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Exploring the Distinctions between Dismissal and Termination Under Ghanaian Labour Law: Insights from the George Akpass Case

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Abstract

Purpose: This paper delves into the nuanced distinctions between dismissal and termination under Ghanaian Labour Law, drawing insights from the notable George Akpass case. With an analytical focus on the legal implications and procedural disparities between these employment termination practices, the study aims to provide clarity on the terminological and jurisprudential nuances that surround employment cessation in Ghana.

Materials and Methods: By examining the specifics of the George Akpass case, this paper contributes valuable insights to the broader discourse on employment law, shedding light on the implications for employers, employees, and the legal framework governing the employer-employee relationship in Ghana.

Findings: Going through the legal maize to this point leads us to the conclusion that, Pwamang JSC's position on the question whether there exists any legal distinction(s) between termination and dismissal is apt and corresponds to today's working climate.

Implications to Theory, Practice and Policy: It is our fervent request that Act 651 be amended to provide trite distinctions between dismissal and termination.

1.0 INTRODUCTION

As a follow up to our earlier paper intituled; JOB SECURITY IN A COMPARATIVE WORLD[1], the question at hand is whether it is legally justifiable to maintain a strict adherence to the common law principles regarding wrongful or unfair dismissal after several years of changes in the socio-political and economic forces that burdened the law. Do these principles require alterations to reflect the evolving needs and realities of a post-independence legal climate? These inquiries raise critical legal and policy considerations regarding the extents to which the Ghanaian jurisdiction has adopted and implemented its international legal obligations, precisely International Labour Standards and Conventions. In conclusion, a resolution of these questions will inform the interpretation and application of domestic employment law(s) vis-a-vis international best practices.

Statute Law

The Ghana's Labour Act

Prior to the enactment of the Labour Act, 2003 Act 651, the Industrial Relations Act, 1965 and a few other relevant pieces of legislation statutorily regulated labour and industrial relations in Ghana. On the coming into force of the Labour Act, 2003, all these pieces of legislation consolidated into a single instrument to mirror labour regulatory ambitions of the jurisdiction. Further, it characterized the ILO conventions which have been ratified by Ghana. For the above, the Scope of application provides that:

"This Act applies to all workers and to all employers except the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act 526)."

The Act[2] however, in Section 1 excludes certain category of workers from its ambit. This exception was litigated in the Supreme Court and upheld in the case of *CEPS v National Labour Commission [2009] SCGLR 530.* The birth of the Act brought some innovations, specifically in the specie of causes of action. These include provisions for unfair practice. They are provided for in sections 127, 128, 129, 130, 131, 132 and 133. The Act defines unfair labour practices as discrimination, intimidation, dismissal or threatened dismissal of any worker because of his membership or holding of office of a trade union; or any act calculated to prevent a worker from joining, continuing his membership or holding office of a trade union. Thus, an employer who, by use of threats, intimidates the worker during negotiations for collective bargaining agreement must be found on this cause, an action for remedies.

Further, any act by the employer which includes taking part in the formation of trade union, or acts which are intended to adversely influence a trade union, contributes, in money or kind, to that trade union, offends unfair labour practice for which remedies may avail. Unfair labour practice also arises when an employer, without reasonable cause, after not less than a twenty-four hours' notice, fails to allow any officer of a trade union, whose members include any of his workers, reasonable facilities and time to confer with the employer or its members, on matters affecting the members of the

[1] Klu, Kwame Richard and Kwame Yaro Appiah, Job Security in a Comparative World- A Preservation of the Law (July 20, 2020). Available at SSRN: https://ssrn.com/abstract=4012530 or http://dx.doi.org/10.2139/ssrn.4012530

[2] Act 651

trade union. Employees can equally be found wanting on this cause. A worker or group of workers who intimidate an employer during negotiations for Collective Bargaining Agreement offends the law on unfair labour practice. Any activity of the worker which is intended to cause serious interference with the organisation's business also amounts to unfair labour practice. Further, any attempt by an officer of a trade union, in the cause of work, to persuade, induce or confer with a worker that is not covered by the collective agreement, without the consent of the employer, such that the employee would become a member or an officer of the trade union constitutes breach. Furthermore, a worker who confers on trade union matters on the premise of the employer, without the latter's consent commits an offence tantamount to unfair labour practice.

Disputes organically have become inseparable from business transactions. Contracts of employment often become entangled. Thus the Labour Act has provided avenues for these settlements. The Act established the National Labour Commission (NLC) as the court with a quasi-judicial mandate. The NLC is also clothed with jurisdiction over administrative and executive functions. Its composition is made of a Chairman/person who may neither be a justice of the courts of Ghana. All legal processes, including the rules of natural justice, subpoenaing powers and the rules of evidence apply, but not as in strict court environment. This description finds the NLC as a creature of Article 295 of the 1992 Constitution, which defines a *"court"* to mean a court of competent jurisdiction established by or under the authority of the Constitution and includes a tribunal.

International Labor Organization

The ILO was founded in 1919 as part of the Treaty of Versailles. Signed on the 28th of June, 1919 at the Versailles Palace, the treaty was promoted to form the legal basis for the end of World War I. The ILO is the first specialized agency of the United Nations which has its object, the establishment of bringing of decent work and livelihoods, job-related security and better living standards to the poor and rich countries. The ILO supervises the improvement of work conditions as well as the promotion of social justice and human rights. It has adopted a good number of conventions and recommendations which have greatly contributed to development of social security as a universal human right.

Background and Objective of ILO Termination of Employment Convention, 1982 (No. 158)

In reviewing employment protection laws, the ILO in its publication; *Employment Protection Legislation, 2015* expressed its objectives for the development of the Termination of Employment Convention, 1982 (No. 158). This provided a rich source for the socio-political and economic force that led to the Convention (No. 158). It reads as thus:

"Employment protection and promotion of employment security as an essential aspect of the right to work have been a major concern of the International Labour Organization (ILO) throughout its history.

The first international labour instrument dealing specifically with this issue – the Termination of Employment Recommendation (No. 119) was adopted in 1963. It marked the recognition at the international level of the idea that workers should be

protected against arbitrary and unjustified dismissals and against the economic and social hardship inherent in their loss of employment.

To take into consideration new developments since then, such as heightened global competition and recurrent economic downturns, the Termination of Employment Convention, 1982 (No. 158) and the Termination of Employment Recommendation, 1982 (No. 166), were adopted by the International Labour Conference in 1982

To date, most of the countries around the world have adopted some type of employment protection legislation. These provisions usually reflect the de facto asymmetry of contractual rights of either party to terminate employment relationship, as well as the need to address the consequences of this asymmetry: while termination of the contract by the worker – exercising the fundamental right to protect his or her freedom of work – is oftentimes merely an inconvenience for the employer, the termination of the contract of employment by the employer can result in insecurity and poverty for the workers and their family, particularly during the periods of high unemployment.

Moreover, employment protection can also be seen as a gatekeeper for fundamental principles and rights at work, as well as other rights of a worker: for example, the fear of being dismissed arbitrarily may induce employees to wave rights related to trade union activities, maternity, or education (De Stefano, 2014).”

The above provisions set the tone for the redevelopment of municipal labour laws to which Ghana’s Labour Act 2001, Act 651 was legislated.

Ghana’s Labour Jurisprudence

Jurists have come and gone, we shall fondly remember them; Lord Justice Ollenu, Lord Justice Atcher, Lord Justice PK Kludze and not too soon, our dear Lord Justice Date-Bah who walked off the Ghanaian bench with grace. Their works redefined the Ghanaian law. The bench at currency witnessed men and women of juristic grace whose works intrigue intellectual discussions for our generation. Our dear Lord Justice Amegatcher and Pwamang,JSC., are today our course for study. In this regard, their Lordships’ majority and dissenting opinion in the Akpass v Ghana Commercial Bank Ltd. No. J4/08/2021 case is eye opening and must come under the judicial mill.

The Akpass Case

The Appellant, George Akpass, was until 29th May 2009 a chief clerk of the Respondent’s bank. The length of his service was approximately 27 years. He was interdicted for fraudulent transfer of funds into his personal accounts as well as uncredited lodgment into third party accounts in favour of another customer. A disciplinary committee was convened for enquiries into his source of authority, contrary to laid down procedures, for his grant of immediate value to cheques sent for clearing. On the 29th day of May, 2009, he was summarily dismissed.

He challenged his dismissal at the High Court as unlawful. He mounted his defence on the bases that he performed said duties upon instruction from the Branch Manager who had full authority to do same. He prayed the reliefs of reinstatement with full benefits, compensation for unlawful dismissal, damages, costs, and solicitor’s fees. He alternatively asked for end of service benefits from 20th May 2009 with interests. The High Court found for the Respondent. On 18th June, 2019, the appeals Court further unanimously dismissed the Appellant’s plea. A further appeal was made to the Supreme Court in which the Appellant raised the issue that the summary dismissal

was unfair and contrary to section 63(4) of Act 651, Ghana's Labour Act. The Honourable Nene Amegatcher, JSC. delivered the majority opinion of the court on the said issue and found for the Respondent. The Honourable Pwamang, JSC took a different path and found for the Appellant. The interest of this paper however, is to delve into reason, whether dismissal and termination are same in law.

Justice Nene Amegatcher's Perspective

In his majority opinion, the learned Justice holds the below position on the above subject matter.

Forms of Termination

Fair Termination

Termination may be fair and unfair. Fair termination is that which is with cause under the law. The Act which justifies termination or a ground where termination is said to be fair is mutual agreement. This is provided for in section 15(a). Where a contract of employment provides that either party can terminate by giving notice within a specified period or salary in lieu of notice, termination by both party could be triggered without reason(s). Any question on the fairness or otherwise of the termination is also waved, thus, in the case of public entities, the *Wednesbury principle* becomes inoperative. This rule was stamped in the case of BANNERMAN-MENSON VS. GHANA EMPLOYERS' ASSOCIATION [1996-97] SCGLR 417. In this case, the contract terms states either party may terminate by giving six months' notice. Respondent gave six months' notice of its intention to retire the Appellant and dissatisfied the Appellant sued. Aikins JSC explained the legal position in such contracts of mutuality as follows:

"... the appellant's conditions of service states that the contract was terminable by six months' notice on either side... the appellant could terminate the appointment by giving his employers six months' notice if he decided to, without giving any reasons. So were the respondents entitled to dispense with the appellant's services by giving him six months' notice. This conforms with equitable principles. The respondents exercised their right in giving the appellant six months' notice to retire from the services of the association…. The respondent owed no other obligation to the appellant……. To me it is of no consequence if the respondents gave as a reason for the termination of the appellant's employment the fact that he had reached the age of 60 years. What is important is the mutual agreement of the parties that the contract of employment could be determined by giving six months' notice of intention to do so. I think the appellant was labouring under a serious illusion in assuming that this appointment was terminated for reaching the retirement age at 60 years. The respondents were under no obligation to give him reasons for his termination."

Unfair Termination

It is observed that, where the termination is not by mutual agreement thus rendering the invocation of termination only possible on grounds provided for in the contract, i.e. ill treatment or sexual harassment, medically unfit or inability to perform duty due to sickness, disability, incompetence or related reasons unmerited of summary dismissal, then the protocol envisaged under Act 651 is that, the reasons for termination must be clearly stated and fair. Any contrary actions may define the termination as unfair. This is because though the employer has the power by contract

and law to terminate on those grounds that power has been curtailed by statute and can no longer be exercised arbitrarily or capriciously.

The reason(s) must justifiably, substantively and procedurally be fair or in the case of public bodies pass the *Wednesbury principle* test. The missing link, however, in this novel provision is the measure of fairness and unfairness. This has not been provided in Act 651. The assumption is that, the legal measure par with the reasonable man's test. Being a code, Parliament could have served the jurisdiction better if it drew the parameters. This became a bone of contention in KOBI vs. GHANA MANGANESE [2007-2008] SCGLR 771. The Supreme Court in holding (3) further buttressed the above postulations. It explained that:

"The traditional rule in employer-employee relationship, relied upon by the Court of Appeal (in the instant case) is that in dispensing with the services of an employee, an employer is at perfect liberty to either give or refuse to give reasons. However, in exercising that right, fairness must be the watchword. The defendant company in the instant case did not pay any regard to fairness in its dealings with the plaintiff employees; it acted with some arbitrariness and discrimination and these rendered its acts wrongful as not being in accord with the terms and spirit of the collective agreement."

The Relationship and Legal Effect of Dismissal and Termination Under Ghanaian Law

Dismissal is a mode through which contracts of employment determine. It can be classified under two categories; summary dismissal, and (ii) constructive dismissal. Termination is also a mode through which labour contract can determine. Under current Ghanaian labour jurisprudence, the two are regulated tritely by the common law and statute law.

Summary dismissal as a right empowers the employer to severe or cut with immediacy an employee's appointment upon infraction. For an act to qualify as an infraction it must threaten the existence of the business such that trust and confidence must be lost. These include but not the least gross misconduct, dishonesty, criminality, competition, violent conduct, drunkenness, gross insubordination and gross dereliction of duty. A plethora of Ghanaian common laws expatiate dismissal as an industry term with its ramifications. In KOBEA vs. TEMA OIL REFINERY [2003-2004] 2 SCGLR 1033 at pages 1039 and 1040, the Supreme Court speaking through Twum JSC stated that:

"… At common law, an employer may dismiss an employee for many reasons such as misconduct, substantial negligence, dishonesty, etc… these acts may be said to constitute such a breach of duty by the employee as to preclude the further satisfactory continuance of the contract of employment as repudiated by the employee… there is no fixed rule of law defining the degree of misconduct that would justify dismissal."

Again, in LAGUDAH V. GHANA COMMERCIAL BANK LIMITED [2005-2006] SCGLR 388, Badoo JSC stressed equivocally that an employer is of right to summarily dismiss the employee on the basis of conduct incompatible with faithfulness in the discharge of duties. Another notorious Ghanaian common law authority is the case of LEVER BROTHERS GHANA LIMITED V DANKWA [1989-90] 2 GLR 385 at 388. In this case, the Court of Appeal stated that, the power

to determine an employment summarily meant that, an employer could exercise such right in haste and on the spur of the moment.

Termination, in as much as it is acutely akin to statute law at currency, its jurisprudence is rooted in the common law. The underlying factors to its deployment however vary. Under this mode, it is not necessary for the employee's conduct to be the spurn on the cause of action. The whims and caprices of the employer could set it into motion. One such condition could be a new business objective. However, in Ghana, termination has been developed and given statutory recognition in sections 15-18 of Act 651. These crucial sections omitted the mention of dismissal. Nonetheless, it is factually accurate to state that, the two are separate and distinct in law. This does not take away the similarity in their connotations. Just as most traditional labour contracts are constructed with terms such as death, retirement and resignation, termination and dismissal constitute modes by which a contract of employment could determine. Another similarity is that the grounds for their invocations are negotiated prior to the life of the contract.

As stated earlier, clear distinctions exist between them. Termination is accompanied usually with notice. It may be voluntary thus without cause flowing from the employee. Dismissal is invoked on want of the employee's conduct. Termination as well may be invoked without supplication of reason(s). Dismissal traditionally accompanies reason(s). Dismissal is usually punitive while termination may not. Again, termination is a right exercised by both employer and worker while dismissal is solely the right of the employer. Furthermore, termination may be accompanied by end of service benefit(s) as sought by the plaintiff in the Akpass Case. This may include gratuity. Dismissal does not traditionally event accompanied benefits. These differences have been recognised and accepted by our courts since the introduction of the common law as part of the received laws of Ghana. Article 11 of the Fourth Republican Constitution is authoritative of this legal assertion. The effect is that, the common law remedies applicable to dismissal and termination will apply as part of the labour regime of Ghana until it ceases to exist by express wording in a local legislation or in in clear conflict with the provisions of a local legislation. A thorough search through Act 651; the labour legislation at currency have revealed no such express departure or conflict with the common law remedies.

Justice Pwamang's Perspective

The Common Law and Labour Relations

The learned Justice pointed that, Labour relations at their inception were mainly contractual whether written or unwritten. It was fundamentally regulated by the rules of contract under the common law and its traditional relief was damages. This beholds that, it may be brought to an end just as any contract under the rules of the common law. The legalese used when such contracts determine is '*'termination''*. Also, the common law rule of contract which gifts either party the right of termination at will applied. Thus, the employer or employee could terminate, at will, the contract of employment. The Honourable Pwamang, JSC. postulated that dismissal is both a common law and statutory precursor to the death of a contract of employment. For public bodies, its orchestration is restrained by the *Wednesbury principle* requirement. It however does not preclude the employer from terminating at will. This is described as voluntary dismissal.

Involuntary dismissal occurs when the employer places impediments on the path of the employee such that it is reasonably impossible for the latter to remain under the contract, the result being that the employee walks off.

The earlier periods of the law was underpinned by medieval theoretical conceptions. These philosophies include the commodification of services, the terms of exchange which were freely negotiated at arms' length. Thus the *master-servant* ascription ruled the relationships. As the age of enlightenment dawned, the global economy expanded. The era of trade unionizations was birthed and the faded glory of the theory of service commodification became conspicuous. It was imperative then to modify the common law rules. This necessity was echoed Sir Otto Kahn-Freund. In his *Labour and the Law (1972)* (at p.8), Sir points out that:

"The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment."

The Ghanaian common law recorgnised the modifications brought upon by the legal revolution in the English common law. A *case in point* is that which occasioned in the 1989-1990 legal year in the case of *Nartey-Tokoli & Ors V. Volta Aluminum Co Ltd [1989-90] 2 GLR 341*. In reaching a 4-1 majority decision, Taylor, JSC, at pages 362/363 of the Report posits that:

''Lord Loreburn L.C. in, Attorney-General v. Birmingham, Tame and Rea District Drainage Board [1912] A.C. 788 at 795, H.L. expressed the collective view of common law judges when he said that: a court of law has no power to grant a dispensation from obedience to an Act of Parliament.''

Pwamang JSC, in furthering his minority course in the *Akpass Case*, invoked the authority of Morgan & Ors v Parkinson Howard Ltd [1961] GLR 68 (At page 70) where the learned Ollenu J. stated that:

"In a claim for wrongful dismissal it is essential that the plaintiff should prove the terms of his employment and then prove either that the determination of the employment is in breach of the terms of his agreement, or that the determination is in contravention of the statutory provisions for the time being regulating employment. His claim cannot succeed if he fails to satisfy the court on these points."

The postulations by Ollenu J. is that. dismissal could be right or wrong under the common law and statute. Their operation is hinged on personal law under contract or statute law at currency. The Honourable Justice did not quiet from the common law causes for dismissal. These include (i) dishonesty, (ii) incompetence and (iii) acting against the interest of the employer. He states that the burden of proof however lies on the employer if the employee denies his conduct falling into the stated ground. The rendition of our Lord furthers the rules of common law which states that termination can be sanctioned *with or without stated reason(s)*. These rules however apply differently under Ghanaian common law. For the latter, the authority of the 1963 House of Lords decision in *Ridge v Baldwin [1963] APP.L.R 03/14, HL* is instructive. Lord Reid posits that:

"The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none."

Our Lordship drew the contrast under Ghanaian common law. The case of Aryee v. State Construction Corporation [1984-86] 1 GLR 425 CA (Reference can be made specifically to Adade, JSC's dissent at page 432) is instructive. The learned Justice in refuting a *strict* application of the *Ridge* principle states that:

"It should be noted that a contract of service is not a contract of servitude. To say, as we are wont to do, that it gives rise to a master-servant relationship is to distort reality. The employee is not the servant; in the popular sense, of the employer. He is merely his employee. The contract is framed in such a way that either party may bring it to an end and free himself from the relationship painlessly. In this case, the defendant could at any time give the relevant three months' notice (or forfeit an equivalent in salary) and leave the corporation, without justifying his action to the corporation. He need not give any reason for his action nor is the corporation entitled, if he should give one, to satisfy itself that the reason is true or false, sufficient or insufficient, justified or unjustified. In the same way it would seem to us that the corporation need not assign any reason for choosing to terminate their contract with the defendant. The contract merely requires that the corporation gives three months' notice (or its equivalent in salary), and their conduct will be perfectly in order.''

By the *Aryee's Case*, Our Lord clearly points to the fact that, the Ghanaian jurisprudence does not approve of the *master-servant* philosophy. Also, there cannot be termination without stated reason(s). The Kobea v. Tema Oil Refinery per Dr Seth Twum, JSC. was to the contrary. In this case, the courts reversed to the English common law principle which rules that there can be termination without stated reason(s). It is to be noticed that the opinion of the Supreme Court of Ghana speaking through Dr. Seth Twum, JSC. was in essence of the state of the Ghanaian law prior to the promulgation and enactment of Act 651.

It must be observed that in all the three authorities cited by our Lordship; the *Ridge Case*, the *Aryee's Case* and the *Kobea's Case*, the legalese employed as a means by which contracts of employment determine is *''terminate''* thus the generic diction that denotes an employer's actions to kill a contract of employment. The remedy under the old common law rule is damages. Under the modified Ghanaian common law, compensation and reinstatement have been made available. According to Pwamang, JSC, Notice Sections are planted into modern contracts to contain procedures for the service of notices prior termination. A traditional notice section calculates the compensation at currency of salary, taking into account the length of time of service and the opportunity cost(s) of termination. To this, we formulate the mathematical representation as follows:

Compensation = Current salary x Period of service + Opportunity cost of termination.

Let C = Compensation (GHC)

S = Salary at currency

Ps= Period of service

O = Opportunity cost of termination

Thus;

C = S X Ps + O

The determinants of the variables are; S; current salary of the plaintiff, Ps; duration within which plaintiff was tied to the contract of service which may include ancillaries such as rank and worth of service i.e. technical officer, and O; the probability that plaintiff will be tied to similar contract within reasonable time.

In our Lordship's minority opinion, these rules of law formed the basis for the enactment of the Labour Act of Ghana; Act 651. In fact, the Memorandum to the Bill indicates that the Act is to usher in a legal labour climate concomitant with international law. It reads:

"The purpose of this bill is to bring the existing enactments on labour into conformity with the Constitution and the several International Labour Organisation (ILO) Conventions to which Ghana is a signatory and to consolidate the several pieces of enactments on the subject into one statute".

Sections 1 and 19 of Act 651 impose limitations on its scope. Section 1 states that the scope of the law is applicable to all contracts of employment *except the Armed Forces, the Police Service, the Prison Service, and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act 526).* Section 19 explains that sections 15, 16, 17 and 18 are only operative when the contract terms are more beneficial to the employee.

What then are the differences in statute law? Notwithstanding the common law differences between "dismissal" and "termination", current Ghanaian labour jurisprudence sees the two as semantically same. Termination is coded under sections 15 and 17 of Act 651. It reads:

''15. Grounds for termination of employment

A contract of employment may be terminated,

i. 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;
ii. by the employer if the worker is found on medical examination to be unfit for employment;
iii. by the employer because of the inability of the worker to carry out work due to
iv. sickness or accident; or
v. the incompetence of the worker; or
vi. the proven misconduct of the worker.

It is obvious that the section refers to *termination* of a contract of employment by the employer for justifiable reasons and subsections 15(e)(ii) & (iii) are specifically in respect of *dismissal* of an employee under a contract of employment. Irrespective of the draftsman's omission of the term *''dismissal''* in Section 15 as a whole, Pwamang, JSC saw its spirit embedded in Sub-section (e) (ii) & (iii). His Lordship's conclusion therefore is that, *termination* as a term of art is not same as *dismissal* under statute law in Ghana as the causes of action in 15(e)(ii) & (iii) are different from section 15 (a), (b),(c) and (d). This is the gravamen of the disagreement between the majority led by the Honourable Amegatcher, JSC. and His Lordship Pwamang, JSC. as the only minority.

In addition to their numerical distinctions in the drafted law, His Lordship further read constructive dismissal, a common law cause of action coded in Section 15(b). It is however revealing that the said Section chose to use the legalese *"termination".* What probably is the reason behind His Lordship Pwamang, JSC's position? In our view, it is because, the grounds for common law dismissal are same under 15(e)(ii) & (iii) of Act 651. This is in furtherance of his earlier submission in his minority opinion that termination and dismissal were to be regarded as different under the legal imports of Section 63(1) and 63(4). Under these provisions, the law places obligation on the employer to ascribe reason(s) for termination or dismissal. Not only is the employer burdened to provide reason(s), but the reason(s) must pass the test of judicial fairness. By this, the controverted common law rule which states that, termination or dismissal could occasion without the obligation of providing reason(s) has been expunged in Ghanaian law to the abyss of judicial hell, burning with brimstone and fire. May its ghost never hunt future legislative exercises. Series of case laws provided footholds to the dimension. The authority of Kobi v Ghana Manganese Co. Ltd (supra), backs the assertion. At page 794, Ansah, JSC, after lamenting the insecurity of employment in Ghana in consonance with our last published article; Job Security in a Comparative world, the learned Justice stated that:

"The passing of the new Labour Act, 2003 (Act 651), has brought relief to the employee, for now there are statutory duties and rights of the employer and the employee. The right to terminate employment does not depend on the whims of the employer. Sections 62-66 of the Act are sub-titled; "Fair and Unfair Termination of employment". And section 63 of the Act headed; "Unfair termination of employment" explains in its subsections (2)-(4) what constitutes unfair termination of employment. Thus, under section 63(4), a termination may be unfair if the employer fails to prove that the reason for termination is fair, or it was made in accordance with a fair procedure under the Act."

These have rendered the rules set in Kobea v Tema Oil Refinery (supra), Lt. Col. Ashun v Accra Brewery Ltd. [2009] SCGLR 81, Aryee v State Construction Corporation (supra), and Bani v Maersk Ghana Ltd [2011] 2 SCGLR 796 at 807 to 808 no longer good law. These case laws opine that, termination could be without stated reason(s). They further stated that, there could not be specific performance of contract of employment. The conjecture here is that, under these authorities, the courts see no distinction between termination and dismissal. The *Bani Case* especially is very notorious of the assertion. The highly revered Dr. Date-Bah, JSC dissenting, took some positions very contrary, respectfully, to clear statutory provisions which we believe should have been considered in the light of current commercial environment. The highly revered Justice posited as thus:

"…This is in recognition of the fact that the modern relationship of an employer to an employee may have less of the personal element of the master and servant relationship in response to which the equitable principle developed, that contracts of employment should not be specifically enforced...."

His Lordship, Pwamang, JSC., sees this position taken by His Lordship Date-Bah, JSC. as offensive to clear legislative provisions; Sections 1, 63 and 64 of Act 651. If Dr. Date-Bah, JSC, respectfully, is understood, His Lordship, as at 2010-2011 legal year still recognizes the existence of the common law right of termination without reason(s), as well as the absence of re-instatement as a remedy for unfair termination or dismissal under modern Ghanaian labour jurisprudence. In our collective view,

Pwamang, JSC's position is the most accurate as Dr. Date-Bah, JSC's may only qualify as factual but not legal. Statutes take preeminence over common law. Dr. Date-Bah, JSC, can however be excused as he scientifically avoided a definitive position on the effects of sections 1, 63 and 64 of Act 651.

In the *Akpass Case*, the rendition of Pwamang, JSC. again relied on Ansah, JSC's position in the *Kobi Case*. In that case, it was posited that, the common law rule where termination or dismissal could occasion without the ascription of reason(s) was expunged by Act 651. Dismissal under statute law must be with stated reasons as well as termination. Their causes of action however not same. The Honourable Pwamang, JSC, further extolled that, policies that underpin the justifications for the old common law rule as upheld by Dr. Date-Bah, JSC. are no longer applicable in the jurisdictions where they emanate. One of such policy instruments as His Lordship relied on is the Report of the Royal Commission on Trade Unions and Employers Associations (Donovan Commission), Vol. 23 Number 4, 1968. The Report makes provisions for the following:

"*Discussing the background against which the Commission surveyed its problems and reached its conclusions, the report points out that the impact of two world wars and changes associated with developing technology, increasing scale of industrial organization, growing wealth and greater Government intervention have contributed to a transformation of the social and economic life of the country since the last Royal Commission reported 62 years ago. Old industries have shrunk and new ones emerged. Processes of production have been revolutionized, old crafts disappearing and new skills emerging. With the continuing growth in the size of industrial units and the amalgamation of companies there has developed a managerial society in which ownership has become divorced from control. The running of large businesses is in the hands of professional managers, responsible to boards of directors. Trade unions have increased their membership from less than 2% million in 1906 to more than 10 million in 1966, and the membership has been increasingly concentrated* in a comparatively small number of large and powerful unions."

If this was the underlying force behind the law on unfair termination in England, then the view that the workman's interest under current labour environment must be reflective of equal protection as postulated by Pwamang, JSC. is apt. This equality then must include modifications of the common law rules which puts the categories of dismissal; fair and wrongful or unlawful in par with termination.

Comparable Statutes in Some Common Law Jurisdictions

The workman's right *vis avis unfair termination* has been known to the legal system of Britain since 1971 i.e prior the passage of the Industrial Relations Act, 1971. This Act, three legal years later, was amended by the Trade Union and Labour Relations Act, 1974 and hath further been amended by subsisting legislations, thus Employment Rights Act, 1996. Section 94 of this law states as thus:

"An employee has a right not to be unfairly dismissed by his employer."

Section 95 defines dismissal to include *termination with or without notice.*

It can be seen from the British legal system also that dismissal cannot be effected without the offer of reason(s) as postulated by Pwamang, JSC. The Employment Rights Act, 1996 must be seen to undo the common law rule in the *Ridge Case.* Dismissal then is not legally technically the same as termination under English law.

The Australian jurisdiction has also echoed the stance of Pwamang, JSC's minority opinion which we believe should have been the position of the courts of Ghana instead of the majority decision led by the Honourable Amegatcher, JSC. Under the Fair Work Act, 2009, precisely Section 382, the causes of action for termination and dismissal vary with those under the common law.

The relevant legislation in South Africa is the Labour Relations Act, 1995. In section 185 recognizes unfair dismissal and unfair labour practices. Re-instatement and compensation have been coded as remedies. This shifts from the common law position where only damages would avail an employee. It is also noted that section 186 denotes termination as dismissal but with reservations. Dismissal was designed to imply termination with stated reason(s) while termination could be invoked without stated reasons. Under section 186 of the South African Act, dismissal is defined to include termination with or without notice. In this law, *''dismissal''* was drafted to refer to termination for misconduct and incapacity. ''*Termination*" likewise is a right reposed in the employer to end a contract of employment.

In all the jurisdictions above; Britain, Australia and South Africa, the statutory labour laws in place; Industrial Relations Act, 1971, Trade Union and Labour Relations Act, 1974, As Amended by Employment Rights Act, 1996; Fair Work Act, 2009; and the Labour Relations Act, 1995 simultaneously have been embedded with similar remedies. These include (i) re-instatement or re-engagement and (ii) compensation against the common law position of damages.

2.0 CONCLUSION AND RECOMMENDATION

Conclusion

Going through the legal maize to this point leads us to the conclusion that, Pwamang JSC's position on the question whether there exists any legal distinction(s) between termination and dismissal is apt and corresponds to today's working climate. The common law rules must therefore give way to law of statutes.

Recommendation

It is our fervent request that Act 651 be amended to provide trite distinctions between dismissal and termination. This will usher in legal certainty to ensure the sanity of the Ghanaian law.