N3124

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS NO 1175 OF 2003

VITUS SUKURAMU
Plaintiff

v

NEW BRITAIN PALM OIL LIMITED
First Defendant

AND:

NEIL SMITH
Second Defendant

AND:

BEN TONAIM
Third Defendant

AND:

KARL AISI
Fourth Defendant

Kimbe: Cannings J

2006: 24 March, 7 June
2007: 16 February

JUDGMENT

LAW OF EMPLOYMENT – contract of service – termination of contract for cause – wrongful dismissal claim – alleged breach of contract – whether termination lawful – terms of contract – express and implied terms – whether employee's right to be heard prior to dismissal is an implied term – whether Company Regulations giving right of appeal are incorporated as terms of contract.

UNDERLYING LAW – common law – principle that employer can hire and fire at will, with or without good reasons and without giving right to be heard – whether appropriate to circumstances of the country – duty of National Court to develop underlying law as a coherent system – formulation of new rule of law as part of underlying law – Constitution, Section 20 (underlying law and pre-Independence statutes), Section 21 (purpose of Schedule 2) – development of indigenous jurisprudence – Underlying Law Act 2000, Section 5 (duty of courts); Section 7 (formulation of law).

The plaintiff was employed as a carpenter under a written contract of employment with the first defendant. He had an argument with his supervisor and allegedly threatened him with personal violence and damaged his employer's property. Six days later he was sacked on the ground of misconduct. He appealed to a senior manager of the company but his appeal was dismissed and termination of his employment confirmed. He commenced legal proceedings against the employer, claiming he was dismissed without good cause and contrary to the principles of natural justice.

***Held*:**

(1) Wrongful dismissal cases are properly regarded as proceedings in which the cause of action is breach of contract.

(2) To determine whether there has been a breach, the particular contract of employment must be interpreted to ascertain whether the right to be heard prior to dismissal and/or a right of appeal against dismissal are terms of the contract.

(3) Terms of a contract of employment can be express or implied.

(4) Under the common law, previously applied as part of the underlying law, the rule is that a right to be heard prior to dismissal is not implied as a term of a contract of employment; the common law being that an employer can hire and fire at will, with or without good reasons and without giving a right to be heard. (*Jimmy Malai v PNG Teachers Association* [1992] PNGLR 568 considered.)

(5) That rule of the underlying law is no longer considered appropriate to the circumstances of the country. Maintaining it would be adverse to development of the underlying law as a coherent system in a manner appropriate to the circumstances of the country.

(6) Accordingly the court formulated a new rule of law, appropriate to the circumstances of the country, under the *Underlying Law Act* 2000, viz the implied terms of a contract of employment include that the principles of natural justice and the constitutional right of protection against harsh or oppressive or other proscribed acts apply.

(7) In the present case, the evidence supported a conclusion that the plaintiff did, in fact, threaten his supervisor with personal violence and that the incident may have been serious enough to warrant the plaintiff's dismissal, for cause.

(8) However, under the contract of employment, exercise of the employer's power of dismissal for cause was subject to (a) implied terms, including that the employer would give the plaintiff a right to be heard on why he ought not to be dismissed for cause and that it would not act harshly or oppressively; and (b) an express term that gave a right of appeal under the Company Regulations.

(9) The first defendant breached the contract by not according a right to be heard, terminating the contract without referring to the termination provisions of the contract and not allowing a fair appeal.

(10) The plaintiff succeeded in establishing liability against the first defendant for breach of contract. The matter will proceed to trial on assessment of damages.

Cases cited:

Papua New Guinea Cases

Rakatani Peter v South Pacific Brewery Ltd [1976] PNGLR 537
Ralph Premdas v The State [1979] PNGLR 329
Iambakey Okuk v Gerald Fallscheer [1980] PNGLR 274
Papua New Guinea Air Pilots Association v The Director of Civil Aviation and the National Airline Commission trading as Air Niugini [1983] PNGLR 1
Enforcement of Rights Pursuant to Constitution, Section 57; Application of Karingu [1988–89] PNGLR 276
Jimmy Malai v PNG Teachers Association [1991] PNGLR 116
Steamships Trading Co Ltd v Joel and Others [1991] PNGLR 133
Jimmy Malai v PNG Teachers Association [1992] PNGLR 568
National Executive Council, the Attorney-General and Luke Lucas v Public Employees Association of Papua New Guinea [1993] PNGLR 264
Bruno Baiwan v University of Papua New Guinea [1995] PNGLR 18
Paddy Fagon v Negiso Distributors Pty Ltd (1999) N1900
Michael Kandiu v ANZ Banking Group (PNG) Ltd (2002) N222
Legu Vagi v NCDC (2002) N2280
Patrick Dissing v Cocoa Board (2002) N2314
*Igiseng Investments Ltd v Starwest Constructions Ltd (*2003) N2498
Wilson Thompson v NCDC (2004) N2686
Pama Anio v Aho Baliki and Bank South Pacific Ltd (2004) N2719
Ayleen Bure and Others v Robert Kapo (2005) N2902
Paul Lingei v Ok Tedi Mining Ltd (2005) N2912
SCR No 2 of 2004; Special Reference Pursuant to Constitution Section 19 by the Morobe Provincial Executive Re Enhanced Co-operation Between Papua New Guinea and Australia Act 2004 (2005) SC785
Commodore Peter Ilau v Rt Hon Sir Michael Somare OS No 889 of 2006, 12.01.07

Overseas Cases:

Ridge v Baldwin [1964] AC 40

STATEMENT OF CLAIM

These were proceedings in which a person sought to establish liability in damages for breach of a contract of employment, based on wrongful dismissal.

Counsel

B Takin, for the plaintiff
J Elijah, for the defendants

16 February, 2007

1. **CANNINGS J: Introduction**: This case is about a man – the plaintiff – who was sacked by his employer. He had an argument with his supervisor about the use of a company vehicle and, allegedly, threatened his supervisor with personal violence. He was sacked six days after that incident.

2. The plaintiff says he was unlawfully terminated as the incident was blown out of proportion. He also says he was not given a right to be heard. He seeks damages for wrongful dismissal.

3. This is a trial to determine whether the employer is liable.

4. The case raises important issues about the rights and duties of employers and employees. In particular, does an employee have a right to be heard before he or she is sacked? The defendants say no. The plaintiff says yes. The conventional approach of the courts in Papua New Guinea has been to say no. They have applied the common law as part of the underlying law. The plaintiff urges this court to take a fresh look at the law.

5. The terms 'sacked', 'terminated', 'dismissed' and 'fired' are used interchangeably. They mean the same thing.

6. The parties are:

- the plaintiff – Vitus Sukuramu – the sacked employee;
- the first defendant – New Britain Palm Oil Ltd – the employer, also called "the company";
- the second defendant – Neil Smith – manager of the company's facilities and constructions department (the construction manager);
- the third defendant – Ben Tonaim – assistant manager of the company's facilities and constructions department (the assistant construction manager) – the supervisor involved in the incident with the plaintiff; and
- the fourth defendant – Karl Aisi – the company's training manager – the manager who dismissed the plaintiff's appeal against termination.

EVIDENCE

7. For the plaintiff, two affidavits were admitted into evidence. The first was by the plaintiff and the second by Simon Kerua, a company employee who witnessed the incident that led to the plaintiff's sacking. Both of them gave oral evidence and were subject to cross-examination.

8. For the defendant, four affidavits were admitted into evidence. The first was by Theodore Puongo, the mechanic responsible for maintenance of the vehicle at the centre of the argument. Other affidavits were by the second, third and fourth defendants who also gave oral evidence and were subject to cross-examination.

FACTS

The contract of employment

9. The company engaged the plaintiff as a concreter in June 1999. They entered into a written contract called a 'non-executive staff service contract'. The plaintiff was later promoted to be a carpenter, the position he held when he was sacked.

10. The contract was four pages in length and consisted of 12 clauses, covering the following subjects:

1. nature of employment;
2. date of commencement (15 June 1999, and the contract "shall continue until termination");
3. probation;
4. termination;
5. repatriation;
6. duties;
7. wages;
8. accommodation
9. leave fares;
10. annual leave;
11. medical;
12. compliance with company regulations.

11. Clauses 4 and 12 are most relevant.

12. Clause 4 (*termination*) stated:

> *During employment either party may give the other one month's notice of termination. The company may in the event of the employee being assessed as unsatisfactory or being unable to perform duties assigned to the employee for any reason whatsoever without assigning any cause hereto, terminate the employee's employment by giving the employee one calendar month's notice or in lieu thereof by paying him one month's salary.*
>
> *Should the employee be guilty of dishonesty, insobriety, misconduct, assault on a company officer or any criminal offence or incur illness which incapacitates the employee from proper performance of the employee's duties either wholly or in part and which in the opinion of the company's medical officer is due to the employee's own misconduct or wilful neglect or shall become bankrupt or make any composition with or any assignment for the benefit of the employee's creditors, or shall be guilty of a breach, omission or of non-performance of any other terms and conditions of this agreement or the attached Company Regulations, the company shall be entitled to summarily terminate the employee's employment immediately without notice. [sic]*

13. Clause 12 (*compliance with Company Regulations*) stated:

> *The employee must always comply with Company Regulations and agrees to*

observe, perform and be bound by these and other Company Regulations including any future amendments thereto whether in addition to or deletion from the existing regulations.

Company Regulations

14. They are contained in a bound volume of approximately 120 pages, covering more than 50 matters, eg wage rates and job classifications, leave entitlements, use of company vehicles, housing, pets, health and safety at work and standing for political office. Section 3.1 was headed "Discipline", which contained two significant provisions.

15. Clause 7 (*hearing a disciplinary case*) stated:

7.1 This must be thorough and not conducted in the heat of the moment. A check on the employee's personal record should be made in appropriate cases.

7.2 The employee must be given a proper opportunity to state his/her case.

16. Clause 10 (*appeals against dismissal*) stated:

If the employee feels he/she has been unjustly treated he/she should be allowed to appeal to a more senior level of management within the company. The senior manager's decision will be final.

17. The events at the centre of this case occurred in late January-early-February 2003.

29 January 2003

18. The plaintiff and the company's construction manager, the second defendant Neil Smith, inspected Volupai Plantation, in the Talasea area. Mr Smith directed the plaintiff to construct a new Southern Cross water tank there the next day, as part of the creation of a new oil palm estate.

30 January 2003

19. In the morning the plaintiff picked up a vehicle, a Toyota Landcruiser, from the company's Haella workshop and went with three other workers, who were under his supervision, to the job site at Volupai. After he was working there for several hours, his supervisor, the third defendant Ben Tonaim, tried repeatedly to contact him on the vehicle's two-way radio. The plaintiff returned to Haella, angered by Mr Tonaim's attempts to track him down, went to Mr Tonaim's office and had an argument with him.

20. As to the cause and nature of the argument, the plaintiff says:

- the mechanic cleared the vehicle before he took it out of the workshop;
- the plaintiff informed Mr Tonaim about the work and he permitted his trip to the work site;
- he went to the work site, parked the vehicle 200 metres down the slope

from where the tank was being constructed and had been working there for several hours when a colleague told him there was someone on the two-way radio in the vehicle repeatedly trying to contact him;

- he went to the vehicle and tried to return the call but the reception was poor so he waited until lunchtime, then went back to the construction yard at Haella;

- someone told him that it was Mr Tonaim who was trying to contact him, so he went to see him;

- he told Mr Tonaim he should refrain from repeatedly calling him on the radio as this would give him a bad name – people would think that he was misusing the vehicle;

- Mr Tonaim told him that he was not authorised to use that vehicle, he responded that he was only carrying out the construction manager's instructions and the vehicle had been released by the mechanic, so they had an argument;

- he did not kick the office door;

- only one other person, Simon Kerua, was present to observe this "very minor incident".

21. Mr Tonaim's version of events is very different. His evidence was:

- the vehicle had been in the workshop for several days for fairly serious repairs, the repairs were only half-completed and the workshop supervisor released it reluctantly on condition that it come back in on return from Volupai;

- after the plaintiff and his crew came back to Haella, the vehicle did not go back in the workshop as arranged;

- instead the plaintiff drove the vehicle out again without permission or letting anyone know what he was doing, where he was going or what progress had been made on the tank job;

- he tried to contact him on the radio to find out what was going on;

- the next he knew, the plaintiff kicked open his office door, smashed it against the wall a couple of times and started yelling, alleging that he (Mr Tonaim) had given instructions for the vehicle to be locked up – which was not true – then the plaintiff walked out, jumped into the vehicle and drove off;

- he returned a few minutes later, still angry and screaming and kicked the door, smashed a spray can and paper tray and threatened to smash Mr Tonaim's face;

- Mr Tonaim told the plaintiff not to threaten him, to which the plaintiff

replied ‘I am not threatening you, I am promising you that I will smash this fist on your face’ before walking out again.

22. Mr Tonaim rang Mr Smith that afternoon to report the incident.

31 January 2003

23. Mr Smith came to Haella the next morning. There are also different versions of what happened then.

24. The plaintiff says:

- Mr Smith called him to a round-table meeting with Mr Tonaim, where the dispute was resolved and he was told to continue his job;
- he did not admit any wrongdoing;
- he and Mr Tonaim hugged each other and were happy;
- Mr Smith did not tell him that any decision had to be made.

25. Mr Tonaim says:

- there was no round-table discussion;
- Mr Smith talked to him and the plaintiff separately, then called them into the office together;
- the plaintiff was jovial and said he wanted to forget about the incident but he (Mr Tonaim) stood firm on his statement and refused to shake hands;
- Mr Smith told them that he would have to deliberate on the matter before making a decision.

26. Mr Smith’s evidence was similar to Mr Tonaim’s. Mr Smith says:

- the plaintiff admitted he was wrong and lost his temper and basically apologised;
- he told the plaintiff that he accepted his apology but the incident would be investigated and dealt with correctly and he (the plaintiff) would be subject to disciplinary action.

31 January to 5 February 2003

27. Mr Smith further investigated the incident during this period and considered a written report from Mr Tonaim. The plaintiff was not suspended. He was permitted to continue normal duties. He was not told in this period that he might face charges or be sacked. Nor was he asked to make a written statement.

28. Mr Smith, however, resolved that the incident amounted to gross misconduct and took steps to effect termination of the plaintiff's employment.

6 February 2003

29. On 6 February 2003, the plaintiff was given a letter signed by Mr Smith headed "TERMINATION". It stated:

> *Following an incident on 30th January 2003, Mr Ben Tonaim, Supt Haella Construction made an official complaint as to your conduct.*
>
> *On speaking with you on 31st January 2003, you admitted these offences to me.*
>
> *The report has been considered by NBPOL management and subsequently, you are advised that your employment with the Company is terminated with immediate effect.*
>
> *You are dismissed on the following grounds:*
>
> *1 Threatening an immediate supervisor.*
> *~~1~~2 Insubordination.*
> *~~1~~3 Disobeying a lawful instruction from your supervisor.*
>
> *You are given notice that you are to vacate the Company's rental accommodation at Section 21, Kimbe by the 20th February 2003. The keys to which are to be returned to NBPOL.*
>
> *Your entitlements will be calculated and paid on vacation of your rented accommodation.*

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30. That letter was incorrectly dated 6 February 2002. The error was corrected by another letter from Mr Smith dated 8 February 2003.

31. On the date of termination the plaintiff was aged 33 years and married with four children.

7 to 17 February 2003

32. On 7 February 2003, the plaintiff wrote a 'letter of appeal' to the company's personnel department. He pointed out that his termination letter was dated 2002, submitted that Mr Tonaim's complaint was without substance, denied admitting any offences to Mr Smith and suggested that his termination was illegal.

33. His appeal was heard by the company's Training and Industrial Relations Manager, Mr Karl Aisi. The plaintiff says that he faced new allegations and was denied access to witness statements. Mr Aisi says that the plaintiff did not face new allegations but agrees that he did not hand over witness statements as they were company property. Mr Aisi says the plaintiff was given the chance to present his case fully, allowed to ask questions and told what was in the witness statements.

34. Mr Aisi considered written statements by Simon Kerua and Martin Bubu dated 8 February 2003. They both said they witnessed the incident of 30 January 2003 and that the plaintiff had threatened Mr Tonaim with personal violence.

35. On 17 February 2003, Mr Aisi wrote to the plaintiff in these terms:

> *After careful consideration of your appeal and statements given by witnesses who were at the scene of the incident, we inform that your appeal has been quashed due to lack of sufficient and new evidence from you. Therefore your termination from New Britain Palm Oil Limited is upheld.*
>
> *New Britain Palm Oil Limited take this opportunity to thank you for your services rendered.*

36. On the same day, 17 February 2003, Mr Kerua wrote a memo to Mr Smith, saying that his previous statement on the incident of 30 January 2003 was incorrect and that the plaintiff had not used any insulting words or threatened to smash Mr Tonaim's face. Mr Kerua gave evidence to that effect at the trial. He said that when he gave his first statement he was thinking about his own employment and accommodation. He has since resigned from the company. He believes that the plaintiff did nothing wrong and that he (Mr Kerua) was the only person who witnessed the incident.

PLAINTIFF'S SUBMISSIONS

37. Mr Takin submitted that the incident of 30 January 2003 involving the plaintiff and Mr Tonaim was blown out of proportion. The plaintiff's version of events was supported by Mr Kerua's evidence. Only the plaintiff, Mr Tonaim and Mr Kerua were present. Mr Tonaim says that the compost supervisor, Mr Bubu, was present. But Mr Bubu did not give evidence. It follows that he was not there.

38. The incident was not serious enough to warrant dismissal, Mr Takin submitted. The company allowed the plaintiff to continue working, thus giving the impression that everything was OK. As a matter of law, the company had to show that the incident fell within the clause of the contract of employment that allowed for termination for cause. It could not do that.

39. Furthermore, the plaintiff had a contractual right to natural justice, Mr Takin argued. The employment relationship is governed by principles of fairness. The company had to give the plaintiff a right to be heard, especially in this case where the contract was terminated for cause. He was denied his right to be heard. He was not given the chance to give his side of the story. This amounted to a breach of contract.

40. Mr Takin pointed out that the termination notice did not refer to the contract, as it should have.

41. As to the status of the Company Regulations, Mr Takin submitted that the regulations were incorporated into the contract by the contract itself and clearly gave a right to be heard. It is ludicrous, he suggested, for the company to disown its own Regulations whenever it suits. The Regulations gave a right of appeal but that right was not accorded

to the plaintiff. The appeal should have been heard by three senior managers in accordance with the company's normal practice, but it was only heard by only one – Mr Aisi – who introduced new allegations and did not listen to the plaintiff.

42. Summing up, Mr Takin submitted that the company committed three breaches of contract: (a) terminating the contract without proper cause; (b) terminating the contract without referring to the relevant clause or words of the contract; and (c) failing to accord natural justice.

43. He argued that natural justice was denied in two respects: (i) not giving the plaintiff a right to be heard before he was dismissed; and (b) failing to allow a proper appeal.

DEFENDANT'S SUBMISSIONS

44. Mr Elijah submitted that the evidence showed that the incident of 30 January 2003 was not a minor one. The evidence was clear that the plaintiff threatened Mr Tonaim. Mr Kerua saw the incident and his first record of what happened was the truthful one. Mr Smith's investigation of the incident left no doubt in his mind of what happened.

45. It was a serious case of insubordination and the company does not tolerate threats of personal violence in the workplace. The company acted perfectly reasonably by dismissing the plaintiff under clause 4 of the contract, for cause and without notice.

46. Mr Elijah referred to the decision of Kandakasi J in *Legu Vagi v NCDC* (2002) N2280 to argue that the plaintiff had no right to be heard as no such right was included in the contract. Further support for that approach was provided by Kandakasi J's decision in *Igiseng Investments Ltd v Starwest Constructions Ltd* (2003) N2498: once the parties have reduced their agreement to writing, the document speaks for itself.

47. It was clear what the reasons for termination were; and it was clear that employment was terminated for cause under clause 4.

48. The plaintiff did not have a right of appeal against his dismissal. Mr Elijah argued that the Company Regulations did not form part of the contract of employment. They are merely guidelines to the company management. As it happened, the company heard his appeal, which confirmed his dismissal.

49. In conclusion Mr Elijah submitted that the plaintiff was properly terminated under clause 4 and there was no breach of contract.

THE ISSUES

50. There are two sorts of issues to be determined. First, the facts. What really happened when the plaintiff and Mr Tonaim argued? Was it a short exchange of heated words, followed by a cooling down and handshake? Or did the plaintiff run amok and threaten his supervisor with personal violence? Secondly, questions of law. Given the findings of fact, were there good grounds for the plaintiff to be sacked? Did the plaintiff have a right to be heard and was it accorded to him? Was there anything wrong with the termination notice? Did the plaintiff have a right of appeal and was it accorded to him? And most importantly, was the company in breach of contract?

51. I will address the issues this way:

1. First, I will make findings on disputed facts, particularly about the incident of 30 January 2003.

2. Was the incident of 30 January 2003 serious enough to warrant dismissal?

3. Did the plaintiff have a right to be heard before he was dismissed? If yes, was it accorded to him?

4. Was the termination notice in accordance with the contract?

5. Did the plaintiff have a right of appeal under the Company Regulations? If yes, was it accorded to him?

6. Finally, in light of the above issues, has the plaintiff proven a breach of contract?

FIRST ISSUE: FINDINGS ON DISPUTED FACTS

52. I didn't find the plaintiff to be a particularly reliable witness on the most contentious issue of fact – the nature of the altercation with Mr Tonaim on 30 January 2003 and its immediate aftermath. The plaintiff gave a credible account of the events leading up to him becoming angry. He was given an important and urgent job to do. He felt he was not getting the logistical support necessary for him to complete the job on time. Mr Tonaim was belittling him by repeatedly calling for him on the radio. He became frustrated then lost his temper.

53. On the issue of what the plaintiff did when he lost his temper, I found Mr Tonaim a credible witness. His demeanour in the witness box was that of a witness of truth. The fact that he reported the incident to Mr Smith soon after it happened and that Mr Smith came to Haella the next day suggests that Mr Tonaim's version of events is to be preferred.

54. Little weight could be placed on what Mr Kerua said in the witness box. It was diametrically opposite to the story he first told Mr Smith. His explanation for changing his story – he was worried about his employment – was not a good one. He was not an impressive witness.

55. The evidence therefore does not support the conclusion that what happened was a short exchange of heated words. It appears to have been more serious than that. The evidence suggests that the plaintiff shouted and threatened Mr Tonaim with personal violence and kicked Mr Tonaim's office door on a couple of occasions.

SECOND ISSUE: DID THE INCIDENT OF 30 JANUARY 2003 WARRANT DISMISSAL?

56. It was open to the company to regard the incident of 30 January 2003 as "misconduct" or an "assault of a company officer", which are two of the circumstances

that under clause 4 of the contract entitle the company "to summarily terminate the employee's employment immediately without notice".

57. It was an incident that, on the face of it, could have warranted dismissal. This means that the first ground on which the plaintiff claims breach of contract cannot be sustained.

THIRD ISSUE: DID THE PLAINTIFF HAVE A RIGHT TO BE HEARD BEFORE HE WAS DISMISSED? IF YES, WAS IT GIVEN TO HIM?

The common law 'fire-at-will' principle

58. Wrongful dismissal cases have conventionally been regarded as proceedings in which the cause of action is breach of contract. To ascertain whether there has been a breach, the particular contract of employment is interpreted to ascertain whether the right to be heard prior to dismissal and/or a right of appeal against dismissal are terms of the contract. Terms of a contract of employment can be express or implied.

59. Under the common law, a right to be heard prior to dismissal is not implied as a term of a contract of employment, the common law principle being that an employer can:

- hire and fire, ie terminate the services of an employee, at will;
- with or without good reasons;
- without giving a right to be heard;
- without giving any right of appeal.

60. For the sake of convenience, I call this the 'fire-at-will' principle.

61. Under the common law, departure from that principle depends on the employer and employee expressly agreeing to do so.

Jimmy Malai's case

62. The leading case supporting the fire-at-will principle is the Supreme Court's decision in *Jimmy Malai v PNG Teachers Association* [1992] PNGLR 568, Woods J, Hinchliffe J, Konilio J. The Supreme Court dismissed an appeal by a sacked employee, Jimmy Malai, against Brown J's decision in the National Court in *Jimmy Malai v PNG Teachers Association* [1991] PNGLR 116. Mr Malai's employer sacked him without giving him a right to be heard.

63. Brown J traced the development of the principles of natural justice that Mr Malai, relied on. His Honour referred to the classic dictum of Lord Reid in the seminal decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40. Lord Reid held:

> *The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract.*

64. Lord Reid famously put dismissal cases into three categories:

- pure master-servant relationship;
- person holding office 'at pleasure';
- must be something against the office-holder to warrant dismissal.

65. A dismissal in the first or second categories did not have to be preceded by a right to be heard. That right only applied to the third category.

66. The Supreme Court (Andrew J, Kapi J, Pratt J, Miles J) adopted the *Ridge v Baldwin* principles in *Iambakey Okuk v Gerald Fallscheer* [1980] PNGLR 274. The appellant, Mr Okuk, was the Minister for Transport and Civil Aviation. He purported to terminate the appointment of the respondent, Mr Fallscheer, as general manager of the National Airline Commission, which in those days operated Air Niugini, on the ground of 'inefficiency'. The Minister did not give the general manager a right to be heard. The Supreme Court held that it was not a pure master-servant relationship and the general manager did not hold his office at the pleasure of the Minister or anyone else. The case fell into the third *Ridge v Baldwin* category. The rules of natural justice applied and the general manager had a right to be heard.

67. Getting back to *Jimmy Malai's case*, Brown J held that the relationship between Mr Malai, who was an acting research officer, and his employer, the PNGTA, was a simple master-servant relationship. It fell into the first *Ridge v Baldwin* category, so there was no right to be heard. The Supreme Court endorsed that approach on appeal.

National Court decisions

68. The National Court has taken the same approach in numerous other cases: in a simple contract of employment, whether the contract is oral or written, the employee has no right to be heard prior to dismissal unless the employer and employee agree otherwise. That is so, even where the employer terminates the contract for cause. For example:

- *Steamships Trading Co Ltd v Joel and Others* [1991] PNGLR 133, Brown J;

- *Bruno Baiwan v University of Papua New Guinea* [1995] PNGLR 18, Andrew J;

- *Paddy Fagon v Negiso Distributors Pty Ltd* (1999) N1900, in which Kirriwom J held:

> *In a master and servant relationship, the master has the right to hire and fire his servants. The same principle applies in private employment situations such as in this case as opposed to public sector employment or those employment concerned under the registered industrial organisations. Under common law a master does not have to give reasons for his decision to remove a servant and to replace one with another. That is his unfettered discretion and the common law respects. Common law is part of the underlying law in Papua New Guinea which was adopted on*

> *Independence and over the years since the Courts in this jurisdiction have adopted and cherished this common law principle.*

- *Michael Kandiu v ANZ Banking Group (PNG) Ltd* (2002) N222, Davani J;
- *Legu Vagi v NCDC* (2002) N2280, Kandakasi J;
- *Patrick Dissing v Cocoa Board* (2002) N2314, Lenalia J;
- *Wilson Thompson v NCDC* (2004) N2686, Kandakasi J;
- *Pama Anio v Aho Baliki and Bank South Pacific Ltd* (2004) N2719, Kandakasi J;
- *Ayleen Bure and Others v Robert Kapo* (2005) N2902, Injia DCJ;
- *Paul Lingei v Ok Tedi Mining Ltd* (2005) N2912, Lenalia J.

69. Only one of those cases resulted in a win for the plaintiff-employee: *Bure and Others v Robert Kapo*. Mr Kapo was a PJV employee. On a field break in Port Moresby he was stopped from boarding the return flight to Porgera as he was allegedly intoxicated at the check-in. The incident was reported to his employer which sacked him the next day without giving him a right to be heard. He brought a wrongful dismissal action in the District Court and won an order for reinstatement and back-pay. On appeal by his employer to the National Court, Injia DCJ held that the District Court had erred by ordering reinstatement. However, the declaration of wrongful dismissal was correct as the contract of employment conferred a right to be heard. His Honour held:

> *Written contracts of employment in private contracts ordinarily do not provide for a disciplinary process which governs dismissal on disciplinary grounds, such as those prescribed by statutes governing public employment found in public employment contracts. It is indeed rare to see extensive stringent disciplinary procedure which are expressly stated by private companies in written contracts or adopted or implied from external sources. However in the case of PJV, for some reason to do with public policy on employment of officers, PJV decided to include those disciplinary provisions in the Manual. … The Manual defines disciplinary offences and prescribe the disciplinary procedures to be followed. They require the employer to carry out full and proper investigations into the alleged offence and give the employee an opportunity to be heard before a decision on dismissal is made. It is inaccurate to describe this procedure as incorporating traditional principles of common law on natural justice, as adopted under Section 59 of the Constitution and applied in many cases dealing with public employment contracts. But it is accurate to say the disciplinary processes in Clauses 5.6 – 5.8 are designed to ensure fairness in the process of dealing with disciplinary offences. In my view, they do confer a right on the employee to be heard on the charge before a decision is made by PJV. This right is conferred by the written contract and not by the common law. …*
>
> *The right to be heard was conferred by contractual agreement. By relying on*

> *reports received from Port Moresby airport security officials and Hevilift officials and by declining the respondent's request to return to the mine site to give his explanation and terminating his employment, the [appellants] failed to comply with the prescribed procedure for conducting a proper and full investigations into the incident and dismissed him without giving him an opportunity to be heard, before the decision was made. The Magistrate was correct therefore in coming to the same conclusion.*

70. His Honour held that private sector employees have no common law right to be heard before dismissal. The employee in that case only had such a right because of the terms of his contract employment. *Bure v Kapo* is thus consistent with all the other cases that have applied the principles endorsed by the Supreme Court in *Jimmy Malai's case*.

Application of common law

71. If I were to apply those principles to the present case, the plaintiff would probably lose the natural justice argument that he is relying on. This is – to use the language of the common law replete with its anachronistic, colonial overtones – a simple "master-servant" relationship. There is no express right to be heard in the plaintiff's contract. There is *arguably* a right to be heard arising from the Company Regulations, Section 3.1. But putting that issue aside for the moment, application of the common law would mean that the company had the right to fire, for cause, and did not have to give a right to be heard. I would probably conclude that there was no breach of contract in regard to failure to observe natural justice.

72. By doing that I would be applying the underlying law of Papua New Guinea which has adopted the common law as it existed immediately prior to Independence Day, 16 September 1975, under Schedule 2 of the *Constitution*. I would be deciding the case consistently with a strong line of authority that has upheld the employer's right to fire at will and denied employees a right to be heard.

73. Mr Elijah urges me to apply the *Jimmy Malai* principles. Mr Takin submits that I should take a different approach and hold that any employer-employee relationship is subject to general principles of fairness.

The issue of fairness

74. Mr Takin's submissions have struck a chord. They have caused me to ponder the fairness of a system of laws that gives one group of employees – those in the public sector – a right to be heard before dismissal but denies it to others – those in the private sector. That might be thought a crude way of explaining the principles of natural justice. But, really, that is what it boils down to, as explained by Kandakasi J in *Legu Vagi's case*:

> *At common law an employer is entitled to terminate an employee with or without reason … However, it has been held in cases where the reason for dismissal affects the reputation of the employee concerned, he must be given the opportunity to be heard and defend himself before being terminated. This principle applies in our country in nearly all public sector employment and to the private sector only by virtue of agreement of the parties to a contract of employment. This is the*

effect of a number of authorities in our country such as the Supreme Court judgment in Jimmy Malai v Papua New Guinea Teachers Association [1992] PNGLR 568.

75. Is it open to me to contemplate departing from the *Jimmy Malai* principles laid down by the Supreme Court, followed so faithfully on so many occasions by the National Court?

76. Though I am not bound by what other Judges of the National Court have decided I am, generally, bound, sitting as a Judge of the National Court, by all decisions of law made by the Supreme Court (*Constitution,* Schedule 2.9 (*subordination of courts*); *Underlying Law Act* 2000, Section 19 (*rules of precedent*).

Duty to develop underlying law

77. On the other hand, I am enjoined by the *Constitution*, Sections, 20 (*underlying law and pre-Independence statutes*), 21 (*purpose of Schedule 2*) and 60 (*development of principles*) to exercise my functions as a Judge in a way that develops an indigenous jurisprudence adapted to the changing circumstances of Papua New Guinea, develops the underlying law and pays particular attention to development of a system of principles of natural justice specifically designed for Papua New Guinea. The *Underlying Law Act*, Section 5 (*duty of courts*) obliges me to ensure that the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country. Section 9 (*inappropriate underlying law*) invites me to consider whether a rule of the underlying law is no longer appropriate to the circumstances of the country. This appears to create an exception to the general rule that the National Court is bound by decisions of law of the Supreme Court, particularly if the Supreme Court decision was made some years ago and the circumstances of the country have changed.

78. I have carefully considered all those laws, which are set out in full below.

***Constitution,* Section 20 (*underlying law and pre-Independence statutes*)**

(1) An Act of Parliament shall—

(a) declare the underlying law of Papua New Guinea; and

(b) provide for the development of the underlying law of Papua New Guinea.

(2) Until such time as an Act of Parliament provides otherwise—

(a) the underlying law of Papua New Guinea shall be as prescribed in Schedule 2 (adoption, etc., of certain laws); and

(b) the manner of development of the underlying law shall be as prescribed by Schedule 2 (adoption, etc., of certain laws).

(3) Certain pre-Independence statutes are adopted and shall be adopted, as Acts of Parliament and subordinate enactments of Papua New Guinea, as

prescribed by Schedule 2 (adoption, etc., of certain laws).

***Constitution*, Section 21 (*purpose of Schedule 2*)**

(1) *The purpose of Schedule 2 (adoption, etc., of certain laws) and of the Act of the Parliament referred to in Section 20 (underlying law and pre-Independence statutes) is to assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea.*

(2) For the purpose set out in Subsection (1), a Law Reform Commission shall be established in accordance with Schedule 2 (adoption, etc., of certain laws), and certain special responsibilities are imposed by that Schedule on the National Judicial System (and in particular on the Supreme Court and the National Court) and on the Law Reform Commission.

***Constitution*, Section 60 (*development of principles*)**

In the development of the rules of the underlying law in accordance with Schedule 2 (adoption, etc., of certain laws) particular attention shall be given to the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea, taking special account of the National Goals and Directive Principles and of the Basic Social Obligations, and also of typically Papua New Guinean procedures and forms of organization.

***Constitution*, Schedule 2.9 (*subordination of courts*)**

(1) *All decisions of law by the Supreme Court are binding on all other courts, but not on itself.*

(2) Subject to Schedule 2.10 (conflict of precedents), all decisions of law by the National Court are binding on all other courts (other than the Supreme Court), but not on itself (except insofar as a decision of the National Court constituted by more Judges than one is of greater authority than a decision of the Court constituted by a lesser number).

(3) Subject to this Part, all decisions of law by a court other than the Supreme Court or the National Court are binding on all lower courts.

(4) In Subsection (3), "lower court", in relation to a matter before a court, means a court to which proceedings by way of appeal or review (whether by leave or as of right) lie from the first-mentioned court in relation to the matter.

***Underlying Law Act*, Section 5 (*duty of courts*)**

The courts, especially the Supreme Court and the National Court, shall ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country.

***Underlying Law Act*, Section 9 (*inappropriate underlying law*)**

In a proceeding, if the Supreme Court or the National Court considers that a rule of the underlying law is no longer appropriate to the circumstance of the country, it may formulate a new rule, appropriate to the circumstances of the country, as part of the underlying law, having regard to—

(a) the National Goals and Directive Principles and Basic Social Obligations established by the Constitution; and

(b) the basic rights guaranteed by Division III.3 (Basic Rights) of the Constitution; and

(c) analogies drawn from the relevant written law and customary law; and

(d) the laws of a foreign country relevant to the subject matter of a proceeding.

Underlying Law Act,* Section 19 (*rules of precedent)

(*1*) *All decisions of law made by the Supreme Court are binding on all other courts but not on itself.*

(2) Subject to Section 20, all decisions of law of the National Court are binding on all other courts except the Supreme Court and itself.

(3) All decision of law by a court, other than the Supreme Court or the National Court, are binding on those courts whose decisions may be appealed to it or may be reviewed by it.

Natural justice for all employees, or only some?

79. Mr Takin's submissions are alluring. If the principles of natural justice are intended to protect people against decisions that affect their reputation and livelihood being made in an arbitrary, knee-jerk or ill-considered way, without hearing their side of the story, what justification is there for applying those principles to public sector employment but not the private sector?

80. As I recently remarked in *Commodore Peter Ilau v Rt Hon Sir Michael Somare* OS No 889 of 2006, 12.01.07, National Court, a person's right to be heard is something special – something to be cherished in a society built on principles of fairness, decency and democracy. Terminating a person's employment is a very big thing, especially in a country like Papua New Guinea where the bulk of the work-age population is unemployed. Jobs are scarce. A person with a job is invariably a breadwinner for the whole of their extended family. Nuclear families are not the norm. A breadwinner has numerous dependants. If a breadwinner is sacked the consequences for many people are significant. In the present case, not only did the plaintiff lose his job and a regular income, he lost the house he and his family were living in. Accommodation is a big problem in PNG, especially in a town like Kimbe. We have no legislative social security system, unlike other countries in which the common law principles relied on in *Jimmy Malai's case* were developed. A sacked employee cannot go to the local social security

office and apply for unemployment benefits.

81. The trade union movement is not as strong in PNG as it is in many other common law countries. The employee is in a difficult position if his or her employer decides to terminate their employment. The Department of Labour and Employment gets involved in investigations of wrongful dismissal. But its effectiveness is limited by the applicable laws, including the law that has so far been interpreted as saying that an employer can fire at will, without giving a right to be heard. There is no Labour office in Kimbe.

82. Employees are not in a strong bargaining position vis-à-vis their employer if they are unskilled or semi-skilled. Many are prepared to work for low wages, just to earn a regular income. The common law allows them to bargain for a right to be heard when they enter into a contract of employment. But as noted by Injia DCJ in *Bure v Kapo,* it is rare for such a right to be agreed to by an employer. For the majority of employees their bargaining power is limited, if not illusory. Employees are in a vulnerable position if they are alleged to have done something wrong. Under the *Jimmy Malai* principles they can be dismissed without getting their side of the story. They only get finish pay for the notice periods prescribed by the *Employment Act*.

Arguments for and against changing the law

83. Mr Takin has convinced me that this does not seem right. It seems intrinsically unfair. Doubly so when it is considered that those working in the public sector have an ironclad right to be heard prior to dismissal.

84. The rejoinder – as I understand the arguments propounded by Mr Elijah on behalf of the company – is that this is the state of the law. It is clear and certain. The principles have been applied in numerous cases. The Parliament has the power to amend the *Employment Act*. It is the pre-eminent legislative institution under the *Constitution*. The law has been unchanged for many years. If it is not broken, why fix it? Forcing employers to give a right to be heard would be bad for business. It would impede labour market flexibility. If this court were to uphold Mr Takin's submissions it would be engaging in judicial legislation, which is not its function.

The duties of a Judge in PNG

85. I appreciate those arguments. Judges must think long and hard before making a decision that might be seen as changing the law overnight. But Judges of the National Court of Justice of Papua New Guinea must also think long and hard about their duties under the *Constitution* to do things that Judges in other jurisdictions might find unusual or uncomfortable.

86. A National Court Judge is obliged, for example, by Section 57 of the *Constitution* to enforce the human rights of individuals, on his or her own initiative, if necessary. Judges sit on leadership tribunals, non-judicial bodies that are required to investigate and inquire into alleged misconduct in office by leaders. Judges sit on the Supreme Court and can be asked to make profound value judgments on whether laws made by the Parliament are reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind. Judges sit in criminal trials without juries, decide on innocence or guilt and pass sentences including the death penalty. And Judges are required to consider

the "appropriateness" of the underlying law – the unwritten law comprising the customary law of the people of the country and the common law.

87. In *Rakatani Peter v South Pacific Brewery Ltd* [1976] PNGLR 537 Prentice DCJ remarked that the Judges have been invested with "a collation of tremendous and humbling powers" and "frightening responsibilities" to select, discard, interpret, modify and apply the law.

88. The duty statement of a Papua New Guinea Judge is imposing indeed. It includes the power and duty to check, examine, critically analyse, develop and that means change, if necessary, the underlying law. If that is judicial legislation, so be it.

The question of appropriateness of the common law

89. I do not find in any of the cases that have applied the common law principles any attempt to consider the appropriateness of those principles to the circumstances of the country. The courts have tended to uncritically embrace them. That might have been justified by the failure of counsel to squarely raise the issues or by the way that Schedule 2.2 (*adoption of the common law*) was being applied. But it is no longer the approach that should be taken.

90. I would be abdicating my duties as a Judge if I were to also unthinkingly apply those principles. The plaintiff's lawyer has raised the issue of fairness and there is now a special Act of the Parliament – the *Underlying Law Act* 2000 – made under Section 20 of the *Constitution* that to a large degree supplants Schedule 2 of the *Constitution* and implores the courts to take a fresh look, with vibrant judicial eyes, at the appropriateness and coherency of the underlying law.

91. I consider that the common law fire-at-will rule, which has become part of the underlying law, is no longer appropriate to the circumstances of this country. It has resulted in an employment apartheid: discrimination on the ground of whether a person is employed in the public sector (where the right to be heard is sacrosanct) or the private sector (where there is no right to be heard unless it is expressly provided for). It is a fundamentally unfair system of law.

92. *The Apprentice* is a popular reality show that has been broadcast on PNG's television screens, on EM TV, in recent times. The star of the show, Donald Trump, administers rights to be heard amongst a group of people before issuing those famous last words that signal the exit of an unsuccessful contestant: "You're fired!". Therein lies a lesson about a consultative approach to decision-making that affects a person's livelihood.

93. The principles of natural justice are about the right to be heard on matters affecting a person's reputation or livelihood, by an unbiased decision-maker. Those principles are recognised in Division III.4 (*natural justice*) of the *Constitution*, Sections 59 to 62.

94. Section 59 (*principles of natural justice*) states:

> *(1) Subject to this Constitution and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings.*

> *(2) The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.*

95. The principles of natural justice should protect every employee unless there are good reasons in a particular case for them not to apply, eg where the parties to a contract of employment agree freely to the contrary. Private sector employees deserve the same rights enjoyed by their brothers and sisters in the public sector. They have a legitimate expectation of equal treatment due to Section 55 (*equality of citizens*) of the *Constitution*, which states:

> *(1) Subject to this Constitution**, all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.** [Emphasis added.]*
>
> *(2) Subsection (1) does not prevent the making of laws for the special benefit, welfare, protection or advancement of females, children and young persons, members of underprivileged or less advanced groups or residents of less advanced areas.*
>
> *(3) Subsection (1) does not affect the operation of a pre-Independence law.*

Formulation of new rule of law

96. As I am satisfied that the fire-at-will rule is no longer appropriate, I am authorised by Section 9 of the *Underlying Law Act* to formulate a new rule, as part of the underlying law, appropriate to the circumstances of the country, having regard to four considerations:

- the National Goals and Directive Principles and Basic Social Obligations; and;
- human rights guaranteed by Division III.3 (*basic rights*) of the *Constitution*; and;
- analogies drawn from the relevant written law and customary law; and
- the laws of a foreign country relevant to the subject matter of these proceedings.

National Goals and Directive Principles and Basic Social Obligations

97. Some are particularly pertinent.

98. National Goal No 1 (*integral human development*) states:

> *We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others.*

99. National Goal No 2 (*equality and participation*) states:

> *We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from, the development of our country.*

100. Directive Principles Nos 2(1), (3), (8) and (9) call for:

> *(1) an equal opportunity for every citizen to take part in the political, economic, social, religious and cultural life of the country; and …*
>
> *(3) every effort to be made to achieve an equitable distribution of incomes and other benefits of development among individuals and throughout the various parts of the country; and …*
>
> *(8) means to be provided to ensure that any citizen can exercise his personal creativity and enterprise in pursuit of fulfilment that is consistent with the common good, and for no citizen to be deprived of this opportunity because of the predominant position of another; and*
>
> *(9) every citizen to be able to participate, either directly or through a representative, in the consideration of any matter affecting his interests or the interests of his community.*

101. National Goal No 5 (*Papua New Guinean ways*) states:

> *We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinean forms of social, political and economic organization.*

102. Directive Principle No 5(1) calls for:

> *a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People.*

103. Under the Basic Social Obligations it is declared:

> *that all persons in our country have … basic obligations to themselves and their descendants, to each other, and to the Nation.*

104. They include the obligations:

> (*a*) *to respect, and to act in the spirit of, this Constitution; and …*
>
> *(e) to work according to their talents in socially useful employment, and if necessary to create for themselves legitimate opportunities for such employment; and*
>
> *(f) to respect the rights and freedoms of others, and to co-operate fully with*

others in the interests of interdependence and solidarity.

105. The National Goals and Directive Principles and the Basic Social Obligations are non-justiciable per force of Sections 25 (*implementation of the National Goals and Directive Principles*) and 63 (*enforcement of the Basic Social Obligations*). That means a person cannot come to court and rely on them to ground a cause of action (see *Constitution*, Schedule 1.7 (*"non-justiciable"*)). Nevertheless the court is bound to encourage compliance with them. This includes interpreting and applying the powers of parties to a contract of employment accordingly.

106. I find in the National Goals and Directive Principles and Basic Social Obligations a call for due process, consultation, participation, equality, equity and respect for others; and an urging against domination and oppression. Those principles lend support to the formulation of a rule of law that militates towards equality in the employer-employee relationship and equality of treatment for private sector and public sector employees.

Basic Rights

107. They fall into 18 categories:

- right to freedom (s 32);
- right to life (s 35);
- protection from inhuman treatment (s 36);
- protection of the law (s 37);
- proscribed acts (s 41);
- liberty of the person (s 42);
- freedom from forced labour (s 43);
- freedom from arbitrary search and entry (s 44);
- freedom of conscience, thought and religion (s 45);
- freedom of expression (s 46);
- freedom of assembly and association (s 47);
- freedom of employment (s 48);
- right to privacy (s 49);
- right to vote and stand for public office (s 50);
- right to freedom of information (s 51);
- right to freedom of movement (s 52);
- protection from unjust deprivation of property (s 53);
- equality of citizens (s 55).

108. The rights conferred by s 37, s.41, s.43, s.48 and s.55 are pertinent.

109. Section 37(1) (*protection of the law*) states:

> *Every person has the right to the full protection of the law, and the succeeding provisions of this section are intended to ensure that that right is fully available, especially to persons in custody or charged with offences.*

110. Section 41(1) (*proscribed acts*) states:

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.

111. Section 43(1) (*freedom from forced labour*) states:

*No person shall be required to perform forced labour***.**

112. Section 48(1) (*freedom of employment*) states:

Every person has the right to freedom of choice of employment in any calling for which he has the qualifications (if any) lawfully required, except to the extent that that freedom is regulated or restricted voluntarily or by a law that complies with Section 38 (general qualifications on qualified rights), or a law that imposes restrictions on non-citizens.

113. Section 55(1) (*equality of citizens*) states:

Subject to this Constitution, all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.

114. Section 37(1) gives everyone – including private sector employees – the right to full protection of the law. This imports a presumption of innocence and due process into any exercise of power in which one person is authorised to take away something belonging to or enjoyed by another, eg a job. It is a fundamental right of universal application, not confined to persons in custody or charged with offences.

115. Section 41(1) (*proscribed acts*) protects individuals against harsh, oppressive and other proscribed acts. It is a broad protection, capable of applying in the event of termination of employment.

116. Section 43(1) (*freedom from forced labour*) is another entreaty for fairness and an urging against oppression in the employer-employee relationship.

117. Section 48(1) (*freedom of employment*) does not give a right to employment. It only gives freedom to choose employment. (*Ralph Premdas v The State* [1979] PNGLR 329, Supreme Court, Prentice CJ, Raine DCJ, Saldanha J, Wilson J, Andrew J; *Enforcement of Rights Pursuant to Constitution, Section 57; Application by Karingu* [1988–89] PNGLR 276, Supreme Court, Kapi DCJ, Bredmeyer J, Amet J, Los J, Hinchliffe J; *National*

Executive Council, the Attorney-General and Luke Lucas v Public Employees Association of Papua New Guinea [1993] PNGLR 264, Supreme Court, Amet CJ, Kapi DCJ, Woods J, Los J, Andrew J.) However, an employee's choice of employment is affected if he or she is sacked. It is removed. It is a significant decision and ought to be made fairly.

118. Section 55(1) (*equality of citizens*) is relevant, as I mentioned earlier. It suggests that all employees, whether in the public or private sectors, should have the same rights and protections.

119. I therefore find in the Basic Rights, as with the National Goals and Directive Principles and Basic Social Obligations, values of due process, consultation, participation, equality, equity and respect for others; and an urging against domination and oppression. Those values lend further support to formulation of a rule of law that brings equality to the employer-employee relationship and equality of treatment to private sector and public sector employees.

Analogies from written law and customary law

120. As to the written law, an analogy can be drawn between, on the one hand, an employee who is alleged to have done something wrong that might result in loss of employment and, on the other hand, a person charged with an offence or a person whose civil rights or obligations are to be determined or removed by some other authority. In the latter cases the written law, perforce of the *Constitution*, Sections 37(3), (4) and (11), provides for a presumption of innocence and a fair hearing by an impartial decision-maker. It makes sense to give the same protection to an employee whose penalty for alleged wrongdoing is loss of employment.

121. As to the customary law, Papua New Guinean decision-making on major issues is characterised by consultation – talking, discussing, meeting, listening, engaging in dialogue: giving a right to be heard. The same style of decision-making, by analogy, should be used when an employer contemplates sacking an employee.

Relevant foreign laws (including international laws)

122. Are there any laws of a foreign country relevant to the subject matter of these proceedings?

123. None are directly applicable as this case concerns a dispute between a PNG citizen and a company resident in PNG, and the dispute occurred within PNG. However, it is useful to bear in mind that a number of common law countries that gave birth to the fire-at-will principle (eg Australia, Canada, New Zealand) have abandoned it or substantially modified it by statute. In Australia the *Industrial Relations Reform Act* (Cth) 1993 prohibited "unfair dismissal", ie failing to give a right to be heard. The law also prevented employers sacking employees unless valid reasons were shown. Valid reasons were restricted to the employee's conduct or capacity or to the employer's operational requirements. A number of those protections were removed by recent changes to the laws, called the WorkChoice laws. But many remain, reflecting an international trend towards conferring a right to be heard on employees and protecting them against unfair or wrongful dismissal.

124. That trend is exemplified by an International Labour Organisation Convention to which PNG is a party: ILO Convention No 158, the *Termination of Employment Convention* 1982. The ILO is a specialised agency of the United Nations. It seeks the promotion of social justice and internationally recognised human and labour rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles, which brought the League of Nations into being. It became the first specialised agency of the UN in 1946. PNG has been a member of the ILO since 1976. PNG has ratified 26 ILO Conventions, including Convention No 158, ratified on 2 June 2000. (See www.ilo.org.)

125. The *Termination of Employment Convention* applies to all branches of economic activity and to all employed persons. It sets international standards regarding termination of employment at the initiative of employers. It promotes the principles that there should be justification for termination, that a decision to terminate employment must be made fairly and that there be a right of appeal against unjustifiable termination.

126. Three provisions of the Convention are pertinent.

127. Article 4 is in Division II.A (*justification for termination*). It states:

> *The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity of the worker or based on the operational requirements of the undertaking, establishment or service.*

128. Article 7 is in Division II.B (*procedure prior to or at the time of termination*). It states:

> ***The employment of a worker shall not be terminated*** *for reasons related to the worker's conduct or performance* ***before he is provided an opportunity to defend himself against the allegations made,*** *unless the employer cannot reasonably be expected to provide this opportunity.* [Emphasis added.]

129. Article 8.1 is in Division II.C (*procedure of appeal against termination*). It states:

> *A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.*

130. ILO Convention No 158 is a "treaty" for the purposes of Section 117 (*treaties etc*) of the *Constitution*. It is an agreement between the States that are parties to it. It creates relationships binding at international law on PNG.

131. Article 1 is in Part I (*methods of implementation, scope and definitions*). It states:

> ***The provisions of this Convention shall,*** *in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice,* ***be given effect by laws or regulations.*** [Emphasis added.]

132. PNG is therefore obliged to make laws that give effect to the Convention, unless it is

given effect in some other manner, eg by court decisions.

133. The fact that PNG has ratified the Convention does not mean that its provisions necessarily form part of the law of PNG. Section 117(7) of the *Constitution* states:

> *Notwithstanding the consent of Papua New Guinea to be bound as a party to a treaty, no treaty forms part of the municipal law of Papua New Guinea unless, and then only to the extent that, it is given the status of municipal law by or under a Constitutional Law or an Act of the Parliament.*

134. It is a question in law, in the case of each treaty to which PNG is a party, whether the treaty forms part of the municipal law. In *Papua New Guinea Air Pilots Association v The Director of Civil Aviation and the National Airline Commission trading as Air Niugini* [1983] PNGLR 1, a question arose as to enforcement of the *Chicago Convention on International Civil Aviation*, which PNG ratified in December 1975. Andrew J held that the fact that the Convention was adopted in a schedule to the *Civil Aviation Act* did not for that reason alone give it any greater authority than it otherwise would have. By contrast in *SCR No 2 of 2004; Special Reference Pursuant to Constitution Section 19 by the Morobe Provincial Executive Re Enhanced Co-operation Between Papua New Guinea and Australia Act 2004* (2005) SC785 ("*the ECP case*") the Supreme Court (Kapi CJ, Injia DCJ, Los J, Hinchliffe J, Sakora J) held that the bi-lateral agreement of June 2004 between PNG and Australia called the *Joint Agreement on Enhanced Cooperation between Papua New Guinea and Australia* became part of the municipal law. That was because the National Parliament made an Act (the *ECP Act*) that expressly gave it the force of law.

135. In the present case there is no Constitutional Law or Act of the Parliament that gives ILO Convention No 158 the status of municipal law. Therefore the question of whether its provisions have been breached is non-justiciable. However, its significance lies elsewhere. PNG is a party to it and has an obligation as a matter of international law to make laws to give it effect, except to the extent that its provisions are given effect in some other manner, including by court decisions. If I formulate a rule of law, as a court decision, that gives effect to ILO Convention No 158 I will be helping PNG discharge its international law obligations. I will be developing the underlying law in a manner consistent with those obligations. PNG's municipal law will be made consistent with international standards.

136. ILO Convention No 158 is a very relevant piece of international law as it entreats PNG to develop its laws to uphold these principles:

- an employee's employment must only be terminated for valid reason (Article 4);

- an employee has a right to be heard before termination of employment (Article 7);

- an employee has a right of appeal on the ground of unjustifiable termination (Article 8).

137. I consider that Article 4 is given effect by Division III.6 (*termination of contracts*) of

the *Employment Act*. Article 8 is given effect by laws that allow employees to bring wrongful dismissal actions before PNG courts. Article 7, however, has not, to date, been given effect. The common law fire-at-will principle, applied so far as part of the underlying law, contradicts it; and needs to be abolished.

138. I find in the laws of foreign countries relevant to the subject matter of these proceedings, including international law, requirements of equity and procedural fairness that significantly qualify the power of any employer to terminate a person's employment.

Formulation of new rule

139. In light of above I formulate a new rule of the underlying law appropriate to the circumstances of the country, viz:

- the implied terms of a contract of employment, whether oral or written, include that the principles of natural justice and the constitutional right of protection against harsh or oppressive or other proscribed acts apply; and, in particular,

- an employee has a right to be heard before termination of employment, especially if the ground of termination is poor conduct or performance or some other matter over which the employee has control.

Should the new rule apply immediately?

140. Having developed a new rule of law, the question arises whether I should apply it to the present case. Would I be engaging in some sort of retrospective judicial legislation? Perhaps, but that is not necessarily a bad thing. There is no prohibition against the Parliament, as the principal custodian of the legislative power of the People, making laws that are retrospective or retroactive (*Constitution*, Sections 100 (*exercise of the legislative power*) and 110(2) (*certification as to making of laws*)). It follows that when a court formulates a new rule of law it is not prohibited from making the law retrospective in operation; which, arguably, is how the rule I am formulating would operate in the present case if I were to apply it to a contract of employment entered into some years ago.

141. It is essentially a matter of discretion, good sense and justice. This is made clear by Schedule 2.11 (*prospective over-ruling*) of the *Constitution*, which states:

> *(1) Subject to any decision of law that is binding upon it, in over-ruling a decision of law or* ***in making a decision of law that is contrary to previous*** *practice,* ***doctrine*** *or accepted custom****, a court may,*** *for a special reason,* ***apply its decision*** *of law* ***only to situations occurring after the new decision****. [Emphasis added.]*
>
> *(2) In the circumstances described by Subsection (1), a court may apply to a situation a decision of law that was over-ruled after the occurrence of the situation, or a practice, doctrine or custom that was current or accepted at the time of the occurrence of any relevant transaction, act or event.*
>
> *(3) In a case to which Subsection (1) or (2) applies, a court may make its*

decision subject to such conditions and restrictions as to it seem just.

142. Schedule 2.11 is one of those convoluted provisions of the *Constitution* that needs to be read many times before making sense. There is a similar, but not exactly the same, provision in Section 22 (*prospective over-ruling*) of the *Underlying Law Act.* In plain English Schedule 2.11 says that if a court makes a decision that goes against previous decisions or practices, it can elect to make its decision apply only prospectively, not to the facts before the court. In the present case I am making a new decision of law by formulating a new rule of underlying law (employees have a right to be heard before dismissal) that is contrary to previous practice and doctrine (the fire-at-will principle), so I can, "for a special reason", apply the new decision only to future situations. I can say: this new rule only applies from now on. Or, I can say: I apply this new rule to the facts of this case.

143. I am going to take the second approach. The common law fire-at-will principle should have been abandoned many years ago. By over-ruling it in this case and formulating a new rule of law I am bringing PNG's labour laws into line with international trends stretching back more than 20 years. ILO Convention No 158 was ratified by PNG in 2000. That should have been a signal to employers that the rules about terminating employees were changing.

144. I am dealing in this case with a young, family man – the plaintiff – and I need to balance his interests and those of his dependants with those of a large corporation – the first defendant – which is the biggest company in West New Britain Province and one of the biggest employers in the country. In what direction to the scales of justice tip? I have already found that the fire-at-will principle has protected the interests of private sector employers for too long and created double standards in the workplace. We have been applying an unjust set of laws. The time is right to tip the scales towards the employee and bring more justice into the employer-employee relationship. I decline to only apply the new rule of law prospectively. I will apply it immediately.

145. I now return to the two questions posed in the third issue of the present case.

Did the plaintiff have a right to be heard?

146. Yes, it was an implied term of the contract of employment the plaintiff entered into with the company that if the company proposed to terminate the contract on the ground of poor conduct or performance he had to be given a right to be heard.

147. That implied term was not displaced by clause 4 of the contract. Clause 4 allowed the company to terminate the contract on a month's notice in some situations. In other situations it allowed the company to "summarily terminate the employee's employment immediately without notice".

148. The fact that a contract of employment can be terminated for any reason does not exclude the right of the employee to be given the opportunity to be heard if the reason is, in fact, poor conduct or performance. Nor does a provision allowing for summary termination exclude a right to be heard. Doing something "summarily" simply means without the various steps and delays of full proceedings (*The Macquarie Dictionary* © Macquarie Dictionary 2001).

149. The fact that there is a section on discipline in the Company Regulations and that there are provisions dealing with the hearing of a disciplinary case requiring that an employee be given a proper opportunity to state his case support the conclusion that the plaintiff had a right to be heard.

Was the plaintiff given a right to be heard?

No.

150. On 31 January 2003 the construction manager, Mr Smith, called the plaintiff to a meeting to discuss the previous days' incident. Mr Smith accepted the plaintiff's apology but told him the incident would be investigated and dealt with correctly and that the plaintiff would be subject to disciplinary action.

151. However, neither Mr Smith nor anyone else told the plaintiff squarely that the company was considering terminating his employment under a particular clause of his contract. He was not asked to show cause on why his contract should not be terminated. He was not given time to prepare a response to the allegations. He was allowed to continue working, he was not suspended, he was not asked to make a written statement. This gave rise to a legitimate expectation on his part that the matter had been settled. But the matter was not settled and the next thing that happened, from the plaintiff's point of view, was that he was served a termination notice.

152. That was not procedurally fair. It meant that the implied term of the contract of employment had been breached.

FOURTH ISSUE: WAS THE TERMINATION NOTICE IN ACCORDANCE WITH THE CONTRACT?

153. Clause 4 provided for two termination scenarios:

- where the employee is given one month's notice or salary in lieu of notice; or
- where employment is immediately terminated without notice.

One month's notice

154. This applied in two situations:

- where the employee was assessed as unsatisfactory; or
- where the employee was assessed as unable to perform duties assigned to the employee.

155. Either situation could apply "for any reason whatsoever without assigning any cause".

No notice

156. The company was entitled to summarily terminate the employee's employment immediately without notice, if the employee:

- was guilty of dishonesty;
- was guilty of insobriety;
- was guilty of misconduct;
- was guilty of assault on a company officer;
- was guilty of any criminal offence;
- incurred illness which incapacitated the employee from proper performance of the employee's duties either wholly or in part and which in the opinion of the company's medical officer was due to the employee's own misconduct or wilful neglect;
- became bankrupt or made any composition with or any assignment for the benefit of the employee's creditors;
- was guilty of a breach, omission or non-performance of any other terms and conditions of the contract;
- was guilty of a breach, omission or non-performance of any terms and conditions of the Company Regulations.

157. The termination notice served on the plaintiff on 6 February 2003 gave three grounds of dismissal:

- threatening an immediate supervisor;
- insubordination;
- disobeying a lawful instruction from his supervisor.

158. None of those grounds are listed as situations justifying termination of the contract. The three grounds given could have all been regarded as "misconduct" but they were not expressed in those terms. In fact clause 4 of the contract was not even mentioned in the termination notice.

159. These errors render the termination notice defective and amount to another breach of contract.

FIFTH ISSUE: DID THE PLAINTIFF HAVE A RIGHT OF APPEAL UNDER THE COMPANY REGULATIONS? IF YES, WAS IT ACCORDED TO HIM?

160. The Company Regulations were incorporated into the contract by clause 12. The employee was expressly obliged to comply with them. It follows that both parties to the contract were subject to the duties the Regulations imposed and entitled to the benefits and rights conferred by them.

161. I agree with Mr Takin that it makes little sense to have such an elaborate set of rules and procedures covering a wide range of matters and then say that it only applies to company employees and that the company can select which rules and procedures it wants to invoke at its discretion. That is how Mr Elijah wanted the court to interpret the Company Regulations. However, I think that is a singularly unfair and oppressive interpretation and not one that is warranted by the wording of the contract.

162. The effect of clause 10 of Section 3.1 of the *Regulations* was to give the plaintiff a right of appeal against the decision to termination of his employment.

163. He exercised his right of appeal by writing a letter of appeal dated 7 February 2003 to the company's personnel department and appearing before Mr Aisi.

164. I see no merit in Mr Takin's argument that the appeal had to be heard by a panel of three senior managers. Clause 10 of Section 3.1 required only that the appeal be heard by "a more senior level of management". No mention is made of a panel of three. Clause 10 also states that "the senior manager's decision will be final", which suggests that the appeal will be determined by only one person. If there was a pre-existing practice of three-member appeal panels that did not create a right to such a panel in this case.

165. The other arguments concerning the appeal were based on the claim that Mr Aisi (a) introduced new allegations against the plaintiff, (b) did not listen to the plaintiff's explanations and (c) refused to supply copies of witness statements.

166. There was no evidence to sustain (a) or (b) so I dismiss those arguments.

167. As to (c), Mr Aisi gave evidence that he did indeed refuse to give the plaintiff's copies of witness statements as they were company property. That was a serious procedural error as it meant that the plaintiff was denied access to the evidence on which the decision had been made to terminate his employment and the evidence that would be the basis of the decision of the appellate body, Mr Aisi. There can be no proper or fair appeal in such circumstances.

168. Another problem with the appeal is that it was not documented or recorded other than by Mr Aisi's brief letter to the plaintiff of 17 February 2003. Mr Aisi suggested that the appeal was dismissed "due to lack of sufficient and new evidence" from the plaintiff. This letter alluded to consideration of statements of witnesses who were at the scene of the incident but did not say who the witnesses were or what they stated. The failure to give any more details of the considerations Mr Aisi took into account gives the impression that he rubber-stamped the decision to dismiss the plaintiff without genuinely reviewing the merits of the decision and taking a fresh look at the case.

169. To summarise, the plaintiff had a contractual right to a fair appeal, but that right was not accorded to him because:

- he was denied access to witness statements;
- determination of the appeal was not adequately documented;
- the appellate body did not genuinely review the merits of the decision being appealled against.

SIXTH ISSUE: HAS THE PLAINTIFF PROVEN A BREACH OF CONTRACT?

170. Yes, in three respects:

- He was denied a right to be heard on the question of termination of his employment, for cause. It was an implied term of his contract that if he were to be sacked for misconduct he had to be given the opportunity to respond to allegations

against him, and fairly heard, before the company made the decision to terminate his employment.

- He was given a defective termination notice. It failed to mention the clause of the contract under which his employment was terminated and none of the grounds given for terminating his employment were expressed in terms of the provisions of the contract allowing for termination.

- He was denied the right to a fair appeal against the decision to terminate his employment. That right was conferred by his written contract of employment, which incorporated the Company Regulations containing a right of appeal. He was allowed to appeal but the appeal was not conducted fairly.

NEXT STEP

171. This case will now, unless the parties settle, proceed to trial on assessment of damages. The plaintiff asserts in the statement of claim that damages should be awarded on the basis that had he not been wrongfully dismissed he would have been employed for another 22 years. He is seeking damages for 'unpaid contractual entitlements' of approximately K487,000.00 plus general damages.

172. This judgment does not address the question of the categories of damages that should be awarded or the amount of damages under the various categories claimed. All of those issues remain the subject of argument.

COSTS

173. The general rule is that a party that wins a civil case has its costs paid for by the other side. I see no reason to depart from that rule of thumb and will award costs to the plaintiff.

JUDGMENT

174. The judgment of the court is:

1 the plaintiff has established a cause of action in breach of contract (wrongful dismissal) against the first defendant;

2 the defendant is liable for damages;

3 the proceedings shall, unless the Court is notified that the parties have settled the claim, proceed to a trial on assessment of damages;

4 costs of these proceedings are awarded to the plaintiff, to be taxed if not agreed.

Judgment accordingly.

B T Gobu & Associates: *Lawyers for the Plaintiff*
John Elijah: *Lawyer for the Defendant*