

UNIVERSITY OF CAPE COAST

**LAWS APPLICABLE TO THE MANAGEMENT OF LABOUR IN
GHANA – AN EXPOSITION ON THE EXIT PHASE**

BY

JAMES ODARTEY MILLS

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DECLARATION

Candidate's Declaration

I hereby declare that this dissertation is the result of my own original work and that no part of it has been presented for another degree in this university or elsewhere.

Candidate's Signature: Date:

Name: James Odartey Mills

Supervisor's Declaration

I hereby declare that the preparation and presentation of the dissertation were supervised in accordance with the guidelines on supervision of dissertation laid down by the University of Cape Coast.

Supervisor's Signature: Date:

Name: Dr. G.K.T. Oduro

ABSTRACT

The Labour Act, 2003 (Act 651) aside; the law governing the management of labour in Ghana appears to be scanty, incomprehensive and not readily available to those who need to use them whenever the need arises. The study therefore sought to fill this gap with specific reference to the exit phase.

The study achieved this by exploring in depth and putting together the laws applicable to the exit phase of labour management in Ghana. This included not only the statement of the appropriate laws and legal principles but also the support and illustration of these principles with ample legal precedents, interpretations and enunciations to enhance the knowledge and understanding of human resource practitioners in particular and readers in general. This involved a great deal of documentary research that covered both the common law and legislation, as well as decided court cases (legal precedents) from both the local (Ghanaian) and foreign jurisdictions.

The study succeeded in bringing to light the various ways in which the contract of employment can lawfully be brought to an end by the employee on one hand and by the employer on the other hand. In doing so, it also brought to the fore the legal meanings, implications and differences between terms such as terminations, resignations and various forms of dismissals (such as constructive, wrongful, fair and unfair dismissals).

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DEDICATION

To all human resource practitioners.

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LIST OF ABBREVIATIONS

AC	Appeal Cases
All ER	All England Reports
CA	Court of Appeal
CAP	Chapter
CAR	Criminal Appeal Reports
CC	Constitutional Court
CDS	Centre for Development Studies
CI	Constitutional Instrument
Co	Company
Cox CC	Cox's Criminal Cases
CP	Common Pleas
FTC	Fast Track Court
EI	Executive Instrument
EPP	Excellent Publishing and Printing
ER	English Reports
ERA	Employment Rights Act
ERELA	Employment Relations Act
ESQ	Esquire
GEA	Ghana Employers' Association
GLR	Ghana Law Reports
GT	Ghana Telecommunications Company Limited

HC	High Court
HRM	Human Resource Management
IDS	Institute for Development Studies
ILO	International Labour Organization
INGO	International Non-Governmental Organization
JP	Justice of the Peace and Local Government Review
LI	Legislative Instrument
Ltd	Limited
LJ	Law Journal
LR	Law Reports First Series
NGO	Non-Governmental Organization
NLC	National Labour Commission
NRCDD	National Redemption Council Decree
Ord	Ordinance
PNDCL	Provisional National Defence Council Law
QB(R)	Queen's Bench Reports
QBD	Queen's Bench Division
R	Republic/Rex/Regina
SC	Supreme Court
SSNIT	Social Security and National Insurance Trust
TUC	Trade Unions Congress
UCC	University of Cape Coast

CHAPTER ONE

INTRODUCTION

Background of the study

The labour management process comprises a number of phases that in turn involve numerous processes. While some of these bring joy and satisfaction to the individual employee and thereby increases the employing organization's prospects of higher productivity, others have the tendency of marring the management – labour relationship with acrimony and discord. In fact some of these acrimonies result in strike actions and even court cases which usually involve workers suing management over certain management decisions. On the other hand, management also sometimes resorts to lock outs, refusal to pay salaries, retention of benefits and others. No other phase in the entire management process yields more bitter ends and leaves more bitter memories than the exit phase.

The exit phase covers all instances or incidents that lead to a worker ceasing to be the employee of an organization that he or she otherwise or hitherto worked with. These include resignations, termination of appointments, dismissals and redundancies, among others.

Records at the Ghana Labour Department, as captured by Obeng-Fosu (2007, pp.142-143) indicate that between 1974 and 1983 there were 419 strike actions involving some 314,663 workers and which resulted in the loss of 1,253,329 man-days. Again between 1984 and 1993 there were 201 strike actions involving 70,858 workers resulting in the loss of 163,513 man-days. Yet again, between 1994 and 2003 there were a total of 330 strike actions involving some 255,614 workers which resulted in the loss of 2,188,781 man-days. These strike actions were the result of a myriad of industrial problems which in no small way included disputes over dismissals and redundancies.

While some of the industrial and court actions are usually initiated by workers, a few are also sometimes initiated by management. Thus, whereas workers could for instance call a strike, lock in management or sue management in court; it is also not uncommon for management to lock out workers, refuse to pay the salaries and other benefits of workers and, in a few cases, sue workers for all kinds of reasons.

In all these cases, however, the winners or losers in the actions taken do not depend on who initiated the actions in question. There are times when workers initiate some of these actions, both industrial and judicial, and lose or win and there are times when management also initiates and either loses or wins. One thing that is common with all these, however, is that it always comes out clearly that many of the actors were not too clear on what the relevant rules and regulations governing their actions as workers and management should be or even

if they knew, what legal meanings and interpretations to put on them to guide their actions with.

Even the National Labour Commission is not left out of this confusion. Under section 138(1)(b) of the Labour Act, 2003 (Act 651), the National Labour Commission is charged with the responsibility of settling industrial disputes. Under section 139 of the same legislation the Commission is even granted powers of the High Court in certain aspects of its work. Together, these presuppose a reliable knowledge of the law relating to labour issues on the part of the same Commission. Unfortunately, the confidence that the National Labour Commission is supposed to exude in the eyes of the public was also seriously punctured when in February 2008 it went to Court with a case of unfair termination of employment against the Ghana Telecommunications Company Ltd. It turned out that the National Labour Commission had had it all wrong. The court dismissed the case and sent both the National Labour Commission and the former Head of Corporate Communications and General Manager of the Ghana Telecommunications Company Ltd whom the Commission had sort to fight for out of the court with shock and unexpected embarrassment.

What could be the problem? Are the labour laws in the country that slippery? Are they indeed slippery or just hazy? And if hazy, does it mean the various actors are not looking hard enough or the laws are just not there at all and all they could get were the scanty bits they keep relying on dangerously?

Statement of the problem

Knowledge on the legalities surrounding the topic under review (Laws Applicable to the Management of Labour in Ghana) appears not to be comprehensive, sufficient and readily available to those who need it in practice. The few who think they have a grasp also discover too often that what they possessed was but scanty, hazy and improperly understood leading to often embarrassing situations when oft their resultant actions were subjected to the test of the law.

Apart from the few statutes in force on the subject, notably the Labour Act, 2003 (Act 651); the Factories, Offices and Shops Act, 1970 (Act 328) and the Workmen's Compensation Law, 1987 (PNDCL 187) plus a couple of industrial relations related Ghanaian books on the market, there are no specific texts tackling the subject in depth.

It is this gap that this study seeks to bridge.

General objective

The purpose of this study, therefore, is to explore in depth and to put together the laws applicable to the management of labour in Ghana, complete with legal precedents and appropriate legal interpretations and enunciations, with the view to contributing to the enhancement of the knowledge and understanding of practitioners and other stakeholders on the subject.

Specific objectives

The specific objectives of the study are to find out the ways in which the contract of employment can lawfully be brought to an end by the employee on one hand, the ways in which the contract of employment can lawfully be brought to an end by the employer on the other hand and the legal meanings, implications and differences between terms such as resignation, dismissal, constructive dismissal, wrongful dismissal, fair dismissal and unfair dismissal.

Research questions

Accordingly, to do a relevant and meaningful exposition on the laws applicable to the management of labour in Ghana with reference to the exit phase, the following research questions will be relevant:

1. What are some of the ways in which the contract of employment can lawfully be brought to an end by the employee?
2. What are some of the ways in which the contract of employment can lawfully be brought to an end by the employer?
3. What are the legal meanings, implications and differences between terms such as resignation, dismissal, constructive dismissal, wrongful dismissal, fair dismissal and unfair dismissal?

Significance of the study

It is envisaged that this study will contribute to the enhancement of the knowledge and understanding of practitioners and other stakeholders on the subject by exploring in depth and to putting together the laws applicable to the management of labour in Ghana, complete with legal precedents and appropriate legal interpretations and enunciations and making these available and accessible to the general public. This, it is believed, will reduce the level of acrimony, the number of illegal strikes based on ignorance and the number of fruitless and time wasting lawsuits that bedevil the current labour front in Ghana.

The study is also expected to help fill the vacuum created by the dearth of local, Ghanaian law related literature on the subject in Ghana. Finally, it is expected to contribute towards a more informed and therefore more predictable and professional management-labour relationship in Ghana.

Delimitation

The study was based on legal interpretations and enunciations placed on existing legislation in Ghana at the time of the study. The common law was also resorted to where current legislation did not have enough or adequate provisions to deal with any particular legal issues. Additionally, legal precedents were also used to support and illustrate the various legislative provisions and their underlying legal principles applicable to regular practice in the labour front.

Limitations

The dearth of local Ghanaian texts on the subject area greatly limited the number of Ghanaian authors on the subject that the present writer could learn and research from.

Additionally, the couple of Ghanaian-based books that relate to the topic were either not close enough or based on old laws which have all been repealed with the passage of the current Labour Act in the year 2003, thus rendering those texts legally unreliable and thereby making them irrelevant for the study.

Also, the labour law in Ghana being a relatively and comparatively undeveloped area, resort had to be made to a number of common law and English precedents to explain certain applicable principles. Although this complementary effort was unavoidable and in fact normal in Ghanaian legal practice in view of the fact that the law in Ghana emanated from English law, it nevertheless has the likelihood of giving the report a slightly foreign impression.

Finally, although (as captured in the literature review) the exit phase could be widened to include Exits Caused by Intervening Circumstances, the study is limited to Exits Initiated by the Employee and Exits Initiated by the Employer due to academic requirement constraints.

Definition of terms

Certain terminologies that will be used in this study and which are worth noting will include the following:

Action: A law suit initiated in a court of competent jurisdiction.

Common Law: That part of the laws of England formulated, developed and administered by the old law courts of England and based originally on the common and ordinary customs of the country and unwritten.

Contract: An agreement enforceable at law. An essential feature of a contract is an offer or promise by one party to another to do or forbear from doing certain specified acts and which offer the other party accepts. It is that species of agreement whereby a legally enforceable obligation is constituted and defined between the parties.

Determination: The act of bringing an agreement to an end.

Employee: A person recruited, hired or appointed to work for the person or organization that recruited, hired or appointed him for monthly or other remuneration or reward.

Employer: Same as 'management'.

Equity: (1) Fairness or natural justice.

(2) As opposed to 'common law' it was that body of rules formulated and administered by the English Court of

Chancery to supplement the rules and procedures of the common law.

Judgment: The decision or sentence of a court in a legal proceeding. Also the reasoning of the judge which leads him to his decision, which may be reported and cited as an authority in law or can be treated as a precedent.

Labour: The workers, employees or staff of an organization, excluding management staff.

Legislation: Same as 'statute'.

Management: The executive staff of an organization who hold positions of authority and decision-making in the organization and who administer and are in charge of the human and other resources of the organization, particularly and usually holding, filling or acting in the positions of managers and directors.

Mutatis Mutandis: The necessary changes being made.

Precedent: A judgment or decision of a court of law cited as an authority for deciding a similar set of facts; a case which serves as an authority for the legal principle embodied in its decision and which decision therefore becomes the yard stick by which cases or disputes of similar nature are settled.

Ruling: Same as 'judgment'.

Statute: An act of Parliament or a decree/law made by a military or other regime or government.

Worker: Same as 'employee'.

Structure of the report

The rest of the report would be organized into the following chapters:

Chapter One covers matters such as the Background of the Study, Statement of the Problem, General and Specific Objectives and the Research Questions for the study. It also covers areas such as the Rationale/Significance of the Study, Delimitation, Limitations and Definition of Terms and provides a brief summary of the introductory chapter before finishing off with the proposed structure or organization of the report.

In Chapter Two, literature on the following areas is reviewed: Ways in Which the Contract of Employment can Lawfully be Brought to an End by the Employee, Ways in Which the Contract of Employment can Lawfully be Brought to an End by the Employer, Ways in Which the Contract of Employment can Lawfully be Brought to an End by Intervening Circumstances and Remedies for Unfair Labour Practices.

Chapter Three looks at the study area, the data collection techniques used and how the data was managed and analysed.

Even though the literature covers four major areas, this chapter concentrates on the first two main areas which are Ways in 'Which the Contract

of Employment can Lawfully be Brought to an End by the Employee’ and ‘Ways in Which the Contract of Employment can Lawfully be Brought to an End by the Employer’.

The Chapter is therefore in two parts. The first part (Ways in Which the Contract of Employment can Lawfully be Brought to an End by the Employee) deals with incidents that lead to the exit of an employee from his employment as a result of the employee’s own choosing or voluntary decision. This part covers topics such as Terminations by the Employee, Terminations by Mutual Agreement and the Abandonment of posts.

The second part (Ways in Which the Contract of Employment can Lawfully be Brought to an End by the Employer) looks at incidents that lead to the exit of an employee from his post which are attributable to or initiated by the employer. It covers topics such as Terminations by the Employer, Dismissals, Constructive Dismissals and Wrongful Dismissals as well as Fair and Unfair Dismissals.

Chapter Five gives a general overview of the research problem and the methodology and provides a summary of the key findings. Under this chapter also, the findings are evaluated with respect to previous and current theoretical positions and labour management practice. Additionally, peculiar and notable limitations are examined with respect to possible effects on the findings after which recommendations and suggestions for future research are also made.

CHAPTER TWO

REVIEW OF LITERATURE

Introduction

The exit phase of labour management covers all those circumstances that lead to the final abrogation of the contract of employment between the employer and the employee or that otherwise make the employee cease to remain an employee of the employer, however and whenever it occurs.

The literature reviewed covered laws passed by the Parliament of Ghana, particularly the Labour Act which is the principal legislation on labour issues in the country, books and articles that border on the chosen area of study. It covered the following broad areas, namely; Exits Initiated by the Employee, Exits Initiated by the Employer, Exits Caused by Intervening Circumstances and Remedies for Unfair Labour Practices.

Protection from slavery and forced labour

The Constitution of the Fourth Republic of Ghana, 1992, forbids the holding of persons in slavery, servitude or forced labour. This guarantees every

person in Ghana the right to work freely and willingly without any compulsion. This means that employees have the freedom to work when they wish to work and to stop any work they may be doing when they feel like doing so [article 16 clause 1(1-2)].

The Constitution however, under article 16 clause 1(3), specifically provides that "forced labour" does not include—

- (a) any labour required as a result of a sentence or order of a court; or
- (b) any labour required of a member of a disciplined force or service as his duties or, in the case of a person who has conscientious objections to a service as a member of the Armed Forces of Ghana, any labour which that person is required by law to perform in place of such service; or
- (c) any labour required during any period when Ghana is at war or in the event of an emergency or calamity that threatens the life and well-being of the community, to the extent that the requirement of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period for the purposes of dealing with the situation; or
- (d) any labour reasonably required as part of normal communal or other civic obligations.

The Labour Act, 2003 (Act 651) agrees entirely with the Constitution that a person is free to work when he wants to and cannot be forced to work or to slave for another. According to section 116 of the Act, a person shall not be required to perform forced labour, and that it is an offence for an employer to exact or cause

to be exacted, or permit to be exacted, for his or her benefit forced labour from any worker. It then goes on to stipulate that any employer convicted of contravening this provision is liable to a fine not exceeding 250 penalty units.

It is also worthy of note that under the Labour Act also, 'forced labour', which is defined by section 117 as work or service that is exacted from a person under threat of a penalty and for which that person has not offered himself or herself voluntarily, also excludes labour:

- (a) required as a result of a sentence or order of a court;
- (b) required of a member of a disciplined force or service as his or her duties;
- (c) required during a period when the country is at war or in the event of an emergency or calamity that threatens life and well-being of the community, to the extent that the requirement of the labour is reasonably justifiable in circumstances of a situation arising or existing during that period for the purpose of dealing with the situation; or
- (d) reasonably required as part of normal communal or other civic obligations.

Ways in which the contract of employment can lawfully be brought to an end by the employee

Resignation

The Labour Act agrees with the Constitution that a person is free to work when he wants to and cannot be forced to work or to slave for another. In deed the

Act provides in section 17(1) that “a contract of employment maybe terminated at anytime”.

To this end, the Act provides an employee three grounds for terminating his contract of employment, viz by mutual agreement between the employer and the worker, ill-treatment and sexual harassment (section 15).

In order not to jeopardize or otherwise negatively affect the business of the employer, however, the employee has a duty in law to duly notify his employer of his intention and in line with the period of notice required by the terms of the contract of employment [section 17 of the Labour Act, 2003 (Act 651)].

To encourage lawful terminations as legitimate forms of leaving one’s job, the Act protects the employee from losing his benefits even if he terminates the contract of employment. It does this by making provision in section 18(1) for the employee to be paid any remuneration earned before the termination, any deferred pay due the employee before the termination, any compensation due him in respect of sickness or accident and in the case of a foreign contract, the expenses and necessities for the journey as well as the appropriate repatriation expenses for himself and accompanying members of his family.

Mutual Agreement

Termination of the contract of employment by mutual consent or agreement is one of the human resource practices usually used by employers for workforce reduction. It is tactically used to induce employees to generally resign.

It also comes in handy when early retirement is contemplated by management. And it usually involves the offering of better or more attractive retirement and other packages. This right is granted the employee by section 15(a) of the Labour Act, 2003 (Act 651).

The contract of employment, like any other contract, is determinable by agreement between the parties. Here, what matters is that there should be a clear agreement between the parties and the agreement should manifestly be voluntary and without signs of compulsion from either side (Fish & Meat Company Limited v Ichnusa Limited, 1963).

Abandonment of Post

The abandonment of posts without prior notice by employees is discouraged by law as this is a bad labour practice that leaves employers in the lurch.

To compensate the employer for any situation that may call for the employee to leave without giving and observing the required notice period the law, notwithstanding the provision in section 17 discussed above, also makes it possible for the employee to terminate his contract without notice if he pays to the employer a sum equal to the amount of remuneration which would have accrued to the worker during the period of the notice [section 18(4)].

Ways in which the contract of employment can lawfully be brought to an end by the employer

Unilateral termination

Just as the employee can terminate the contract of employment between him and his employer at anytime, so also can the employer terminate the contract at anytime. This is based on the legal principle of reciprocity of contracts which is to the effect that whatever one party to a contract can do, the other party should be able to do likewise. If the principle of reciprocity were not to apply, it would mean that the contract would be unbalanced and would certainly tilt in the favour of one party to the detriment of the other.

One could imagine what the situation would be like if the employer were to have the power to terminate the employment contract at will without the employee being able to do likewise. This is why the employee can terminate by resigning his position whenever he likes. The problem, however, is that whereas employees most often feel (and in fact usually take it for granted) that it is their right to resign at will, they see it as a taboo for the employer to seek to do likewise.

Section 15 of the Labour Act, 2003 (Act 651) which provides grounds on which an employee may terminate the contract of employment between him and his employer, also provides grounds on which the employer can also terminate the contract of employment. These include:

- (a) by mutual agreement between the employer and the worker;
- (b) by the employer on the death of the worker before the expiration of the period of employment;
- (c) by the employer if the worker is found on medical examination to be unfit for employment;
- (d) by the employer because of the inability of the worker to carry out his or her work due to
 - (i) sickness or accident; or
 - (ii) the incompetence of the worker; or
 - (iii) proven misconduct of the worker.

Just like the employee also, the employer can also terminate the contract of employment without giving the required notice to the employee, provided that the employer pays to the employee a sum equal to the amount of remuneration which would have accrued to the employee during the period of the notice [section 18(4)].

Where a contract of employment is terminated by the employer in the manner stated above (in accordance with section 15) of the Labour Act, the employer has to pay to the employee:

- (a) any remuneration earned by the worker before the termination;
- (b) any deferred pay due to the worker before the termination;
- (c) any compensation due to the worker in respect of sickness or accident; and
- (d) in the case of foreign contract, the expenses and necessaries for the journey and repatriation expenses in respect of the employee and

accompanying members of his or her family in addition to any or all of the payments specified in paragraphs (a), (b) and (c).

These are stipulated in section 18(1) of the Labour Act.

The employer is also expected to pay all remuneration due the employee not later than the date of expiration of the notice of termination [section 18(2)]. Additionally, where no notice is required, the payment of all remuneration due is expected to be made by the employer not later than the next working day after the termination [section 18(2)].

Termination by mutual agreement

Termination of the contract of employment by mutual agreement is also available to the employer as it is to the employee as discussed under the previous chapter, *mutatis mutandis*. The employer also has this right under section 15(a) of the Labour Act.

A point worth noting however is that where the contract of employment contains a clause providing for mutual termination, a mere claim that a termination was by mutual termination would not suffice. This was the case in *Hellyer Brothers v Atkinson and Dickinson* [1994] the plaintiff employees had been employed for a number of years under a number of crew agreement to work on the employer's fishing boats. The agreements were to last for certain periods and had a clause that stipulated that termination could be by mutual agreement, by notice or by loss of vessel. At a point in time the company decided to

decommission some of its boats and the plaintiffs “signed off” from the latest crew agreement. The plaintiff employees argued that they were entitled to redundancy payments on the basis that their employment contracts were terminated when they were informed of the decommissioning. On the other hand their employer argued that since the termination was neither by loss of the vessel nor by notice, it must have been terminated by mutual consent (the remaining ground for termination provided in the contract).

The Court of Appeal held that a unilateral termination by the company took place when the employees were told that the boat on which they sailed was not going to sail again. As such, the employees’ signing off only constituted an acceptance of what was actually a ‘fait accompli’ and were therefore merely waiving their right to receive a notice of termination.

Dismissal

According to Oxford (2001), to dismiss is to discharge from employment or to send away. To put it more succinctly, however, Woodford & Jackson (2003) define a dismissal as the act of removing someone from his job, especially because he has done something wrong.

Generally, it is accepted that dismissal is a special form of terminating the contract of employment which imputes or connotes an element of misconduct on the part of the employee as justification for his removal. This is as against a

termination which is simply an expression of the terminating party's unwillingness to continue with the employment relationship with the other party.

Thus, unlike a mere discharge of the contract of employment in the case of a termination of appointment which need not necessarily go with reasons, a dismissal on the other usually requires the reason or reasons for the dismissal to be stated. In other words, whereas in a mere termination of the contract of employment in which the person terminating is not bound to give any reason at all for the termination (for instance in a resignation by an employee), in a dismissal the employer is bound to give reasons, at least when required.

Additionally, a termination can be at the instance of either the employee or the employer but a dismissal can only come from the employer. An employee cannot logically purport to dismiss his employer or the organization he works for.

Also, whereas a termination carries with it required periods of notice to be given to other party by the party terminating, a dismissal is usually done summarily without any reasonable period of notice being given to the employer. Again, whereas in terminations the periods of notice are paid for in situations where the party terminating prefers not to give the notice and this payment can be enforced, in a dismissal the notice that is not given is may not be paid for and is in such cases usually not enforceable against the employer, unless of course it is not done lawfully.

Lastly, whereas in a termination the employee receives all his terminal benefits and privileges, in a dismissal the employee loses most of these, arrears of salaries and allowances accrued before the dismissal date excluded.

Wrongful Dismissal

Wrongful dismissal is the sacking of the employee by the employer without notice at all or with insufficient notice to the employee, and without justification. (Jefferson, 2000: 228, 232; Sargeant, 2003: 123).

Where the contract is silent on a specific period of notice, a reasonable period of notice is to be implied based on a number of factors including custom and practice, the nature of the job, the position of the employee in the organization, how easy it is to replace such a person, etc (Masiak v City Restaurants Limited).

It is also to be noted that where notice is to be given and there are a number of employees involved, the notice must be given to each employee individually. Additionally, the dismissal notice must specifically be one and not just a warning of dismissal [Morton Sundour Fabrics Limited v Shaw (1967) and Haseltine Lake & Co v Dowler (1981)]. Also, the notice cannot be withdrawn unilaterally after it has been given. Any revocation of the notice of dismissal should be by agreement between both parties [Harris & Russell Limited v Slingsby (1977)]. The dismissal takes effect when the notice runs out. Jefferson (2000: 229)

Summary dismissal

Summary dismissal is the outright sacking of the employee by the employer without any notice to the employee but with justification (Jefferson, 2000: 231; Sargeant, 2003: 126).

The right to dismiss summarily may arise out of an express term in the contract of employment or by implication. In the case where it arises out an express term in the contract, it must fall within the scope or purview of actions stated as warranting or capable of attracting summary dismissal. Most often than not, these actions are deemed to amount to gross misconduct which cannot be tolerated by the employer or which seriously undermine the essence of the employment relationship between the employer and the employee. Additionally, they could be actions which expose certain characters in the employee that make him a highly undesirable person to work with or to do the work he does (Presbyterian Hospital, *Agogo v Boateng* [1984-86]).

Constructive dismissal

There is constructive dismissal where the termination of the contract of employment by one party to the contract (usually by the employee) is induced by the behaviour of the other party (usually the employer). In other words, there is constructive dismissal where the employee terminates the contract of employment

as a result of the employer's conduct. It is also sometimes referred to as a discharge by breach.

At common law, constructive dismissal is defined by Lord Denning in the case of *Western Excavations (ECC) Ltd v Sharp* [1978] thus:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.

Under the Labour Act, constructive dismissal is not expressly mentioned and no statutory definition is also proffered. However, section 63(3) of the Act provides that

a worker's employment is deemed to be unfairly terminated if with or without notice to the employer, the worker terminates the contract of employment because of ill-treatment of the worker by the employer, having regard to the circumstances of the case; or because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the work place.

Unlawful dismissals and terminations

An unlawful dismissal, as the name denotes, is a dismissal that is not in accordance with either general principles of common law or that infringes on certain statutory requirements. The Labour Act refers to all these instances as ‘unfair terminations’.

Thus, section 63 of the Labour provides that the employment of an employee shall not be unfairly terminated by the employer. Additionally, it goes on to provide [in subsection 2 of section 63] that a worker’s employment is terminated unfairly if the only reason for the termination is

- (a) that the worker has joined, intends to join or has ceased to be a member of a trade union or intends to take part in the activities of a trade union;
- (b) that the worker seeks office as, or is acting or has acted in the capacity of, a workers' representative;
- (c) that the worker has filed a complaint or participated in proceedings against the employer involving alleged violation of this Act or any other enactment;
- (d) the worker's gender, race, colour, ethnicity, origin, religion, creed, social, political or economic status;
- (e) in the case of a woman worker, due to the pregnancy of the worker or the absence of the worker from work during maternity leave;
- (f) in the case of a worker with a disability, due to the worker's disability;

- (g) that the worker is temporarily ill or injured and this is certified by a recognized medical practitioner;
- (h) that the worker does not possess the current level of qualification required in relation to the work for which the worker was employed which is different from the level of qualification required at the commencement of his or her employment; or
- (i) that the worker refused or indicated an intention to refuse to do any work normally done by a worker who at the time was taking part in lawful strike unless the work is necessary to prevent actual danger to life, personal safety or health or the maintenance of plant and equipment.

Even in cases where the employee himself terminates the contract of Employment between him and his employer, the law says that the employer could still be held to have unfairly terminated the employee's contract. This is in subsection (3) of section 63. It states that a worker's employment is deemed to be unfairly terminated if with or without notice to the employer, the worker terminates the contract of employment:

- (a) because of ill-treatment of the worker by the employer, having regard to the circumstances of the case; or
- (b) because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the work place.

Eligibility

It is not just any worker at all who can bring an action for unfair dismissal against his employer. Being a statutory right, there are also statutory qualifications an employee must have or certain criteria he must meet in order to be eligible to bring an action for unfair dismissal against his employer. Under section 66 of the Labour Act, certain categories of workers are excluded from the general application of the provisions of Part VIII – Fair and Unfair Termination of Employment of the Act.

These categories of workers excluded under section 66 include workers engaged under a contract of employment for specified period of time or specified work; worker serving a period of probation or qualifying period of employment of reasonable duration determined in advance; and workers engaged on a casual basis.

Fair reasons

The reasons deemed by the Labour Act to be fair bases for termination are set out under section 62 of the Act. According to section 62, a termination of a worker's employment is fair if the contract of employment is terminated by the employer on ground that the worker is incompetent or lacks the qualification in relation to the work for which the worker is employed; on the ground of proven misconduct by the employee; on grounds of redundancy under section 65 of the

Act; or due to legal restrictions imposed on the worker prohibiting the worker from performing the work for which he or she is employed.

Unfair reasons

Under the Labour Act, an employee's appointment is deemed to have been terminated unfairly if the reason for termination falls under any of the grounds stipulated under section 63 of the Act. Under section 63, a worker's employment is terminated unfairly if the only reason for the termination is:

- (a) that the worker has joined, intends to join or has ceased to be a member of a trade union or intends to take part in the activities of a trade union;
- (b) that the worker seeks office as, or is acting or has acted in the capacity of, a workers' representative;
- (c) that the worker has filed a complaint or participated in proceedings against the employer involving alleged violation of this Act or any other enactment;
- (d) the worker's gender, race, colour, ethnicity, origin, religion, creed, social, political or economic status;
- (e) in the case of a woman worker, due to the pregnancy of the worker or the absence of the worker from work during maternity leave;
- (f) in the case of a worker with a disability, due to the worker's disability;
- (g) that the worker is temporarily ill or injured and this is certified by a recognised medical practitioner;
- (h) that the worker does not possess the current level of qualification required in relation to the work for which the worker was employed which is different from

the level of qualification required at the commencement of his or her employment; or

(i) that the worker refused or indicated an intention to refuse to do any work normally done by a worker who at the time was taking part in lawful strike unless the work is necessary to prevent actual danger to life, personal safety or health or the maintenance of plant and equipment.

The constructive dismissal of an employee is also deemed unfair if it falls within any of the grounds stipulated under subsection (3) of section 63. Per 63(3) a worker's employment is deemed to be unfairly terminated if with or without notice to the employer, the worker terminates the contract of employment because of ill-treatment of the worker by the employer, having regard to the circumstances of the case; or because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the work place.

Additionally, under section 63(4) a termination may be unfair if the employer fails to prove that the reason for the termination is fair; or the termination was made in accordance with a fair procedure or generally in accordance with the Act.

Ways in which the contract of employment can be brought to an end by intervening circumstances

Although it might not be the wish of either the employer or the employee to terminate the employment contract between them under normal circumstances,

there may be times when the contract may have to be abrogated or at least taken to have been abrogated due to certain specific circumstances or difficulties that might crop up in due course. These may include the death of either the employee or the employer, general frustration of the contract and circumstances that render certain employees redundant or call for the retrenchment of staff. These are further examined below.

Frustration

According to Rutherford and Bone (1993), a contract is discharged by frustration if, after its formation, certain events occur which make its performance impossible, illegal or radically different from that which was contemplated at the time it was entered into. Per Blackburn J in *Taylor and Another v Caldwell and Another* (1863):

The principle seems to be that, in contract in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance ... that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.

This definition was adopted by the Supreme Court in the case of Barclays Bank Ghana Limited v Sakari [1996-97]. Per Acquah JSC:

The doctrine of frustration is one of the simplest concepts in the law of contract. But like any simple concept, its application is not as simple as it is understood. In Ghana the doctrine involves a mixture of common law rules and statute, that is the Contracts Act, 1960 (Act 25). The common law rules determine when frustration can be said to have occurred, while Part One of Act 25 deals with the consequences of frustration. Briefly, frustration occurs where an external event of some kind, which is not the responsibility of either party, renders further performance of a contract impossible ... or radically different from what had been contracted for see. (Page 645)

Frustration may occur in a number of instances, some of which are examined below. These include personal incapacity, destruction of the subject matter of the contract, government intervention, illegality, non-occurrence of expected events and other instances which are examined below.

Personal incapacity/medical condition

There is frustration where a person is unable to perform the contract for which he was employed through permanent physical incapacity or chronic illness. Where the medical condition of the employee makes it impossible or medically

improper for him to continue working for his employer in the manner in which he was employed, either permanently or over an unreasonably long period of time, that can be a basis for terminating the contract of employment between the employee and the employer.

This is also supported by the section 15(e) of the Labour Act which states among others, that the “contract of employment may be terminated by the employer because of the inability of the worker to carry out his or her work due to sickness or accident”.

A case in point is *Condor v. The Baron Knights Ltd* (1966) where the plaintiff joined the defendant group as a drummer under a contract of employment which stipulated that he was needed to work seven days a week and to even perform twice in one evening sometimes. The plaintiff collapsed one day and was treated in hospital. After his treatment the doctor said he could only work for three days a week. The defendant company therefore terminated the contract it had with him and the plaintiff sued for a breach of contract but the Court held that the termination was lawful because he could not continue to perform the contract in the way it was intended.

It is however necessary here to draw a distinction between a worker who is permanently incapacitated with respect to the work he was contracted to do and one who is just temporarily ill. Thus, on the issue of HIV/AIDS for instance, a distinction can be drawn between a worker living with HIV (the virus) on one hand and a worker whose infection has travelled beyond the HIV stage into the AIDS stage. A person who only has HIV, according to medical information, can

live and work normally like other persons. An employer cannot terminate an employee's employment just because the worker is HIV positive. The employer cannot also hide behind general temporary sicknesses or injuries that the HIV positive person may suffer to terminate his appointment. Such a move by an employer will be contrary to section 63(2)(g) of the Labour Act which forbids any employer from unfairly terminating the employment of a worker on the ground "that the worker is temporarily ill or injured."

Subsection (1) of section 63 of the Labour Act generally forbids the unfair termination of a worker's employment, and therefore any termination that is seen as unfair contravenes the Act. To this end, the Act specifically places the burden on the employer to prove that the termination was fair.

Section 63(4) :

"A termination may be unfair if the employer fails to prove that:

- a. the reason for the termination is fair; or
- b. the termination was made in accordance with a fair procedure or this Act."

In the case of *Tanberg v. Weld County Sheriff* (1992) the plaintiff who was a volunteer reserve deputy for the sheriff's department, was fired after he had tested HIV-positive. He successfully sued the department for compensatory damages for discrimination, lost job opportunities and emotional stress.

Unlike those who are only HIV positive, those whose conditions have travelled into the AIDS stage and are not able to continue working cannot reasonably expect to continue having their names on their employers' pay-rolls.

Thus, an employer will be able to terminate the employment of a person living with AIDS (not HIV), where the person is bedridden or too weak to continue working without infringing on the fairness provisions in sections 62 and 63 of the Labour Act. The *Condor v. The Baron Knights Ltd* case above illustrates this.

Additionally, in *Hilton v. Southwestern Bell* (1992) a draftsman was stopped from coming to work because he had AIDS and a dangerously low blood platelet count. He sued his employer for discrimination. The Court held for the employer on the basis that although the law prohibits employers from discriminating against employees on the basis of a physical or mental handicap, his condition was one that impaired his ability to reasonably perform his job and therefore the question of discrimination does not arise at all.

Death of employee or employer

The contract of employment can also be discharged in law by the death of the employee. Statutorily, the employer is empowered by section 15(c) of the Labour Act to terminate the contract of employment when the employee dies. This is especially so, where the death occurs before the expiration of the period of employment agreed between the two parties.

Just as the death of the employee could frustrate the contract between him and his employer and discharge the parties from the contract between them, so also can the contract be brought to an end by the death of the employer due to insolvency and other reasons.

Destruction of the subject matter of the contract

Where the subject matter or a thing forming the fundamental basis of the employment contract is destroyed, for instance by fire, a storm, an accident or a natural disaster, or ceases to exist for any other reason; this can frustrate the employment contract and lead to a discharge of the contract between the employer and the employee if this leads the employee with no work to do. An example is where a driver is employed to drive a company's only vehicle and this vehicle is destroyed by fire or through a road accident leaving the parties with no other vehicle to drive. Here, the contract will be discharged unless the company can afford to buy another vehicle for the employee to drive.

A case in point is *Taylor v Caldwell* (1863) where a concert hall which was let for a series of concerts, caught fire and was destroyed before the first concert could come off. It was held that the destruction of the hall frustrated the contract for the use of the premises and therefore discharged the contract between the parties.

Government intervention

The employment contract can also be frustrated by government intervention through the implementation of certain government policies and decisions. This can occur, for instance, in a situation where the government

decides to nationalize the employer's business or takes over the employer's assets in times of war and other emergencies. An example is the case of *Re Shipton, Anderson & Co. (1915)* where wheat stored in a warehouse, and which was contracted for sale to a buyer, was requisitioned by the government under emergency (wartime) legal powers.

Illegality

An employment contract may also be discharged through frustration if the business the parties are involved is subsequently made illegal by statute. In such a situation, the contract between the parties would be discharged by frustration since its continued performance would amount to an illegality. A hypothetical example would be where government decides to ban through legislation the continued manufacturing, possession, trade in tobacco and related products.

Non-occurrence of expected event

A contract can also be discharged through frustration if the whole contract is based or premised solely on the occurrence of an expected future event and this event fails to occur. An example is where a company hires staff for the sole purpose of producing souvenirs in anticipation of the visit of the first Black American president of the United States of America to Ghana and this visit is later cancelled. And in the case of *Krell v Henry [1903]*, a room overlooking the

coronation procession route of Edward VII was let for use on the coronation day but the coronation was unfortunately postponed due to the king's illness. The contract was held to have been frustrated.

Imprisonment

Where an employee misconducts himself or otherwise commits an offence and he is imprisoned, the law provides that he “any public office held by him within the jurisdiction of the Court shall forthwith become vacant”. This means that the person will automatically lose his position, post or appointment he held immediately before his conviction and sentence. This is the provision in section 298(1)(a) of the Criminal Procedure Code, 1960 (Act 29).

In fact the Criminal Procedure Code goes further to state categorically that “any pension, superannuation, allowance or emolument payable to him out of the public revenues or out of any public fund, or chargeable on any rate or tax, any accruing right to any such pension, allowance, or emolument, shall determine and be forfeited from the date of the conviction” section 298(1)(b).

The Code however exempts persons who were minors at the time of committing the crime from the consequences of the mentioned. This is per sub-section (2) of section 298.

Additionally, where a person who has been convicted and sentenced receives a pardon, he shall thereby, unless the pardon otherwise directs, be relieved from all the consequences mentioned, except as to any office or

employment which, having been vacated, has been filled up before he receives the pardon. This is in sub-section (3) of section 28.

Redundancy and retrenchment

Redundancy is defined by Rutherford and Bone (1993) as the dismissal of an employee wholly or mainly on the ground that the employer has or intends to cease carrying on business for which the employee was employed or to cease doing so in the place where the employee was employed or the requirements of that business for employees to do work of that kind have diminished or are expected to do so either completely or in the place where the employee was employed. This definition is the same in section 1 of the British 'Employment Protection Act of 1978.

The Labour Act does not define retrenchment. It however outlines certain steps an organization will have to take when contemplating declaring a redundancy. Per Woodford & Jackson (2003), however, to be redundant is to lose "your job because your employer no longer needs you"; and a redundancy payment is "money that a company pays to workers who have lost their jobs because they are no longer needed".

Retrenchment on the other hand is defined by Woodford & Jackson (2003) as "spending less or reducing cost" or dismissing a worker "as a way of saving the cost of employing them".

Differences between redundancy and retrenchment

Whereas redundancy is concerned with shedding off excess staff, retrenchment is concerned fundamentally with saving cost. It may appear, therefore, that even though keeping excess staff may also lead or amount to losing money that an organization could otherwise save, having redundant staff may not necessarily mean having general overall fiscal difficulties.

Another difference is that whereas a redundancy hinges on having excess staff as the reason for shedding off workers, in retrenchment even workers of an understaffed organization may be laid off as the central aim is reducing operational costs to sustainable limits to keep the organization going, and not necessarily saving money that would otherwise have been wasted on workers who may not be needed or required.

Redundancy procedures

For the purposes of the Labour Act, however, redundancy and retrenchment would be deemed to be the same as the Act does not make any distinction between the two and only provides for similar and related circumstances, all under section 65 of the Act. Thus, under subsection (1) of section 65, the Act provides that when an employer contemplates the introduction of major changes in the production, programme, organization, structure or

technology of an undertaking that are likely to entail terminations of employment of workers in the undertaking, the employer shall

- (a) provide in writing to the Chief Labour Officer and the trade union concerned, not later than three months before the contemplated changes, all relevant information including the reasons for any termination, the number and categories of workers likely to be affected and the period within which any termination is to be carried out; and
- (b) consult the trade union concerned on measures to be taken to avert or minimize the termination as well as measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

Additionally, subsection (2) of section 65 the Act provides that without prejudice to subsection (1), where an undertaking is closed down or undergoes an arrangement or amalgamation and the close down, arrangement or amalgamation causes:

- (a) severance of the legal relationship of worker and employer as it existed immediately before the close down, arrangement or amalgamation; and
- (b) as a result of and in addition to the severance that worker becomes unemployed or suffers any diminution in the terms and conditions of employment,

the worker is entitled to be paid by the undertaking at which that worker was immediately employed prior to the close down, arrangement or amalgamation, compensation by way of what the section refers to as "redundancy pay".

The amount of redundancy pay and the terms and conditions of payment are matters which are subject to negotiation between the employer or a representative of the employer on the one hand and the worker or the trade union concerned on the other. Any dispute that concerns the redundancy pay and the terms and conditions of payment may be referred to the Commission by the aggrieved party for settlement, and the decision of the Commission shall, subject to any other law be final [subsection (3) and (4) of section 65].

Liquidation

Where the employer is not an individual but a company, the company dies or ceases to exist through liquidation. Liquidation is the process of winding up and dissolving a corporate entity for it to cease to exist. As soon as liquidation occurs, it brings the contractual relationship between the employer and the employees to an end.

Liquidations are provided for under the Companies Code, 1963 (Act 179) and the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180). The Companies Code, 1963 (Act 179) deals with liquidations involving private solvent companies while the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180), deals with the liquidation of insolvent companies. The two were designed to come into operation at the same time (section 67 of Act 180).

Liquidation may be necessitated by a number of reasons. These include situations where the body corporate is unable to pay its debts, where the Court is

of the opinion that the business or objects of the body corporate or any of them are unlawful or that the body corporate is being operated for any illegal purpose or is carrying on business or operations which are not authorised by its constitution, or where the Court is of the opinion that it is just and equitable that the body corporate should be wound up (section 64). It commences with, among others, a special resolution of the company; a petition addressed to the Registrar or a petition to the Court.

In case of liquidation, employee remuneration in arrears is protected and ranks among the class of debts given first priority when it comes to payment of debts owed by the company, except that this protection covers the remuneration for the four months preceding the liquidation and not beyond (section 41(2)(a)(i)). This invariably means that employees would have to guard against allowing their salaries to be arrears beyond four months at any point in time. Although the Act also stipulates in the same section (section 41) a fixed amount which this remuneration for the four month period should not exceed, this amount is quoted in currency which is currently not in use in Ghana, leaving the specified period as the only currently relevant portion of the provision.

Section 41 provides:

Section 41—Duty to Ascertain Priority of Debt.

(1) On the commencement of a winding up it shall be the duty of the liquidator, in relation to each debt which ranks for dividend, to ascertain into which class the whole or any part of the debt falls.

(2) The classes are,

(a) class A, that is to say, a debt or part of a debt which answers either of the following descriptions, that is to say,

(i) remuneration not exceeding one hundred and fifty pounds owed to an employee of the company in respect of employment during the whole or any part of the four months preceding the commencement of the winding up;

(ii) rates, taxes or similar payments owed to the Republic or a local authority which have become due and payable within the year preceding the date of the commencement of the winding up;

(b) class B, that is to say, a debt or part of a debt which does not fall within any other class;

(c) class C, that is to say, a debt or part of a debt which does not fall within class D and is, or was at any time within the year preceding the commencement of the winding up, owed to a director or former director of the company or to a near relative of any such director or former director;

(d) class D, that is to say, a debt or part of a debt which answers either of the following descriptions, that is to say,

(i) excess benefit restored to the liquidator under section 31 of this Act;

(ii) excess interest that is any portion of a debt which whether it is stated to do so or not represents interest at a rate in excess of seven per centum per annum.

(3) Class A debts shall have priority over the claims of holders of debentures under any floating charge credited by the company and shall be paid accordingly out of any property composed in or subject to such charge.

Remedies for unlawful dismissals and terminations

Dealing with both unlawful dismissals and terminations under the umbrella name 'unfair terminations', the Labour Act also provides in section 64 that an employee who claims that his employment has been unfairly terminated by his employer may present a complaint to the National Labour Commission and if upon investigation of the complaint the Commission finds that the termination of the employment is unfair, the Commission may:

- (a) order the employer to re-instate the worker from the date of the termination of employment;
- (b) order the employer to re-employ the worker, either in the work for which the worker was employed before the termination or in other reasonably suitable work on the same terms and conditions enjoyed by the worker before the termination; or
- (c) order the employer to pay compensation to the worker.

Summary

In effect, the law has ample provisions, both at common law and through statutes, that duly and effectively deal with the various forms of exits at the instance of both the employee and the employer as well as those that occur due to circumstances necessitated by intervening circumstances.

Together, these common law and statutory provisions serve as a good foundation or resource base for the facilitation of not only the conduct of the study but also the achievement of its objectives.

CHAPTER THREE

METHODOLOGY

Introduction

The study examined the laws applicable to the management of labour in Ghana with specific reference to the exit phase. This chapter of the study describes, among others, the design and the procedure followed in the collection of the data, as well as how the data were analysed.

Research design

The study used the documentary analysis method as its main research approach. Specifically, it involved library and archival research of law and related books and documents relevant to the study. It also involved studies of court cases decided on issues relevant to the study over the years, as well as content analysis of Acts of Parliament and other laws applicable to labour issues in Ghana.

Although one weakness of the documentary research approach is that it generally does not give the researcher the primary accounts and experiences of the objects of research compared to other approaches like the use of questionnaires,

this approach was chosen as against the other approaches because when it comes to the law the primary and most authoritative sources are rather the documented ones and not the statements, opinions or experiences of individuals.

In other words, when it comes to legal issues, the best source of the law itself is with published or promulgated legal documents like Acts of Parliament, Decrees, Bye-Laws, etc; and not with individuals, as any statements or postulations they purport to make could only be reports or opinions of what they think the law is or should be at any point in time.

Data collection procedure

The data for the study were collected in a number of ways. Law and related books relevant to the study topic were searched for and either borrowed or bought as appropriate. They were then studied in detail and all important points relevant to the topic were noted. The same applied to journal and other articles written by persons knowledgeable in the area under study.

Ghanaian court cases were also obtained primarily through a close scrutiny of law reports for older Ghanaian decided cases (precedents). Resort was also made to both old and recent common law and English cases, which serve as precedents with persuasive value in Ghana, to help illustrate some of the legal principles involved. These included cases from the British Employment Relations Tribunal, the British Court of Appeal and the British House of Lords.

Ethics

In carrying the study, care was taken not to violate any ethical rules. All rules applicable in the various research libraries where research was carried out were followed. Great care was also taken not to violate copyright rules in compiling the report, including avoiding acts of plagiarism.

Field work

Field work for the study involved visits to various courts in the country to apply for, pay and obtain certified true copies of more recent Ghanaian cases. The court visits covered mainly the High Court, the Court of Appeal and the Supreme Court of Ghana.

Visits were also paid to Parliament House and the Government Printer (now the Ghana Publishing Company, also known as the Assembly Press) where copies of Acts of Parliament and other laws relevant to the topic were also obtained.

Various libraries were also visited, notable among them being the University of Cape Coast Library, Cape Coast; the Faculty of Law Library, University of Ghana, Legon; the Ghana School of Law Library, Accra and the Supreme Court Library, Accra.

Lastly, many bookshops were also frequented for books and other literature on the subject. These also covered a number of bookshops in Cape

Coast and Accra, including the Excellent Publishing and Printing (EPP) and Readwide Bookshops in Cape Coast; the University Bookshop, University of Ghana, Legon; as well as the Kanda and La branches of the Readwide and Excellent Publishing and Printing (EPP) Bookshops respectively.

Challenges

There was a general dearth of publications (especially local textbooks) on the subject apart from the pieces of legislation which were readily available in the various law libraries visited. The researcher therefore had to resort to foreign textbooks which generally did not reflect the local Ghanaian legal position on the subject.

Additionally, some personnel manning official positions from whom help was needed to enable the researcher access certain judicial and other documents were generally uncooperative, thereby making the study a bit more frustrating.

Also, initial budgetary estimates were exceeded as, in certain quarters, monetary payments had to be made even in situations where certain services had to be rendered without further charge (all due and lawful official rates and charges having been paid) without which these personnel not prepared to cooperate as speedily as expected.

Data analysis

The data collected was analysed. This involved the content analysis and application of the current laws to practical labour or labour related issues in Ghana, with specific reference to the exit phase. These were juxtaposed with the legal positions posited by authors of local and foreign books written from both Ghanaian and foreign but related backgrounds. They were then amply illustrated and supported with decided Ghanaian and English courts cases.

In the end, conclusions were drawn based on appropriate legal interpretations, as a result of which appropriate legal submissions were made for the purpose of addressing some of the issues applicable to the management of labour in Ghana, with specific reference to the exit phase.

CHAPTER FOUR

RESULTS AND DISCUSSION

Introduction

The findings in this chapter are the answers found to the research questions formulated at the beginning of the study, namely:

1. What are some of the ways in which the contract of employment can lawfully be brought to an end by the employee?
2. What are some of the ways in which the contract of employment can lawfully be brought to an end by the employer?
3. What are the legal meanings, implications and differences between terms such as resignation, dismissal, constructive dismissal, wrongful dismissal, fair dismissal and unfair dismissal?

These findings are fully enumerated and amply discussed in detail as follows.

Ways in which the contract of employment can lawfully be brought to an end by the employee

Termination by mutual agreement

Termination of the contract of employment by mutual consent or agreement is one of the human resource practices usually used by employers for workforce reduction. It is tactically used to induce employees to generally resign. It also comes in handy when early retirement is contemplated by management. And it usually involves the offering of better or more attractive retirement and other packages.

Judging by the name, however, it is also always possible for the employee to also initiate negotiations for a mutual agreement towards his exit. This right is granted the employee by section 15(a) of the Labour Act, 2003 (Act 651).

The contract of employment, like any other contract, is determinable by agreement between the parties. Here, what matters is that there should be a clear agreement between the parties and the agreement should manifestly voluntary and without signs of compulsion from either side. This was buttressed by Prempeh J in the case of *Fish & Meat Company Limited v Ichnusa Limited* where Prempeh J stated inter alia that:

“It is a general rule of law that one of the modes in which an existing contract maybe discharged is by the same process and in the same form as that in which it is made, that is by mutual consent of the parties.”

It is always advisable that a mutual agreement for the discharge of an existing contract be put into writing to avoid distortions and ambiguities at later dates by either party. This does not however preclude the courts from upholding mutual agreements made orally if, from the circumstances, there is clear evidence that one was indeed made by the parties. Cases in point are *Sowah v Bank for Housing and Construction* and *Ghana Rubber Products v Criterion Company Limited* in which the Supreme Court and the Court of Appeal respectively held that a written contract could be varied by an oral one.

Where the contract of employment is terminated by mutual agreement, it means that there has been no dismissal and therefore no claim for unfair dismissal or redundancy will hold. This is illustrated in the case of *Birch and Humber v The University of Liverpool* where the university (their employer) invited applications for early retirement with the view to reducing its staff. Those who applied and were accepted in the course of this staff reduction exercise included the two applicants. The incentive package in the exercise was that those who opted for early retirement would receive more money than what was guaranteed by legislation and the agreement made it clear that they would receive this money in lieu of the statutory redundancy payments. After duly receiving this incentive package however, the two still applied for the statutory redundancy payments.

The issue was whether the contract of employment had been mutually and freely terminated or the employees had been dismissed in disguise. The Court of Appeal held that there had been a mutual agreement to terminate the contract of employment.

Agreeably, the most important issue is whether the purported agreement to end the contract of employment was entered into freely and willingly. In the case of *Igbo v Johnson Matthey Chemicals Limited* the employee applied for an extended leave to enable her visit her husband and children in Nigeria. The employer granted her the leave but only on the condition that she signed a note that read: “You have agreed to return to work on 28.9.86. If you fail to do this, your contract of employment will automatically terminate on that date.” She agreed and signed it to enable her have her leave. She however fell ill and was not able to make to work on the stipulated date. The employer maintained that her contract had been terminated as per the note she was made to sign, arguing that there was no dismissal but a consensual termination. The Court of Appeal rejected the employer’s argument; holding, *inter alia*, that the note she was made to sign attempted to limit her potential claim for unfair dismissal.

This is distinguishable from the case of *Logan Salton v Durham County Council* in which the employee, after becoming aware that a report submitted to his employer had recommended his summary dismissal, successfully negotiated a written agreement for his departure from the organization. He subsequently claimed he was made to enter into the agreement under duress. The tribunal rejected his claim and distinguished his case from the *Igbo* case, holding that he

entered into the agreement willingly, without duress and after proper advice and for good consideration.

Should there be pressure or duress to resign, however, this would be a clear case of the agreement not having been entered into by free, consensual mutual agreement. This was the case in *Pearl Assurance PLC v Manufacturing Science and Finance* in which insurance agents were put under pressure to resign. The tribunal held that there was no termination by mutual agreement.

Unilateral termination by the employee (resignation)

Legally, resignation is the voluntary unilateral repudiation of the contract of employment by the employee, with or without prior notice to his employer. As stated earlier, the Constitution of the Fourth Republic of Ghana, 1992, forbids the holding of persons in slavery, servitude or forced labour; and that employees have the freedom to work when they wish to work and to stop any work they may be doing when they feel like doing so [article 16 clause 1(1-2)]. To this end an employee has the right to resign when he decides he no longer wants to work with his employer at any point in time. Although he may be required to fulfill certain conditions prior to his resignation, his right to resign per se, if he wants to, cannot be denied him in law.

Distinction between resignation and termination by mutual agreement

One key difference between resignation and termination by mutual agreement would therefore be that whereas in termination by mutual agreement the employee's decision to terminate is subject to negotiations between the employee and the employer, in resignation the decision to leave is solely that of the employee.

The Labour Act implies that employees may lawfully resign for a number of reasons [sections 15 and 63(3)], although it does not use the 'resignation' per se. Resignation forms part of terminations by mutual agreement or consent, but it is not all resignations that are mutual or consensual. This is because in practice it is not all the time that employers agree with employees on their quest to resign. In fact in many instances some employers even do all they could to restrain their best employees from resigning. Yet once the employee is determined to go, the employer cannot stop him because of the legal position (as per the Constitution and the Labour Act as cited) on protection from slavery and forced labour. In essence, therefore, a resignation is but a special right conferred in law on an employee to unilaterally terminate the contract of employment as and when he decides, at any point in time, that he can no longer work for his employer.

Notice

In order not to jeopardize or otherwise negatively affect the business of the employer, however, the employee has a duty in law to duly notify his employer of his intention to resign. This must be in line with the period of notice required by the terms of his contract of employment and in accordance with the provisions of section 17 of the Labour Act, 2003 (Act 651).

At common law the party wishing to terminate a contract of employment has to give a reasonable period of notice to the party (*McClelland v Northern Ireland Health Services Board*). Where no specific periods are expressed in the contract of employment, it is implied (*Masiak v City Restaurants (UK) Limited*) based on a number of factors including custom and practice, the nature of the job, the level of the employee in the organization and how easy it is to replace such a person, etc.

In the absence of any stated notice period in the contract of employment or in the absence of a more favourable term in the contract, section 17 of the Act provides that a contract of employment may be terminated at anytime by either party giving to the other party one month's notice or one month's pay in lieu of notice in the case of a contract of three years or more; two weeks' notice or two weeks' pay in lieu of notice in the case of a contract of less than three years; or seven days' notice in the case of a contract from week to week. In addition, a contract of employment determinable at will by either party may however be terminated at the close of any day without notice, and all notices must be in

writing. It is also to be noted that for the avoidance of doubt the Labour Act makes it clear in subsection (4) of section 17 that the days on which notices are given shall be included in the period of the notice.

Relationship during the notice period

The contract of employment continues to run throughout the notice period and remains so until the notice period ends. The employee has to avail himself for work and he is to be paid during the period. It is the employer's duty to assign or provide him with work to do and so far as he avails himself and is ready and willing to work for the employer he has to be paid whether there is work for him to do or not. The employee's pay is also not to be negatively affected by any genuine periods of absence due to sickness, pregnancy, childbirth or maternity leave. For the avoidance of doubt the employee is also entitled to his annual leave in proportion to the portion of the calendar year he has served before the termination (section 30(1) of the Labour Act).

On the other hand, if the employee takes part in an illegal strike during the period the employer is not obliged to pay the employee his or her remuneration in respect of the period during which he or she was engaged in the illegal strike [section 168(4)].

It is to be noted that an employee's indication that he intends resigning does not and should not be taken as a formal or official notification of termination. A case in point is *Ely v YKK Fasteners Limited* where the employee

informed his employer that he intended quitting his job and moving to Australia. A few months later he was asked to give a firm date for his last day at work and he responded that he had changed his mind and wanted to stay. By then, however, his employer had found a replacement for him and maintained that the intention he expressed had been taken as a resignation.

The Court of Appeal held that the employee's expression of his intention to resign did not amount to an official notice of termination of his contract of employment. He had only expressed a future intention and that could not count as an unequivocal and actual resignation.

Employer's obligations

Where an employee resigns, the sole obligation on the employer is to accept the resignation as signifying the employee's exercise of his lawful right to unilaterally repudiate the contract of employment. According to Sargeant (2003), where a purported resignation occurs in circumstances that can cast doubt on whether the employee really intended to resign or not, the employer is reasonably expected to allow a reasonable cooling off period to elapse to help make the employee's intention clear. This could be anything from a day to a few days depending on the circumstances of each particular case. It helps to avoid unnecessary legal and practical human resource problems that can crop up. Examples of such situations are cases where the resignation is blurted out in the heat of the moment or as reaction to pressure by an overburdened employee.

Where there are no such special circumstances, however, “the employer is entitled to take the employee’s words at face value and is not required to look behind the words and interpret them as a ‘reasonable man’ might”.

In the case of *Kwik Fit (GB) Ltd v Lineham*, Lineham was the manager of one of the company’s depots. He was disciplined by the divisional sales manager of the company due to some lapses that were discovered at his depot and were reported to the divisional manager. In the course of a heated interview between them, Lineham threw down his keys on the counter and walked out. The divisional manager took Lineham’s behaviour to mean a resignation and accordingly informed the company’s personnel office that Lineham had, by his actions, resigned and should not be re-employed. Lineham later claimed unfair dismissal and his employers maintained that he had resigned at the end of the interview with his divisional manager.

The tribunal held that where an employee resigns, the employer is entitled to assume the resignation as genuine on the face of it and immediately accept it as repudiating the contract of employment between them. However, in situations where the words or actions importing a resignation are spoken or acted in the heat of the moment or under considerable pressure, the employer should allow a reasonable period of time to elapse (a day or two) before accepting the resignation at face value. During this period, facts may emerge which may cast doubt on the seriousness or otherwise of the resignation. Furthermore, although an employer is under no obligation to investigate the circumstances of such a ‘resignation’, it maybe prudent to do so to find out whether the employee really did intend to

resign. On these facts, however, the employer was not entitled to assume that what had actually occurred was a genuine resignation.

In similar vein, in *Barclay v City of Glasgow District Council*, the court held that the employer was not entitled to take at face value, an unequivocal oral resignation by an employee who had serious learning difficulties. This is because employers are expected to take into account the special circumstances of each employee when determining whether a resignation was conscious and rational. This could be looked against the *Sothorn v Franks Charlesly & Co* where it was held that the words “I am resigning” could be taken at face value.

Entitlements

The Act protects the employee from losing his benefits even when he resigns. It does this by making provision in section 18(1) for the employee to be paid any remuneration earned before the termination, any deferred pay due the employee before the termination, any compensation due him in respect of any sickness or accident; and in the case of a foreign contract, the expenses and necessaries for the journey and repatriation expenses in respect of the worker and accompanying members of his or her family in addition.

Abandonment of Post

The abandonment of posts without prior notice by employees is discouraged by law. It is a bad labour practice that leaves employers in the lurch. Some employees do it either because they deliberately want to leave their employers in a mess or because they have got another job and they just do not care what happens to their current employers. This is particularly so, given the fact that legally an employee can properly resign without giving and observing any period of prior notice to his employer.

The only proviso is that the employee who wants to resign without giving and observing any notice to his employer has to pay to his employer a sum equal to the amount of remuneration which would have accrued to the worker during the period of the notice [section 18(4) of the Labour Act, 2003 (Act 651)]. However, in practice, most employees who leave without notice do not pay the money and most employers also do not chase or sue their ex-employees for it, thereby encouraging the practice to continue. Nevertheless, employers sometimes pay their ex-employees back by refusing to cooperate when it comes to giving references or recommendations on those ex-employees to their new employers should the new employers request any.

Constructive resignation, elective or automatic termination?

An important issue for consideration here, is whether a repudiatory act

such as an abandonment of an employee's post can or should constitute a valid termination of the contract of employment by itself? Since no letter of resignation or termination is written to formally or officially inform the employer when the employee is leaving, the notion exists that such an action by the employee should or could be taken as an automatic termination or at least some kind of 'constructive resignation'. It is to be noted that in the case of such a repudiatory breach by the employee, the law is that the contract of employment is not automatically terminated by a breach by the employee, however fundamental the breach would be. This is because if contracts of employment were to be automatically terminated by breaches occasioned by employees the repercussions on employment protection would be too far reaching.

Therefore, the rule is that where any such breach is committed by the employee and the employer wants to have the contract terminated as a result of the repudiation, the employer is not to take it as an automatic termination or a constructive resignation, but rather take steps to accept the repudiation and expressly or impliedly terminate the contract of employment.

A case in point is *London Transport Executive v Clarke* where the employee who worked as a bus mechanic, applied for unpaid leave to enable him visit his family based in Jamaica. His application was turned down and he was warned that if he went without permission his name would be struck off roll. He went, nevertheless and his employer wrote to his home address requesting an explanation for his absence. No reply came and another letter was dispatched from his employer to the effect that if he did not provide the explanation he would

be deemed to be no longer interested in the job and to have resigned from his job. After seven weeks he surfaced at the work place and was denied entry. In court, the employee claimed he had been dismissed whereas his employer claimed the employee had left on his own accord.

The Court of Appeal held that the employee's contract of employment had not been terminated by his conduct of absenting himself for seven weeks without official permission. The court explained that the employee had engaged in a repudiatory breach by committing such a serious offence, yet this does not automatically terminate the contract of employment by itself. The employer would have to take steps to terminate the contract, thereby accepting the breach. And that in this case, the acceptance of the breach and subsequent termination the contract of employment was occasioned by the employer's refusal to allow the employee to return to his work.

Ways in which the contract of employment can lawfully be brought to an end by the employer

Unilateral Termination by the Employer

Just as the employee can resign or terminate the contract of employment between him and his employer at anytime with or without giving reasons, so also can the employer terminate the contract between him or it and the employee at anytime with or without giving reasons. This is based on the legal principle of

reciprocity or mutuality of contracts which is to the effect that whatever one party to a contract can do, the other party should be able to do likewise. If the principle of mutuality were not to apply, it would mean that the contract would be unbalanced and would be seen to be tilted in favour of one party to the detriment of the other. One could imagine what the situation would be like if the employer were to have the power to terminate the employment contract at will without the employee being able to do likewise by resigning whenever he liked. The problem, however, is that most often whereas employees always feel it is their right to resign at will and in fact take it for granted, they see it as a taboo for employers to do likewise.

The common law

At common law, this principle is illustrated in the case of *Stocker v Wedderburn* (1857) in which the employer employed the defendants to work on some patents he owned, to sell the patents and to generally serve the company for two years. He later sought to specifically enforce the contract against the defendant employees. It was held, however, that the plaintiff employer could not specifically enforce the contract against the defendant employees since specific performance could mutually not lie against him in law. In Ghana also, the principle of mutuality was upheld by the High Court in the case of *Lartey v Bannerman* [1972] in which Justice Sarkodee held that specific performance

could not be decreed against a party who had entered into a contract with an infant for lack of mutuality. He stated:

“Thus specific performance cannot be enforced against a party who has entered into a contract with an infant since the remedy does not lie against an infant. A court of equity will not lend its aid where the remedy is not mutual”. (p.442).

The mutuality principle is further echoed in cases like *Flight v Bolland* (1828); *Lumley v Ravenscroft* [1895]; *Blackett v Bates* (1865) and also explored in depth by Cook (1927).

Thus, applying the principle to the termination of the contract of employment by employers in Ghana, the High Court held in *Chatlani v. Haroutunian* [1974] that the employer, like the employee, could indeed terminate the contract of employment “at any time”. The facts of the case were that plaintiff was employed as a store-keeper of a retail store by the defendant in 1959. He was later promoted to managerial status. The contract provided for the plaintiff’s salary to be paid on a monthly basis as well as a month’s leave every year. There was however no provision on how the contract of employment was to be terminated. Later, shortages were discovered after a number of stock-takings, which shortages the employer did not ask the employee to refund. Later, it was also discovered that the employee had been unilaterally ‘borrowing’ money from the cash sales for his personal use without the knowledge and consent of his employer, some of which he had not finished paying. The employer fired the

employee for the shortages and the employee sued for damages for wrongful dismissal.

The court per Abban, J, held inter alia that

“Concerning the termination of the plaintiff’s employment, I find that there was no express term dealing with the conditions under which the services of the plaintiff could be terminated by the defendant. Consequently in the absence of misconduct the plaintiff’s employment was determinable at any time by either party on giving reasonable notice.”

Another Ghanaian case in which this view was supported is *Bank of Ghana v. Narko & Another* [1973]. Here the Court of Appeal held that the appellant bank “was entitled, even without assigning any reason, to dispense with the services of any of its employees”.

The Labour Act

Section 15 of the Labour Act, headed “Grounds for Termination of Employment” which, among others, provides grounds on which an employer may terminate the contract of employment between him and his employee, states the employer’s grounds to include:

- (a) by mutual agreement between the employer and the worker;
- (b) by the employer on the death of the worker before the expiration of the period of employment;

- (c) by the employer if the worker is found on medical examination to be unfit for employment;
- (d) by the employer because of the inability of the worker to carry out his or her work due to
 - (i) sickness or accident; or
 - (ii) the incompetence of the worker; or
 - (iii) proven misconduct of the worker.

Reasons for termination

The employer, just like the employee, is not bound to assign any reasons for terminating the contract of employment between him and the employee as long as the appropriate notice requirements are observed. In deed according to Jefferson (2000:233), “if the employers do comply with the notice requirement, there is no wrongful dismissal. There is no need for them to provide any reason at all why they dismissed the worker. If they do give a reason, there is no need for the reason to be a good or valid one. An employee could not challenge being dismissed, no matter how long he had worked for the firm”.

Thus, in *Consolidated African Selection Trust Limited v Nketia* [1971] the respondent was employed in December 1957. He was permanently engaged in March 1960 and given a subsequent letter in October 1962. On 29 January 1965 the letter of engagement of October 1962 was amended to allow the appellants to terminate the respondent’s contract of employment by giving three months' notice

in writing. The respondent's appointment was terminated on 11 October 1965 by the appellants with immediate effect without giving reasons. He was paid three months' salary in lieu of notice, repaid his earlier contributions to the provident fund together with his leave and other entitlements. The respondent successfully sued the appellants for damages for wrongful dismissal five months later and the company appealed.

In allowing the appeal, the Court of Appeal held, *inter alia*, that the submission that the appellants were under a contractual obligation not to exercise their right of terminating the respondent's contract of employment without disclosing their reasons for doing so was erroneous.

The Question

As can be seen from the grounds available to the employer for terminating the contract of employment under section 15 of the Labour Act above, however, there is no specific provision in the section that expressly confirms the employer's right to terminate the contract without assigning reasons as the employer generally has in law. Nevertheless, it has to be noted also that the Labour Act does not expressly preclude the employer from terminating without assigning reasons either. The only thing that is clear in-between, is that all the grounds specifically provided under section 15 for the employer require certain conditions or circumstances to be present before the employer can seek to rely on any one of

them, not to mention the provisions in section 63 [particularly 63(4)] of the same Act.

The question that remains therefore is whether, in view of the fact that the Labour Act requires certain conditions or circumstances to be present before the employer can seek to rely on any of the grounds provided by the Act, an employer can still terminate the contract of employment without assigning or giving reasons to indicate which of the statutory grounds he seeks to rely on.

For the avoidance of doubt section 15, headed “Grounds for Termination of Employment”, reads:

A contract of employment may be terminated,

- (a) by mutual agreement between the employer and the worker;
- (b) by the worker on grounds of ill-treatment or sexual harassment;
- (c) by the employer on the death of the worker before the expiration of the period of employment;
- (d) by the employer if the worker is found on medical examination to be unfit for employment;
- (e) by the employer because of the inability of the worker to carry out his or her work due to
 - (i) sickness or accident; or
 - (ii) the incompetence of the worker; or
 - (iii) proven misconduct of the worker.

Section 63, headed “Unfair Termination of Employment” also reads:

(1) The employment of a worker shall not be unfairly terminated by the worker's employer.

(2) A worker's employment is terminated unfairly if the only reason for the termination is

(a) that the worker has joined, intends to join or has ceased to be a member of a trade union or intends to take part in the activities of a trade union;

(b) that the worker seeks office as, or is acting or has acted in the capacity of, a workers' representative;

(c) that the worker has filed a complaint or participated in proceedings against the employer involving alleged violation of this Act or any other enactment;

(d) the worker's gender, race, colour, ethnicity, origin, religion, creed, social, political or economic status;

(e) in the case of a woman worker, due to the pregnancy of the worker or the absence of the worker from work during maternity leave;

(f) in the case of a worker with a disability, due to the worker's disability;

(g) that the worker is temporarily ill or injured and this is certified by a recognised medical practitioner;

(h) that the worker does not possess the current level of qualification required in relation to the work for which the worker was employed which is different from the level of qualification required at the commencement of his or her employment; or

(i) that the worker refused or indicated an intention to refuse to do any work normally done by a worker who at the time was taking part in lawful strike unless

the work is necessary to prevent actual danger to life, personal safety or health or the maintenance of plant and equipment.

(3) Without limiting the provisions of subsection (2), a worker's employment is deemed to be unfairly terminated if with or without notice to the employer, the worker terminates the contract of employment

(a) because of ill-treatment of the worker by the employer, having regard to the circumstances of the case; or

(b) because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the work place.

(4) A termination may be unfair if the employer fails to prove that,

(a) the reason for the termination is fair; or

(b) the termination was made in accordance with a fair procedure or this Act.

section 63(4) provides that “A termination may be unfair if the employer fails to prove that

a. the reason for the termination is fair; or

b. the termination was made in accordance with a fair procedure or this act”.

The response

The question whether, with the coming into force of the Labour Act, an employer can still terminate the contract of employment without assigning or giving reasons to indicate which of the statutory grounds he seeks to rely on was answered when the issue came up for determination by the High Court, Accra, in

the case of the National Labour Commission v Ghana Telecommunications Company Limited.

In this case the petitioner, Ms Afua Yeboah, was employed by the Respondent (Ghana Telecommunications Company Limited) in September 2003 as an Assistant Manager. She was later promoted in April 2005 to the position of Chief Manager and subsequently became the Head of Corporate Communications and General Manager at which time the parties purported to sign a new contract of employment which reserved for the Respondent the right to terminate the contract without assigning reasons. Things went well between the petitioner and her employer until the contract was terminated in February 2006.

She lodged a complaint of unfair termination of appointment with the Applicant (the National Labour Commission) and sought:

1. that the termination should be converted into resignation;
2. compensation of three years' gross salary for wrongful termination;
3. GH¢1,500.00 for the embarrassment caused to her;
4. an apology from Ghana Telecom;
5. the conversion and payment of all her entitlements into cash;
6. payment of her bonus; and
7. an excellent reference from Ghana Telecom signed by the Chief Executive Officer.

For its part, the Commission after considering the dispute, declared “that the so called contract or re-employment entitling the Respondent to dismiss without reason was not a contract of employment but a mere notice of promotion”

and that “the reservation of the right to dismiss without reason was contrary to section 63(4) of the Labour Act and is therefore overridden by the latter”.

The Commission further substituted termination on grounds of redundancy as the reason for the termination of employment, recalculated the petitioner’s entitlements as though she had been declared redundant and then proceeded to make an award in accordance with these findings and declarations. The Respondent challenged and refused to comply with the Commission’s orders, as a result of which the Commission applied to the High Court for the enforcement of its orders against the Respondent.

On the issue of whether the Respondent lost its right to terminate an employment contract without giving any reason with the coming into force of the Labour Act [particularly sections 15 and 63(4)] the High Court settled the issue by affirming the right of the employer to terminate the contract of employment without assigning any reason even in the face of the provisions of the Labour Act as they currently stand. Per Justice Mrs Irismay Brown:

“Nowhere in the above provisions [sections 15 and 63(4)] has the law made it a mandatory duty on an employer to provide reasons for the termination of an employment. The law is that a contract of employment not being a contract of servitude can be severed at anytime and for any reason or none by the service of the appropriate notice. All that the law requires is that it should be done in accordance with the terms of agreement between the parties and there should be mutuality based on

equitable principles in the exercise of the respective rights of termination by both parties.”

Notice of termination

Like the employee, at common law the employer wishing to terminate the contract of employment also has to give a reasonable period of notice to the employee (*McClelland v Northern Ireland Health Services Board*). Similarly, where no specific periods are expressed in the contract of employment, a reasonable period of notice is implied (*Masiak v City Restaurants (UK) Limited*) based on a number of factors including custom and practice, the nature of the job, the level of the employee in the organization and how easy it is to replace such a person, etc.

Under the Labour Act, in the absence of any express notice period in the contract of employment or in the absence of a more favourable term in the contract, section 17 of the Act provides that the employer may terminate the contract of employment at anytime by giving to the employee one month's notice or one month's pay in lieu of notice in the case of a contract of three years or more; two weeks' notice or two weeks' pay in lieu of notice in the case of a contract of less than three years; or seven days' notice in the case of a contract from week to week. Where the contract of employment is determinable at will, the employer may terminate it at the close of any day without notice. Additionally, and all notices must be in writing, and for the avoidance of doubt

the days on which notices are given shall be included in the period of the notice [section 17(4)].

Furthermore, the employer can also terminate the contract of employment without giving the required notice to the employee, provided that the employer pays to the employee a sum equal to the amount of remuneration which would have accrued to the employee during the period of the notice. This is supported by section 18(4) of the Labour Act.

In the Ghanaian case of *Appiah & Others v Akers Trading Company Limited* [1972] the defendants were crew members on board the MTA Ada. They were previously employed by the State Fishing Corporation. The Plaintiffs however came under the direct control of the defendants after the defendants took over the management of the vessel. Their conditions of service were unchanged. In July 1969 while the MTA Ada was docked in Dakar, the Plaintiffs went ashore, according to them, with the captain's permission. The vessel however set sail without them, thereby leaving them stranded in Dakar. Upon their repatriation to Ghana later, they were dismissed on the basis that they had gone ashore without permission and that in any case they were employed on a trip to trip basis and the defendants could dismiss them summarily at the end of a trip if their work or conduct was unsatisfactory.

The Court held, *inter alia*:

- (1) the only person who could give an accurate account of whether or not the plaintiffs had permission to go ashore was the captain and he was not

called. In all the circumstances the court was entitled to believe the plaintiffs;

- (2) Assuming the plaintiffs were guilty of misconduct, on the defendants' own interpretation of the contract of employment, they could only be dismissed summarily at the end of a trip. The right of summary dismissal was therefore wrongly exercised since the defendants were not entitled to exercise a lawful right in a wrongful manner.
- (3) Where the conditions of employment are silent as to the notice to be given, a term must be implied that such notice should be reasonable. The plaintiffs herein being paid monthly were covered by the Labour Decree, 1967 (NLCD 157), para.33(2) (*now repealed by the Labour Act*), and were therefore entitled to fourteen days' notice whenever the defendants intended to terminate their employment on grounds other than misconduct.

Other cases with a bearing on this issue are *Morgan v. Parkinson Howard Ltd.* [1961] followed. *Hiscox v. Batchellor* (1867); *Payzu Limited v. Hannaford* [1918]; *Re African Association Limited and Allen*[1910] and *Savage v. British India Steam Navigation Co. Limited* (1930).

Relationship during the notice period

As in the case of the employee, the contract of employment also continues to run for the employer throughout the notice period and remains so until the notice period ends. All other rights and responsibilities applicable to the employee

during the notice period as enunciated under the preceding chapter also apply to the employer, mutatis mutandis.

Entitlements

Where a contract of employment is terminated by the employer, section 18(1) of the Labour Act requires the employer to pay to the employee:

- (a) any remuneration earned by the worker before the termination;
- (b) any deferred pay due to the worker before the termination;
- c) any compensation due the worker in respect of sickness or accident; and
- (d) in the case of foreign contract, the expenses and necessaries for the journey and repatriation expenses in respect of the employee and accompanying members of his or her family in addition to any or all of the payments specified in paragraphs (a), (b) and (c).

The employer is expected to pay all remuneration due the employee not later than the date of expiration of the notice of termination [section 18(2)]. Where, for any lawful reason, no notice is given the payment of all remuneration due is expected to be made by the employer not later than the next working day after the termination [section 18(2)].

Termination by mutual agreement

Termination of the contract of employment by mutual agreement is also available to the employer as it is to the employee as discussed under the previous chapter, *mutatis mutandis*. The employer also has this right under section 15(a) of the Labour Act.

A point worth noting however is that where the contract of employment contains a clause providing for mutual termination, a mere claim that a termination was by mutual termination would not suffice. Thus, in *Hellyer Brothers v Atkinson and Dickinson* [1994] the plaintiff employees had been employed for a number of years under a number of crew agreement to work on the employer's fishing boats. The agreements were to last for certain periods and had a clause that stipulated that termination could be by mutual agreement, by notice or by loss of vessel. At a point in time the company decided to decommission some of its boats and the plaintiffs "signed off" from the latest crew agreement. The plaintiff employees argued that they were entitled to redundancy payments on the basis that their employment contracts were terminated when they were informed of the decommissioning. On the other hand their employer argued that since the termination was neither by loss of the vessel nor by notice, it must have been terminated by mutual consent (the remaining ground for termination provided in the contract).

The Court of Appeal held that a unilateral termination by the company took place when the employees were told that the boat on which sailed was not

going to sail again. As such, the employees' signing off only constituted an acceptance of what was actually a 'fait accompli' and were therefore merely waiving their right to receive a notice of termination.

Dismissal

The Labour Act does not define the word 'dismissal'. According to Oxford (2001), however, to dismiss is to discharge from employment or to send away. To put it more succinctly, Woodford & Jackson (2003) define a dismissal as the act of removing someone from his job, especially because he has done something wrong. There are various forms of dismissal which would be considered under this sub-heading. They include summary dismissals, wrongful dismissals, unfair dismissals and constructive dismissals.

Differences between dismissal and unilateral termination

A dismissal is a special form of terminating the contract of employment which often imputes or connotes an element of misconduct on the part of the employee as justification for his removal. This is as against a termination which is simply an expression of the terminating party's unwillingness to continue with the employment relationship with the other party.

Thus, unlike a mere discharge of the contract of employment in the case of a termination of appointment which need not necessarily go with reasons, a

dismissal on the other hand usually requires the reason or reasons for the dismissal to be stated. In other words, whereas in a mere termination of the contract of employment in which the person terminating is not bound to give any reason at all for the termination (for instance in a resignation by an employee), in a dismissal the employer is bound to give reasons, at least when required.

Additionally, a termination can be at the instance of either the employee or the employer but a dismissal can only come from the employer. An employer cannot logically purport to dismiss his employer or the organization he works for.

Also, whereas a termination carries with it required periods of notice to be given to other party by the party terminating, a dismissal is usually done without any reasonable period of notice being given to the employee.

Again, whereas in terminations the periods of notice are paid for where the party terminating prefers not to give any notice and this payment can be enforced, in a dismissal the notice that is not given may not be paid for and is usually not enforceable against the employer, unless of course it is not done lawfully.

Lastly, whereas in a termination the employee receives all his terminal benefits and privileges, in a dismissal the employee usually loses most of these, arrears of salaries and allowances accrued before the dismissal date excluded.

It is to be noted, however, that the distinctions between dismissal and unilateral termination of the contract of employment in the Ghanaian law as enumerated above are not so distinct in current English law. This is because most of the distinctions have simply been merged together under the common term

‘dismissal’ by legislation. Thus, under section 95 of the Employment Rights Act, 1996 (ERA) a person is dismissed by his employer if:

- (1) the contract under which the individual is employed is terminated by the employer with or without notice;
- (2) the person is employed under a fixed-term contract and the term expires without being renewed under the same contract; and
- (3) the employee terminates the contract, with or without notice, as a result of the employer’s conduct.

Wrongful dismissal

Wrongful dismissal is the sacking of the employee by the employer without notice at all or with insufficient notice to the employee, and without justification Jefferson (2000: 228, 232) and Sargeant (2003: 123).

Where the contract is silent on a specific period of notice, a reasonable period of notice is to be implied based on a number of factors including custom and practice, the nature of the job, the position of the employee in the organization, how easy it is to replace such a person, etc (Masiak v City Restaurants Limited, *supra*). The Ghanaian case of Appiah & Others v Akers Trading Company Limited, discussed under ‘Notices’ above is instructive here. Further issues on the notice period, including the minimum statutory notice periods stipulated under section 17 of the Labour Act, are discussed in detail under ‘Notices’ above.

It is also to be noted that where notice is to be given and there are a number of employees involved, the notice must be given to each employee individually. Additionally, the dismissal notice must specifically be one and not just a warning of dismissal [Morton Sundour Fabrics Limited v Shaw (1967) and Haseltine Lake & Co v Dowler (1981)]. Also, the notice cannot be withdrawn unilaterally after it has been given. Any revocation of the notice of dismissal should be by agreement between both parties [Harris & Russell Limited v Slingsby (1977)]. The dismissal is takes effect when the notice runs out (Jefferson, 2000: 229)

Summary dismissal

Summary dismissal is the outright sacking of the employee by the employer without any notice to the employee but with justification (Jefferson, 2000: 231) and (Sargeant, 2003: 126).

The right to dismiss summarily may arise out of an express term in the contract of employment or by implication. In the case where it arises out an express term in the contract, it must fall within the scope or purview of actions stated as warranting or capable of attracting summary dismissal. Most often than not, these actions are deemed to amount to gross misconduct which cannot be tolerated by the employer or which seriously undermine the essence of the employment relationship between the employer and the employee. Additionally,

they could be actions which expose certain characters in the employee that make him a highly undesirable person to work with or to do the work he does.

Thus, in *Presbyterian Hospital, Agogo v Boateng* [1984-86] the plaintiff was employed by the defendant hospital as a senior nurse-midwife. On 17th January 1981 the plaintiff was on night duty together with an assistant when a pregnant woman, AB, came to deliver a baby at about 9 p.m. The nurse checked on AB and put her to bed to relax. Later AB felt like visiting the toilet so she got out of bed only to realize that it was rather the baby which was descending. She therefore called the plaintiff for assistance only for the plaintiff to insist that AB's time was not yet due. AB then tried getting back to her bed she could not and ended up delivering the baby on the floor and called for the plaintiff's help. The plaintiff together with the nurse rushed to the scene but instead of the necessary sympathetic and professional assistance requested of her, the plaintiff rather insulted AB and slapped her twice. She cut the umbilical cord and left the baby in the pool of blood and fluid until the nurse took charge of the baby. The plaintiff then ordered AB to wipe off the blood and remove the placenta from the floor.

Due to what happened, the plaintiff was called to the matron's office and interrogated the following day but she behaved rudely and insultingly to her superiors. She was later given a query which she also refused to answer. Consequently, on 20th January 1981, the hospital summarily dismissed her and sent her packing out of her flat in the nurses' quarters, citing her remissness and charging her under article 24 of the conditions of service with insubordination and gross negligence of duty.

The plaintiff subsequently sued in the Circuit Court, Juaso, claiming damages for wrongful dismissal and perpetual injunction restraining the hospital authorities from forcibly removing her belongings from the nurses' quarters. The trial circuit court held that her dismissal was wrongful because the proceedings which culminated in her dismissal were null and void under articles 24 and 29 of the plaintiff's conditions of service. That was because under those articles, before any employee could be summarily dismissed for gross insubordination and gross negligence of duty, proper proceedings should have been conducted by convening a disciplinary committee. He held further that the plaintiff was entitled to reinstatement but because she had asked for damages, he awarded that instead from the date of her dismissal up to the date of judgment. The hospital appealed.

The Court of Appeal held, allowing the appeal, that the plaintiff stood condemned for instant dismissal either on account of gross insubordination or of gross negligence. It did not require the setting up of a committee to determine her gross insubordination when the plaintiff by insults posed a defiant attitude before the authorities. She also put herself outside the pale of any investigation disciplinary committee by her deliberate refusal to answer the query so as to put forward her version of the incident reported against her. In those circumstances, it was wrong for the circuit court judge to have had any truck with the provisions of the conditions of service (which called for the convening of a disciplinary committee) to invalidate the dismissal. The gross insubordination was a clear case and so was her inhuman treatment of the patient.

Laws v London Chronicle (Indicator Newspapers) Limited [1959] also deals with actions that breach the certain important terms of the contract of employment in such manner as to undermine the employment relationship in general and the duty of mutual trust and confidence in particular. Per Evershed MR, the issue should be “whether the conduct complained of is of such as to show the servant to have disregarded the essential conditions of the contract of service”. This was re-echoed by Neary and Neary v Dean of Westminster [1999] where Lord Jauncey posited that

“the conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment”.

It is to be noted, however, that depending on the contractual definition adopted in the contract of employment, however, gross negligence could in certain cases be distinguishable from gross misconduct. This occurred in the case of Dietman v London Borough of Brent [1998] where the contract of employment defined gross misconduct justifying summary dismissal as “misconduct of such a nature that the authority is justified in no longer tolerating the continued presence at the place of work of the employee who commits the offence”. The employee was, after an inquiry, found to have been grossly negligent in her duties. It was

held that the contractual definition of gross misconduct attracting dismissal did not include gross negligence and therefore her purported dismissal was wrongful.

This shows that the way the contract of employment defines what constitutes a ground for summary dismissal counts a lot. This is further buttressed by the Court of Appeal decision in *Uzoamaka v Conflict and Change Limited* (1999) that the ordinary meaning of gross misconduct could be extended by the contract of employment. Here, it was held that an act that had the tendency of bringing the employer's project into disrepute constituted gross misconduct because there was an express term to that effect, although but for that express term the act in question would not ordinarily have amounted to a gross misconduct.

Instances warranting summary dismissal

An example of where the courts will uphold a summary dismissal for gross misconduct is when an employee accesses confidential information that he is not entitled to, for illegitimate purposes. In *Denco Limited v Johnson* [1991] the employee, a trade union representative, who was employed as a temporary supervisor on a night, was dismissed summarily when he gained unauthorized access to his employer's computers and obtained information on the employer's business, customers, size of orders and the salaries of other employees. It was held, per Wood J:

“In this modern industrial world, if an employee deliberately uses an unauthorized password in order to enter or attempt to enter a computer known to contain information to which he is not entitled, then that of itself is gross misconduct which prima facie will attract dismissal.”

In fact the tribunal noted that the employee’s motive was immaterial, as this situation is akin to dishonesty and is not different from that of an employee who enters an office where he had no authority to enter, picks up keys without authority and secretly opens a filing cabinet to access confidential information therein.

Others may include going on an illegal strike thereby breaching a fundamental term of the contract, i.e. the duty to work [Simmons v Hoover Limited [1977]; disobedience of a lawful order [Macari v Celtic Football and Athletic Company Limited [1999]; and dishonesty [Sinclair v Neighbour [1967].

In Sinclair v Neighbour above, the plaintiff was employed as a manager of a betting shop. He borrowed £15.00 from the shop’s cash till to enable him place a bet at another betting shop. He only placed an IOU in the till for the same amount. He later paid it. His employer dismissed him on hearing of it and the employee sued for damages for wrongful dismissal. It was held that the employee had committed a gross breach of good faith with the action he took, although he may not have been openly dishonest. This breached the obligation to serve the employer faithfully and that in turn seriously undermined the relationship of trust which must exist between them. With the damage done to the working

relationship between them, the employee's action has amounted to a repudiatory breach which thereby justifies the decision to dismiss him.

Sometimes a series of incidents may constitute gross misconduct, for example drunkenness (*Clouston & Co v Corry*) [1906] and in other cases a previous history of unacceptable behaviour or misconduct will strengthen the employer's justification to dismiss summarily. On the other hand, just single act could amount to gross misconduct or gross negligence necessitating a summary dismissal. Thus, in *Taylor v Alidair Limited* [1978] just bumpy landing by a pilot amounted to gross negligence.

Words used

Because of the circumstances in which dismissals occur, they are sometimes not communicated through the usual official mode of business communication, that is, through letters. Rather, they are often communicated through verbal exchanges in fits of anger and other similar situations. The question then arises as to what the words blurted out in those circumstances meant and how the employee should have taken them in law.

The first rule is that words dished out in such situations have to be considered in line with the custom and practices of the trade concerned. Thus in *Futty v D & D Brekkes Limited* [1974] the applicant was a fish filleter who, in his everyday work, often engaged in abusive 'banter' with his colleagues as well as his superiors. During one such banter with his supervisor which became

acrimonious, however, his supervisor told him “If you don’t like the job, fuck off”. The employee took the supervisor at his word and left the premises never to return again, and later sued for damages for unfair dismissal. It was held that the words had to be considered the circumstances of the job, and that in the fish trade where industrial language and light hearted conflict was common, the specific words used in this did not necessarily mean that the employee was dismissed. Rather, the words in this instance only amounted to a mere criticism and an admonishing to the employee that he should take a ‘cooling off’ break’. Consequently, it meant that the employee had terminated his contract of employment by himself by leaving and going to work elsewhere.

Secondly, the words used would have to be considered in the light of how the reasonable employee in those circumstances would have understood what the employer said or did. In *Tanner v DT Kean Limited* [1978]. The employee was told by his employer not to use the employer’s van again. The employer went on to advance some money to the employee to assist him purchase one for his personal use. He however continued to use the company van. Upon hearing that the employee was still using the company van, the employer exclaimed: “What’s my fucking van doing outside; you’re a tight bastard. I’ve just lent you £275 to buy a car and you are too tight to put juice in it. That’s it, you’re finished with me”. The employee sued for unfair dismissal. It was held by the industrial tribunal that the employer had merely spoken in the heat of the moment and did not intend dismissing the employee. Considering the words used, a reasonable employee would have understood as a reprimand and not a dismissal.

Where the words are accompanied by actions consequent upon the words used, the two are to be construed together to ascertain the employer's intent. In *J and J Stern v Simpson* [1983] the employee was appointed the general manager of the employer's business. In the course of a heated debate between them, the employer shouted "Go, get out, get out". The employee left the premises and returned later to find himself locked out of his office. The tribunal held that the words had to be construed in the context of the facts. But, contrary to expectation, the locking of the employee's office was also an action taken in the heat of the moment and so the employer could not be taken to have intended a dismissal.

The words used should indicate dismissal at a specific date or time. Mere warning of dismissal at some time in the future will not suffice. In *Haseltine Lake & Co v Dowler* [1981], the employee was told by his employer that he had no future with the firm so he should look for another job or else he would be dismissed in the very near future. In fact he was told to try and look for the alternative job before "the end of the summer". After that the employer kept reminding him from time to time to look get another job. He later resigned and sued for damages for unfair dismissal. It was held that the contract of employment could be terminated where the date is known or is ascertainable from the circumstances. In this case the employer had neither threatened immediate dismissal if he did not resign nor specified any specific date in the future for his dismissal.

Important points

Where an employee commits an act of gross misconduct, whether expressly stated in the contract of employment or reasonably implied, it does not matter whether there are internal disciplinary mechanisms in place in the organization for dealing with such matters or not. Such internal disciplinary mechanisms or procedures may not stop the employer from dismissing the employee summarily. The employee may be summarily dismissed notwithstanding the fact that those remedies have not been exhausted. The non-exhaustion of those remedies will also not necessarily render the dismissal wrongful.

A summary dismissal remains valid even where the employer dismisses the employee for a reason which turns out to be unjustified but later discovers that the employee has committed an offence of gross misconduct or other unacceptable act that warrants a summary dismissal.

Additionally, the reference of any criminal aspect of a gross misconduct committed by an employee to the police does not make the related industrial dispute between the employee and the employer resolvable by the police or the outcome of their work.

Furthermore, it makes no difference whether the procedures are set out in individual contracts of employment with employees or in collective bargaining agreements signed between the employer and a trade union on behalf of employees.

A case in point is *Lever Brothers Ghana Limited v Annan; Lever Brothers Ghana Limited v Dankwa (Consolidated)* [1989-90]. The collective agreement between the Employer and the Industrial and Commercial Workers Union of the TUC which covered the employees provided in article 31 that the employees could be dismissed summarily if found guilty of serious misconduct such as dishonesty or other serious offence. Article 34 of the contract also provided that where the employee is suspected of having committed an offence requiring necessitating investigations, the employee may be suspended for 30 days for the matter to be investigated by the police and the result of the investigation will be binding on the employer. Later the employees were involved in a fraudulent deal involving the sale of some of the employer's products. The case was referred to the police. However, before the conclusion of the police investigations, the employer wrote to withdraw the case from the police and summarily dismissed the employees.

The employees sued for wrongful dismissal in the High Court. The trial judge ruled in favour of the plaintiffs because according to him:

(1) the defendants were not entitled to withdraw the case from the police and hence the

withdrawal was a deliberate act to circumvent article 34 of the agreement; and
(2) the plaintiffs were not given a fair hearing-having no opportunity to face their accusers.

The employee appealed and the Court of Appeal held, allowing the appeal:

(1) where an employee had been guilty of misconduct so grave that it justified instant dismissal, the employer could rely on that misconduct in defence of any action for wrongful dismissal even if at the date of the dismissal the misconduct was not known to him;

(2) Since the employer was entitled to dismiss summarily an employee he considered guilty of grave misconduct such as dishonesty, he was not obliged to give the employee a fair hearing. What was required was that when the employee's dismissal was brought to question in a court of law the employer's action could be vindicated;

(3) The reference to the police under article 34 was not intended to constitute the police an umpire or arbitrator who would sit as judge to decide on the industrial conflict between the employer and the employee. The provisions under article 34 could not contemplate the decision of the court on the offence which had been the subject matter of the investigation.

And since only questions of suspected criminal offences might be referred to the police by the employer, he could not countermand the police investigation (except, perhaps, where the suspected offence was a mere misdemeanour). The police were therefore not obliged to take instructions from the defendants to put an end to the investigations;

(4) The plain language of article 31 gave the employer power of summary dismissal in any of the events spelt out. The power to terminate the employment being summary, meant that it could be exercised in haste or on the spur of the moment; and

(5) It was not necessary for the employer to give reasons for the dismissal.

Another very important case that illustrates these points is Presbyterian Hospital, Agogo v Boateng [1984-86] cited above, where after the employee nurse-midwife treated a pregnant woman cruelly and shabbily to the extent of leaving her to give birth on the hospital floor out of neglect, forced her to wipe the bloody floor after issuing her two slaps and refused to answer a query on the matter, the Court of Appeal held that her summary dismissal with attendant ejection from her flat in the nurses' quarters, was justified despite the fact that her contract required a disciplinary committee to have been set up to go into the matter first.

The case of Boston Deep Sea Fishing & Ice Co v Ansell (1888) also supports the rule that a summary dismissal remains valid even where the employer dismisses the employee for a reason which turns out to be unjustified where the employer later discovers that the employee has committed an offence of gross misconduct or other unacceptable act that warrants a summary dismissal.

It is to be noted, however, that in cases of unfair dismissals where statutory provisions expressly require valid reasons, an after-discovered reason will not suffice to justify an otherwise unjustifiable dismissal. Thus, in Devis (W) & Sons Limited v Atkins [1977] the employee was dismissed for refusing to obey a lawful order and he sued for unfair dismissal. Although the employer later discovered evidence of dishonesty against him after the dismissal, the House of Lords ruled that the employer could not rely on the after-discovered evidence of dishonesty to convert an unfair dismissal into an unfair one.

The interesting thing about the ruling in *Devis (W) & Sons Limited v Atkins* [1977], however, is that should the employee be reinstated in his job, nothing prevents the employer from using the after-discovered reason to justify a subsequent summary dismissal of the same employee.

Elective or automatic termination?

Just like the case of the employee, an equally important issue for consideration here, is whether a repudiatory breach by an employer can or should constitute a valid termination of the contract of employment by itself – that is automatically or without any further positive action being taken towards termination. An example is where an employer dismisses an employee without following due process and goes ahead to lock the employee out of his office. Here, because of the peculiar nature of the reverse relationship (as opposed to breaches by the employee as discussed in the preceding chapter), and the practical and logical difficulties inherent in forcing an employer to accept a worker he does not want on his premises, the law accepts that the contract of employment is automatically terminated by a repudiatory breach by the employer. This is especially so in the case of private organizations (in the case of public, government or state institutions there are a few exceptions).

The law therefore takes the position that any such breach by the employer amounts to a kind of wrongful or unfair dismissal for which the employee is generally entitled to appropriate remedial action.

A case in point is *Sanders v Ernest A Neale Ltd* [1974] where it was made clear that in contracts of employment, a repudiation by the employer was an exception to the rule that the repudiation of a contract does not by itself discharge the contract unless the repudiation is duly accepted by the injured party as such.

A refusal by the employee to accept the repudiation by the employer as terminating the contract of employment with or without his acceptance of the repudiation does not make any practical sense (except in the few exceptional cases where reinstatement could be ordered). Even in a rare case of *Gunton v London Borough of Richmond upon Thames* [1980], where the court accepted an individual's right to elect whether to accept a repudiation or not, the Court of Appeal distinguished its application to contracts of employment thus:

this practical basis for according an election to the injured party has no reality in relation to a contract of service where the repudiation takes the form of an express and direct termination of the contract in contravention of its terms. I would describe this as a total repudiation which is at once destructive of the contractual relationship.

Constructive dismissal

There is constructive dismissal where the termination of the contract of employment by one party to the contract (usually by the employee) is induced by the behaviour of the other party (usually the employer). In other words, there is

constructive dismissal where the employee terminates the contract of employment as a result of the employer's conduct. It is also sometimes referred to as a discharge by breach. At common law, constructive dismissal is defined by Lord Denning in the case of *Western Excavations (ECC) Ltd v Sharp* [1978] thus:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.

Under the Labour Act, constructive dismissal is not expressly mentioned and no statutory definition is also proffered. However, section 63(3) of the Act provides that

a worker's employment is deemed to be unfairly terminated if with or without notice to the employer, the worker terminates the contract of employment because of ill-treatment of the worker by the employer, having regard to the circumstances of the case; or because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the work place.

From the above, it clear that whereas the common law definition is broader and more encompassing, the statutory provision in the Labour Act on constructive dismissal is quite narrower. Nevertheless, in as much as the Act does not purport to redefine it nor attempt any barring of the applicable common principles, section 63(3) could at best be deemed to be a provision setting out a couple of the grounds upon which an employee could sue for constructive dismissal, under statutory protection.

Seriousness

For a successful claim for constructive dismissal, the employer's breach must be of a nature that is serious enough as to entitle the employee to leave at once, although the employee may not leave immediately. A mere claim by the employee of unreasonable behaviour on the part of employer is not enough. Per Lord Denning in *Western Excavations (ECC) Ltd v Sharp* [1978] supra,

The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

In the instant case the employee had taken a day off work without permission and was suspended without pay by his employer as a disciplinary step.

This put him in a dire financial situation. Later, he resigned and sued his employer for unfair dismissal on the grounds that he had been constructively dismissed because his employer had acted unreasonably by refusing to give him a loan or an advance on his holiday pay. The Court of Appeal disagreed with his claim that the employer's conduct amounted to a constructive dismissal.

Also in *Dryden v Greater Glasgow Health Board* [1992] where the employer introduced a no smoking a policy without breaching the contract of employment per se, it held that since there was no particular breach of the contract of service, let alone a serious one, there was no constructive dismissal.

Additionally, in *Brown v Merchant Ferries Ltd* [1998] where the employee resigned and sued for constructive dismissal on the grounds that due to a reorganization of work he was unsure of his role within the organization and thereby felt undermined by the changes taking place, it was held that the employer's conduct was not serious enough to justify the employee's decision to resign and so his claim for constructive dismissal could not be supported.

For the avoidance of doubt, whether an employer's conduct is of a sufficiently serious nature as to warrant the employee's departure is a question of fact for the court to decide. This was the decision in *Woods v WM Car Services (Peterborough) Limited* [1981].

Reasons for leaving

Additionally, the employee needs not state any reason for leaving and needs not generally nor specifically refer to the employer's conduct as his reason for leaving at the time of leaving. All that matters is that it can be deduced from the facts of the case that the employee's decision to leave was a result of the employer's conduct. In *Weathersfield v Sargent* [1999], the employee, a receptionist of the employer was given instructions by her employer to refuse services to persons from certain ethnic minorities; specifically, not to hire vehicles to coloureds and Asians. Upset by this policy, she called her employer on telephone and told the employer she was resigning. She did not tell her employer why she was leaving.

It was held by the Court of Appeal that where the employee gives no reason for his resignation to his employer, the court may come to the conclusion that the employer's conduct was not the reason for the employee to leave. However, there is no requirement by the law that the employee must give reasons in order to substantiate a claim for constructive dismissal. All that is required is for the court to determine whether, from the facts and circumstances of the case, the employee's decision to leave was due to the employer's repudiatory breach.

Additional reasons

Furthermore, the employer's conduct needs not be the sole reason for the employee's resignation. The employee could have other reasons for leaving, including finding another job. However, for purposes of claiming constructive dismissal it is sufficient if it could be established that the employer's behaviour was the effective cause of the employee's resignation. A case in point is *Jones v Sirl and Son (Furnishers) Ltd* [1997] where the employee experienced a series of conducts amounting to constructive dismissal by the employer. Over a year later the employee got a job with rival firm and resigned. It was held that she resigned because of the employer's breaches of fundamental terms in her contract of employment and that the fact that there was another cause, that is the offer of a new job elsewhere, did not matter.

Time of departure

The case of *Jones v Sirl and Son (Furnishers) Ltd* [1997]) also illustrates the fact that it is not a necessary condition that the employee leaves immediately to show that his leaving was the result of his employer's breach. This is supported by the case of *Waltons & Morse v Dorrington* [1997] where the employer was held to have breached an implied term to provide a safe and healthy working environment. Here, the employee stressed on the need for the employer to provide a smoke free environment to no avail. She worked for sometime until she secured

another job and then sued for constructive dismissal. Her employer argued that she had negated the constructive dismissal, if any, by delaying in leaving. The tribunal however rejected this argument taking into consideration her period of service with the organization and the fact that she needed to earn an income as a reasonable and responsible person.

Mobility clauses

An order for an employee to relocate to another branch in circumstances that would invariably cause him to resign could amount to constructive dismissal where this is not part of the terms of the contract of employment. This was illustrated in the case of *Aparau v Iceland Frozen Foods Plc* [1996] where the tribunal held for the employee on the basis that the mobility clause in question had not been incorporated into the contract of employment.

The case is however different where there is evidence of an agreed term in the contract allowing the employer this flexibility to move the employee around. In *White v Reflecting Roadstuds Ltd* [1991] the employee resigned when he was transferred to a place where he earned less pay than he was getting in his previous station. He resigned and sued for constructive dismissal. The tribunal ruled against him on the basis that there was a flexibility clause in the contract of employment which gave the employer the right to do that.

Vicarious responsibility

The employer's conduct needs not be taken by the employer himself. It is enough if the action amounting to constructive dismissal is taken by another person for whom the employer is responsible. This is particularly so in the case of persons appointed to positions of authority to take decisions in certain areas on behalf of the employer.

In *Hilton Hotels (UK) Limited v Protopapa* [1990] the employee, a supervisor, was very severely reprimanded by her immediate superior officer in front of other employees. She resigned and sued for constructive dismissal. The tribunal held for the employee on the basis that her superior had behaved in an "officious and insensitive manner" leading to the employee being "humiliated, intimidated and degraded to such an extent that there was breach of trust and confidence which went to the root of the contract". The employer appealed on the basis that the employer had not been constructively dismissed because the supervisor who committed the offence had no authority to dismiss the applicant.

It was held by whether the actions of the offending supervisor binds the employer or not depends on the application of general law of vicarious liability. Under vicarious liability therefore, the test was whether the offending supervisor's actions were carried out in the course of her employment. Since the offending supervisor acted within the scope of her employment in reprimanding the employee, the employer was liable for her actions.

Contributory fault

Where the employer's conduct amounting to the constructive dismissal was itself induced by the actions or behaviour of the employee, the employee is to share in the quantum of damages to be awarded against the employer. Here, the employer's otherwise total amount payable is to be reduced by the percentage attributable to the employee for his contribution. Thus, in *Morrison v Amalgamated Transport and General Workers Union* [1989] the employer suspended the employee as a result of the employee's behaviour. The employee successfully resigned because there was nothing in the contract of employment authorizing to the employer to take such action against the employee. Although she was successful, the court ruled that her compensation should be reduced by 40 percent as she was responsible for inducing her employer's unlawful reaction by her provocative behaviour.

In determining contributory fault, however, the Court of Appeal outlined a number of principles and guidelines to be followed. These included:

1. The tribunal should take a broad common sense view of the situation;
2. the broad approach should not necessarily relate to a particular moment, even the terminal moment of employment;
3. what needs to be looked at over a period is conduct on the part of the employee that is culpable, blameworthy or otherwise unreasonable; and
4. the employee's culpability or unreasonable conduct must have contributed to, or played a part in, the dismissal.

Breach of trust and confidence

It is to be noted that many contemporary instances of constructive dismissal originate from a breach of the implied term of trust and confidence between the employer and the employee. This includes the employer's duty to treat employees with respect and not to treat them arbitrarily or capriciously. A case in point is *Courtaulds Ltd v Andrew* [1979] where the employee was an experienced supervisor with no blemish on his service record. In the course of a heated argument with one of the managers, the manager shouted to the hearing of others: "You can't do the bloody job anyway". The employee left and sued for constructive dismissal. It was held that there is an important implied term in a contract of employment that an employer will not behave in a manner likely to destroy or seriously damage the relationship of trust and confidence that must exist between the employer and the employee in order for the contract to function effectively. Criticising the employee without good reason to the hearing of others is conduct that destroys the relationship of trust between the parties and is a fundamental breach that goes to the root of the contract, thereby justifying the employee's claim of constructive dismissal.

Where the implied term is breached in whatever form on a number of occasions, it may not matter that the last breach was not repudiatory. In *Lewis v Motorworld Garages Ltd* [1985] the employee was demoted from his position as a sales manager, was given a smaller company car and denied a salary increase and

suffered a series of criticisms from senior management afterwards. He later quit his job and sued for constructive dismissal. He maintained that per the overall conduct of the employer, a repudiatory breach of the contract of employment had occurred, namely the implied term of trust and confidence that exists between the employer and the employee.

It was held by the Court of Appeal that although the employee did not treat the initial breach of the express contractual terms by way of the demotion as wrongful repudiation, he was

... entitled to add such a breach to the other actions, which taken together, may cumulatively amount to a breach of the implied obligation of trust and confidence ... The tribunal should consider the breaches of the express terms as part of the background material in evaluating the respondent's subsequent conduct and, if those breaches were also breaches of the implied term of trust and confidence, to add them to any other breaches ... to support an allegation that there had been a course of conduct which cumulatively constituted a breach of the implied obligation of sufficient gravity to justify the appellant in claiming that he had been constructively dismissed. (Dictum of Glidewell LJ).

In *Brown v Merchant Ferries Ltd* [1998] it was held that seriously unreasonable conduct may provide sufficient evidence that there had been a breach of the implied term of trust and confidence.

Other instances

The practical instances that can lead to constructive dismissal are numerous and varied. It may include a deliberate failure to pay salaries, however big or small the unpaid amount may be – *RF Hill Ltd v Mooney* [1981] no matter the amount left unpaid. However, if the fault is due to a genuine temporal fault or mistake in for processing the payment, equipment failure, etc, the breach may not be one that can sufficiently be fundamental enough as to constitute a repudiatory breach – *Cantor Fitzgerald International v Callaghan* [1994].

Others include the failure to ensure a safe system of work (*British Aircraft Corporation v Austin* [1978] and *Waltons & Morse v Dorrington* [1997]), using extremely foul language (*Palmanor Ltd v Cedron* [1978]) and awarding a punishment or penalty disproportionate to the offence (*BBC v Beckett* [1983]).

Radical variation

It is to be noted that where the employer unilaterally introduces variations or changes to the contract of employment that are very radical or substantial in nature and which attack the very foundation of the contract, this may constitute an express or direct dismissal and not an ordinary repudiatory variation which may amount to constructive dismissal. A typical example of this was *Hogg v Dover College* [1990]. In this case a teacher was told that he would no longer be the

head of department, that he would have to change from a regular to a part-time teacher and that he was going to be receiving only half of his salary. It was held per the tribunal, inter alia, that “both as a matter of law and common sense, he was being told that his former contract was from that moment gone”.

Unfair dismissal

An unfair dismissal is simply a dismissal that is contrary to a statutory or legislative provision. This is as against, for instance, wrongful dismissal which is rooted in the common law. In Ghana, this is captured as ‘Unfair Termination’ under section 63 of the Labour Act, 2003.

Eligibility

It is not just any worker at all who can bring an action for unfair dismissal against his employer. Being a statutory right, there are also statutory qualifications an employee must have or certain criteria he must meet in order to be eligible to bring an action for unfair dismissal against his employer. Under section 66 of the Labour Act, certain categories of workers are excluded from the general application of the provisions of Part VIII – Fair and Unfair Termination of Employment of the Act.

These categories of workers excluded under section 66 include workers engaged under a contract of employment for specified period of time or specified

work; worker serving a period of probation or qualifying period of employment of reasonable duration determined in advance; and workers engaged on a casual basis.

Fair reasons

The reasons deemed by the Labour Act to be fair bases for termination are set out under section 62 of the Act. According to section 62, a termination of a worker's employment is fair if the contract of employment is terminated by the employer on ground that the worker is incompetent or lacks the qualification in relation to the work for which the worker is employed; on the ground of proven misconduct by the employee; on grounds of redundancy under section 65 of the Act; or due to legal restrictions imposed on the worker prohibiting the worker from performing the work for which he or she is employed.

Unfair reasons

Under the Labour Act, an employee's appointment is deemed to have been terminated unfairly if the reason for termination falls under any of the grounds stipulated under section 63 of the Act. Under section 63, a worker's employment is terminated unfairly if the only reason for the termination is

(a) that the worker has joined, intends to join or has ceased to be a member of a trade union or intends to take part in the activities of a trade union;

- (b) that the worker seeks office as, or is acting or has acted in the capacity of, a workers' representative;
- (c) that the worker has filed a complaint or participated in proceedings against the employer involving alleged violation of this Act or any other enactment;
- (d) the worker's gender, race, colour, ethnicity, origin, religion, creed, social, political or economic status;
- (e) in the case of a woman worker, due to the pregnancy of the worker or the absence of the worker from work during maternity leave;
- (f) in the case of a worker with a disability, due to the worker's disability;
- (g) that the worker is temporarily ill or injured and this is certified by a recognised medical practitioner;
- (h) that the worker does not possess the current level of qualification required in relation to the work for which the worker was employed which is different from the level of qualification required at the commencement of his or her employment; or
- (i) that the worker refused or indicated an intention to refuse to do any work normally done by a worker who at the time was taking part in lawful strike unless the work is necessary to prevent actual danger to life, personal safety or health or the maintenance of plant and equipment.

The constructive dismissal of an employee is also deemed unfair if it falls within any of the grounds stipulated under subsection (3) of section 63. Per 63(3) a worker's employment is deemed to be unfairly terminated if with or without notice to the employer, the worker terminates the contract of employment because

of ill-treatment of the worker by the employer, having regard to the circumstances of the case; or because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the work place.

Additionally, under section 63(4) a termination may be unfair if the employer fails to prove that the reason for the termination is fair; or the termination was made in accordance with a fair procedure or generally in accordance with the Act.

Competence/Capability

Competence or capability, although subjective, is assessable by examining the employee's skills, aptitude or other health or mental qualities (Sargeant, 2003). Therefore, employers are required to demonstrate reasonable grounds for their belief. The Court of Appeal, in examining competence of an airline pilot in *Taylor v Alidair Ltd* [1978], stated that the examination of an employee's competence contemplates a subjective test, and that in doing so,

The tribunal has to consider the employee's state of mind. If the company honestly believed on reasonable grounds that the pilot was lacking in proper capability to fly aircraft on behalf of the company, that was good and sufficient reason for the company to determine the employment of then and there. (Dictum of Lord Denning, MR)

It is trite law that the employer has a right not to suffer from keeping an incompetent employee. He therefore has the right to dispense with such an employee's services (section 62(a) of the Labour Act). He however has to make sure that he treats the employee fairly, which does not include not dispensing with his services just because he has worked with the establishment for a very long time. Thus, in *Gair v Bevan Harris Ltd* [1983] the employee's contract of employment was terminated for unsatisfactory performance despite the fact that he had a previous service record of 11 years.

Ill health

An employee's appointment cannot be terminated just because he is sick or ill. This will amount to an unfair treatment in law. In fact, subsection (1) of section 63 of the Act generally forbids the unfair termination of a worker's employment, and therefore any termination that is seen as unfair contravenes the Act. Specifically, section 63(2)(g) of the Labour Act forbids employers from unfairly terminating the employment of a worker on the ground "that the worker is temporarily ill or injured."

In the case of *Tanberg v. Weld County Sheriff* (1992) the plaintiff who was a volunteer reserve deputy for the sheriff's department, was fired after he had tested HIV-positive. He successfully sued the department for compensatory damages for discrimination, lost job opportunities and emotional stress. This is because merely being HIV positive did not mean an employee could not work,

unlike an employee whose condition has moved from the HIV stage to the AIDS stage where he is more likely to become generally weak and incapable of continuing to work effectively.

It is clear, therefore, that workers who happen to be too weak to continue working cannot reasonably expect to continue having their names on their employers' pay-rolls. An employer will therefore be able to terminate the employment of such a worker without infringing the fairness provisions in sections 62 and 63 of the Labour Act.

This is akin to the Common Law doctrine of frustration under which the employment contract may be frustrated by prolonged ill health. Here, a contract may be discharged if after its formation, events occur making its performance impossible or radically different from that which was contemplated at the time the contract was entered into. A case in point is *Condor v. The Baron Knights Ltd* in which the plaintiff joined the defendant group as a drummer under a contract of employment which stipulated that he was needed to work seven days a week and to even perform twice in one evening sometimes. The plaintiff collapsed one day and was treated in hospital. After his treatment the doctor said he could only work for three days a week. The defendant company therefore terminated the contract it had with him and the plaintiff sued for a breach of contract but the Court held that the termination was lawful because he could not continue to perform the contract in the way it was intended.

Qualifications

A qualification means any degree, diploma or other academic, technical or professional attainment that is relevant to the position held (Sargeant, 2003; section 98(3) of the Employment Relations Act, 1996). The qualification required therefore depends on the position or appointment held and what level of academic, technical or professional educational attainment required in general and by the employer in particular.

Thus, in *Tayside Regional Council v McIntosh* [1982] for instance, an advertisement by the local authority for vehicle mechanics required applicants to have clean driving licenses. On being employed, however, the employment letter given the employee was silent on the need for a driving license. About three years later the employee committed a motor offence as a result of which he was disqualified from driving. His employer had no choice but to terminate his appointment as there was no alternative work for him to do. He sued the employer.

The tribunal held that even though the appointment letter did not repeat the need for a driving license as a necessary condition for the job, the possession of a valid driving license could be inferred and it constituted an essential and continuing condition for his continued employment.

Conduct

General business offences

Dismissal for bad conduct on the job usually takes the form of summary dismissals for gross misconduct. For an employee's dismissal for misconduct to be fair, it has to be established that the employee was sufficiently aware of the conduct that is expected of him and that which is not expected of him per the job he is doing in general and his appointment in particular. These 'dos and don'ts' are usually stipulated in the contract of employment between the employer and the employee, although sometimes it can be inferred from prevailing circumstances and custom of the trade involved.

In *Lock v Cardiff Railway Co. Ltd* [1998] where a train conductor was dismissed for asking a teenage boy to leave the train at an obscure area for having neither a ticket nor money to pay for one, it was held that the employer's disciplinary code did not make it clear which offences would be regarded as gross misconduct that would justify a summary dismissal.

On the whole, dishonesty is one area of bad conduct that often leads to the dismissal of employees. In law, dishonesty breaches the fundamental relationship of mutual trust and confidence that is supposed to exist between the employer and the employee. In the case of *British Railways Board v Jackson* [1994], the employer dismissed employee who was a train buffet supervisor because the employer believed the employee had wanted to deprive him of revenue by taking

his own goods on board the train and selling them to the train's customers. The court held the dismissal to be reasonable. The court stated that the employer was entitled to look at the prevalence of such offences among staff and the likelihood that the dismissal would serve as a deterrent to others. Another example is *Marshall v Industrial Systems & Control Ltd* [1992] where a managing director who made plans to compete with his employer and actually sought to get another senior manager and other employees to join him in his pursuit was held to have been fairly dismissed.

In cases where the employee may not have been caught in the act or where there may not be primary evidence, if the employer has reasonable grounds for arriving at the belief that the employee is guilty of the offence based on thorough investigation, this may be sufficient to justify the dismissal. Cases in point are *British Leyland (UK) Ltd v Swift* [1981] and *British Home Stores Ltd v Burchell* [1978].

It is also to be noted that in carrying out investigations into allegations of misconduct by employees, the investigation does not necessarily have to take the form of a judicial inquiry where the accused employee can question witnesses. This was the decision in *Ulsterbus Ltd v Henderson* [1989] where a bus conductor appealed on the grounds of not being able to put questions to the customers who testified against him, after he had been accused of collecting money without issuing tickets and had subsequently been dismissed.

Where the misconduct is one that arises from an act that has not been specifically stipulated in the employment contract as constituting a misconduct

justifying dismissal and reliance is therefore sought on business practice and custom, the dishonesty or otherwise of the act is examined by answering two questions. The first is whether the act done amounts to dishonesty in the minds of ordinary reasonable peoples in similar situations and secondly, whether the accused employee must have known that the act he indulged in was dishonest per those standards. Thus in *John Lewis plc v Coyne* [2001] where the employee was dismissed for going contrary to the rules governing the use of office telephones, it was held that the termination was unfair because the employer failed to conduct sufficient investigations into the matter with a view to finding answers to the two questions above. This is particular so, as whereas an employer may see the use of telephones by the employee as dishonest; the employee, depending on the circumstances, may not see it so.

Criminal offences

Where the employee commits a criminal offence for which the state gets involved through the police and other security or law enforcement agencies of the state as the case may be, then in ideal situations, it may be better to even wait for the employee to be prosecuted and to be able to tell whether indeed the accused employer was guilty of the offence or not. Where the employee is convicted, this would be a sufficient basis for dismissing the employee. A case in point is *Secretary of State for Scotland v Campbell* [1992] where a prison officer's dismissal was held to be justified on the grounds of having been found guilty of

embezzling funds belonging to the officers' social club while serving as treasurer to the club.

Where this is not possible, the least the employer can do would be to wait for the outcome of the police investigations and reconcile this with a fair hearing of the accused before taking a decision on whether to dismiss him or not. Thus, *ILEA v Gravett* [1998], the employee, a swimming instructor, was accused of a sexual offence against a girl. He was dismissed even though the police decided not to take any action on it. His dismissal was held to be unfair because there was lack of sufficient investigation to establish his guilt before dismissing him.

On the other hand, where the accused employee admits guilt or confesses to the crime, the employer can go ahead to dismiss him without further ado. A case in point is *P v Nottinghamshire County Council* [1992] where the employee, an assistant school groundsman, pleaded guilty to a sexual offence against his daughter and he was dismissed because of the risk he posed to other children. The Court of Appeal ruled that the employer did not need to conduct any further investigation because the plea of guilty and the nature of the job he was doing were enough to justify his dismissal. Another case in which dismissal based on the employee's admission to the crime for which he had been charged is *Mathewson v RB Wilson Dental Laboratories Ltd* [1988]. Here the employee, a dental technician, admitted guilt when he was arrested and charged with possessing cannabis, a narcotic drug. His employer argued that it was improper to keep a person who was using drugs on such highly skilled work. It was held that

the employer acted reasonably and fairly in treating his crime and guilty plea thereof as a sufficient reason for dismissing him.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Introduction

The study was aimed at exploring in depth laws applicable to labour management in Ghana with a view to putting together the laws with particular reference to the exit phase, complete with legal precedents and appropriate legal interpretations and enunciations, with the view to contributing to the enhancement of the knowledge and understanding of practitioners and other stakeholders on the subject. This was in view of the fact that knowledge on the legalities surrounding the topic appeared not to be comprehensive, insufficient and not readily available to those who practised it.

Summary

The report began with a coverage of matters such as the Background of the Study, Statement of the Problem, General and Specific Objectives and the Research Questions for the study. Additionally, it provided an overview of areas

such as the Significance of the Study, Delimitation, Limitations and Definition of Terms.

It continued with a review of literature on important areas within the exit phase such as Ways in which the Contract of Employment Can Lawfully be Brought to an End by the Employee, Ways in which the Contract of Employment Can Lawfully be Brought to an End by the Employer, Ways in which the Contract of Employment Can be brought to an End by Intervening Circumstances and Remedies for Unfair Labour Practices; and further discussed the data collection techniques used and how the data was managed.

These were followed by the findings of the study which were covered in two parts. The first part, Ways in which the Contract of Employment Can Lawfully be brought to an End by the Employee, looked at incidents that lead to the exit of an employee from his employment as a result of the employee's own choosing or voluntary decision. On the other hand the second part, Ways in which the Contract of Employment Can Lawfully be brought to an End by the Employer, dealt with incidents that lead to the exit of an employee from his employ which are attributable to or initiated by the employer.

Key findings

Ways in which the contract of employment can lawfully be brought to an end by the employee

- Exits initiated by the employee fall into three broad categories. These are

- termination by mutual agreement;
 - unilateral termination by the employee (resignation); and
 - the abandonment of posts.
- There is a termination by mutual agreement where the employer and the employee enter into a common consensual agreement to determine the employment contract between them.
 - The law will accept this provided the agreement was entered into willingly by both parties and there is no evidence of duress or undue influence.
 - On the other hand, there is unilateral termination where the employer terminates the contract at will or the employee resigns at will.
 - Where the employee wishes to unilaterally terminate (resign), he is expected to give adequate advance notice to his or her employer to enable the employer take steps to find a replacement in due course.
 - Where this notice is given, the employee is expected to continue working and normal working relations between the employee and the employer are to be maintained till the notice period finally expires.
 - Whether the termination is mutual or unilateral, the employee is to be paid the following:
 - any remuneration earned before the termination,
 - any deferred pay due the employee before the termination,
 - any compensation due him in respect of any sickness or accident;
 - the expenses and necessaries for the journey and repatriation expenses in respect of the worker and accompanying members of his or her family in addition (in the case of a foreign contract).

- Where for any reason the employee wishes to leave immediately without serving and observing any period of notice, the law requires him or her to pay to the employer the equivalent of the money he would have earned from the employer for that same period if he had observed the notice to the full.
- An employee abandons his post when he quits his job unceremoniously without giving notice or without observing such other conditions as would be stipulated in the contract of service and other courtesies expected of him.
- Where the employee leaves abruptly without serving and observing the requisite notice and without paying to the employer the sum aforesaid, the employer is entitled in law to deduct that amount from any money the employee may be entitled to receive from the employer.
- The employer is also entitled to take legal action to retrieve such entitlement from the employee in the same way that the employee can take legal action to retrieve any outstanding entitlements from the employer should he refuse or fail pay any such entitlements to him or her.
- Where the employee leaves unceremoniously or abandons his or her post without observing the requisite formalities; the employer, contrary to popular practice, is to takes steps to formally and unambiguously terminate the contract of employment and not deem the employee to have ‘constructively’ or ‘automatically’ resigned by his or her action.

- This is because of the legal position that if contracts of employment were to be automatically terminated by breaches occasioned by employees the repercussions on employment protection for the general citizenry would be too far reaching.

Ways in which the contract of employment can lawfully be brought to an end by the employer

- Exits initiated by the employer, like those of the employee, also fall into three broad categories. These are unilateral termination by the employer, termination by mutual agreement and dismissal.
- Dismissal, however, has a number of sub-categories. These include summary dismissal, wrongful dismissal, constructive dismissal and unfair dismissal.
- The employer can unilaterally terminate the contract at will just as the employee can also terminate unilaterally (resign) at will (because the employment relationship being one that is based on contract and therefore hinged on reciprocity/mutuality).
- The employer can also enter into a mutual agreement with the employee for the employment contract between them to be terminated.
- Dismissal is the act of removing someone from his job, especially because he has done something wrong. It generally connotes intolerable misconduct on the part of the employee as justification for his or her

removal. This is as against a termination which is simply an expression of the terminating party's unwillingness to continue with the employment relationship with the other party.

- Whereas in a termination of the contract of employment the person terminating is not bound to give any reason at all for the termination (for instance in a resignation by an employee or a simple termination by the employer); in a dismissal the employer is bound to give reasons, at least when required.
- Additionally, whereas in terminations the periods of notice are paid for where the party terminating prefers not to give any notice and this payment can be enforced, in a dismissal the notice that is not given may not be paid for and is in such cases usually not enforceable against the employer.
- Also, whereas in a termination the employee receives all his terminal benefits and privileges, in a dismissal the employee usually loses most of these, arrears of salaries and allowances accrued before the dismissal date excluded.
- Wrongful dismissal is the sacking of the employee by the employer without notice or with insufficient notice to the employee, and without justification.
- Summary dismissal is the outright sacking of the employee by the employer without any notice to the employee but with justification.

- There is constructive dismissal where the termination of the contract of employment by one party to the contract (usually by the employee) is induced by the behaviour of the other party (usually the employer). That is, there is constructive dismissal where the employee terminates the contract of employment as a result of the employer's conduct.
 - Where the employer's conduct amounting to the constructive dismissal was itself induced by the actions or behaviour of the employee, the employee is to share in the quantum of damages to be awarded against the employer. The employer's otherwise total amount payable is reduced by the percentage attributable to the employee for his contribution.
- An unfair dismissal is simply a dismissal that is contrary to a statutory or legislative provision. This is as against, for instance, wrongful dismissal which is rooted in the common law. In Ghana, this is captured as 'Unfair Termination' under section 63 of the Labour Act, 2003.

Conclusions

In conclusion, it is the believe of the researcher that the study has succeeded in exploring in depth and putting together the laws applicable to the exit phase of the labour management process in Ghana, complete with legal precedents and appropriate legal interpretations and enunciations. It is also the believe of the researcher that the findings of the study will contribute appreciably

towards the enhancement of the knowledge and understanding of employees, employers, academics, labour practitioners and other stakeholders on the subject.

The unavailability of current and reliable local texts on the subject made it difficult to approach it with a much wider perspective though. Nevertheless, it is the writer's hope that with this study, adequate interest would be generated as would lead to further research on the subject and its related areas.

Recommendations for further research

The laws applicable to the other phases of the labour management process, particularly the maintenance phase – in whole or in part, are hereby recommended for further research.

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