

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

PLAINT NO. 2/13

KAVE RINGI

(Applicant)

v

JAMES ALCIDE GOSSELIN

(First Respondent)

AND

ATTORNEY-GENERAL

(Second Respondent)

Date of Hearing: 14 March 2013

Counsel: Mr B Mason for the Applicant
Mrs K Saunders, Solicitor-General & Ms M Henry for the Respondents

Judgment: 2 April 2013

JUDGMENT OF HUGH WILLIAMS J

A. All the issues raised by Mr Ringi in his Amended Application for Certiorari having been determined against him, he has made out no basis for any of the relief sought and his Amended Application is accordingly dismissed.

B. An interim order has been in force since shortly after these proceedings were issued precluding the First Respondent from taking any action to appoint a permanent Principal Immigration Officer to replace Mr Ringi¹. That interim order is rescinded from the later of 24 hours following expiry of the period for Mr Ringi to appeal against this judgment or an order of the Court of Appeal.

¹ an Acting PIO was appointed by the Acting Minister responsible for Immigration on 21 December 2012

C. Costs are to be dealt with in accordance with paragraph [72] of this judgment.

INTRODUCTION

[1] Putting the matter neutrally – and solely in order to set the stage for what follows in this judgment – the Applicant, Mr Ringi, was, or is, in charge of immigration matters in the Cook Islands government. He has – or is purported to have – been dismissed by Dr Jim Gosselin, the First Respondent. Brought by way of an (Amended) Application for Certiorari, not by way of judicial review, these proceedings are a challenge by Mr Ringi to his actual or purported dismissal.

[2] Mr Ringi’s amended application begins by citing the terms of a letter addressed to him as “Director of Immigration” dated 21 December 2012 from Dr Gosselin in his capacity as Secretary (‘HOM’) ² of the Ministry of Foreign Affairs and Immigration (‘MFAI’) (‘the Second Notice’). The letter reads:

“Notice of Termination

Pursuant to Section 34 of the Public Service Act 2009, I hereby terminate your employment as Director of Immigration.

The following (non exhaustive) reasons for the termination apply:

1. Repeated refusal to work with me as your HOM and to accept my authority;
2. Repeated insubordination and undermining of my authority in public and at the office; for example, emails where you criticise me that are copied to other staff members; and
3. Failure to submit back to office reports as required by me and ministry policy.

This termination is effective immediately and in lieu of four week’s notice of termination you will be paid today one month’s salary and outstanding special allowance due.

Payment of your unused annual leave entitlement, if any, will be paid as soon as your leave records are checked and the calculations made.

You may come into the office on Monday morning, 24 December, at 9am and have one hour to collect your personal possessions.

² Various referred to in evidence and submissions as “HOM” or “HOD”. Either abbreviation will be used in this judgment.

You are to return all keys to your office, this building and to the Ministry's vehicle to me now."

[3] Mr Ringi pleaded four bases for his claim.³ With the Respondents' defences they were:-

- a) The First Respondent did not have at the time of dismissal the authority to terminate the employment of the Applicant as Principal Immigration Officer ("PIO") because the power to remove the PIO is by statute vested in another person. The Respondents say that Dr Gosselin as HOM of MFAI was the appropriate person to dismiss Mr Ringi.
- b) The dismissal was in breach of the Public Service Act 2009 ("the 2009 Act") because of any of the following features:
 - i) either the Applicant was appointed a HOM and the procedure for his removal from office as such is set down in s 14(3) and clause 4 of Schedule 3 of the 2009 Act and was not followed. It was common ground that the procedure for removal from office in s 14(3) and clause 4 of Schedule 3 of the 2009 Act was not followed in this case but the Respondents aver the Applicant was not a HOM.
 - ii) If Mr Ringi was not appointed as a HOM the dismissal was expressed as being effective immediately contrary to s 34(1) of the 2009 Act which requires the giving of one month's notice. The Respondents say the dismissal was effectual;
 - iii) If Mr Ringi was not appointed as a HOM the dismissal was improperly made under s 34(1) of the 2009 Act because it should have been made pursuant to the terms set out in his written contract of employment. The Respondents deny there was any written contract of employment applying to Mr Ringi personally or to his position.

³ a fifth ground namely that Mr Ringi's dismissal was in breach of S 50(1) of the Employment Relations Act 2012 was abandoned at the hearing, it being conceded that the relevant provisions of that Act were not in force at the relevant time.

[4] The issues for determination accordingly come down to:-

- a) was Mr Ringi appointed as PIO and was he appointed as a HOM?
- b) whether the First or Second Notices were defective in form or in the way the parties actioned the matter.
- c) whether the relationship between the parties was covered by a written contract of employment which supplanted any statutory provisions so that, to be valid, Mr Ringi's dismissal was required to be effected in accordance with the contractual terms irrespective of any statutory regime.

WAS MR RINGI APPOINTED AS PIO? IS IMMIGRATION A SEPARATE MINISTRY OR DEPARTMENT OF THE COOK ISLANDS GOVERNMENT? WAS MR RINGI APPOINTED AS ITS HOM?

[5] In early 2008 a Mr Mitchell was appointed to the position of Secretary of MFAI. He held that position until 15 March 2010 when Dr Gosselin was appointed as his replacement.

[6] Shortly after Mr Mitchell's appointment the then head of what he described as the Immigration Section of MFAI resigned. Mr Mitchell said it was his task as HOM of MFAI under S 15 of the Public Service Act 1995-96 ("the 1995-96 Act") to appoint a replacement. Because of the difficult human aspects involved in grants of residency, work permits and the like, immigration, Mr Mitchell said, has always been a fraught matter in the Cook Islands. Because of that, he asked experienced officials from MFAI and the Public Service Commissioner's Office ("PSC") to assist him in the process.

[7] After applications had been received, applicants interviewed and a consideration of their merits, Mr Ringi was selected as the preferred candidate. He was described as the "stand-out candidate" in an Information Paper from the then Minister for Foreign Affairs and Immigration, Hon. Wilkie Rasmussen, to Cabinet dated 23 June 2008. Mr Ringi had lengthy experience in immigration matters, he was employed in the Australian Department responsible for Immigration and he was, by birth, a Cook Islander.

[8] Mr Mitchell's recollection of what then occurred is hazy but, having reviewed the relevant files, his belief is that he advised the then Minister in charge of MFAI of his, Mr Mitchell's, decision under s 15 of the 1995-96 Act to appoint Mr Ringi and the Minister notified Cabinet in the Information Paper just mentioned. That procedure was adopted, Mr Mitchell recalls, because of the sensitive nature of the position, coupled, perhaps with the provisions of the Entry, Residence and Departure Act 1971-2 ("ERDA")

[9] The Hon. Wilkie Rasmussen, however, recalls being briefed by Mr Mitchell on Mr Ringi's appointment. That was unusual as MFAI staff were normally engaged by the HOM. Mr Rasmussen's recollection is that the panel or Mr Mitchell recommended Mr Ringi's appointment as the PIO or, as the position was sometimes called, the Director of Immigration. His recollection is confirmed by the terms of the Information Paper; it asks Cabinet to note Mr Ringi's "proposed" appointment as the new "Director of Immigration – previously referred to as the Principal Immigration Officer".

[10] The Cabinet Minute of 23 June 2008, however, notes Mr Ringi's proposed appointment as "Director of Immigration, Ministry of Foreign Affairs and Immigration" though Mr Rasmussen, on 4 September 2008 and acting under ERDA, signed a formal appointment of Mr Ringi as PIO "for the term of his contract".. Mr Rasmussen said he signed the appointment because Mr Mitchell was uncertain whether he had power to appoint a PIO. Thereafter, Mr Rasmussen dealt directly with Mr Ringi on immigration matters.

[11] That mode of appointment brings the terms of ERDA into focus. After defining in s 2 that the "Minister" is the "Minister responsible for Immigration" and that "Immigration Officers" include the PIO, s 6, being the part dealing with administration, relevantly reads:

6. Appointment of Immigration Officers

(1) There shall, from time to time, be appointed, under the Public Service Act 1969 and for the purposes of this Act, a Principal Immigration Officer and such other Immigration Officers as may be considered necessary for the proper carrying out of the provisions of this Act.

(2) Any Immigration Officer appointed pursuant to subsection (1) of this section may hold office in conjunction with or in addition to any other office in the Public Service.

(3) Should the Principal Immigration Officer be, as a result of sickness, absence from the Cook Islands or any other cause which to the Minister appears sufficient, incapable of carrying out his duties and functions under this Act, the Minister may, by writing under his hand, appoint some other Immigration Officer to exercise all the rights, perform all the duties and carry out all the functions, under this Act, of the Principal Immigration Officer, and such other Immigration Officer shall, during the subsistence of his appointment, be deemed to be the Principal Immigration Officer.

(4) Any appointment, made pursuant to subsection (3) of this section, may at any time be revoked, by writing under his hand, by the Minister.

.....

7. Responsibilities of Immigration Officers

(1) Subject to the provisions of this Act:

(a) The Principal Immigration Officer shall, subject to the control and directions of the Minister, be responsible for the due administration of this Act and for the control and supervision of other Immigration Officers;

(b) Subject to subsection (2) of this section, an Immigration Officer, shall carry out such duties and perform such functions as may, from time to time, be specified by the Principal Immigration Officer.

(2) In the carrying out of his duties and the performance of this functions under this Act, an Immigration Officer shall comply with all lawful directions given to him by the Minister, and an Immigration Officer, other than the Principal Immigration Officer, shall comply with all lawful directions given to him by the Principal Immigration Officer which are not inconsistent with any lawful directions given to such Immigration Officer by the Minister.

8. Power of Minister to delegate

(1) The Minister may, from time to time, by writing under his hand, delegate to the Principal Immigration Officer all or any of the duties, powers or functions under this Act of the Minister and may, from time to time and in like manner, revoke, vary or amend any such delegation: Provided that the Minister shall not delegate to the Principal Immigration Officer any of the duties, powers or functions conferred upon the Minister by section 5 of this Act.

[12] It is notable, as counsel submitted, that ERDA:

- a) does not say in subs (1), by whom Immigration Officers and a PIO are to be appointed.
- b) that appointments under subs (1) that should be by the Minister is implied by subs (3) - (5). It would be odd if appointments as Immigration Officers and as a PIO could be validly made by an official such as the HOM of MFAI when acting PIO's could only be validly appointed, or appointments revoked, by the Minister. That may well have been the reason Mr Mitchell asked Minister Rasmussen to sign Mr Ringi's appointment as PIO on 4 September 2008.
- c) interpreting s 6(1) as requiring appointments of Immigration Officers and a PIO to be by the Minister is fortified by the provisions of Sections 7 and 8. They clearly require the actions of the PIO and subordinate Immigration Officers to be subject to direct Ministerial directions.

[13] Mr Mitchell said his recollection, albeit unclear, is that Mr Ringi was appointed PIO to satisfy the requirements of ERDA but that for other purposes Mr Ringi was the Director of the Immigration Division within MFAI. Mr Mitchell strongly refuted that Mr Ringi's appointment was that as HOM of a Ministry or department since at that time HOMs were appointed under the 1995-96 Act by the Public Service Commissioner appointing persons in accordance with Cabinet decisions. Mr Mitchell also strongly denied that Mr Ringi's appointment was as HOM of a ministry or department as, under s 74BB(2) of the Cook Islands Constitution, heads of department are "exempted positions" and are made by the Public Service Commissioner in accordance with a decision of Cabinet. That route for appointment was not utilised in Mr Ringi's case.

[14] Mr Mitchell supported his view by reference to a series of Public Service (Identification of Departments) Orders. They were promulgated following widespread rationalisation of the Public Service after the severe economic recession

experienced in the Cook Islands in the mid-1990s. Cabinet Minutes of 29 April and 10 June 1996 required there to be 22 departments and ministries of government with former departments under the overall control of another becoming divisions of the controlling body. Pursuant to the earlier Minute, Customs and Immigration was to be placed under the Ministry of Financial and Economic Management (“MFEM”) and there was to continue to be a Ministry of Foreign Affairs. Under the latter, the existence of MFEM was confirmed and the Ministry of Foreign Affairs became the Ministry of Foreign Affairs and Immigration. A series of Public Service (Identification of Departments) Orders promulgated in 1996, 1997, 2000, 2001 and 2008 effected other rearrangements within the Cook Islands government but left the title of MFAI unchanged. In none of that material is there any reference to a ministry or department of Immigration.

[15] For the applicant, Mr Mason submitted on this aspect of the case that Mr Ringi’s appointment under ERDA implied he was appointed a HOM particularly since an officer of the Public Service Commission participated in the appointment and Cabinet was involved in the matter. He submitted the procedure adopted was far closer to the appointment of a HOM than that of an ordinary appointee.

[16] For the Respondents, the Solicitor-General, Mrs Saunders, relied on the Identification of Departments Orders and submitted, regardless of whether ERDA applied, the power to appoint and terminate resided in the Minister responsible for Immigration. She supported that submission by referring to the power for Ministers to act for others under Article 21 of the Constitution and the *Carltona* doctrine⁴ which held that it is constitutionally effective if decisions expressed to be made by Ministers are made on their behalf by officials, unless that power is reposed in the Minister personally.

[17] In light of all that, the Court concludes that at least since 1996 MFAI has been the only Ministry or Department of the Cook Islands government with responsibility for immigration. In the whole of that period, there has never been a separate department or ministry charged with responsibility for that area of

⁴ *Carltona Limited v Commissioner of Works* [1943] 2 All ER 560,563 as discussed in *Webster v Taiaroa* (1987) 7 NZAR 1,10; *McGuinness v Minister of Transport* HC WTN CP 240/99 3 July 2000; McGechan J and *Bounty or/& Gas ML v A-G* HC WTN AP 2006-485-15 27 June 2006; MacKenzie J

government activity. That being the case, Mr Ringi could not have been appointed as a HOM of a separate ministry as there never was one. Whether Mr Ringi was described as PIO or as Director of Immigration or by any similar title, the formal position was that he was appointed as Head – then called Director - of the Immigration Division of MFAI.

[18] He was also appointed as PIO but, given the gap in s 6(1) of ERDA as to by whom appointments of Immigration Officers and PIOs are to be effected, it is logical, having regard to the other provisions of s 6, that Mr Ringi was additionally appointed by the Minister as PIO to ensure he was able to exercise the powers of that position as set out in ERDA. The statute, at least by implication, required that formal route to the PIO's appointment and ability to access the statutory powers of the position. And, in light of the provisions of ss 6, 7 and 8 the direct relationship between Mr Ringi and Minister Rasmussen seems to conform with the requirements of those sections.

[19] True, for practical reasons, officers of the Public Service other than Mr Mitchell were involved in Mr Ringi's selection, but that was because of the sensitivity of the role. It was Mr Mitchell who actually appointed Mr Ringi and he appointed him as head of the Immigration division of Mr Mitchell's ministry, MFAI. The involvement of the Minister was only because prudence seen against the terms of ERDA seemed to indicate it. It was not because Mr Ringi was being appointed according to the procedure required for the appointment of HOMs and Cabinet did not appoint him but merely noted the appointment.

[20] It is arguable that that this case does not involve the *Carltona* principle since the power to appoint employees of MFAI, including the Director of Immigration, resided in its HOM and, in doing so, Mr Mitchell was not purporting to exercise ministerial powers on behalf of the Minister. Other than in the case of temporary employees, ERDA does not require Ministerial involvement in dismissals of PIOs and even though s 25(f) of the Acts Interpretation Act 1924 (NZ)⁵ says powers to appoint are deemed to include power to dismiss, that is expressly "unless the context otherwise provides" and, here, gives no basis to conclude that the Minister of Immigration had to dismiss a PIO: a Ministerial appointment to give an officer of the

Public Service the ability to exercise powers does not mandate Ministerial involvement in action to terminate access to those powers. Deemed inclusion of power to dismiss in powers of appointment does not say only those with power to appoint can dismiss. The nature, scope and purpose of the dismissal power does not, therefore, mean it was conferred only on the Minister. The context here indicates that dismissal of a PIO can be effected by the same means as dismissal of other officers of the Public Service (other than those – not PIOs - to whom special provisions apply).

[21] An alternative view - but leading to the same conclusion - is that the *Carltona* principle applies and dismissal of a PIO is held to be a function reposed in the Minister. Even then, for the reasons just outlined, cessation of an employment with defined statutory powers does not involve the same sensitive issues as appointment, so termination by a HOM as delegate of the HOM's Minister would seem to be effective, particularly when that method of termination is identical to that applicable to all other employees of that Ministry.

[22] The Court accordingly concludes that Mr Ringi was at all relevant times from at least 4 September 2008 validly appointed as PIO.

[23] The Court also concludes that, at any time relevant to this proceeding, Cook Islands government immigration matters were handled by the Immigration Division of MFAI; that the Immigration section was never a separate department of the Cook Islands government; and therefore that Mr Ringi was not and never could have been appointed as HOM or HOD of a separate, and non-existent, department.

[24] The Court's finding that though Mr Ringi was appointed as PIO but the Immigration function of the Cook Islands government is not administered and managed by a government department alters the route by which his dismissal or purported dismissal is to be assessed -. it necessarily involves a finding that dismissal of a PIO can be effected by a HOM - but, before turning to that question, a legislative quiddity warrants brief discussion.

⁵ In force in the Cook Islands by s 622 of the Cook Islands Act 1915

[25] Although seemingly overlooked by everyone involved in the manner in which Mr Ringi's employment was created and terminated – including Mr Ringi – the Solicitor-General and Ms Henry, in preparing for this case, uncovered the provisions of the Ministry of Labour and Commerce Act 1973-74 (“MLCA”) and very properly brought it to the Court's attention and to the attention of counsel for Mr Ringi.

[26] According to counsel, most of the provisions of the MLCA have been repealed or superseded – indeed no such ministry appears in any of the Identification of Department Orders earlier reviewed⁶ – but section 10(2) expressly says that for the purposes of ERDA the “Secretary [of Labour and Commerce] shall be deemed to be the Principal Immigration Officer”.

[27] Mrs Saunders argued that Mr Ringi was never appointed as Secretary of Labour and Commerce and because nobody considered s 10(2) throughout the period of Mr Ringi's employment, she submitted the measure could continue to be disregarded.

[28] The Court takes the same view, though for slightly different reasons..

[29] The principal questions on this aspect of the case are, first, whether Mr Ringi was appointed as PIO and, secondly, whether he was appointed as HOM of a separate department. The question whether he was ever appointed Secretary of Labour and Commerce - or whether the Secretary ever exercised the functions of a PIO - is, and never has been, an issue but given that the Ministry of Labour and Commerce has apparently been disestablished and government's functions in that area are now handled through a division of the Ministry of Internal Affairs, the same conclusions would apply nonetheless: Mr Ringi's appointment was never as HOM of a separate department.

[30] An additional route may lead to the same conclusion.

[31] Although s 2 of ERDA defines the PIO as “the Principal Immigration Officer” and s 6 speaks of “a Principal Immigration Officer”, by s 4 of the Acts

⁶ it is now apparently part of the Ministry of Internal Affairs

Interpretation Act 1924 (NZ) the singular includes the plural and accordingly, even if the Secretary of Labour and Commerce and Mr Ringi were both PIOs, one by statute and one by appointment, dual appointment to the position would be open as a matter of statutory interpretation. Each of them could attend to their other daily duties but be empowered to carry out functions reserved to the PIO by virtue of those appointments. Neither could ever have been regarded as a HOM of a separate immigration department at any time relevant to this case.

[32] The focus in this case is not on whether Mr Ringi was appointed Secretary of Labour and Commerce or and what powers he or the Secretary may have exercised. The focus is on whether he was appointed PIO and more importantly, whether he was appointed HOM of a separate department, and the answers to those questions are ‘yes’ and ‘no’ respectively.

BY WHOM COULD MR RINGI BE DISMISSED?

[33] The First and Second Notice (the former dated 10 September 2012) were both signed by Dr Gosselin who has been HOM of MFAI since 15 March 2010. The question therefore is; was Dr Gosselin the correct person to sign either or both of the Notices?

[34] Article 74BB(2) of the Constitution deals with “Exempted Positions”. The PIO is not one. Appointments to Exempted Positions must be made by the PSC in accordance with a decision of Cabinet, But Article 74B(1) makes the PSC responsible for all other appointments to the Public Service “except as may otherwise be provided by enactment”.

[35] That invokes the 2009 Act, s 14 of which requires each department to have a HOM who is to be appointed in accordance with Schedule 2. It is common ground that Mr Ringi was not appointed in accordance with Schedule 2.

[36] Mr Ringi was an “employee” as defined by s 4 of the 2009 Act i.e.:

“A person employed [in the Public Service] whether as an officer or temporary salaried employee or as wage worker whether by way of

written contract or otherwise; but does not include a head of department or the Commissioner.”

[37] Mr Ringi was neither a temporary salaried employee nor a wage worker and accordingly was covered by s 34 of the 2009 Act which deals with Notices of Termination and says:

34. Notice of termination – (1) Every employee who is not a temporary salaried employee or a wage worker is deemed to be a 4-weekly employee and, despite any other provision in this Act, that employment may be terminated at any time after 4 weeks’ notice in writing has been given –

(a) by the head of department to the employee; or

(b) by the employee to the head of department.

(2) A head of department may immediately terminate the employment of any employee who gives less than 4 weeks’ notice.

(3) This section –

(a) is subject to the express terms and conditions of any written contract of employment; and

(b) does not derogate in any manner from any other provisions of this Act conferring a power to dismiss employees.

[38] Mr Ringi was therefore a 4-weekly employee whose employment could be terminated on 4 week’s notice given by the HOM of his Ministry but with that power being subject to the terms of any written contract of employment.

[39] Since the First and Second Notices were both signed by the HOM of MFAI and the Court has held that the PIO is not a HOM and Immigration was not a separate department but a division of MFAI, it follows that the First or Second Notices were correctly executed and were potentially effectual unless trumped by the terms of Mr Ringi’s written contract of employment. Since the question whether there ever was a written contract of employment was in contention, the Court turns to the evidence on that topic.

WAS MR RINGI'S EMPLOYMENT PURSUANT TO A WRITTEN CONTRACT?

[40] The appointment of an employee by a HOM under s 15 of the 1995-96 Act did not require a written contract; such were only required for employees of a different status than Mr Ringi or for HOMs.

[41] However, at the time of his selection, Mr Ringi was working in Australia with his family living there and because he would suffer a considerable reduction in income in accepting appointment to the Cook Islands and there were other factors discussed between Mr Mitchell and himself, Mr Mitchell concluded a written contract of employment relating to Mr Ringi's employment would be helpful.

[42] Mr Ringi actually commenced his employment as PIO within MFAI on 15 August 2008 but the terms and conditions of his employment had not then been finalised from earlier meetings and discussions before that date. The question is whether they were finalised in the flurry of draft contracts which passed between the parties subsequently.⁷

[43] The first draft in evidence said Mr Ringi was to "be employed as Director of Immigration with the Ministry of Foreign Affairs and Immigration" and provided for a salary of \$NZ 60,000 being \$55,000 base salary and an extra duties allowance of \$5,000 per annum reviewable after the first year of the contract's three year term. It had blank entries for a remuneration allowance, an initial housing assistance allowance and a telephone allowance but provided for annual return air tickets Rarotonga-Canberra-Rarotonga. It contained no provision for termination other than for misconduct or on two month's notice by Mr Ringi.

[44] The second draft in evidence was the first draft with Mr Ringi's "tracked" amendments. He wanted the annual salary increased automatically instead of as agreed, raised the question of superannuation, varied the proposed start date by a few days, fleshed out the provisions for allowances and moving expenses and suggested significant additions to the description of his duties in the contract. It proposed an

⁷ The parties agreed that the drafts in chronological order were Mitchell Exhibits F, then C, then D, Tab 1 of ABD, then Mitchell Exhibit E and Ringi Exhibit R.

amendment to the type of misconduct which could give rise to immediate dismissal and a dispute resolution clause but no major alteration to that provision beyond that.

[45] The third draft in evidence was Mr Ringi's "tracked" draft as annotated by Mr Mitchell. It proposed amendments to the salary and the manner in which it was to be paid, the commencement date, the allowances – including ceilings on amount – and queried such matters as the proposal that serious misconduct be the sole ground for immediate dismissal.

[46] For some reason Mr Mitchell then used his personal employment agreement as HOM of MFAI as a template for the next draft for Mr Ringi. There are two versions in evidence⁸, though they differ. The source of the draft meant numerous amendments had to be proposed by Mr Mitchell and the drafts contained extensive termination provisions.

[47] The last draft in evidence⁹ was put in by Mr Ringi and was clearly modelled on Mr Mitchell's draft HOM agreements and incorporated most of Mr Mitchell's handwritten notes from his HOM draft into the typescript. It therefore includes detailed provisions as to termination on notice in the event of serious misconduct (which is defined) including incapability, poor performance, restructuring of the Director's duties, insubordination and incompatibility. The last gives a right of termination and in the event of insubordination by the Director or a breakdown in the Director's opinion in his relationship between the Minister and himself, refusal to implement a lawful instruction from the Minister or the Head of Ministry or providing misleading or false information to the Minister. The details just recounted from that clause make clear that it had been translated direct from Mr Mitchell's contract despite a number of the additions being clearly illogical, inapplicable and incompatible with Mr Ringi's position: clauses appropriate to a HOM's position translate only with difficulty – if at all – to a position such as a PIO

[48] Though the draft put in evidence by Mr Mitchell appears to be signed both by Mr Ringi and himself despite the many handwritten amendments (not initialled), the final draft, that put in evidence by Mr Ringi, is unsigned and against Clause 4.2

⁸ Mitchell Exhibit E, ABD1

⁹ Ringi Exhibit R

providing for the Director's remuneration to be within a salary band confirmed by the PSC, Mr Ringi has written "No!".

[49] In addition, Schedule 2 of the hand-noted and signed draft, the Remuneration Schedule, differs significantly from the version put in evidence by Mr Ringi. Notably, it leaves the annual remuneration blank and it omits a handwritten addition relating to removal costs.

[50] Mr Mitchell said he does not recall ever seeing the final version put in evidence by Mr Ringi before this litigation was launched and went on to say that the negotiations with Mr Ringi broke down because of what Mr Mitchell saw as Mr Ringi's unreasonable proposals for amendment¹⁰. In addition, Mr Mitchell was having considerable difficulty getting approval for Mr Ringi's \$60,000 p.a. salary, it being \$5,000 over the band. The relationship between them became strained. As a result Mr Mitchell said he "gave up" negotiating further and "relied on [Mr Ringi's] employment under s 15" of the 1995-96 Act. Mr Ringi did not comment on that passage from Mr Mitchell's evidence but there is no evidence that he objected to the cessation in negotiations and it seems he accepted salary payments at \$55,000 p.a. without complaint.

[51] All that Mr Ringi said was that "all of the substantive terms of my employment were agreed" and were performed by the parties over the next four and half years. He pointed out that the final form of the contract he put in evidence provides for the Minister Responsible for Immigration to dismiss him. That applies only to termination for insubordination and incompatibility in the agreement on which Mr Ringi relies, and that, for the reasons elsewhere explained, is a provision taken, and taken inappropriately having regard to the rest of the suggested agreement, from Mr Mitchell's own contract

[52] Mr Mason submitted that all the substantial terms of Mr Ringi's contract of employment had been agreed and that any outstanding issues were minor with the delay in executing the contract due to attempts by the parties to fit their agreement into existing Public Service rules.

¹⁰ such as refusing to be described as a "Public Servant" until he had actually taken up the position

[53] Mrs Saunders submitted the evidence did not disclose the conclusion of any written contract relating to Mr Ringi's employment. If the Court reached the opposite conclusion she submitted the final draft contained a three year term and that had now expired and that, if the First Notice remained in force, Mr Ringi had been paid or received more than the three months' salary for which the termination provisions of that agreement provided.

[54] What has been said, in the Court's view, plainly demonstrates that there was never a concluded written agreement between Mr Mitchell as HOM of MFAI and Mr Ringi as PIO of the Immigration Division of MFAI which contained all the terms of the contract. In particular the final version, the one which Mr Ringi says contains all the terms of the agreement, omits the remuneration and includes a number of inappropriate provisions seemingly transposed from Mr Mitchell's own contract. Further, Mr Ringi has, emphatically, refused to accept one of the major provisions in the version of the contract on which he principally relies. True, the terms of the negotiations between the parties may be argued to have resulted in something approaching agreement on most of the terms - those mentioned in the various versions of Mr Ringi's employment contract and in the correspondence - but ultimately the Court concludes there was no agreement on some of the key matters and accordingly that there is no one written contract containing all the agreed provisions of the contract, nor one which can be spelled out from the various documents.¹¹

[55] The Court accordingly concludes that s 34(3) of the 2009 Act does not, in this case, trump s 34(1) and the Court turns to the question whether the First Notice, the Second Notice, neither or both comply with that section.

WERE THE FIRST NOTICE OR THE SECOND NOTICE DEFECTIVE IN FORM OR IN THE WAY THE PARTIES ACTIONED THEM TO THE POINT WHERE EITHER OR BOTH WERE INEFFECTUAL

[56] On 10 September 2012 Dr Gosselin gave Mr Ringi the First Notice. It read:

"NOTICE OF TERMINATION OF EMPLOYMENT

¹¹ It notes that s 34(3) of the 2009 Act does not require any written contract of employment to be signed, though obviously prudence would ordinarily dictate such a course.

Pursuant to Section 34(1) of the Public Service Act 2009 I hereby give you Notice of Termination of your employment.

Termination of your employment is effective four weeks from the date of this letter namely 5 October 2012.

The following (non exhaustive) reasons apply:

1. Repeated refusal to work with me as your HOM and to accept my authority;
2. Repeated insubordination and undermining of my authority in public and at the office for example emails where you criticise me that are copied to other staff members; and
3. Failure to submit back to office reports as required by me and ministry policy."

[57] To his affidavit, Dr Gosselin exhibited a lengthy memo he sent on 16 October 2012 to senior government officials. The memo set out the background but since Mr Ringi did not comment in any affidavit in reply on Dr Gosselin's version of events and since this litigation is about process, not merit, it is unnecessary to recount that detail other than to say that it followed extensive discussion between Mr Mitchell and Dr Gosselin as to Mr Ringi's employment position and that, if correct, it provides support for the assertions in the Notice that Mr Ringi was unwilling to comply with certain aspects of MFAI practice. Those matters lead to Dr Gosselin to conclude the relationship between Mr Ringi and himself had irretrievably broken down, hence the First Notice.

[58] The First Notice lead to a detailed email exchange between the Applicant and the PSC, Mr Thomas. Again, it is unnecessary to recount the detail, save to note:

- a) that Mr Ringi, in addition to denying the correctness of the three grounds for his dismissal in the First Notice, lodged his own complaint to the PSC about actions of Dr Gosselin and sought to invoke against him the complaint resolution procedure in ss 36ff of the 2009 Act. While reliance and comment on actions by Dr Gosselin which resulted in and bore on the accuracy of the First Notice may have been relevant, a separate complaint by Mr Ringi against Dr Gosselin based on other issues would appear to have been a parallel

procedure not dependent on the validity or otherwise of the First Notice and the allegations it contained against Mr Ringi.

- b) The PSC enquired of Mr Ringi as to how he wished his complaint to be actioned. Discussions concerning the mode of procedure occupied the parties throughout most of September. Notably, on 19 September 2012 the PSC reiterated that he could “only commence an investigation if there is first a complaint by an employee to the HOM pursuant to s 36(2) and the complaint cannot be resolved pursuant to s 36(3)”. He noted Mr Ringi’s complaint had centred on the First Notice. The PSC also sought confirmation that Mr Ringi accepted there was no prospect of resolution of the complaint under s 36(3) and the relationship between Dr Gosselin and himself was untenable.
- c) On 28 September 2012 Mr Ringi accepted there was no prospect of resolving the dispute under s 36(3) and that the PSC should investigate the matter under s 36(6). His complaint had been lodged against Dr Gosselin under s 36(2) to ensure there could be no assertion he had not complied with statutory requirements.
- d) On 24 September 2012 Mr Ringi’s letter to Dr Gosselin acknowledged his receipt of \$10,567.31 on 10 September 2012. Dr Gosselin said that in addition to permitting Mr Ringi to retain his ministry vehicle – a perquisite enjoyed by Mr Ringi alone among MFAI’s five directors – and other perquisites, as a matter of good faith he decided to pay Mr Ringi the \$5,000 per annum allowance to which Mr Mitchell had agreed but for which he had been unable to find any avenue for payment. Dr Gosselin paid the sum although there was no agreement he could see concerning the duration of that allowance. The \$10,567.31 was for the period from the commencement of Mr Ringi’s employment to September 2012.
- e) By 1 October 2012 Mr Ringi’s email to the PSC recorded that Dr Gosselin would suspend the First Notice until the PSC’s investigation was complete and the report furnished to both parties.

[59] The PSC investigated Mr Ringi's complaint under s 36 of the 2009 Act and issued a decision on 30 November 2012, having first shown a copy to Dr Gosselin the previous day. The 29 November 2012 report read:

**FINDINGS OF THE PUBLIC SERVICE COMMISSIONER IN
ACCORDANCE WITH SECTION 36 OF THE PUBLIC SERVICE ACT 2009**

To: The Head of Ministry and the Complainant

Date of these Findings: 29 November 2012

1. Background details

Name of Complainant:	Kave Ringi
Ministry/Position held:	Director of Immigration
Head of Ministry:	Dr Jim Gosselin
Date of Complaint:	11 September 2012
Issues complained of/Nature of dispute:	Challenge to Notice of Termination

2. Preliminary Findings Concerning the Pre-conditions under section 36

Note: Only a person who is an "employee" of the Public Service of the Cook Islands at the time the complaint is made is entitled to make use of the procedures under section 36

Section 36(2) requires that the employee must first refer the complaint or dispute to the Head of Ministry AND that this be done within 14 days of the circumstances upon which the complaint is made or the dispute arises. This is a mandatory pre-condition.

Pre-condition	Finding of the Commissioner
1. The complainant was an employee at the time of the complaint or dispute	* <i>The complainant was an employee</i>
2. The complaint must be referred <u>first</u> to the HOM within 14 days	* <i>This precondition was <u>not</u> met</i>

The Commissioner THEREFORE DETERMINES –

* That a pre-condition for making the complaint has not been met.

3. Findings and Recommendations

FINDINGS –

1. Mr Kave Ringi was employed as the Director of Immigration from 04 September 2008 with no written employment agreement.
2. Mr Ringi was terminated by notice on the 10 September 2012, which was a valid exercise of power by the Head of Department, under Section 34 of the Public Service Act 2009, but this termination was not implemented and the time period for termination has lapsed.

3. Mr Ringi sent his complaint to the Public Service Commissioner on 11 September 2012.
4. There was no compliance with Section 36(2) prior to the complaint being made the Commissioner.
5. There is no prospect of resolution of issues as agreed by Mr Ringi in his letter to the Commissioner on 28 September 2012.

OTHER OBSERVATIONS –

The previous notice of termination has lapsed but was a proper and lawful exercise of the power to terminate under section 34 of the Public Service Act. This section applies despite any other provision of the Act.

In these circumstances a further notice can be issued giving 4 week's notice, or payment in lieu of notice.

Issues surrounding the unlawful use by the complainant of a government vehicle must be reported to the police and followed up. The complainant should not have access to a government vehicle under any circumstances pending his termination if this is to happen.

RECOMMENDATION TO THE HEAD OF MINISTRY –

No recommendations are made pursuant to section 36 of the Public Service Act.

Mr Russell Thomas
Public Service Commissioner

[60] The version dated 30 November 2012 – but not handed to Mr Ringi until 21 December 2012 – repeated the sections in the 29 November 2012 version headed “Background details”, and “Other Observations” and omitted the “Recommendation” section. The remainder of the 30 November document reads:

2. Preliminary Findings Concerning Notice of Termination section 34 PS Act 2009

Section 34 is set out under that part of the Act headed ‘Transfer and termination of employment’ and is headed ‘Notice of Termination’ Section 34 (1) provides:

‘Every employee who is not a temporary salaried employee or a wage worker is deemed to be a 4-weekly employee and, despite any other provision in this Act, that employment may be terminated at any time after 4 weeks notice in writing has been given –

- (a) by the head of department to the employee; or
- (b) by the employee to the head of department

In this case, Mr Ringi is neither a temporary salaried employee nor a wage worker – therefore he falls under section 34 of the Act and he is deemed to be

a 4-weekly employee. Section 34(1) provides the legal basis on which Mr Gosselin, as head of MFAI, can terminate Mr Ringi's employment any time after 4 weeks notice is provided in writing. Note that this can be done 'despite any other provision in this Act'.

Section 36 is set out under the heading 'Complaints and disputes'. It is important to note that section 36 is quite separate and distinct from section 34. Section 36 deals with the process relating to complaints or disputes made by an employee against his or her head of department; whereas section 34 specifically relates to the termination of employment of a 4-weekly employee and the process in which the notice of termination is to be made.

It is clear from the wording of section 34(1) that this provision is to override any other section of the Act, by the words 'despite any other provision in this Act'. This follows that section 34(1) prevails over section 36 of the Act.

The Commission THEREFORE DETERMINES that –

1. The HOM of MFAI Mr Gosselin acted within his authority in terminating Mr Ringi as provided by section 34(1) of the PS Act 2009;
2. OPSC, based on the information provided by both parties in their correspondence confirmed that the relationship between the HOM of MFAI Mr Gosselin and Mr Ringi has gone beyond the point of no return or reconciliation;
3. Mr Ringi's continued employment will not be in the best interest of MFAI;
4. OPSC upholds the action taken by the HOM of MFAI Mr Gosselin in terminating Mr Ringi;
5. Since almost three months has passed since this matter was referred to OPSC for investigation and the Commissioner has now issued this determination the original notice of termination has lapsed. In these circumstances should the HOM of MFAI Mr Gosselin wish to do so he may now issue another notice of termination pursuant to section 34 of the Act terminating Mr Ringi's employment.

[61] Dr Gosselin said he took advice concerning the efficacy of the First Notice and any possible impact on it of the PSC findings and, having been advised the latter remained valid and he could proceed to terminate Mr Ringi's employment, he then served the Second Notice. Acting on advice he paid Mr Ringi one month's salary in lieu of any possible entitlement to a further four week's notice and he also paid him the proportion of the \$5,000 allowance, \$1975.34, which had fallen due in the period since the First Notice. After Mr Ringi's annual leave entitlement was calculated he was paid a further cheque for \$6,228.44.

[62] On 8 January 2012 Mr Ringi sought advice from the PSC on the comment that he had no jurisdiction to investigate Mr Ringi's complaint against Dr Gosselin

under section 36; whether Mr Thomas had misled Mr Ringi by asking whether he wished the former to investigate his section 36 complaint when he now claimed a lack of jurisdiction; and whether section 34(1) overrode the appeal section of the 2009 Act.

[63] Mr Thomas' reply of 15 January 2012 (sic) is instructive, it read:

“RE: Section 34 Notice of Termination

I refer to your letter dated 8 January 2013 and respond adopting the same numeration.

1. I confirm my findings that:
 - Your employment was lawfully terminated pursuant to section 34 of the Public Service Act 2009;
 - I have no jurisdiction to make a recommendation pursuant to section 36(6) of the Act as requested in your letter to me dated 16 September 2012.
2. My letter to you dated 12 September 2012 requesting clarification as to whether you wished to invoke the section 36 procedure was written in good faith and on the assumption that there was a prior complaint or dispute between yourself and the HOM and there had been compliance with section 36(2) – (5). It was only when I commenced the investigation that it became clear on the facts of this case that the procedure had not been followed. Consequently I had no jurisdiction to commence an investigation pursuant to section 36(6).
3. Part 6 of the Act sets out the procedure for appeals to the Cook Islands Public Service Board of Appeal. Section 39(1)(a) and (b) sets out the two grounds where an employee can appeal as of right. Neither ground applies to the facts of this case because a recommendation has not been made under section 36 and section 34 does not expressly confer a right to appeal against the decision to issue a Notice of Termination, nor is there a right to appeal to the Board against that decision conferred by any other enactment. However this does not mean that you have no legal remedies available to you. If you dispute the legality of the section 34 Notice of Termination I suggest you seek independent legal advice as to what action you can take.”

[64] Mr Mason submitted that if the power to dismiss Mr Ringi lay with the Minister of MFAL, the Secretary of that department had authority to dismiss the PIO on the Minister's behalf. That lead Mr Mason to discuss the *Carltona* principle in detail but it is unnecessary to do more than summarise the Court's earlier discussion and conclusions on this topic. Mr Ringi was dismissible, like all other employees of

MFAI, by his HOM. Even if – which is only the inferentially the case – his appointment as PIO could only be validly made by the Minister responsible for Immigration, for the reasons earlier outlined that provides no basis for concluding he could only be validly dismissed by the Minister responsible for that area of government activity. Even if Mr Ringi's dismissal could only be effected by the Minister responsible for Immigration, again for the earlier reasons and pursuant to the *Carltona* principle, that power could be validly exercised on that Minister's behalf by the HOM of the Department responsible for immigration, namely the HOM of MFAI.

[65] Mr Mason also submitted that the applicant had been misled by the PSC in the correspondence between the First and Second Notices and was only advised by the PSC that he had no jurisdiction to deal with the matter on the day the Second Notice was delivered. Mr Mason submitted Mr Ringi acted to his detriment by not pursuing other legal avenues in the interval between the two Notices and accordingly the Respondent should be estopped from being able to rely on the First Notice.

[66] Then, Mr Mason submitted, the Second Notice provided for immediate dismissal when s 34 of the 2009 Act required 4 weeks' notice.

[67] Mrs Saunders submitted that even if ERDA required the Ministry of Immigration's signature to dismiss Mr Ringi validly, the Minister of Foreign Affairs had power to do so under Article 21 of the Constitution and the *Carltona* principle. She submitted, however, that this case revolved around a straightforward dismissal by a HOM of an employee which accorded with s 34 of the 2009 Act with Mr Ringi accepting a lump sum equivalent to four weeks' pay instead of the then Notice being worked out.

[68] From all of the above, as it relates to the termination of Mr Ringi's employment, the Court concludes:

- a) the First Notice was valid, Mr Ringi being a 4-weekly employee and thus entitled to 4 weeks notice in writing from his HOM under s 34 of the 2009 Act.

- b) the 4 weeks would have expired automatically on 5 October 2012 but, after negotiations involving Messrs Ringi, Thomas and Dr Gosselin, it was agreed the Notice would be suspended – though not rescinded – until such time as Mr Ringi's complaint against Dr Gosselin was investigated and reported on.
- c) that complaint, as the PSC's findings of 29 and 30 November 2012 and the Commissioner's letter of 15 January 2012 made plain had not been preceded by compliance with the statutory prerequisites to a PSC investigation into an employee's complaint against a HOM. That deprived the PSC of jurisdiction to deal with the complaint.
- d) because Dr Gosselin was in doubt as to the continuing validity of the First Notice and any impact on its validity that might have been brought about by the PSC's findings, he took advice and, as a precaution, issued the Second Notice.
- e) While they could have continued paying Mr Ringi the usual weekly or fortnightly instalments of his salary until expiry of the 4 weeks ending on 18 January 2013, Dr Gosselin offered, and Mr Ringi accepted, payment on 21 December 2012 of his 4 weeks' salary in lieu of working out the salary until his notice expired. Although Mr Ringi challenges the validity of the Second Notice and that means of him receiving his 4 weeks' salary, payment of a lump sum in lieu of working out a notice is a commonplace means of terminating a person's employment: it saves embarrassment to both parties, it ensures the employee receives his or her remaining employment in a lump sum instead of by instalments, it frees them to seek other employment. In the Court's view, nothing hangs on the payment of Mr Ringi's 4 weeks' salary in one lump sum rather than over the period of notice. In any event, he accepted it at the time and cannot now complain about what he agreed to.

[69] The Court's conclusion is accordingly:

- a) that the First Notice was effective until suspended by agreement and could, arguably, be said to have revived following the PSC's report.
- b) That given the PSC's comment that a further notice could be issued, it was effectual for Dr Gosselin to give the Second Notice and the fact that parties agreed to a lump sum payment of the remaining salary in lieu of working out the notice was of no legal consequence. No issue of estoppels arises when persons, knowing their position, do not act to their detriment on a mistaken belief induced by another but agree to a course of conduct.
- c) Mr Ringi's employment as PIO and Head of the Immigration Division of MFAI was, even if not validly terminated by the First Notice, validly terminated by the Second Notice and the parties complied with all legal requirements following the Notice being given.

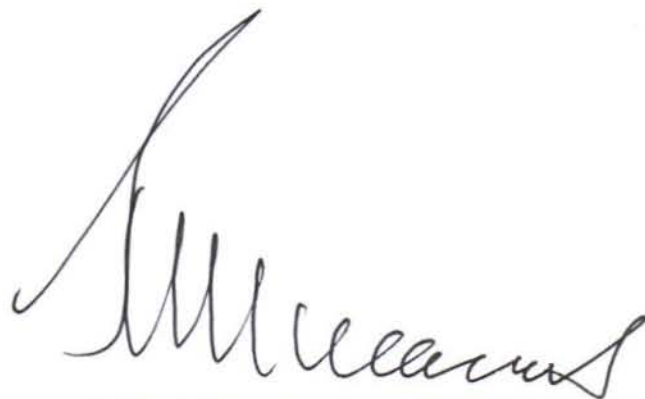
RESULT

[70] All the issues raised by Mr Ringi in his Amended Application for Certiorari having been determined against him, he has made out no basis for any of the relief sought by him and his Amended Application is accordingly dismissed.

[71] An interim order has been in force since shortly after these proceedings were issued precluding the First Respondent from taking any action to appoint a permanent PIO to replace Mr Ringi. That interim order is rescinded from the later of 24 hours following expiry of the period for Mr Ringi to appeal against this judgment or an order of the Court of Appeal.

[72] Counsel are to endeavour to agree on questions of costs but, if agreement eludes them, memoranda (maximum 5 pages) may be filed with that on behalf of the Respondents being due 28 days after delivery of this judgment and that on behalf of the Applicant within 35 days of that date with counsel certifying, if they consider it

appropriate so to do, that the Court may determine all issues of costs without a further hearing.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, J