

SC2749

**PAPUA NEW GUINEA
[SUPREME COURT OF JUSTICE]**

SCA NO. 31 OF 2024

**BETWEEN
MADANG TIMBERS LIMITED**
Appellant

**AND
SONNY MATTHEW FOR AND ON BEHALF OF HIMSELF AND
PETER JAI, JERRY GANZ, MATTHEW AMBONG, ARNOLD
ARUMBAI, THADDEUS MARK, MICHAEL AURIP, GOMIA KIMIN,
GEORGE KAMBIN, LUKE SAI, AND EKI MUNAME**
Respondents

**WAIGANI: COLLIER J, CARMODY J, CROWLEY J
26 JUNE, 4 JULY 2025**

CONSTITUTION – s. 41 “proscribed acts” - not a “guaranteed right or freedom” for the purposes of ss 57 and 58. Breach of s. 41 – no entitlement to damages as compensation under s. 58. S. 58(1) is an addition to, and not in derogation of, s. 57.

EMPLOYMENT LAW – Inherent power imbalance

DAMAGES – An exercise of judicial discretion – nominal damages.

Brief Facts

The appellant employed each of the respondents as security guards and paid them at a rate of K2.70 per hour as compensation prior to 2014. Sometime in 2014 the appellant changed the respondents’ remuneration to a fixed rate of K450 per fortnight. The respondents, under significant pressure, signed individual contracts containing the new fixed rate of pay but were not made aware of the new rate.

In 2018 the respondents sought assistance from the Provincial Labour Office in Madang to improve their employment terms including the change in the rate of pay which they said they had not been informed of at the time of the execution of the contracts. The Labour Office and the appellant then entered into a series

of communications. In 2019 the respondents' employment was either terminated or they were not re-employed by the appellant.

The respondents instituted Court proceedings against the appellant and were successful on the issue of liability at the National Court. The judgment with respect to damages included damages pursuant to s. 58 of the *Constitution* and nominal damages. The appellant appealed the judgment on assessment of damages.

HELD:

1. A breach of s. 41 of the *Constitution* is not capable of remedy through s. 57 of the *Constitution*.
2. The primary Judge, in conducting an assessment of damages, did not consider irrelevant facts, or facts not supported by evidence.

Cases cited

Breckwoldt & Co. (N.G.) Pty Ltd v Groyke [1974] PNGLR 106
Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd [2023] FCAFC 51
Curtain Brothers (PNG) Ltd v UPNG [2005] SC758
Kaluwin v Haiveta [2023] SC2384
Nimbituo v Commissioner of the Correctional Service [2025] SC2729
Paraia v The State (1995) N1343
Premdas v Independent State of Papua New Guinea [1979] PNGLR 329.
Raz v Matane [1985] PNGLR 329
SCR No 1 of 1984; Re Minimum Penalties Legislation [1984] PNGLR 314

Counsel

Mr T Injia for the Appellant
Mr S Gor for the Respondents

REASONS FOR JUDGMENT

BY THE COURT: Before the Court is an appeal from a decision of a Judge of the National Court of Papua New Guinea in *Matthew v Ling* [2024] PGNC 34; N10687 (**primary Judgment**). The primary Judgment concerned an assessment of damages owed to the respondent by the appellant (Madang Timbers Limited). The matter before the primary Judge concerned the appellant's liability to pay damages to the respondents, and subsequently the quantity of such damages, arising out of the employment of the respondents by the appellant. The appellant appeals the primary Judge's findings that, in summary, the respondents were entitled to damages under s 58 of the *Constitution* for breach of s 41 of the *Constitution*, and that there was sufficient evidence for the calculation of nominal damages. The first and second defendants to the proceedings below are not party to this appeal – the corporate entity is the sole appellant.

The appellant relies on four grounds of appeal, namely:

- (1) The National Court erred in law and mixed fact and law by applying the principles established in *Petrus v Telikom PNG Limited* (2008) N3373 which was followed in *David Simon v Michael Koisen* (2018) N7075, *Pama v Chris Gens (trading as Kanagio Security Services)* (2020) N8516, *Bual v Kila* (2021) N9329 and awarding compensation for breach of s.41 of the Constitution in addition to damages for unlawful termination and in so doing departed from the principles established in *Jimmy Malai v Papua New Guinea Teachers Association* [1992] PNGLR 568 and *New Britain Oil Limited v Sukuramu* (2008) SC946 that it is an employer's right to hire and fire and the measure of damages for unlawful termination was an employee's notice period and his outstanding wages and entitlements under his employment contract and the *Employment Act* and nothing further.
- (2) The National Court erred in law or mixed fact and law by ruling that the respondents were entitled to compensation under section 58 (3) of the Constitution pursuant to the National Court's power under section 57 of the Constitution for a breach of section 41 of the Constitution in that the Supreme Court in *Raz v Matane* (1985) PNGLR 329 established that section 41 of the Constitution did not create a basic right enforceable by section 57 of the Constitution.
- (3) The National Court erred in law or mixed fact and law in that it should have found that in all circumstances, including the

evidence of the respondents, the power imbalance between the respondents was not relevant in assessing damages for unlawful termination as the respondents' claim in the National Court was for unpaid entitlements, wages and over time between 2015 and 2019 and not for the entire duration of their employment with the appellant, and that in all circumstances the National Court could not be satisfied that it was reasonable to award higher compensation than a nominal amount of K2,000 awarded in comparative cases where a breach of section 41 of the Constitution was established such as *Peter Pama v Chris Gens* (2020) N8516 and *Simon v Koisen* (2018) N7075, and in *Petrus v Telikom* (2008) N3373.

- (4) The National Court erred in law and mixed fact and law by taking into consideration the fact that all of the respondents had been employed by the appellant for most of their working lives and one of the respondent was employed since 1999, a fact not supported by the evidence, in that those facts were not relevant for assessing damages for unpaid wages and entitlements and by so doing awarded an amount greater than the nominal amount of K2,000 awarded in comparative cases such as *Peter Pama v Chris Gens* (2020) N8516 and *Simon v Koisen* (2018) N7075, and in *Petrus v Telikom* (2008) N3373.

In our view, the appeal should be allowed. We have formed this view for the reasons that follow.

background

At all relevant times, the appellant employed each of the respondents as security guards.

Prior to July 2014, the respondents were all paid a salary of around K2.70 per hour as compensation for their services as security guards.

In or about July 2014, the appellant transferred the respondents' remuneration to a fixed rate of K450 per fortnight. It is not in contention that the respondents all signed individual contracts agreeing to that new fixed rate. The primary Judge found that the respondents were under significant pressure when they signed the new contract and were not aware of its provisions.

In 2018, the respondents contacted the Provincial Labour Officer in Madang (Mr Peter Neimani) to seek assistance with improving their employment terms. Thereafter, throughout 2018 and 2019, a series of correspondence was sent

between the Labour Office and the appellant. Several meetings were also held.

In 2019, the respondents' employment was either terminated, or they were not re-employed by the appellant.

Primary Judge's decisions

On 30 November 2020, the primary Judge published judgment in *Matthew v Ling* [2020] PGNC 406; N8665 (the **Liability Judgment**). Importantly, that judgment was not appealed, and is not the subject of this appeal.

On 15 March 2024, the primary Judgment was delivered.

On the issue of the principles of assessing a quantum of damages, his Honour held, relevantly:

13. Breach of s 41(1) of the *Constitution* in an employer/employee situation has attracted compensatory damages under the *Constitution* in this jurisdiction, and the court adopts this approach in this case *Petrus v Telikom PNG Ltd* (2008) N3373, cited with approval in *Morobe Provincial Government v Kameku* (2012) SC1164.
14. Addressing now the question of quantum of damages for breach of s 41, under s 58(3) of the *Constitution*, my findings at paragraphs 27 to 31 in my decision on liability (*Matthew v Ling* (2020) N8665) is the common thread in the evidence of the plaintiffs that led me to conclude that the plaintiffs' rights under s 41(1)(a),(b) and (c) of the *Constitution* were breached. Mr Wak relies on the case of *Kolokol v Ambuarapi* (2009) N3571 to argue that quite apart from compensatory damages for breach of human rights, a human rights victim is entitled to general damages. In a number of cases such as *Buat v Kila* (2021) N9329 I have taken this approach. Breach of s 41 of the *Constitution* in an employer/employee situation has attracted damages in the range of K2,000. In *Pama v Chris Gens (trading as Kanagio Security Services)* (2020) N8516 I awarded K2,000 for breach of s 41(1) of the *Constitution* and K2,000 general damages.

In applying the above principles, his Honour found, relevantly:

15. Due to the power imbalance between the employer and employee in this situation, and the lengthy service of the plaintiffs, warrants a higher award than *Pama v*

Gens. In Petrus v Telikom PNG Ltd (2008) N3373, K5,000 was awarded in circumstances where the security guard were employed for more than four years. The plaintiffs in this case, have spent much of their working life with the defendants. I will therefore award K10,000 to each plaintiff for breach of their rights. I do not think that it is appropriate to award a specific sum for general damages as I have dismissed the claim for negligence. I also accept the defendants' submissions that the plaintiffs had a duty to mitigate their losses. There is also evidence that most of them continue to occupy the defendants' premises at no cost. The wife of one of the deceased plaintiffs, is now in the employ of the third defendant. Mitigation in this instance, meant that they were required to seek employment elsewhere to reduce their loss.

16. In relation to the claim for final entitlements, one of the crucial documents which the plaintiffs relied on to prove the loss of entitlement was a letter dated 17 May 2021 from Hubert Laboi from the Madang office of the Department of Labour. I referred to this piece of evidence earlier in my judgement. The defendants objected to the tendering of that document because the plaintiff could not have the author of the letter available for cross examination, and the letter was attached to the affidavits of the plaintiffs. I upheld that objection. Without the author of the letter, the defendants are denied the opportunity to cross-examine the witness and the court cannot verify the claim. How then do I quantify the plaintiffs' loss of entitlements, given the absence of verified claims?
17. In *Jonathan Mangope Paraia v The State* (1995) N1343, Injia J (as he then was) held that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages. Where precise evidence is available the court expects to have it. However, where it is not, the court must do the best it can. I take this approach in this case which I followed in *Tai v Aka* (2020) N8618.
18. From my general knowledge, the usual items that are factored into any final entitlements are the annual leave entitlements, the notice period, plus any unpaid overtime. The evidence is that the plaintiffs have not been paid these entitlements which I found on the

question of liability. The predicament is that there is no exact sum from the evidence. From the final entitlements that the defendants have calculated, the figures range from K1,761.12 to K2,638.88. This was for the 2019 year alone (Jeffrey Ling's affidavit). From the plaintiffs' affidavits, one of them commenced employment as far back as 1999 and all of them were in employment for much of their life with the third defendant. I take these into account and award a nominal sum to each of the plaintiff of K10,000.00. Given their lack of evidence to verify the quantum although they have established a cause of action for unpaid entitlements, the amount I have assessed is reasonable.

In concluding, his Honour ordered that, relevantly:

1. The third defendant pay the plaintiffs a judgment sum of K232,271.51 to be paid to each plaintiff as follows:

1	Sonny Mathew	K22,593.75
2	Peter Jai	K22,638.88
3	Jerry Ganz	K21,761.12
4	Mathew Ambong	K22,638.88
5	Arnold Arumbai	K22,638.88
6	Thaddaeus Mark	K20,000.00
7	Michael Aurip	K20,000.00
8	Goima Kimin	K20,000.00
9	George Kambin	K20,000.00
10	Luke Sapi	K20,000.00
11	Eki Muname (deceased) substituted by his wife Elizabeth Muname	K20,000.00

appellant's submissions

In relation to grounds of appeal 1 and 2, the appellant submitted, in summary, that:

- The respondents filed 30 affidavits in the proceedings below which were objected to by the appellant. The primary Judge upheld the appellant's objections to those affidavits and ruled them inadmissible. The respondents relied on only the appellant's affidavit of Jeffrey Ling filed 4 October 2019, and the facts established in the Liability Judgment.
- At trial, the respondents sought damages under four separate heads. The appellant submitted that the Primary Judge should have only awarded damages as compensation for the loss of the respondents' entitlements.
- Despite a lack of pleadings and evidence by the respondents at trial, the primary Judge followed the rulings in *Petrus v Telikom Limited* (2008) N3373 and other cases along the same line of authority, and awarded damages for a breach of s 41 of the *Constitution*.
- The primary Judge fell into error by relying on irrelevant or erroneous authorities from the National Court, which were contrary to binding Supreme Court authority. Instead, the primary Judge should have relied on this Court's ruling in *Kaluwin v Haivetta* [2023] SC2384.
- The primary Judge fell into error by awarding damages for the breach of s 41 of the *Constitution*, departing from principles of binding authority that:
 - private employers have the right to hire and fire at will (in the absence of express agreement to the contrary): *Jimmy Malai v PNGTA* [1992] PNGLR 567; *New Britain Oil Limited v Sukuramu* (2008) SC946; and
 - the measure of damages for unlawful termination is what an employee would have received for his salary and other entitlements, had his employment been lawfully terminated: *Porgera Joint Venture Manager Placer (PNG) Ltd v Robin Kami* (2010) SC1060 at [15], [21] and [24].
- For these reasons, the primary Judge's award of K10,000 to each respondent in compensation for the appellant's breach of s 41 of the *Constitution*, should be quashed.

In relation to grounds of appeal 3 and 4, the appellant submitted, in summary, that:

- At [12] of the primary Judgment, his Honour considered facts not in evidence, and facts that were irrelevant to the exercise of discretion for a claim of final entitlements. Specifically, there was no evidence that any of the respondents was employed continuously since 1999, or that the respondents had worked for the appellant for much of their lives.
- The primary Judge failed to consider the principles established in

Ruhuwamo v PNG Ports Corporation Limited (2019) N8021 at [21] and in *PNGBC v Jeff Tole* (2002) SC694. In *PNGBC*, Kandakasi J established that where a plaintiff's claim for damages is special in nature, it must be specifically pleaded with particulars.

- The respondents failed to plead their loss of wages and entitlements and did not produce any evidence at the trial, including evidence which would allow for a nominal award higher than made in comparable cases.

respondents' submissions

In relation to grounds 1 and 2, the respondents submitted, in summary, that:

- The appellant never appealed the Liability Judgment and is barred from raising any findings of that judgment in this appeal.
- It is trite law that a breach of s 41 of the *Constitution* can give rise to a cause of action.
- The respondents' claims before the primary Judge were not for wrongful termination. Rather, the claims were for damages based on the appellant's actions towards the respondents throughout the course of the respondents' employment.
- In cases such as *Petrus*, the National Court awarded compensation for a breach of s 41 of the *Constitution*. By following such cases, the primary Judge did not fall into error.
- The primary Judge was aware that compensation for a breach of s 41 could not be awarded under s 57, and made the deliberate choice to award compensation under s 58 instead.

In relation to grounds 3 and 4, the respondents submitted, in summary, that:

- Most of the evidence of the respondents regarding their terms of employment with the appellant was uncontroversial. The evidence of the appellant by its affidavit of Jerry Ling did not rebut the respondents' evidence regarding the terms of their employment. In this respect, the primary Judge found that the facts led by the respondents were cogent, credible and corroborated: Liability Judgment at [26].
- The primary Judge summarised the actions of the appellant which led to the conclusion that the appellant had breached s 41 of the *Constitution* at [27] to [32] of the Liability Judgment.
- In calculating the final entitlements of the respondents, the primary Judge

relied on the evidence of the appellant in the affidavit of Mr Ling. This figure was reasonable.

- The cases relied on by the appellant in relation to comparative awards of damages were delivered years before.
- In *Petrus*, the National Court awarded each plaintiff K11,147.96.
- In the circumstances, the primary Judge's award of damages was not attended by error.

consideration

At the hearing, it emerged that there were essentially three key issues before the Court, being:

- (1) whether compensation can be awarded as a result of a breach of s 41 of the *Constitution*;
- (2) whether the primary Judge's award of nominal damages was excessive as it was made without evidence; and
- (3) whether the Court could properly award compensation to the respondents for the same injury, under two different heads of damages.

We will consider each of these issues in turn below.

Whether Compensation can be Awarded as a Result of a Breach of s 41 of the *Constitution*

Section 41 of the *Constitution* provides:

41. Proscribed acts.

- (1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case—
 - (a) is harsh or oppressive; or
 - (b) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the 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 an 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.

As already noted, the primary Judge, in the Liability Judgment, found that the appellant had breached s 41. In the primary Judgment, his Honour then awarded compensation under s 58(3) of the *Constitution* for said breach.

Section 58 of the *Constitution* provides, relevantly:

58. Compensation.

- (1) This section is in addition to, and not in derogation of, Section 57 (enforcement of **guaranteed rights and freedoms**).
- (2) A person whose rights or freedoms declared or protected by this Division are infringed (including any infringement caused by a derogation of the restrictions specified in Part X.5 (internment)) on the use of emergency powers in relation to internment is entitled to reasonable damages and, if the court thinks it proper, exemplary damages in respect of the infringement.
- (3) Subject to Subsections (4) and (5), damages may be awarded against any person who committed, or was responsible for, the infringement.

...

(emphasis added)

At the hearing, Counsel for the appellant submitted that s 58 does not operate independently of s 57 of the *Constitution*, and the two must be considered together, at least in the context of this matter.

Section 57 of the *Constitution* provides, relevantly:

57. Enforcement of **guaranteed rights and freedoms**.

- (1) A right or freedom referred to in this Division shall be

protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.

...

(emphasis added)

The key issue before the Court in this respect is whether

In *Raz v Matane* [1985] PNGLR 329, Kapi DCJ explained:

I am not persuaded that s 41 confers a “right or freedom”. The provision deals with acts that are empowered to be done or are allowed to be done by a valid law. The provision sets out the circumstances, (s 41 (a), (b) or (c)), under which such acts may be held unlawful or invalid. The whole thrust of the provision is directed at these actions. It does not confer a “right or freedom” as for example “right” to privacy under s 49 or “freedom” of assembly and association under s 47.

However, any person aggrieved by acts which are prohibited by s 41 (a), (b) or (c), may seek judicial remedy in terms of the provision. That is to say, he has a cause or right of action upon which he may make an application to a court. McDermott J expressed this well when discussing s 41 in the *Minimum Penalty* case, (at 363):

‘... As well there is the newer remedy in the form of a declaratory order available, provision for which is made in the *National Court Rules*. But, the difficulty has always been in getting a cause of action if you like to establish the basis on which to bring one of these actions. Access to courts has been fairly limited in this area. I consider s 41 wittingly or unwittingly remedies that – it supplies a right of action....’

Such a cause of action arises or is constituted at the time these actions are taken.

In this sense, a person has a right of action to come to the Court. This is quite a different thing from a “right or freedom” referred to

in the *Constitution*, s 57.

In *Raz*, Kidu CJ, with whom Kapi DCJ agreed, found:

There is, in my opinion, no doubt that s 41 of the *Constitution* confers a right – the right to challenge an act done under a valid law. In *SCR No 1 of 1984; Re Minimum Penalties Legislation* [1984] PNGLR 314 the following was said by Kapi DCJ at 332-333 of the nature of this right:

‘... A remedy under s 41 cannot be described as an enforcement of a right or freedom under s 57 of the *Constitution*, and therefore the National Court has no power to grant the remedy. It is a general remedy which is quite distinct and separate from enforcement of a right or freedom ...

Section 57 can have no application to the issue in question. Section 57 only applies to enforcement of rights or freedoms. As I have already pointed out, s 41 is a separate and distinct constitutional remedy.’

His Honour the Chief Justice then went on to conclude that:

There is absolutely no doubt that s 41 does not provide for a human right.

Section 57 was quite clearly meant to be used by the Supreme Court, the National Court and any other court designated by an Act of the Parliament to remedy breaches of human rights.

...

(emphasis added)

Prior to *Raz*, this Court reached a similar conclusion in *Premdas v Independent State of Papua New Guinea* [1979] PNGLR 329.

In *Kaluwin v Haiveta* [2023] SC2384, this Court adopted the approaches of the Court in *Raz* and *Premdas*. In a unanimous decision, detailing the authorities concerning, and principles underpinning ss 41 and 57, their Honours concluded:

...we find the decisions and the respective reasoning in each of the cases are sound and should be maintained. We adopt the reasoning in those decisions as our own. Proceeding on that basis, we are of the view that s. 41 does not create and or grant a right capable of enforcement under s. 57 of the *Constitution*.

...

Plainly, the law is settled that a breach of s 41 is not capable of remedy through s 57 of the *Constitution*. We respectfully adopt the reasoning of the Supreme Court in the above authorities.

At the hearing, the respondent sought to distinguish the above line of authority on the basis that the trial Judge in this instance exercised his Honour's power under s 58 of the *Constitution*, not s 57. We find that there is no basis for such distinction.

According to the authorities above, the reason for the inapplicability of s 57 to remedy a breach of s 41 is that s 41 does not create a "right or freedom" for the purposes of s 57. Similarly to s 57, s 58 is clearly predicated on being used to remedy a right or freedom: s 58(2) of the *Constitution*. Without the breach of a "right or freedom" the ability to rely on s 58 is not enlivened.

Further, s 58(1) states that it "is an addition to, and not in derogation of, Section 57 (enforcement of guaranteed rights and freedoms)". It follows that there is no basis whatsoever for distinguishing the ability to remedy a breach of s 41 with the use of s 57 or s 58.

Sections 57 and 58 can be distinguished, for example, from s 23 of the *Constitution*. That section allows for the awarding of compensation by the National Court for acts not limited to a "guaranteed right or freedom".

In light of the above, the primary Judge had no proper basis for ordering damages to be paid pursuant to s 58 of the *Constitution* for breach of s 41 of the *Constitution*. It follows that ground of appeal 2 is substantiated.

At the hearing, the appellant relied on grounds of appeal 1 and 2 largely as a combined ground. Given our finding in relation to ground 2, there is no utility in ground 1, and it therefore need not be considered.

Whether the Primary Judge's Award of Nominal Damages was Attended by Error

It is well settled that the assessment of damages involves an exercise of judicial discretion : see for example *Nimbituo v Commissioner of the Correctional Service* [2025] SC2729 at [12]-[14]. It is also settled law that this Court – when considering an appeal from a lower Court's exercise of discretion in awarding damages – will only disturb such an order if the discretion was exercised in accordance with a wrong principle, or where the lower Court relied on

extraneous or irrelevant material, mistook the facts, or failed to consider relevant facts: see, e.g., *Curtain Brothers (PNG) Ltd v UPNG* [2005] SC758 at 12, citing *Breckwoldt & Co. (N.G.) Pty Ltd v Groyke* [1974] PNGLR 106 at 112-113.

Principles relevant to an assessment of damages were clearly laid out by the primary Judge at [5] of the primary Judgment. The appellant has raised no appeal from the identification of the relevant principles by the primary Judge.

By ground 3, the appellant's only challenge to the primary Judgment is that the primary Judge relied on extraneous or irrelevant material, or mistook the facts, in assessing damages.

The appellant submits that the primary Judge's consideration of a "power imbalance" between the appellant and the respondents was not supported by evidence. The appellant further submits that a consideration of any power imbalance was erroneous as the respondents' claim was merely for unpaid entitlements between 2015 and 2019.

At [26] of the Liability Judgment, his Honour found:

27. I find the facts led by the plaintiffs to be cogent, credible and corroborated. The evidence shows that the manner the plaintiffs were treated were harsh and oppressive...

The primary Judge continued:

27. The defendants' actions to pay the plaintiffs a fixed salary of K450 per fortnight from when it commenced in 2014 to 2019 was to avoid paying the plaintiffs for actual hours worked...

It can be readily inferred that the primary Judge's recognition of a power imbalance between the appellant and the respondents in assessing damages, followed the unchallenged factual findings of the primary Judge in the Liability Judgment. In particular, the fact that the appellant was able to avoid paying its employees their minimum legal entitlements for a period of at least 5 years.

In any event, in the vast majority of cases, there will be an inherent power imbalance between an employer and its employees. The Full Court of the Federal Court of Australia has similarly recognised that such a power imbalance is "inherent": *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51 at [38].

In *OS MCAP*, the Full Court held:

38. ...the provision confronts is the inherent power imbalance that exists between employers and employees. By virtue of this imbalance, employees will often feel compelled, and not understand, that they have the capacity to refuse a request that is unreasonable or where their own refusal is reasonable.

We are not persuaded that the primary Judge fell into error by considering that there was a power imbalance between the appellant and the respondents in assessing damages payable to the respondents.

By ground 4, the appellant again claims that the primary Judge relied on extraneous or irrelevant material, or mistook the facts in assessing damages. This ground takes issue with the alleged excessive nature of the damages awarded.

The appellant submits that the primary Judge erred by taking into consideration the fact that all of the respondents had been employed by the appellant for substantial periods of time. The appellant submits that this consideration was irrelevant and not supported by evidence.

The assertion that many of the respondents had been employed for significant periods of time was noted by the primary Judge at [9] of the Liability Judgment. That observation was followed by the primary Judge's finding that the respondents' assertions of fact were "cogent, credible and corroborated" at [26] of the Liability Judgment.

As we have already stated, the Liability Judgment, including the primary Judge's findings of fact therein, are not the subject of this appeal. Therefore, for this Court to consider the correctness of such findings would be an exercise of judicial power outside the jurisdiction of this Court.

In light of the above, we find that the primary Judge, in conducting the assessment of damages, did not consider irrelevant facts, or facts not supported by evidence.

For completeness, the appellant submitted that the respondents were only entitled to their unpaid entitlements on termination, and accordingly, any award should be limited to K2,000 for each respondent. The problem with this submission is threefold.

First, the appellant's case was not merely one for wrongful termination. The claim was a broad one relating to the appellant's conditions of employment and remuneration over an extended period of time. As we observed earlier, the appellant's claim and prayer for relief in its Statement of Claim was phrased extremely broadly.

Second, the primary Judge noted at [5] of the primary Judgment that there was insufficient evidence for an exact award of nominal damages to be reached. Instead, his Honour correctly relied on *Paraia v The State* (1995) N1343 in stating that it is the Court's task to do the best it can with the evidence before it. That is what the primary Judge did. The primary Judge's task was particularly difficult in that the appellant's liability included a failure to pay the respondents overtime for an extended period. Precisely calculating such entitlements was a near impossible task. The task of this Court is not to determine whether *we* would have awarded the same amount of damages as the primary Judge. The task of this Court is to identify whether there was any error in the primary Judge's approach. There was no such error.

Third, the appellant's claim that each respondent should be awarded K2,000 in damages is entirely inconsistent with both its submissions before this Court, and those before the primary Judge. Counsel for the appellant in this Court submitted that there should be clear evidence to calculate damages. The appellant provided no such calculation for the award of damages it seeks in this appeal. Also, before the primary Judge, the appellant submitted that the total award of damages should be K73,000. The appellant has provided no explanation for the substantial difference in the orders it seeks from this Court, as compared to those sought before the primary Judge.

As we observed earlier in these reasons, the appellant did not raise any issue with the primary Judge's identification of principles of assessment of damages. The appeal from the assessment of nominal damages was limited solely to the appellant's claims about the consideration by the primary Judge of particular facts. We have found that there was no such error on the part of the primary Judge. As such, grounds of appeal 3 and 4 are not substantiated.

conclusion

Each party has enjoyed some success in this appeal. In the circumstances, we consider it appropriate for each party to bear their own costs of the appeal.

We now turn to the appropriate form of orders to give effect to these reasons.

The respondents' Statement of Claim filed 13 August 2019 made a broad claim as to damages sought. It is clear, from the transcript of the hearing on assessment of damages before his Honour, that the appellant did not argue that the National Court lacked power to award compensation for a breach of s 41 of the *Constitution*. Plainly the appellant's case in this Court was substantially different to that argued before the primary Judge.

We consider that, had the primary Judge correctly found that the National Court did not have the power to award compensation for a breach of s 41, his Honour may have made a different award of damages.

Accordingly, we consider it appropriate that the matter be remitted to the primary Judge for a fresh consideration of the assessment of damages.

63. The Court orders that:

1. The appeal be allowed.
2. The matter be remitted to the primary Judge for a directions hearing whereby timetabling orders are made for the parties to file any further evidence on the assessment of damages.
3. The primary Judge reassess the damages in light of the reasons of this Court and any further evidence filed pursuant to timetabling orders made in accordance with para 2 of these Orders.
4. There be no order as to costs.

Lawyers for the appellant: *Ashurst*

Lawyers for the respondents: *Gor Lawyers as Town Agent for Bradley & Co Lawyers*