

THE STATE

v

THE POLICE SERVICE COMMISSION

ex parte

ROMANU TIKOTOKOCA & OTHERS

[HIGH COURT, 1993 (Byrne J), 24 February]

Revisional Jurisdiction

Public Service-whether Regulations made under the 1970 Constitution survived its abrogation- Constitution 1970 and 1990- Interpretation Act (Cap 7) Section 19- Judicial Review-Police Service Commission Regulations 1970- interdiction- extent of right of hearing prior to- meaning of "pending trial"- Police Act (Cap. 85) Section 28(1).

The 4 Applicants sought Judicial review of their interdictions submitting (a) that the 1970 Regulations had been abrogated (b) that they had wrongly been denied a hearing before being interdicted and (c) that interdiction was not available as no trial was then pending. The High Court HELD: (a) the Regulations had not been abrogated (b) that they had a right to be heard before being interdicted and (c) the phrase "pending trial" was sufficiently wide to cover the circumstances.

Cases cited:

Birss v. Secretary for Justice [1984] 1 NZLR 513

Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175

Dixon v. Commonwealth (1981) 55 F.L.R. 34

Furnell v. Whangarei High Schools Board [1973] 1 All E.R. 400

Heatley v. Tasmanian Racing and Gaming Commission

(1977) 137 C.L.R. 487

John v. Rees [1970] Ch. 345, 397

Lewis v. Heffer [1978] 3 All E.R. 354

Ratu Epenisa Seru Cakobau v. Fijian Affairs Board (Action No. 295 of 1988)

Ridge v. Baldwin [1964] A.C. 40

Robert Tweedie McCahill v. Reginam FCA (Cr App No. 46 of 1982)

Schmidt v. The Secretary for State for Home Affairs [1969] 2 Ch. 149

Twist v. Council of the Municipality of Randwick (1976) 136 C.L.R. 106

S.M. Koya for the 1st & 2nd Applicants

J. Semisi for the 3rd & 4th Applicants

A. Cope for the Respondent

Judicial Review by the High Court.

Byrne J:

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Introduction

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These are applications for Judicial Review, the first three of which, Nos. 26, 27 and 30 raise an interesting and possibly important point of constitutional law, namely whether regulations made under the 1970 Constitution of Fiji, which was abrogated by events in 1987 in Fiji and by the Constitution which came into force on the 25th of July, 1990 (hereinafter called "The 1990 Constitution"), are still in force.

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The fourth application, No. 31 of 1991, raises for interpretation Section 28(1) of the Police Act Cap. 85 and particularly the phrase "pending the trial of an offence".

All four applications raise yet again the frequently recurring question in Administrative Law, "When should a right of hearing be given?"

To answer the questions raised in the proceedings it is necessary to state the brief facts of each application.

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The Facts

In Judicial Review No. 26 of 1991 the Applicant is a gazetted Police Officer who joined the Fiji Police Force in July 1968.

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On the 27th of May 1991 he received a Memorandum from the Commissioner of Police stating that the Commission had received a Memorandum and Papers from the Police Service Commission instructing him to investigate a number of complaints relating to members of Police Force. The Commissioner stated that the complaints suggested widespread corrupt practice and abuse of office and that certain allegations had been made against the Applicant. These allegedly suggested in broad terms:

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(1) Irregularities in the deployment of the Police Band; providing musical entertainment without charge when payment should properly have been made.

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(2) being engaged in the supply of alcohol to functions to the Applicant's own benefit.

(3) Having a business interest in the form of provision of private security contrary to Force Orders and incompatible with the Applicant's duties as a Police Officer. The Memorandum then continued-

"These are clearly serious matters. There is a great deal of administrative work to be done to decide whether there is any substance in the allegations.

There must be no interference with any potential witness or any alteration or destruction of any official document."

The letter was then signed P.G. Arnfield.

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On the 21st of June 1991 the Respondent through its Secretary handed a letter marked "Confidential" addressed to the Applicant, advising him, *inter alia* as follows:

"At its meeting held today, Friday the 21st June 1991 the Police Service Commission after considering a progress report from the Commissioner of Police on current investigations of corruption and abuse of office against you, has decided that in accordance with Sections 19 & 20 of the Police Service Commission regulations, and particularly in view of the very serious nature of the alleged offences, you be and you are hereby interdicted from performing the functions of your office forthwith
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In addition the Ministry of Information made an official press release on the 21st of June as to the interdiction of the Applicants, Tikotikoca, Vakaloloma and Ravonu. News of these interdictions appeared in the editions of the Fiji Times and Na I Lalakai on the 22nd and 27th June 1991 under a large headline on the front page of each such newspaper.

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News of the interdiction of the Applicant Nakanacagi appeared in the issue of the Fiji Times of the 13th July 1991. Further, on the 25th June 1991 the Fiji Times carried an editorial headed "Police Integrity" which referred to the interdictions of the "three top Police Officers", naming by his title, the Applicant - Vakaloloma.

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After the Applicant Tikotikoca had been interdicted his solicitor wrote a letter dated 8th of July 1991 to the Chairman of the Respondent seeking confirmation of certain matters relating to the Applicant. On the 16th of July 1991 the Respondent replied to the Applicant's solicitor confirming that the:

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(a) Police Service Commission did not issue any notice to show cause or accord an opportunity to the Applicant to be heard in person or by his representative or counsel before the issuance of the Notice of Interdiction:

(b) Neither the Police Service Commission nor the Commissioner of Police had disclosed to the press any information about the Applicant's Interdiction but advising that an official press release had been made through the Ministry of Information on Friday 21st June 1991.

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- (c) The decision to interdict the Applicant was made for the purpose of investigating certain allegations which had been made against him to the Police Service Commission and the Commissioner of Police.

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JUDICIAL REVIEW NO. 27 OF 1991

The Applicant, Vakaloloma enlisted in the Police Force in November 1964 and was promoted to Deputy Commissioner of Police in February 1989. Among other awards and commendations he had received was the Police Medal for meritorious service for dedication and outstanding investigation into a series of complex criminal cases.

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On the 27th of May 1991 he received a letter from the commissioner of Police stating that the Commissioner had been instructed by the Respondent to investigate a number of complaints relating to the members of the Force. Five allegations had been made against the Applicant. These were:

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- (1) Irregularities in the deployment of the Police Band; providing musical entertainment without charge when payment should properly have been made.

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- (2) Being engaged in the supply of alcohol to functions and to individuals for his own benefit.

- (3) Failing to fairly administer discipline amongst members of the Force who had defaulted; primarily by neglecting to impose disciplinary proceedings where they were properly due.

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- (4) Improper use of official funds on overseas visits and unauthorised extension of period overseas and home annual leave.

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- (5) Causing the improper termination of criminal investigation into a fraud involving a relative.

On 21st of June 1991 Mr. Vakaloloma received a letter marked "Confidential" from the Respondent through its Secretary advising him that he had been interdicted as from that date from performing the functions of his office and in similar terms to that of the Applicant, Tikotikoca.

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JUDICIAL REVIEW NO. 30 OF 1991

The Applicant, Nakanacagi is also a gazetted Police Officer and at the material time held the position of the Director of Music of the Fiji Police Dance Band. On the 14th of January 1988 the Applicant was re-enlisted into the Fiji Police Force as an Inspectorate Officer and on the 20th of February 1989 he was promoted to the rank of Superintendent of Police with the position of Director

of Music.

On the 9th of July 1991 Mr. Nakanacagi received a Confidential memorandum from the Commissioner of Police in the following terms:

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"I have studied a number of statements which indicate that you may be responsible for the misappropriation of property belonging to Fiji Police. Also there are allegations you improperly influenced potential witnesses, in respect of investigations I have conducted.

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It is my intention to report to a meeting of the Police Service Commission on 12th July, 1991.

Enquiries will continue to discover what substance there is in the allegations.

You should take special leave on full pay until the Police Service Commission have considered the evidence to date.

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There must be no interference with any potential witness or any alteration or destruction of any official document."

On 12th of July 1991 the Applicant was served with an interdiction letter by the Secretary of the Respondent which read:

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"At its meeting held today, Friday the 12th July, 1991 the Police Service Commission after considering a report from the Commissioner of Police on investigations into allegations of corruption, abuse of office and misappropriation of public funds against you, has decided that in accordance with Sections 19 & 20 of the Police Service Commission Regulations, you be and you are hereby interdicted from performing the functions of your office forthwith.

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2. During the period of interdiction you shall not have access to any official premises and shall not remove, destroy or add to or cause to be removed, destroyed or added to any official documents, instrument or matter.

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3. You are not to leave Fiji without the permission of the Commission while you are on interdiction.

4. The Commission has decided that during the period of interdiction you will be paid 50% of your salary."

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JUDICIAL REVIEW NO. 31 OF 1991

The fourth Applicant is currently a Senior Inspector of Police who enlisted into the Fiji Police Force in January 1970. In addition to his duties as a member of the Force he coached the Police Rugby Team and was a member of the Fiji

Sevens Rugby Team to Hong Kong from 1977 to 1985.

A On 27th of May 1991 the Applicant received a Confidential memorandum from the Police Commissioner who stated that he had been instructed by the Respondent to investigate a number of complaints relating to the members of the Force. In the case of the Applicant these were broadly that he had a business interest in the form of provision for private security contrary to Force Orders and incompatible with his duties as a Police Officer.

B On 21st of June 1991 he received a Notice of Interdiction from the Police Commissioner, the relevant part of which read:

- C "1. In view of the investigations already made by me into allegations of corruption and abuse of office against you, I have decided in accordance with Section 28(1) of the Police Act, and particularly in view of the very serious nature of the alleged offences, you be, and you are hereby interdicted from performing the functions of your office forthwith.
- D 2. During the period of interdiction you shall not have access to any official premises and shall not remove, destroy or add to or cause to be removed, destroyed or added to any official documents, instrument or matter.
- E 3. You are not to leave Fiji without the permission of the Commission while you are on interdiction.
4. The Police Service Commission concur with my decision.
5. The Commission has decided that during the period of interdiction you will be paid 50% of your salary."

F Each applicant seeks an Order of Certiorari to quash the Respondent's decision interdicting them and various grounds as to why Certiorari should go are stated by each Applicant. In the case of the Applicants Tikotikoca and Vakaloloma these are broadly that the Respondent acted without jurisdiction in interdicting them; alternatively that the Respondent acted in breach of fundamental rules of natural justice in not giving each Applicant an opportunity to present his case or make representations to it before issuing the Notices of Interdiction. It is also claimed that the Respondent acted in bad faith or unfairly in that it interdicted each Applicant solely for the purpose of enabling the Commissioner of Police to carry out investigations into the allegations and in causing Notice of Interdiction to be published in the local press.

G In the case of the Applicant Nakanacagi the allegations as to the lack of jurisdiction by the Respondent to interdict the Applicant are that regulations

19 and 20 of the Police Service Commission Regulations which were made under the 1970 Constitution of Fiji ceased to have any legal validity when that Constitution was abrogated on the 5th of September 1987.

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That up to the date of the Applicant's interdiction no relevant decree had been promulgated to validate the regulations made under the 1970 Constitution.

That the Respondent has not made any regulation under the 1990 Constitution of the Republic of Fiji before or at the time the Applicant was interdicted. Allegations are then made of breach by the Respondent of the rules of natural justice in not providing the Applicant of any opportunity to furnish an explanation or make representations prior to the decision to interdict.

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That by omitting to make any regulation under the 1990 Constitution, the Respondent has failed to establish a procedural framework within which it can lawfully exercise its powers under Section 129 of the Constitution.

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Section 129 gives the power to the Respondent among other things to exercise disciplinary control over officers of the Police Force holding rank above that of Senior Inspector.

Finally it is alleged that the Applicant was interdicted purely to enable the Commissioner of Police to investigate the allegations against the Applicant.

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JUDICIAL REVIEW NO. 31 OF 1991

In the case of the last Applicant, Ravonu, the grounds are that before he could be interdicted under Section 28 of the Police Act he had to be charged with either a disciplinary or criminal offence and that he had not been so charged. He also alleges in the alternative that the Respondent has acted contrary to the rules of natural justice in not providing the Applicant with any opportunity to furnish an explanation or make written or oral representations to the Respondent prior to the decision to interdict him. He also alleges that the decision by the Respondent to reduce the Applicant's salary by 50% without first laying any charges against him has caused the Applicant and his family substantial injustice, prejudice and financial hardship.

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The last named Applicant also seeks an Order of Certiorari to quash the Respondent's decision of 21st of June 1991 purporting to interdict the Applicant from the Police Force.

The Constitutional Questions

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I shall first deal with the constitutional questions. The submissions of the Applicants, Tikotikoca, Vakaloloma and Nakanacagi are broadly similar and they may be summarised thus:

The Police Service Commission, which was established under the 1970

- A Constitution had power under Article 107 to appoint Police Officers above the rank of Assistant Superintendent, to remove them and to exercise disciplinary control over them. The whole of the 1970 Constitution has been abrogated or repealed by the events of the 1987 coups. The second paragraph of the recital to the 1990 Constitution states:

“Whereas events in 1987 in Fiji led to the abrogation of the 1970 Constitution.”

- B Under Article 157(1) of the 1990 Constitution the Respondent had power to make regulations for regulating and facilitating the performance by the Commission of its functions under this Constitution.

- C Similar powers were given to the former Police Service Commission by Article 135 of the 1970 Constitution and it did make regulations entitled “Police Service Commission Regulations” on the 6th of June 1975 which came into force on the 13th of June 1975. Regulation 20 made pursuant to the 1970 Constitution came into force on the 14th of July 1976. It reads as follows:

- D “A gazetted officer interdicted from duty by the Commission, or by the Commissioner where the power of interdiction has been delegated to him, shall not be entitled to receive any salary or any amount in compensation for loss of earnings in respect of a period of interdiction unless the officer is acquitted of any charges in disciplinary or criminal proceedings arising from the circumstances giving rise to the interdiction, and even if the charges in any disciplinary proceedings are not laid until after the conclusion of any criminal proceedings, or unless the Commissioner otherwise directs.”
- E

- F The Respondent did not exercise its powers under Article 157 of the 1990 Constitution to make any regulations concerning the interdiction of gazetted Police Officer.

- It follows therefore, according to the Applicants, that once the 1970 Constitution was revoked or abrogated all regulations made by any Commission pursuant to Section 135 of the 1970 Constitution have been revoked or abrogated also.

- G It is acknowledged by the Applicants that by Section 2(a) of the Existing Laws Decree 1987 of the Interim Military Government of Fiji existing laws, apart from the Fiji Constitution itself, are continued. However the Applicants say that neither the military Government nor the President of the Republic of Fiji has made any decree to the effect that the words “existing laws” include any regulation made by any Commission or Authority especially under the 1970 Constitution. In particular it is said that the President of the Republic of Fiji did not declare at any time that the words “existing laws” wherever appearing

in the 1990 Constitution include the regulations made by any Commission pursuant to Decree 135 of the 1970 Constitution.

Therefore, in the absence of any provision in any decree the Military Government or the President of the Republic of Fiji prior to 25th of July 1990 when the 1990 Constitution came into being expressly saving the regulations made by any Commission under Decree 135 of the 1970 Constitution, the Respondent had no power to interdict the first three Applicants.

The Respondent has filed an answering affidavit to those filed on behalf of the Applicants which is virtually, and in my view wrongly, a submission on the law and as such contrary to Order 41 Rule 5 of the High Court Rules and I have also received comprehensive submissions by the Respondent's counsel.

Although I have just criticised the Respondent for breaching Order 41 Rule 5 I must nevertheless hasten to say that I appreciate what I shall term the "chain of legality" set out by Mr. Sada Naidu the Secretary of the Police Service Commission in his affidavit of the 28th of August 1991 because it assists the Court in this instance. Order 41 rule 5 is clear in stating that with the exceptions stated therein, which I need not mention here, the affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

In all future cases Affidavits in Reply in Judicial Review proceedings should not contain submissions on the law which must be left to counsel for the parties. The chronology which I shall take from Mr. Naidu's affidavit in a moment should have been prefaced by an expression such as "I am informed by the Solicitor-general (or which ever legal adviser gives the information) and verily believe that" and then state the chronology or law on which the Respondent proposes to rely.

In the present case however I do not consider any injustice has been caused to the Applicants and I shall now set out the relevant parts of Mr. Naidu's affidavit. The Respondent states that although it has not made any regulations under Section 157 of the 1990 Constitution for facilitating the performance of its functions it maintains that the regulations made pursuant to Section 135 of the 1970 Constitution are still in force. This is claimed because:

- "(a) The Fiji Constitution 1970 was wholly removed with effect from 25th September 1970 by the Fiji Constitution Revocation Decree 1987 (Interim Military Government Decree No. 1).
- (b) However, by Section 2 (a) of the Existing Laws Decree 1987 (Interim Military Government of Fiji Decree No. 2) existing laws (apart from the Fiji Constitution itself) are continued. "Existing laws" is defined in Section 2 (b) as meaning all laws in force in Fiji before 25th

September 1987 (apart of course from the Fiji Constitution 1970).

- A (c) The Constitution (Abrogation) Military Government and Finance Decree No. 3 1987 (Fiji Interim Military Government Decree No. 3) came into force on 25th September 1987.
- B (i) Section 8 (1) continues in force all existing laws, apart from the Constitution of Fiji 1970.
- C (ii) Section 8(2) puts the matter beyond doubt so far as any legislation subsidiary to the Constitution of Fiji is concerned; it continues in operation all law which was in force by virtue of any provision of the Constitution of Fiji.
- D (iii) Section 9(1) provides for the continuation in office, appointments made and things done under any provision of the Constitution of Fiji provided that the office, appointment or thing done was not suspended by any decree.
- E (d) Section 5 of the Fiji Service Commission and Public Service (Amendment) Decree No. 10 confirmed all positions in the public service, providing for the preservation of the status quo of both the positions themselves and of the terms of appointment as at 25th September 1987.
- F (e) The Head of State and Executive Authority of Fiji Decree 1988 (Government of the Republic of Fiji Decree No. 5) came into force on 5th December 1987.
- G (i) Section 29(1) provides for existing laws as at 25th September 1987 to be continued.
- (ii) Section 29(2) confirms the revocation of the Fiji Constitution 1970; and continues in force decrees of the Fiji Military Government.
- (iii) Section 29(13) provides for the continuation of the holding of public office as at the date of this decree.

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| (iv) | The provisions of the Constitution (Abrogation) Military Government and Finance Decree No. 3 1987 are repealed by section 31 of this Decree, but only so far as they are inconsistent with this Decree. Section 8(1), 8(2) and 9(1) of the Constitution (Abrogation Military Government and Finance Decree No. 3 1987 are not inconsistent with this Decree, and are thus not repealed). | A |
| (f) | The Fiji Service Commissions Decree 1988 (Government of the Republic of Fiji Decree No. 7) came into force on 5th December 1987. | B |
| (i) | Section 25 repeals the Fiji Service Commissions and Public Service (Amendment) Decree 1987, but only in so far as its provisions are inconsistent with this Decree. Section 5 of that Decree is not inconsistent with this decree. | C |
| (ii) | In any event, Section 26 provides for the continuation of the holding of public office. | D |
| (g) | The Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990 came into force on 25th July 1990. | E |
| (i) | Section 8 provides generally for the continuation in force of existing laws. | F |
| (ii) | Section 9(1) provides for the continuation of the holding of public office. | G |
| (iii) | Section 14 repeals the Fiji Service Commissions Decree 1988; however, it does not repeal the Fiji Service Commissions and Public Service Amendment Decree 1987. | G |
| (h) | The Constitution of the Sovereign Democratic Republic of Fiji 1990 also came into force on 25th July 1990. | |

- A (i) Section 165 provides for the continuation of the holding of public office.
- (ii) Section 168 provides for the continuation in force of existing laws.
- B (i) Section 19 of the Interpretation Act provides for the continuation in force of all subsidiary legislation where the governing Act is repealed, unless the subsidiary legislation is expressly revoked or repealed.
- C (j) The Police Service Commission regulations generally are therefore still in force, and regulations 19 and 20 in particular. The Applicant is incorrect in saying that these Regulations were made pursuant to section 107 of the Constitution of Fiji 1970; they were made in pursuance of section 135."

As much reliance is placed by the Respondent on section 8 of the "Constitution (Abrogation) Military Government and Finance Decree No. 3 of 1987" I shall quote the relevant parts of this now:

- D 8.(1) "Subject to this and any other Decree all existing law, that is to say, all law (other than the Constitution of Fiji 1970 Cap. 1) which, whether being a rule of law or a provision of an act of Parliament or of any other enactment or instrument whatsoever, was in force immediately before 25 September 1987 shall, until that law is altered have effect with such modification as may be necessary to bring that into conformity with the Constitution of the Republic of Fiji as effected by this or any other Decree.
- E
- F (2) It is hereby declared that the abrogation by this or any other Decree of any provision of the former Constitution of the Republic of Fiji shall be without prejudice to the continued operation in accordance with subsection (1) of any law which immediately before 25th September 1987 was in force by virtue of that provision."
- G The Respondent also places much reliance on Section 19 of the Interpretation Act Cap. 7 which reads:
19. "Where any Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof, shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation

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issued or made under the provisions of such repealing Act, and shall be deemed for all purposes to have been made thereunder.”

A

As to this the Applicants argue that Section 19 deals with an Act of Parliament. It does not or could not deal with any provision of the 1970 Constitution.

The Respondent accepts that the Interpretation Act does not specifically extend its provisions to cover the Fiji Constitution 1970; and that that Constitution has not been passed as an Act of Parliament of Fiji. However, the Respondent submits that the Fiji Constitution 1970 is an “Act” at least for the purposes of Section 19 of the Interpretation Act.

B

In this regard it first submits that the Court should take judicial notice of the status of the Fiji Constitution 1970. It was treated by the Courts as though it were an Act of the Fiji Parliament.

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Secondly, it is in the same position as an Act of the United Kingdom Parliament made before 2nd of January 1875 which was received into the law of Fiji by the Deed of Cession and other regulations made in Fiji or which was applied to Fiji by Order in Council of the United Kingdom, e.g. the Copyright Act 1956 of the United Kingdom.

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In the case of Robert Tweedie McCahill v. Reginam F.C.A. (Criminal Appeal No. 46 of 1982) the Court of Appeal unanimously upheld both the Magistrate in the Court below and then the present Chief Justice in holding that the Copyright Act 1956 applied to Fiji as a result of an Order in council and was a valid law of Fiji despite independence being granted by the 1970 Constitution. The Court had no doubt that it became “an existing law” which was continued after independence by virtue of Clause 5 of the Fiji Independence Order 1970. I shall say more about the Fiji Independence Order and the Fiji Independence Act of 1970 shortly but I accept the submission of the Respondent here that the 1970 Constitution may be regarded as analogous to the English Copyright Act of 1956. That Act in my view became subject to the Interpretation Act and to subsequent amendment by the Fiji Parliament in that once it had the force of law in Fiji it could be amended by the Fiji Parliament.

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Thirdly the Respondent relies here on Section 67 of the 1970 Constitution. Subsection (1) of Section 67 reads:

“(1) Subject to the provisions of this Section, Parliament may alter this Constitution.”

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It is not necessary to mention the other subsection of Section 67 for my present purposes.

Then Section 68 of the Constitution states that an Act of Parliament may amend the provisions of certain particular laws of Fiji if passed by the requisite

A number of votes therein provided and there can be no doubt that such Acts come within Section 19 of the Interpretation Act. Thus, the respondent submits, any amendment of the Fiji Constitution 1970 must have been by Act of the Fiji Parliament because of Section 67. Section 19 of the Interpretation Act therefore automatically applies to the amending Act and thus the provisions of the Fiji Constitution 1970 would be subject to Section 19.

B In my view there is much force in this submission because to hold otherwise would mean that only the amendments could be covered by Section 19 and not the whole of the 1970 Constitution. If that were to be the case it would lead to the absurd result that only parts of the Constitution would be subject to the Interpretation Act if they were amended by an Act of Parliament of Fiji and not the whole of the Constitution.

C There is a certain attractive simplicity about the submission of the Applicants on this question but in my judgment it ignores the circumstances in which the 1970 Constitution came into being. This is set out in Cap. 1 of the Constitution Documents and is headed "Constitution, Fiji Independence Act 1970".

D This Act was passed on the 23rd of July 1970 and its title is AN ACT TO MAKE PROVISION FOR, AND IN CONNECTION WITH, THE ATTAINMENT BY FIJI OF FULLY RESPONSIBLE STATUS WITHIN THE COMMONWEALTH.

E The Act is stated to come into force on and after 10th October 1970, which date is referred to as "the appointed day". On the 30th of September 1970 the Fiji Independence Order, an Order in Council made by Her Majesty the Queen with the advice of her Privy Council, was made. It too contains several references to "the appointed day" first mentioned in the Fiji Independence Act and the 1970 Constitution which is set out in a Schedule to the Order.

F According to Osborne's Concise Law Dictionary an Order in Council is an Order made by the Queen "by and with the advice of Her Majesty's Privy Council" for the purposes of government, either in virtue of the royal prerogative as, e.g. declarations of war and peace, or under statutory authority. The latter may be termed subordinate legislation, and is said by the author to be much used in modern times for giving the force of law to the administrative regulations and provisions drawn up by government department.

G In my judgment it is clear that neither the Fiji Independence Act of 1970 nor the 1970 Constitution can be read in isolation in that each must depend on the other. Accordingly in my view this is further reason for holding that Section 19 of the Interpretation Act must apply to the 1970 Constitution. It therefore follows that the subsidiary legislation with which we are concerned here, namely the Police Service Commission Regulations, must still be in force unless they have been revoked or repealed by subsidiary legislation made under the provision of a repealing Act, of which there is no evidence.

Applying "the chain of legality" so clearly stated in Mr. Naidu's affidavit I am of the opinion therefore that the Police Service Regulations are still in force.

I also derive support for this view from the submission by the Respondent that the fact that the Fiji Constitution 1970 can be amended by an Act of the Fiji Parliament is an indication that the Constitution is an Act. My attention is drawn by the Respondent to the provisions for amendment of the Constitution in American Samoa (Decree CI, Section 3-4 of the Revised Constitution 1967) and Hawaii (Decree XVII, State Constitution) which can only be amended by either a Constitutional Convention or by the Legislature together with a Referendum; whereas the passage of Bills into law by the Legislature is exactly the same as that for an Act in the Fiji Parliament.

Thus in my view the Fiji Constitution 1970 is a special type of Act which comes within the ambit of Section 19 of the Interpretation Act.

Much is made by the Applicants of the fact that since the events of 1987 the Fiji Military Government and later the Public Service Commission have passed regulations dealing with the Public Service Commission. It is said that this is evidence of a lacuna on the part of the administration in that it indicates for reasons unknown the necessity seen by the Administration to pass regulations for the Public Service but, unaccountably, not for the Police Service Commission. It is said that therefore whilst there are new regulations governing the Public Service Commission, because of the abrogation of the 1970 Constitution there are no longer any Police Service Commission Regulations.

For reasons which I have attempted to give above I do not accept this submission. An examination of the various Public Service Commission Regulations passed since 1987 reveals that all are different. In my judgment the fact that such regulations were issued in for example 1990 does not affect the question of the legality and continued validity of the earlier regulations nor of the Police Service Commission Regulations of 1970.

I therefore reject the Applicants' submissions on the non-validity of the 1970 Police Service Commission Regulations and hold that the Police Service Commission had jurisdiction to interdict the first three Applicants.

Whether or not such interdiction was however valid I will attempt to answer when dealing with the question of whether all four Applicants had a right to be heard before being interdicted.

Before doing that however it is necessary to consider the submission made on behalf of the fourth Applicant Mr. Rupeni Ravonu. He was interdicted under Section 28(1) of the Police Act Cap. 85 which states:

- 28.(1) "The Commissioner may interdict from duty any inspectorate officer or subordinate officer pending the trial of any offence, whether under the provisions of

this Act or before a court, and pending the determination of any appeal."

A It is submitted that the clear meaning of this subsection is that the Respondent is only empowered to interdict the Applicant if he had been charged with either a disciplinary or a criminal charge which was pending trial. It is common ground between the Applicant and Respondent that at the material time the former was not charged with any offence whatsoever and as such the Respondent acted outside its jurisdiction and acted illegally in interdicting the Applicant.

B I reject this submission. 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 the trial" is sufficiently wide to cover the period while investigations are carried out into allegations of criminal or disciplinary offences and I so hold.

C This Applicant also submits, as does Epi Nakanacagi, that their constitutional rights have been violated by their interdiction. This submission appears to be based on Section 9 of the 1990 Constitution which states that no property of any description should be compulsorily taken possession of except under the authority of a relevant law. In this case the Applicants argue that they have been deprived of 50% of their salary thus contrary to Section 9.

D These allegations have not been pleaded before by the Applicants and could not be pleaded now without the leave of the Court under Order 53 Rule 6 (2) of the High Court Rules 1988. No such leave has been sought by the Applicants and I therefore reject this submission.

E Have the Applicants been denied an opportunity to be heard?

F It is common ground that none of the Applicants was given an opportunity to make any submission or offer any explanations to the Respondent before being interdicted. The question is, should they have been?

G The Applicants rely particularly on certain decisions of the Federal Court of Australia, the High Court of Australia and the New Zealand Court of Appeal, some local authorities and some English decisions all of which are well known. The first case to be considered is Dixon v. Commonwealth (1981) 55 F.L.R. 34. There the Full Court of the Federal Court of Australia upheld an appeal against the purported suspension of the Appellant under the Public Service Act. In doing so the Court held unanimously that the Appellant should have been given an opportunity to be heard on the question of whether he should be suspended from duty and on the question of whether payment of salary should cease for the period of his suspension and that failure to do so constituted a denial of natural justice to him.

The Court refused to follow the English case of Lewis v. Heffer [1978] 3 All E.R. 354 on which the Respondent relies in the instant case. In Lewis v. Heffer the Plaintiffs had been suspended from a local branch of the Labour Party pending the results of an inquiry. The Court of Appeal held unanimously that they were not entitled to an opportunity to be heard in relation to that suspension. In this course of his judgment Lord Denning M.R., after distinguishing between a suspension "by way of punishment" and a "suspension made as a holding operation pending inquiries" commented at p. 364:

"Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department of the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At this stage the rules of natural justice do not apply: see Furnell v. Whangarei High School s Board."

The Federal Court of Australia distinguished Lewis v. Heffer from the case before it and held that the comment of Lord Denning was not relevant to the real question involved in Dixon as indeed in the present case namely whether the person concerned is entitled to be heard not on the ultimate question of whether the charge is or is not made out but on the question under consideration at that time namely, whether or not he should be suspended as an interim step. Further, as the Federal Court pointed out, Lewis v. Heffer was distinguishable from Dixon's case in that there was no loss of salary involved during the period of suspension. The Court commented that Lord Denning's general remarks which I have set out above were expressly related to the case where the suspension pending inquiries is "on full pay".

A similar comment can be applied to all four of the cases before me.

It is also interesting to note that in Birss v. Secretary for Justice [1984] 1 NZLR 513 the Court of Appeal in New Zealand made a similar comment on Lord Denning's remarks in Lewis v. Heffer - see p. 517 per Richardson J. In Birss' case the Appellant was a Senior Probation Officer employed by the Department of Justice. In May 1982 he was notified by the Secretary for Justice of various charges which had been made against him under the New Zealand State Services Act. Nineteen months later without any immediate prior notice the Appellant received a notice from the Secretary for Justice

A directing that he was to be suspended from duty with effect from the date of receipt of the notice and that part of the period of suspension was to be without pay. He sought Judicial Review of the Secretary for Justice's decision. In the High Court his application for review was dismissed but on appeal he was successful.

B At page 516 Richardson J. Quoted the well known remarks of Megarry J. In John v. Rees [1970] Ch. 345, 397: "Suspension is merely expulsion *pro tanto*. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office." As Richardson J. Commented in Birss, while the equating of suspension and dismissal may be debated the observations of Megarry J. serve to emphasise two important features that suspension and dismissal have in common : in each case the officer is deprived of his entitlement to perform his duties in the Public service, or in this case the Police Force, so long as the suspension or dismissal stands; and in each case where suspension is without salary the officer is deprived of his entitlement to his salary or whatever portion his employer chooses to withhold, until the charges against him are determined.

D It is interesting to observe that in the same volume of the All England Reports in which Lewis v. Heffer is reported there is also reported a decision of the Court of Appeal similarly constituted to that in Lewis v. Heffer namely Norwest Holst v. Department of Trade, the report of the Court of Appeal beginning at page 290. This case is cited by the Respondent in support of its contention that the Appellants were not denied natural justice in not being given a prior hearing before being interdicted. Lord Denning M.R. at p. 292 said this:

E "There are many cases where an inquiry is held, not as a judicial or quasi - judicial inquiry, but simply as a matter of good administration. In these circumstances there is no need for any preliminary notice of any charge, or anything of that sort. Take the case where a police officer is suspected of misconduct. The practice is to suspend him pending enquiries. He is not given notice of any charge at that stage, nor any opportunity of being heard. The rules of natural justice do not apply unless and until it is decided to take proceedings."

Geoffrey Lane L.J. at page 296 (b) - (d) said this:

G "I also agree. First, dealing with the argument based on what is called 'natural justice', it is important to remember that natural justice and the principle *audi alteram partem* are not synonymous because there are occasions, and very many occasions, when natural justice does not demand that the other side should be heard on the question.

In every investigation or allegation of fraud or misfeasance there are, it seems to me, by and large three different phases. First of all, the administrative phase; next, the judicial phase; and, finally the executive phase when the orders of the court or the tribunal are, if necessary, executed or promulgated. Quite plainly, fairness to the suspect (if one may call him that) demands that he should be given a chance of stating his case before the final period: the execution. That is set out plainly in Cooper v. Wandsworth Board of Works and also in Durayappah v. Fernando. Equally fairness demands that the suspect shall be given a chance of putting his side of the case before the judicial inquiry is over. That scarcely needs illustration, but if it does it is to be found in Re Pergamon Press Ltd. In 1971. But on the other side, and the other side are entitled to fairness just as the suspect is, fairness to the inquirer demands that during the administrative period he should be able to investigate without having at every stage to inquire from the suspect what his side of the matter may be."

It seems to me considering the judgments in Lewis v. Heffer and Norwest Holst v. Department of Trade and the judgment in the Federal Court in Dixon and the Court of Appeal in New Zealand in Birss v. Secretary for Justice that a different approach has been taken to the rights of a person suspended from public duty in England from that in the antipodes and in view of the remarkable developments which have taken place in administrative law since Lewis v. Heffer and Norwest Holst were decided, in my view the approach of the English Courts now may be different. Each case has to be considered on its own facts and whilst one can understand the general principles stated by Lord Denning and Lord Geoffrey Lane it seems to me on the facts of the present case that the approach taken by the Federal Court of Australia in Dixon and the Court of Appeal in Birss is to be preferred.

I derive support for this view from a decision of Fatiaki J. of this Court in Ratu Epenisa Seru Cakobau v. Fijian Affairs Board, Action No. 295 of 1988 in a judgment delivered on the 27th of May 1988. Counsel for the Respondent admits that at first sight this decision appears to be conclusive in the applicant's favour. However he invites me to distinguish the judgment from the facts in the present case on two points. First he submits that Fatiaki J. failed to make the distinction between suspension as a penal measure and suspension as part of the disciplinary process and submits that Fatiaki J. failed to note adequately the distinction between Lewis v. Heffer and John v. Rees both of which his Lordship noted with approval in his judgment. Counsel continues that none of the English authorities on which the Respondent relies for example Furnell v. Whangarei High Schools Board [1973] 1 All E.R. 400, a Privy Council case from New Zealand. Norwest Holst v. Department of Trade and R. v. The Committee of Lloyds *Ex-parte: Portgate* reported in the Times of the 12th

A January 1983 was mentioned by His Lordship. Counsel submits that had Fatiaki J. considered these cases he may well have not concluded that an employer either at common law or by statute has no power to suspend without a hearing.

B To my mind this is pure speculation but in any event it seems to me that by quoting the remarks of Megarry J. in John v. Rees and the later decisions of Dixon v. Commonwealth and Birss v. Secretary for Justice (supra) His Lordship accepted them as being good law in Fiji and worthy to be followed by the Courts here if the circumstances warranted it.

Reference was made by the Respondent to the decision of the Privy Council in Furnell v. Whangarei High Schools Board as I have just said.

C In Furnell which was cited with approval by Lord Denning in Lewis v. Heffer the Appellant was employed as a teacher at a high school in New Zealand and agreed to serve under the conditions laid down in the Secondary and Technical Institute Teachers Disciplinary Regulations. He was charged with certain disciplinary offences and suspended without pay pending the determination of the charges. He applied for judicial review against his suspension on the grounds that he had been denied natural justice inter alia on the ground that he had not
D been given any opportunity of being heard before the decision of the relevant authority to suspend him from his duties. By a majority of the Privy Council with Lords Reid and Viscount Dilhorne dissenting the Privy Council held that in the particular circumstances of the disciplinary code governing the matter the rules of natural justice were to be excluded.

E In a powerful dissenting judgment however with which Lord Reid agreed Viscount Dilhorne remarked at page 416 of the loss suffered by the Appellant in his suspension without pay which also imposed on him the stigma which suspension brings, without having been told of the allegations made against him and without being given any opportunity of answering the case against him before he was suspended. This is one of the complaints which the Applicants
F made against the decision of the Commission in suspending them and in my view they are justified. Consider the facts: all four Applicants, particularly the first three, are senior officers in the police Force. In my view, just as much as the school teacher Furnell or the probation officer Birss or the public servant Dixon, they too must have suffered the stigma of being suspended without first being heard. Then there are the newspaper reports to which admittedly the
G Commission was apparently not a party but which nevertheless in my judgment must have caused considerable concern to the Applicants. It is true that the editorial in the Fiji Times was quick to point out that at that stage no finding of guilt had been made against the Applicants but I have little doubt that the very writing of the editorial would have caused some members of the community to at least have some suspicions about the guilt of the Applicants. At least indirectly in my view this could have been avoided, and I believe any publicity

could have been avoided had the Respondent first decided to give the Applicants a chance to explain themselves. Of course the public has the right to know of any dishonesty in the Police Force but in my judgment the Respondent's case would be much stronger had the Applicants first been given the opportunity to put their cases before suspension.

A

I therefore hold that the Applicants were denied natural justice in not being first given that opportunity. This finding is sufficient to conclude the matter but because the Applicants also argue that they had a legitimate expectation of being heard before interdiction and "Wednesbury unreasonableness" I shall briefly express the views I have formed on these claims.

B

The expression "legitimate expectation" was first coined by Lord Denning in Schmidt v. The Secretary for State for Home Affairs [1969] 2 Ch. 149 and again in his dissenting judgment in Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175, at pp. 190-1.

C

In Schmidt's case Lord Denning referred to Ridge v. Baldwin [1964] A.C. 40 and said that the speeches in that case showed that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. He continued, "It all depends on whether he has some right or interest, or, I would add some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say." He again used the phrase "legitimate expectation" in Breen where he said when discussing the case of a person whose livelihood may be adversely affected by a decision of an administrative body, "I go further. If he is a man who has some right or interest or some legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand."

D

E

The term has also been discussed at various times in the High Court of Australia - see e.g. Twist v. Council of the Municipality of Randwick (1976) 136 C.L.R. 106 at pp. 109-10, Heatley v. Tasmanian Racing and Gaming Commission (1977) 137 C.L.R. 487. The High Court of Australia has tended to prefer the expression "reasonable expectation" to "legitimate" on the ground that the latter carries with it the concept of legality, that is a lawful expectation which is in mind. Whatever term be used, recently the principles governing the concept of legitimate expectation have been set out very simply by the Divisional Court in England in R. v. Jockey Club, ex parte R.A.M. Racecourses Limited (1991) Administrative Law Reports at 265 where the Court held that to succeed on the basis of legitimate expectation an Applicant has to prove: (1) a clear and unambiguous representation (2) if the Applicant was not a person to whom any representation was directly made, he or it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the applicant to rely upon it. (3) That he did so rely upon it. (4) That he did so to his detriment.

F

G

A While in some cases it is not altogether clear that this is a necessary ingredient since a public body is entitled to change its policy if it is acting in good faith, it is a necessary ingredient where the Applicant says, "You can't alter your policy now in my case; it is too late." See pp. 208-281 per Stuart-Smith L.J.

B In the context of the present case I am not satisfied that the Respondent made any clear and unambiguous representation to any of the Applicants; nor is there any evidence in my view that the Applicants relied on any representations made by the respondent to their detriment or otherwise. The attack against the interdiction on this ground thus fails.

C Finally the Applicants argue "Wednesbury unreasonableness" meaning that the Respondent acted irrationally and unreasonably in deciding to interdict each Applicant and reduce his salary and allow publicity to be given to the action taken by the Respondent. In my opinion, based on what I have said above, it was unreasonable in the circumstances of these cases to interdict the Applicants without first allowing them to state their cases to the Commission. I would therefore uphold this ground also.

D The result is that the applications for Judicial Review succeed and I order that Certiorari to go to quash the decisions of the Respondent made on 21st June 1991 in respect of the Applicants Tikotikoca, Vakaloloma and Rupeni Ravonu and the decision of the Respondent of 12th July 1991 in respect of the Applicant Nakanacagi.

I further order that the Respondent is to pay the Applicants' costs.

E *(Motion allowed)*

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