Workers rights under the *Constitution*

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Executive summary

1. "The human rights provisions of the *Constitution* are all about humanity. Dealing with people with humanity and decency. Section 41 is a very important provision. Terminating someones employment is a significant event. Even if it is done under a valid law it must be done with humanity, not harshly and oppressively…." *Simon v Koisen & Teachers Saving & Loan Society*

2. Human Rights, as confirmed by the *Constitution* may be regarded as implied terms of any contract of employment *Steven v RamKC & Tsang Ltd*

3. Treating an employee "harshly" by abuse, defamatory words, use of unfavorable epithets etc may trigger section 41 of the *Constitution* (harshness and oppressiveness) *Simon v Koisen & Teachers Saving & Loan Society*

4. Where there is no written contract of employment to the contrary, "casual labourers" employed for over six days must be paid commensurate to permanent employees, doing the same work *Petrus & or v Telikom*

5. Employers not addressing workers complaints may amount to harsh and oppressive treatment *Petrus & or v Telikom*

6. Where the worker is on an oral contract, there is no workers right to be heard,. *Steven v RamKC & Tsang Ltd*

7. An employer in Papua New Guinea can hire and fire oral contract workers at will, with or without good reason, and there is no right to be heard. *Steven v RamKC & Tsang Ltd*

8. Termination of an oral contract worker "for cause", no salary in lieu of notice needs to be paid. *Steven v RamKC & Tsang Ltd*

9. Oral contracts of employment, not terminated for cause, must have statutory compliance, notice or salary in lieu of notice etc *Steven v RamKC & Tsang Ltd*

10. No reasonable cause of action disclosed (*National Court Rules* Order 12 r 40(1) issues:

    - An application under s57(1) of the *Constitution* alleging human rights violations, is a lawful cause of action, and not frivolous

- But proceedings may be frivolous in a technical sense because there is no chance of success.
- Section 41 of the *Constitution* can conceivably apply to the termination of an oral contract worker, under the *Employment Act*, but providing there is statutory compliance, there is no chance of success.
- Providing the respondent cannot show that the applicant harassed, deliberately put the respondent to unreasonable expense, or the proceedings are a sham, or that the proceeding could not possibly succeed, s57(1) proceedings are not vexatious.
- If the applicant for s57(1) remedies applies to the National Court on the right form; has a genuine grievance (they sacked me and my family is destitute etc) – there is no abuse of process. All : *Paru v B Mobile*

Constitution section 41

(1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in a particular case-

(a) is harsh or oppressive; or
(b) is not warranted by, or is disproportional to, the requirements of the particular circumstances or of a particular case; or
(c) is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind

is an unlawful act.

(2) The burden of showing that Subsection (1)(a), (b), or (c) applies in respect of ant act is on the party alleging it, and may be discharged on the balance of probabilities.

(3) Nothing in this section affects the operation of any other law under which an act may be held to be unlawful or invalid.

background

- statutory framework in the *Employment Act* is out of date, colonial and gives workers very few rights in terms of money and conditions.
- NPF coverage is growing, but doesn't include small business, and there is a strata of worker who are without benefit, because of timing, or they slipped through the system.
- If they have a written contract at all (and most don't) , or there is a local award, workers rights otherwise depend on a written contract.
- In 1975 the *Constitution* raised the bar on the quality of social economic rights, but over the years little has changed for most Papua New Guinean low-level workers.
- *CIA Fact Book* on PNG shows PNG has a real problem with human trafficking associated with the logging industry, prostitution, Asian gangs etc.
- There is undoubtedly corruption in Migration and the Department of Labour over visas and work-permits.
- The Government of the Philippines has put in place a system where there is now a single portal for the entry of Filipino contract workers.
- Anecdotally
    - Bangla Deshi lured to "a tourist management position" found himself virtually enslaved in a tucker-box in Gerehu, with his passport confiscated, paying off the huge bribe his employer had paid to Migration to get the visa and work and permit
    - Filipino outside Moresby (no lawyers in the location) , again passport held by employer, was accused of a general deficiency (stealing money which was alleged to be under his control), was imprisoned in police cells after the employer reported to the police, but not charged, was released, threatened with criminal prosecution so as to force him "to pay the money back", had his entitlements confiscated, was evicted from accommodation, looked after by the Catholic mission, eventually after no charges were laid, evacuated by his Embassy, penniless.
    - National employee (oral contract worker) outside Moresby, recruited on the basis of a written contract that was never entered into, assisted with building materials for housing to the tune of K100,000+ , unlawfully dismissed on spurious grounds (probably down-turn in companies business) , then threatened with an action for debt over the value of the building materials. The employee paid the debt, and did not sue for wrongful dismissal because his income rose as a result of the dismissal.
    - Hospital casual employed for 20 years as a morgue attendant, never made permanent.

The cases : Canning J, now the "Human Rights judge", Waigani, formerly Kimbe and Madang judge

case 1 *Petrus & Gawi v Telikom* N3373, 30 May 2008 Canning J Kimbe

facts etc : casual labourers recruited as a security for a mountain top Telikom repeater station. Previously, Telikom had hired helicopters, and flown in police (expensive) , before the applicants were employed as security for four years at K218. 40 each per fortnight, and nothing else. Telikom simply did not reply to their requests to be treated as permanents and paid allowances. The allowances were such things as a hardship allowance, and camping allowance etc normally paid to permanents working in the same locality (mountain-top). The appliacants had to walk-up the mountain and feed themselves. They were terminated after Telikom decommissioned the repeater station. They were substantially out-of-pocket compared to permanents, and they were aggrieved, inconvenienced and stressed.

They applied to the National Court under s57 (enforcement of human rights) for alleged breach of constitutional rights, namely, under s41, that Telikom had treated them harshly and oppressively.

Telikom's argument was to the effect that the workers had to show the court they were victims of cruel, unsympathetic ruthless action. Crassly Telikom argued the workers weren't enslaved, or forced to work, they came to work voluntarily. The court said *harsh and oppressive conducted could include "unfair", "ungentle", "unwarranted" acts in the circumstances of a particular case.*

The court then focused on the *Employment Act*.

- The plaintiffs were oral contract employees under s10(1) of the Act as they had been employed for over 6 days in one month
- The Defendant could not produce, or did not produce, any written record of the terms and conditions of their contracts of service as required under s15(1) of the *Employment Act*.
- There was a dispute over the terms of that contract of service, and so, because there was no written employer record, by s15(2), the employee's statement (that their contract of service should have included the allowances paid to permanents) became conclusive evidence of the contract.
- The workers consistent statements to the employer that they be paid the same allowances as permanent workers for the same type of work were not unreasonable, and became conclusive evidence of the terms and conditions of the otherwise oral contract of employment.
- Telikom's failure to pay according to the terms and conditions implied into the oral contract as required by law (the *Employment Act*) was harsh and oppressive conduct and breached s41 of the *Constitution*, and damages were awarded, under section 23(1)(b) and s155(4) of the *Constitution*, of which more later….
- Telikom had to pay to each worker K11, 147.96 broken down into K6,7147 , 96 unpaid allowances (camping allowance, hardship, risk, overtime, money in lieu of leave) based on a loading of 25% of the actual amount of wages paid to the workers , and K5,000 for the workers inconvenience and stress.

Some other matters

- the case took a long time. It started in Kimbe in 2006, the originating summons specifically pleading a general, although unspecified claim for compensation had a hearing in Waigani November 2007; and judgment was 30th May 2008.
- part of the reason for the finding of harsh and oppressive treatment, was the workers tried on numerous occasions to have their grievances resolved, and were ignored by Telikom.
- The reason why Canning J awarded damages under s23 and s155(4) of the *Constitution* was because he was bound by the majority (Kidu CJ and Kapi DCJ in *Raz v Matane [1985] PNGLR 329* that says s41 is not a basic human right. The dissenting judgment of Amet J, as he was then, was much more to the liking of Canning J., as it is to me, (makes more sense).

case 2

Meta v Kumono and ors N4598 Waigani, Canning J, 29 February 2012.

facts etc : this is not an employment case. It was an action against the police and the State, for kneecapping the plaintiff, and was straight forward. The plaintiff produced credible evidence he was arrested in Kimbe in 1997, forced by police to "run away" shot in the legs, and had to have his leg amputated. That was a violation of a raft of the human rights protections in the *Constitution*. There was no evidence at all for the State. Canning J found for the plaintiff, and awarded damages to be assessed.

The case is important because of what Canning J had to say about *Raz v Matane* and s41 of the *Constitution,* and the *Statute of Limitations.* His Honour said:

- in the past he took the view he was bound by the majority in *Raz*, (that s41 is not a human right capable of being pleaded under s57 of the *Constitution*.), but the section could be enforced under s23 and 155(4) of the *Constitution*.
- Continuous allegations since that case (27 years previously) of police brutality, had change the circumstances in the country, and the dissenting opinion of Amet J was to be preferred.
- On that basis, the kneecapping of plaintiff satisfied all conditionality of s41.
- *The Frauds and Limitations Act 1988* stops actions for wrongs after a six year period. The State submitted the Act applied, as the the kneecapping was in 1997, and the hearing in 2007, judgment 2008.
- Canning J ruled that s16(1) of the **Act** did not apply to applications for the enforcement of human rights under s57 of the ***Constitution.*** In any case the proceedings were lawfully commenced by filing the human rights complaint form, 5 months after the kneecapping. (It transpired, the human rights complaint file, originating in Kimbe, was erroneously transfered to Waigani, and became "a lost file", until found by Canning J.)

case 3

Paru v Katigama & Bmobile N6089 1 October 2015, Waigani, Canning J

facts etc: after working for Bmobile for over a year as an account executive, the plaintiff was terminated summarily. No reasons given. She sued Bmobile under s57 of the *Constitution* for breaches of a variety of rights, including s41 of the *Constitution*.

Bmobile was represented by Mr. Jason Brookes, who by notice of motion, sought to dismiss the action for frivolity etc.

Ms Paru appeared in person.

This was a motion under O12 r40(1) : no reasonable cause of action disclosed; frivolous; vexatious, abuse of process. The court ruled:

- On the "no reasonable cause of action": that the plaintiff alleged 9 breaches of the human rights provisions of the *Constitution* under s57(1). That is sufficient, and founds the reasonable cause of action
- The proceedings were not "vexatious"; there was no harassment of the defendant, no putting the defendant to unreasonable expense; no sham; it was not case where the plaintiff could not possibly succeed.
- The proceedings were not an abuse of process. She was in the right court; she was not misusing the procedures; she had a genuine grievance; she had filed the correct form in the National Court registry.
- <u>The proceedings were frivolous in a technical sense</u> because they had no chance of success. She had no written contract, no fixed term of employment, after a delay, her entitlements were paid, but by law (the *Employment Act*) she could be dismissed summarily. S41 of the *Constitution* could conceivably apply to a summary dismissal, but here the allegations did not go far enough to satisfy s41.
- The proceedings were dismissed.
- But the costs were shared between the parties, when normally the loser pays the winners' lawyers costs. This was a matter of discretion, plaintiffs in the human rights situations have to be encouraged to access the courts, and not penalized if they lose.

case 4

Steven v Ram KC & M&S Tsang Ltd N6577 Madang, 9 December 2016 Canning J

facts etc: Tsangs Ltd terminated the applicant's employment "for cause" (absence from duty, failure to follow instructions, giving improper instructions to employees), paid her K2,634 16 finish pay, including salary in lieu of notice, and they offered to pay K1000 to avoid litigation; she refused this money, and Tsangs paid it into court.

She sued under the *Constitution* s36 freedom from inhuman treatment; s 41 proscribed acts; s59, lack of natural justice. Tsangs said there was no Constitutional breach; she was terminated lawfully under s36 of the *Employment Act* she was coming late to work; she was telling the staff on the millinery section not to cut clothe, when she had been told not to give those instructions. The court found there was sufficient evidence that the plaintiff had willfully disobeyed lawful and reasonable orders breaching s36 (1)(a)(i) (ii) of the *Employment Act,* , and so there was otherwise a lawful termination for cause under the *Employment Act.* <u>There had been no breach of her constitutional rights: no inhuman treatment, no harsh or oppressive treatment, no denial of natural justice.</u>

The court also said some other interesting things:

- <u>Human rights, as conferred by the *Constitution*, have universal application and can properly be regarded as implied terms of any contract of employment.</u>
- The plaintiff failed to prove any constitutional breaches.
- The *Employment Act* s 34, 35, 36 determine that there was an oral contract, that may be terminated any time, on any ground without notice. There is provision for termination and payment for the number of weeks specified under s34 and 35; but an employee maybe dismissed <u>for cause</u> and paid no salary in lieu of notice.
- On the breach of natural justice" issue, in *Sukuruamu v New Britain Palm Oil*, 2007, N3124 Canning J had ruled that contracts of employment in Papua New Guinea had an implied term in them that an employee had a right to be heard on termination. His Honour had followed that rule in a number of cases. But that ruling was over-turned on appeal by the Supreme Court, who said, in *New Britain Palm Oil v Sukurama* SC946, 30 October 2008, that a national court judge had no power to develop the law, where the Supreme Court had previously settled it as it has in *Jimmy Malai v PNG Teachers Association* [1992] PNGLR 568.

- Hence the law is :

    - an employer in Papua New Guinea, can hire and fire at will, and fire with or without good reason and without being given a right to be heard
    - that basic position may be displaced by a contract of employment : Ayleen Bure v Robert Kapo (2005) N2902.
    - If employment is terminated for cause, no salary in lieu of notice has to be paid
    - if employment is not terminated for cause, notice of termination must be given, or salary in lieu of notice must be paid.

- The Judge made some non-binding (obiter) comments that are worth noting too, because of sensitives in personnel management, and in particular the cross-cultural situation:

> "[Tsangs] could have managed the situation better. They could have handled the issues about the plaintiffs attendance record more decisively and given her a clear warning that

she needed to improve her performance. Complaints about customers being turned away because the plaintiff would not let other staff cut material, should have been brought to Mrs. Tsangs attention sooner than they were. The plaintiff should have been warned her job was on the line."

[Judges do not come into court immaculate. They have social context. One cannot help thinking about how Papua New Guinea base-level employees cope with a chaotic transport PMV system. They invariably live in distant settlements. Live in conditions with inadequate water and human waste facilities. If it rains clothes may be wet, with no hope of drying. If they are women, in particular, they have children, and children get sick. Public health usually requires waiting in long queues, half a day, or a whole day. Employers make deductions from employees pays for "negligence" not giving the right change; allowing stock to go out for no charge etc.]

- He also noted the plaintiff, who worked for Tsangs for 8 years, was in a difficult and emotional state; she was a mother and a breadwinner; that she was cross-examined and alleged that she "was aggressively interrogated… over a trivial matter, defamed, verbally abused and sacked on the spot"….

- as a matter of discretion, the Judge ordered
  - the K1000 paid into court, to be paid to the plaintiff
  - each party to bear their own costs.

case 5

Simon v Koisen & Teachers Saving & Loan Society (TISA) N7075 31 January 2018, Canning J

facts etc: Simon worked for TISA for 4 years before he was sacked. First he was based in Moresby, then he was transferred to Wewak in 2006, where he worked for two years. Then he was given two weeks notice to transfer back to Moresby.

He was married into the Sepik Province and wanted to stay there. His wife was able to live in the village, and the children went to school there. When he transferred to Wewak he went willingly, paid his own expenses to get here. His evidence, not contradicted, was that he worked diligently to build up TISA membership in East Sepik, and as a result there was a plan to put a new office in Wewak. At the beginning of 2008 the position of manager Wewak was advertised; he applied for it. On the 10th of March he got a fax from TISA Moresby telling him he was transferred to Moresby and to report for duty there on the 24th March 2008. No offer was made about payment of any transfer expenses for himself or his family.

He resisted the transfer on hardship grounds and asked for an explanation. No explanation came.

He asked for a reconsideration of the decision. No reply. He got instead a "final warning", that he would face disciplinary charges if he did not obey. He asked for travel costs and accommodation in

Moresby. He was charged with disciplinary offenses including insubordination and disobedience of managements orders, given 7 days to respond. He responded. The charges were sustained, and he was told that tickets could be picked up at Air New Guinea Wewak for him and his family and he had to be in Moresby at the office 1000 15 April.

He became stressed; got a medical certificate to say he had hypertension, anxiety and depression and was unfit for work. He did not go to Moresby. On the 18th of April he was charged yet again. In the course of this charging, he was abused, or addressed rudely "Undesirable character traits in the extreme" It was also alleged he indulged in specific improper behaviour over the transfer.

He responded to the new charges, but was terminated, and more acrimonious comments were included in the letter of termination.

He filed a human rights application under s57, and s41 of the *Constitution*, that he was treated harshly and oppressively or otherwise in a manner not reasonably justifiable in a democratic society.

- At the trial TISA did not did not contest the applicants affidavit evidence, but sought the summary dismissal of the action as an abuse of process, as in the submission of the defendants, proceeding should have been by way of writ of summons.
- The court held there was no abuse of process. The proceedings were properly filed as a human rights application in the National Court. (the applicant appeared in person; the respondents were represented by counsel.)
- This conclusion followed the reasoning in previous cases I have discussed, that *Raz* as decision of the Supreme Court in 1984, may be distinguished or neutralized, as it applies to s41 of the *Constitution*, and the need for a writ of summons some how disappears, because judges may avail of sections 23 and 155(4) of the *Constitution*, for their power to deal with s41.
- Lets say that is the law. But I am not sure how the Supreme Court would rule, if that matter was fully argued. Although *New Britain Palm Oil v Sukurama* SC946, 30 October 2008, would worry me.
- Be that as it may, once the proceedings are ruled to be not an abuse of process, and because Mr. Simon's evidence was not seriously challenged, indeed the respondents did not mount a serious defence, the s41 issue fell into place.
- The court found the respondents had labeled the applicant "disgraceful, disrespectful, and demanding". The respondents never took seriously, the applicant's view that he was being treated harshly.
- Big mistake: "harshness" is fundamental to a s41 application.
- The court appreciated the position of TISA dealing with what it may see as a difficult and obstinate employee. It said "However, there is more than one way one way to deal with an obstinate and difficult employee who is resisting a transfer. Such as giving him a reason for the transfer, being frank, negotiating a position, giving him extra time to transfer-especially a man who has a wife and school aged children to care for."
- The charging of the plaintiff and the unfavorable epithets went against the respondents, at least after a fashion.
- The court found breaches of human rights, and in favour of the applicant, and declared he had been treated illegally, under s41 of the *Constitution*. The other grounds were dismissed. It awarded damages of K2000, and exemplary damages of a further K2000. There was no interest

was awarded, as it was not considered appropriate. The applicant got a further K1000 as costs of the proceedings.

Some comments

- I do not know know if there has been an appeal.
- A total of K5000 against the respondents, plus solicitor client and court costs, would make them ponder the cost of an appeal to the Supreme Court...they could take the view, if they are rid of the applicant, to let sleeping dogs lie.
- we do not know if the applicant remains sacked.
- There was no order as to reinstatement.
- That raises the interesting point, that it is certainly within the power of S57 to order reinstatement. That may ruffle feathers.
- The case may not mean much because of the outstanding *Raz* issue; that remains to be seen.
- Certainly Judge Canning is very clear, and he is setting the precedents, and he is the human rights judge.
- But as a matter of practice, the current law would appear to be as laid down by the learned judge :"The human rights provisions of the *Constitution* are all about humanity. Dealing with people with humanity and decency. Section 41 is a very important provision. Terminating someones employment is a significant event. Even if it done under a valid law it must be done with humanity, not harshly and oppressively…."