

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

Plaint No. 27/07

BETWEEN **NANDI GLASSIE** a
Member of Parliament
("MP") of Atiu Island
Plaintiff

AND **THE PRIME MINISTER**
as Head of the
Government Cabinet
First Defendant

AND **THE PUBLIC**
SERVICE
COMMISSIONER
Second Defendant

AND **THE GOVERNMENT**
OF THE COOK
ISLANDS
Third Defendant

Mr Vakalalabure for Plaintiff
Mr Lynch for Defendants
Date: 10 November 2008

ORAL JUDGMENT OF WESTON J

The Claim

1. Mr Glassie sues various defendants in relation to the alleged wrongful termination of his employment on 29 June 2005. I am satisfied that the correct defendant to this claim is the Second Defendant only and that the other two defendants should not have been cited as parties to this proceeding. In reaching that conclusion I rely both on the Public Service Act as well as the Crown Proceedings Act.
2. I have previously considered this file on a Strike Out application brought by the Crown. The Court was then satisfied that the Plaintiff could not bring a claim beyond 30 June 2005 being the

termination date under the contract that the Court then understood to be the relevant contract and which I will refer to as the OMIA contract.

3. The claim before me is candidly put on the basis that it is for wrongful termination one day before the contract would otherwise have come to an end. The Plaintiff seeks special damages of \$2,000.00, general damages of \$150,000 and punitive or exemplary damages of \$50,000, a total sum of \$202,000 plus interest and costs.

The Public Service Act 1995-1996

4. Employment of a Head of Ministry is governed by Sections 10 and 11 of the Public Service Act 1995/96 as amended in 2002. Section 10 provides that all promotions and all appointments to the Public Service must be made in accordance with the Act. Section 11 then specifically deals with the promotion or appointment of Heads of Ministry, making it clear that such appointments must occur in accordance with the decision of Cabinet and pursuant to a Contract of Employment approved by Cabinet.
5. I believe these provisions make it clear that any employment of a Head of Ministry can only occur in terms of this statute. There is no scope for informal employment arrangements that lie outside the Act. The employment of a particular Head of Ministry cannot be wider than the Cabinet approval that is given. This is a mechanism to protect the politicians against claims by employees and it is also intended to ensure that politicians do not directly control the employment process.

The Facts

6. On 30 July 2004 Mr Glassie entered into a contract with the Public Service Commissioner as Head of Ministry. This is the OMIA contract as it came to be referred to. His employment started on 1 July 2004.
7. Mr Glassie has given evidence that there was a meeting between him and the Prime Minister on 4 November 2005 where he was asked by the Prime Minister to be the new Chief of Staff. The evidence is reasonably innocuous in the sense that the meeting simply started a process that took place over the next month. At this point I note that the Court did not hear evidence from the Prime Minister. At my request both counsel addressed me on this. While there was a suggestion that there may be some constitutional convention preventing the Prime Minister from giving evidence, equally it appears that earlier Prime Ministers have in some cases given evidence. Mr Vakalalabure submitted that the Crown took a risk in proceeding with its defence without calling the Prime Minister. I return to this issue when I analyze the facts shortly.
8. The next step in the chronology is that on 17 November 2005 Mr Glassie alleges there was an announcement made by the Prime Minister's Office that he was going to be the new Chief of Staff rather than an Acting Chief of Staff. While this proposition, like the earlier evidence, is not met by the Prime Minister, I am satisfied that at no stage was it intended that Mr Glassie be the full Chief of Staff. He was to be taken on and was eventually taken on as the Acting Chief of Staff. I will refer to the evidence that supports that conclusion shortly.
9. Mr Glassie then gave evidence that he started as Chief of Staff of the Prime Minister on 24 November 2005. Mr Caffrey, who was the Public Service Commissioner at the time, accepted under cross

examination that this had occurred although he was not sure of the date. He gave his opinion that this might have been unlawful. At least it appears most unwise on the part of the Prime Minister but I am not able to resolve that factual issue in the absence of evidence from the Prime Minister on that. I do not believe it is an issue that I need to resolve in order to answer Mr Glassie's claim.

10. On 14 December 2005 Mr Glassie tendered his formal resignation from his position as Chief Executive Officer at the Office of the Minister for Island Administration. The letter is written on OMIA letterhead and is signed by Mr Glassie as Chief Executive Officer of that office. The letter is copied to the Prime Minister in his capacity as Minister for Outer Islands. I believe it quite clear that this letter brought the OMIA contract to an end.
11. The next day Mr Caffrey issued a Warrant of Appointment appointing Mr Glassie as Acting Chief of Staff in the Office of the Prime Minister. This Warrant contained a provision that excited some comment during the course of the hearing. I quote it:

“Contractual Arrangement: The provisions of the Contract of Employment prescribed for Denise Rairi made on 15th March 2005 shall apply to the Appointee in every respect, except for the salary provided in Schedule (Remuneration Schedule) shall not apply.”

12. Mr Caffrey gave evidence that he did not see any need to enter into a new contract between his office and Mr Glassie. He said that because there was only six months or so left to run that the provision made by him in the Warrant was adequate. It appears to be common ground that, as at the date of this Warrant (that is, 15 December 2005), Cabinet had yet to approve the appointment of Mr Glassie as Acting Chief of Staff.

13. The Cabinet approval was given on 22 December following an application made on 19 December. Both the application and the approval given by the Cabinet made it clear that Mr Glassie was to be appointed as Acting Chief of Staff and that his position as Acting Chief of Staff would come to an end on 30 June 2006.
14. On 6 January 2006 a memorandum was issued under the name of Mr Caffrey (but it seems not actually written by him) addressed to Mr Lobb as Funds Manager and copied to Mr Glassie. This confirmed Mr Glassie's appointment as Acting Chief of Staff of the Prime Minister's Department. It also said that the appointment was effective as at 16 December 2005.
15. In April 2006 a number of positions were advertised. I was shown a copy of the original advertisement and then a copy of it as placed in the Cook Islands News. One of the positions advertised was for a permanent Chief of Staff of the Office of the Prime Minister.
16. When Mr Glassie gave evidence I asked him whether he was aware of this advertisement and he said he was not. After he had given evidence a copy of an application made by him and dated 1 May 2006 was located. I recalled Mr Glassie and put it to him. He accepted the application shown to him was made; that application is addressed to Mr Caffrey. In it Mr Glassie applied for the Chief of Staff of the Office of the Prime Minister but he also applied for three other positions that had been advertised. He signed this application as Acting Chief of Staff of the Office of the Prime Minister.
17. On 29 June 2006 Mr Glassie said that he was dismissed from his position as Chief of Staff. The exact detail can be found in paragraph 16 of his deposition which I quote:

"That at 2.00pm on 29 June 2006, the First Defendant, that is the Prime Minister, instructed me to attend to his office where

the First Defendant nervously told me that he just had a meeting with Cabinet and Cabinet had decided that I'm no longer the COS effective as from that very day."

There was no evidence in response to this from the Prime Minister. Again I deal with the consequences of that shortly.

18. In answer to a question from me, Mr Glassie accepted that he had been paid through until 30 June 2006. It also seems that he attended in the office on that day and spoke to his staff about his departure from the office.

The Contractual Situation in November and December 2005

19. The Prime Minister took Mr Glassie into his office as Acting Chief of Staff on 24 November 2005. At that time Mr Glassie was still employed by OMIA. At the least this was an unwise step, at the most it may have been unlawful. Nevertheless I do not believe it determines the outcome of this case. That is because subsequent events superseded what had occurred in November.
20. On 14 December 2005 Mr Glassie resigned from his position at OMIA. I have already said in this judgment that at that point his employment under the OMIA must have come to an end. It seems clear that the issue of the Warrant was premature. Mr Caffrey issued it at a time when on the evidence before me he did not have the authority of Cabinet to do so.
21. Mr Epati, the present Public Service Commissioner, gave evidence that the use of the contractual arrangements in that Warrant did not follow his current practice. Nevertheless that is the situation which confronts the Court and I need to deal with it.

22. In order to do so I step over the issue of the Warrant for the moment and come forward to the approval by the Cabinet on 22 December. At that time Cabinet approved the appointment of Mr Glassie as Chief of Staff of the Prime Minister's Office for the balance of the contractual period of the former incumbent of that office. While that is an unusual practice, and certainly not one to be encouraged, that appears to be the reality that I must accept. It may be possible to fit this practice within Section 11(4) of the Public Service Act which speaks of a replacement to a terminated position being appointed for the balance of the unexpired term.
23. At the end of the day, though, I cannot take the position further than the Act allows. The Act provides that Mr Glassie's appointment as Acting Chief of Staff could only occur in accordance with a decision made by Cabinet and this did not occur until 22 December. In those circumstances, I believe the Warrant is of no effect. I do not think it is fatal, however, that there is then no replacement Warrant. That is because the Act simply provides that once Cabinet has made a decision, and a contract is entered into, that is the end of the matter. So I need to address the question of the contract.
24. Again, while it is not entirely satisfactory, I believe the only sensible conclusion is that Mr Glassie was appointed in terms of the contract previously held by Denise Rairi. Of course, he was now the contracting party and his salary would apply in place of that earned by Ms Rairi.
25. In a real sense none of this makes too much difference. The terms of contract in the OMIA contract and the terms in Denise Rairi's contract were virtually identical. I have not checked every single provision but it appears that both of these were a standard form contract.

26. The Act requires that Mr Glassie be employed not only in accordance of a decision of Cabinet but with a Contract of Employment. The only contract that I can find in those circumstances was the one set out in the Warrant. Mr Glassie gave evidence that he knew of the Warrant and at no time did he protest or challenge those contractual arrangements. Consequently I am satisfied that by 22 December 2005 Mr Glassie was employed as Acting Chief of Staff in the Prime Minister's Office. He was not the full Chief of Staff. His employment would continue through until 30 June 2006 and he had no formal expectation of employment beyond that date.
27. I am also satisfied that despite the evidence that he gave, Mr Glassie was well aware of all of this. The fact that he applied for the new job when it was advertised in April 2006 is entirely consistent with him having been appointed as Acting Chief of Staff for the balance of the contract period. I reject the Plaintiff's submission that that application was a formality by Mr Glassie.
28. The terms of the Contract of Employment between the Public Service Commissioner and Mr Glassie required the Public Service Commissioner to be a good employer. Again I will shortly deal with the issue whether that standard has been met.
29. I am satisfied that come 30 June 2006, all things being equal, the Contract of Employment simply would have come to an end. I repeat this is a case where the Public Service Commissioner is sued because of an allegation of wrongful dismissal the day before the contract would have otherwise ended.

The Claim

30. I have been troubled by the fact that the Prime Minister did not give evidence to rebut the allegations made by Mr Glassie. In the

absence of any clear submission from the Crown that there was some constitutional convention preventing him doing so I assume that the decision not to call the Prime Minister was deliberate. Indeed Mr Lynch submitted that that was the case because the Prime Minister could not make any formal decision that would have impacted on the employment relationship between the Public Service Commissioner and Mr Glassie. That, he said, was the whole point of the statutory framework. I put to him that there must be circumstances in which the act of the Prime Minister in a case such as this could impact upon the employment contract but he did not accept that.

31. Mr Glassie's evidence at paragraph 16 has already been set out in this judgment (see paragraph 17 above). That evidence is reasonably bland. It simply says that there had been a meeting of Cabinet and that Cabinet had decided that Mr Glassie was no longer the Chief of Staff effective from that day.
32. The difficulty facing me is that this proposition is essentially consistent with the Plaintiff's job application for the permanent Chief of Staff having been decided against him. It does not necessarily assume that he had been terminated from his employment because of poor performance or anything like that. Equally there was no clear chain of evidence showing that political considerations had entered that decision. I accept that Mr Glassie gave evidence consistent with that but I have to bear in mind he bears the burden of proof on the balance of probabilities.
33. It seems to me fundamentally unlikely that the Prime Minister, knowing about the job applications and knowing that the contract of employment would have come to an end on 30 June 2005, and I think I can assume both of those things, would have acted precipitately to dismiss Mr Glassie on 29 June.

34. Although Mr Glassie's evidence is the only evidence directly on point I believe I need to step back and ask myself whether that all rings true. Frankly, I do not think it does, and accordingly I dismiss the claim that Mr Glassie was wrongfully dismissed on 29 June.
35. If I am wrong as to that, and the matter needs to be taken further, I now make some brief observations in relation to the damages claim assuming that there was a wrongful dismissal. Clearly, there can be no special damages because Mr Glassie was paid through until 30 June. That leaves general damages and punitive damages.
36. I deal first with the question of general damages. Both counsel told me there is no Cook Islands law upholding the awarding of general damages in an employment case. I can see no good reason why, in an appropriate instance, general damages might not be awarded. In saying that, though, I emphasize that in most cases general damages are awarded in comparatively small sums. In New Zealand employment cases, it would be unusual for general damages to be awarded beyond \$10,000. Mr Vakalalabure referred me to the New Zealand High Court decision of Whelan v Waitaki Meats where \$50,000 was awarded. The circumstances in that case, though, were at some remove from the present.
37. In this case, and assuming that general damages were to be awarded, the Court must bear in mind that the early termination of employment was only one day. In those circumstances I think it highly unlikely that the Court would have awarded general damages in a sum anything more than about \$4,000.
38. I now turn to punitive damages. Punitive damages (or exemplary damages) are awarded in the most extreme of cases. It is very rare for them to be awarded. The Privy Council decision in Boterill is normally regarded in New Zealand as the basis of the law. I am satisfied that, even if there had been a wrongful dismissal, that

these facts would not give rise to an entitlement to exemplary damages in this case.

39. I have heard submissions from counsel on the question of costs. Mr Lynch for the Defence seeks to have costs fixed and made payable to the Public Service Commissioner. He has referred specifically to the strike out application dealt with by the Solicitor General. Costs are reserved in that. He also seeks costs in today's hearing. Mr Vakalalabure has pointed out the antidote that he is entitled to costs on the earlier adjournment application. He submitted that both parties should bear their own costs and he said that this was the first case of this type and that should also be taken into account.
40. My decision is this. Although the Crown has prevailed before me today I do not believe it should receive an award of costs either on the earlier strike out or today's hearing. While I have taken account of the adjournment application, my decision is made mainly on the basis that the Crown to some extent was the author of its own misfortune. The procedures undertaken in Mr Glassie's employment appear to have been unduly casual. If things had been done properly it is possible that this claim could not have been brought. In saying that I do not attempt to justify Mr Glassie's litigation because I found against him. Nevertheless, the Crown should bear its own costs in my opinion because its actions were such that they may have led to this litigation. Accordingly, I order that each side bear its own costs.

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Weston J