may, however, be exceptional cases where the court would grant relief by way of judicial review without requiring the applicant to pursue the alternative remedy available to him. (see R -v- Chief Constable of Merseyside Police, exp Calveley [1986] Q.B 424; [1986] 1 ALL ER 257 CA and para 53/1-14/11).

28. For an application for judicial review, the Applicant must satisfy the Court of any of the four grounds. The grounds were explained in the Supreme Court Practice 1988 (Vol 1, Sweet and Maxwell, London) page 796 para 53/1-14/12 as follows :

(i) Excess of jurisdiction – i.e Anisminic Ltd -v- Foreign Compensation Commission [1962] 2 AC 147 where a decision of an administrative authority is founded on an error of law for which the authority or Tribunal acted outside of its jurisdiction, that decision can be quashed. This does not apply to inferior courts of law that are have powers to adjudicate.

(ii) Error of law on face of record – In State -v- Arbitration Tribunal. Fiji Public Service Association, Melaia Baleiwai and Land Transport Authority [2004] FJHC 152; HBJ0011 of 2002S where Pathik J stated:

> On the evidence before me I do not find that there was an ‘’error in law’ when a point of law arises the reigning rule as stated by Wade Administrative Law 5th edn at p 817 as follows and is apt to be applied to the facts and circumstances of the case:
>
> > ‘the reigning rule today is more sophisticated and less legal. It is designed to give greater latitude to tribunals, where there is room for difference of opinion. The rule is, in effect, that the application of a legal definition or principle to ascertained facts is erroneous in point of law only if the conclusion reached by the tribunal is unreasonable. If it is within the range of interpretations within which different persons might reasonably reach different conclusions, the court will hold that there is no error of law.”

(iii) Breach of Natural Justice - In Ridge -v- Baldwin [1964] AC 40; [1963] ALLER 897 where it was held that when a chief constable was dismissed without giving him a fair hearing was a breach of natural justice.

(iv) Wednesbury principle i.e. whether the decision was reasonable: No authority properly directing itself on the relevant law and acting reasonably could have reached it (Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation [1948] 1 K.B 223; [1947] 2 ALL ER 680 per Lord Greene, MR) where his Lordship stated:

> “The Court is entitled to investigate the action of the local authority with the view to seeing whether they have taken account matters which

they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once the question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

Lord Brightman said in R -v- Hillingdon London BC ecp Puklhoffer [1986] AC 484; [1947] 1 All ER:

> "It is not in my opinion appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in exceptional cases. The ground in which the courts will review exercise of administrative discretion is abuse of power e.g. bad faith, a mistake constructing the limits of power, procedural irregularity or unreasonableness in the Wednesbury sense i.e unreasonableness verging on absurdity."

29. Brennan J. in Attorney-General (N.S.W.) V/ Quin (1990) 170 CLR 1 at p.35 when his Honour referred to the exercise of administrative powers. He said:

> "The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual's legitimate expectations against adverse exercises of the powers? I have no doubt that the answer is: none, Judicial Review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power. If it were otherwise, the courts would be asserting a jurisdiction, in protection of individual interests, to override the law by which a power to affect those interests is conferred on the repository."

ANALYSIS

30. The Applicant relies on the following grounds:

(i) Respondent exceeded and/or did not properly exercise his jurisdiction;

(ii) acted ultra vires and/or made errors of law;

(iii) abused its discretion and/or acted unreasonably;

(iv) irrationally and/or acted in breach of Natural Justice.

(v) acted in breach of the legitimate expectations of the Applicant in dismissing the Applicant from the Fiji Police Force.

The application for judicial review is against the decision of the Respondent to dismiss the Applicant, based on the recommendation by the Tribunal. Section 33 of the Police Act empowers the Commissioner of Police to review all proceedings heard by the Tribunal and exercise his power to :

> (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;"

31. The Respondent reviewed the findings of Tribunal and affirmed it which determined that the Applicant was guilty of two offences: Conduct Prejudicial to Good Order and Discipline of the Force.

32. The Respondent then usurped his powers to dismiss the Applicant in accordance with Section 32 of the Police Act.

Disclosures and Representation

33. The Applicant argued that the Respondent acted ultra vires or exercised his discretion beyond his jurisdiction by dismissing the Applicant after having received the findings from the Tribunal, who during the hearing, had not released disclosures nor allowed the Applicant to be represented by a senior Counsel.

34. The Tribunal that conducted the hearing, then made a finding to the Commissioner. The Commissioner, in light of the findings, exercised his powers under section 32 and 33 of the Police Act to uphold the findings and dismiss the Applicant.

35. The grounds for judicial review seek to challenge the manner in which the Tribunal conducted its hearing.

36. According to section 32 and 33 of the Police Act, the Commissioner had reviewed the Tribunal's decision and confirmed the findings of the Tribunal which held that the Applicant was guilty of the said offence on the basis of his plea of guilt.

37. The Applicant contends that his plea of guilt was taken without proper advice and assistance from a Senior Officer and without proper disclosures of the disciplinary offences he was charged with.

38. The Applicant was served with two default notices, both stipulating the offences, the facts pertaining to the offence as well as stating the name of the witnesses.

39. The Applicant was therefore aware and knowledgeable of the offences against him. According to Section 32 (2) of the Police Act, the provision requires that the charge be read and investigated in the alleged offenders presence and be given an opportunity to make his or her defence.

40. I find therefore that the Commissioner did not commit an error in law nor act outside of his jurisdiction nor acted unreasonably to uphold the findings of the Tribunal, as

the Tribunal had arrived at its findings based on the admission by the Applicant, who had sufficient information of what was alleged against him.

41. Secondly, the Applicant contends that he was influenced to plea guilty as a lesser punishment and that this could have been avoided if a Senior Officer represented him. Furthermore he contends he was not given the opportunity to be properly advised by a senior officer. In precedent cases where an indictment was issued against a police officer, senior officers were invited.

42. Did the Commissioner act outside his powers or failed to usurp his powers appropriately when he reviewed the findings and upheld the findings of the Tribunal?

43. The Court finds that the powers of the Commissioner were independent from the findings of the Tribunal and hence it was within the power of the Commissioner to revise and remit, alter, quash the findings of the Tribunal.

44. The Commissioner decided to uphold the findings of the Tribunal after having considered that the Tribunal findings which were based on the plea of guilt of the Applicant.

45. Whether or not the plea was obtained with or without force or influence is an issue of appeal on merits and not an issue requiring revisionary powers of the Court to consider unless the Commissioner had acted irrationally, had erred in law in the procedures he adopted.

46. In this instance, I find that the Commissioner had exercised his discretion within the ambit of the law. The Tribunal had entered a plea of guilt which the Commissioner upheld in affirming the findings. The Commissioner therefore had not acted irrationally or outside of his powers

Interdicting without Salary

47. The Applicant also contends that the Commissioner interdicted him without paying him his salary. As a result he lost out on 6 months of salary pending his hearing before the Tribunal in March of 2021.

48. Under section 28 of the Police Act, the Commissioner may interdict from any duty a police officer pending a trial of an offence.

49. Subsection (3) provides that an officer interdicted from duty [shall] not be paid his salary or compensation for losses of earnings during the period of interdiction unless the Commissioner determined otherwise or when he or she is acquitted of the said offence.

50. The provision in subsection (3) is mandatory. The duty lies upon the Police Force to cease salary payments or compensation for losses of earnings with immediate effect.

51. The Applicant contends he was not paid during the period of indictment. It was this deprivation of livelihood that he argued rendered the Commissioners decision unreasonable and hence and error of law.

52. Given the wording of the provisions, there was no legitimate expectation that the salaries would not be ceased unless the Commissioner had stipulated otherwise when he issued the indictment or prior to issuing the indictment.

53. The Tribunal issued a Default Notice of the charges in March of 2021, 6 months after indictment. At no time did the Applicant seek to formally request the Commissioner for reinstatement of salary or a portion of the salary or even to be repaid the losses from his earnings immediately after being served with the indictment or during this period of indictment.

54. The Commissioner's powers to interdict an officer is discretionary. He does so after having considered that there is a pending matter against the officer concerned.

Justice Byrne in the case of The State -v- The Police Service Commission ex parte Tikotikoca [1993] Fj LRp 4; [1993] 39 FLR 12 (24 February 1993) held that:

> …In my opinion the phrase 'pending trial' is sufficiently wide, in fact much wider, to cover more situations than those 'after a charge has been preferred'. If parliament had intended to limit the power to interdict only to where charges had been laid in my view it would have said so in clear terms and it has not done so. I consider that the term 'pending trial' is sufficiently wide to cover the period while investigations are carried out into allegations of criminal or disciplinary offences and so I hold."

55. I agree with the opinion of Justice Byrnes. The interdiction can be issued where the officer is undergoing investigations for allegations of a disciplinary offence. Therefore the Commissioner did act within his powers to issue an interdiction notice.

56. The exercise of powers by the Commissioner in interdicting the officer is not a judicial or quasi-judicial decision but an administrative decision pending investigations. Interdicting automatically suspends the salary of the officer. It is not a procedure to penalize the officer but to enable investigations to proceed.

57. I find that it was not wrong for the Commissioner to continue the indictment until he made his decision based on findings of the Tribunal.

58. I also find that in accordance with subsection (3) of section 28 of the Police Act, the Commissioner did not act unreasonably or unfairly nor acted in error of law by issuing an indictment which ceased salary with effect immediately thereafter.

Dismissal

59. Lastly, the Applicant contended that the dismissal by the Commissioner was unfair, unreasonable and irrational.

60. The powers of the Commissioner under section 33 and 32 of the Police Act to review the findings and thereafter impose punishment or sentence is a judicial decision.

61. The decision of the Commissioner arising from the Tribunal's findings, did not indicate whether or not mitigation was recorded by the Tribunal on his plea of guilt.

62. I find that the Commissioner had acted irrationally and erred in law by immediately dismissing the Applicant without failing to invite the Applicant to mitigate prior to terminating and depriving him of his form of livelihood.

63. I cite with approval the case of Ridge -v- Baldwin [1963] UKHL 2; [1963] 2 ALL ER 66 where Lord Green in the House of Lords the following decision:

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

64. I am mindful that the discretion to dismiss by the Commissioner is a power stemming from the Constitution under section 129 (7). However this power is exercised sparingly and must be exercised with caution as a livelihood is deprived as a result of the powers to dismiss.

65. All the Commissioner had to do was to write a letter informing the Applicant of the decision and to invite the Applicant to provide mitigation within a specified time, failure for which would render the Commissioner to have appropriately made his decision.

66. Furthermore the invitation for mitigation was to enable the Commissioner to hear both the Applicant and the Tribunal before imposing the disciplinary sentence.

67. The Commissioner would have considered the Tribunal's findings and their recommendation for the appropriate disciplinary measures.

68. It was upon the Commissioner to undertake to determine appropriately in proportionate to the offence and the findings taking into consideration the early guilty plea as well.

69. In order to properly analyse and apportion the disciplinary measures accordingly, it was incumbent on the Commissioner to entitle the Applicant to be heard on his mitigation and his recommended disciplinary measures.

70. I therefore find that the action of the Commissioner to dismiss the services of the Applicant without hearing him on mitigation, was unfair and unreasonable and therefore an error of law.

Legitimate expectation to meet with the Commissioner

71. The Applicant contended that after he was informed of the notice of dismissal, he had sort an audience with the Commissioner three times.

72. On the first occasion he was informed in writing that he would not be reinstated.

73. On two occasions, he only met with a Director as the delegate of the Commissioner and on the last occasion he was not able to meet the Commissioner at all.

74. During these times he informed the Commissioner of his request to be reinstated given the manner in which his Tribunal Hearing was conducted.

75. The Court finds that after his dismissal from employment, there was no legitimate expectation that the Applicant would be reinstated directly from the Commissioner.

76. Furthermore, there were no appeal provisions provided for in the Police Act entitling an aggrieved dismissed officer to appeal against the Commissioners decision requiring the Commissioner to stay or revise his decision.

77. I find that there was no act or conduct of the Commissioner rendering him unreasonable or unjust as the Applicant was no longer an employee of the Fiji Police Force.

ORDERS

78. The Court Orders as follows:

(i) It is declared that the decision of the Police Commissioner of 11th May 2021 to dismiss the Applicant without hearing his mitigation is unreasonable, unjust and irrational;

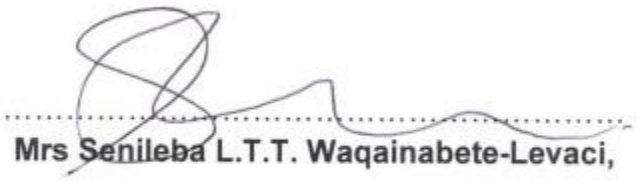
(ii) An Order of Certiorari is issued to quash the decision of the Police Commissioner of 11 May 2021;

(iii) The Applicant is to be reinstated and his salaries which were suspended from indictment until his dismissal be repaid to him;

(iv) Alternatively, that the Applicant be repaid his full salary and benefits from the date of indictment until judgment and a compensation on a generous scale be awarded to him.

(v) The matter is remitted to the Respondent under Order 53 rule 9 (4) of the High Court Rules 1988 to comply with the orders of the Court within 60 days from today.

(vi) Costs summarily assessed costs awarded to the Applicant for the sum of $2500.00.



Mrs Senileba L.T.T. Waqainabete-Levaci,

Puisne Judge of the High Court of Fiji