

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

**HRA NO. 257 OF 2019**

BETWEEN:

**SONNY MATTHEW FOR AND ON BEHALF OF HIMSELF AND  
PETER JAL, JERRY GANZ, MATTHEW AMBONG, ARNOLD  
ARUMBAL, THADDEUS MARK, MICHAEL AURIP, GOMIA KIMIN,  
GEORGE KAMBIN, LUKE SAPI AND EKI MUNAME**

*Plaintiff*

AND:

**JEFFREY LING, GENERAL MANAGER, MADANG TIMBERS  
LIMITED**

*First Defendant*

AND:

**FRANCIS KALIP, HUMAN RESOURCE MANAGER, MADANG  
TIMBERS LIMITED**

*Second Defendant*

AND:

**MADANG TIMBERS LIMITED**

*Third Defendant*

Madang: Narokobi J

2020: 26<sup>th</sup> October, 30<sup>th</sup> November

***HUMAN RIGHTS – Whether the plaintiffs have established a cause of action for breach of their rights under ss 37, 41, 54 and 59 of the Constitution on the pleadings and the evidence***

***NEGLIGENCE – Whether the plaintiffs have established a cause of action for breach of duty of care on the pleadings and the evidence***

The plaintiffs are former employed security guards of the third defendant. They are suing the defendants for breach of human rights and negligence.

***Held:***

- (1) The plaintiffs have established a cause of action for breach of human rights under s 41(1)(a),(b) and (c) of the *Constitution* and are entitled to damages for the infringement.
- (2) The claims for breach of ss 37, 54, 59 and for negligence are dismissed.

**Cases Cited:**

*Kuman v Digicel (PNG) Ltd* (2013) SC1232  
*Morobe Provincial Government v Kameku* (2012) SC1164  
*Pama v Gens (trading as Kanagio Security Services)* (2020) N8358  
*Petrus v Telikom PNG Ltd* (2008) N3373  
*Simon v Koisen* (2018) N7075

**References referred to:**

CPC Final Report 1974

**Counsel**

*Mr B Wak*, for the Plaintiffs  
*Mr B Meten*, for the Defendants

**JUDGMENT**

**30<sup>th</sup> November, 2020**

**1. NAROKOBI J:** This is a trial on liability for infringement of human rights and for breach of duty of care occasioning negligence.

**Background**

2. The plaintiffs are security guards of the third defendant. Some of them have been terminated. They are claiming unpaid entitlements and damages occasioned from their treatment. They say this constitutes a breach of their rights and negligence on the part of the defendants.

## Issues

3. The main contention in this proceeding is firstly whether the plaintiff's right has been infringed and secondly whether the defendants breached the duty of care it owed to the plaintiffs?
4. The rights claimed to have been infringed are ss 37, 41, 54 and 59 of the *Constitution*.

## Evidence

5. The following are the evidence tendered before the court by the plaintiffs and the defendants:

No	D a t e filed	Description of document/item tendered	Exhibit No
1	16.3.20	Affidavit of Sonny Mathew sworn 3/3/20	"P1"
2	16.3.20	Affidavit of Peter Jai sworn 13/3/20	"P2"
3	16.3.20	Affidavit of Jerry Ganz sworn 13/3/20	"P3"
4	16.3.20	Affidavit of Mathew Ambong sworn 13/3/20	"P4"
5	16.3.20	Affidavit of Arnold Arumbai sworn 13/3/20	"P5"
6	16.3.20	Affidavit of Thaddius Mark sworn 13/3/20	"P6"
7	16.3.20	Affidavit of Gomia Kimin sworn 13/3/20	"P7"
8	16.3.20	Affidavit of George Kambing sworn 13/3/20	"P8"
9	16.3.20	Affidavit of Luke Sapi sworn 13/3/20	"P9"
1 0	16.3.20	Affidavit of Elizabeth Munume sworn 17/3/20	"P10"
1 1	13.8.19	Affidavit of Sonny Mathew sworn 5/8/19	"P11"
1 2	4.10.19	Affidavit of Jeffrey Ling sworn 29/8/19	"D1"

6. All in all, the plaintiffs tendered 10 affidavits and the defendant tendered one (1).

### **The Plaintiffs Case**

7. The plaintiff's case is that when they were asked to sign a contract of employment for a fixed fortnightly salary of K450, they did not know what they were signing. Upon realizing the change in the salary they took the matter up with the human resource unit in the management but were refused. They then complained to the Department of Labour. After the Department's intervention they reached an agreement for them to be paid overtime for 2019 only and not all the way back to 2014. It was then that they were asked to collect their final entitlement which includes the overtime from 2019 only and resign as the third defendant was now going to engage the services of a private firm. They allege that their termination was done out of reprisal for their actions.

8. In support of their claim the plaintiffs rely on the affidavits identified as P1 to p10, inclusive.

9. A summary of what each affidavit states is set out hereunder.

<b>Deponent</b>	<b>Evidence</b>
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Affidavit of Sonny  
Mathew sworn 3/3/20

- 45 years old, married with two wives and has children and has lived and worked in Madang for the last 10 years;
- Works as a static security guard for Madang Timbers Ltd;
- Commenced employment on 18 September 2009, and stationed in a number of locations such as company sawmills, mechanical workshop and main administration;
- From September 2009 to January 2012 was paid at K2.29 per hour;
- From January 2012 his rate was increased to K2.70 per hour;
- In 2014 Woodbank Ltd came in leasing some of Madang Timbers Ltd yard;
- Around July 2014 they (plaintiffs) were paid K2.80 per hour for two (2) fortnights only from June 21 to 18 July 2014;
- In 2015 he and the other two plaintiffs (Peter Jai and Mathew Ambong) were informed by the Human Resource Manager, Mr Francis Kalip of Madang Timbers Ltd that they would sign a three (3) year employment contract;
- They asked to read the contract, but was refused and threatened to be terminated if they read it;
- After signing it, they requested for copies of the contract but were refused;
- On 19 July 2014 they learnt that instead of being paid K2.80 per hour, they were paid at a fixed rate of K450.00;
- They were not satisfied so they wrote to the Personnel Manager, Mr Ken Martin. Receiving no response they wrote a second time in a letter dated 20 September 2017;
- On Wednesday 6 July 2014 a Ken Martin informed them that there will be a change in their pay rate.
- This did not eventuate and they continued to receive pay at a fixed rate of K450 from 16 July 2014 to 12 July 2019;
- The issue was brought by Peter Jai, Mathew Ambong and himself to the Provincial Labour Officer, Mr Peter Neimani who then wrote to Madang Timbers Ltd regarding their grievance in a letter dated 11 December 2018;
- There was no response and a follow-up letter from Mr Hubert Laboi was sent dated 7 March 2019;
- The Labour office then sent a report dated 27 March

<p>Affidavit of Peter Jai sworn 13/3/20</p>	<ul style="list-style-type: none"> <li>• 50 years old, married with four (4) children and from East Sepik Province;</li> <li>• Commenced employment on 9 November 2005, and provides security at the new sawmill area;</li> <li>• Starting pay rate of K2.29 per hour;</li> <li>• In June 2014 it was increased to K2.70 per hour</li> <li>• In 2014 pay was increased by 10 toea but was only for two (2) fortnights;</li> <li>• Has not been paid overtime, holidays and annual leave since employment;</li> <li>• In June 2014, Woodbank company merged with Madang Timbers Ltd and has been using some of the latter's facilities;</li> <li>• When he was being paid at a fixed rate of K450 per fortnight, he complained and at one time Mr Francis Kalip became very angry with him, and banged the table and told them to take the matter to court;</li> <li>• Provides similar details deposed to by Mr Sonny Mathew regarding their complaint to the Labour office and the aftermath.</li> </ul>
<p>Affidavit of Jerry Ganz sworn 13/3/20</p>	<ul style="list-style-type: none"> <li>• 47 years old, married with six (6) children and from East Sepik Province;</li> <li>• Commenced employment on 6 June 2012, and provides security at the new sawmill area;</li> <li>• Starting pay rate of K2.29 per hour;</li> <li>• In June 2014 it was increased to K2.70 per hour</li> <li>• In 2014 pay was increased by 10 toea but was only for two (2) fortnights;</li> <li>• His payslips were destroyed in a fire; and</li> <li>• When he was being paid at a fixed rate of K450 regardless of hours worked and says his rights have been infringed.</li> </ul>

<p>Affidavit of Mathew Ambong sworn 13/3/20</p>	<ul style="list-style-type: none"> <li>• 45 years old, married with five (5) children and from East Sepik Province;</li> <li>• Commenced employment on 9 November 2013, and provides security at the new sawmill area;</li> <li>• Starting pay rate of K2.29 per hour;</li> <li>• In June 2014 it was increased to K2.70 per hour</li> <li>• In 2014 pay was increased by 10 toea but was only for two (2) fortnights;</li> <li>• Has not been paid overtime, holidays and annual leave since employment;</li> <li>• In June 2014, Woodbank company merged with Madang Timbers Ltd and has been using some of the latter's facilities;</li> <li>• When he was being paid at a fixed rate of K450 per fortnight, he complained and at one time Mr Francis Kalip became very angry with him, and banged the table and told them to take the matter to court; and</li> <li>• Provides similar details deposed to by Mr Sonny Mathew regarding their complaint to the Labour office and the aftermath.</li> </ul>
<p>Affidavit of Arnold Arumbai sworn 13/3/20</p>	<ul style="list-style-type: none"> <li>• 58 years old, married with four (4) children and from East Sepik Province;</li> <li>• Has lived and worked in Madang for more than 40 years. Of this he has spent 36 years working with Madang Timbers Ltd providing security services as a static guard;</li> <li>• First employed by Madang Timbers Limited from 1989 to 2003. He discontinued from working because of eviction exercises going on;</li> <li>• From 1989 to 2003 he was paid K1.00 per hour. Due to the fire from the eviction exercise his payslips were destroyed;</li> <li>• On 11 November 2007 he was reemployed by Madang Timbers Ltd, starting at K2.29 per hour from November 2007 to January 2012 when it was increased to K2.70 per hour;</li> <li>• When he was being paid at a fixed rate of K450 per fortnight, he complained and at one time Mr Francis Kalip became very angry with him, and banged the table and told them to take the matter to court; and</li> <li>• Provides similar details deposed to by Mr Sonny Mathew regarding their complaint to the Labour office and the aftermath.</li> </ul>

<p>Affidavit of Thaddius Mark sworn 13/3/20</p>	<ul style="list-style-type: none"> <li>• 30 years old and married with no children, and was born in Madang;</li> <li>• Employed as a static guard in October 2008, and was paid at the rate of K2.29 per hour up until 25 March 2012, when it was increased to K2.70;</li> <li>• In 2018 the hourly rate was changed to a fixed rate of K450 per fortnight and subjected to tax and Nasfund deductions;</li> <li>• On 30 July 2018 for unknown reasons he was terminated and on 15 August 2019 was informed and forced to accept his termination and receive his entitlements;</li> <li>• He was told that he would be re-employed;</li> <li>• He was paid entitlements of K2,208.00 being for 5 August 2019 and K2,593 for 5 August 2019;</li> <li>• He was not reemployed as promised and has not been paid according to the Minimum Board's Determination of July 2014 and 2015</li> </ul>
<p>Affidavit of Gomia Kimin sworn 13/3/20</p>	<ul style="list-style-type: none"> <li>• 57 years old, married with one (1) child and four (4) grandchildren;</li> <li>• Starting pay rate of K2.29 per hour;</li> <li>• In June 2014 it was increased to K2.70 per hour</li> <li>• In 2014 pay was increased by 10 toea but was only for two (2) fortnights;</li> <li>• Has not been paid overtime, holidays and annual leave since employment;</li> <li>• The defendants have not complied with the Department of Labour's letters;</li> <li>• On 30 July 2019 he went to the company office to collect his backdated pay but Mr Jeffrey Ling and Mr Francis Kalip told him that the Provincial Labour office has not endorsed the payments and that he must sign his termination letter first to collect his entitlements and after four (4) months he would be reemployed;</li> <li>• He was not allowed to read the contents of the documents he signed regarding his termination.</li> </ul>

Affidavit of George Kambing sworn 13/3/20

- 68 years old, from Bilia Urbane village in Madang, Madang Province;
- He was employed by Madang Timbers Ltd in May 1989 and was attached to the Sawmill Fitter & Maintenance Engineering assisting the production line;
- He was retrenched in 1998 with 200 others due to drop in logging prices;
- He was reemployed on 13 June 2005 with Madang Timbers Ltd as a static security guard, supervising 30 guards guarding five (5) locations;
- He was promised on 25 April 2012 to be paid K3.20 per hour with effect from 1 May 2012 according to the minimum wages board determination;
- Between July 2014 and 2019, he with others in the proceedings encountered many employer/employee problems with Madang Timbers Ltd regarding working conditions;
- He has done several follow-ups but there was no feedback from him;
- On 26 July 2019 he was called into the office and asked to sign some papers by Mr Francis Kalip in the presence of an expatriate woman and two labour officers. He was urged to sign them without looking at them. Later he realized that the papers he signed were in relation to:
  - i. Backdate pay for 2019 only and not for the other past pay periods;
  - ii. Termination from employment;
  - iii. Fortnight pay for 29 June 2019 to 12 July 2019; and
  - iv. My recreational leave and my final entitlements.
- He later learnt that other four (4) company's security guards before him refused to sign their papers and left the office because they were concerned by the presence of the Labour officers who they realized were colluding with the company to force to do things against their better judgments and their rights; and
- Since the Labour office is not helping him, he is seeking justice from the courts.

Affidavit of Luke Sapi  
sworn 13/3/20

- 42 years old, married with three (3) children, although he comes from East Sepik he was born in Madang and spent all his life in Madang;
- Has worked with Madang Timbers Limited from March 2013 to July 2019
- Starting pay rate of K2.29 per hour;
- He was never paid overtime, holidays and annual leave since employment;
- In June 2014 Woodbank company merged with Madang Timbers Ltd;
- In June 2014 it was increased to K2.70 per hour
- In 2014 pay was increased by 10 toea but was only for two (2) fortnights;
- Has not been paid overtime, holidays and annual leave since employment;
- On 30 July 2014 he was surprised by the decision of Madang Timbers Ltd General Manager Mr Jeffrey Ling and Human Resource Manager Mr Francis Kalip and the late Human Resource Manager for Woodbank Mr Ken Martin who changed his hourly rate from K2.80 to K450 per fortnight. It was non-negotiable;
- In July 2019 he has been terminated without any formal notice after bringing his grievance to the Labour office and refusal to sign any further documents.

Affidavit of Elizabeth  
Munume sworn 17/3/20

- Widow of the late Eki Munume, one of the named plaintiffs. They have six (6) children and they are from Rai Coast in Madang Province;
- Late husband was employed by Madang Timbers Limited on 5 January 1999 as a static guard managing the warehouse within Madang Timbers yard;
- From 5 January 2019 her late husband worked continuously and served the company on full time bases working six (6) days a week with only one day off;
- He worked despite complaining of being sick;
- Her late husband was paid a fortnightly rate of K1.70 as of 5 January 1999;
- In 2010 he was paid K2.29 per hour and on 25 March 2012 his pay was slightly increased to K2.70 per hour;
- He supported Mr Sonny Mathew to fight for better working conditions;
- His sickness was due to overworking and poor working conditions;
- After seeing the nurse at the clinic he had to walk home as there was no money for us to get on the bus;
- Husband died on 6 April 2019

- The 11 plaintiffs in these proceedings, are currently employed by Madang Timbers Limited as Security guards. Started working with the company on different dates, but we were already in employment and serving the company Madang Timbers Limited when Woodbank took over management of the company in June 2014;
- When Woodbank took over the company, Madang Timbers Limited in June 2014, each plaintiff were offered new Employment Contracts. Most of them are semi- literate or illiterate and do not understand the contents of the employment contracts.
- Told to just sign our new contracts because a new owner had taken over the company and that the re-employment under a new employment contract was imperative;
- Did not realize that under the new employment contract they were supposed to be paid a fixed amount of K450.00 per fortnight. This effectively meant that they were are not entitled to claim overtime pay for extra hours that we would work;
- Under the previous management, they were paid overtime for extra hours worked. On the normal working days Monday to Friday, they were paid time and a half for overtime and on Sundays and Public Holidays we were paid double time for extra hours worked;
- Eleven separate Contracts of Employment were prepared for them, (security guards) and they were told to just sign the contracts. The management of the company did not tell them that this contract basically states that they will not be paid overtime for any extra hours that was worked.
- Did not notice this clause in the contract of employment. The company is now stating that they have signed employment contracts and therefore are not entitled to overtime pay;
- Realised at the first fortnight that overtime was not paid. When inquired they were told that under the new employment contract they will be paid a fixed sum of K450.00 per fortnight and no extra pay for extra hours worked;
- Upon realizing that overtime was not paid, they approached the Human Resources Manager of the company to inquire as to why overtime was not paid;
- The Human Resources Manager refused to entertain

10. In submissions the plaintiff submitted that the actions of the defendants have led to the breach of the following rights of the plaintiffs – ss 37, 41, 54 and 59 of the *Constitution*.

11. They seek orders for the court to find the defendants liable for the two causes of action pleaded.

### **Defendant's Case**

12. The defendant refutes the claim and submits that they have done everything properly and all the documents signed was signed after it was explained to them. They say that the company has taken a management decision to terminate company guards and employ a private firm of security guards.

13. The defendant relies on only one (1) affidavit, that of Jeffrey Ling sworn on 29 August 2019.

14. A summary of what the deponent states is set out hereunder.

<b>Deponent</b>	<b>Evidence</b>
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Jeffrey Ling sworn 29  
August 2019

- Between 4 May 2015 and 10 August 2015, each of the Plaintiffs signed individual contracts of employment with the 3<sup>rd</sup> Defendant to be employed as security guards in accordance with the terms of each of their own contract of employment.
- Before each of the Plaintiffs signed their individual contracts of employment, the terms of the contract were interpreted to each of the Plaintiffs individually in the Pidgin Language. Each of the Plaintiffs indicated individually that each understood his contract of employment before each signed the contract. The interpreter also signed the contract of each of the Contracts.
- With some of the Plaintiffs when they signed their Contract of Employment, they also signed a Housing Agreement which formed part of the terms of their contract of employment.
- By letter dated 27<sup>th</sup> March 2019, the Madang Provincial Labor Office (MPLO) wrote advising them of a complaint by their Security Guards that they were not being paid overtime and that the fixed wage rate contained in each of their contract was illegal. We received the letter on the 21<sup>st</sup> of June 2019.
- Following that letter, a meeting was held between the MPLO and the human resources on 10 July 2019.
- By MPLO letter dated 16 July 2019, briefed of the discussions in that meeting and some proposal as to settling the dispute.
- After receiving the MPLO letter, agreed to pay the overtime for 1 January 2019 to 31 July 2019 as suggested in the discussion of 10 July 2019.
- A memorandum of agreement was prepared and signed by the securities including some of the Plaintiffs.
- We have complied with the terms of the MOA and calculate the overtime for each of the Plaintiffs from 1 January 2019 to 31 July 2019.

15. In the defendant's contention no right has been infringed and all entitlements due to the plaintiffs have been paid.

### **The Law**

16. The relevant provisions of the *Constitution* being considered as to whether they have been infringed are ss 37, 41, 45 and 59.

17. The plaintiffs also say that the manner in which they were treated was negligent, and in that regard has to prove the following (*Kuman v Digicel (PNG) Ltd* (2013) SC1232):

- There was a duty of care;
- The duty was breached; and
- Damages ie injuries, distress etc was suffered as a result.

18. I will state the findings of facts against each of these areas of the law and consider whether they establish the cause of action as claimed.

### **Right to Protection under the Law, Constitution s 37**

19. Section 37 of the *Constitution* provides a number of rights within the general ambit of that provision.

20. The defendant contends that the plaintiffs have not particularized which right under s 37 of the *Constitution* was breached.

21. I have considered the submissions of the plaintiff and visited their statement of claim, and I am in agreement with the defendant in their submissions. I therefore dismiss this claim.

### **Proscribed Acts, Constitution s 41**

22. Section 41 of the *Constitution* is in the following terms:

*“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.”*

23. I have to determine whether the plaintiff was treated in a manner that was contrary to any of the succeeding paragraphs of s 41(1) of the *Constitution*, that is s 41(1)(a), (b) or (c) and thereby establishing a cause of action.

24. A definition of s 41(1) of the *Constitution* was provided in *Petrus v Telikom PNG Ltd* (2008) N3373 and endorsed by the Supreme Court in *Morobe Provincial Government v Kameku* (2012) SC1164. In *Petrus* the court relevantly said:

*“7. Section 41 proscribes (ie prohibits) and gives protection against seven sorts of acts. Even if done under a valid law and notwithstanding anything to the contrary in any law, an act is unlawful if it is, in the particular case:*

*1. harsh; or*

*2. oppressive; or*

*3. not warranted by the requirements of the particular circumstances;*

*4. disproportionate to the requirements of the particular circumstances;*

*5. not warranted by the requirements of the particular case; or*

*6. disproportionate to the requirements of the particular case; or*

*7. otherwise not, in the particular circumstances,*

*reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind.”*

25. I turn now to the facts of the case, bearing in mind my findings of facts on the balance of probability and see whether they show a breach of s 41(1) of the *Constitution*.

26. 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 following circumstances were harsh and oppressive.

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 as required under Par IV, Conditions of Employment of the *Employment Act*, Ch 373, especially s 52 and the *Minimum Wages Board Determination No 1 of 2014* to pay K3.50 per hour as of 3 July 2016. It does not take into account the number of hours worked beyond a normal eight (8) hour working day from Monday to Friday and then at time and a half on a Saturday and double time on Sunday as well as double time on public holidays. As such it was harsh and oppressive in the circumstances.

28. I find that only paying them for hours worked in 2019 was to avoid meeting the requirements as spelt out by the Labour Department in their brief to the defendants dated 16 July 2019.

29. Such actions were not only harsh and oppressive but were not warranted by the circumstances of the case and not reasonably justifiable in a democratic society where people need to live on a decent wage.

30. The defendants were wrong to negotiate with the plaintiffs if the basic requirements of the employment laws to be paid according to the *Employment Act* was not met in the first place. A need for negotiation would arise if the terms to be negotiated was above the minimum term. Such action was therefore not warranted by the requirements of a particular case.

31. I am inclined to draw the inference that what the defendants did to the plaintiffs was in reprisal for taking their matter up with the Labour Department. If the defendants wished to terminate the plaintiffs, all it had to do was to pay the plaintiffs the minimum requirements under the relevant laws and then terminate them by giving the required notice period or paying them money in lieu of notice. Such action was therefore harsh and oppressive. The defendants have not led evidence to show that as of the date of filing the case against them by the plaintiffs, they have in fact engaged a private security firm to provide

security for them. I can only conclude that the actions to terminate was in direct reprisal for taking up the matter with the Labour Department. It is true that the defendants have the right to terminate but the manner in which it was done was harsh and oppressive.

32. All these instances in which the plaintiff was treated by the employees of the fourth defendant have been established as facts, and in my respectful view, amount to breach of s 41(1)(a),(b) and (c) of the *Constitution*. In this regard, I also find relevant the several National Court decisions to support my view - *Pama v Gens (trading as Kanagio Security Services)* (2020) N8358, *Petrus v Telikom PNG Ltd* (2008) N3373 and *Simon v Koisen* (2018) N7075, where the court found that the manner in which an employer treats his or her employee may amount to breach of s 41(1) of the *Constitution*. In *Pama*, I held amongst other findings, that failing to respond to correspondence of the Labour Department amounts to breach of s 41. In *Petrus*, the issue was not being paid the appropriate salaries. For *Simon* the concerned issue was the abrupt transfer notice to the plaintiff to move to another work location. This case falls within the range of the circumstances of these National Court decisions.

33. Consequently, my ultimate view on this issue is that the plaintiffs have established a cause of action under s 41(1)(a),(b) and(c) of the *Constitution* on the balance of probability against all the defendants.

### **Freedom of Conscience, Thought and Religion, Constitution s 45**

34. In relation to Section 45 of the *Constitution*, it is in the following terms:

*“45. Freedom of conscience, thought and religion.*

*(1) Every person has the right to freedom of conscience, thought and religion and the practice of his religion and beliefs, including freedom to manifest and propagate his religion and beliefs in such a way as not to interfere with the freedom of others, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38 (general qualifications on qualified rights).*

*(2) No person shall be compelled to receive religious instruction or to take part in a religious ceremony or observance, but this does not apply to the giving of religious instruction to a child with the consent of his parent or guardian or to the inclusion in a course of study*

*of secular instruction concerning any religion or belief.*

*(3) No person is entitled to intervene unsolicited into the religious affairs of a person of a different belief, or to attempt to force his or any religion (or irreligion) on another, by harassment or otherwise.*

*(4) No person may be compelled to take an oath that is contrary to his religion or belief, or to take an oath in a manner or form that is contrary to his religion or belief.*

*(5) A reference in this section to religion includes a reference to the traditional religious beliefs and customs of the peoples of Papua New Guinea.”*

35. Whilst I can appreciate the plaintiffs claim in that they were not accorded the opportunity to freely make a decision, however, after reading s 45 carefully and having regard to the *CPC Report*, Chapter 5, Pat 1, p10, I am inclined to take the view that the general thrust of that provision is inclined towards freedom of worship according to a person's choice of faith or to no faith at all. It was therefore incumbent upon the plaintiffs to plead the particular right that is being infringed and provide adequate case authorities to strengthen its claim for breach of this right. On this basis, I will accede to the defendant's submissions and dismiss this claim.

### **Principles of Natural Justice, Constitution s 59**

36. The law as it stands, fairly or not is that in a private employer/employee relationship the employer has the right to hire and fire. What is required is the payment of the notice period. The authorities that the plaintiff relies on is in the public sector where claims are made by way of a judicial review. This is a private employment situation. Requirements to comply with s 59 of the *Constitution* does not arise. I therefore dismiss this claim.

### **Negligence**

37. The plaintiffs have not pursued the claim of negligence in their submissions but instead made submissions on unlawful termination. Unlawful termination was not pleaded in the statement of claim. They have therefore not persuaded me to the requisite standard to find the defendants negligent.

### **Orders**

38. In light of the foregoing I make the following orders:

- 1) The plaintiffs have established a cause of action for the breach of their rights under s 41(1)(a),(b) and (c) of the *Constitution*.
- 2) Consequently, the plaintiffs have established a cause of action for failure by the third defendant to pay the plaintiffs their lawful final entitlements.
- 3) All the other claims are dismissed.
- 4) Plaintiffs make the necessary application to have the deceased plaintiff Eki Munume substituted by his wife Elizabeth Munume.
- 5) Matter shall be listed for 15 February 2021 at 9.30am for directions hearing for assessment of damages.
- 6) Costs of the proceedings to date is awarded in favour of the plaintiffs and will be ascertained after the conclusion of trial on assessment of damages.
- 7) Time is abridged.

Bradley Wak Lawyers: *Lawyers for the Plaintiffs*

Meten Lawyers: *Lawyers for the Defendants*