COLLECTIVE BARGAINING IN PAPUA NEW GUINEA

Anna Kretowicz*

This note introduces the case of Piokole v Logona *which is a decision of the National Court of Papua New Guinea on the topic of employee rights and collective bargaining.*

L'arrêt rendu par le Tribunal National de Papouasie-Nouvelle-Guinée dans l'affaire Piokole v Logona*, sur les droits des salariés et la portée des accords collectifs en Papouasie-Nouvelle-Guinée, fait l'objet de l'analyse de l'auteure.*

I INTRODUCTION

On 21 April 2017, Kandakasi J of the National Court of Papua New Guinea (PNG) delivered the judgment in *Piokole v Logona*,[1] holding, inter alia, that collective bargaining agreements between unions and employers are legally enforceable on ordinary contractual principles. It is a notable decision for two reasons: first, it is only the third case to address collective bargaining in PNG, and second, it stands as a definitive advancement in the law in this area. Invoking policy, international law, and analogising with proximate jurisdictions, this decision affirms the role of unions in protecting employees' rights and encourages fairness in PNG employment and industrial relations.

Trade unionism has "long roots"[2] in PNG, emerging mainly in the last decade of Australian colonial rule.[3] However, the development of unions was turbulent and stultified in the environment of "poor leadership and a stagnant base of private-sector employment."[4] Gaining independence in 1975 was a lighter moment in that history; unions in sectors like mining and teaching gained autonomy and enjoyed greater

* Law research assistant at TC Beirne School of Law, University of Queensland.

1 (National Court of Papua New Guinea, Kandakasi J, 21 April 2017).

2 Satendra Prasad and Darryn Snell "The Sword of Justice: South Pacific Trade Unions and NGOS During A Decade of Lost Development" (2004) 14 Development in Practice 267, 268.

3 Ibid 269.

4 Ibid.

success, but conversely some unions that pre-dated independence did not survive and union activity since then has remained patchy. Their strategies for supporting workers' rights have often been mixed responses to legislative reforms, all happening against a background of "poor governance, inadequate public-sector management, and internal political crisis."[5] Indeed, union-led protests in 2001 culminated in violence and death, discouraging trade unions and their role in facilitating productive social alliances to protect workers' rights.[6] Although they felt a "leap" in 2002 with the formation of the PNG Labour Party, their role remains largely undeveloped and uncertain.[7]

II THE CASE

Clark Piokole was employed as a captain by Air Niugini Ltd (the Airline), whose human resources general manager was Rei Logona. The Airline had entered into industry-based agreements with two unions: the PNG National Airline Pilots Union (NAPU) and the Airline Pilots Association (APA) in 2012 (the 2012 Agreements). The 2012 Agreements worked as contracts between the unions and the Airline to outline the pilots' terms of employment and the parties' respective rights. Pilots who were union members, like Piokole, would become parties to those agreements, with separate expiry dates, when they signed their own execution clauses. As the expiry date for the 2012 Agreements drew nearer the Airline attempted to negotiate with representatives of the unions but that amounted to nothing when the Airline repeatedly cancelled meetings and unilaterally made major decisions in light of economic pressures.[8] Some two months before expiry, the Airline presented individual contracts to pilots (the 2015 Contracts) and effectively told them to sign otherwise they would be considered as no longer wanting further employment with the Airline. Some pilots signed, while others, including Piokole, refused.

The matter was brought before the National Court at first instance. Piokole, the first defendant, joined with the unions as the second and third defendants, against Logona and the Airline. They challenged the validity of the 2015 Contracts arguing that the 2012 Agreements were still valid, which turned on an interpretation of the "termination and replacement" clauses in the Agreements. The Court identified three issues: (1) whether the 2012 Agreements between the Airline and the unions expired on the date outlined in the contract and were lawfully superseded by the individually

5 Ibid.

6 Ibid 270.

7 Ibid 271.

8 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [20].

signed 2015 Contracts; (2) whether the failure to sign the 2015 Contracts was an act of repudiation by the particular pilots; and (3) whether the failure and/or refusal by the Airline to employ cadet pilots under the 2012 Agreements for NAPU was discriminatory employment practice. The action canvassed multiple areas of law and neatly illustrated the intersection between contract, employment law, and industrial relations. It was held that the 2012 Agreements were valid but that the 2015 Contracts were not. More broadly, the ratio of the case is that collective bargaining agreements between unions and employers have legal validity as contracts and can therefore be enforced by either party - even the individuals whom they regulate - as long as they satisfy basic contractual principles.

III THE NATIONAL COURT JUDGMENT

A Issue 1: Expiry Date and Superseding of the 2012 Agreements

Kandakasi J divided this into two further sub-issues: first, whether the 2012 Agreements expired on 31 December 2014 (as per the contract) and second, whether the 2015 Contracts properly and legally superseded the 2012 Agreements upon their expiry.

The answer to the first question turned on the principles of contractual interpretation as applied to the termination and replacement clauses. Unsurprisingly, it was acknowledged that "[t]he principles governing interpretation of contractual provisions are trite and well-settled in our jurisdiction."[9] Citing an earlier case, *Tian Chen Ltd v The Tower Ltd (No 2)*,[10] the approach in Papua New Guinea was confirmed as founded in the English and Australian common law. More specifically for commercial contracts, "the Court must endeavour to uphold the agreement of the parties… [they] can and have ignored words or clause [sic] that are meaningless or superfluous… and supply terms or words as appear reasonable and necessary."[11] This underscores the courts' objective approach to contractual interpretation and their emphasis on freedom of contract, especially for large commercial parties; this is a thread that runs subtly through both the judgment and subsequent orders.

In applying those principles, the court concluded that "[the termination and replacement] provisions clearly reveal that the words employed by the parties are so plain and very clear so… that they leave no room for any art of interpretation to

9 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [6].

10 (National Court of Papua New Guinea, Kandakasi J, 20 January 2003).

11 *Tian Chen Ltd v The Tower Ltd (No 2)* (National Court of Papua New Guinea, Kandakasi J, 20 January 2003) 20-1.

apply."[12] The clauses meant that 2012 Agreements were to expire on 31 December 2014 and that they should be replaced by new contracts through a process of *negotiation* and *mutual* agreement. However, this was complicated by the fact that pilots signed their individual contracts having expiry dates beyond 31 December 2014. The Court then concluded that such conduct, by both the pilots and the Airline, indicated that the 2012 Agreements should remain in force until replaced by their *mutual* agreement. This was one indication of how the Court gave effect to freedom of contract.

The answer to the second question involved the most substantive discussion and development of the law. As just established, a new lawful agreement would have to have been the product of negotiation and mutual agreement; a question of fact. Evidence adduced made it clear that this had not occurred with either the pilots individually or the unions more generally. The court then re-stated the four essential elements of a legally binding contract[13] and concluded that the Airline not only breached the 2012 Agreements by failing to comply with the contractually embedded procedure for termination and replacement, but that the 2015 Contracts were not legally binding or enforceable. Furthermore, a question of signing under duress or intimidation was raised by the plaintiffs and briefly discussed. While there was no definitive answer on this point Kandakasi J frequently acknowledged that the pilots were forced to sign "at the threat of losing their jobs" or "forced by their wish" to sign the 2015 Contracts, which arguably suggests that such an argument may have been upheld to nullify the contracts had they been otherwise legally enforceable.

Following this contractual analysis of the Airline's behaviour, the Court shifted the focus to consider it through the lens of employment law and industrial relations. This segued into the important point of the judgment on collective bargaining and the legal enforceability of union agreements. The Court began the discussion broadly, citing the PNG Constitution[14] and provisions in the Industrial Organizations Act[15] and the Industrial Relations Act[16] as the existing bases for employees' rights. It was observed that "these provisions appropriately empower employees to form, be members and officers of trade unions to fight for better terms and conditions of

12 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [12].

13 Citing *Hargy Oil Palm Ltd v Ewasse Landowners Association Inc* (National Court of Papua New Guinea, Kandakasi J, 2 December 2013) [51].

14 Constitution of the Independent State of Papua New Guinea (Papua New Guinea) 16 September 1975 ss 47, 48.

15 Industrial Organizations Act 1962 (Papua New Guinea) ch 173 s 63(1).

16 Industrial Relations Act 1962 (Papua New Guinea) ch 174 s 63(1).

employment and generally fight for better treatment of employees by employers… through… collective bargaining resulting in collective agreements or enterprise agreements." The Court then reviewed the scant case law on point. Only one decision was noted; it made a brief comment that collective bargaining was governed by practice rather than law, so such agreements could not be intended to create legal relations or be legally enforceable.[17] The Court took this opportunity to shift the balance of power in favour of employees, holding that "[a]s long as collective agreements have the necessary ingredients for legally enforceable contracts, they can be enforced" either by unions or their individual members. The justification was simple and had four limbs: first, this approach gives effect to the "spirit and intent of the relevant provisions of the *Constitution* and the whole of the two industrial legislation [sic]"; second, it brings PNG into line with international standards and the well-recognised duty of the court to uphold them; and third, it is consistent with the legal position in "PNG's nearest neighbours, Australia and New Zealand."[18] The fourth reason was more policy-oriented and Kandakasi J did not hesitate to express disapproval of the Airline's conduct: That is, this step was necessary to deter such conduct in the future and for the betterment of industrial relations and the economy of PNG. Piokole and the unions therefore had a legal right to enforce the 2012 Agreements and the case set a precedent generally for the legal enforceability of collective bargaining agreements between unions and employers in PNG.

Albeit obiter, the court also considered the Fairness of Transactions Act 1993.[19] While not specifically plead by either party, it was remarked that "it is important to note it exists when transactions that might attract the Act's application are being sought to be entered into."[20] Applying the Act, it was observed that notwithstanding any breach of contract and improperly circumventing the unions in negotiations, the Airline's method of dealing with pilots individually was inherently unfair. Kandakasi J offered examples of what the Airline could have done instead to create fairness, such as "giving the pilots ample opportunity to consider the terms of the 2015 Contracts, seek legal advice, [and] consult their respective unions."[21] So even if the earlier conclusion on the enforceability of collective agreements had not been made,

17 *Manau v Telikom (PNG) Ltd* (National Court of Papua New Guinea, Davani J, 20 February 2008).

18 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [40].

19 Fairness of Transactions Act 1993 (Papua New Guinea) 1993.

20 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [41].

21 Ibid [43].

the Airline was still acting contrary to the law. Kandakasi J's obiter remarks suggest that the 2015 Contracts may have been set aside had the Act been pleaded.

B Issue 2: Repudiation

The second issue, whether a failure to sign the 2015 Contracts amounted to repudiation, was dealt with more quickly. It was dismissed upon the basic principles of repudiation, that is, "that repudiation concerns only that which already exists."[22] And as the Court had already concluded that the 2015 Contracts never came into existence, this argument could only have referred to a repudiation of the 2012 Agreements. Once again giving effect to freedom of contract, the Court concluded that because there was no provision in the detailed agreement addressing repudiation and the Airline had already unilaterally breached it, the pilots' failure to sign the 2015 Contracts was immaterial.

C Issue 3: Discriminatory Employment Practices

The last issue sat more firmly in the realm of employment law and industrial relations, asking whether the Airline's practice of employing some pilots under a different scheme was discriminatory. For context, the Airline employed two different kinds of pilots: "well-experienced", who were engaged on open-entry contracts, and "trainee pilots" under a cadet scheme, who were employed under specific terms and conditions.[23] For example, deductions would be made from the cadet pilots' salaries during their training period, but if they stayed with the Airline for a required period then the deductions would be reimbursed.

The Court quickly identified this scheme as "bonding", a "well-accepted practice" that strikes the balance between the employer's interest in gaining from investing in their employees, and the employee's benefiting from getting work that is commensurate with their training and experience.[24] Similar to the reliance on policy to justify the legal enforceability of collective bargaining agreements and favour employees, policy was used again to uphold the "bonding" employment scheme because of its careful balancing of the parties' interests. It was held that the Court could only assess whether such schemes are discriminatory with proper evidence, such as details of the particular bonding scheme and the application of double standards. Whether this was a conscious decision or not, the outcome on this third issue tipped the scale back in favour of employers and arguably continues the thread

22 Ibid [51].

23 Ibid [54]-[55].

24 Ibid [56].

of freedom to contract for large commercial parties. In other words, while employers must be bound by any collective bargaining agreements they enter into the terms of them are unlikely to be scrutinised heavily by the courts without proper evidence.

IV COMMENTARY

On the whole this judgment demonstrates the National Court taking a progressive stance on employment law in PNG with its decision couched firmly in existing legal principle while also drawing upon policy and the needs of society. By holding that collective agreements are legally enforceable as binding contracts, the Court used contract law to address the power imbalance between large corporate employers and individual employees and simultaneously gave full effect to the intended role of unions in that relationship. It had been ten years since the last judgment on collective bargaining and Kandakasi J deemed that law inaccurate. Arguably, this judgment represents a key development in employment and contract law and will have a real impact on society. That said, some points of law were addressed less fully, perhaps due to limited submissions by counsel, and the orders seem unsatisfying when contrasted with the strong, denunciatory language that permeated the reasoning.

Arguably, Kandakasi J intended to induce real, practical changes in this sector of society, expressly stating that "[t]he kind of conduct and behaviour… displayed here is a kind… that is not conducive for better industrial relations and the economy of the country."[25] This could translate to workers having their rights better recognised and enforced, assuming that they are party to collective agreements and members of a union, or at least to less litigation and fewer disputes. That, however, begs the question of how common behaviour of this sort (ie the Airline's) is and the frequency of employment disputes, at least those involving unions. Kandakasi J's review of the case law suggests that this is a rare occurrence. With only three cases in the National and Supreme Courts of PNG on this subject, it may well be that the practical impact of this decision will not be felt. There have been no subsequent decisions referring to it, but the number of published legal decisions is not necessarily an accurate measure of labour rights violations in PNG.

Neumauyer and de Soysa, in considering the effects of globalisation on labour rights, measured the extent of free association and collective bargaining in countries around the world. Correlative with the sparse case law, they found that PNG had very few rights violations - 'rights' meaning those articulated by the International

25 Ibid [40].

Labour Organisation.[26] In fact, PNG had a lower score than Australia.[27] On that basis, it is arguably unsurprising that this area of law has remained relatively stagnant in PNG. Furthermore, Imbun observed in his literature review of PNG's industrial relations that it "seem[ed] to be a dormant system" and at least a theoretical understanding of it "is still in a pre-systemic stage."[28] Perhaps the paucity of case law is reflective of the extent of labour rights violations, so it follows that there was no pressing practical need for the Court to have advanced the law in this way. However, it remains an important theoretical development considering the uncertain and underdeveloped role of trade unions in PNG that Prasad and Snell highlighted.[29]

Additionally, this decision brings PNG into line with international law requirements. Kandakasi J relied heavily on the fact that "organised labour and collective bargaining… and the ability of the Courts to uphold such agreements is now recognized worldwide [in] the UN declarations and conventions" and that the Airline's behaviour was "contrary to… the clear legal position worldwide."[30] Presumably what his Honour was referencing are the International Labour Organisation's (ILO) 'Right to Organise and Collective Bargaining Convention, 1949 (No 98)',[31] the 'Freedom of Association and Protection of the Right to Organise Convention, 1948',[32] and the United Nations (UN) *Convention Concerning the Promotion of Collective Bargaining.*[33] Interestingly, PNG ratified the first of those on 1 May 1976 and it is in force. It is somewhat surprising that its judicial teeth developed in PNG 43 years later, but that may be explained by Imbun's earlier observation on the slow development of PNG's industrial relations framework. Finally, PNG law in this area is now consistent with jurisdictions like Australia, New Zealand and the United States, and perhaps most importantly gives effect to "the

26 Eric Neumayer and Indra de Soysa "Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis" (2006) 34 *i* 31, 32, 49.

27 Ibid 48.

28 Benedict Y Imbun "Making Sense of an Imposed Industrial Relations System in Papua New Guinea: A Review of Literature" (2008) 12 Journal of South Pacific Law 1, 13, 14.

29 Above n 2.

30 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [40].

31 Right to Organise and Collective Bargaining Convention, opened for signature 1 July 1949, ILO Conventions (entered into force 18 July 1951).

32 Freedom of Association and Protection of the Right to Organise Convention, opened for signature 9 July 1948, ILO Conventions (entered into force 4 July 1950).

33 Convention Concerning the Promotion of Collective Bargaining, opened for signature 19 July 1981, 1331 UNTS 268 (entered into force 9 September 1983).

spirit and intent"[34] of its own Constitution and relevant industrial legislation. Kandakasi J considered these to be PNG's "nearest neighbours" Other jurisdictions, like Solomon Islands, are geographically closer and have similarly strong recognition of the legal enforceability of collective bargaining agreements.[35]

Another point of curiosity is the orders that the Court made, which simply "require [the parties] to consider the foregoing decisions and the reasons for those decisions and resolve the issue of what should be an appropriate remedy" themselves.[36] On one hand, a strict order would have been expected given the disparaging comments on the Airline's behaviour and emphasis on deterrence. Conversely, it is unsurprising given that the concept of freedom of contract, especially for large commercial parties, significantly underpinned the reasoning. Maintaining that thread, it would be just as reasonable to leave the parties to decide on the appropriate remedy. Although not stated by the Court, an underpinning policy reason could be that the employment relationship between Piokole, the unions and the Airline is ongoing and it could be inappropriate for the court to regulate that. Furthermore, such orders encourage the parties to engage in exactly the kind of behaviour the court is trying to promote.

34 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [40].

35 See eg, Trade Disputes Act 1981 (Solomon Islands) Act No 3 1981 s 12.

36 *Piokole v Logona* (National Court of Papua New Guinea, Kandakasi J, 21 April 2017) [61].