

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION
CIVIL APPEAL NO. ABU0052/95S

BETWEEN:

POLICE SERVICE COMMISSION

APPELLANT

- AND -

BENIAMINO NAIVELI

RESPONDENT

Mr. D. Singh for the Appellants

Mr. A. Gates for the Respondent

Date and Place of Hearing : 13 August 1996, Suva

Date of Delivery Judgment : 16 August 1996

JUDGMENT OF THE COURT

There are two questions arising in this appeal by leave against Scott J's award of "indemnity costs" against the Police Service Commission, as the unsuccessful respondent in an application for judicial review by the present respondent, Beniamino Naiveli. The latter had sought an award of costs on

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the basis of a solicitor/client relationship.

The first question relates to the meaning of "indemnity costs" a term commonly used in the past in England to indicate a more generous award than the usual party and party costs provided for in the English equivalent of O.62,r.25 of the Fiji High Court Rules, the latter being defined therein as those costs "necessary or proper" for the attainment of justice or for enforcing or defending the party's rights.

Until it was recognised in the amendment to the English Order 62 in 1986, a separate category of "indemnity costs" was not mentioned in either the former English rules or the present Fiji rules based on them. In EMI Records v. Wallace [1982] 2 All ER 980 Sir Robert Megarry V-C undertook a detailed review of the use of that expression and concluded that it was equivalent to an award of "Solicitor and own client costs" in O.62,r.29 (described in its Fiji equivalent O.62,r.25 as "costs payable to a barrister and solicitor by his own client"), but excluding paras (2) and (3) thereof. It would result in all costs being allowed "except insofar as they are of an unreasonable amount or have been unreasonably incurred" (r.25(1)). Sir Robert's judgment is with respect persuasive, and we concur with Scott J in accepting his conclusion that an award of costs on an indemnity basis is to

be understood in Fiji as an award in terms of 062,r.26(1).

The second question in the appeal is whether Scott J was right in awarding such costs in this case. As Brightman LJ said in Bartlett v. Barclays Bank Trust Co Ltd (NO.2) [1980] 2 All ER 92, 98; [1980] Ch 515, 547:

"... the usual rule (subject to well-recognised exceptions) in the case of fiduciary, contractual or tortious wrongdoing is that the defendant pays to the plaintiff only party and party costs. It is not, I think, the policy of the courts in hostile litigation to give the successful party an indemnity against the expense to which he has been put and, therefore, to compensate him for the loss which he has inevitably suffered, save in very special cases."

The application for review was brought by the respondent to challenge his dismissal from the Fiji Police Force in which he held the position of Assistant Commissioner of Police (Crime). He had been charged with the offence of abuse of

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office and was convicted in the High Court on 12th July 1992 and sentenced to 9 months imprisonment, suspended for 1 year, and fined \$1,000.

His appeal to this Court against conviction and sentence and an appeal against sentence by the Director of Public Prosecutions were dismissed on 12 August 1994. On 6 September 1994 he commenced an appeal to the Supreme Court, that being also dismissed in November 1995.

The charge against the respondent was laid on 11 March 1992 and on 18 March he was interdicted by the Commission (i.e. forbidden to act as a police officer); forbidden to leave Fiji without permission; and placed on half pay during the period of interdiction. This state of affairs lasted until 25 January 1992 when he was suspended without pay. After the dismissal of the appeals to this Court (but before the expiry of the 42 days allowed for appeal to Supreme Court) the Commission determined on 25 August 1994 to dismiss him from the Police Force with effect from 18 March 1991. A letter to this effect was written to him on 6 September.

On 7 September his solicitors had written to the Commission advising that he was appealing to the Supreme

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Court. They requested that no further action be taken against him until the final outcome of that Court's decision. They followed this up with a letter dated 28 September expressing the opinion that the Commission had acted prematurely and drawing attention to the Police Service Commission Regulations, and in particular to Reg. 23, providing that normally disciplinary proceedings are to await the outcome of criminal proceedings and any appeal therefrom; and Reg. 24 prescribing the procedure to be adopted for disciplinary action after criminal proceedings have been finally concluded. The solicitors invited the Commission to vacate the order of dismissal and await the final conclusion of the criminal proceedings. Such a course, they added, would avoid the need for taking Judicial Review proceedings.

In a brief reply of 10 November 1994 the Commission advised that it had decided to uphold its decision and that the respondent remained dismissed. On 6 December he applied for leave to commence Judicial Review proceedings alleging a failure by the Commission to comply with Regulations 23 and 24 in dismissing him, and asking that its decision be quashed. Leave was granted and the proceedings were heard by Scott J who delivered a judgment on 4 August 1995 in the respondent's favour, rejecting the Commission's submission that Reg. 23 did

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not prevent disciplinary action before disposal of the Supreme Court Appeal; and holding that it had not followed the procedure laid down in Reg. 24, and was not entitled to dismiss the respondent in the peremptory fashion it had adopted. The Commission lodged an appeal to this Court against that judgment, but we were informed by counsel that it was withdrawn following the Supreme Court's dismissal of the respondent's criminal appeal.

Scott J issued a supplementary judgment on 4 September 1995 awarding the indemnity costs which are the subject of the appeal. He adopted the conclusions of Sir Robert Megarry in EMI Records above, and accepted that such costs may be awarded only in exceptional cases. He referred to counsel's submission that the respondent had been dismissed from the Police Force after several years' suspension, and that the decision was adhered to by the Commission, even after its attention had been drawn to the irregular way in which it had been made. He added some strictures about the inadequate scale of party and party costs, with its resulting unfairness and even hardship to successful litigants, and in particular to the respondent. However, neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award

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beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable - see the examples discussed in Thomson v. Swan Hunter and Wicham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163.

We are satisfied that there was oppressive or vexatious conduct by the Commission. The decision to dismiss the respondent was persisted in after advice that he was appealing to the Supreme Court and in the face of his solicitors' reasonable exposition of the effect of the Regulations. He had been suspended without pay for over 2 years before his unsuccessful appeal to this Court, and we can see no sensible reason why that state of affairs could not have been allowed to continue until the Supreme Court appeal had been determined. Furthermore, the Commission was warned that Judicial Review proceedings would be instituted, and indeed this was clearly the only course left open to the respondent to protect his position if its decision was not vacated, and the Commission must have been aware of this. He was effectively forced into the litigation by its unreasonable intransigence and in the event its actions were found to be unlawful in the way the solicitors had pointed out.

In these circumstances the Judge had adequate grounds for his award of "indemnity costs" and we are satisfied that order was one he was entitled to make. We see no reason to disagree with this exercise of his discretion. The appeal is dismissed with costs to the appellant, to be taxed - on a party and party basis - if the parties cannot agree.

M. Casey

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 Sir Maurice Casey
Judge of Appeal

Gordon Ward

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 Justice Gordon Ward
Judge of Appeal

Ken Handley

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 Justice Ken Handley
Judge of Appeal