

THE STATE

v.

THE DISCIPLINED SERVICES COMMISSION

ex parte
BENIAMINO NAIVELI

[HIGH COURT, 1999 (Fatiaki J) 19 November]

Revisional Jurisdiction

Public Service- Fiji Police Force- dismissal of gazetted police officer following conviction for criminal offence- whether a disciplinary enquiry must be held- Police Service Commission Regulations 24, 26 - Constitution, 1970 Section 135.

The Applicant who was previously Assistant Commissioner of Police (Crime) sought judicial review of the decision of the Police Service Commission to dismiss him following his conviction of the criminal offence of abuse of office. The principal ground advanced was the failure of the Commissioner of Police to hold a disciplinary enquiry before recommending the Applicant's dismissal. The High Court rejected this submission and HELD (i) Regulation 24 provides a procedure for dismissal independent of that laid down in Regulation 26 and does not require an enquiry to be held; and (ii) the applicant's only right to be heard by the Commission was on the matter of the Commissioner's recommendation.

Case cited:

State v. Police Service Commissioner ex parte Naiveli (HBJ 29 of 1994S)

Application for leave to move for judicial review.

N. Sadhu for the Applicant

S. Kumar for the Respondent

Fatiaki J:

This is an opposed application for leave to issue judicial review proceedings against a decision of the Police Services Commission taken on the 21st of July 1998 dismissing the applicant from the Fiji Police Force. An earlier identical application was apparently aborted after leave had been granted over the respondent's objection, owing to the substantial amendments that were sought to be made to the original motion after leave had been granted.

A

B

C

D

E

F

G

A On 1st September, 1999 after hearing counsel I refused leave for reasons which I now provide.

The rather sorry chronicle of this matter dates back to March 1991 when the applicant was first charged with an offence of Abuse of Office whilst holding the position of Assistant Commissioner of Police (Crime). It may be conveniently set out as follows :

- B
- (1) 18.3.91 applicant interdicted on half pay;
 - (2) 12.6.92 applicant was convicted in the High Court for an offence of Abuse of Office and was fined \$1,000.00 in addition to a suspended prison sentence;
- C
- (3) 12.8.94 the Fiji Court of Appeal upheld the applicant's conviction and sentence in Criminal Appeal No.4 of 1992;
- D
- (4) 24.8.94 the Commissioner of Police in a report to the respondent Commission recommended the applicant's dismissal ;
 - (5) 25.8.94 the respondent Commission dismissed the applicant from the Fiji Police Force ;
- E
- (6) 28.9.94 applicant's solicitors advised that an appeal to the Supreme Court against the decision in (3) above was pending and sought the vacation of the decision in (5) above ;
- F
- (7) 10.11.94 the respondent Commission replied upholding its decision in (5) above;
 - (8) 25.1.95 the applicant obtained leave to issue Judicial Review against the decision in (5) above in Judicial Review No. HBJ 29 of 1994 ;
- G
- (9) 4.8.95 Scott J. quashed the dismissal decision in (5) above and ordered costs against the respondent Commission ;
 - (10) 23.8.95 the respondent Commission appealed against Scott J's decision in (9) above to the Fiji Court of

THE STATE v. THE DISCIPLINED SERVICES COMMISSION
ex parte BENIAMINO NAIVELI

Appeal (later confined to the indemnity costs awarded);

- (11) 20.11.95 the Supreme Court of Fiji refused the applicant special leave to appeal against the decision in (3) above ; A
- (12) 16.8.96 the Fiji Court of Appeal dismissed the appeal in (10) above and ordered costs against the respondent Commission B
- (13) 24.11.97 the Commissioner of Police re-submitted to the respondent Commission his report in (4) above with the same recommendation ;
- (14) 11.12.97 the applicant was dismissed a second time from the Police Force by the respondent Commission; C
- (15) 1.6.98 the respondent Commission vacated its decision in (12) above and sought written submissions from the applicant; D
- (16) 25.6.98 the applicant filed written submissions seeking permission 'to retire voluntarily' ;
- (17) 21.7.98 the respondent Commission rejected the request and affirmed the applicant's dismissal (a third time) 'from 12.6.92' ; E
- (18) 4.8.98 applicant's counsel sought the respondent Commission's reason(s) for its decision in (15) above;
- (19) 28.8.98 the respondent Commission replied to the request alluding *inter alia* to the applicant's criminal conviction ; F
- (20) 26.10.98 further clarification was sought from the respondent Commission ;
- (21) 8.12.98 the respondent Commission refused to elaborate on its earlier reasons disclosed in its letter at (17) above ; G
- (22) 24.3.99 application seeking leave to issue judicial review filed;

- A
- (23) 26.3.99 respondent's objection to leave filed ;
- (24) 28.4.99 Motion to amend Notice of Motion applying for judicial review ;
- (25) 12.5.99 leave granted by Pathik J. to the applicant to withdraw application in (22) above ;
- B
- (26) 10.6.99 Order granting leave to withdraw application in (22) above sealed ;
- (27) 11.6.99 fresh application for leave to issue judicial review proceedings and respondent's opposition to leave filed ;
- C
- (28) 22.6.99 respondent's amended objection to leave filed;

D

So much then for the chronology of significant dates which extends over a period of eight years during which time the applicant remained interdicted on half pay for at least three years ; was 'dismissed' on no less than three separate occasions over four years ; and three months was lost on an aborted application for judicial review.

E

There can be no doubting that the applicant as the person directly affected by the respondent Commission's dismissal decision has a sufficient interest to apply for judicial review. Equally there can be no doubting that having regard to the primary relief sought by the applicant and taking the latest dismissal decision of the respondent Commission taken on the 21st July 1998 at (17) above, there has been some delay in applying for judicial review.

In this latter regard the respondent's amended grounds of objection to leave states:

- F
- (1) The application is out of time as per Order 53 r.4 since the decision to dismiss the applicant was reached on 21st July, 1998 ; and
- G
- (2) The respondent in reaching the decision to dismiss the applicant duly followed the procedure laid out in Regulation 24 of the Disciplined Services Commission Regulations and thus there was no procedural impropriety nor the decision was illegal.'

As to (1) Counsel for the applicant submits that there has been no undue delay since there has been correspondence exchanged between the applicant's solicitors

and the respondent Commission after its dismissal decision seeking its reasons therefor and these were only finally concluded with the respondent Commission's refusal on or about 8.12.98 [See : (17) to (21) above]. Thereafter Counsel states the applicant was hospitalised for several months and underwent surgery, but, in any event, any delay has not been undue.

A

State Counsel submits that Order 53 r.4 of the High Court Rules 1988 is clear in laying down a three month time limit where the relief sought is an order of certiorari.

B

Furthermore counsel submits that the reason or excuse advanced for the delay namely, counsel trying to obtain reasons or clarification from the respondent Commission for its decision, is plainly insufficient in so far it could have provided a substantive ground for seeking judicial review of the decision.

C

In this regard it is noteworthy that Regulation 26(9) of the Police Service Commission Regulation merely obliges the Secretary of the respondent Commission to communicate to the officer concerned the decision of the respondent Commission but not the reasons for the decision. Needless to say if an officer is statutorily disentitled to the reasons for the (Commissions) decision any delay caused by a request for the same must be viewed in that context.

D

A further more obvious reason is that the time limit is clearly imposed in the public interest on the applicant for judicial review to comply with, and as such, the court should be slow to countenance or sanction any attempt unilaterally to shift the onus of compliance or suspend the date from which time begins to run, onto the respondent.

E

Having said that however I am not satisfied that the respondent Commission has provided any factual or evidential basis from which this Court could form any adverse opinion as to any hardship, prejudice or detriment to good administration that might have been caused by the applicant's delay or by the grant of leave now and accordingly, I reject this first ground of objection.

F

I turn next to the ground (2) of the amended objection which seeks to challenge the arguability of the applicant's claim for substantive relief.

Counsel for the applicant in seeking leave submits that the papers disclose that the applicant was denied natural justice in that he was dismissed without a hearing or, only as to punishment. This submission if I may say so, is predicated on the view that the respondent Commission has no power to summarily (for want of a better term) dismiss a gazetted police officer who has been convicted of a criminal offence, in the absence of a disciplinary inquiry conducted in accordance with Part VIII of the Police Service Commission Regulations.

G

A There is dictum in HBJ 29 of 1994 [op.cit at (8) above] per Scott J. that lends some support for Counsel's submission where his lordship said (at p.7) :

B '... there is nothing whatever in the wording of the Regulations under consideration to suggest the existence of a two track approach to disciplinary proceedings, the first an 'abnormal approach' under Regulation 23 for 'serious' criminal offences and the second under Regulation 24 for less serious criminal offences such as those listed under Regulation 18.'

and later at p.12 where he says :

C Unfortunately neither counsel addressed me on the precise point which had emerged. Mr. Gates confined his submissions to Regulations 23 and 24 and Mr. Singh simply stood by his written submission without offering any explanation at all of how Regulation 23 could give the Respondent or anyone else the power to dismiss anyone given that neither the Respondent nor dismissal are even mentioned in it. Neither did he explain how the procedures laid down by Regulation 26(1) could possibly have been followed given that the Respondent never received a report from the Commissioner pursuant to Regulation 24 (the Appeal procedures not having been completed) and could not do so under Regulation 23 since that Regulation does not empower any body to send anything to anybody at all.'

and finally at pp.13/14 where the following passages are to be found :

F 'I have the gravest doubts as to whether the Respondent could act under Regulation 28 except following consideration of a report provided to it under Regulation 26(7). I am however entirely satisfied that Regulation 23 provides no procedure for dismissal, or for forwarding any report by the Commissioner to the respondent, that Regulation 24 only becomes operative following the exhaustion of the whole and entire appeal procedure available to an appellant and that the actual dismissal procedure by the Respondent must be commenced with a consideration by the Respondent of the report furnished to it under Regulation 24 following which it must decide whether or not a disciplinary inquiry should be held.

G

THE STATE v. THE DISCIPLINED SERVICES COMMISSION
ex parte BENIAMINO NAIVELI

It is interesting to note that convictions for a criminal offence by a gazetted officer do not necessarily result in dismissal although the idea that a very senior police officer could be found guilty of a serious crime... and not suffer dismissal seems strange. Regulation 24 requires the Commissioner to report the conviction to the Respondent 'together with his recommendation as to punishment, if any'. Presumably if the recommendation is that there should be no punishment then no disciplinary inquiry will be held.'

A

B

Counsel for the applicant accepted however, that it was not the respondent Commission's decision not to hold a disciplinary inquiry that was being challenged but the decision dismissing the applicant from the Fiji Police Force. Needless to say the former decision is contained in the respondent Commission's letter of 1st June 1998 and having regard to the applicant's comprehensive submission that followed the letter without objection, it may well be that this issue must now be considered as having been waived.

C

In this latter regard reference may be made to the applicant's grounds (a) to (d) which appear to assume that in the given circumstances, the respondent Commission was dutybound to hold a disciplinary inquiry pursuant to Regulation 26(1)(b) before imposing a penalty on the applicant.

D

State Counsel for his part relies on the provisions of Regulation 24 of the Police Service Commission Regulations and submits that it was duly followed by the respondent Commission in reaching its decision to dismiss the applicant.

E

Regulation 24 provides :

'Where criminal proceedings have finally concluded (including the determination of any appeal) resulting in the conviction of a gazetted officer, the Commissioner shall report the matter, together with his recommendation as to punishment, if any, to the secretary who shall forward the report to the Secretary of the Commission for consideration by the Commission.'

F

Having independently considered the scheme of PART VIII of the Police Service Commission Regulations, I am driven to the firm view that Regulation 24 provides an avenue or procedure for the dismissal of a gazetted officer without the holding of a disciplinary inquiry. My reasons for saying so are briefly as follows :

G

- A (1) There can be no doubting the power of the Respondent Commission 'to remove officers from The Fiji Police Force' or 'to take disciplinary action' ... (See : Section 129(1) of the 1990 Constitution and Sections 152(1)(b) & (c) of the 1997 Constitution).
- B (2) Regulation 26 of the Police Service Commission Regulations is silent on what happens where the respondent Commission decides not to hold a disciplinary inquiry as occurred in the applicant's case ;
- C (3) The decision not to hold a disciplinary inquiry does not in my view, necessarily or inevitably mean that the respondent Commission has therefore decided not to remove the officer concerned or is precluded from exercising such powers ;
- D (4) Regulation 24 provides a procedure independent of Regulation 26, whereby a gazetted police officer who has been convicted of a criminal offence, may be dismissed without a disciplinary inquiry being first held ;
- E (5) Regulation 24 is entirely predicated upon the conviction of a gazetted officer for a criminal offence, irrespective of whether or not there exists a disciplinary equivalent for the offence.

F In the applicant's case, he was convicted for an offence of Abuse of Office : contrary to Section 111 of the Penal Code Cap.17 of which the Court of Appeal said, in dismissing the applicant's appeal, in Criminal Appeal No. 4 of 1992, at (p.10):

G ... such offences strike at the very roots of the administration of law and order and justice in this country. Such an offence can be committed only by a person who is in a position of authority and trust.'

Given the nature of the criminal offence with which the applicant was convicted after trial in the High Court and considering the position he held within the Fiji Police Force at the relevant time, it is difficult to imagine a more serious

THE STATE v. THE DISCIPLINED SERVICES COMMISSION
ex parte BENIAMINO NAIVELI

equivalent disciplinary offence, nor, in my view, would it serve any useful purpose to conduct a disciplinary inquiry into any disciplinary offence(s) that might have occurred during the course of the commission of the criminal offence by the applicant.

A

- (6) In addition, Regulation 24 requires the Commissioner of Police '(to) report the matter, together with his recommendation as to punishment, if any,' to the respondent Commission for its consideration.

B

In my view the requirement that the Commissioner of Police consider the (disciplinary) punishment appropriate for the criminal offence committed merely serves to further emphasise the distinction between the (summary) procedure under Regulation 24 and that under Regulation 26(1). One is tempted to ask why consider the punishment and not whether disciplinary proceedings for dismissal should be instituted if a disciplinary inquiry is a pre-requisite to dismissal?

C

D

Needless to say, Regulation 5 requires the Commissioner of Police in furnishing his report under Regulation 24 to enclose with it '... copies of all necessary supporting and relevant documents', and one may well ask, what more needs to be proved or established against the applicant that could or would add anything to what he already knows and has been proven in a Court of law? and who better to gauge the consequences to the Fiji Police Force of such a conviction or the retention of the convicted officer than its Commissioner?

E

F

In my view the respondent Commission on receipt of the Commissioner's report is only required to consider whether or not the Commissioner's punishment recommendation (if any) should be confirmed, altered or rejected, and, it is only on this narrow limited aspect of the matter that the applicant has a right to be heard and not otherwise.

G

In this latter regard having considered the contents of the affidavit deposed by the Chairman of the respondent Commission, its letter to the applicant's counsel of 1st June 1998 and Counsel's written submission in response, I was more than satisfied that the application for judicial review was doomed to fail on the merits and accordingly leave was refused.

A Where however no punishment has been recommended by the Commissioner of Police then my provisional view is that the respondent Commission is still obliged to consider whether or not to hold a disciplinary inquiry in terms of Regulation 26.

B Having said that however, I am more than satisfied that the respondent Commission had no power to back-date the applicant's dismissal to any date prior to its actual decision and more especially to a date which bears no relationship to the respondent Commission's decision in the exercise of its powers under Regulation 24. To that limited extent the applicant's dismissal must be and is hereby altered to take effect from July 22, 1998.

(Leave to move for judicial review refused.)

C

D

E

F

G