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I hereby declare that I have read and understood the regulations governing the submission of dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Abbreviations

BCEA – Basic Conditions of Employment Act.

CBA – Collective Bargaining Agreement.

CCMA – Commission for Conciliation, Mediation and Arbitration.

CCTG – Coalition of Concerned Teachers of Ghana

COIDA – Compensation for Occupational Injuries and Diseases Act

EEA – Employment Equity Act

GEA – Ghana Employers Association.

GFL – Ghana Federation of Labour.

GNAT – Ghana National Association of Teachers.

GFPF – Government Employees Pension Fund.

IBC – International Business Centre,

ILC – International Labour Conference.

ILO - International Labour Organization

ITUC – International Trade Union Confederation.

LC – Labour Court

LRA – Labour Relation Act.

NAGRAT – National Association of Graduate Teachers

NDMW – National Daily Minimum Wage.

NLC – National Labour Commission.

NMWA – National Minimum Wage Act.

NTC – National Tripartite Committee.

OATUU – Organization of African Trade Union Unity.

OHSA – Occupational Health and Safety Act

OTUWA – Organization of Trade Unions of West Africa

PDA – Protected Disclosures Act

SME - Small and Medium-size Enterprises.

SSNIT – Social Security and National Insurance Trust.

TEWU – Teachers and Educational Workers' Union

TUC-Ghana – Trade Union Congress (Ghana)

UIA – Unemployment Insurance Act

UICA – Unemployment Insurance Contributions Act.

Abstract

This minor dissertation explores the standards set by the International Labour Organisation (ILO) on the reasons and procedure for termination of employment of employees as provided in ILO Convention 158. The reasons ILO approves as justifiable grounds for termination of contract employment include misconduct, incapacity and operational requirement. Though both Ghana and South Africa have not ratified the Termination of Employment Convention 1982, the former has developed elaborate labour legislations and case laws as vanguard for the protection of employment. Using a comparative approach, the dissertation examines the definition and court's interpretation of concepts of termination of employment and dismissals in Ghana and South Africa. The dissertation also compared the codified statutory procedures employers must follow prior to dismissal and came to the conclusion that Ghana lacks such precision and certainty in the substantive and procedural requirement for termination of employment. Though there are instances of similarities in Ghana and South African laws on termination of employment, there are several other areas Ghana can learn from South Africa. For this reason, the dissertation recommends amendments to the Labour Act of Ghana to include the safeguards identified in South Africa into Ghana's labour law.

CHAPTER ONE

INTERNATIONAL LAW PERSPECTIVES ON TERMINATION OF EMPLOYMENT

1.1 Introduction

The Republic of Ghana is the first country in south Saharan Africa to have attained independence from colonial rule, having been ruled by the United Kingdom between 1873 and 1957.[1] At independence in 1957, Ghana inherited the English legal systems and court structures and institutions. The common law of England, including the doctrines of equity, statutes, and Ghanaian customary laws[2] governed the socio-economic and political life of Ghana. These sources of laws are still relevant in the jurisprudence of Ghana.[3]

The Republic of South Africa has a similar historical experience of colonialism. The apartheid system was arguably the worse form of colonial experience any African country has had. However, the similarities and commonalities between Ghana and South Africa in terms of their respective legal systems and legislations are of utmost interest in this study. Both countries belong to the common law tradition and are members of the Commonwealth of Nations. The Roman-Dutch common law forms part of the South African common law,[4] unlike Ghana's. Both are members of the International Labour Organization (ILO), having ratified many of the international labour instruments and conventions. Ghana joined the ILO immediately after independence. South Africa was a founding member of the ILO in 1919 but withdrew from the ILO because the apartheid policy became a major issue of discussion at the International Labour Conference. South Africa rejoined the organization on 26th May, 1994 after the first post-apartheid democratic elections.[5]

The similarities of the distinct jurisdictions make it worthwhile to analyse the extent to which the laws of the two countries address common concerns of their people. Consequently, this

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[1] https://www.cvce.eu/en/education/unit-content/ The emancipation of sub-Saharan Africa

[2] Supreme Court Ordinance, 1876, § 19 (Ghana); cit by Julie A. Davies & Dominic N. Dagbanja 'The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective' (2009) 26 *Arizona Journal of International & Comparative Law* p 306.

[3] Constitution of the Republic of Ghana, 1992, article 11(1).

[4] Introduction to Law School, 2021 UCT at p 7. Also see Rochelle le Roux 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *ILJ* at p 141-142.

[5] Paul Andries Smit, *'Pre-dismissal procedures in terms of ILO Convention 158: South African and comparative perspectives'* at p 2: https://www.researchgate.net/publication/281105593,

dissertation seeks to analyse the laws governing the termination of a contract of employment in these countries.

1.2 Background

Upon attaining the republican status on 1st July 1960, Ghana enacted laws to govern herself. The industrial sector is a significant part of the governance of every country. Ghana inherited legislation governing the industrial sector from the colonial masters.[6] Today, the Constitution of Ghana[7] is the supreme law that guarantees the economic right of all citizens.[8] Besides, the main legislation governing the industrial sector of Ghana is the Labour Act.[9] This Act amended and consolidated[10] several legislations promulgated from the first republic in 1965 to the eve of the 4th republic in 1992, a period of almost three decades. The Labour Act of 2003 repealed the old legislation that existed from the first republic to the fourth republic.[11] In effect, the Labour Act of Ghana has become a one-stop-shop legislation governing all labour issues and the industrial sector in Ghana. The Labour Regulations, 2007 (L. I. 1833)[12] was enacted to give effect to the Labour Act.

Similarly, South Africa has promulgated a few legislations to regulate the industrial sector. In the post-apartheid constitution[13] of South Africa, labour rights and protections of workers are enshrined in the bill of rights.[14] Sequel to this, several statutes have been passed to give effect to these rights. These include the Labour Relation Act (LRA),[15] Basic Conditions of Employment Act (BCEA),[16] Employment Equity Act (EEA),[17] and the National Minimum Wage Act (NMWA).[18] The aforementioned statutes regulate labour relations between employers and their

[6]Section 177 of the Labour Act, 2003, (Act 651).
[7] The Constitution of the Republic of Ghana 1992.
[8] Ibid at aArticle 24.
[9] 2003 (Act 651).
[10] Ibid at the preamble.
[11] See schedule III of the Labour Act, 2003 (Act 651).
[12] Labour Regulations is a subsidiary legislation passed to give effect to the Labour Act, 2003 (Act 651)
[13] Constitution of the Republic of South Africa Act No 108 of 1996.
[14] Ibid at s. 23.
[15] No. 66 of 1995.
[16] No. 75 of 1997.
[17] No. 55 of 1998.
[18] No. 9 of 2018.

employees, both at individual and collective level.[19] Other complementary statutes which provide various forms of protection and social security for workers include the Occupational Diseases in Mines and Works Act (ODIMWA),[20] the Occupational Health and Safety Act (OHSA),[21] the Compensation for Occupational Injuries and Diseases Act (COIDA),[22] the Protected Disclosures Act (PDA),[23] the Unemployment Insurance Act (UIA),[24] and the Unemployment Insurance Contributions Act (UICA).[25]

Ghana has ratified 51 of the ILO conventions[26] while South Africa has ratified 27 ILO.[27] An ILO convention, which is of interest to this research is the Termination of Employment Convention, 1982,[28] which came to force on 23rd November 1985. Neither of the two countries has ratified this convention. Nonetheless, the Labour Act of Ghana introduced provisions to reflect other ratified ILO Conventions.[29] One of the purposes of the Labour Relations Act 66 of 1995 of South Africa is 'to give effect to the public international law obligations of the Republic relating to labour relations.'[30] Notwithstanding, the non-ratification of the Termination of Employment Convention, both countries knew of the existence of Convention 158, which predates their labour legislations. The subsequent labour legislation mirrored the provisions in Convention 158 to conform with their respective public international laws obligations, particularly the ILO obligations.

This dissertation seeks to analyze Ghana's labour laws regulating dismissal and termination of employment and compare them to the ILO convention 158 and South Africa's labour laws.

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[19] Cohen (Collier and Fergus ed) Labour Law in *South Africa Context and Principles 1e Oxford University Press South Africa* (2020) 8 ed Collier & Fergus (eds) at p 5.
[20] Ibid; Act 78 of 1973.
[21] Ibid; Act 85 of 1993.
[22] Ibid; Act 130 of 1993.
[23] Ibid; Act 26 of 2000
[24] Ibid; Act 63 of 2001.
[25] Ibid; Act 4 of 2002.
[26] Source http://ilo.org/dyn/normlex/en/f?)
[27] https://www.ilo.org/dyn/normlex/en/f?.
[28] https://www.ilo.org/dyn/normlex/en/f?
[29] National Labour Law Profile: Ghana (ilo.org); Contributed by Jane Hodges, DIALOGUE, ILO; and Dr. Anthony Baah, Head, Research and Policy Department, Ghana Trades Union Congress. 2006.
[30] The preamble of the Labour Relation Act 66 of 1995.

1.3 **The theories of termination of employment**

This subtopic briefly identifies the theories of termination of employment propounded by the courts, scholars and jurists in the area of employment law. These theories include the elective theory, automatic theory, the Mutuality of Obligations Doctrine and Termination of Employment Contract, the doctrine of termination at will and the statutory intervention theories of termination of employment.

First, the elective theory stipulates that where an employer repudiates the contract of employment unilaterally in breach of the implied mutual terms and conditions but short of dismissal, the employee must accept the repudiatory breach before the employment can be treated as effectively terminated. In this circumstance, the 'elective' theory gives the employee the option to either accept the breach and claim damages for constructive wrongful dismissal at common law upon resignation or affirm the contract so that it remains in existence.[31]

The automatic theory of the termination of employment holds that an employer's unilateral repudiatory breach of the material terms of the employment operates automatically to terminate the contract of employment.[32] The automatic theory operates on the principle that a contract of employment cannot survive wrongful dismissal because, in English law, there is a presumption against the order of specific performance or injunctive relief in the context of the actual or threatened dismissal of an employee.[33]

The Mutuality of Obligations Doctrine and Termination of Employment Contract theory was propounded by Lord Drummond Young in the case of *McNeill v Aberdeen City Council (No 2).*[34] The concept is unique to the Scots common law in contradistinction from the English common law. This principle thrives on the merger of a statutory constructive dismissal under section 95(1)(c) of the Employment Rights Act[35] and traditional common law principles under the law of contract. At common law, a breach of an express term of a contract or a common law implied that

[31] David Cabrelli, Rebecca Zahn 'The Elective and Automatic Theories of Termination at Common Law: Resolving the Conundrum?' (2012) 41 *ILJ* at p 349; John McMullen 'A Synthesis of the Mode of Termination of Contracts of Employment' (1982) 41 *Cambridge Law Journal* at p 111.
[32] David Cabrelli, op cit note 31 at p 346.
[33] Ibid at p 347.
[34] [20131 CSIH 102, [20141 IRLR 113.
[35] Employment Rights Protection Act of United Kingdom.

the term of the contract of employment by the employer is automatically repudiatory and it would be considered sufficiently serious to entitle the employee to claim constructive dismissal. The effect is that it also amounts to statutory constructive dismissal.[36]

The third theory of termination of employment is the common law doctrine of employment-at-will. The doctrine entitles the employer to discharge an employee for a good cause, a bad cause, or no cause, without any contractual limitations.[37] These circumstances always put the employees at a peril. Marvin (1982) reported that most American workers were still employed at will, and they were subject to discharge for good reasons, bad reasons, false reasons or for no reason.[38]

The fourth theory of termination of employment contract is statutory intervention created to remedy the employment-at-will relationships. This theory seeks to protect the employment rights of workers since employment is fundamental to human existence and lack of it endangers humans' dignity. The doctrine requires termination of employment only on grounds of valid reasons, subject however to statutory requirements, such as pension age. The International Covenant on Economic, Social and Cultural Rights[39] prohibits the deprivation of people's means of subsistence.[40] The theory is found in international treaties, instruments, conventions, national laws, collective agreements, etc.

The ILO adopted the Termination of Employment Convention, 1982, (No. 158) following significant developments that occurred in the law and practices of the ILO member states on the back of the Termination of Employment Recommendations in 1963. The Convention 158 sets new international standards for termination of employment due to the emerging instances of termination of employment in many countries because of economic difficulties and technological

[36] David Cabrelli 'The Mutuality of Obligations Doctrine and Termination of the Employment Contract: McNeill v Aberdeen City Council (No 2)' (2014) 18 p 260. Also see Hugh Collins 'Constructive Dismissal and the West Lothian Question: Aberdeen City Council v McNeill' (2011) 40 *ILJ* p 439.
[37] Mordsley & Steven R. Wall: *The Dismissal of Employees under the Unfair Dismissal Law in the United Kingdom and Labor Arbitration Proceedings in the United States: The Parameters of Reasonableness and Just Cause*, 16 CORNELL INT'l L.J. 1 21 ed (1983). Also see Marvin F. Hill Jr., *Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal*, 3 N. ILL. U. L. REV. 111 21 ed (1982) 112.
[38] Ibid, Marvin F. Hill Jr.,
[39] General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976, in accordance with article 27.
[40] Ibid at article 1(2).

changes.[41] Convention 158 came along with the Termination of Employment Recommendation 1982.

1.4 **International Labour Organisation framework on termination of employment**

The International Labour Organisation (ILO),[42] is a product of the World's genuine desire for everlasting peace through social justice. In 1919, the World Leaders admitted that the conditions of labour that existed in the world at the time were characterised by injustice, hardship and privation to the majority of people. They foresaw a greater likelihood of labour situation endangering world peace and harmony. As a consequence, there was an urgent need to rectify the labour situation by regulating employees' working hours, labour supply, unemployment, adequate living wage, protection of the worker against sickness, disease and injury arising from their employment, protection of children, young persons and women, provision for old age and injury, protection of the interests of workers employed in countries, etc.[43]

The ILO enabling legislation formed part of the Treaty of Versailles at Part XIII of the Peace Treaty.[44] The main function of ILO is the adoption of Conventions and Recommendations on matters affecting work and labour and social policy global tripartite dialogue.[45] One of the objectives of the ILO is to establish protective values for profit and social peace through equal working conditions.[46] The ILO is a tripartite organization comprising three main bodies, namely, governments', employers' and workers' representatives. ILO works through three institutions; these are:

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[41] Termination of Employment Convention, 1982 (No. 158) at preamble.
[42] The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to devote to promoting social justice and internationally recognized human and labour rights, pursuing its founding mission that social justice is essential to universal and lasting peace.
[43] See the preamble of the Treaty of Versailles at section 1.
[44] The Labour Provisions of the Peace Treaties 1920, Geneva.
[45] *Compilation of international labour Conventions and Recommendations/International Labour Office. Geneva: ILO*, 2015 at p 13.
[46] Paul Andries Smit, '*Pre-dismissal procedures in terms of ILO Convention 158: South African and comparative perspectives'* at p 2: https://www.researchgate.net/publication/281105593

- the International Labour Conference, which is often called an International Parliament of Labour. It sets the international labour standards and the broad policies of the ILO and meets annually in Geneva.
- the executive council of the ILO, which takes decisions on ILO policy and establishes the programme and the budget subject to the approval and adoption by the Conference.
- the International Labour Office is the permanent secretariat of the ILO. The office is headed by a Director-General. It is the centre of all ILO activities, under the auspices of the Governing Body.[47]

Beside the three main bodies listed above, the International Labour Conference (ILC) also established the Committee of Experts in 1926 with the main function of reviewing the reports submitted to the ILC by member countries on the application of the ratified conventions. The ILC considered and established the Committee of Expert following the numerous reports it received from member countries, and it became obvious that the Conference plenary could not examine all of them, adopt new standards and deliberate on other key matters.

Over the years, not only has the ILO played a vital role in sustaining world peace but has also taken significant steps to advance social justice and protect workers through a responsible social dialogue.[48] The ILO has adopted 189 Conventions[49] but 82 of them are in existence. Six Protocols have been adopted so far and 204 Recommendations, out of which 83 are up to date.[50] For this dissertation, the ILO's Termination of Employment Convention 1982 and the Termination of Employment Recommendation, 1982 are significant. Whereas the former is binding on a state once it is ratified, the latter is non-binding but provides guidance to the authorities of the country for their actions and policies.

1.5 Termination of Employment Convention, 1982 (No. 158)

The adoption of the Termination of Employment Convention by the ILO was informed by the economic difficulties and technological changes employers in many countries experienced in the

[47] https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm
[48] Compilation op cit note 45 at p 13.
[49] Ibid.
[50] Ibid at p 14.

years preceding 1982.[51] Workers bore the brunt of the employers' response to the economic difficulties and technological changes. The obvious response of many employers was termination or retrenchment of their employees. Workers in some countries became victims of arbitrary dismissals by their employers. For instance, in Brazil, the absence of a regulatory framework to enforce the constitutional guarantee against arbitrary dismissal gave employers the leeway to terminate employment on whimsical grounds. For instance, employers terminated employment and rehired for the same job for a lower pay rate. A report from the Ministry of Labour and Employment statistics reveals that one-third of dismissals occur during the worker's first year of employment in the enterprise concerned.[52]

Convention 158 has 22 articles organized into four parts. The first part deals with the methods of implementation, the scope and definition and the second part is the standard of implementation. The third part is on supplementary provision relating to termination of employment for economic, technological, structural and similar reasons whilst the fourth part has the final provision. Convention 158 is supplemented by a non-binding instrument, Termination of Employment Recommendation, 1982 (No. 166). The instrument makes several recommendations for state parties to include in their national legislations, collective agreement, judicial decisions, work rules and arbitration awards to give effect to Convention 158.[53]

The scope of Convention 158 excludes fixed-term contract employees, probationary employees, casual employees,[54] categories of employees with equivalent protection the Convention offers[55] and categories of employees in undertaking with special problems including the size and nature of the work.[56] The Convention prohibits contracts of employment nuanced in a manner to circumvent the legal obligation of the employer to deprive the employee of protections upon termination of employment.[57] In response to the possibility of circumvention of a contract of employment, the Termination of Employment Recommendation recommends that state parties make provisions in their labour legislations to deem contracts of employment for a specified period

[51] Convention 158 - Termination of Employment Convention, 1982 at preamble.
[52] https://www.ilera2015.com/dynamic/full/IL213 authored by Magda Barros Biavaschi Camila Morsch, a retired judge from Brazil's Regional Labour Court for Region 4 at p 12.
[53] Termination of Employment Recommendation, 1982, Recommendation 1.
[54] Convention 158 op cit note 51 at article 2(2).
[55] Ibid at article 2(4).
[56] Ibid at article 2(5).
[57] Ibid at article 2(3).

as indeterminate if it is renewable for more than one occasion.[58] The Convention construes the terms 'termination' and 'termination of employment' in a limited sense to termination of employment at the instance of the employer but not the employee.[59]

1.5.1 Reasons or justification for Termination of employment

Termination of employment of a worker is justified if there is a valid reason which relates to a worker's capacity or conduct or based on the operational requirements of the undertaking or business. Termination of employment shall not be valid if the reason for the termination is age, (other than the national retirement age), absence from work because of national, civic or military duty, and temporary absence due to ill-health or injury. What constitutes a temporary period of absence is subject to the laws of the member country. In the view of the committee of experts of ILO, the need to base termination of employment on a valid reason is the cornerstone of the provision in the Convention.[60] Article 4 of the Convention bars an employer from unilateral termination of the employment relationship. An employer is required not to only give reasons for the dismissal, but also the reason must be grounded on the 'fundamental principle of justification', connected with the capacity, or conduct of the worker or based on the operational requirements of the undertaking.[61]

To justify termination of employment on grounds of incapacity of the worker, the employer must show that the worker either lacks the requisite skills or qualities to perform her assigned tasks, leading to unsatisfactory performance or her work performance is poor, not due to intentional misconduct, but because of incapacity to perform work arising from illness or injury. Similarly, termination of employment connected with the conduct of the worker takes two forms. The first is the inadequate performance of the worker in his/her assigned duties contracted to carry out because of neglect of duty, violation of work rules, disobedience of legitimate orders, etc. The

[58] Op cit note 53 Recommendation 3.
[59] Convention, 158 op cit note 51 at article 3.
[60] *'Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment'* at p 1. The note was prepared by the International Labour Standards Department (Sector I), the Employment Analysis and Research Unit (Sector II) and the Social Dialogue, Labour Law and Labour Administration Branch (Sector IV), with the collaboration of specialists from the ILO Training Centre in Turin.
[61] Ibid.

second form is a general improper behaviour of the worker including disorderly conduct, violence, physical assault, using insulting language, disrupting the peace and order of the workplace, etc.

Finally, though the Convention does not define the concept of "operational requirements, it is generally accepted to include reasons of economic, technological, structural or similar nature. Dismissals resulting from operational requirements may affect an individual or a group. It is a no-fault dismissal that is intended to reduce the workforce.[62] Convention 158 supports productive and sustainable enterprises. It also recognizes that in times of economic downturns, the employer has a right to reorganize in order to sustain the enterprise. Financial difficulties constitute a valid reason for termination of employment.[63] However, the employer is expected to engage in a social dialogue with workers or their representatives to search for alternative means to avoid or minimize the social and economic impact of terminations of employment on workers. This is a core procedural response to collective dismissals on grounds of operational requirements.[64]

The employer cannot justifiably and validly terminate employment for one or more of the following non-exhaustive list of reasons:

i) union membership or participation in union activities outside of working hours or, with the consent of the employer within working hours;
ii) seeking office as, or acting or having acted in the capacity of, a workers' representative;
iii) the filing of a complaint or the participation in the proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
iv) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
v) absence from work during maternity leave.[65]

[62] Ibid at p 2. Also see Convention 158 op cit note 51, article 4.
[63] '*Note on Convention No. 158* op cit note 60 at p 44.
[64] Ibid.
[65] ILO Convention 158 at article 5. Also see op cit note 60 at p 1.

1.5.2 Procedure before termination of employment

Where the termination is on grounds of misconduct, a warning must be given for the first misconduct. Termination for an act of misconduct would be justified only if the worker repeats the misconduct on one or more occasions. The employer shall notify a worker, in writing, of a decision to terminate his employment and state the reason or reasons for termination on request. The employer shall also consult workers' representatives so that the worker will be assisted by another person before making a final decision to terminate for misconduct.[66]

If the termination is based on incapacity, the employer must give the worker appropriate instructions to improve her capacity. The employer must also write to warn the worker to improve on her performance. If the performance remains unchanged, the employer will be justified to terminate the contract of employment.[67] Prior to termination on this ground, both the employer and the employees shall, as far as possible, explore alternative solutions in order to minimize or avert termination of employment. They must also find means of mitigating the adverse effects of any termination of employment on the worker(s) concerned. The Recommendations equally expect the national authority to assist in finding solutions to the reasons for the termination of employment to save the workers' job.[68]

When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that will involve termination of employment, the employer must consult the representatives of the workers on the changes to be introduced to discuss the likely effects and the measures for averting or mitigating any adverse effects of the changes. The employer is further required to supply the workers with all relevant information on the major changes contemplated and the effects they are likely to have upfront. This will enable the workers' representatives to participate effectively in the consultations in the entire process before the termination. The measures to be considered to avert or minimise terminations of employment might include restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary

[66] Ibid.
[67] Ibid.
[68] Op cit note 53 Recommendation 25.

early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

The employer shall provide for the selection criteria, order of priority and relative weight for the termination in advance. The criteria must balance both the interest of the enterprise and the workers. In the event of re-engagement, the employer shall give priority to workers whose employment were terminated for reasons of operational requirement priority subject to their expression of a desire to be rehired. The employer shall assist in the placement of the affected workers in suitable alternative employment as soon as possible. The employer and the employees' representatives should collaborate with the national authority to train and retrain the affected workers for possible re-employment.

1.5.3 Appeal

Articles 8 and 9 of Convention 158 provide the right and procedure of appeal against unjustified dismissal or termination of appointment. A worker is entitled to appeal against his termination to an impartial body such as a court or labour tribunal. Where the termination was sanctioned by a competent authority of a state party, the requirement in Article 8 paragraph 1 of the Convention might be varied in accordance with national law and practice. The right to appeal is time bound and failure to appeal within the time limit is deemed a waiver of right.

Recommendation No. 166 recommends a procedure of conciliation before or during appeal proceedings against termination of employment. The Committee of Experts believe that,

"[C]onciliation gives each party an opportunity to review, in the presence of a third party, the question of justification of the termination of employment, in the light of applicable legal standards, and to assess the likelihood of winning or losing the case before the competent court and the possibility of reaching an agreed solution … [enabling] the number of cases to be heard by the competent bodies … to be reduced".[69]

The appeal processes mandate the impartial body to examine the reasons for termination and other circumstances and deliver its decision whether the termination was justified.[70] The onus of proving that the termination is valid is placed on the employer. The Committee of Experts has

[69] '*Note on Convention No. 158* op cit note 60 at p 10.
[70] Op cit note 51 article 9.

observed that "in cases of termination of employment, the application of the general rule applicable in contract law, whereby the burden of proof rests on the complainant, could make it practically impossible for the worker to show that the termination was unjustified, particularly since proof of the real reasons is generally in the possession of the employer". Therefore, the Convention proposes several methods of ensuring that the worker does not bear the burden of proof solely. Where the termination is based on an operational requirement, the independent body is empowered to investigate and determine the veracity of the reasons given to justify the termination.[71] The independent body may declare termination invalid and order or propose reinstatement of the worker, payment of adequate compensation to the worker or any other appropriate relief if it finds the dismissal unjustified.[72]

1.5.4 Severance Pay

Upon termination of an appointment, the worker is entitled to a severance allowance or other separation benefits; benefits from unemployment insurance or assistance or other forms of social security or a combination of such allowance and benefits.[73] A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any severance allowance or other separation benefits envisaged under Article 12, paragraph 1(a), solely because s/he is not receiving an unemployment benefit under Article 12, paragraph 1(b). The Convention gives room for national methods of implementation to limit the entitlements for workers whose employment were terminated for serious misconduct.[74]

1.6 Brief Introduction to Ghanaian Labour Legislation, labour market and trade union activities

The 1992 Constitution guarantees some fundamental rights for workers. These include a worker's right to work under satisfactory, safe and healthy conditions, receive equal pay for equal work without distinction of any kind;[75] rest, leisure and reasonable limitation of working hours and

[71] Ibid article 9(3).
[72] Ibid at article 10.
[73] Ibid at article 12.
[74] Note on Convention No. 158 op cit note 60 at p 11.
[75] Op cit note 3 article 24(1).

periods of holidays with pay, remuneration for public holidays;[76] and the right to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests.[77] These rights are subject only to restrictions prescribed by law which are reasonably necessary in the interest of national security or public order or for the protection of the rights and freedoms of others.[78]

Beyond the Constitution, the Labour Act introduced pluralism in trade union activities in Ghana. The Act regulates the working conditions of workers such as freedom of association at the workplace, right to strike, lockouts, the right to collective bargaining and prohibits anti-union discrimination. The Act also regulates trade unions and employers' organisations and collective bargaining agreements. Besides, the Act establishes the Labour Inspection, the National Labour Commission, and the National Tripartite Committee. The chief labour officer is appointed by the government, and s/he is mandated to issue a certificate of registration to all trade unions and employers' organisations.

The two major national trade union umbrella organisations or centres in Ghana are the Trade Union Congress (Ghana) (TUC-Ghana) and the Ghana Federation of Labour (GFL). There are several other non-affiliated national trade unions, sector-based unions, and enterprise-based unions. In 2018, the number of registered organized workers in Ghana stood around 832,000. This constitutes about 7.3 per cent of the total employment. TUC-Ghana is a member of the International Trade Union Confederation (ITUC) and it is active in the regional organisation of ITUC-Africa. TUC-Ghana is also a member of OATUU and the Organisation of Trade Unions of West Africa (OTUWA).[79] The GFL, on the other hand, has affiliates made up of several independent trade unions and has an estimated registered membership of 178,000 members in 2018.

Ghana National Association of Teachers (GNAT) is the single largest non-affiliated trade union in Ghana with an estimated membership of 178,000 as at 2018. GNAT draws its membership from teachers teaching in the public basic and second cycle educational institutions in Ghana. They are all employees of the Ghana Education Service. Until 2000, GNAT was the only trade union of

[76] Ibid at article 24(2)
[77] Ibid at article 24(3).
[78] Ibid at article 24(4)
[79] Ghana Labour Market Profile 2020 Danish Trade Union Development Agency at p 1.

teachers of Ghana Education Service. However, other teacher unions emerged from 2000, thereby causing a considerable reduction in the membership of GNAT. These include Teachers and Educational Workers' Union (TEWU), National Association of Graduate Teachers (NAGRAT) and Coalition of Concerned Teachers of Ghana (CCTG).

The Ghana Employers Association (GEA) is the main employers' organization in Ghana. The Association comprises over 1,500 employers of enterprises operating in all sectors of the economy. In November 2019, the list of membership of GEA from 20 sectors represented 491 companies out of which the commercial and manufacturing sub-sectors formed 23 per cent and 7.7 per cent respectively for the banking sector. GEA is a body that represents, promotes, and defends employers' interests when conducting business with organized labour and Government.[80]

The Ghana Labour Market Profile report of 2020 conducted by the Danish Trade Union Development Agency estimated Ghana's population at 28.1 million people with an annual growth rate of 2.2 per cent. The provisional results of the 2021 Population and Housing Census put the population of Ghana at 30,792,608[81] comprising 50.7 per cent females and 49.3 per cent males. Ghana's total employment-to-population ratio (15 years and above) was estimated at 63 per cent in 2020. This contrasts 37 per cent of the population who were registered as inactive on the labour market mainly because they may be unemployed or out of the labour force altogether, school children, students, pensioners, housewives, etc. Statistical data from the International Labour Organization (ILO) also shows that Ghana has a higher total employment-to-population ratio relative to the West African average. Whereas Ghana has an employment-to-population ratio of 63 per cent and 36 per cent of employable youth (15 to 24 years), the West African average is 57 per cent and 30 per cent respectively.

The private sector in Ghana is considered the engine of growth of the economy. The sector consists of micro, small and medium-size enterprises (SMEs). The SMEs comprises about 70 per cent of all the industrial establishments in Ghana. They contribute about 22 per cent to the GDP and constitute about 92 per cent of businesses in Ghana. The SMEs employ more than 60 per cent of the employed workforce, most of them in the rural areas. It is estimated that 85 per cent of

[80] Ghana Labour Market Profile 2020 op cit note 79 at p 3.
[81] http://www.census2021.statsghana.gov.gh/

manufacturing employment, and to a larger extent, overall employment growth in the country comes from the SME sector.[82]

One major socio-economic and political problem in Ghana is unemployment, which stood at 13 per cent according to the National Labour Force Survey, 2015. Youth employment also stood at 26 per cent in 2015. However, when measured according to the ILO's specific definition of 'strict' unemployment rate which covers everyone whose work does not exceed an hour per week, Ghana's unemployment rate stood at almost seven per cent in 2019, and 14 per cent youth unemployment. It was estimated in 2011 that about 700,000 graduates were unemployed.

The Labour Act created a 16-member National Tripartite Committee (NTC) comprising representatives of government, employers Association and trade unions and chaired by the Minister in charge of labour.[83] The functions of the NTC include the determination of the national daily minimum wage; advising government on employment and labour market issues, including labour laws, international labour standards, industrial relations and occupational safety and health; consulting with partners in the labour market on matters of social and economic importance.[84] In early 2019, the NTC concluded negotiations on the National Daily Minimum Wage (NDMW) and increased it by 10 per cent from GH¢ 9.68 (US$2.44) in 2018. There is an annual marginal increase in the minimum wage. The 2022 NDMW has been set at GH¢13.53, which is eight per cent over the 2021 figure.[85] The NDMW has experienced 103 per cent increase between 2014 and 2019.[86]

The challenge, however, is the enforcement mechanism of the payment of the minimum wage to workers, particularly those in the informal private sector. The Labour Act failed to provide mechanisms to compel employers to pay the minimum wage. The law only requires the NTC to publish the daily minimum wage in the Gazette and in such public media as the Minister may determine.[87] Thus, many workers are paid daily wages far lower than the National Minimum Wage.

[82] Moses Oppong, Alexander Owiredu and Ransford Quarmyne Churchill, 'Micro and Small-Scale Enterprises Development in Ghana' *European Journal of Accounting Auditing and Finance Research* (2014) 2 pp. 84-97 cited Ghana Labour Market Profile 2020 op cit note 79 at p 12.
[83] Labour Act 2003 (Act 651) section 112
[84] Ibid at section 113.
[85] https://www.gna.org.gh/1.20856871
[86] Ghana Labour Market Profile 2020 op cit note 79 at p 9.
[87] Labour Act 2003 (Act 651) section 113(2).

1.7 **Key notions and processes guiding dismissal law in South Africa**

South African laws permit employers to dismiss employees on grounds of misconduct, incapacity and operational requirements. These constitute substantive fairness for dismissal. Unlike Ghana's labour law, the Labour Relation Act of South Africa has codified the Dismissal Code that guides the procedural fairness of a dismissal. The Dismissal Code has guidelines for each of the substantive grounds of dismissal. For instance, there is a dismissal code for misconduct,[88] incapacity[89] and operation requirement.[90] The guidelines provided in these Codes are binding on an employer to comply unless there is a legally justifiable reason for non-compliance.[91] The guidelines prohibit employers from arbitrary dismissal while ensuring that employers obtain satisfactory performance from their employees.

The notion and processes of dismissal under the South African laws, particularly the Labour Relations Act (LRA),[92] offer more protection for employees than the common law does. Whereas the common law is interested in lawful and unlawful dismissals, the LRA goes beyond the lawfulness or otherwise of a dismissal. The LRA examines the fairness and unfairness of dismissals. It also focuses on whether a dismissal complied with the required notice according to the common lawful dismissal.[93] The second level of protection of the worker arises from the fact that the employer bears the onus of proving that a dismissal is both substantively and procedurally fair whereas the worker only proves the existence of dismissal.[94] Dismissal is defined in section 186 (1) of the LRA to mean any one of the following circumstances:

i. 'an employer has terminated employment of the worker with or without notice to the worker;
ii. an employee employed for a fixed-term contract of employment reasonably expected the employer:
    a) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

[88] Schedule 8 of the LRA.
[89] Code of Good Practice: Dismissal (the Dismissal Code).
[90] Code of Good Practice: Dismissal Based on Operational Requirements.
[91] Rochelle Le Roux 'Collective Agreements on the Crest of the Legislative Wave, but the Common Law Still Making Ripples: The Sources of Labour Law in South Africa' p 357.
[92] The Labour Relations Act 66 of 1996.
[93] Cohen (Collier and Fergus ed) op cit note 19 at p 186.
[94] LRA section 188(1).

b) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms or did not offer to retain the employee;

iii. an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment; Page 187187

iv. an employer who dismissed some employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another;

v. an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or

vi. an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.'[95]

Once a dismissal is proven to have taken place under one or more of the circumstances above, the employer must establish substantive and procedural fairness.[96] The substantive fairness of a dismissal is proven if the reason for the dismissal is misconduct or incapacity of the employee[97] or the operational requirement of the employer.[98] Procedural fairness of the dismissal requires the employer to comply with the Dismissal Code set out in the schedule of the LRA or any other fairer means binding on the parties.[99] If the dismissal occurs in public service, the dismissing authority must, in addition, comply with provisions of the Public Service Act[100] and the Code of Conduct for the Public Service, as well as any disciplinary code of the public service to ensure both substantive and procedural fairness.[101] Dismissal, however, is automatically unfair if the reason for dismissal is one or more of the reasons provided in section 187(1) of the LRA discussed below.

[95] Ibid section 186 (1).
[96] Ibid section 188(1).
[97] Ibid section 188(1)(a).
[98] Ibid section 188(1)(b).
[99] Ibid section 188(2).
[100] Public Service Act 103 of 1994.
[101] Cohen (Collier and Fergus ed) op cit note 19 at p 194.

1.7.1 Dismissal for reason of misconduct

Dismissal for gross misconduct is fair and justifiable subject, however, to procedural sanctity. Misconduct occurs when an employer legitimately loses trust in an employee because of the employee's demonstrable conduct depicting want of trustworthiness on his part.[102] Misconduct also arises when an employee contravenes or breaches workplace rules.[103] The Dismissal Code[104] enjoins both the employer and the employee to treat each other with mutual respect. While an employee is statutorily protected from arbitrary acts of the employer, the employer is equally guaranteed satisfactory performance of the employee, failing which, the employer is entitled to dispense the employee of her services or take disciplinary action against her.[105] The Dismissal Code requires the employer to make disciplinary rules or codes as part of the standards of conduct to regulate all employees at the workplace.[106] It is the sole prerogative of the employer to determine the set of conduct necessary to promote the business and to prescribe the penalty of dismissal for the contravention of the rules.[107] The workplace rules could form part of the employment contract, the collective agreement,[108] industry standard or a separate disciplinary code.[109] The rules must be clearly communicated to all employees to create certainty and predictability in their minds.[110] The rules must also be consistently applied to all employees.[111]

The Dismissal Code identifies a four-step procedure an employer must follow before termination of employment. First, the employer must give written notice of the allegation of misconduct to the employee in a clear and unambiguous language the employee can understand. Second, the employer must give the employee adequate time to state his response to the allegation. Beyond stating his response, the employee may, where necessary, cross-examine his adversaries at the hearing. He may also be given an interpreter depending on the circumstance.[112] Third, the

[102] du Toit, D Bosch, D Woolfrey et al, 'Labour Relations Law - A Comprehensive Guide' (2015) 6th ed at p 443.
[103] Cohen (Collier and Fergus ed) op cit note 19 at p 208.
[104] Schedule 8 of the LRA.
[105] Schedule 8 item 1(3) of the LRA. Also see Cohen op cit note 19 at p 208.
[106] [Sch 8 item 3(1). Also see Anton Bakker, Len Dekker & Rochelle le Roux et al 'Principles and Practice of Labour Law' (2021) 41 at para 201.
[107] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) para 181.
[108] Ibid.
[109] Cohen (Collier and Fergus ed) op cit note 19 at p 208.
[110] Ibid.
[111] du Toit, et al, op cit note 102 at p 443.
[112] ibid at pp 446- 457.

employer must give an opportunity to the employee to receive assistance from her colleague employee or a trade union representative. Finally, the employer must communicate the decision to the employee and, in case of dismissal, must give a written reason for the dismissal. Also, the employer must indicate in the decision to the employee of her right to refer the matter to a council with jurisdiction or CCMA if there is a dispute.[113] The employer may under limited and exceptional circumstances dispense with pre-dismissal procedures.[114] However, where the collective agreement or an employment contract prescribes a particular disciplinary procedure, that procedure becomes contractual between the parties and same must be followed except where the procedure undermines fair hearing protection offered to an employee in the Dismissal Code.[115]

1.7.2 Dismissal for reason of incapacity or incompetence

Termination of employment on grounds of incapacity may arise when an employee abysmally fails to perform her task to meet the legitimate and reasonably attainable standard set in the employee's contract of employment.[116] Dismissal arising from incapacity could be due to poor work performance, illnesses or injury, incompatibility, operational incapacity and impossibility of performance.[117]

The employer must follow the steps provided in the Dismissal Code before he can eventually dismiss the employee. The Dismissal Code enjoins the employer not to dismiss the employee for unsatisfactory performance unless the employee has been given appropriate evaluation, instruction, training, guidance or counselling. If after a reasonable time for improving the employee continues to perform unsatisfactorily, the employer may take the next step towards dismissal.[118] Prior to the dismissal, the employer must give the employee hearing and allow assistance from a trade union representative or a fellow employee.[119] The employer shall investigate the employee to establish the reasons for unsatisfactory performance and consider alternatives rather than dismissal.[120]

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[113] Dismissal Code at Item 4.
[114] Ibid at Item 4(4).
[115] Cohen (Collier and Fergus ed) op cit note 19 at p 210.
[116] Ibid at p 231.
[117] Ibid at p 230.
[118] Item 8(2)(b).
[119] Item 8(4).
[120] Item 8(3).

1.7.3 Dismissal for operational requirement

The LRA defines operational requirements as requirements based on the economic, technological, structural or similar needs of an employer.[121] It is further explained in the Operational Requirements Code that 'Economic reasons are those that relate to the financial management of the enterprise.' Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.'[122] An employer may retrench for a combination of economic, technological and structural reasons. However, the employer must justify, in all circumstances, that the reason is substantively fair.[123]

Whenever the employer contemplates such measure, he must consult persons named in the collective agreement or workplace forum or trade union representatives.[124] Secondly, the employer and the consulting parties shall explore measures to avoid dismissal, minimize the number of dismissals, change the timing of dismissal and minimize the adverse effects of dismissals; discuss methods of selecting employees to be dismissed and the payment of severance pay to the dismissed workers.[125] The employer shall give a written invitation to the consulting parties to consult with the employer and disclose all relevant information, including reasons for the proposed dismissal, alternatives to the dismissal and why he rejects the alternatives, number of employees to be affected, method of selecting employees, the timing of the dismissal, severance pay, assistance from the employer, likelihood of future re-employment, etc.[126]

The LRA further introduced section 189A to guide dismissal for operational requirements involving large scale retrenchment. This involves the appointment of facilitators in the processes before the dismissal, employer's right to dismiss facilitation fails, workers right to strike and the role of CCMA in the resolution of disputes.

[121] Section 213 of the LRA
[122] Item 1 of the Operational Requirements Code.
[123] Section 192(2) of the LRA.
[124] Section 189(1) of the LRA.
[125] Section 189(2) of the LRA.
[126] Section 189(3) of the LRA.

1.8 **Statement of Problem**

Ghana is a member of the ILO and Ghanaian workers reasonably expect to benefit from the wide protection offered by the ILO conventions, declarations, and recommendations. The relative inadequate protection in Ghanaian laws renders workers disadvantaged. Again, the current regime in Ghanaian labour law deviates significantly from ILO convention 158. This does not protect foreign workers who want to put their expertise at the disposal of the employer in Ghana. The need to align the labour legislation with the international standard is long overdue.

This research will therefore do a comparative analysis of Ghanaian laws and the South African laws on termination of employment. This will be done using the jurisprudence of the ILO Conventions 158, Recommendations 166 and other declarations as the benchmark. This research will not cover the termination of employment under the following circumstances: voluntary resignation by an employee without being constructively dismissed; expiry of a fixed-term contract without reasonable expectation of renewal, death of employee, termination at retirement age, frustration of the contract of employment, making performance impossible without the fault of the employer; mutual agreement to end the employment relation and termination of employment arising from statute or government policy or legal restrictions. These are excluded because the termination occurs under circumstances without the fault or cause of the employer.

1.9 **Reasons for choosing South Africa as a comparator**

Comparative study of laws has a significant impact on laws reforms by legislation.[127] Comparative study promotes reforms by adopting new ideas from one jurisdiction to another through legislation.[128] Kamba (1974) explains it as the study of, and research into law by a systematic comparison of two or more legal systems; or of parts, branches, or aspects of two or more legal systems.[129]

[127] Kamba W. J. 'Comparative Law: A Theoretical Framework' *The International and Comparative Law Quarterly,* (1974) 23 p. 496
[128] Ibid.
[129] Ibid at pp. 485-519

In the post-apartheid democratic regime, South Africa made a deliberate and conscious effort to create robust labour legislative frameworks and institutions that will significantly dissociate from the adversarial and tensed labour relations between organised labour and employers in the past. Through the newly established National Economic Development and Labour Council (NEDLAC),[130] intense negotiations involving organised labour, employers' association and government resulted in several labour legislations to regulate labour relations.[131] These include the Labour Relations Act,[132] which became pivotal in labour legislation in South Africa. It was followed by the Basic Conditions of Employment Act,[133] which established a single employment standard and safety net for all workers covered by the LRA.

The next legislation was the Employment Equity Act,[134] which was enacted to promote equal opportunity in employment by eliminating unfair discrimination and redressing the disadvantages experienced by designated groups through affirmative action measures. Also, the Skills Development Act[135] was enacted to establish a new institutional and financial framework for training and skills development; aimed at addressing the skills shortage in South Africa and changing the skills profile of the workforce to suit the needs of the economy.[136]

It is obvious that at full-fledged democracy, the people of South Africa reasonably expected a significant improvement in their livelihood. This labour legislative framework was a response to the expectation of South Africans. This has undoubtedly developed labour jurisprudence tremendously in South Africa. Even though South Africa has not yet ratified the Termination of Employment Convention, 1982, No. 158, the Committee of experts of the ILO has noted that the courts in South Africa have used the Convention to develop its jurisprudence.[137] This observation by the ILO puts the South African labour jurisprudence on a high pedestal worthy of emulation.

[130] A state institution created under the National Economic Development and Labour Council Act No 35 of 1994 to bring social partners together to cooperate, through problem-solving and negotiation, on economic, labour and development issues and related challenges facing South Africa.
[131] du Toit, et al, op cit note 102 at 5.
[132] Act 66 of 1995 (LRA).
[133] Act 75 of 1997 (BCEA).
[134] Act 55 of 1998 (EEA).
[135] Act 97 of 1998 (SDA).
[136] du Toit, op cit note 102 at 5.
[137] 'Note on Convention No. 158 op cit note 60 at p 44.

Besides, the South African society is a complex one with a mixed race made up of whites, coloured and blacks.[138] More significantly, the Constitution of the Republic of South Africa enjoins a court, tribunal, or forum to consider international law and foreign law when interpreting the bill of rights.[139] It has been held that international conventions, whether ratified or not, form part of customary international law; it follows that the Termination of Employment Convention, though not ratified by South Africa, must be considered in the interpretation of labour rights.[140]

The country was colonized by the British and has therefore been influenced by the British legal system and laws.[141] Ghana has similar characteristics as South Africa. It has colonial experience with the British and a similar legal system. Currently, both countries have adopted democratic governance. South Africa is strategically positioned at the tip of the South African continent with proximate trade ties with Asia, Australia and the European Union as well as the mainland African countries.[142] The continental trade contacts have influences on the jurisprudence of South African laws. Arguably, South Africa has developed its labour jurisprudence significantly among its peers in the continent. It is for this reason that the author has selected South Africa as a benchmark for exploring the level of Ghana's compliance with ILO conventions.

1.10 **Jurisdiction of National Labour Commission (NLC) in Ghana and Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa in labour disputes.**

Convention 158 envisages that member states shall set up an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator which will adjudicate on a complaint or appeal from a worker who considers the termination of her employment unjustifiable.[143] In South Africa, the Commission for Conciliation, Mediation and Arbitration (CCMA)[144] and the Labour Court[145] are the impartial bodies established in the LRA to resolve labour disputes. In Ghana, the National

[138] Population Registration Act 1950.
[139] op cit note 13 section 39(1)(a)&(b)
[140] Rochelle Le Roux op cit note 91 at p 366.
[141] Rochelle le Roux op cit note 4 at p 141-142.
[142] Paul Andries Smit op cit note 46 at p 5.
[143] ILO Convention 158 article 8(1).
[144] Section 112 of the LRA.
[145] Section 151 of the LRA.

Labour Commission (NLC) and the High Court (Labour Division in Accra) are the impartial bodies dedicated to the resolution of labour disputes.

The NLC was established under the Labour Act, and it comprises a chairperson jointly nominated by both the organized business and organized labour. The other six members comprise two representatives of the social partners, namely, the government, organized business and organized labour. All the members of the commission are appointed by the president.[146] The functions of the NLC include the facilitation and settlement of industrial disputes, investigation of labour-related complaints such as unfair labour practices to prevent labour dispute, maintaining date of mediators and arbitrators and promotion of corporation between labour and management.[147] The NLC is independent and not subject to the control of any authority in the performance of its functions.[148]

The NLC has jurisdiction in receiving, investigating, and hearing complaints of unfair termination of employment and if unfair termination is found to exist, make orders of re-instatement or re-employment or monetary compensation to the worker.[149] The NLC also has jurisdiction to investigate and determine complaints of unfair labour practices brought before it per its rules of procedure.[150]

The NLC may make an order forbidding a person found guilty of unfair labour practice from engaging in such further acts. Where the unfair labour practice involves termination of appointment, the NLC may order the employer to restore the worker to employment or pay compensation to the worker.[151] The order of the NLC shall have the same force as the orders of the High Court.[152] If any person refuses to comply with the orders or direction of the NLC under the Labour Act, the NLC shall apply to the High Court to compel the person to comply with the direction or the order.[153]

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[146] Ibid at section 136.
[147] Ibid at section 138(1).
[148] Ibid at section 138(2).
[149] Ibid at section 64.
[150] Labour Act 2003 (Act 651) at section 132.
[151] Ibid at section 133.
[152] Ibid at section 134.
[153] Ibid at section 172. Also see **N***ational Labour Commission vs. Ghana Telecommunications Ltd* [2010] DLSC 2618 at p 10

A person aggrieved by the decision, direction, or orders of the NLC on unfair labour practices may file an appeal against the order, direction or decision at the Court of appeal within 14 days.[154] However, in the case of unfair termination, the Labour Act is silent on the forum an aggrieved party may file an appeal. In *Brown vs The National Labour Commission & Anor*,[155] the Court of Appeal declined jurisdiction to hear an appeal from the decision of the NLC on a complaint of unfair termination on ground that the Labour Act has not clothed it with the jurisdiction to hear an appeal from the NLC in respect of unfair termination. On further appeal to the Supreme Court, the court admitted that the legislature created a vacuum in the Act by failing to indicate the forum aggrieved parties shall challenge the decision of the NLC. Another jurisdiction of the NLC is to receive and settle disputes on redundancy pay and its terms of payment. The decision of NLC on the redundancy pay shall subject to other laws, be final.[156]

Another vexed issue is whether an aggrieved party can file an appeal against the decision of the NLC at the Court of Appeal as of right. The constitution provides that an appeal shall lie as of right from a judgment, decree or order of the High Court to the Court of Appeal. The Act is silent on whether an appeal lies as of right to the Court against the decision of the NLC. But the Supreme Court has held that an appeal of the decision of the NLC to the Court of Appeal is not in respect of a judgement delivered by the High Court; so, though such judgment may be a final decision, leave would be required to file an appeal at the Court of Appeal.[157] The court formulated its opinion and inserted a provision that 'wherever in the Labour Act, the NLC is required to make a determination and no remedy is provided for the aggrieved party, a dissatisfied party shall be entitled to appeal within 14 days of the making or giving of the order, direction or decision to the Court of Appeal.' This is in line with similar provisions in the Act.

In South Africa, the LRA established the CCMA as a juristic person[158] and independent of the state, political parties, trade union, employer organization, and federation of trade unions and federation of employers' organization.[159] The Commission's functions include resolving disputes

[154] Ibid at section 134.
[155] *Brown vrs National Labour Commission and Another* (J4 74 of 2018) [2019] GHASC 43 (19 June 2019).)
[156] Labour Act 2003 (Act 2003) at section 65(5).
[157] *Danso Vrs Executive Secretary Lands Commission and Others* (J4 35 of 2017) [2018] GHASC 59 (28 November 2018); (unreported).
[158] Section 112 of the LRA.
[159] Section 113 of the LRA.

referred to it under the Act through conciliation,[160] and many other functions provided in section 115 of the LRA. If conciliation fails, the Commission may arbitrate where the LRA permits so, and a party to the dispute has requested the Commission to arbitrate[161] or if the Labour Court has jurisdiction over the matter in dispute and all the parties give consent to the Commission to arbitrate the dispute.[162] The arbitration award issued by the Commission is final and binding on the parties and it is enforceable as if it is the judgment of the Labour Court unless it is an advisory arbitration award.[163]

1.11 Jurisdiction of the High Courts in Ghana and Labour Court in South Africa in the labour of disputes

The High Court of Ghana has jurisdiction in all matters and in particular, in civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by the Constitution or any other law.[164] The High Court also has jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution.[165] The Labour Act created supervisory powers in the High Court to monitor and enforce the powers of the Labour Commission. For instance, on an application made by the NLC, the High Court shall make an order to compel a person to comply with the direction or order made by the NLC.[166] The Labour Act conferred jurisdictions on the National Labour Commission to determine some labour disputes and grants reliefs. The question was whether the High Court's jurisdiction was ousted in matters the NLC has coordinate jurisdiction.

In *Bani v Maersk* (supra), the Supreme Court held that the reliefs of re-instatement and re-employment under section 64 of the Labour Act can only be granted by the NLC on a complaint of unfair termination filed by an aggrieved worker and that the courts do not have express jurisdiction from the Act to make such orders. However, in *Republic v High Court, Accra; Ex*

[160] Section 115(1)(a) of the LRA.
[161] Section 115(1)(b)(i) of the LRA.
[162] Section 115(1)(b)(ii) of the LRA.
[163] Section 143(1) of LRA.
[164] op cit note 3 article 140(1).
[165] Ibid at article 140(2).
[166] Section 172 of the Labour Act, 2003 (Act 651).

parte Peter Sangber-Der (ADB Bank Ltd- Interested Party),[167] the Supreme Court unanimously held that the High Court has concurrent jurisdiction with the Labour Commission to grant the reliefs of re-instatement and re-employment provided for under section 64 of Act 651. The court explained that before the enactment of the Labour Act, the Constitution empowered the High Court with the jurisdiction[168] to enforce the economic, educational and disability rights provisions contained in the 1992 Constitution,[169] that form the basis of section 63 of the Labour Act which deals with unfair termination of employment. Again, the same unfair termination rights in the previous legislation were enforced by the High Court. The enactment of the Labour Act did not oust the jurisdiction of the High Court from hearing and determining complaints of unfair labour practice.[170]

In South Africa, the Labour Court (LC) was established as a court of law and equity.[171] The LC exercises a limited concurrent jurisdiction with the civil courts to adjudicate matters of contract of employment regardless of whether the basic condition of employment is a term of the contract.[172] The LC is a superior court of record that has authority, inherent powers and standing and has coordinate powers with the High Court in matters under its jurisdiction.[173] The LC has exclusive jurisdiction in all matters in the LRA and any other law that confers jurisdiction on it subject to the constitution and section 173 of the LRA.[174] It also has concurrent jurisdiction with the High Court in matters of alleged or threatened violation of the fundamental rights entrenched in chapter two of the South African Constitution concerning employment and from labour relations; dispute over the constitutionality of an actual or threatened administrative or executive act or conduct of the state in its capacity as an employer; and application of any law of the administration of which the minister of labour is responsible.[175] The LC has the powers to make an order of urgent interim relief, interdict, order performance of an act to remedy wrong and to give effect to the object of the LRA, make declaratory orders, award a just and equitable

[167] *Republic v High Court, Accra; Ex parte Peter Sangber-Der (ADB Bank Ltd- Interested Party)* [2017-2018] SCLRG 552.
[168] op cit note 3 article 33(1).
[169] op cit note 3 articles 24, 25 and 29.
[170] *Republic v High Court, Accra; supra note 167* at holding (2).
[171] Section 151(1) of the LRA.
[172] Section 77(3) of BCEA
[173] Section 151(2) of the LRA.
[174] Section 157(1) of the LRA.
[175] Section 157(2) of the LRA.

compensation and cost, order compliance of the provisions of the LRA and employment laws, adopt settlement agreement and arbitration award as the order of the court, determine dispute between registered trade unions and employers' association, condone time for filing processes in court, etc.[176]

In cases of unprotected strike or lockouts, the LC has exclusive jurisdiction to grant an interdict or an order restraining any person from participating in a strike or lock or anything contemplation of a strike or lockout[177] and to award just and equitable compensation for loss occasioned by the strike or lockout.[178]

[176] Section 157(1) of the LRA.
[177] Section 68(1)(a) of the LRA.
[178] Section 68(1)(b) of the LRA.

CHAPTER TWO

COMPARISON OF TERMINATION OF EMPLOYMENT UNDER GHANA AND SOUTH AFRICA LABOUR LAWS

2.1 Introduction

Both Ghana and South Africa are member states of ILO and they have ratified 51 and 28 of the ILO conventions respectively. Ghana's Constitution enjoins the state to be guided by international human rights in its social development.[179] Likewise, South Africa's Constitution requires a court, tribunal or forum interpreting the Bill of Right to consider international laws.[180] These rights include labour rights enshrined in various ILO conventions, ratified or otherwise. Employment contract regimes in Ghana and South Africa are regulated by national statutes, the common law and international law and conventions. Employment relations under normal circumstances should lapse upon attainment of the compulsory retirement age.[181] The constitution of Ghana guarantees the economic rights of workers.[182] Employees in the public service enjoy greater protection from the constitution[183] than their counterparts in the private sector in terms of dismissal or termination of employment. Indeed, termination of employment is almost non-existing in the public service unless for reasons of retrenchment in public corporation backed by legislation. However, this is not the case in South Africa. The statutes regulating employment in South Africa including the LRA, the BCEA and EEA all offer the same protection to employees in both public and private sectors.[184]

Before retirement, an employment contract in both public and private sectors is terminable on the occurrence of certain conditions. The Labour Act of Ghana and the LRA of South Africa[185] prescribe circumstances in which an employee's employment can be terminated before retirement.

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[179] op cit note 3 article 37(3).
[180] op cit note 13 section 39(1)(b).
[181] National Pensions Act, 2008 (Act 766), section 76(1)(b).
[182] Ibid at article 24.
[183] Ibid at article 191.
[184] Rochelle Le Roux op cit note 91 cited P. Ndlovu J. in *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC); para 102
[185] (2003) Act 651.

The Acts also distinguishes between the termination of employment and the dismissal of the employee. This chapter examines, in detail, the Ghanaian and South African labour statutes and case laws on the grounds for termination and/or dismissal of employees prior to compulsory retirement age.

2.2 The concept of dismissal and termination of employment

The ILO Convention 158 omitted to use the word "dismissal". The word "termination" was used throughout the instrument to explain severance of employment relationship. Convention 158 also failed to explain "termination" vividly except to say that 'the term ***termination*** and ***termination of employment*** mean termination of employment at the initiative of the employer.'[186] The LRA of South Africa defines dismissal to occur under several circumstances all initiated or caused by the actions of the employer.[187] Termination is also explained to mean severance of employment relation either by voluntary agreement between the parties or under circumstances other than the fault or cause of the employer.[188]

Both termination and dismissal are means of severing employment relationship between an employer and a worker. The two concepts developed out of the common law.[189] The constitution of Ghana provides that a member of the public service must not be dismissed without a just cause.[190] The constitutional protection against dismissal without a just cause is specific to public service workers. The constitution does not use the phrase "termination of employment" with regard to public servants. The Labour Act has given statutory recognition to the concept of termination of employment.[191]

Whereas the constitution of Ghana uses the word "dismissal" to describe severance of employment relationship, the Labour Act uses "termination of employment" to describe employment severance. The concept and grounds for termination of employment are sufficiently explained in Act 651, unlike dismissal. The two concepts are disjunctively used in the Labour Act,

[186] Article 3 of ILO Convention 158.
[187] Section 186(1) of the LRA. Also see above on footnote 120.
[188] Cohen (Collier and Fergus ed) op cit note 19 at p 194.
[189] *George Akpass vs. Ghana Commercial Bank ltd.* [2021] DLSC10768 at p 18.
[190] op cit note 3 article 191(b).
[191] See sections 15-18 and 62-64 of the Labour Act 2003 (Act 651).

which suggests that the legislature did not intend similar or same meaning for both words.[192] For instance, section 119 (2) of the Labour Act provides that 'an employer shall not ***dismiss or terminate*** the employment of a worker or withhold any remuneration of a worker who has removed himself or herself from a work situation which the worker has reason to believe presents imminent and serious danger to his or her life, safety, or health.'

Though the term dismissal is used in the Labour Act, the grounds for dismissal are not provided, unlike termination. The Act states that 'the provision in the section that a terminated worker would be entitled to his annual leave earned in the calendar year and shall not be deprived of any other grants or awards including payment in lieu of notice of termination which the worker is entitled to will not apply to cases where the employer has the right to ***dismiss*** a worker without notice.'[193] The Act also provides that 'a person who seeks by intimidation, ***dismissal,*** threat of ***dismissal***, or by any kind of threat or by imposition of a penalty, or by giving or offering to give a wage increase or any other favourable alteration of terms of employment, or by any other means, seeks to induce a worker to refrain from becoming or continuing to be a member or officer of a trade union is guilty of unfair labour practice.'[194]

The Ghanaian case law has identified the similarities and dissimilarities between dismissal and termination of employment. Two similarities are established. First, both constitute ways in which a contract of employment could be severed, determined, or disengaged. Second, the grounds for termination and dismissal are negotiated in advance and specified in employment contracts.[195]

There are however a few distinctions between termination and dismissal. Firstly, termination of employment is preceded by notice, and it may be occasioned by voluntary reason or done for organizational or business purposes whereas dismissal is done because of the misconduct or wrongful act of the worker; thus, notice is not required. Secondly, termination may not require an assigned reason while dismissal necessarily requires assigned reasons for the disengagement because of the severity of its consequences on the worker. Thirdly, dismissal is usually punitive whilst termination is not. Termination in most cases is a process of ending a contract of employment. Fourthly, termination of employment is a right exercisable by both employer and

[192] *George Akpass* supra note 189 at p 20.
[193] Labour Act 2003, (Act 651) at section 30 (3) of the.
[194] Ibid at section 127 (2).
[195] *George Akpass* supra note 189 at p 19.

worker while dismissal is the sole right of an employer. Lastly, termination entitles the worker to receive end of service benefits, such as his gratuity and accrued leave, but a dismissed worker loses all his benefits.[196]

In *Kobea v Tema Oil Refinery,*[197] the Supreme Court explained the difference between termination and dismissal. The court said,

> '… an employer is legally entitled to terminate an employee's contract of employment whenever he wishes and for whatever reasons, provided only that he gives due notice to the employee or pay him his wages in lieu of notice. He does not have to reveal his reason, much less justify the termination…' On dismissal, the court 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…'[198]

The Court of Appeal confirmed this distinction and further elucidated the differences in the consequences of both concepts. The court held that 'dismissal is where an employee's appointment has been truncated based on his behaviour…. Dismissal is an embarrassment as the employee loses most of his benefits.' Termination is not an embarrassment. Upon termination, the employee is entitled to her benefits. An employer may terminate the employment of her employee without any reason provided the required notice is given or the salary is paid in lieu of the notice per the collective agreement.[199]

The Labour Act provides grounds for the termination of an employment contract. These include a mutual agreement between the employer and the worker; by the worker on grounds of ill-treatment or sexual harassment; on the death of the worker, on medical grounds, inability of the worker to carry out work due to sickness or accident; or incompetence or proven misconduct of the worker.[200] What the employer must do is to give appropriate notice or payment of wages in lieu of notice.[201]

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[196] Ibid. Also see Labour Act 2003 (Act 651) at section 30.
[197] [2003-2004] 2 SCGLR 1033.
[198] *Kobea v Tema Oil Refinery* [2003-2004] 2 SCGLR 1033 at p 1040.
[199] *Faustina Asantewaa & 7 ors v Registered Trustees of the Catholic Church of Koforidua.* [2016] 92 GMJ 176 (CA).
[200] Labour Act 2003 (Act 65) at section 15.
[201] Ibid at section 17.

In South Africa, dismissal is statutorily defined to occur under six distinct circumstances in which employment relationship is severed.[202] However, where there is a severance of employment relationship in circumstances outside the purview of the statutory definition of dismissal, then termination has occurred. Termination of employment, for instance, occurs when an employee voluntarily resigns without constructive dismissal, retire at the agreed retirement age, completes a fixed-term contract without expectation of renewal. Termination may also occur due to impossibility of performance without the fault of any party to the contract or arising from statutory restrictions.[203] There is therefore a distinction between the Ghanaian and South African concept of termination of employment and dismissal.

2.3 The concept of unfair labour practices

The concept of unfair labour practice in the Ghanaian labour law is quite distinct from the South African laws, particularly in terms of who can commit the act. The constitution of South Africa guarantees to all persons the right to fair labour practices.[204] This means both employer and employee are entitled to the right. However, the LRA limited and conferred the right to fair labour practices on only employees. Consequently, it is only an employer who can be found liable for unfair labour practices as defined in the LRA.[205] In Ghana, however, three categories of persons – employer(s). worker(s) and any person at all can be liable for unfair labour practices. The following conducts by an employer constitute unfair labour practices:

i. 'Employers or employer's organizations using threats to intimidate workers during negotiations of a collective agreement.[206]
ii. An employer taking part in the formation of a trade union or making a contribution in money to a trade union with intent to adversely influence the trade union[207]
iii. An employer who fails to give reasonable facilities and time to trade union at his workplace to confer with him matters affecting the workers.'[208]

[202] Section 186(1) of the LRA.
[203] Cohen (Collier and Fergus ed) op cit note 19 at p 194.
[204] op cit note 13 section 23(1).
[205] Cohen (Collier and Fergus ed) op cit note 20 at p 165.
[206] Labour Act 2003, (Act 651) sections 127(4).
[207] Ibid section 128.
[208] Ibid section 129.

A worker or workers group may be liable for unfair labour practices if -

i. ‘A worker or group of workers, who by any kind of threat, seeks to intimidate the employer during negotiations of a collective agreement is guilty of unfair labour practice.[209]

ii. a worker carries on any activity intended to cause serious interference with the business of his or her employer that may result in financial loss.’[210]

Finally, any person at all could be guilty of unfair labour if —

i. ‘He or she discriminates against any person concerning the employment or conditions of employment because that other person is a member or an officer of a trade union,[211] or

ii. He or she seeks by intimidation, dismissal, threat of dismissal, or by any kind of threat or by imposition of a penalty or giving or offering to give a wage increase or any other favourable alteration of terms of employment, or by any other means, seeks to induce a worker to refrain from becoming or continuing to be a member or officer of a trade union.’[212]

In South Africa, each of the following conduct constitutes unfair labour practices by the employer:

a) ‘unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;[213]

b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;[214]

c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement;[215] and

[209] Ibid at section 127(3).
[210] Ibid at section 130.
[211] Ibid at section 127(1).
[212] Ibid at section 127(2).
[213] section 186(2)(a) of the LRA.
[214] Ibid section 186(2)(b).
[215] Ibid. section 186(2)(c).

d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act[216]

e) an employer unilaterally alters wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage.'[217]

Clearly, what constitute unfair labour practices in South Africa labour law are different from the unfair labour practices in Ghana.

2.4 Dismissal for Misconduct

The ILO's Termination of employment recommendation provides that '[t]he employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions unless the employer has given the worker appropriate written warning.'[218]

In South Africa, Code of Good Practice— Dismissal (Dismissal Code) provides the following guidelines and procedures the employer must follow before dismissal. First, the employer must determine objectively whether the employee contravened a rule or standard regulating conduct at the workplace. Secondly, determine, if a rule or standard was contravened, whether or not the rule was a valid rule or standard. Thirdly, determine whether the rule was a valid or reasonable rule or standard. Fourthly, determine whether the employee was aware or could reasonably be expected to have been aware of the rules or standards. Fifthly, determine if the rule or standard has been consistently applied by the employer and finally, whether the dismissal was an appropriate sanction for the contravention of the rule or standard.

As already stated, the dismissal of an employee in Ghana is a punishment for a stated misbehaviour or misconduct. The constitution prescribes a 'just cause' as the sole reason for the dismissal of a public service worker. What constitutes a "just cause" is however neither defined in the constitution nor the Labour Act. The Labour Act also failed to provide the grounds or reasons

[216]Ibid section 186(2)(d).
[217] National Minimum Wage Act No. 9 of 2018 section 4(8)).
[218] Op cit note 53 Recommendation 7.

for the dismissal of a worker. A proven misconduct constitutes one of the grounds for a fair termination of employment.[219] The doctrines of the common law of England, adopted in the Ghanaian jurisprudence,[220] will form the basis for identifying the grounds for dismissal. In an unreported High Court case of *Danaa v Natogmah*,[221] the court outlined several misconducts, which could be deemed as just cause to justify dismissal. These include fraud, stealing, extortion, corruption, bribery, falsification of accounts/records, fraudulent breach of trust, gross insubordination, dereliction of duty, sleeping at work, verbal or physical abuse, fighting, assault and battery, working under the influence of alcohol or any illicit psychotropic drug, conflict of interest, competition with the employer's business, conversion of company's property for private use without the employer's permission.

A just cause could also mean any conduct of an employee which is prejudicial to the interest and existence of the business of his employer. In *Arkhurst v Ghana Museum and Monuments Board,*[222] the plaintiff-employee was employed as a museum assistant in the defendant institution. The plaintiff secretly and deliberately exported museum pieces without any licence, and without the consent and knowledge of the defendants. The defendants invoked a provision in the plaintiff's appointment letter, which entitled the defendants to dismiss the plaintiff instantly for misconduct or a proven criminal offence. The plaintiff in an action claimed general damages for wrongful dismissal and the recovery of certain benefits to which he is entitled under the pension scheme established by the defendants.

The court held that there is no rule of law that defines the degree of misconduct which will justify dismissal, but an employee owes a duty of fidelity to his employers even in his spare time, and where an employee knowingly, deliberately and secretly in his spare time does any act likely to be prejudicial to the interests of the employers, they are entitled to dismiss him.'[223] The degree of misconduct that should warrant the dismissal of an employee is left to the discretion of the

[219] Ibid at section 15(e)(iii) and 62(b)
[220] op cit note 3 article 11(1)(d).
[221] *Danaa v Natogmah* Suit No: TMISC/0001/2016 (Judgment delivered on 30 November 2016) unreported, per Kyei-Baffour J.
[222] *Arkhurst v Ghana Museum and Monuments Board* [1971] 2 GLR 1-11.
[223] Ibid at headnotes 2.

employer.[224] In *Kobea v Tema Oil Refinery*, Dr. Twum JSC explained dismissal in the following words:

'… 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 a dismissal.'[225]

In South African law, misconduct occurs when, by reason of the employee's demonstrable conduct depicting want of trustworthiness on his part, an employer legitimately loses trust in an employee.[226] Misconduct also arises when an employee contravenes or breaches workplace rules.[227] Conduct of an employee which may constitute misconduct is dishonesty such as fraud and theft,[228] insubordination arising from an employee's willful and serious disobedience of an employer's lawful instruction and deliberate defiance of the employer's authority,[229] insolence of an employee displayed by lack of respect towards the employer, conveyed by conduct that is 'offensive, disrespectful, impudent, cheeky, rude (disrespectful in speech or behaviour), insulting or contemptuous',[230] intoxication and drug use at the workplace, assault, sexual harassment,[231] unauthorised absenteeism and desertion[232] and participation in unauthorised strike.[233]

In Ghana, there are two procedures an employer may follow to dismiss an employee for misconduct. These are summary dismissal and dismissal upon disciplinary proceedings. Summary dismissal is a common law right which an employer may exercise instantly to sever the employment relationship with the worker in circumstances where the worker is caught in an act or conduct which threatens or harms the reputation of the business. The conducts that justify summary dismissal include violent conduct, insubordination, gross misconduct, dishonesty, criminality, drunkenness, competition with the employer's business, dereliction of duty, refusal to follow legitimate instruction and others provided in the contract of employment.[234] These misconducts

[224] *Kobea v Tema Oil Refinery* supra note 198 at p 1040.
[225] Ibid [2003-2004] 2 SCGLR 1033 at pages 1039 and 1040.
[226] du Toit, et al, op cit note 102 p 443.
[227] Cohen (Collier and Fergus ed) op cit note 19 at p 208.
[228] Ibid at p 217.
[229] Ibid at p 218
[230] Ibid. Also see *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* [2015] 5 BLLR 484 (LAC) 495 at para 20.
[231] Ibid at p 220.
[232] Ibid at p 222.
[233] Ibid at p 223
[234] *George Akpass* supra note 189 at p 18.

irreparably destroy the trust and confidence required to exist between an employee and employer. The common law's position on the procedure for summary dismissal propounded by Bowen L. J. in *Boston Deep Sea Fishing & Ice Co. v. Ansell*[235] is that an employer may instantly dismiss an employee if the employee's conduct is not only wrongful and inconsistent with her duty to her master but also inconsistent with the continuance of confidence between them.[236] The Ghanaian courts have rigidly followed this common law rule.

In *Presbyterian Hospital, Agogo v Boateng,*[237] the plaintiff, who was an employee, was employed as a senior nurse-midwife at the hospital. On 17th January 1981, the plaintiff was on night duty assisted by a nurse when a pregnant woman (client) came to deliver a baby. The nurse carried out the preliminary preparations and put the client to bed. The client felt like visiting the toilet, so she got out of bed but then she soon realized it was rather the baby which was descending and therefore called the plaintiff for assistance. The plaintiff told the client that her time was not yet due. As the client was plodding towards her bed, she delivered the baby on the floor and called for the plaintiff's help. Both the plaintiff and the nurse rushed to the scene. Instead of the necessary sympathetic and professional assistance requested of her, the plaintiff insulted the client and slapped her twice. The plaintiff 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 the client to wipe off the blood and remove the placenta from the floor. Following that incident, the plaintiff was invited the following day to her authorities and interrogated but she insulted the authorities. The hospital gave the plaintiff a query the same day, which she failed to answer. The hospital, therefore, dismissed the plaintiff.

The plaintiff subsequently sued and claimed damages for wrongful dismissal. The circuit court found in favour of the plaintiff that she was wrongfully dismissed because the defendant failed to follow the disciplinary procedure under the conditions of employment. On appeal, the court of appeal allowed the appeal and held 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 throwing insults, posed a defiant attitude before the authorities. She also put herself outside the pale of any investigation of

[235] *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) 39 Ch. 339, 363 per Bowen L.J.
[236] *Aboagye v Ghana Commercial Bank* [2001-2002] SCGLR 797 at pp. 828-831 per Adzoe JSC cited note 235.
[237] *Presbyterian Hospital, Agogo v Boateng* supra note 237.

a disciplinary committee by her deliberate refusal to answer the query 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.'[238]

Also, in *Lever Brothers Ghana Ltd v Annan (Consolidated),*[239] it was provided in article 31 of the contract of employment that the employee could be summarily dismissed by the employers where the employee had been guilty of serious misconduct such as dishonesty or other serious offences. Article 34 also provided that where an employee was suspected of having committed any offence warranting police investigations, the employee might be suspended for 30 days, and the matter referred to the police for investigation. The employers alleged that the employees had been involved in a fraudulent deal relating to the sale of their products and suspended the employees from duty under article 34 and referred the allegation of fraud to the police for investigation. However, before the conclusion of the police investigations, the employers withdrew the case from the police and summarily dismissed the employees from their employment. The employees sued in the High Court claiming damages for wrongful dismissal. The trial judge found for the employees because they were not given a fair hearing and did not have the opportunity to face their accusers. On appeal, Osei-Hwere JSC cited *Boston Deep Sea Fishing & Ice Company v Ansell* and explained that where an employee has, in fact, been guilty of misconduct so grave that it justifies instant dismissal, the employer can 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.[240]

However, in a subsequent case of *Aboagye v Ghana Commercial Bank*[241] the Supreme Court attempted to formulate a new position in the procedure for summary dismissal. The plaintiff's appointment letter provided that, on acceptance, the plaintiff would be deemed to have agreed that his employment would be governed by the staff service rules of the defendant's bank. The plaintiff was summarily dismissed for misconduct, negligence and failure to take necessary precautions to

[238] *Ibid at* headnotes 1.
[239] *Lever Brothers Ghana Ltd v Annan (Consolidated)* [1989-90] 2 GLR 385.
[240] ibid at pp.388-9.
[241] *Aboagye v Ghana Commercial Bank* supra note 236 at pp. 828-831.

protect the interest of the defendant's bank. Plaintiff was summarily dismissed without a hearing. Counsel for the defendant argued that the conduct of the plaintiff/appellant viewed in the context of the nature of the business of banking constitutes such grave misconduct that it was lawful to dismiss him without a hearing. On appeal, the Supreme Court, per Adzoe JSC, while conceding the common law position as argued by counsel, proceeded to consider English cases based on the Industrial Relations Act 1971 and the Trade Union and Labour Relations Act 1974 and concluded that there is a modern tendency to discourage summary dismissals. The court was of the view that it is wrong to resort to the common law right of the employer to summarily dismiss the employee for gross misconduct without observing the Staff Service Rules which was a binding agreement between them.[242]

In a later case, the same Supreme Court speaking through Date-Bah JSC disagreed with the modern concept of the procedure for summary dismissal. The court distinguished between the Court's supervision of public or administrative bodies to ensure that they keep within the bounds of their jurisdiction or area of allocated authority. In the private sector business units, Date-Bah JSC said, like public bodies, public policy requires that the court must refrain from the same control over their administrative decision.[243] Responding directly to the Adzoe JSC, Date-Bah JSC stated in *Laguda v Ghana Commercial Bank*[244] that once the record showed sufficient to justify the conclusion that the plaintiff misconducted himself, the trial judge needed not to concern himself with whether there had been compliance with the rules of natural justice unless a contractual provision stated otherwise. The above decision sought to reinstate the common law position of summary dismissal propounded by Bowen L. J. supra.

But that is not the end. In *Opare Yeboah v Barclays Bank Ltd.*,[245] the court stated the Supreme Court's position that it would always affirm the time-honoured proposition which provided that the procedures outlined in contracts of employment such as the Collective Bargaining Agreement (CBA) must be followed to validate a summary dismissal. This position was reiterated in a recent unreported consolidated case of *Alex Onumah Coleman and 8 others vs. Newmont Ghana Gold*,[246]

[242] Ibid at pp. 828-831.
[243] *Bani v Maersk Ghana Ltd* [2011] 2 SCGLR 796.
[244] *Laguda v Ghana Commercial Bank* [200-2006] SCGLR 388 at pp. 401-2.
[245] *Opare Yeboah v Barclays Bank Ltd* [2011] 1 SCGLR 330 at 332,
[246] *Alex Onumah Coleman and 8 others vs. Newmont Ghana Gold,* [2021] DLSC10161.

where the Supreme Court confirmed the new position of procedure for summary dismissal of employees. It said:

'Moreover, it is trite that once an employer followed the procedures as enshrined in the contract of employment such as the CBA and followed the mandatory requirements as the hearing under the CBA, it gives a summary dismissal a validity… In the instant appeal, the respondent duly interdicted the appellants, gave them a hearing at the disciplinary committee level and which also made their recommendations as their contract of employment, the CBA required. A dismissal of the appellants was done in accordance with the CBA and therefore we hold that the dismissal of the appellants is not perverse but valid.'

To conclude the discussion on summary dismissal, it seems the Ghanaian courts have not settled on a common procedure for summary dismissal. Three different approaches can be inferred from the case law. The first approach concerns summary dismissal of public service employees. Here, the court requires high standards of administrative bodies to ensure procedural fairness prior to summary dismissal.[247] However, in South Africa, the labour legislation, particularly the LRA, EEA and the BCEA offer the same protection for all employees whether in public service or private sector.[248]

The second approach relates to commercial business entities. Here, the public policy requires that the court does not subject private sector business units to the same control over their administrative decisions as public bodies. The private sector needs more flexibility and is not expected to operate under the same rules of the game as government and public bodies.[249] In this approach, summary dismissal without a fair hearing is justified if objectively there is evidence on record that the worker's misconduct is prejudicial to the existence of the employer's business. This approach was stated by Date-Bah JSC in *Laguda v Ghana Commercial Bank.*[250] He said:

'I am not persuaded that, in a commercial setting, in the absence of a contractual provision to the contrary, an employer is bound to comply with the rules of natural justice before dismissing an employee for misconduct. At common law, it is enough if the facts objectively establish cause for dismissal. … the employer is not obliged to set up an investigative process to give the employee a fair hearing. … What is required is that when the employee's dismissal is brought to question in a court of law the employer's action can be vindicated.'[251]

The last approach is the strict adherence to the procedure agreed on in the Collective Bargaining Agreement (CBA). This approach advocates that the employer must follow the

[247] Op cit note 3 article 23..
[248] Rochelle Le Roux op cit note 91 at p 215.
[249] *Bani supra* note 234 at 796.
[250] *Laguda v Ghana Commercial Bank* [200-2006] SCGLR 388.
[251] Ibid at pp. 401-2.

procedure in the CBA to arrive at a fair dismissal of the worker for misconduct. A dismissal will be wrongful or unlawful where an employer fails to comply with the procedure stated in the contract of employment or collective bargaining agreement or statute or breaches the rules of natural justice or without a reason in dismissing the employee.[252] The author leans favourably on the third approach because it protects the interest of the worker who is a weaker party. It also brings certainty in the employment relations and curtails arbitrary decisions of the employer. Besides, the ILO Convention 158 recognizes the importance of Collective Agreement reached between labour and employer in protecting the interest of the worker.[253]

In South Africa, the common law similarly does not entitle an employee to a pre-dismissal hearing unless specifically provided for by the contract.[254] Indefinite employment can simply be terminated on notice. However, the LRA and the Dismissal Code prescribes the procedure an employer must follow before dismissal. To dismiss an employee for misconduct, the employer must prove substantive and procedural fairness.[255] The substantive fairness requires the employer to prove that the employee contravened a rule in the disciplinary code and the rule is reasonable, valid, relevant and not arbitrary; the employee knows or ought to know the rules in existence; the rules have been consistently applied to all employees and dismissal is appropriate in the circumstance.[256]

Procedural fairness implies that the employee must be given a fair hearing before an impartial and open-minded panel. Whenever an allegation of misconduct is made against an employee, the employer shall, with the consent of the affected or per the collective agreement, request a council, an accredited agency or the CCMA to appoint an arbitrator to conduct an enquiry into the conduct or capacity of the employee.[257] The employee may be advised on the allegation of misconduct against her. The Council, the accredited agency or the Commission may appoint the arbitrator upon the employer paying the required fee and the affected employee giving her written consent. During the hearing, a party to the enquiry may represent in person or by a co-employee,

[252] *Morgan & Others v Parkinson Howard Limited* 1961] GLR 68; *Faustina Asantewaa & 7 ors v Registered Trustees of the Catholic Church of Koforidua* [2016] 92 GMJ 176 (CA); *Kobea* supra note 198 at p 1040.
[253] ILO Convention 158 1rticle 1.
[254] *SA Maritime Safety Authority v McKenzie* (2010) 31 *ILJ* 529 (SCA) para 43.
[255] Section 188 of the LRA. Also see Cohen (Collier and Fergus ed) op cit note 19 at p 209.
[256] Ibid at p 211.
[257] Section 188A of the LRA.

representative of the party's trade union or employers' organization, a director or employee if the party is a juristic person, a legal practitioner on an agreement between the parties or permitted by the arbitrator in accordance with the rules.[258] A party may give evidence, call witnesses, cross-examine the party and his witnesses and make a concluding argument before the arbitrator.[259]

The arbitrator shall examine all the evidence before him in accordance with fairness in the law and make his ruling on what should be done to the employee if any. The ruling of the arbitrator on the inquiry shall have the same status as an arbitration award.[260] An employer may conclude that a particular conduct merits dismissal after considering the gravity of the offence and the application of the penalty of dismissal to the same offence previously.[261] The employer may also consider the employee's circumstances (length of service in the employment, previous disciplinary record, personal circumstances); the nature of the job and how the breach occurred.[262] The Dismissal Code envisages that punishment for misconduct is progressive, from a minimal counselling or written warning to dismissal for serious misconduct or repeated misconduct.[263]

In *Sidumo and Anor v Rustenburg Platinum Mines Ltd,*[264] the respondent had stationed the first applicant, a security officer, at a strategic area of the respondent's mine with a duty of controlling access to the area. The first applicant failed to follow the detailed random search procedure instituted by the employer and was consequently dismissed. He filed a petition of unfair dismissal against the employer. The Commissioner arbitrated the matter and concluded that the first applicant was guilty of misconduct, but he was not convinced that dismissal was the appropriate penalty under that circumstance. He took the following circumstance of the first applicant into consideration: the principle of progressive discipline, the employee's 14 years clean record of service with the employer, employer suffered no losses, the breach of the rule was unintentional or "a mistake" and the employee was a known honest worker.[265] The Commissioner concluded that the dismissal was unfair. On further appeal, the Constitutional Court held that the Commissioner had to balance employment justice —the need to protect the worker from harsh and

[258] Section 188A(5) of LRA.
[259] Section 138(2) of the LRA
[260] Section 188A(8) of the LRA.
[261] du Toit, et al, op cit note 102 at pp 446- 447.
[262] Cohen (Collier and Fergus ed) op cit note 19 at p 209.
[263] Item 3.3 of the Dismissal Code. Also see Cohen (Collier and Fergus ed) op cit note 19 at p 208-209.
[264] [2007] 12 BLLR 1097 (CC).
[265] Ibid at para 21.

arbitrary action vis-a-vis the need for efficient operation of the employer's business as well as the employer's entitlement to satisfactory conduct and work performance from the employee. Balancing the two, the Court upheld the Commissioner's decision.[266]

These elaborate procedural processes clothe a South African employee with maximum statutory protection against arbitrary decision to dismiss him, unlike the procedure of summary dismissal in Ghana.

2.5 Termination on the ground of incompetence/Incapacity or poor performance

Termination of employment is justified if the reason for termination is the inability of the worker to perform her task satisfactorily because the worker is medically unfit for the employment or due to sickness, disability, incompetence or lack of the qualification to do the work for which the worker was employed.[267] The ILO Convention 158 prohibits termination of employment for temporary absence from work because of illness or injury of the employee.[268] However, what constitutes temporary absence and the requirement of medical certification is left to be determined by member states.[269]

In Ghana, the traditional rule is that an employer is at liberty to either give or refuse to give reasons for termination. He may give good reasons, bad reasons, or none at all. A contract of employment was seen not as a contract of servitude. It is not in reality, a master-servant relationship. That means either party might bring the contract to an end at any time and free herself from the relationship painlessly. A party only must give the relevant notice or pay or forfeit her salary in lieu of notice.[270]

The traditional rule was subsequently considered as having the potential of resulting in oppression by the employer and docility in the employee. In reality, a worker was perpetually nervous and afraid of losing her job any time depending on the whims and caprice of her employer who may dismiss her at will, because the worker enjoyed no security of tenure. She would become

[266] Ibid at para 288.
[267] Labour Act 2003 (Act 651) section 15 and 62; *George Akpass* supra note 189 at p 17.
[268] Article 6(1) of ILO Convention 158.
[269] Ibid at article 6(2).
[270] *Aryee v State Construction Corporation* [1984-86] 1 GLR 425 CA, at p 432, Also see *Bannerman-Menson vs. Ghana Employers' Association* [1996-97] SCGLR 417 at pp 422-423.

a malleable tool in the hands of her master and do her bidding. The solution to the vulnerability of the worker is the existence of a collective agreement which may require that the employer could terminate an employment on stated grounds such as when the worker is found guilty of scheduled offences of the collective agreement, the laws of the land, or statutes regulating employment in the land for the time being or declared redundant under specified conditions.[271]

The Supreme Court of Ghana recently upheld the termination of employment on grounds of incompetence in the case of *Charles Affran vs SG-SSB Limited.*[272] The plaintiff was the Deputy Branch Manager of the defendant's bank branch at Tema Fishing Harbour. The plaintiff received two transfer request letters from a customer of the bank, for the transfer of £32,400 and £82,364 to the customer. The plaintiff signed against the signatures on the transfer request letters and forwarded them to the International Business Centre (IBC) of the defendant's bank, which deals with foreign transfers. After the IBC had completed its processes, it approved the request and duly transferred the said sums of £32,400 and £82,364 to the named beneficiary. It later turned out that the signature on the transfer request letters was forged and the defendant bank was unable to recover the amounts transferred and thereby lost the £114,764.00. The defendant bank terminated the employment of the plaintiff on grounds of negligence and incompetence.

Plaintiff sued and claimed, among others, that he was not negligent or incompetent when he verified the signature on the transfer letter from the customer. He sought damages for wrongful dismissal. The High Court held that the termination of appointment amounted to unfair termination under section 62 of the Labour Act. The Court of Appeal set aside the judgment. On further appeal, the Supreme Court found on the preponderance of the evidence adduced on record that the responsibility of verifying the signatures on the transfer letters lay with the plaintiff and not the IBC. However, the plaintiff's failure to use the Flexcube, which was the defendant bank's protocol for the verification of signatures, supported the claim of negligence or incompetence in the performance of his duty as contained in the letter of termination.[273] The Supreme Court cited the approval in the case *Kobea & Ors v. Tema Oil Refinery* (supra) per Dr Twum JSC and held that an employer is not required to give any reasons for termination. Once the employer complied with

[271] *Kobi vs. Ghana Manganese* [2007-2008] SCGLR 771.
[272] *Charles Affran vs SG-SSB Limited,* Civil Appeal No. J4/71/2018 (Supreme Court judgment on 21 March 2019).
[273] Ibid.

section 12 of the Rules and Conditions of Service by giving either one month's notice in writing or one month's salary in lieu thereof, the termination is not wrongful.

There seems to be uncertainty on the interpretation of fair termination under the Labour Act. Whereas some decisions of the same court suggest that termination can be properly effected without giving reasons except notice, another decision suggests otherwise. Barely two years after *Charles Affran vs SG-SSB Limited*, there seems to be a shift from the traditional rule of termination of employment. The new rule, forcefully enunciated in *George Akpass vs. Ghana Commercial Bank Ltd* (supra), is that if the termination is not by mutual agreement between the employer and the worker, and the employer is compelled to terminate the employment, he must do so on stated grounds provided for in the contract of employment such as ill-treatment or sexual harassment, medically unfit for the employment or inability of the worker to perform his role due to sickness, disability, incompetence or lack of qualification for the position employed or other reasons which do not merit summary dismissal. In that case, the Labour Act envisages that the reasons for the termination must be clearly stated and must be seen to be fair. This is because, though the traditional rule empowers the employer by contract and law to terminate without reason, that power has been curtailed by statute and can no longer be exercised arbitrarily or capriciously. Termination must be substantively and procedurally fair and justifiable.[274]

In South Africa, termination of employment on grounds of incapacity may arise when an employee abysmally fails to perform her task to meet the legitimate and reasonably attainable standard set in the employee's contract of employment.[275] Dismissal arising from incapacity could be due to poor work performance, illnesses or injury, incompatibility, operational incapacity and impossibility of performance.[276] The Dismissal Code provides guidelines for three distinct grounds for dismissal for incapacity. These include dismissal during or after probationary period,[277] dismissal for poor work performance[278] and dismissal for ill-health or injury.[279] The employer must equally follow the substantive and procedural fairness test prior to dismissing the employee.

[274] *George Akpass* supra No 258 at p 17.
[275] Cohen (Collier and Fergus ed) op cit note 19at p 231.
[276] Ibid at p 230.
[277] Dismissal Code at Item 8.
[278] Ibid at Item 9.
[279] Ibid at Item 10 and 11.

There are, however, overlapping steps in the substantive and procedural fairness, which both place the employee at the centre of all the processes.[280]

The guidelines for dismissal on grounds of poor work performance or incompetence are: first, the employer must objectively determine whether or not the worker failed to meet a performance standard. Two, if the worker did not meet a performance standard, determine if the employee was aware or could reasonably be expected to have been aware of the required performance standard. Three, determine if the worker was given a fair opportunity to meet the required performance standard. Finally, determine if dismissal is an appropriate sanction for not meeting the required performance standard.[281]

In case of incapacity arising from ill-health or injury, the employer must objectively determine whether the employee can perform her work. If she is not capable, determine the extent to which she can perform the work; the extent to which the employee's work circumstances might be adapted to accommodate her disability. Where it is impossible, determine the extent the employee's duties could be adapted and finally, the availability of alternative work.[282]

2.6 Dismissal for operational requirement or Redundancy/Retrenchment

The ILO convention 158 recognizes termination of employment for the operational requirements of the undertaking, establishment or service as a valid reason.[283] The convention envisages that a court, labour tribunal, arbitration committee or arbitrator will be empowered by the member state to investigate and determine whether the termination was really for operational requirement. Both Convention 158 and South Africa's LRA define operational requirement as 'reasons of an economic, technological, structural or similar nature.[284] The Labour Act of Ghana uses the words "redundancy" and "retrenchment" as synonymous with operational requirements. An employer can fairly terminate the employment of a worker or workers on the ground of redundancy.[285] Besides, the state has passed various legislations to empower state-owned enterprises and

[280] Cohen (Collier and Fergus ed) op cit note 19 at p 231.
[281] Dismissal Code, Item 9.
[282] Ibid at item 11.
[283] ILO Convention 158 article 4.
[284] Section 189(1) of the LRA.
[285] Labour Act 2003 (Act 651) section 62(c).

corporations to terminate employment of workers for efficiency through retrenchment. For instance, under the Ghana Cocoa Board (Reorganisation and Indemnity) Law,[286] a state entity could lawfully terminate the employment of the worker. Termination on grounds of redundancy in Ghana is justified when an employer intends to introduce major changes in production, programme, organization, structure or technology in the business, which is likely to result in terminations of employment of workers in the business.

The procedure requirement in such circumstances is that the employer shall notify the Chief Labour Officer and the trade union concerned, at least three months before the contemplated changes. The employer shall provide all relevant information, including the reasons for the termination, the number and categories of workers to be affected and the period within which the termination will take place.[287] The employer must consult the trade union to explore measures to avert or minimize the termination and measures to mitigate the adverse effects of the termination on the affected workers. These measures may include finding alternative employment for them.[288] Redundancy may also arise due to amalgamation and merger or take-over of a business by another. These circumstances are not the fault of the worker. Consequently, the worker is entitled to severance pay to alleviate or mitigate the misfortune of losing her job.[289] The severance pay will be discussed in a sub-topic below.

The substantive reason and procedural guidelines for dismissal of employees on grounds of redundancy in Ghana align well with the provisions in Articles 13 and 14 of the ILO convention: termination for reasons of economic, technological, structural or similar nature. The LRA of South Africa, however, distinguishes between small scale dismissal and largescale dismissal. Large-scale dismissal involves an employer who employs more than 50 employees and intends to dismiss 10 to 50 or more employees of the employer.[290] In a large-scale dismissal for operational reasons, the LRA makes provision for the appointment of an independent facilitator.[291]

[286] Ghana Cocoa Board (Reorganisation and Indemnity) Law, 1985 (PNDCL 125) section 1(2).
[287] Labour Act 2003 (Act 651), section 65(1)(a).
[288] Ibid at s. 65(1)(b).
[289] Ibid at s. 65(2).
[290] Section 189A of the LRA.
[291] Section 189A(3) of the LRA.

2.7 Unfair termination/dismissal

The ILO convention 158 provides that it is not justified to terminate employment for any one of the following reasons:

i. Employee's membership of a union or participation in union activities outside working hours or, with the consent of the employer, within working hours;
ii. Employee seeking office as, or acting or having acted in the capacity of, a workers' representative;
iii. Employee filing a complaint or participation in proceedings against an employer involving an alleged violation of laws or regulations or recourse to competent administrative authorities;
iv. race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
v. absence from work during maternity leave.[292]

In Ghana, the concept of fair and unfair termination of employment is a novel provision introduced in the Labour Act.[293] Unfair termination is distinct from the common law concept of wrongful dismissal. The concept is a creature of statute in the Labour Act, 2003.[294] It is not a concept to be applied or enforced by the courts of Ghana.[295] Unfair termination covers employer's breaches of the terms and conditions of employment concerning the worker, specifically, where the employer had acted unreasonably or cannot show any justifiable reasons for the termination.[296] The Labour Act guarantees the security of employment of workers. Employment should be terminated fairly.

Ghana's position on unfair termination almost entirely overlaps with the provision in Convention 158. Additional grounds for unfair termination include disability of the worker; temporary illness of the worker or an injury the worker sustained, which is certified by a recognized medical practitioner; refusal to work while the worker was taking part in a lawful strike

[292] ILO Convention 158 article 5.
[293] *George Akpass* supra No 258 at p 15.
[294] *Charles Affran vs SG-SSB Limited,* supra note 272.
[295] *Bani v Maersk Ghana Ltd* [2011] 2 SCGLR 796.
[296] *Brown vrs National Labour Commission and Another supra note 155*.

unless the work is necessary to prevent actual danger to life, personal safety or health or the maintenance of plant and equipment.[297]

In a suit of unfair termination, the worker's burden is to prove a *prima facie* case that her employment has been terminated on at least one of the grounds of unfair dismissal. The employer carries the onus of proving that the reason for the termination is substantively fair and it was in accordance with the procedure set out in the Act.[298] The onus of proof is similar to the provision in the South African law in cases of automatically unfair dismissals.[299] Paragraphs iii, iv and v of the provisions in ILO Convention 158 above overlaps with the automatically unfair dismissal grounds in South Africa's LRA. However, the LRA, in addition, makes the following grounds of termination automatically unfair dismissal:

a) the employee lawfully participated in or supported a protected strike;
b) the employee refused to do work normally done by an employee who is engaged in a protected strike;
c) the employee refused to accept a demand in respect of a matter of mutual interest;
d) reasons related to the transfer of a business in terms of section 197; and
e) reasons related to a protected disclosure.[300]

The LRA provides that a dismissal that is not automatically unfair is still unfair if the employer fails to prove that the dismissal is fair and based on the reason of employee's conduct, incapacity and operational requirement of the employer.[301] In effect, unfair dismissal is any dismissal that is neither fair based on conduct, incapacity, operational requirement nor automatically unfair.

2.8 Constructive dismissal

Convention 158 is silent on the concept of constructive dismissal. The Halsbury Laws of England explains constructive dismissal as an employee who terminates the contract of employment, with

[297] Labour Act 2003 (Act 651) at section 63.
[298] *George Akpass* supra No 258 at pp 51 and 56.
[299] Cohen (Collier and Fergus ed) op cit note 19 at p 197.
[300] Section 187 of the LRA.
[301] Section 188(1) of the LRA.

or without notice, may still claim to have been dismissed if the circumstances are such that he is entitled to terminate it without notice due to the employer's conduct.[302]

In the Labour Act of Ghana, the concept of constructive dismissal is not specifically defined. However, it is inferred from one of the grounds for termination of employment and under unfair termination of employment. The Act provides that 'A contract of employment may be terminated by the worker on grounds of ill-treatment or sexual harassment.'[303] The court has referred to this provision as dismissal, although Act 651 uses the terminology "termination".[304] Similarly, under unfair termination, the Act further provides that 'a worker's employment is deemed unfairly terminated if, with or without notice to the employer, the worker terminates the contract of employment because the employer has failed to take action on repeated complaints of sexual harassment of the worker at the workplace.'[305] Here again, the court construes this provision as the reason for constructive dismissal, which is automatically unfair.[306] In *Jonathan Ago Adjei, Issaka Aliya & Anor v. GCB Bank Ltd*,[307] the Court of Appeal held that '[t]he Labour Act makes provision for constructive dismissal. Though the Labour Act 2003, Act 651 does not expressly mention constructive dismissal, section 63(3) 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"

From the foregoing, it can be said that constructive dismissal occurs when the worker voluntarily resigns from the employment because the employer creates conditions that make it impossible for the worker to continue in the employment, compelling the worker to stop the work.[308] In effect, the worker terminates his employment because of some wrongful act done by the employer against the employee.[309] In an action for a claim of wrongful or constructive dismissal, the burden is on the worker to prove that the employer has breached a term, actual or

[302] Halsbury Laws of England 5th ed vol 40 at p 720.
[303] Labour Act 2003 (Act 651) Section 15(b).
[304] *George Akpass* supra No 258 at p 36.
[305] Labour Act 2003 (Act 651) Section 63(3).
[306] *George Akpass* supra No 258 at p 51.
[307] Civil Appeal No. 1/101/2018.
[308] Ibid at p 31-32.
[309] *Tetteh v. Intertek* (2019) JELR 91980 (CA) at p 3.

implied, of the terms of his contract of employment and further prove that the employer's conduct contravenes statutory provisions for the time being regulating employment.[310]

The LRA defines dismissal to include an employee terminating a contract of employment with or without notice, because the employer made the employment intolerable to the employee.[311] The LRA equally does not mention the phrase "constructive dismissal". Indeed, the South African court has confirmed that the term "constructive dismissal" is a concept the former Industrial Court adopted from English Law during the development of the jurisprudence of labour law under the former LRA.[312] The Labour Court explained that constructive dismissal entails the notion that there is an implied term in a contract of employment that an employer would refrain from conduct that would cause material damage to the relationship of trust and confidence between the parties, which if breached by the employer, would entitle the employee to elect to accept that breach and cancel the contract.[313]In *Murray v Minister of Defence*,[314] the court described the concept of constructive dismissal as 'victory of substance over form'. Thus, the court explained further that 'although the employee resigns, the causal responsibility for the termination of service is recognized as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences.'[315] This concept has subsequently been codified in the LRA as one of the definitions of dismissal.[316] The concept, therefore, has a common root and both Ghana and South Africa give the same meaning to the concept.

2.9 Strike-related dismissals

The 1919 ILO Constitution recognised freedom of association as one of its core principles.[317] This right is extensively elaborated in two conventions, the Freedom of Association and Protection of the Right to Organise Convention[318] and the Right to Organise and Collective Bargaining

[310] *Yaw Asare Darko v. Ghana Port & Harbour authority* (2006) JELR 65655 (CA) at p 6.
[311] Section 186(1)(e) of the LRA.
[312] *HC Heat Exchangers (Pty) Ltd v Araujo and others* [2020] 3 BLLR 280 (LC) at para 44.
[313] Ibid at para
[314] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para 8.
[315] Ibid.
[316] *HC Heat Exchangers (Pty) Ltd v Araujo and others* op cit note 312 at para 45.
[317] ILO Constitution of 1919 at preamble.
[318] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

Convention.[319] None of the two conventions expressly provide for the right to strike. However, Convention 87 establishes the right of trade unions to 'organise their activities' and to 'formulate their programmes', while Article 10 recognises that the objective of trade unions is to further and defend the interests of workers. The supervisory committees have interpreted these two provisions to confer a right to strike for workers.[320] Further to this, the International Covenant on Social, Economic and Cultural Rights[321] expressly provide for the right of workers to strike subject to imitations provided in state laws.[322] Both Ghana and South Africa have ratified this convention.

In Ghana, the Labour Act recognizes the right to strike. The South African Constitution confers the right to strike on all employees,[323] subject, however, to the statutory framework and guidelines provided in the LRA. Thus, the rights to strike conferred by statute is a departure from the common law, which saw strike as a fundamental breach of the terms of the contract of employment.[324] It will amount to unfair termination of employment if an employer terminates the employment of an employee who refuses to work while participating in a lawful strike.[325] Similarly, the dismissal of an employee in South Africa for participating in a lawful strike or declaring an intention to participate or support a protected strike is automatically unfair dismissal.[326]

The right to strike is nonetheless, not unlimited. In Ghana, a strike is illegal or unlawful if the trade union or the workers involved fail to follow the statutory procedures[327] in the Labour Act or the workers are engaged in the provision of essential services.[328] A person who instigates, declares or incites others to partake in an unlawful strike stands liable for any damage, loss or injury suffered by any other person as a result of the illegal strike[329] and may have her services terminated by the employer without notice for breach of her contract of employment or may forfeit her remuneration in respect of the period during which she engaged in the illegal strike.[330] Strikes in

[319] Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
[320] Halton Cheadle et al 'Strikes and the Law' 2017 at p 10.
[321] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.
[322] Ibid at article 8(1)(d).
[323] op cit note 13 section 23(2)(c).
[324] Cheadle et al 'Strikes and the Law' 2017 at p 194.
[325] Labour Act 2003 (Act 651) s 63(2)(i).
[326] Section 187(1)(a) of the LRA.
[327] Labour Act 2003 (Act 651) sub-part II.
[328] Ibid 163.
[329] Ibid s 168(2).
[330] Ibid at section 168(3).

breach of statutory requirements provided in section 64 of the LRA in South Africa are 'unprotected' and constitute a ground for fair dismissal.[331] Strike becomes unprotected under any of the following circumstances: a) where a collective agreement prohibits a strike in respect of the issue in dispute; b) where an agreement requires the issue in dispute to be arbitrated; c) where a party has a right to refer the dispute to arbitration or adjudication; and d) where the employee is engaged in essential or maintenance services.

The Ghana Labour Act is silent on the procedure to terminate the appointment of an employee for embarking on an illegal strike. The South African Dismissal Code prescribes the guidelines prior to dismissal. The dismissal code views unprotected strikes as a form of misconduct. Consequently, the employer must establish both substantive and procedural fairness of the dismissal. The substantive fairness is determined by identifying the seriousness of the contravention of the Act, efforts made by the workers to comply with the Act, whether or not the strike was in response to unjustified conduct by the employer.[332] Procedurally, the employer must contact the trade union official at the earliest opportunity, to discuss the course of action he intends to take. The employer shall issue an ultimatum in clear terms, stating what is required of the employee and the sanctions to be imposed if the employees do not comply with the ultimatum. The employer shall give the employee enough time to reflect and respond to the ultimatum, to accept or reject it. The employer may dispense the service of the employee if it is impracticable or unreasonable to follow the foregoing steps.[333]

[331] Section 68(5) of the LRA.
[332] Dismissal Code item 6(1).
[333] Ibid at item 6(2).

CHAPTER THREE

COMPARISON OF REMEDIES AND LABOUR DISPUTE RESOLUTION BODIES IN GHANA AND SOUTH AFRICA

3.1 Introduction

Convention 158 provides that a worker whose employment has been terminated is entitled to receive a severance allowance or other separation benefits, the amount of which shall be based, *inter alia,* on length of service and the level of wages and paid directly by the employer or by a fund constituted by employers' contributions.[334] In South Africa, sections 193 and 194 of the LRA provides remedies for unfair dismissal and unfair labour practices.

3.2 Remedies for fair termination

In Ghana, an employer must give reasonable notice to a worker whose employment is to be terminated or compensation in lieu thereof, unless the termination is on grounds of serious misconduct, which would make it unreasonable to require from the employer.[335] After fair termination of employment, the worker is entitled to receive remuneration earned, due pay, compensation in respect of sickness or accident accrued to the worker prior to the termination. In the case of an expatriate worker, the employer must, in addition, pay the repatriation expenses and necessaries for the worker and his family members.[336] The employer shall make this payment to the worker within the notice period and where there is no notice, payment must be made a day after the termination.[337] Where there are conditions of service in the collective bargaining agreement more beneficial to the worker, the latter will take precedence over the provisions in the Act.[338]

[334] ILO Convention 158 at article 12(1)(a).
[335] Ibid at article 11.
[336] Labour Act 2003 (Act 651) section 18(1)(a)-(d).
[337] Ibid at section 18(2) and (3).
[338] Ibid at section 19.

3.3 Remedies for unfair termination and automatically unfair dismissal

In Ghana, many of what constitute unfair termination are similar to the grounds of automatically unfair dismissal in South Africa. Unfair termination is a new concept created in the Labour Act. Unfair termination is not a common right enforceable in the law courts in Ghana.[339] The Act prescribes a forum and remedy for a worker who complains that her employment has been unfairly terminated.[340] Where the Labour Commission finds, upon investigation, that there is unfair termination of employment, it may order one of three remedies, namely, reinstatement of the worker from the date of the termination, re-employment of the worker by the employer in the same work or other suitable work and payment of compensation to the worker.[341] The consequence of reinstatement is that the employment would be deemed not to have been terminated. Therefore, the employee will be entitled to the payment of all remunerations, entitlements, emoluments, and benefits that he would have received but for the unfair termination.[342] No compensation will be awarded after reinstatement.[343] These statutory remedies are conferred on the Commission but not, at least expressly, to the courts[344]

In South Africa, the remedy for unfair dismissal and automatically unfair dismissal is an order of re-instatement or re-employment in the same employment prior to dismissal or in a reasonably suitable work or payment of compensation to the employee.[345] Re-instatement or re-employment is a preferable option the court or arbitrator must order unless the employee does not wish to be re-instated or continued employment relationship will be intolerable, or it is reasonably impracticable to re-instate or re-employ, or the dismissal was only procedurally unfair.[346]

[339] *Bani v Maersk Ghana Ltd* [2011] 2 SCGLR 796
[340] Labour Act 2003 (Act 651) at section 64(1).
[341] Ibid at section 64(2)
[342] *George Akpass* supra note 189 at p 58 (dissenting decision by Pwamang JSC.)
[343] Ibid.
[344] Labour Act 2003 (Act 651) Section 64.
[345] Section 193(1) of the LRA.
[346] Section 193(2) of the LRA.

3.4 Remedy of compensation

Convention 158 recommends an order of compensation where reinstatement is not practicable.[347] In South Africa, the LRA prescribes just and equitable compensation for unfair dismissal, automatically unfair dismissal and unfair labour practice. Compensation payable to an employee for substantive and/or procedurally unfair dismissal is not more than 12 months' remuneration effective from the date of the dismissal.[348] In automatically unfair dismissal, compensation of not more than 24 months' remuneration of the employee, calculated to commence from the date of the dismissal.[349] And in the case of unfair labour practice, the employer shall pay not more than 12 months' remuneration to the employee from the date it occurred.[350] It has been argued that the higher cap of 24 months remuneration as compensation for automatically unfair dismissal contain punitive measure against the employee. The courts have held the quantum is to send a signal to employers of the LRA's disapproval of automatically unfair dismissal.[351]

Where automatically unfair dismissal also amounts to unfair discrimination, such act also breaches section 6 of the Employment Equity Act (EEA). In that case, the dismissed employee is permitted under the EEA to claim both compensation and damages from the employer. The Labour Court, in such circumstances, does not have a limit of amount to award. In *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*, the Labour Appeal Court synthesized the position as follows:

a. Where a dismissed employee seeks reinstatement or re-employment under the LRA and is granted that relief, that employee will still be entitled to 'compensation' for the claim formulated under the EEA.
b. Where compensation is sought under both Acts, the same meaning should be ascribed to compensation under both Acts.
c. Where compensation is sought under the LRA and the EEA and the court are satisfied that there has been an Automatically Unfair Dismissal and that the employer's action also constitutes a violation of the EEA, it must determine what a just and equitable amount of compensation is. The court should not consider separate compensation under the LRA and

[347] ILO Convention 158 at article 10.
[348] Section 194(1) of the LRA.
[349] Section 194(3) of the LRA.
[350] Section 194(4) of the LRA.
[351] Cohen (Collier and Fergus ed) op cit note 19 at p 289.

the EEA; however, there is no need to reduce the amount because there is no limit to compensation prescribed by the EEA.

d. Where the claim for compensation is only in terms of the LRA, the amount is subject to the usual cap that applies to compensation under the LRA.
e. In respect of losses suffered because of discrimination, the employee may also claim damages under the EEA.

In Ghana, the only remedy the courts will not hesitate to grant in favour of a dismissed employee for unfair termination or unlawful dismissal is damages or compensation.[352] The principle of ***restitutio in integrum*** is used for calculating damages or loss suffered by the dismissed employee. The damages to be awarded should reasonably put the dismissed employee in the position that he would have been, had the contract been properly performed, to the extent that money can achieve.[353] There are two factors the courts consider in the award of damages. First is the measure of damages, that is, the lump sum that must be awarded and second, the remoteness of damages, the proximate cause of the breach.[354]

In the case of *Royal Dutch Airlines (KLM) and Another v Farmex Ltd,*[355] the Supreme Court held that 'On the measure of damages for breach of contract, the principle adopted by the courts in many cases is that of *restitutio in integrum*, i.e. if the plaintiff has suffered damage that is not too remote, he must, as far as money can do it, be restored to the position he would have been in had that particular damage not occurred.*'* In an employment contract, the measure of damages for wrongful or unlawful dismissal is not limited to only the loss of salary or wage. Other benefits such as SSNIT payment, provident fund benefits, leave allowance, bonus, long service awards (if any) and all other benefits the worker enjoyed during his tenure of employment may be awarded in favour of a successful party. In *Nartey-Tokoli v Volta Aluminum Co Ltd (No 2),*[356] the plaintiffs collectively sued their employer for wrongful dismissal. The case ran from the High Court, Court of Appeal and to the Supreme Court. The Supreme Court confirmed the concurrent judgments of the two lower courts and ordered that the salaries of the dismissed employees from

[352] *David Agbeli vs. Merchant Bank Ghana Ltd*. [2021] DLSC10789.
[353] Ibid. also see *Klah v Phoenix Insurance Ltd* [2012] 2 SCGLR 1139 which cited with approval the case of *Hardley v Baxendale [1854] 9 EX 341 @ 354-355 and Blay-Morkeh v Ghana Airways Corporation [1972] 2 GLR 254.*
[354]*Okrah v Agricultural Development Bank [2016-2017] GLR* per Appau JSC.
[355] *Royal Dutch Airlines (KLM) and Another v Farmex Ltd.*[355] *[1989 -90] 2 GLR 632.*
[356] [1989-90] 2 GLR 341, SC.

the dates they ceased to receive salaries to the dates of their respective de facto termination be paid to them. The court further awarded additional twelve months salaries in favour of the employees as damages for wrongful dismissal.[357]

The quantum of money for wrongful dismissal is the money the dismissed employee would have earned from his employment, commencing from the date of the wrongful dismissal to a reasonable period within which the dismissed employee is expected to have obtained alternative employment.[358] The quantum of damage to be awarded is determined by the specialized nature of the employee's work and the unemployment situation in the country.[359] Thus, the courts have set a range between 12 to 24 months' salary of the dismissed employee as the reasonable quantum for wrongful dismissal.[360] This is similar to the quantum of compensation payable under the LRA of South Africa. The quantum of award of damages can also be influenced by the public law right of the employee. Where there is a dismissal in breach of public law safeguards or constitutional guarantee against dismissal "without a just cause", a court will be willing to award maximum damage to show its disapproval of the unconstitutional conduct of the employer.[361]

3.5 Remedies for wrongful or unlawful dismissal

Reinstatement of a dismissed worker is one of the remedies Convention 158 envisages if an independent arbitrator has the power to make in case of unjustifiable termination.[362] In Ghana, the principle is that a contract of employment does not mean life employment or till the retirement age, though it may be for an indefinite period or potentially until retirement.[363] The position of the Ghanaian common law is that an employee who is wrongfully or unlawfully dismissed from the employment is entitled to damages. A court cannot make an order for his re-instatement into a job from which the employer has removed him unlawfully unless there is a public law that requires otherwise. An order of re-instatement is similar to or the same as an order of specific performance

[357] *Nartey-Tokoli and others v. Volta Aluminium co ltd (No. 3)* [1989-90] 2 GLR 513-531 at p 528.
[358] *Ashun v Accra Brewery Ltd. [2009] SCGLR 81.*
[359] *Kobi v Ghana Manganese Co. Ltd* [2007-2008] SCGLR 771 @ 772,
[360] Ibid.
[361] *Ghana Cocoa Marketing Board v Agbettor & Ors* [1984-86] 1 GLR 122. Also see *Lt. Col. Ashun v Accra Brewery Ltd.* [2009] SCGLR 81.
[362] ILO Convention 158 at article 10.
[363] *Nartey-Tokoli v Volta Aluminium Company* supra note 357 at p. 545.

of a contract of employment, which is not permissible.[364] The policy rationale for this position is that the courts restrain themselves from interfering with personal liberty. This is because of the principle that contracts of employment are not contracts of servitude. It is impracticable to compel an employee to work for an employer he does not want to work for, and vice-versa. Employment contract has a large element of personal relationship, which makes it impossible for incommutable parties to work together.[365]

This principle was emphasized in *George Akpass vs. Ghana Commercial Bank Ltd*[366] when the Supreme Court held that the relief of re-instatement should not be lightly ordered by the court or the Labour Commission and the interest of the employer must be seriously considered before making such order. However, this position is different in South Africa where the LRA makes re-instatement or re-employment mandatory in case of unfair dismissal unless the employee does not wish to be re-instated or re-employed and save other exceptions.[367] But South Africa does not have the phrase *wrongful* or *unlawful dismissal* in its statutes. The expression is limited to Ghana.

Modern legislation is shifting away from this position due to the fact that personal relationships between the employer and employee in modern employment is almost non-existing.[368] In *George Akpass*, the court observed there was a little direct personal relationship between the employer and the worker and the employer had a big bank with branches in many parts of the country. Therefore, reinstatement under such circumstances will not seriously undermine the interest of the employer. The South African law supports the shift in the position of the Ghanaian law. In *Santos Professional Football Club (Pty) Ltd v Igesund and Another*[369] 2003 (5) SA 73 (C), Foxcroft J departed from the English common law position that specific performance is a supplementary remedy to damages and cannot be ordered in a contract of service when damages are adequate. The South African law, however, recognizes specific performance as a primary remedy and could be ordered in a contract of employment entered into by the parties

[364] *Bani v Maersk Ghana Ltd* [2011] 2 SCGLR 796.
[365] Ibid.
[366] *George Akpass* supra No 258 at p 57.
[367] Section 193(2) of the LRA.
[368] Ibid.
[369] *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C).

themselves unless the order might occasion unreasonable hardship, injustice, inequitable or the contract itself is unreasonable.[370]

3.6 Severance pay

Severance or redundancy pay shall be paid to an employee whose employment is terminated or suffers diminution in the condition of employment on account of the business being closed down or undergoing an arrangement or amalgamation. To determine the diminution of the terms and conditions of service of the worker, an account shall be taken of the past services and accumulated benefits of the worker with the undertaking before the changes were carried out. The quantum of the severance pay and the terms and conditions of payment shall be negotiated between the employer and the representatives of the workers' trade union. In the event of dispute on the severance pay and terms of payment, an aggrieved party shall refer the matter to NLC and the decision subject to any other law be final.[371]

In *National Labour Commission vs. First Atlantic Bank Limited*,[372] the bank declared two of its workers redundant owing to significant changes that have occurred in the demands, skills and competencies required for the delivery of the current objectives of the bank. The NLC settled the dispute over redundancy pay but the bank challenged the terms of settlement and the High Court set it aside. The Court of Appeal upheld the appeal but the bank appealed to the Supreme Court on the ground that a worker whose employment had been terminated under circumstances not involving a close-down, arrangement or amalgamation is not entitled to redundancy pay as contemplated in section 65 (2) (b) of the Labour Act, 2003 (Act 651). The Supreme Court dismissed the appeal and held 'Redundancy pay under section 65(2) (b) and sections 65(4) and (5) of the Labour Act as applicable to a person whose employment had been terminated under circumstances not involving a close-down, arrangement, or amalgamation, is also applicable to persons who are made redundant by the introduction of major changes in production, programme, organization, structure or technology of an undertaking.'[373]

[370] Ibid at headnote.
[371] Labour Act, 2003 (Act 651) s 65.
[372] *National Labour Commission vs. First Atlantic Bank Limited* [2020] DLSC 9924
[373] Ibid at p 23-24.

CHAPTER FOUR

RECOMMENDATION FOR GHANA AND CONCLUSIONS

4.1 Recommendations

The review and comparison of the labour statutes and case laws between Ghana and South Africa concerning termination and dismissal laws have gravely exposed the inadequacies in the Ghanaian labour jurisprudence relative to the ILO convention 158 and the South African labour legislation. It bears saying that South Africa has developed elaborate laws to govern dismissal of employees more than envisaged in the ILO convention 158. The consequence thereof is that the employee in South Africa feels secured and better protected than the counterpart in Ghana. In this era of mobility of labour across borders, the significance of the review of the Ghanaian labour laws to meet the modern trends cannot be over-emphasized.

Some trade unions have called on the social partners to amend several portions of Ghana's Labour Act to address unjust practices against workers to reflect the ideals of decent work.[374] Indeed, there is not much difference between the substantive reason for dismissal or termination of employment in Ghana and South Africa labour laws. The Ghanaian law lags in the procedural sanctity of termination or dismissal of an employee. Nevertheless, the author has identified areas of the Ghanaian laws that could be beefed up to fall in line with the ILO conventions and the South African labour legislations.

First, the Labour Act of Ghana does not define dismissal. Case law has, however, given a narrow description of dismissal and imputed dismissal as a form of punishment. It is proposed that Ghana Labour Act be amended to codify the definition of dismissal to fall in line with section 186(1) of the LRA to cover all the instances explained in the section as constituting dismissal. This, it is hoped, will prevent arbitrariness of employers and protect employees.

Secondly, Ghana's case law position that an employer may terminate the employment of a worker without reason is indeed clear defiance of international customary law and treaty, particularly ILO Convention 158. Indeed, there is a shift in the judicial interpretation of the law on

[374] https://allafrica.com/stories/

termination of employment. The Supreme Court subsequently held that 'there is no right in the employer to terminate the employment simpliciter. That right is linked to the proven commission of an offence.'[375] In a very recent case of *George Akpass vs. Ghana Commercial Bank Ltd*. (supra), a dissenting opinion of a single judge held the position that '…my clear thinking is that the Ghanaian cases that held that the employer has a right to terminate the employment of a worker for no reason and that there can be no specific performance of a contract of employment are no longer good laws.'[376] With these uncertainties, it is proposed that Ghana's provision on termination of employment adopts Article 4 of the ILO Convention 158 and section 188(1) of the LRA of South Africa, which provide explicitly that termination of employment is unfair unless the employer proves that the reason of termination is related to the conduct and incapacity of the employee or the operational requirement of the employer.

Thirdly, and most significantly, neither the Labour Act nor the Labour Regulations[377] provide for statutory procedural processes to be followed by an employer before dismissal or termination of employment for reasons of misconduct and incapacity. Indeed, Ghanaian case law endorses summary dismissal of an employee for misconduct on hearing. This, again, falls short of Article 7 of the ILO Convention 158. It is further suggested that Ghana adopts the provisions in the Dismissal Code in Schedule 8 of the LRA as a statutory guideline for all employers to follow and a benchmark for contents of Collective Agreements.

Ghana can bring her laws on termination of employment and dismissal in conformity with Convention 158 and the South African laws through several ways. First, through execution of Convention 158 by the executive and ratification by the parliament of Ghana by resolution.[378] After almost two decades of its existence, the Labour Act has not witnessed any amendment. Ghana may also amend the Labour Act to inculcate the provision of Convention 158 into the Act. Another way to bring the provision of Convention 158 to bear on Ghana is through the promulgation of Legislative Instrument (L.I.) under section 175 of the Labour Act to guide the termination of employment and dismissals. An L.I. will have the same force as the Dismissal Code

[375] *Kobi vs. Ghana Manganese* [2007-2008] SCGLR 771.
[376] *George Akpass* supra No 258 at p 46.
[377] Labour Regulations, 2007 L.I. 1833.
[378] Constitution of Ghana at article 75(2).

of South Africa. Indeed, these amendments will not only bring Ghana's labour in conformity with international standards but also make the country an attractive destination for transfer international labour expertise.

4.2 Conclusion

This minor dissertation examined a crucial aspect of labour law, that is, the law of termination and dismissal of Ghana relative to South Africa's laws. The ILO Convention 158, though not ratified by Ghana and South Africa, is nevertheless a source of customary international law and it served as the lodestar of comparison in this work. The ILO's Termination of Employment Convention 1982 has set a framework of substantive reasons, procedural and appeal processes in which all state parties must domesticate in their municipal or national laws with necessary modifications. Convention 158 sets the standards at the international level to protect workers' rights across the world. However, a careful study of South Africa's labour laws reveals that workers' right to security of employment and the right not to be unfairly dismissed are well ingrained and guaranteed. However, Ghana's dismissal laws contained in the Labour Act and interpretation thereof in case laws fall short of the international standard set in the Convention 158.

The dissertation, therefore, compared the laws of the two countries in the areas of substantive reasons for dismissal or termination of employment of a worker as well as the procedural guidelines an employer must follow before termination. It became evident that Ghana's position falls short and a recent judicial pronouncement from the Supreme Court acknowledged this fact and depart from the earlier position. The author also identified areas of South Africa's laws, particularly the procedure laws and recommended same to Ghana in order to bring Ghanaian laws on termination of employment in conformity with international standards.

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