IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **CA 5/11**

BETWEEN **HEATHER WEBBER-AITU**

Appellant

AND **TUPOU ALFRED FAIREKA**

Respondent

Hearing: 29 November 2011

Coram: Barker, P
Williams, JA
Paterson, J

Counsel: T Arnold for the Appellant
M C Mitchell and M Henry for the Respondent

Judgment: 15 December 2011

JUDGMENT OF THE COURT

Introduction – Nature of Appeal

[1] This is an appeal from the judgment of Hugh Williams J delivered on 25 May 2011 wherein he found favourably to the Respondent on a contested interlocutory application for directions made under ss 128 and 138 of the Code of Civil Procedure. The application sought inter alia a direction that the Appellant first exhaust the remedies provided under the Public Service Act 2009 ("the Act") before pursuing her Court proceedings for damages for breach of her employment contract made with the Respondent on 17 December 2009.

[2] A Public Service employee's remedies involve a three stage procedure set out in sections 36 and 42 of the Act: first, reference of an employee's complaint or dispute

to the relevant Head of Department, secondly, if the complaint is not resolved, reference to the Public Service Commissioner, thirdly, if the employee is not satisfied with the recommendation of the Commissioner and elects to appeal, an appeal to the Cook Islands Public Service Board of Appeal.

[3] The Judge granted the application and further held that rights of recourse to the High Court were secondary, were limited to judicial review and were available only on the ground of lack of jurisdiction. It was common ground between the parties that this appeal is of considerable public and constitutional importance beyond the facts of this particular case, due to the wide range of public service employees who have written contracts similar to that of the Appellant.

[4] There is no dispute about the primary facts. They may be summarised as follows:

- From 27 August 2007 to 31 October 2009 the Appellant, Ms Heather Webber-Aitu, was employed under an employment contract with the Secretary of the Ministry of Health as Director of Health Services in the Ministry.

- Towards the end of 2009 the Appellant and Mr Faireka, the Respondent, who was then Acting Secretary of the Ministry of Health and as such the relevant Head of Department, entered into negotiations for a new employment contract.

- On 10 December 2009, Mr Faireka offered Ms Webber-Aitu the position of Hospital Health Service Director commencing on 14 December 2009, on terms set out in that letter and an accompanying employment agreement which, amongst other things, bound the Ministry of Health to comply with the Act and the Public Service Code of Conduct.

- Ms Webber-Aitu claims she complied with her obligations under the 14 December 2009 letter and the individual employment agreement until 13 December 2010 but that, in breach of the contract and in additional ways on which she elaborates in her statement of claim, Mr Faireka made plain he had no intention of employing the Appellant beyond 13 December 2010 or of

complying with aspects of the employment contract such as performance appraisals.

- In late 2010 there were negotiations between the parties over the dispute but no resolution was achieved.

- On 2 December 2010, the Appellant's complaint was referred by the Respondent as the relevant Head of Department to the Commissioner. In its submissions supporting its Application for Directions the Respondent conceded that the reference did not comply with the 14 days timeline under section 36 of the Act. However, in those submissions the respondent argued as follows:

> DEFENDANT REFERRING THE PLAINTIFF'S COMPLAINT TO COMMISSIONER
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> 21. The Plaintiff pleads in paragraph 23 of her statement of claim that she "moved swiftly in late 2010 to seek a negotiated resolution of the matter without success", it is common ground that the negotiations was (sic) protracted and delayed for several entirely understandable reasons devoid of any bad faith on the part of both parties. The Defendant was engaged with his Counsel in those negotiations on the premises of discharging his statutory obligation under section 36 of the Act.
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> 22. The Defendant on 2 December 2010 referred the Plaintiffs alleged claims/complaint to the Commissioner. Attached is the copy of the letter. It obvious that the referral did not comply with the 14 days timeline required under section 36 of the Act.
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> 23. However, Counsel submits that the non-compliance is not fatal to render redundant the jurisdiction of the Commissioner and the Appeals Board to carry out their statutory function under the Act. The Plaintiff suffered no material prejudice, no fair trial consideration was or could be raised, and no fundamental human rights are in issue. In essence the remedies pursued by the Plaintiff in this Court per her statement of claim are within the jurisdiction of the Appeal Board to grant to her should she succeed in her claim/complaint. ...
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> 25. The 14 day requirement under section 36 of the Act is required to be complied with by the Defendant, however, considering its place in the scheme of the Act and the degree and seriousness of the non-compliance, it seems highly unlikely that Parliament could have intended that breaches of time limits under section 36 of the Act at the investigation stage would inevitably prevent the Commissioner from discharging his public function and duty of inquiring into and, making recommendation to the Defendant as to how the Plaintiffs complaint/dispute should be determined. ...

> 28. It is respectfully submitted that given the design and scheme of the Act, it is evident that the Plaintiff has prematurely proceeded to Court to pursue her claims/complaint/dispute with the Defendant. Therefore, the Court ought to give appropriate direction for the future of this proceedings given the clear legislative procedure and process provided under the Act and the Constitution.

- No recommendation was ever made by the Commissioner
- From 17 January 2011 Ms Webber-Aitu has been employed by the Public Service Commissioner's Office as a Governance Advisor but at a significantly lower salary than that she was previously paid. As a result, on 4 April 2011, she issued these proceedings seeking $31,984, being the total of the differences in her salaries, loss of income between jobs, anticipated bonuses and increases in salary, plus general damages of $15,000.

[5] For the avoidance of doubt it should be recorded that in terms of section 36 and 42 the Appellant's employment dispute thus reached the second stage only, that is to say reference of a dispute to the respondent which did not lead to a resolution, followed by a later reference to the Commissioner. It appears that the Commissioner never made a recommendation under s.36(6).

The Judgment

[6] Hugh Williams J decided that for the Act to remove the Appellant's right of access to the Courts for the resolution of her employment dispute with the Respondent, clear statutory provisions to effect that purpose would be required. He saw the central question was whether the Act had that aspect.

[7] The Judge noted that neither the remedies nor the appeal rights in the Act differed materially from those of its predecessor, the Public Service Act 1995-1996 (the 1995-1996 Act). His Honour's analysis of the appeal rights in the two Acts led to the conclusion that the Act did not contain appeal rights which did not exist under the 1995-1996 Act.

[8] However, it was largely an analysis of the appeal rights in the Act that led His Honour to the view that the Act did not give to employees such as Mrs Webber-Aitu the right to bring proceedings in the High Court.

[9] For reasons given in the judgment Hugh Williams J held that it was not open to the Appellant to issue any proceedings in the civil jurisdiction of the Court before determination of any appeal to the Board of Appeal. She was, therefore, required to have the dispute described in her statement of claim dealt with by the Board of Appeal even though it be subject to the monetary limitations appearing in s 42(2)(3) of the Act.

[10] The Respondent was accordingly entitled to directions that the Appellant first exhaust the remedies under the Act and that these proceedings be stayed pending determination of those rights.

[11] The residual jurisdiction of the High Court, according to His Honour, was limited to judicial review on the ground of lack of jurisdiction. In short, a resort to the general civil jurisdiction of the Court, as evidenced by the Appellants claim for breach of contract, was impermissible.

Grounds of Appeal

[12] In her application for leave to appeal, Ms Webber-Aitu alleged two substantial errors in fact and law; namely:

a. The finding that she had, first, to exhaust her remedies under the Act, before instituting proceedings in the High Court; and

b. The judge failed to have regard to the provisions of Article 65 of the Constitution and construed and applied the Act so as to abrogate, abridge or infringe her property rights.

[13] In his submissions in this Court, Mr Arnold for the Appellant narrowed the substantive issue. He accepted that Ms Webber-Aitu was obliged to lay a complaint under s 36(2) of the Act to the Head of Department but submitted that she was not required to proceed to an appeal to the Appeal Board if dissatisfied with the

Commissioner's recommendation as to how the dispute should be resolved, or if the Commissioner after a reasonable time had failed to make a recommendation.

The Issue

[14] Mr Mitchell, for the Respondent, submitted the issue before this Court is:

Is there –

a. Concurrent jurisdiction of the High Court on the one hand, and the Public Service Board of Appeal ("the Board") on the other; or

b. Exclusive jurisdiction in favour of the Board (with recourse to the High Court only by way of judicial review for want of jurisdiction).

[15] In view of Mr Arnold's concession, with which this Court agrees, the issue is more appropriately stated thus:

> After a complainant has referred a complaint or dispute to the Head of Department, pursuant to s 36 of the Act and the dispute is not resolved at that first stage and an out of time reference of the dispute is made by the Head of Department to the Commissioner and there is never any recommendation made by the Commissioner, is the complainant prevented from pursuing in the High Court the complainant's common law or other legal rights.

The Statutory Provisions

[16] Central to the issue is an interpretation of ss 36 and 42 of the Act. The relevant provisions of those sections state:

> 36. Complaints and disputes – (1) Except as provided in subsection (9), this section applies where an employee has a complaint or dispute with his or her head of department.
>
> (2) The employee must first refer the complaint or dispute to the head of department within 14 days of the circumstances giving rise to the complaint or dispute arising.
>
> (3) The head of department must then advise the Commissioner and attempt to resolve the complaint or dispute.
>
> (4) If the complaint or dispute; -
>
> a) Is resolved, the head of department must advise the Commissioner; or

b) Is not resolved, the head of department must refer it to the Commissioner,

c) Within 14 days after the matter is brought to the attention of the head of department.

(5) A referral of a complaint or dispute under subsection (4) must be in writing.

(6) The Commissioner must investigate the complaint or dispute and make a recommendation to the head of department as to how the complaint or dispute should be determined.

(7) An employee or head of department, as the case may be, has a right of appeal to the Board if –

a) Either the employee or head of department is not satisfied with the Commissioner's recommendation; or

b) A head of department refuses to follow the Commissioner's recommendation.

42. Remedies of Board – (2) If the Board allows the appeal, it may provide for one or more of the following remedies –

a) The reimbursement to the employee of a sum equal to the whole or any part of the wages, salary, or other money lost by the employee due to any breach by the head of department of the obligation to be a good employer;

b) Reinstatement of the employee to the employee's former position or the placement of the employee in a position no less advantageous to the employee;

c) The payment to the employee of compensation including compensation for –

i. Humiliation, loss of dignity, and injury to the feelings of the employee;

ii. Loss of any benefit, whether or not of a monetary kind, that the employee might reasonably have been expected to obtain if the head of department had not breached the obligation to be a good employer;

d) Any other order the Board thinks just.

(3) Despite subsection (2)(d), no sum of compensation (other than in the case where an employee is reinstated having been suspended without pay and only to the extent that the compensation is for the loss of salary or wages the employee would have otherwise received) may exceed 3 months' salary of that employee.

The Appellant's Submissions

[17] The crux of Mr Arnold's submissions on behalf of Mrs Webber-Aitu were:

a. An employment contract entered into by a senior public servant is a contract which, unless limited by the provisions of the Act, allows the employee to pursue common law remedies if the contract is breached by the employer;

b. Such a breach would normally give rise to a right of action in the High Court and entitle the employee to seek the full range of remedies provided for by the contract and by the common law, if the employer is in breach.

c. The Act does not oust the jurisdiction of the High Court to adjudicate on breaches of such a contract or to award relief in terms of the employment contract and/or the common law of the Cook Islands.

d. The Act only allows the Board of Appeal to award compensation (which is limited to three months' salary of the employee) for:

   i. a breach of a statutory obligation to operate a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of their employees in all aspects of their employment; and

   ii. for humiliation, loss of dignity and injury to the feelings of the employee.

e. The rights of the employee under a written employment contract are valuable property rights, as are the rights of action arising in the case of their breach, and such property rights are protected by Articles 64 and 65 of the Constitution.

f. To deny a public servant the full measure of recourse in the circumstances of this case is:

   i. to derogate from the spirit of 'fair remuneration', which is the true intent of the Act; and

   ii. to deny contracted employees of the Public Service the same rights and remedies for breaches of an employment contract as are available to other contracted employees in the Cook Islands

The Respondent's Submissions

[18] Mr Mitchell for the Respondent submitted:

a. Part 6 and s 36 of the Act provide a code for resolution of disputes for those employed in the Public Service.

b. Of crucial importance is that the Appeal Board is established by the Constitution, which elevates it in status. The Constitution, being the supreme law of the Cook Islands, can determine the boundaries of that jurisdiction.

c. The High Court does not have inherent jurisdiction in this case. Its jurisdiction arises from statute.

d. It is a necessary implication that the Act gives the Appeal Board exclusive jurisdiction in this matter.

Discussion – Statutory Interpretation

The 2009 Act: Does it oust the Jurisdiction of the High Court?

[19] It is common ground that the terms of the employment contract in this case requires the parties to adhere to the terms of the Act. This is expressly stated in the contract itself and would have been the case if not so stated. The Act imposes this requirement.

[20] The provisions of the Act do not expressly oust the jurisdiction of the High Court. This is the reason for the Respondent's submission that s 36 and Part 6 of the Act establish a code which, by necessary implication, ousts the High Court's jurisdiction.

[21] For the jurisdiction of the High Court to be ousted the privative clause must expressly do so. In this Court's view if the ouster is to be by implication, that implication must be clear, unambiguous and such that no other interpretation is possible.

[22] The law on this point is encapsulated by *Burrows on Statute Law in New Zealand* (3rd Edition) at page 249:

> For example, privative clauses in legislation attempting to restrict access to the Courts always received a narrow interpretation, sometimes to the point of

> artificiality. The Courts began, in fact, with a presumption that the Act did not deprive the individual of access, and would only hold it did if no other interpretation were possible. In *New Zealand Waterside Workers Federation Industrial Association of Workers v Frazer* Salmond J said:
>
> > In order to do so [that is remove the right of judicial review] effectually it would be necessary for Parliament to use language so clear and coercive as to be *incapable* of any other interpretation.
>
> On this approach the Courts will adopt a meaning upholding an important right if it is merely a *possible* meaning, however strained or unusual a meaning it might be.

[23] His Honour referred to a citation in *Burrows on Statute Law in New Zealand* (5th Edition), which included a statement of Viscount Simonds on *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, where it is said at 249:

> The Courts go to great length to find implied limitations which water down the literal meaning of ouster clauses. Viscount Simonds said it was a fundamental rule not to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words. The cases show that even clear words may not be enough.

[24] The High Court's jurisdiction, if not ousted by the Act, comes from Article 77 of the Constitution, which jurisdiction continued in force from the date of Constitution, unless repealed or amended. Under s 47(2) Cook Islands Act 1915 the High Court's jurisdiction extends to the matters in issue in this case unless Mr Mitchell's necessary implication submission is correct.

[25] While accepting that the Constitution is the supreme law of the Cook Islands, the fact that the Appeal Board was established by an article in the Constitution does not assist the Respondent. The Constitution did not prescribe the jurisdiction of the Appeal Board.

[26] The jurisdiction of the Appeal Board in Public Service employment cases was established by the Act. It is the provisions of the Act, which fall to be interpreted under usual interpretative principles, which must clearly and unambiguously lead to no other interpretation, if the Respondent's submission is correct.

[27] The starting point is s 36 of the Act. Is the implication contended for by the Respondent strong and convincing?

[28] For s 36 to apply there must be "a complaint or dispute". This term is not defined. In answer to a submission that s 36 and the remedies available under s 42 are not appropriate for some types of dispute, Mr Mitchell suggested that the term has a restricted meaning. An unjustifiable dismissal would not be within the meaning of the term.

[29] It is not necessary to determine the meaning of "a complaint or dispute" and that can be left to another occasion when the meaning is relevant. For the purposes of this case it is accepted that the Appellant's claim is within the meaning of "a complaint or a dispute".

[30] In this case there are three breaches pleaded, namely, a breach of Mr Faireka's contractual obligations (both expressed and implied) under the employment contract; breaches of Mr Faireka's obligations as a good employer under the Act; and breaches of his requirement under public administrative law to exercise his delegated statutory authority without bias or predetermination.

[31] Although counsel did not address the point, it is accepted for the purposes of this judgment without determining the issue, that all three alleged breaches give rise to a "dispute".[1]

[32] There can be no doubt that if Ms Webber-Aitu has a right to institute proceedings in the High Court, she was first required to refer the complaint to Mr Faireka under the provisions of s 36(2) of the Act. The phrase "must first refer" is clear and unambiguous.

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1 In respect of the definition of "arbitration agreement" in Section 2 of the Arbitration Act 1996 (NZ) which definition also appears in section 2 of the Arbitration Act (C.I.), reference may be made to the following statement of Fisher J in *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95 at [76]:

> For the purposes of the Act there will be a '[dispute]... between them' when two or more individuals express and maintain in relation to each other conflicting views or positions the resolution of which will or may be of legal consequence.

This definition was approved on appeal to the Court of Appeal: see [2004] 3 NZLR 454 at [59].

[33] The use of the adverb "first" suggests that there may be other possible means of having the dispute determined.

[34] The use of the mandatory "must" in subsections (3), (4), (5) and (6) of s 36 indicates that the steps referred to in the subsections must follow and the Head of Department and the Commissioner are required to take those steps. A comment will be made later on the rights of a complainant if the Head of Department or the Commissioner fails to take those steps.

[35] The right of appeal to the Appeal Board arises if the circumstances set out in s 36(7) exist. If the Commissioner does not report in a timely manner, as is alleged in this case, the complainant has no right of redress apart from seeking the High Court's assistance to compel the Commissioner to fulfil his statutory duty, if there is no right to bring the claim in the High Court at that stage. This is an unsatisfactory situation.

[36] If one of the circumstances in s 36(7) exists, the section gives the complainant the right to follow the course referred to in s 30(7) on an appeal to the Board rather than institute High Court proceedings at that stage.

[37] It does not follow, in the Court's view, that by necessary implication the High Court's jurisdiction is ousted. The s 36 procedure may be intended as a type of mediation or conciliation process which in many cases will resolve the dispute. If it does not, there is still the opportunity of appealing to the Appeal Board. On the face of it, there is nothing to prevent a complainant going to the High Court.

[38] Applying the usual principle that an ouster clause must expressly take away jurisdiction, the Court is the view s 36 does not carry the implication contended for on behalf of Mr Faireka. There is no express provision; the presence of "first" in s 36(2), the possibility that administrations can delay or possibly frustrate resolution of a dispute by inaction, and the possibility that the intent may be to encourage mediation all indicate that s 36 is not an ouster provision.

[39] The case of *Ogilvy v Mather (New Zealand) Ltd v Turner* [1994] 1 NZLR 641, a decision of a five-Judge Court of Appeal, is instructive. The judgment was on an application to strike out a wrongful dismissal pleading on the ground that the Employment Court had no jurisdiction to hear it. It was determined that there was nothing in the relevant Act or in any of the *Hansard* reports to lead to the conclusion

that the Employment Court's jurisdiction was to be in any way cut down. By analogy this Court does not consider any provisions of the Act take away the High Court's jurisdiction once the steps in subs (2) to (6) of s 36 have been followed.

Discussions: The Constitutional Law Grounds of the Appeal

[40] The foregoing conclusion as to the interpretation of section 36 is sufficient to determine the appeal in favour of the Applicant. However, as alternative grounds of appeal it was alleged that the learned judge erred in fact and law in failing to have regard to the "rights of property recognised and protected by Article 40 of the Constitution". In the written submissions of the appellant it was submitted:

> 68. Conversely, the Appellant prays in aid the property protections afforded her under the Constitution, in terms of her right to seek the same rights and avenues of redress to the same extent of recovery as afforded workers generally in this country.
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> 69. Article 64(1) recognizes the '*fundamental human rights and freedoms ... of the individual to own property and the right not to be deprived thereof except in accordance with law.*' The Appellant assert that the rights of action arising from the breach of her written contract of employment are valuable property rights.
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> 70. Should there be any interpretative uncertainty regarding this matter, then the Appellant submits the appropriate approach is that prescribed by Article 65(1); viz:
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> > '... every enactment shall be construed and applied so as **not to** [emphasis added] abrogate, abridge, or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms recognized and declared by sublcause (1) of Article 64 hereof.'
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> 71. The Appellant recognizes Article 65(1) is expressed as being subject to Article 64(2) and Article 65(2).
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> 72. Article 64(2) recognizes that limitations may be imposed on an individual in the exercise of his rights or freedoms "*for protecting the rights and freedoms of others or in the interest of public safety, order or morals, the general welfare or the security of the Cook Islands*'. The Appellant submits a that an arbitrary distinction drawn between workers generally, and public servants, to limit recovery by one class or worker relative to the other cannot be justified under this Article.
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> 73. The Appellant submits that the proviso relating to Article 65(2) is supportive of her position. This provision echoes the provisions of Section 4 of the Acts Interpretation Act 1924 of New Zealand (which remains in force in the Cook Islands). ...

[41] It is apparent that the Appellant was not inviting the Court to declare the relevant parts of the Act invalid under Article 39(4) of the Cook Islands' Constitution, but rather relying on Article 40 to support her interpretation of the Act as not absolutely

precluding resort to the High Court. This is a perfectly legitimate approach and consistent with the established principles of constitutional interpretation that, as stated in Article 65(1):

> ... every enactment shall be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised and declared by subclause (1) of Article 64 hereof.[2]

[42] The Appellant relied, inter alia, upon Article 64(1) which it was said recognises the "fundamental human rights and freedoms ... of the individual to own property and the right not to be deprived thereof except in accordance with law" and asserted that her rights of action arising from her breach of her written contract of employment were valuable property rights. As noted, the Appellant also referred to Article 40(1) of the Constitution which reads:

> 40(1) No property shall be taken possession of compulsorily, and no right over or interest in any property shall be acquired compulsorily, except under the law, which of itself or when read with any other law –
>
> (a) Requires the payment within a reasonable time of adequate compensation therefor; and
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> (b) Gives to any person claiming that compensation, a right of access, for the determination of his interest in the property and the amount of compensation, to the High Court; and
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> (c) Gives to any party to proceedings in the High Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a Court of original jurisdiction.

[43] As to the meaning of property, Langdale MR said in *Jones v Skinner* (1835) 5 L.J Ch 87 at 90 that "'property' is the most comprehensive of all term which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have." Moreover, in the constitutional context, it is necessary to give a "generous interpretation suitable to give individuals the full measure of the fundamental rights and freedoms referred to": see Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319 at 328 (PC). The Privy Council in *Attorney-General of the Gambia v*

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2 The following statement by Brandeis J in *Ashwander v Tennessee Valley Authority* (1936) 297 US 288 at 341 (U.S. Supreme Court) is also relevant:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

Momodon Jobe [1984] AC 689 (PC) determined that "property" in a constitution must be given a generous and purposive construction. It includes a chose-in-action such as a debt owed by a banker to his customer. In the Court's view the word "property" in Article 40(1) includes a claim for damages of the type Mrs Webber-Aitu wishes to bring.

[44] Other constitutional indicators supporting the view that s 36 does not oust the jurisdiction of the High Court were said to be found in Articles 64 and 65. Article 64(1)(c) is the right of a person not to be deprived of property "except in accordance with law" and as, already noted, Article 65(1) of the Constitution requires every enactment to be "construed and applied as not to abrogate, abridge or infringe any of the rights or freedoms recognised and declared by subclause (1) of Article 64".

[45] Further, Article 65(1)(d) states that no enactment shall be construed or applied so as to:

> Deprive any person of the right to a fair hearing, in accordance with the principles of fundamental justice, for the determination of his rights and obligations before any tribunal or authority having a duty to act judicially.

[46] We find that these constitutional provisions strongly support the view to which we have come as a matter of construction that s 36 is not, and was not intended to be, an ouster provision.

[47] It is not necessary to determine whether the Appeal Board would have had the jurisdiction to consider all three breaches alleged in the statement of claim if Ms Webber-Atiu had elected to take an appeal to the Board or whether Ms Webber-Atiu could have recovered on an appeal to the Appeal Board all the amounts sought in this case; or what complaints and disputes are subject to s 36 references.

Conclusions

[48] It is the view of this Court that once the reference has been made under s 36(2) and matters have proceeded under the provisions of ss 36(2) to (6), or the Head of Department has failed in a timely way to deal appropriately with the complaint or dispute and/or failed to refer it to the Commissioner within 14 days, an employee is not prevented from seeking relief in the High Court. In this case, Mr Mitchell fairly

and rightly acknowledged that Ms Webber-Aitu had done all that was required of her under s 36.

[49] The Court considers the true position to be analogous to that applying to multi-level dispute resolution provisions generally. A helpful illustration is provided by *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608. In that case the multi-layered dispute resolution clause in the contract between the parties provided first for negotiation between the parties, secondly for negotiation between the parties' chief executives, thirdly for reference to the architect for his formal decision, and lastly for arbitration. The procedure was described by the Court as "mandatory" and "staged". The plaintiff argued that the dispute could not be referred to arbitration because the pre-condition that the dispute be negotiated by the parties' chief executives had not been satisfied. The Court found that the negotiation pre-condition was unsatisfied because of the plaintiff's failure to respond to the defendant's attempts to negotiate. Wild J was of the view that there had been adequate attempts by the defendant to negotiate and therefore sufficient compliance. He concluded that the plaintiff could not take advantage of its wrong and affirmed the validity of the initiation of the arbitration.

[50] As was the case here, a difficulty may arise in the application of s 36 of the Act if the Head of Department fails to make a timely reference of an unresolved dispute to the Commissioner or if for whatever reason there is no investigation and recommendation to the Commissioner.

[51] If the *Marnell* principle were to be applied, a complainant would be free to go to the High Court if the Commissioner did not comply with his obligations under s 36(6) of the Act. Mr Mitchell's acknowledgment, noted at [48], is relevant on this point.

Result

[52] The appeal is allowed. The Directions issued by the High Court, the stay imposed by the High Court, and the cost order made there are all set aside.

[53] The Court declares that Ms Webber-Aitu is not prevented from pursuing her claims through the High Courts.

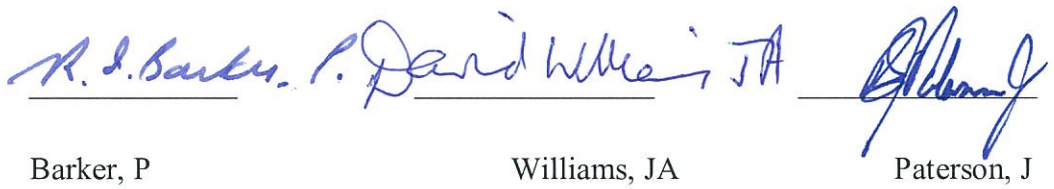
Costs

[54] Mrs Webber-Aitu is entitled to costs in both the High Court and this Court. They are fixed at $5,000 in total plus disbursement in both Courts, as fixed by the Registrar.

Additional Declarations

[55] After the hearing, counsel for the claimant lodged a memorandum suggesting the form of relief which should be granted by the Court. In these further submissions, there are ten "propositions" which it was said the Court might consider appropriate by way of declaration.

[56] The Court has carefully considered these additional submissions. It does not consider it would be appropriate to make any further declarations. First, it would not be appropriate to do so without providing to the Crown the opportunity to comment on the memorandum. Secondly, the matters referred to in these proposed draft declarations have been sufficiently addressed in the judgment and in the orders set out above at [52] and [53].



Barker, P Williams, JA Paterson, J