

BENIAMINO NAIVELI v STATE and Anor

COURT OF APPEAL — CIVIL JURISDICTION

REDDY P, BARKER and DAVIES JJA

26 February, 1 March 2002

[2002] FJCA 52

Administrative law — regulations — reconsideration — opinion — questions of law — criminal offence v disciplinary hearing — no disciplinary inquiry before dismissal — Constitution s 52 — Court of Appeal Act s 15 — Police Act (Cap 85) ss 29, 30, 32(2) — Police Service Commission Regulation Pt 8, regs 18, 21, 24, 25, 26, 26(1), 26(8), 26(9), 27, 28.

Applicant sought reconsideration from a lower court decision on whether Respondent has power summarily to dismiss a gazetted police officer who has been convicted of a criminal offence in the absence of a prior disciplinary hearing in accordance with Pt VIII Police Service Commission Regulations. Applicant was convicted of abuse of office. He was sentenced to 9 months imprisonment, suspended for 1 year and fined. There was no disciplinary charge and inquiry prior to his dismissal by the commission.

Held — Regulation 24 is a procedural provision and confers no power of summary dismissal upon the commission. It merely provides for the making of a report. Applicant did not receive a statement of the charge against him together with a brief statement of the allegations on which the charge was based, as reg 26(1) requires. Nor was any inquiry held.

Reconsideration dismissed.

No cases referred to.

V. M. Mishra for Beni Naiveli

S. Kumar for the State

J. Udit for the Disciplined Services Commission

Judgment

Reddy P, Barker, Davies JJA. The case stated reads as follows:

On the facts stated in the Statement of the Applicant dated 8th March 1999 and the Affidavit of Beniamino Naiveli sworn on 8th March 1999 and the Affidavit of Ratu Epeli Kanaimawi sworn on 20th August 1999, the following questions of law are respectfully reserved for the consideration of the Court of Appeal and its opinion sought in accordance with Section 15 of the Court of Appeal Act;

Whether the Respondent has power summarily to dismiss a gazetted Police Officer who has been convicted of a criminal offence in the absence of a prior disciplinary hearing in accordance with Part VIII Police Service Commission Regulations.

The brief facts leading to this case stated are that the Applicant, Beniamino Naiveli, a gazetted officer in the Fiji Police Force, was convicted 12 July 1992 of the offence of Abuse of Office. He was sentenced to 9 months imprisonment, suspended for 1 year, and fined \$1000. Subsequently, the Commissioner of Police reported the matter to the Police Services Commission, now the Disciplined Services Commission (the Commission), with the recommendation that Mr Naiveli be dismissed from the Force. There were then

a number of proceedings which need not be discussed. Mr Naiveli was not formally charged with any disciplinary offence but, on 1 June 1998, he received the following letter:

- 5 ... *The Commission has decided that a disciplinary inquiry is not warranted given Mr Naiveli's conviction but he may make a written submission within fourteen (14) days on why he should not be dismissed.*

A submission on behalf of Mr Naiveli was forwarded to the Commission. On 22 July 1998, the Commission wrote to Mr Naiveli's solicitor as follows:

- 10 *The Police Service Commission has considered the factors raised in your written submission dated 25/6/98 on behalf of Mr Naiveli and has decided that Mr Naiveli's dismissal from the Fiji Police Force, from 12/6/92 stands.*
Mr Naiveli is being advised separately of this decision.

- 15 Although the letter used the words "dismissal ... stands", it is the Commission's case that the Commission on 21 July 1998 determined that Mr Naiveli be dismissed from the Fiji Police Force. Prior to the dismissal, no disciplinary offence was formulated, no disciplinary charge was laid and no inquiry was held pursuant to the provisions of reg 26 of the Police Service Commission Regulations (the Regulations), which apply to gazetted officers of the force.

- 20 Before examining the Regulations, it is useful to refer to the Police Act Cap 85 (the Act).

- 25 Section 29 of the Act specifies certain offences under the Act which are punishable by law while s 30, which deals with disciplinary offences by an officer other than a gazetted officer, refers to "any offence against discipline as may be prescribed under the provisions of this Act". A fundamental principle of the disciplinary proceedings is stated in s 32(2) which provides:

No police officer shall be convicted of an offence against discipline unless the charge has been read and investigated in his presence and he has been given sufficient opportunity to make his defence thereto.

- 30 It would be surprising if gazetted officers were to receive less natural justice in respect of disciplinary offences than is accorded by the Act to lesser ranks.

- 35 Section 152 of the Constitution provides that the Disciplined Services Commission has the function, inter alia, "(b) to remove officers from the Fiji Police Force or Fiji Prisons Service". The Regulations, which apply to gazetted officers, provide for procedures to be followed in the performance of that function. Regulation 18 specifies thirty offences and provides that any gazetted officer who commits any of the offences "commits an offence against discipline for the purpose of disciplinary proceedings". Those offences are the disciplinary offences with which an officer may be charged. No other offence may be subject
40 of a charge.

- 45 Regulation 18 does not provide that the commission of a criminal offence is itself a disciplinary offence. The commission of the criminal offence of Abuse of Office is not, of itself, a disciplinary offence. Of course, the conduct which leads to the conviction may fall within one or more of the paragraphs of reg 18, particularly [30] which speaks of "any other act, conduct, disorder or neglect to the prejudice of good order or discipline". During the hearing of the appeal, counsel for the State failed to identify a disciplinary offence specified in reg 18 for which Mr Naiveli had been dismissed.

- 50 Regulation 21 deals with minor disciplinary offences in respect of which disciplinary proceedings are not justified. The Regulation provides that a letter of warning that an act of misconduct has been recorded may be issued.

Regulation 27 deals with the circumstance where it is considered necessary to institute disciplinary proceedings for misconduct not warranting dismissal. The Regulation provides that the officer shall be informed of the charges against him and shall be called upon to state in writing his answers to the charge and anything he desires to urge on his own behalf in the matter. The Regulation provides that “such proceedings shall be carried out in such a manner that the officer shall know the whole case against him and shall have an adequate opportunity throughout of making his defence”.

Regulation 26 deals with the circumstance, which applied in Mr Naiveli’s case, that the Commissioner considered that disciplinary proceedings for dismissal should be instituted against the officer. Regulation 26 provides, *inter alia*:

- 1 (a) *Where the Commissioner considers that disciplinary proceedings for dismissal should be instituted against a gazetted officer, he shall make a report to the secretary who shall forward such report to the Secretary of the Commission in order that the Commission may decide whether or not a disciplinary inquiry is to be held.*
- 15 (b) *Where the Commission decides that a disciplinary inquiry shall be held, the secretary shall forward to the officer a statement of the charge or charges framed against him, together with a brief statement of the allegations on which each charge is based.*
- 20 (c) *The Secretary shall also advise the officer that, if he so wishes, he may state in writing before a date to be specified (which shall allow a reasonable interval for the purpose) any grounds upon which he relies to exculpate himself.*
- 25 2 (a) *Unless the statement, if any, of the officer contains an admission of the charges preferred, the secretary shall appoint a Committee of such persons as he shall specify, not being less than three in number, to inquire into the matter.*
- 30 (b) *A Committee appointed under sub-paragraph (a) shall have the same powers as the Commission to summon and examine any witness whose evidence may be deemed material.*
- 35 (c) *The Chairman of every such Committee shall be a judge, a magistrate, legal officer or some other person possessing legal qualifications.*
- (d) *Neither the Commissioner nor any police officer shall be a member of the Committee.*
- 40 (e) *Where not expressly provided for under these Regulations, the procedure of the Committee in inquiring into any matter referred to it shall be such as the Committee may determine.*
- 3 The Committee shall inform the officer that on a specified day, the charges against him will be investigated by it and that he will be allowed or, if the Committee shall so determine, will be required, to appear before it to defend himself.
- ... 7 The Committee, having inquired into the matter, shall forward its report thereon to the Secretary of the Commission accompanied by the record of the charges framed, the evidence led, the defence and all other proceedings relevant to the inquiry.
- 45 8 The Commission after considering the report of the Committee, may —
- (a) *if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the secretary for reference to the Committee for further investigation, report and later decision of the Commission;*
- 50 (b) *if it is of the opinion that the officer does not deserve to be dismissed, may impose some lesser penalty; or*

(c) *decide in relation to dismissal or otherwise.*

9 *The decision on each charge preferred against the officer shall be communicated to him by the Secretary of the Commission but not the reasons for the decision.*

5 It cannot be in doubt that, although the Commission is given a discretion to decide whether an inquiry will be held, it must institute an inquiry when dismissal is a possible result of the proceedings. Regulation 26 intends that a gazetted officer will not be dismissed for the commission of a disciplinary offence without receiving the protection which it provides. The discretion not to hold an
10 inquiry is conferred on the Commission so that it may deal speedily with those cases which, in its view, although not that of the Commissioner, do not warrant dismissal.

It is not in dispute in this case that Mr Naiveli did not receive a statement of the charge against him together with a brief statement of the allegations on which
15 the charge was based, as reg 26(1) requires. Nor was any inquiry held of the type which reg 26 prescribes.

We should emphasise that Pt VIII of the Regulations, which part deals with the subject of discipline, commences with reg 18 which specifies 30 offences in respect of which “disciplinary proceedings” may be taken. Regulations 26 and 27
20 deal with cases where disciplinary proceedings are instituted. Both regulations require that the officer shall receive a statement of the charge or charges. Regulation 26(9) provides that the decision on each charge preferred against him, excluding the reasons therefor, shall be communicated to him by the Secretary of the Commission. Regulation 21 deals with the case where it is considered that
25 disciplinary proceedings are not justified in respect of a minor act of misconduct. Regulation 28, the last regulation in Pt VIII, specifies the punishments which may be ordered as a result of disciplinary proceedings under Pt VIII. All these regulations deal with aspects of disciplinary proceedings.

In the midst of these regulations are four regulations which deal with the
30 subject of criminal prosecutions. The first three of those regulations provide:

22. *Subject to the provisions of regulation 23, when a preliminary investigation or an inquiry discloses that an offence against any law may have been committed by a gazetted officer, the Commissioner shall order an investigation and shall take action in accordance with the Force Standing Orders.*
35

23. *Where criminal proceedings are instituted against any gazetted officer, disciplinary proceedings shall not normally be taken until the conclusion of such proceedings and the determination of any appeal therefrom.*

24. *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.*
40

Those regulations appear to be perfectly plain and to mean what they say.
45 However, the basic crux of the view taken by the Commission and propounded Commission recommending that the officer be dismissed.

The submission fails at the hurdle that neither reg 24 nor reg 26 confer any such power. Regulation 24 confers no power to dismiss. It merely provides for the making of a report. Regulation 26 confers a power to dismiss. Regulations 26
50 (8) and 28 are explicit in this respect. However the power to dismiss is exercised within the structure of the disciplinary proceedings for which reg 25 makes

provision. The opening words of reg 26 show that the operation of the power to dismiss conferred upon the Commission is conditional upon the receipt of a report from the Commissioner recommending that “disciplinary proceedings for dismissal should be instituted against” the gazetted officer. Those words make it plain that a gazetted officer may not be dismissed otherwise than through the holding of the disciplinary proceeding specified in reg 26.

Counsel for the State has placed much emphasis upon reg 24. However, that regulation makes it plain that a conviction for a criminal offence will not necessarily result in the institution of disciplinary proceedings. The Commissioner is required to report when a gazetted officer has been convicted of a criminal offence. In his recommendation for punishment, he may suggest any one of the seven grades of punishments specified in reg 28. The words “if any” indicate that the Commissioner may recommend that there be no punishment.

On the receipt by the Commission of a commissioner’s report forwarded to it pursuant to reg 24, the Commission may decide to take no action against the officer or to act under reg 21, reg 27 or reg 26. However, it does not have power to discipline an officer outside those regulations save that, as stated in reg 28, the commissioner has a power which enables it to require an officer to retire in the public interest.

The view we have expressed accords with that tentatively stated by Scott J in a judgment given on 4 August 1995 in proceedings between the present parties. His Lordship said, *inter alia*:

I have gravest doubts as to whether the Respondent (the Commission) could act under regulations 28 except following consideration of a report furnished under Regulations 26(7).

Subsequently, Fatiaki J rejected a submission put on behalf of Mr Naiveli that the commission has no power to dismiss a gazetted officers who has been convicted of a criminal offence in the absence of a disciplinary inquiry conducted and accordance with Pt VIII of the Regulations. His Lordship concluded:

Having independently considered the scheme of Part VIII of the Police Service Regulations, I am driven to the fair view that Regulation 24 provides an avenue of procedure for the dismissal of a gazetted officers without the holding of a disciplinary inquiry.

In our view, reg 24 is a procedural provision and confers no power of summary dismissal upon the Commission.

For the reasons we have given, the question posed for the opinion of the court must be answered: No.

The State should pay Mr Naiveli’s costs of the case stated, which costs are fixed at \$1000 plus disbursements as fixed by the registrar.

Reconsideration dismissed.