IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2021

CORAM: YEBOAH, CJ (PRESIDING)
PWAMANG, JSC
AMEGATCHER, JSC
OWUSU (MS.), JSC
HONYENUGA, JSC

CIVIL APPEAL
NO. J4/08/2021

16TH JUNE, 2021

GEORGE AKPASS ……. PLAINTIFF/APPELLANT/APPELLANT

VRS

GHANA COMMERCIAL BANK LTD. ……. DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

MAJORITY OPINION

AMEGATCHER, JSC:-

Until 29th May 2009, the appellant, George Akpass was a chief clerk of the Bole Branch of respondent bank, having worked there for approximately 27 years. The appellant was summarily dismissed on 29th May 2009. He was initially interdicted for certain acts of fraudulent transfer of funds into his accounts and uncredited lodgement into the account of Total Petroleum by a customer of the bank called Gyimantwi Enterprise. Prior to the dismissal, a disciplinary hearing was held into the source of his authority to give immediate value to bank cheques sent for clearing between 1st January 2007 and April 2008 contrary to laid down policies of the bank.

FACTS:

The appellant challenged his dismissal by a writ at the High Court, Accra. He sought a declaration that his dismissal was unlawful, reinstatement with full benefits, compensation for unlawful dismissal, damages, costs, and solicitor's fees, In the alternative, he asked for payment of his end of service benefits from 20th May 2009, interest on the amount at the prevailing commercial bank rate and any other reliefs the court may deem fit. He contended that entries he passed to disburse the loan facility for the purchase of a vehicle by the bank's customer and letters he wrote or co-signed to the bank's customer were under the instructions of the bank's branch manager, Rev Duke Commey who was given authority by management to determine appellant's duties.

The respondent disputed this assertion and insisted that appellant failed to comply with the staff responsibilities as set out in his appointment letter, bank's books of instructions, service rules, circulars, policy guidelines and the Collective Bargaining Agreement (CBA). Additionally, respondent says the appellant perpetuated fraud against the bank when he accepted cash inducement from the customer of the bank to conceal his cheques thereby causing financial loss to the bank. The respondent, therefore, counterclaimed for the sum of Ghc227,765.94 being the claim made against the bank by the customer for dereliction of duty and damages for loss of business and reputational damage.

After a full trial, the High Court presided over by Laurenda Owusu J on 4th July 2016 dismissed the appellant's claim. Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal which on 18th June 2019 unanimously dismissed the appellant's appeal. The current appeal before the apex court is the result, again, of the dissatisfaction of the appellant to the judgments of the two lower courts, albeit superior courts of record. The appellant filed and argued three grounds of appeal as follows:

i. The judgment is against the weight of evidence.

ii. The court below erred in law when it held that plaintiff was given a fair hearing within the defendant/respondent/respondent concerning his dismissal.

iii. The court below erred when it held that the dismissal of appellant was fair.

APPEAL AGAINST CONCURRENT FINDINGS OF TWO LOWER COURTS:

We are guided by a long line of decisions of this court that our appellate jurisdiction in appeals dealing with concurrent findings by two superior courts lower than the apex court could be properly exercised in favour of the appellant if he is able to satisfy this court that the trial and the intermediate appellate courts failed to properly evaluate the evidence or have drawn wrong conclusions from the accepted evidence. Other factors are that the two courts committed fundamental errors in their findings of fact or there are strong pieces of evidence on record which are manifestly clear that the findings of the two courts are inconsistent with the totality of the evidence led by the witnesses. See the cases of Akuffo-Addo vrs Catheline [1992] 1 GLR 377 per Osei Hwere JSC; Achoro vrs Akanfela [1996-97] SCGLR 209; Awuku Sao vrs Ghana Supply Co. Ltd. [2009] SCGLR 710; Obeng v Assemblies of God Church, Ghana [2010] SCGLR 300; Gregory v Tandoh [2010] SCGLR 971.

We intend now to review the appeal record based on the grounds of appeal and weigh it against the principles enunciated in the cases above.

THE OMNIBUS GROUND:

The appellant first argued grounds 1 and 3 together. Ground 1 being a ground dealing with the judgment against the weight of evidence, the legal position is that the case is open for fresh consideration of all the facts and related law submitted by the parties to the appellate court. We are, therefore, invited to re-examine certain pieces of evidence allegedly misapplied against the appellant or which if considered properly will change the decision of the two courts in appellant's favour.

DISCREPANCY BETWEEN LETTER OF INTERDICTION & CHARGES PREFERRED BEFORE A DISCIPLINARY HEARING:

The first complaint of the appellant under the omnibus ground is that his dismissal contravened article 18(a) of the CBA and staff rules because there was a discrepancy between the memo of interdiction and the memo inviting the appellant to the disciplinary committee. The appellant was interdicted for acts of fraudulent transfer of funds from Total Petroleum Ghana Limited into his account and uncredited lodgement into the accounts of Total Petroleum by the bank's customer, Gyimantwi Enterprise. The invitation letter to appear before the disciplinary committee stated the matters to be investigated as the authorisation and immediate value given by the appellant to almost all other banks cheques sent for clearing between 1st January 2007 and April 2008 contrary to laid down policies of the bank and the source of appellant's authority for the actions he took. According to appellant, article 18(a) contemplated a situation where the grounds for interdiction and the offence investigated by the disciplinary committee would be the same. Therefore, where an employee is interdicted for one offence and investigated for other offences, that article would have been breached.

In answer to the allegation of breach of article 18(a) of the CBA, respondent submits that appellant was invited to the disciplinary committee first to answer acts of uncredited lodgements into the accounts of Total Petroleum Ghana Ltd by Gyimantwi Enterprise at the Bole branch. When he was queried by the inspectors/auditors, he admitted giving immediate value to cheques. Secondly, he was to justify the non-adherence to Executive Credit Committee's directive on medium term loan to Gyimantwi Enterprise. When confronted with this at the disciplinary committee hearing, he admitted he did not have authorisation powers in the way he acted and apologised. The list of cheques appellant was confronted with by the disciplinary committee are in exhibit GA 11 at page 207 of the Record of Proceedings.

The allegation of the discrepancy between the reasons given for the interdiction and the charges preferred against the appellant was not denied by the respondent. The trial court and the intermediate appellate court all found as a fact that the reasons for interdiction and the charges for the disciplinary hearing were different.

Article 18(a) of the CBA relied on by counsel for the appellant provides as follows:

"**If an officer is suspected to have committed an offence which might justify summary dismissal or termination, the bank may interdict the officer from duty while further investigation, inquiries or trial are carried out. A copy of the letter of interdiction is to be delivered to the union. During the period of interdiction from duty, the officer shall be entitled to be paid at half of his or her salary. But if he or she is not found guilty of the offence, the officer shall be re-instated in his employment and shall be paid his or her full salary for the period during which he was interdicted.**"

The core idea implicit in this article envisages that an offence would have been committed which would then justify summary dismissal or termination of an employee. In lieu of those actions, management has a discretion to interdict the employee for further investigations and or a disciplinary hearing to take place. After the investigations, the same offence may form the basis of the disciplinary hearings or new matters may be uncovered. Depending on the gravity of the offence, management reserves the right to either terminate, dismiss summarily, or demand a written explanation from the worker before a decision is made. Management reserves the right to also trigger the disciplinary hearing procedure, in which case to ensure fair trial, the disciplinary committee should frame charges embodying the new offences to enable the worker to prepare his defence.

A letter of interdiction only communicates to the worker that an offence is suspected to have been committed which requires a written response, further investigation or depending on the gravity, summary dismissal. It is prudent in ensuring fair trial to hand over such charges to the employee concerned with the date and place of the trial and reasonable time to prepare his defence. Since letters of interdiction are not charges, we reject the submission of counsel for the appellant that the article contemplates the offence for which the worker is interdicted to be the same as the charges at the disciplinary hearing.

We are fortified in our position by a previous decision of this court on the dismissal of a worker of respondent bank. The court reviewed the disciplinary rules of respondent's bank and the differences between a mere query and a disciplinary charge. Bamford-

Addo JSC in the case of **Aboagye v Ghana Commercial Bank [2001-2002] SCGLR 797** held at page 814 as follows:

"Plaintiffs' rights cannot be wished away by a mere presumption, and furthermore a query is not the same as a disciplinary charge or notice of an ongoing disciplinary proceeding. The two queries in "Exhibit E" and "Exhibit G" merely asked the plaintiff to give reasons why he signed the draft No. 177036 dated 17/7/92 for £15,000 and a cable authorising payment of US$13,559.60 on behalf of White Chapel without ensuring that the customer's account were debited and why internal entries were not passed to the debit of customers and to confirm whether the signature on the two transactions were that of the plaintiff which he did. Surely these queries cannot by any stretch of imagination be considered or likened to a disciplinary charge or to notice. Nor did the queries refer to any disciplinary charge against him".

In this appeal, although the appellant was served with a notice of interdiction stating the offences as fraudulent transfer of funds from Total Petroleum Ghana Limited into his account and uncredited lodgement into the accounts of Total Petroleum by the bank's customer, Gyimantwi Enterprise, a formal charge was formulated dated 24th November, 2008 (Exh GA 3) and served on him indicating that he was being tried before the disciplinary committee for authorisation and immediate value given to almost all other banks cheques sent for clearing between 1st January 2007 and April 2008 contrary to laid down policies of the bank and the source of his authority for the actions he took.

The trial judge at page 352 of the record found that all the issues in the charges levelled against the appellant in the memorandum inviting him to the disciplinary hearing and the reasons for his dismissal were raised at the hearing and put across to the appellant. The judge further found that the appellant was given an opportunity to react to all the issues at the hearing. Additionally, the Court of Appeal at pages 452-453 reviewed the report of the disciplinary hearings on the charges and reasons for the dismissal of the appellant and affirmed the findings made by the trial judge that

while the contents of the interdiction letter and the dismissal letter were different, what was stated in the dismissal letter emerged from the investigation of the allegations levelled against the appellant who had the opportunity to be heard on all the charges. Reminding ourselves of the duty imposed on us when exercising our appellate jurisdiction, can one say that the findings, inferences, and conclusions reached by the trial court and affirmed by the intermediate appellate court were unsupportable by the evidence on record?

As stated earlier, we are bound by a long line of sound decisions of law which we do not intend to depart from. Our jurisdiction as the apex court would be properly exercised in favour of an appellant if he is able to satisfy this court that the trial and the intermediate appellate courts failed to properly evaluate the evidence or have drawn wrong conclusions from the accepted evidence. See **Obeng v Assemblies of God Church, Ghana (supra) and Gregory v Tandoh (supra).**

We have scrutinised the record, the evidence of the parties and the proceedings of the disciplinary committee. The evidence is overwhelming that appellant was confronted and questioned about the following:

1. The authorisation and immediate value given other banks cheques sent for clearing between 1st January 2007 and April 2008; see pages 145-152 of the record.
2. Signing letters pledging the bank to honour post-dated cheques issued by Gyimantwi Enterprises; see pages 145-154 of the record.
3. Passing entries disbursing loan facility of Ghc33,600 to the bank's customer instead of the vendor for the purchase of vehicle contrary to instructions of the Executive Credit Committee. Appellant at the hearing admitted he erred because he did not know the vendor at the time; see pages 137-144 of the record.
4. The source of authority for the actions he took; see pages 137-144 of the record.

In the Aboagye's case (supra), two queries were issued by the disciplinary committee to the worker, but no charges were framed for the offences to be investigated by the

committee. In this appeal, a query was issued and in accordance with article 18(1) of the CBA, after further investigations, charges were framed. Even matters which came up after the charges were served on the appellant were put before the appellant at the disciplinary hearing for his comments which he did. We do not expect disciplinary bodies involved in administrative justice to strictly follow procedures in criminal trials in the courts; where any additional charge framed after commencement of trial inevitably would lead to total withdrawal of the original charge and a substitution of fresh charges for proceedings to start de novo. It is sufficient, in our view, for the new charges to be placed before the affected worker for his response before a decision is made. The position would have been different if the fresh charges were not placed before the worker to be afforded an opportunity to respond. In that case, no disciplinary sanctions could be applied on those charges.

We are of the view that the appellant was not disadvantaged in anyway when he appeared before the disciplinary committee. We are satisfied that the trial court and the intermediate appellate court properly evaluated the evidence before them and drew the right conclusions from the accepted evidence. The appellant was served with the charges to answer at the disciplinary hearing. The outcome of the hearing is contained in the proceedings tendered at the trial. Both courts below were satisfied that the fraudulent transfer of funds and uncredited lodgement into the accounts of Total Petroleum by the bank's customer, Gyimantwi Enterprise; the immediate value given by the appellant to bank's cheques sent for clearing contrary to laid down policies of the bank were all serious infractions which by the bank's policies warranted dismissal. Their findings are supported by the record. Accordingly, we will decline the invitation to interfere with those findings.

MEMBERSHIP OF THE DISCIPLINARY COMMITTEE:

This brings us to the next complaint under the omnibus ground and that is the membership of the disciplinary committee. According to the appellant, the disciplinary committee was not properly constituted in accordance with article 14(g) and rule 5.1 of the Staff Service Rules because it did not have a membership of six and that some officers who were required to be on the committee such as the head of the legal

department who was required to chair did not, leaving a representative from the legal service division to chair. The respondent disagrees arguing that the committee was properly constituted and that appellant's argument on this is porous and should be rejected.

We are not very much attracted by the submissions of the appellant's counsel on this. We do not think any of the rules of the CBA has been breached for constituting a panel of five instead of six to investigate the case of the appellant. Rule 5.2 of the Staff Service Rules, Exh 'GCB' 5 provide for a disciplinary committee of six members made up of the head of legal as chairman. Article 14 of the CBA Exh 'GCB' 14, however, makes provision for the same disciplinary committee composed of five members and chaired by the General Manager, Legal Services Division, or his representative. There is therefore a clear conflict between the composition specified in the Staff Rules and that of the CBA. Section 105 of the Labour Act, 2003, (Act 651) states that the provisions of the collective agreement shall be regarded as terms of a contract of employment and if there is any conflict between the terms of a collective agreement and the terms of any contract not contained in the collective agreement, the collective agreement shall prevail unless the terms of the contract are more favourable to the worker.

In this appeal, selecting a representative of the Legal Services Division to chair the committee instead of the General Manager and requesting the HRD representative to play the dual role of a member/recorder instead of a non-member recorder in our opinion, did not offend any provisions of the CBA. In any case, members of the disciplinary committee are not named individuals appearing in their personal capacities. They are representatives of divisions within the bank. In that respect, any responsible officer of the division could be authorised to represent the division. Further, recorders who sit on such committees are not essential members of the committees. They are there to record the proceedings unless they are appointed as member/recorder. We find no merit in this submission and decline to interfere with the opinion of the Court of Appeal.

CONFLICT BETWEEN RECOMMENDATION OF A DISCIPLINARY COMMITTEE AND DECISION OF MANAGEMENT:

The appellant has also advanced in support of the omnibus ground that respondent bank failed to give any reasons to the union for departing from the disciplinary committee's recommendation. According to the submissions by counsel, three officers were investigated, and recommendations made on the three. Counsel submitted that while management accepted and implemented the recommendation in respect of two, in the case of the appellant, the disciplinary committee recommended that he should be demoted but management failed to uphold that recommendation and substituted demotion for dismissal. According to counsel, in the process, management breached article 14(h) (iii) of the CBA which enjoined it to inform the union with reasons why it was unable to uphold the recommendations of the committee. Counsel submitted that the union should be informed of the reasons even before the decision is carried out. However, in this case the bank failed to inform the union as required by the CBA and yet the court below failed to hold that the respondent bank breached the CBA. This, according to counsel, has made the dismissal unlawful.

SHIFTING OF EVIDENTIAL BURDEN WHEN THE NEGATIVE IS ASSERTED:

Counsel for the appellant then took on the trial judge and the Court of Appeal for dismissing his arguments on the evidential burden. According to Counsel, the reason given by the trial judge and the Court of Appeal that the appellant who bore the evidential burden to prove that the union was not informed failed to do so was flimsy. Admittedly, in answer to which of the parties bore the evidential burden to prove that the union was informed, the learned High Court judge after her evaluation of the evidence held at pages 352-353 as follows:

"Sure, this is true but what positive evidence on record suggests that reasons for the departure were not given to the Union? It is not in dispute that there were several correspondences between the Union and Executive Management on the matter and the Union even wrote to plead on behalf of the Plaintiff. He who asserts must prove. I refer to the case of OWUSU V

TABIRI & ANOTHER [1987-88] 1 GLR @ 287. The plaintiff has failed to establish that Management did not inform the union of reasons as to why the recommendation of the Committee was not upheld. I find this as a fact".

On appeal to the Court of Appeal on the failure of management to inform the union, this is what the Court of Appeal also stated at page 454 of the record:

"It is the Plaintiff who is alleging that Management did not inform the Union about its reasons for not upholding the recommendations of the disciplinary committee as required by Article 14(h)(iii). It is clear from the record that the plaintiff led no evidence in support of this position and the trial judge's finding that the said allegation was unproved is sound in law. I find in answer to the third question that it is the Plaintiff who bore the burden of proof and he failed to discharge it".

Counsel for the appellant decried the reasons given by the two lower courts for dismissing its claim for the management to inform the union of the change in the recommendations of the disciplinary committee. According to counsel, it was the respondent's burden to prove that it had complied with article 14(h)(iii) of the CBA. However, the trial court wrongly allocated the burden of producing the evidence to the appellant and this was concurred to by the Court of Appeal. Counsel argued that since appellant made a negative assertion of matters within the peculiar knowledge of the respondent i.e., that respondent did not inform the union while the respondent asserted the positive that it notified the union, the evidential burden then shifted unto the respondent. Counsel cites the cases of **Sumaila Bielbiel v Adamu Dramani [2012] 1 SCGLR 370, Salifu v The Republic [1974] GLR 291** and **Republic v Bonsu, Ex-parte Folson [1999-2000] 1 GLR 523** in support of his submissions.

The position of the law admits of no controversy. Section 14(1) of the Evidence Act 1975 NRCD 323 contemplates situations where the evidential burden may shift. One such situation is where, as a rule, the plaintiff who is the party on whom the burden rest asserts the negative and the defendant who is required to disprove asserts the positive. In the case of **Boakye v Asamoah & Anor. [1974] 1 GLR 38**, the plaintiff

asserted that the amount paid was ¢120.00 while the defendant was saying that it was not ¢120.00. The trial magistrate shifted the onus on the defendant to prove that he paid more than ¢120.00. Osei-Hwere J (as he then was) held that the order of the magistrate was to call on the defendant to prove the negative. In the words of the learned judge at page 45:

"if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative".

Again, in **Salifu v Mahama & Ors [1989-90] 1 GLR 431**, Benin J (as he then was) held that:

"Taking for guidance the rule of evidence that where the subject matter of a party's allegation (whether affirmative or negative) was peculiarly within the knowledge of his opponent, it lay upon the latter to rebut such allegation, it would be an almost impossible task to ask the applicant to prove that the respondents, the judgment creditors, were men of straw when he did not know them previously, let alone the work they did and other relevant facts. The applicant only had to raise a reasonable ground as to their inability to refund money to be paid to them and then the burden would be shifted to the respondents to satisfy the court that they would be in a position to refund the money paid to them should the appeal succeed; for they only knew their resources, means, assets, liabilities, and commitments. Since it would seem from the available evidence that the respondents had not been in any serious or gainful employment since the accident, that was enough for the applicant and the court to, prima facie, conclude they would not be able to refund any money paid to them. The respondents were therefore enjoined to produce evidence peculiarly within their knowledge to displace that reasonable prima facie conclusion". See also **Salifu & Anor v. The Republic [1974] 2 GLR 291** cited by counsel for the appellant.

Relating the above cases to this appeal, the question we pose is which of the parties bore the evidential burden to prove that the union was notified about the decision of management to substitute the punishment prescribed by the disciplinary committee from demotion to dismissal. The appellant asserts that the union was not informed of management's decision while the position of the respondent bank was that the union was informed. In so far as the appellant asserted that the union was not notified, he asserted the negative. The respondent who insisted that the union was notified asserted the positive and therefore assumed the evidential burden to lead evidence to establish that position. In **Fynn v Fynn & Osei [2013-2014] 1 SCGLR page 729** this court held that one of the legal grounds that the Supreme Court would overturn concurrent findings of two lower courts is when the finding was based on erroneous proposition of law. In our opinion, the trial court misdirected itself and the Court of Appeal concurred by placing the evidential burden on the appellant who asserted the negative. That finding by the two courts placing the evidential burden on the appellant to prove the negative is an error in law. We hereby set it aside.

FAILURE TO NOTIFY THE UNION OF THE DECISION OF MANAGEMENT NOT TO UPHOLD THE RECOMMENDATIONS OF THE DISCIPLINARY COMMITTEE:

What, then, is the implications of correcting the shift in the evidential burden on the merits of the appeal before us? Article 14(h)(iii) of the CBA provides that:

"where Management is unable to uphold the recommendation of the committee it shall inform the Union with reason as to why it is unable to do so".

The key phrase here is "**shall inform the union**". What if as in this case there is no evidence led by the respondent that the union was informed. To be informed is to be notified, told, apprised, or advised. It does not denote any negotiations with or consent of the union before the decision substituting another punishment is made. The manner of the information is not provided in the CBA. In that regard, good corporate governance requires that any reasonable form of notification such as a letter, face to face meeting or any electronic medium of communication would suffice. The timing of

the notification should also be immediately the decision is made by management or contemporaneously to when the decision is communicated to the worker concerned.

Article 48 of the CBA, however, provides an internal mechanism to be followed in the handling of grievances and breaches of its provisions such as the one under discussions. The procedure has five steps starting from an appeal or petition by the worker and countersigned by the union to the head of department, next to General Manager and Human Resource Manager, then summoning the Standing Joint Negotiating Committee to meet and failing resolution by the four earlier steps, referring the matter by either party to the National Labour Commission in accordance with the Labour Act. The reason for this detailed internal procedure is clear. The union is not the disciplinary body within the bank. The information to the union is not intended to take over the disciplinary role of management but to promote good corporate practice and industrial harmony. Article 16 of the CBA vests management with power to dismiss summarily for causes involving dishonesty, fraud, wilful refusal to obey legitimate and reasonable instruction, proven gross misconduct. Further all penalties are applied at the discretion of management depending on the circumstances and gravity of the offence. Thus, article 56 of the CBA on responsibility of parties to the CBA states that **"the union recognises the right of the bank to employ, promote, demote, transfer, suspend or otherwise discipline any employee for just cause…… The union also recognises the right of the bank to operate and manage its business in all respects and to maintain order and efficiency…. In all cases the laid down grievance procedure shall apply…"**.

In **Bani v. Maersk Ghana Limited [2011] 2 SCGLR 796,** following the findings of a subcommittee of the company, the employee was dismissed. This court held that even if the finding of the subcommittee were ultra vires, it would not derogate from the defendant's common law right to dismiss the plaintiff for proven misconduct. Once there are facts on the record justifying the defendant/respondent dismissing the appellant for misconduct, the fact that the findings were made by a committee that was acting, allegedly, ultra vires, is irrelevant.

Thus, where the CBA has vested power in management (as in this appeal) to dismiss summarily, the employer's power to exercise it is **"short, sharp and peremptory to the extent that where the employer has set up a departmental board of inquiry which has made certain recommendations to the employer the decision to dismiss is entirely for the employer who is not bound to accept the recommendations**": see R**epublic v. State Hotels Corporation; Ex parte Yeboah [1980] GLR 875** where the Court of Appeal per Edusei JA held at page 879 that:

"In our opinion, the recommendations of the investigation/fact finding enquiry set up by the respondent Authority was not binding on management. The Chief Executive was right in making his own decision to dismiss the appellants summarily".

Based on the provisions above, it is our considered opinion that the failure by the respondent to comply with article 14(h)(iii) of the CBA could be remedied by the internal procedures within the CBA. This, per se will not nullify or make management decision on the worker unlawful. We are, therefore, unable to agree with counsel for the appellant that the failure by respondent to comply with article 14(h)(iii) rendered the dismissal unlawful.

OBEYING SUPERIOR ORDERS:

This brings us to the next submission under the omnibus ground. The appellant attacks the court below for holding that the appellant disobeyed instructions of the bank by disregarding the terms of the loan when the disciplinary committee found that the blame was to the entire Bole branch. In the opinion of counsel, the branch manager accepted responsibility for whatever happened. Appellant also alleges that the customer to whom he lent money was the main customer of the bank and that it was a decision of the Bole branch that the staff could lend money to save customer's cheques from being returned to keep their prime customers.

Counsel further submits that the instructions given to the appellant by the Bole branch manager to co-sign the letter pledging on behalf of the bank to pay post-dated

cheques were not illegitimate because article 13(a) of the CBA and Rules 2.1.2 of the Staff Service Rules mandated staff to obey all legitimate orders and directions given from time to time by any person under whose jurisdiction, superintendence or control he may for the time being, be placed. It is also the case of the appellant that the Bole branch manager who instructed him to sign the letter was the person he was placed under and required to obey. The appellant again argues that the letter he signed did not occasion any financial loss to the bank.

In response, the respondent submits that by keying the cheques and his branch manager authorising the transaction when it had not been ascertained that the customer had enough money in his account, appellant and his manager gave instant value to the cheques which were returned unpaid because the customer did not have sufficient funds to pay for the cheques. In acting that way, the appellant and his manager disobeyed legitimate instructions on the payment of cheques which constituted misconduct and therefore the Executive Committee was entitled and justified in sanctioning the appellant with dismissal. Respondent further submits that appellant was given a hearing in which he admitted signing exhibit GCB 8 to the customer stating the approved terms and conditions of the facility i.e., payment was to be made to the vendor but in disbursing the facility rather credited the customer's account with Ghc36,600.00 and issued a payment order of Ghc20,000.00 to the vendor and made the remainder of Ghc13,600.00 to the customer. Respondent also argues that appellant and his manager again varied the terms of the approval for the payment of the 4x4 Pick Up when they pledged to honour post-dated cheques of the customer on the due dates' contrary to the Executive Credit Committee's instructions. This refusal to obey legitimate instructions justified the dismissal meted out to the appellant.

The Court of Appeal reviewed the findings of fact made by the trial court on these submissions. It concluded that it was satisfied that the reasons for the findings were sound and borne out by the evidence on record and in line with the CBA and the law. The Court of Appeal then itemised some acts of misconduct on the part of the appellant which were incompatible with the faithful discharge of his duty to his employers and constituted summary dismissal. These were:

1. Blatant disregard by the appellant and his manager of the terms of the facility granted Gyimantwi Enterprise which stated that the money was to be paid directly to the vendor of the vehicle to be purchased. But appellant and his colleague chose to credit part of the amount to the customer's account and in doing so gave the customer access to part of the facility and committed the bank to honouring the customer's post-dated cheques issued on the balance.

2. Admission by appellant that he sometimes personally paid money into the customer's account when there were insufficient funds in the account to enable his cheques clear and later got refund from the customer by payments into appellant's account.

In article 13(a) of the CBA, employees were only required to "**observe, comply with and obey all legitimate orders and directions which are in the interest of the bank**". In that regard, though the appellant was working directly under PW1, the Bole branch manager, he was only required to obey legitimate instructions.

The defence of obeying superior order has been held in law to be a weak defence which sometimes, depending on the peculiar facts of a case, will not inure to the benefit of any officer working under superiors. If while obeying superior orders appellant had been made a 'sacrificial lamb' and victimised with disproportionate punishment, that would have been the price to pay for opting to follow mortal man rather than the code of ethos carved out to shape the work ethics and ensure smooth functioning of the bank.

Halsbury's Laws of England (4th ed), Vol. 11(1) has this principle on superior orders at p. 34, para. 27:

"**The mere fact that a person does a criminal act in obedience to the order of a duly constituted superior does not excuse the person who does it from criminal liability, but the fact that a person does an act in obedience to a superior whom he is bound to obey, may exclude the inference of malice or wrongful intention which might otherwise follow from the act**."

In the case of **Yaokumah v The Republic [1976] 2 GLR 147** a major in the Army drove a military vehicle to the Ghana-Togo border and loaded uncustomed goods headed for Accra. He was apprehended at a check point and arrested. At his trial, he pleaded the defence of superior orders. On appeal to the Court of Appeal, Amissah JA stated the legal position in the following words:

"**This in effect amounts to a defence of superior orders. We agree that a subordinate officer is obliged to obey the commands of his superior. But this obligation is limited to commands which are lawful or at least are not obviously unlawful. Besides the commands must be given in the course of duty….. He was not under a duty to obey or to comply with any such order or request."**

Again, the submissions of appellant that he did nothing wrong because it was a decision of the Bole branch that the staff could lend money to save customer's cheques from being returned to keep their prime customers does not appeal to us. We will not buy into the defence of an unlawful act being legalised because it has been made the practice in an establishment. No matter how long the practice may be, what is unlawful by the CBA will remain unlawful.

We have combed through the record and are satisfied that the findings of fact made on this issue by the trial High Court judge and concurred to by the Court of Appeal are justified and borne out of the proceedings at the disciplinary hearing and at the trial court.

On our part we found from the record some breaches of respondent bank's rules by the appellant. These are first lending money to a customer of the bank without the permission of the Managing Director. Appellant admitted that customer Gyimantwi paid money into his personal account and at other times he paid monies into the customer's account when he did not have sufficient funds to enable his cheques to go through. This behaviour on the part of the appellant contravened article 15(c) of the CBA which provides that "**An officer shall not lend money in his/her private capacity to a customer or officer of the Bank**." Article 15(d) also provides

"**Except with the permission of the Managing Director, an officer shall not guarantee in his or her personal capacity the pecuniary obligations of another person or agree to indemnify another person from loss.**"

The second breach is carrying on private farming activities without the permission of the Managing Director as required by article 15(e) of the CBA. It states that "**Except with the permission of the Managing Director, an officer shall not engage in any other banking financial business or in any commercial business whether for reward or otherwise either on his/her own account or as agent for another or others**."

The trial judge concluded that the appellant had breached the rules and regulations of respondent bank making his conduct incompatible with the faithful discharge of his duty to his master. There is no legal justification for us to do otherwise. We therefore decline the invitation by the appellant to reverse the findings.

UNFAIR DISMISSAL

Argued along with the omnibus ground is the contention of appellant in ground 3 that the court below erred in upholding his dismissal which was unfair. Counsel for the appellant has forcefully argued that the trial court below did not consider the effect of section 63(4) of Act 651 when it impliedly held that the dismissal of appellant was fair. In the opinion of counsel, the dismissal was done in violation of the laid down procedures in the CBA and the staff service rules.

The concept of fair and unfair termination of employment is a novel provision introduced in Part VIII of Act 651. Thus, section 62 of the Act provides as follows:

"Section 62—Fair Termination.

A termination of a worker's employment is fair if the contract of employment is terminated by the employer on any of the following grounds:

(a) that the worker is incompetent or lacks the qualification in relation to the work for which the worker is employed;

(b) the proven misconduct of the worker;

(c) redundancy under section 65;

And section 63(4) also states:

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

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

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

Being a creation of statute, the concept places an obligation on the employer to justify the termination of the appointment of a worker. The overarching condition is that the reason for the employee's termination must be fair and in accordance with due process of law. Dismissal as a right in labour relations was omitted from those sections thus creating a challenge among stakeholders in the labour fraternity whether dismissal has been abolished under the Act or is to be used interchangeably with termination. The scope of sections 15-18 and 62-64 of Act 651 and its correlation if any with a claim for wrongful dismissal is what we now turn to?

One of the grounds which Act 651 justifies termination of employment is by mutual agreement between the employer and the worker. This is provided for in section 15(a). Where a contract of employment provides that either party can terminate the relationship by giving a specified period of notice or salary in lieu of notice, that mode of termination could be triggered without the employer or worker assigning any reasons. In our opinion, where termination is resorted to under this provision, the fairness or otherwise of that termination cannot be called into question. There is judicial support for this. In **BANNERMAN-MENSON VS. GHANA EMPLOYERS' ASSOCIATION [1996-97] SCGLR 417**, the terms of employment of the parties stated that either party may terminate the relationship by giving six months' notice.

The employer gave six months' notice of its intention to retire the appellant and dissatisfied the appellant sued. Aikins JSC explained the legal position in such contracts of mutuality at pages 422-423 as follows:

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

Where the termination is not by mutual agreement and the employer is compelled to terminate on other 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 perfume his role due to sickness, disability, incompetence or lack of qualification for the position employed or other reasons which do not merit summary dismissal, then the protocol envisaged under Act 651 is that the reasons for the termination must be clearly stated and must be seen to be fair. This is because though the employer has the power by contract and law to terminate on those grounds, that power has been curtailed by statute and can no longer be exercised arbitrarily or

capriciously. It must justifiably be substantively and procedurally seen to be fair. Failing that acid test, the courts will have power to inquire into the fairness of the decision to terminate and pronounce on it. The missing link, however, in this novel provision is the measure of fairness and unfairness. This has not been provided for in Act 651 making it unclear and uncertain for employers and stakeholders to fashion out the appropriate framework to follow. It is in scenarios like this that the courts are called upon to develop the framework to guide the stakeholders how to assess the fairness or unfairness of their actions substantively and procedurally.

This is exactly what this court attempted to do in **KOBI vs. GHANA MANGANESE [2007-2008] SCGLR 771** where this Court at holding (3) stated that:

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

It does not appear to us that sufficient guidelines have been provided by the courts and regrettably, we do not intend in this appeal to formulate the framework because the central issue before us is one of summary dismissal and not termination under sections 62-64 of Act 651.

SUMMARY DISMISSAL UNDER THE LABOUR ACT 651

We intend, now, to address the legal effect of the dismissal within the context of Act 651 and the current labour environment especially the facts in this appeal where the obligations imposed on the parties in their negotiated contract of employment is in issue.

Summary dismissal is a common law right which the employer exercises over an employee. This right enables the employer to severe or cut short an employee's appointment immediately where the employee does something that threatens the existence of the business or harms the reputation of the employer. Examples of such conduct are gross misconduct, dishonesty, criminality, competition with the employer's business, violent conduct, drunkenness, insubordination, dereliction of duty, refusal to follow legitimate instruction among other grounds provided in the contract of employment. Most often the worker would have destroyed the trust and confidence required between an employee and employer.

In **KOBEA vs. TEMA OIL REFINERY [2003-2004] 2 SCGLR 1033 at pages 1039 and 1040**, dismissal was explained by Twum JSC 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 dismissal."**

Again, in **LAGUDAH vs GHANA COMMERCIAL BANK LIMITED [2005-2006] SCGLR 388**, this court speaking through Badoo JSC stressed that an employer has the right to summarily dismiss an employee whose conduct is incompatible with the due or faithful discharge of his duties.

In **LEVER BROTHERS GHANA LIMITED V DANKWA [1989-90] 2 GLR 385 at 388**, the Court of Appeal held that the power to determine an employment summarily meant that an employer could exercise such right in haste and on the spur of the moment usually because the employee has been caught red-handedly committing the offence.

Termination and dismissal as ways of severing relationship between workers and employers developed out of the common law. However, in Ghana, termination has been developed and given statutory recognition in sections 15-18 and 62-64 of Act

651 while dismissal is not mentioned. The fact is there are similarities and differences between the two terminologies.

One similarity between termination and dismissal is that just like death, retirement and resignation provided for in the contract of employment, they constitute ways by which a contract of employment could be determined, disengaged, and severed. Another similarity is that the grounds for termination and dismissal are negotiated in advance and specified in contracts of employment.

There is, however, a clear distinction between termination of a contract of employment and dismissal. Termination usually goes with notice and may be voluntary or done for organizational or business reasons while dismissal is done because of the behaviour or wrongful act of the employee and notice is not required. Termination may not have reasons assigned while because of the sharp and coercive nature of dismissal reasons are assigned for the disengagement. Dismissal is usually punitive in nature while termination is not and in most cases is simply a process to bring a contract of employment to an end. Again, termination of employment is a right exercised by both employer and worker while dismissal is the sole right of an employer. Further, under termination, the worker receives an end of service benefits such as his gratuity, but a worker who is dismissed loses all his benefits.

The differences between the two terminologies have been recognised and accepted by our courts since the common law was introduced as part of the received laws of this country. Under the current fourth republican dispensation, Article 11 recognises the common law as part of the laws of Ghana. In that regard, a common law remedy applied as part of our labour regime will continue to be part of the laws of this country until it ceases to exist by express wording in a local legislation or clear conflict between the application of that common law right and the provisions of the local legislation. We have searched through Act 651 which is the current legislation affecting labour relations in this country and have found no such express departure or conflict between the common law remedy and local legislation. On the contrary, section 176 of Act 651 provides for the modification of existing enactments as follows:

> **"The provisions of any enactment of relevance to this Act in existence before the coming into force of this Act shall have effect subject to such modifications as are necessary to give effect to this Act, and to the extent that the provisions of any of such enactment is inconsistent with this Act, the provisions of this Act shall prevail".**

Our interpretation of this provision is that Act 651 did not repeal all previous provisions of laws dealing with labour in this country unless they conflicted with the provisions of the Act. In any case a scan through other provisions of Act 651 will leave no one in doubt that the Act recognises and acknowledges the existence of the common law remedy of dismissal.

Section 30 (3) headed "Termination of Employment Not To Affect Leave Entitlement" 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"**.

Section 57 (8) on Maternity, Annual and Sick Leave provides that an **"employer shall not dismiss a woman worker"** because of her absence from work on maternity leave.

Section 119 (2) headed "Exposure to Imminent Hazards" states 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.

And finally, section 127 (2) headed Discrimination states 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.

We can safely conclude that the careful choice of words and language by the Legislature in the sections referred to above, where in some cases "termination" and "dismissal" were used disjunctively is a clear manifestation of the intention on the part of the law maker to give effect to the separate and independent existence of the two remedies in our labour law. We further believe that the failure to mention dismissal as one of the remedies for severing relationship with a worker in sections 15-18 and 62-64 of Act 651 would not affect the right of labour unions and their management to agree to include it in their contracts of employment as was done in the CBA under consideration between the Ghana Commercial Bank Ltd and the Union of Industry, Commerce and Finance Workers of TUC.

In the appeal before us, the parties being persons of full age and understanding and represented by labour experts on both sides negotiated in Article 16 of the CBA as follows:

"Management may effect summary dismissal for just and reasonable cause involving dishonesty, fraud, wilful refusal to obey legitimate and reasonable instruction, proven gross misconduct and any of the provisions of sections 12(a), (b) and 13."

The record revealed that management after the disciplinary investigations took a serious view of the conduct of the appellant for signing the letter pledging the bank to honour post-dated cheques when the customer did not have sufficient funds in his account. The appellant also refused to obey legitimate instructions by passing entries disbursing a loan facility for the purchase of a vehicle by Gyimantwi Enterprises contrary to the Executive Credit Committee's instructions. Based on these infractions, some of which the appellant admitted he did not have authorisation powers in the way he acted and apologised, he was dismissed summarily. It is the fairness of this dismissal that the appellant is challenging in this ground.

We have no hesitation in stating that where a worker is dismissed summarily and the employer cannot justify that the dismissal conforms with the terms of the contract of employment, the dismissal would be wrongful, and the courts would be clothed with power to strike down any such dismissal of a worker which is contrary to the CBA.

This is how Ansah JSC explained it at pages 794-795 in **Kobi v Ghana Manganese Co Ltd (supra):**

"It was time the 'traditional rule' epitomised by Aryee v State Construction Corporation (supra), was re-considered because it had the potential of resulting in oppression by the employer and creating docility in the employee. With the fear of losing his job at anytime depending on the whims and caprice of his employer who may dismiss him at will, staring at him perpetually, the worker enjoyed no security of tenure. He would become a malleable tool in the hands of his master and do his bidding. However, his consolation was that a collective agreement may require that the employer could only terminate an employment; upon certain contingencies, namely, the employee being found guilty of an offence in a schedule of offences in the collective agreement; or the laws of the land or statute regulating employment in the land for the time being; or declared redundant under special conditions".

In the same way if the contract of employment vested the employer with the right to dismiss a worker and the employer acted on that power based on justifiable evidence, the court will uphold the dismissal as binding based on terms negotiated by the parties in their CBA under section 105 of the Act 651 unless the contract is unconscionable, i.e. so severely one-sided and unfair to one of the parties that it shocks the conscience and it is thus deemed unenforceable. This is in consonance with the time-tested common law strong rule of freedom of contract.

In **Kobi v Ghana Manganese Co Ltd (supra)** this court per Ansah JSC examined the import of a contract of employment within the framework of disciplinary actions imposed by employers and held at pages 790-791 as follows:

"In looking for justification for the action of the company, where a collective agreement existed between the employer and the employees, that must be the yardstick or the acid test to apply……. As stated, when the parties have provided for certain eventualities and procedures in a collective agreement, they ought to apply fully so as to justify any action by the parties to the

agreement. The binding efficacy of collective agreement…. Must never be whittled away".

In this appeal management dismissed the appellant based on the terms of the contract negotiated and agreed to in the CBA. We find the reasons provided for the dismissal to be lawful and will not interfere with the decisions of the trial court and the Court of Appeal on this ground.

FAIR HEARING IN ADMINISTRATIVE JUSTICE:

This brings us to ground of appeal 2 which is:

"The court below erred in law when it held that plaintiff was given a fair hearing within the defendant/respondent/respondent concerning his dismissal".

The appellant argues that he was not given a fair hearing because he was taken by surprise when he was confronted with other issues other than those for which he was invited to the disciplinary committee and therefore, could not prepare with documentary evidence to show the committee. This, according to him was evidenced from failure to give him opportunity to confront the inspectors who did the audit during their investigation or at the disciplinary hearing and further his right of appeal under the CBA was hindered by the managing director. Further the hearing was biased against him as the chair of the disciplinary committee was a judge in its own cause by statements made by the chair at the beginning of the proceedings.

In response, the respondent submitted that in accordance with the decision of the court in the Aboagye case (supra) a disciplinary committee was constituted, charges were framed, and the appellant given the opportunity to appear and answer questions. The respondent also submitted that the proceedings at the disciplinary hearing were recorded, fair and that no evidence was adduced to support the assertion of bias or that the respondent treated appellant unfairly. On the appeal to the board through the Managing Director, the respondent stated that the appeal was submitted on 28th

August 2009, three months after the dismissal instead of the 30 days provided in the rules and so the appeal was dismissed.

Since fair trial has been raised, we turn to the primary document of the land for guidance. Like the property rights of spouses, labour matters touching on the right to work has been classified by this court as a human rights issue. See the dictum of Benin JSC in **REPUBLIC V HIGH COURT, ACCRA (INDUSTRIAL AND LABOUR DIVISION COURT 2); EX PARTE PETER SANGBER-DERY [2017-2018] 1 SCLRG 552.** In this case the Supreme Court noted that the prohibited grounds for terminating an employment under section 63 of Act 651 are simply restatements of the human rights provisions under the Constitution. Benin JSC noted at page 569 as follows:

> **"Upon a close look at section 63 of the Act, it will be noticed that the grounds stated therein as grounds of unfair termination of employment are largely taken from the Human Rights provisions of the 1992 Constitution particularly articles 24, 26 and 29 and it appears the legislature was merely seeking to give effect to those provisions."**

Being a human rights issue under our Constitution, the right to a fair trial must be adhered to at all costs for the development of our democracy. Every step taken in the adjudication process should be manifestly and undoubtedly be seen to be fair. Thus, Article 19(13) of the Constitution dealing with the duties of adjudicating authorities provides as follows:

"An adjudicating authority for the determination of the existence or extent of a civil right or obligation shall, subject to the provisions of this Constitution be established by law and shall be independent and impartial and where proceedings for determination are instituted by a person before such an adjudicating authority, the case shall be given an adjudicating fair hearing within a reasonable time".

To give effect to the aged-old principle of fair trial in labour matters, adjudication of labour disputes affecting misconduct of workplace staff before disciplinary committees should as nearly as possibly follow adjudication practices which promote procedural fairness such as natural justice. There must also be pre-hearing protocols which eliminate elements of surprises. Every effort must be made to avoid 'ambush' or surprises likely to work against the interest of the staff under investigations. Elements of surprises have been abolished in civil disputes in this jurisdiction by the passage of C.I. 87 which introduced the exchanges of witness statements and exhibits at case management conference before trial. In criminal cases accused persons now have true sense of justice after the interpretation of Article 19 by this court in the celebrated case of **Republic v Baffoe-Bonnie & Ors [2017-2020] 1 SCGLR 327.** Surprises, therefore in administrative justice should be a matter of concern to the court.

The fairness expected by the framers of the Constitution has been further given a boost in Article 23 where administrative officials and tribunals of administrative bodies have been charged to act fairly. According to Article 23:

"Administrative bodies and administrative officials shall act fairly and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal."

Administrative bodies, therefore, exercising discretionary power to determine the fate of workers facing disciplinary hearings are to make conscious effort to guard against "illegality, irrationality, and procedural impropriety" and to act with fairness and reasonableness if the justice for all enshrined in the Constitution is to be given effect.

The appellant in that regard has argued that he was taken by surprise when he was confronted at the hearing with other issues which were not part of the charges. He also stated the hearing was biased against him, the chair of the disciplinary committee was a judge in its own cause, and he was not given the opportunity to confront the inspectors who made adverse findings against him leading to his interdiction, investigation, and subsequent dismissal. The appellant gave an example as the

opening comments of the chairman of the disciplinary committee at page 59 of the record.

If, as alleged by the appellant, the disciplinary hearing was fraught with such acts, that certainly would be a blight on the right to a fair trial which the courts and every citizen in general must aspire to protect. The fairness of a trial is not limited to the prosecution or the committee charged with investigating a disciplinary matter. The defence also has a role to play in ensuring that the process of fairness is complete. So, where an appellant as in this case has concerns about matters which he was not charged with but failed to object to at the trial and was content to provide answers without any compulsion, he cannot at this late stage raise these matters as grounds of appeal especially when the record did not capture any of these alleged infractions. Besides, the appellant did not plead any of these serious breaches at the trial court and no evidence was led on them at the trial.

A second appellate court such as the Supreme Court in reviewing the record will limit itself to the factual issues raised at the trial and not on appeal to this court. We have read the introductory remarks of the chairman of the disciplinary committee which the appellant alleges were prejudicial to the fair hearing of the investigation. The chairman after stating the reasons for the invitation of the appellant stated the matters the appellant was said to have been involved in and how he should answer allegations i.e., an admission or a denial with evidential proof and not just bare denial. This is the concluding comments from the chairman:

"**Since the allegations are based on a report of an inspection, we will require you to admit them or deny them. If you are denying them, you must come with unimpeachable proof of the denial and not just by word of mouth**".

We find nothing prejudicial about these remarks which should incur the wrath of the appellant and to accuse the disciplinary committee of being bias and judges in their own cause. We are satisfied that the appellant received fair hearing when he appeared before the disciplinary committee and that the constitutional requirements in articles 19(13) and 23 were satisfied in this matter. We find the appellant's conduct

incompatible with the faithful discharge of his duty to his employers, the bank. Accordingly, we find no merit in the appeal and same is dismissed.

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG, JSC:-

My Lords, the facts and the law in this case persuade me to a conclusion different from the rest of you my esteemed and honourable colleagues. I therefore herewith set out the reasons for my decision to grant one of the reliefs claimed by the plaintiff. This case involves a claim by a dismissed worker for re-instatement in an employment that does not have a public element to it and as this is a new area in our labour law my judgment on this occasion will be a bit long so bear with me.

THE FACTS

The genesis of this case is a letter of interdiction dated 3rd October, 2008 which the defendant/respondent/respondent (the defendant) wrote to the plaintiff/appellant/appellant (the plaintiff), its employee working at the Bole branch of the bank, interdicting him for his alleged involvement in acts of fraudulent transfer of

funds between the bank accounts of Total Petroleum Ghana Limited and Gyimantwi Entreprise (Gyimantwi), a customer of the branch. The plaintiff had by then worked continuously with the defendant for 26 years and risen to the rank of Chief Clerk. Following upon the interdiction, the plaintiff was invited to face a disciplinary committee set up by the defendant on the basis of provisions of a Collective Bargaining Agreement (CBA) it signed with the workers representatives. The plaintiff was served with a charge for the enquiry by the Disciplinary Committee but the charge was different from the reason for which he was interdicted. The charge stated that the plaintiff authorized and gave immediate value to almost all other banks cheques sent for clearing between 1st January, 2007 and April, 2008 contrary to laid down policies of the bank. The plaintiff attended upon the Disciplinary Committee and took objection to the shifted ground on which he was made to face disciplinary proceedings. He nevertheless participated in the enquiry and presented his defences. In fact, the investigations went beyond the matter of giving immediate value to other banks cheques to include his role in the disbursement of a loan approved by the bank for Gyimantwi to purchase a vehicle for its business.

My Lords, Gyimantwi at the material time was a contractor and dealer in petroleum products at Bole and the major customer of the Bole Branch of the defendant. In its report at the end of the enquiry, the Disciplinary Committee acquitted the plaintiff of being involved in the manipulation of the accounts of Total Petroleum Ghana Limited and giving immediate value to other banks cheques. However, the Committee found that the plaintiff and the branch manager jointly signed documents for the disbursement of the loan granted to Gyimantwi in a manner contrary to the conditions of approval of the said loan. The plaintiff signed those documents as acting Second-in-Command of the branch at a time the actual officer was said to be on leave. This, the Committee held, constituted misconduct under the CBA for which the plaintiff was liable to be sanctioned.

It must be stated at the outset that the Branch manager was also made to face disciplinary proceedings and when he was questioned about the unapproved disbursement of the loan to Gyimantwi, he accepted responsibility as the one who requested the plaintiff to sign off the impugned letter and entries. After his disciplinary

hearing, the Committee recommended that he be dismissed and he was accordingly dismissed. He did not challenge his dismissal and even testified at the trial of this case in defence of the plaintiff. One Mohammed Abdul Fatawu of the Bole Branch was also investigated for the same matters but the Committee did not find him culpable so he was exonerated.

As punishment for the misconduct the Committee found against the plaintiff, it recommended to the Executive Management Committee, which is the disciplinary authority of the defendant in respect of workers of the category of the plaintiff, that he should be demoted as no dishonesty was established against him. However, the Executive Committee did not act in accordance with the Committee's recommendations but decided, as permitted by Article 18(c) of the CBA, to dismiss the plaintiff from its employment. In the letter communicating the decision, the reasons for the dismissal were stated as; "(a) Signing the letter pledging the bank to honour the post-dated cheques issued by Gyimantwi to the vendor of the vehicle, (b) Passing the entries disbursing the loan facility for the purchase of the vehicle in a manner contrary to the executive credit committee's instructions, and (c) Refusing to obey legitimate instructions as per article 16(a) of the CBA (2007-2009)."

THE EARLIER PROCEEDINGS

The plaintiff took strong exception to his dismissal as it meant that he lost all benefits that he would otherwise have been entitled to considering his long service with the defendant. He initially resorted to the internal mechanisms of the defendant to seek redress but that did not yield positive results. Thus, on 22nd December, 2014 he took out a writ of summons from the High Court, Accra against the defendant and claimed the following reliefs;

i. An order declaring the dismissal of the plaintiff as unlawful.
ii. Reinstatement of the plaintiff with full benefits.
iii. Compensation for unlawful Dismissal.
iv. Damages, costs and solicitor's fees.
v. Any other reliefs deemed fit by this Honourable Court.

In the alternative, the plaintiff claimed as follows;

i. An order declaring the dismissal of Plaintiff as unlawful.
ii. Payment of end of service benefits to Plaintiff as of 20th May, 2009 when Plaintiff was unlawfully dismissed.
iii. Interest on (b) ii at the prevailing commercial bank rate.
iv. Compensation for unlawful dismissal.
v. Damages costs and solicitor's fees.
vi. Any other reliefs deemed fit by this Honourable Court.

The plaintiff stated in his pleadings that his role in the disbursement of the loan to Gyimantwi did not amount to refusal to obey legitimate instructions. He also contended that the hearing he was accorded by the defendant before dismissing him did not measure up to the proper standard of fair hearing under the CBA as the defendant kept changing the allegations against him. By the claim for re-instatement, the plaintiff seeks a relief under section 64 of the **Labour Act, 2003 (Act 651)** which is predicated on section 63 of the Act on Unfair Termination of employment. In line with that, the plaintiff pleaded at paragraphs 8 and 9 of his statement of claim as follows;

"8. Plaintiff contends that his dismissal was not borne out of the realities on the grounds given in Plaintiff's dismissal letter as they are not borne out of the disciplinary committee's report…..

9. Plaintiff will contend that his dismissal is borne out of malice as the Disciplinary committee did not recommend his dismissal and that Plaintiff did absolutely nothing untoward to merit dismissal by Defendant."

In its statement of defence and counterclaim, the defendant asserted that the dismissal of the plaintiff was lawful and went further to allege fraudulent conduct against him, claiming that Gyimantwi induced him with money for him to conceal some of its cheques causing financial loss to the bank. The defendant insisted that the plaintiff had been given a fair hearing before the Disciplinary Committee and he was found to have acted together with the branch manager in a manner contrary to laid down policy so he deserved to be dismissed for dereliction of duty.

At the close of the trial the High Court gave judgment against the plaintiff but dismissed the defendant's counterclaim. The learned High Court judge held that the defendant failed to prove its claim of fraudulent conduct against the plaintiff. The case turned principally on the fact that the plaintiff signed jointly with the branch manager for a loan approved by the defendant to be disbursed in a manner contrary to the conditions for the loan as approved by management. In rejecting the defence of the plaintiff that it was the branch manager, his immediate superior, who requested him to sign, the judge said as follows;

"As afore stated, he may not have signed it deliberately with the intention of obtaining a material advantage to the detriment of the Defendant but he knew what he was doing was wrong as he contradicted an earlier memorandum."

At the trial of the case the defendant had raised new charges against the plaintiff that it had not pleaded, one being that he contravened Article 15(c) of the CBA in that he learnt money in his private capacity to Gymiantwi, a customer of the bank. The defendant further accused the plaintiff of breach of Article 15(e) of the CBA which forbids an employee from engaging in commercial business without permission from the managing director. The defendant led evidence that the plaintiff, while working with the bank engaged in farming and even won a National Best Farmer's Award without permission of the Managing Director. The plaintiff argued that his farming activities were well known to his branch manager and when he won the National Award his activities were deemed known by management but he was never queried on it until at the trial in court only because he sued the defendant. In dismissing this argument of the defendant not complaining about these matters the trial judge, relying on the case of **Lever Brothers Ghana Limited v Annan [1989-90] 2 GLR 385,** held that an employer can use new grounds to justify a dismissal after the dismissal. I shall digest that case fully *in fra.*

The plaintiff appealed promptly against the judgment of the High Court but his appeal was dismissed by the Court of Appeal. Lovelace-Johnson, JA (as she then was), with whom the rest of the court agreed, summed up their reasons for dismissing the appeal as follows;

"The trial judge made a finding of fact at page 348 of the ROA that the Plaintiff contravened the CBA and Staff Service Rules and in so doing misconducted himself. Her reasons for this finding can be found at pages 348 to 349. At those pages the trial judge reproduced portions of the proceedings and gave her reasons for this finding. I am satisfied that her reasons for her finding are sound and borne out by the evidence on record and in line with the law."

THE APPEAL TO THE SUPREME COURT.

The plaintiff has appealed from the decision of the Court of Appeal to the Supreme Court and the grounds of appeal set out in the notice of appeal are that;

i. The judgment is against the weight of the (sic) evidence.
ii. The court below erred in law when it held that appellant was given a fair hearing within the defendant/respondent/respondent concerning his dismissal.

Particulars of error

a. The court below did not take into account the fact that the appellant was taken by surprise when he was confronted with other issues other than those for which he was invited to the disciplinary committee of the respondent.
b. The court below ignored the fact that appellant's right of appeal within the respondent was hindered by respondent's managing director.

iii. The court below erred when it held that the dismissal of appellant was fair.

ARGUMENTS OF THE PLAINTIFF IN THIS APPEAL

In his statement of case, the plaintiff partly re-echoes his arguments in the two lower courts and submits that contrary to what those courts held, the whole conduct of the disciplinary proceedings were not in line with terms of the CBA and the Staff Service Rules. He maintains that on a proper reading of Articles 18(a)(b) and(c) of the CBA, he ought to have been tried by the Disciplinary Committee for only the offences for which he was interdicted. Not having done so, the defendant breached the CBA. The plaintiff also points out that the membership of the Disciplinary Committee did not conform to Article 14(g) of the CBA. Still on failure to grant him hearing in accordance

with the CBA, the plaintiff contends that under Article 14(h)(iii) of the CBA, where after disciplinary proceedings the disciplinary authority decides to vary the sanction recommended by the Committee, it shall inform the union and provide the reason for the variation. This was not done in this case so the defendant breached the CBA and the procedure adopted was thus unfair. Additionally, the plaintiff argues before us, very forcefully, that from all the circumstances of his case, it is wrong to conclude that he failed to obey legitimate instructions of his employer. He quotes Article 13(a) of the CBA and submits that it enjoined him to obey legitimate orders of persons under whose jurisdiction he was serving and he did exactly that by signing off the entries as ordered by the branch manager under whom he was serving. The plaintiff finally submits that the lower court did not consider section 63(4) of Act 651, a statute binding on the court, and that if they did they would not have held his dismissal as fair.

ARGUMENTS OF THE DEFENDANT IN THIS APPEAL.

In response the defendant says that all the matters relating to the handling of the account of Gyimantwi including the manner of disbursement of the loan and the plaintiff's role in it were raised at the disciplinary proceedings and he was given opportunity to state his side so he cannot complain of not being given a fair hearing. Respondent argues that where after interdiction investigations reveal other misconduct not stated in the interdiction letter, it is not out of place to raise them during the disciplinary hearing so Article 18 of the CBA was not breached. As to the charges that were only laid for the first time at the trial in court, the respondent states that they were uncovered during the case and the plaintiff cannot complain that he was taken by surprise as the law permits reliance on new matters in defence of a dismissal. Defendant contends that in any event, in court the plaintiff was given opportunity to defend himself on those matters. The defendant says that the composition of the Disciplinary Committee was in compliance with Article 14 of the CBA. As to whether the Executive Management Committee complied with Article 14(h)(iii) of the CBA and provided reasons for varying the recommended punishment, the defendant, without saying whether it did or did not comply with the provision, states that the two lower courts held that the burden was on the plaintiff to prove that

it did not but he failed to discharge that burden. On the issue of section 63(4) of Act 651, the defendant submits that the dismissal of the plaintiff was fair and that it was in accord with section 62(b) of the Act. Defendant quotes the provisions of section 63(4) of Act 641 as follows;

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

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

Defendant then submits that;

"The defendant gave the reasons for the termination of the plaintiff's employment (sic) in exhibit GA at page 40 of the record. The proceedings of the Disciplinary Committee and the trial at the High Court clearly shows that the dismissal was effected after a fair process. The CBA exhibit GA5 was complied with. Plaintiff was given notice of the charges and he defended himself. The defendant, it is submitted proved that the dismissal of the plaintiff was fair and is in accord with fairness procedure under the Act."

My Lords, it is vital to recognize that **Unfair Termination** of employment as a cause of action is separate and distinct from **Unlawful Termination** of employment or wrongful dismissal as known to the common law. In the case of **Charles Afram v SG-SSB Ltd; CA NO. J4/71/2018,** unreported judgment of the Supreme Court dated 21st March, 2019, the court per Kotey, JSC observed as follows;

"Unfair termination", as distinct from the common law concept of "wrongful dismissal", is therefore a creature of statute, currently the ***Labour Act, 2003 (Act 651).***

Though unfair termination is new in our jurisdiction as it was introduced for the first time by sections 62-66 of Act 651 in 2003, it has always been a part of English Law since the passage by the British Parliament of the **Industrial Relations Act, 1971**. As the plaintiff in this appeal has grounded his case on both Unlawful Dismissal and Unfair Termination, I intend to consider the appeal on the lines of the following two

main questions; (a) Was the dismissal of the plaintiff unlawful? and, (b) Was the dismissal of the plaintiff unfair as envisaged by Act 651?

CONSIDERATION OF THE APPEAL.

TERMINATION OF EMPLOYMENT.

This case calls for a detailed discussion of how our employment law has evolved over time to its present state as provided in Act 651 so my discussion of the legal principles will include the historical progression of the law on termination of employment. At the initial stages of the common law labour relations were seen only within the framework of a contract, whether written or unwritten, and as such it may be brought to an end just as any contract entered into by two parties. Bringing to an end an employment contract is generally referred to as termination of employment. An employment relationship may be brought to an end or terminated either by the employer or by the employee. At common law the employer could dismiss the worker for valid reasons or decide to terminate the employment because she no longer wished to work with the particular worker. The worker too may voluntarily resign from the employment but there are also situations where the employer creates conditions that make it impossible for the worker to continue in the employment compelling the worker to stop the work. That is referred to as constructive dismissal.

At the early times the common law principles on employment were influenced by theoretical conceptions of the middle ages that regarded the services a worker provides to her employer as a commodity the terms of exchange of which were freely negotiated between the worker and the employer at arms length. The terminology that was used to describe the relationship between worker and employer was "master-servant" and the principles evolved understandably permitted the master to do as he pleased with his servant who had no real rights except to stop the work. In the course of time, where the worker and the employer entered into agreed terms for their relationship, the courts enforced those terms as a matter of freedom of contract. But with developments in human interaction for production of goods and services, the gradual expansion of civil rights in Western democracies and the growth of trade unionism, the fallacy of the theory of a worker's services as only a commodity traded

on free terms and at arms length with the employer became evident. This led governments to pass legislations within a framework that totally shifted from the theory of equality of arms in negotiations of terms of employment contracts and offered protection to workers while accommodating the interests of employers. The reality of the relationship between worker and employer that has influenced most of modern labour legislations has been aptly captured by that doyen of British Labour Law, Sir Otto Kahn-Freund in the following words in his book **"Labour and the Law" (1972)** at p.8;

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

On account of the recognition of the inherent inequality in the relationship of worker and employer, the main object of labour legislation has been to act as a countervailing force to counteract the unequal bargaining power which is ever present in the employment relationship. Labour statutes impose terms and conditions on the employment relationship and they have effect, unless expressly exempted, irrespective of any contractual terms to the contrary. Thus Section 1 of Act 651 states as follows;

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

An exemption is also made in section 19 of Act 651 as follows;

"19. Exception

The provisions of sections 15, 16, 17 and 18 are not applicable where in a collective agreement there are express provisions with respect to the terms and conditions for termination of the contract of employment which are more beneficial to the worker."

In **Nartey-Tokoli & Ors v Volta Aluminum Co Ltd [1989-90] 2 GLR 341,** Taylor JSC writing for the 4-1 majority of the Supreme Court at pages 362/363 of the Report said as follows; *"Lord Loreburn L.C. in,* ***Attorney-General v. Birmingham, Tame and Rea District Drainage Board [1912] A.C. 788 at 795,*** *H.L. expressed the collective view of common law judges when he said that: "[a] court of law has no power to grant a dispensation from obedience to an Act of Parliament."*

Therefore, while it is true that the rules of the common law on employment evolved on the back of master-servant relationship have influenced some aspects of current labour law, a substantial part of the rights, especially of the employer at common law, have been greatly reduced, either by contracts of employment negotiated on behalf of workers by strong trade unions or statutes passed by governments. Currently, certain concepts on labour matters have gained the status of international best practices and are promoted by the international labour movement in the form of international treaties ratified by many countries. Hence it is stated in the Memorandum that accompanied the Bill that has been enacted as Act 651 as follows;

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

Against this background, though we refer to wrongful or unlawful dismissal as common law cause of action, its full ambit has been profoundly affected by contractual terms and statutes. Ollennu, J (as he then was) presented the accurate state of the law on unlawful termination of employment when in the case of **Morgan & Ors v Parkinson Howard Ltd [1961] GLR 68 at p. 70** he said as follows;

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

See also the case of **Kobi v Ghana Manganese Co. Ltd [2007-2008] SCGLR 771(SC).**

UNLAWFUL DISMISSAL AND UNLAWFUL TERMINATION

The common law from the beginning recognized certain grounds upon which it was lawful for an employer to dismiss a servant. These grounds included dishonesty, incompetence and acting against the interest of the employer, and for any of these reasons an employer could lawfully dismiss her worker. The term that was used was dismissal or summary dismissal and it generally referred to termination of employment for cause in that the employer has a reason for bringing the employment relationship to an end. The law was therefore that if the employer decides to dismiss a worker on any of the above grounds and the worker disputes the reason and denies being guilty of the misconduct alleged, the law required the master to prove that she was indeed liable failing which the dismissal would be held wrongful or unlawful. This is what in **Kobea v Tema Oil Refinery [2003-2004] 2 SCGLR 1039** Dr Seth Twum, JSC referred to when he said at page 1040 that:

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

When parties began writing formal and detailed contracts of employment, in drafting provisions on termination for misconduct, the term used has been dismissal or summary dismissal and this can be found in most contracts of employment and collective bargaining agreements as we have in this case. Some statutes too in making provisions concerning this right of the employer to terminate a worker's employment for cause employ the term dismissal. When the employment of a worker is ended by dismissal as we have in this case, usually the worker goes home without any compensation paid to him no matter the number of years of satisfactory work with the employer.

Another way an employment relationship may be brought to an end by the employer that was recognized by the common law, as we have already noted, was that an employer had a right to end an employment relationship for any reason or no reason at all. Lord Reid said as follows in **Ridge v Baldwin [1963] APP.L.R 03/14, HL;**

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

In the case of **Aryee v State Construction Corporation [1984-86] 1 GLR 425 CA,** at page 432, Adade, JSC speaking on behalf of the Court of Appeal said that;

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

Also, in **Kobea v Tema Oil Refinery (supra)** Dr Seth Twum, JSC referred to this situation in the following words;

… 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…"

In this opinion I take the view that, to the extent that these statements of Adade and Dr Seth Twum, JJSC were in respect of the state of Ghanaian Law before the passage

of Act 651, they were good law. Note that the term used here is "terminate" and that is generally the term used where an employer brings an employment relationship with a worker to an end but not on account of misconduct or incapability of the worker. So in employment contracts and statutes, the term termination is regularly used to refer to this ground of ending the employment relationship where the employer is not alleging misconduct or incapability as distinct from dismissal or summary dismissal. It is therefore understandable to refer to wrongful termination or unlawful termination where conditions to be fulfilled by an employer before termination, such as period of notice as contained in an employment contract or statute, have not been complied with. Where the employment of a worker is terminated this way and in accordance with the requisite notice, it normally goes with some compensation payable by the employer calculated according to the worker's salary and the length of time she was in the particular employment.

Notwithstanding the above explanation of the difference between the terms "dismissal" and "termination", they both amount to termination and that term may be used to refer to both situations. In fact, in the instruments of the ILO, they apply the term "termination" to refer to both dismissals and termination properly so called. That is what the draftsman also did in Act 651 and used the term "termination" to refer to both what is usually called dismissal and what is termination properly so called. This drafting is understandable because the Memorandum to the Act said it was to bring our Labour legislation into conformity with ILO treaties ratified by Ghana. For instance, Section 15 of the Act is as follows;

15. Grounds for termination of employment

A contract of employment may be terminated,

(a) by mutual agreement between the employer and the worker;

(b) by the worker on grounds of ill-treatment or sexual harassment;

(c) by the employer on the death of the worker before the expiration of the period of employment;

(d) by the employer if the worker is found on medical examination to be unfit for employment;

(e) by the employer because of the inability of the worker to carry out work due to

(i) sickness or accident; or

(ii) the incompetence of the worker; or

(iii) the proven misconduct of the worker.

It is obvious that the section refers to termination of the employment of a worker by the employer for justifiable reasons and subsections 15(e)(ii) & (iii) are specifically in respect of dismissal of an employee by the employer. Section 15(b) equally refers to constructive dismissal but Act 651 uses the terminology "termination". Termination properly so called by exercise of the employer's right to bring to an end an employment relationship is covered by Section 17 of the Act which provides as follows;

17. Notice of termination of employment

(1) A contract of employment may be terminated at anytime by either party giving to the other party,

(a) in the case of a contract of three years or more, one month's notice or one month's pay in lieu of notice;

(b) in the case of a contract of less than three years, two weeks' notice or two weeks' pay in lieu of notice; or

(c) in the case of contract from week to week, seven days' notice.

(2) A contract of employment determinable at will by either party may be terminated at the close of any day without notice.

(3) A notice required to be given under this section shall be in writing.

(4) The day on which the notice is given shall be included in the period of the notice.

As aforesaid, the principles of the common law on employment have been markedly affected by statute so though one may talk of common law cause of action for wrongful dismissal or unlawful dismissal, if in the case reliance would be placed on section 15 of Act 651, then describing an action for wrongful dismissal as unlawful termination would not be wrong in Ghanaian Law.

Now, let us return to what Ollennu, J stated in **Morgan & Ors v Parkinson Holman (supra)** and answer the question whether in this case the plaintiff has been able to prove that his dismissal was in breach of the terms of his employment as captured in the CBA and Staff Service Rules or was in breach of section 15 of Act 651, which is the relevant statutory provision on unlawful dismissals. At this point in the case there is not much dispute about the primary facts as found by the trial judge and affirmed by the Court of Appeal. The real difference between the parties is the interpretation to be given to the primary facts and the legal consequences that flow from the facts.

I will first consider the plaintiff's case that the courts below erred in admitting the charge of lending money in his private capacity to a customer and undertaking commercial business without permission of the managing director both of which were not brought up before his dismissal but only after the dismissal when he sued in court. The plaintiff's case is that before he can be sanctioned for any charge of misconduct, the charge ought to have been preferred at least before he faced the Disciplinary Committee but that was not done in respect of these two charges. In answer, the defendant quoted and relied on the following passage in the judgment of the Court of Appeal in **Lever Brothers Ghana Ltd v Annan [1989-90} 2 GLR 385 at 388;**

"The learned trial judge in our view stated the correct principle of law when he said:

"The law is that where an employee has, in fact, been guilty of misconduct ***so grave*** *that it justifies* ***instant*** *dismissal, the [p.389] 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: see* ***Boston Deep Sea Fishing & Ice Company v Ansell (1888) 39 ChD 339 at 363, CA."(emphasis supplied).***

First, that principle states that where the employee was guilty of misconduct so grave that it justifies instant dismissal. In the **Lever Brothers case**, the employees

committed fraud by dishonestly paying for and collecting large quantity of products of the employer that were meant for their customers in Kumasi. At that time in Ghana there was shortage of those products and there was an offence known as diversion of essential commodities. The employees were reported to the police who arrested them and carried out investigations that established their fraud and that justified the application of the principle in the **Boston Deep Sea Fishing case**. That case can therefore be distinguished from the case at bar. What is so grave a misconduct that justifies instant dismissal about the plaintiff engaging in farming without permission or using his own money to satisfy cheques of a key customer for no reward as we have in this case? When the CBA talks of lending it must be understood to mean lending at an interest in competition with the bank but in this case there was no evidence of interest paid to the plaintiff or any benefit that accrued to him from that gesture he extended to Gyimantwi.

The **Boston Deep Sea Fishing case** involved the discovery of fraud committed by Mr Ansell, a director, which was not known to the employer until after the termination of his employment, but in the instant case the trial court acquitted the plaintiff of any fraud so those cases cannot serve as authority for holding that the defendant could dismiss the plaintiff on these two new charges without laying them during the disciplinary hearing. Similarly, the facts of **Presbyterian Church Agogo v Boateng [1984-86] 2 GLR 532** were that the plaintiff who was on duty as a senior nurse-midwife was required to help pregnant women to deliver safely but she rather insulted and twice slapped a woman who was in the pangs of labour with her child dropping. She was served a query which she ignored to answer so she was summarily dismissed. That was proven grave misconduct that justified instant dismissal so that decision can also be distinguished from this case.

But, a more fundamental point against the defendant on this matter is that this so called common law principle relied on in the **Lever Brothers case** has been held to be subject to a right to hearing contained in an employment contract, and I will add, to clear provisions of a binding statute. In **Laguda v Ghana Commercial Bank [2005-2006] SCGLR 388 at page 402** Date-Bah, JSC said as follows;

"Thus, once there is evidence on the record sufficient to justify the conclusion that the plaintiff's behavior amounted to misconduct, the learned trial judge did not have to concern himself with whether there had been compliance with the rules of natural justice, ***unless there was a contractual provision to the contrary****." (emphasis supplied).*

In this case, a reading of the provisions of the CBA and the Staff Service Rules as a whole, and particularly Articles 14(e) on the mandate of the Disciplinary Committee and 18 on interdiction and investigations of offences, I have no doubt in my mind that the contract of employment between the parties entitled the plaintiff to be offered the opportunity to be heard on any charge arising out of the CBA before that charge can form the basis of a decision to dismiss him. These two new charges were based on specific provisions in the CBA and not otherwise.

Furthermore, in **Aboagye v Ghana Commercial Bank [2001-2002] SCGLR 797** the respondent contended that it had a right to dismiss the appellant without a formal hearing as provided for in its Staff Service Rules since there was evidence before the court that he had acted negligently in passing some foreign exchange entries without properly verifying them. In dismissing that argument the Supreme Court held, per Bamford-Addo, JSC, as follows at page 815 of the Report;

"Finally, in considering the question whether or not in any particular case there has been a failure of natural justice, the fact that there was evidence to support the charge preferred against the plaintiff, namely negligence, is immaterial to the determination of the issue whether the plaintiff had not been given a fair trial. Lord Denning in the case of Annamuthodo v Oil Field Workers Trade Union [1961] AC 945 on the point said;

'Mr Lazarus did suggest that a man could not complain of failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice. He will not be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside."

On this issue there is the further question of if its amounts to a fair procedure to dismiss a worker on new charges after the fact of dismissal? That I shall discuss under unfair termination. For the reasons explained above, I am of the considered opinion that the charges of doing commercial business and lending money to a customer could not be relied on by the defendant as justification for dismissing the plaintiff.

I will next consider whether it was right for the defendant to use the evidence on the manner of disbursement of the loan to Gyimantwi to dismiss the plaintiff as that issue was not specifically stated either in his interdiction letter or the charge preferred against him for the hearing before the disciplinary committee. The plaintiff submits that Article 18 of the CBA implies that it is the charges set out in an interdiction letter that must be tried by the disciplinary committee but I have read that provision closely, as well as Article 14 of the CBA and they do not support such a rigid interpretation as though it was a criminal trial. The charges in the interdiction letter and the letter inviting him for the disciplinary proceedings read together sufficiently notified the plaintiff that the propriety of the handling of issues concerning their customer, Gyimantwi, were part of the subject matter of the disciplinary action. The disbursement of the loan was an integral part of those issues so I am of the view that the plaintiff had sufficient notice that the disbursement of the loan would be enquired into. Though the defendant was generally sloppy in the handling of the whole disciplinary action against the plaintiff, particularly having regard to the experience accumulated from the several cases in the Law Reports concerning this very defendant, some of which have been referred to in this case, it would still be stretching the argument too far to demand criminal-trial-like charges that are drafted with the precision of experienced prosecutors.

In fact, the issue of the disbursement of the loan to Gyimantwi and the plaintiff's role in it was extensively examined at the disciplinary hearing and the explanation of the plaintiff was heard by the committee before it concluded that his role in it breached his obligations under the CBA. The plaintiff does not seriously challenge that he signed for the loan granted to Gyimantwi to be disbursed in a manner contrary to the conditions of approval by the Executive Credit Committee of the Bank. Even if he was not aware of the conditions, he ought to have familiarized himself with them before

appending his signature. His explanation was that the branch manager, his immediate superior, requested him to sign and he complied because he was his superior. Indeed, a reading of Article 13(a) of the CBA, which elaborates on the offence of disobeying legitimate instructions, and not Article 16(a) quoted in the dismissal letter, lends itself to different interpretations. It is as follows;

Article 13(a) of the CBA provides that;

"[Every officer] shall observe, comply with and obey all legitimate orders and directions which are in the interest of the bank and which may from time to time, be given to him/her by any person or persons under whose jurisdiction, superintending or control he may for the time being be placed."

This provision is nebulous because it is capable of being interpreted to mean that the interest of the bank as determined by the person under whose jurisdiction an officer is serving. This makes the explanation of the plaintiff on this issue deserving of favourable consideration when it came to the punishment to impose. The defendant has argued that if a person carries out unlawful orders he will be held culpable for the unlawful act and reference has been made to the case of **Yaokumah v The Republic [1976] 2 GLR 147.** That case, with due respect, is a criminal case and it talks about criminal liability for committing an offence with the defence of superior orders. In the civil law realm, the legal consequences of a proven defence of superior orders has always been taken into account in determining liability where malicious intent is involved. The distinction of the defence between criminal culpability and civil liability is shown in the following statement by the authors of the **Halsbury's Laws of England (4th ed), Vol. 11(1) at p. 34, para. 27:**

"The mere fact that a person does a criminal act in obedience to the order of a duly constituted superior does not excuse the person who does it from criminal liability, ***but the fact that a person does an act in obedience to a superior whom he is bound to obey, may exclude the inference of malice or wrongful intention which might otherwise follow from the act."(emphasis supplied).***

Nonetheless, since failing to obey laid down instructions is a ground of misconduct for which the defendant may terminate the employment of a worker, the dismissal in this

case is not unlawful on that score but the explanation of superior orders which was confirmed by the branch manager who testified in support of the plaintiff ought to have been taken into account by the Executive Management Committee in determining the appropriate punishment as the Disciplinary Committee rightly did.

The plaintiff has next complained about the composition of the membership of the Disciplinary Committee, but there is not much value in that complaint since the defendant did not in substance breach the provisions of the CBA under which the disciplinary proceedings were conducted so I am not persuaded to accept that complaint. Finally, in respect of the failure by the Executive Management Committee of the defendant to comply with Article 14(h)(iii) of the CBA, it seems to me that the argument of the defendant leaves some critical questions unanswered but the issue fits more into the procedural fairness of the dismissal so I will discuss it under the heading of unfair termination, to which I now turn.

UNFAIR TERMINATION.

In order for us to have a full understanding of unfair termination as a cause of action in our jurisdiction, we need to set out the three provisions of Act 651 on the concept which are directly in issue in this case. There may be unfair termination arising out of a redundancy exercise by an employer but that does not concern us in this case so that will not be specifically considered.

They are sections 62, 63 and 64 and are as follows;

Fair and Unfair Termination of Employment

62. Fair termination

A termination of a worker's employment is fair if the contract of employment is terminated by the employer on any of the following grounds:

(a) that the worker is incompetent or lacks the qualification in relation to the work for which the worker is employed;

(b) the proven misconduct of the worker;

(c) redundancy under section 65;

(d) due to legal restrictions imposed on the worker prohibiting the worker from performing the work for which the worker is employed.

63. Unfair termination of employment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

64. Remedies for unfair termination

(1) A worker who claims that the employment of the worker has been unfairly terminated by the worker's employer may present a complaint to the Commission.

(2) If on investigation of the complaint the Commission finds that the termination of the employment is unfair, it may

(a) order the employer to re-instate the worker from the date of the termination of employment;

(b) order the employer to re-employ the worker, in the work for which the worker was employed before the termination or in any other reasonably suitable work on the same terms and conditions enjoyed by the worker before the termination; or

(c) order the employer to pay compensation to the worker.

My Lords, it is instructive to underscore the fact that, as stated in the Memorandum to the Bill, the above provisions are a replication of Part II of the **ILO Termination of Employment Convention, 1982 (No. 158).** It is plain that the above provisions are aimed at changing the law on termination of employment as it existed prior to the enactment of Act 651. Therefore, in interpreting the above provisions to discover the intention of parliament, we must take into account the mischief in the existing law that the provisions on unfair termination of employment were intended to address. This approach to the interpretation of statutes which introduce previously non-existing rights and remedies is referred to as the Mischief Rule of interpretation. It was established in the sixteenth Century English case known as **Heydon's Case (1584) 76 ER 637**. In that case the Barons of the Exchequer unanimously held as follows;

"And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy;

and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and ***pro private commodo****, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act****, pro bono public****".*

The above directive has been consistently applied by common law judges when called upon to construe statutes that create new remedies previously unknown to the existing law. See **Mercer v. Guinea Press Ltd., [1962] GLR 638.**

Since the provisions in issue here originate from the ILO treaty, the mischief they are directed to cure can very easily be extracted from the instruments of that organization.

In a review of employment protection globally, the ILO in its publication titled "Employment Protection Legislation", 2015 states the background and objectives of its **Termination of Employment Convention, 1982 (No. 158)** as follows;

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

1. **The first international labour instrument dealing specifically with this issue – the Termination of Employment Recommendation (No. 119) was adopted in 1963. It marked the recognition at the international level of the idea that workers should be protected against arbitrary and unjustified dismissals and against the economic and social hardship inherent in their loss of employment.**
2. **To take into consideration new developments since then, such as heightened global competition and recurrent economic downturns, the Termination of Employment Convention, 1982 (No. 158) and the Termination of Employment Recommendation, 1982 (No. 166), were adopted by the International Labour Conference in 1982**
3. **To date, most of the countries around the world have adopted some type of employment protection legislation. These provisions usually reflect the de facto asymmetry of contractual rights of either party to terminate employment relationship, as well as the need to address the consequences of this asymmetry: while termination of the contract by the worker – exercising the fundamental right to protect his or her freedom of work – is oftentimes merely an inconvenience for the employer, the termination of the contract of employment by the employer can result in insecurity and poverty for the workers and their family, particularly during the periods of high unemployment.**
4. **Moreover, employment protection can also be seen as a gatekeeper for fundamental principles and rights at work, as well as other rights of a worker: for example, the fear of being dismissed arbitrarily may**

induce employees to wave rights related to trade union activities, maternity, or education (De Stefano, 2014)."

Accordingly, as I set out to interpret these provisions and apply them to the facts of this case I have in my mind the above stated mischief of insecurity of employment in the existing law that the legislation is meant to cure. I have undertaken an extensive search for precedent within the limits of our poor system of up-to- date law reporting but I have not come across a decision of our courts in Ghana which has thoroughly considered sections 62, 63 and 64 of the Act and pronounced on their scope. But, since unfair termination has been known in labour law globally for some years now, when our parliament decided to introduce it into our jurisdiction the words used must be presumed to bear certain meanings generally applied to them in labour instruments and decided cases, particularly in countries with a similar system of law as us.

In the case of **Unmin v Hanson [1891] 2 QB 115 at 119** Lord Esher said as follows;

"If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which every body conversant with the trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning though it may differ from the common or ordinary meaning of words."

As observed *ut supra*, the right of workers against unfair termination of employment has been in force in Britain since 1971 when their parliament passed the **Industrial Relations Act, 1971**. That Act was amended by the **Trade Union and Labour Relations Act, 1974** which has seen further amendments and the subsisting legislation of Britain that talks of unfair termination is the **Employment Rights Act, 1996**. Section 94 of that Act, states as follows;

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

Section 95 of the Act defines dismissal to include termination by an employer, with or without notice. A similar drafting is used in Section 382 of the **Fair Work Act, 2009** of Australia. The section declares the workers right against unfair dismissal which is

then defined under Section 386 to include termination of employment by an employer, with or without notice. The relevant legislation in South Africa is the **Labour Relations Act, 1995** and under section 185 thereof it states that an employee has a right not to be unfairly dismissed or subjected to unfair labour practices. Under section 186 of the South African Act, dismissal is defined to include termination with or without notice. In those legislations, the draftsmen employ the words "dismissal" when referring to termination for misconduct and incapability and "termination" when referring to the right of an employer to end a contract of employment. That accounts for the manner their legislations confer the right against unfair dismissal and unfair termination. In all of those jurisdictions, the remedies accorded a worker whose employment is unfairly terminated are re-instatement or re-engagement and compensation. But as pointed out above, by way of terminology, Act 651 uses the word "termination" to describe both dismissal and termination properly so called hence our Act in section 63(1) states that;

"The employment of a worker shall not be unfairly terminated by the worker's employer" and this refers to both dismissal and termination properly so called.

Though Act 651 does not use the words employed in the comparable statutes of the countries I have referred to by declaring a straight right of a worker not to have her employment unfairly terminated, the plain legal import of Sections 63(1) and 63(4) is that an employer in Ghana can no longer terminate the employment of a worker without assigning a reason for the termination. Not only is the employer compelled to give a reason for termination either with or without notice or for misconduct, the reason must be fair. Consequently, in current Ghanaian law, every worker, except those exempted by Section 1 of the Act, has a right not to have her employment unfairly terminated. By section 64, Act 651 accords a worker in Ghana whose employment is unfairly terminated the remedies of re-instatement, re-employment and compensation. What this means is that the common law right of an employer in Ghana to terminate the employment of a worker for any reason or no reason has been taken away by Sections 63(1) and 63(4) of Act 651 so Ghana has joined the many other countries that give real meaning to the protection of the right to employment.

In **Kobi v Ghana Manganese Co. Ltd** (supra), at page 794 of the Report, Ansah, JSC, after lamenting the insecurity of employment in Ghana on account of the "traditional rule" of the common law permitting an employer to terminate a worker's employment for any reason or no reason, welcomed the protection of employment enacted in Act 651 in the following words;

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

On account of the provisions of Act 651 referred to by Ansah, JSC and the analysis I made above, 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 law. The cases include **Kobea v Tema Oil Refinery (supra), Lt. Col. Ashun v Accra Brewery Ltd. [2009] SCGLR 81** and **Aryee v State Construction Corporation(supra).**

Yet, Date-Bah, JSC in **Bani v Maersk Ghana Ltd [2011] 2 SCGLR 796 at 807 to 808** of the Report said as follows;

"These facts call for a restatement of the Ghanaian common law on the termination of contracts of employment and the extent to which it has been modified by the statutory provisions in the Labour Act 2003 (Act 651). It remains the common law that the remedy available to an employee who has been wrongfully dismissed or terminated is an action for damages. An employee cannot be awarded an order for his reinstatement into a job from which he has been removed unlawfully, unless there is a public law element which requires otherwise. See Lt. Col. Ashun v Accra Brewery

Ltd. [2009] SCGLR 81. A reinstatement would be equivalent to specific performance of a contract of employment, which is not permissible. It is settled law that contracts of employment, in general, may not be specifically enforced at the suit of either party. There is a sound policy underlay to this rule. It has to do with the courts restraining themselves from interfering with personal liberty. The essence of the policy is sometimes expressed in the saying that contracts of employment are not contracts of servitude. It would not be wise to compel an employee to work for an employer he does not want to work for, nor conversely to compel an employer to employ an employee it does not want to. There is a large element of personal relationship in many employment contracts which would make them unworkable if the parties were compelled to work together. However, increasingly, modern legislation has been intervening to give employees a right to reinstatement. This is in recognition of the fact that the modern relationship of an employer to an employee may have less of the personal element of the master and servant relationship in response to which the equitable principle developed, that contracts of employment should not be specifically enforced."

From the above quoted speech, it is unclear if the respected jurists is saying that notwithstanding the plain provisions of Sections 1, 63 and 64 of Act 651, in Ghana the employer's common law right of termination for no reason still exists and there cannot be re-instatement of a worker. For, while he says "it still remains the common law that….", he ends his dictum by noting that increasingly, legislation has been intervening on matters of termination of employment to give the right of reinstatement. But that is precisely what parliament has done by passing Act 651 and enacting sections 63 and 64 to give relief to workers against termination by employers for no reason and effect must be given to the Act by courts.

In **Republic v High Court (Fast Track Division) Accra; Ex Parte National Lottery Authority (Ghana Lotto Operators Association & Ors Interested Parties) [2009] SCGLR 390** at page 397 of the Report, Atuguba, JSC said as follows;

*"It is **communis opinio** among lawyers that the courts are servants of the legislature. Consequently any act of a court that is contrary to a statute such as Act 7; 22, & 58(1) – (3) is, unless expressly or impliedly provided, nullity."*

At page 405 of the Report, Dr. Date-Bah JSC in the same case also said:

"The Judicial Oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders. The end of the judicial oath set out in the Second Schedule of the 1992 Constitution is as follows; 'I will at all times uphold, preserve, protect and defend the Constitution and laws of the Republic of Ghana.' This oath is surely inconsistent with any judicial order that permits the infringement of an Act of Parliament."

Therefore, where an Act of Parliament confers rights and remedies that plainly override the common law, judges are under an obligation to uphold the Act of Parliament in place of what the common law provided.

The point must however be made that, in his speech, the venerable Date-Bah, JSC did not categorically take a position on whether or not Act 651 has taken away the common law right of an employer to terminate a workers employment for no justifiable reason and whether specific performance can be ordered against an employer in Ghana. Ansah, JSC was certain in his dictum in **Kobi v Ghana Manganese Co. Ltd (supra)** by stating that Act 651 has taken away that right of an employer and, in my opinion, Ansah, JSC's position is the correct statement of the current law on termination of employment by the employer in Ghana. To the extent that Date-Bah, JSC's dictum did not state a definitive position on the effect of sections 1, 63 and 64 of Act 651, on the right of a workers not to have her employment unfairly terminated, the jurist ought not to be understood as saying that those provisions are of no binding effect.

For, as he himself recognized, the policy justification for the common law principles on termination of employment by the employer for no reason and the denial of re-instatement have long ceased to hold in the country of their origin on account of the realities of modern systems of production. In the **Report of the Royal Commission on Trade Unions and Employers Associations (Donovan Commission) Vol 23**

Number 4, 1968, which recommended the enactment of the provisions on unfair termination in the Industrial Relations Act, 1971, the following justification was provided for the then radical recommendations by the Commission;

"Discussing the background against which the Commission surveyed its problems and reached its conclusions, the report points out that the impact of two world wars and changes associated with developing technology, increasing scale of industrial organization, growing wealth and greater Government intervention have contributed to a transformation of the social and economic life of the country since the last Royal Commission reported 62 years ago.

Old industries have shrunk and new ones emerged. Processes of production have been revolutionized, old crafts disappearing and new skills emerging. With the continuing growth in the size of industrial units and the amalgamation of companies there has developed a managerial society in which ownership has become divorced from control. The running of large businesses is in the hands of professional managers, responsible to boards of directors. Trade unions have increased their membership from less than 2% million in 1906 to more than 10 million in 1966, and the membership has been increasingly concentrated in a comparatively small number of large and powerful unions."

That was thirty five years ago Britain, and it had to take us that number of years and after committing ourselves to international labour instruments on protection of employment to accept that the industrial relations landscape has changed and to follow the example of most countries by enacting sections 62-66 of Act 651. Therefore, there is overwhelming justification for these provisions in our labour legislation.

In **Bani v Maersk(supra)** Date-Bah, JSC also held that the reliefs of re-instatement and re-employment under section 64 can only be granted by the Labour Commission on a complaint of unfair termination filed before them by an aggrieved worker and that the courts have not been expressly given jurisdiction to make such orders. However, in the case of **Republic v High Court, Accra; Ex parte Peter Sangber-**

Der (ADB Bank Ltd- Interested Party) [2017-2018] SCLRG (Adaare) 552, the Supreme Court unanimously held that the High Court has jurisdiction concurrently with the Labour Commission to grant the reliefs of re-instatement and re-employment provided for under section 64 of Act 651. At holding (2) in the Headnote, it was decided as follows;

"Before the enactment of Act 651, the High Court had jurisdiction under Article 33(1) of the 1992 Constitution to enforce the Human Rights provisions contained in articles 24, 25 and 29 of the 1992 Constitution, which are the basis of the provisions in section 63 of Act 651 which deals with unfair termination of employment. Prior to the enactment of Act 651, the rights under section 63 of the Act existed and were enforced by the High Court. The enactment of Act 651, did not therefore oust the jurisdiction of the High Court in respect of matters of unfair termination of employment and that was not the intention of the legislature when it enacted Act 651."

In fact, in **Ex Parte Peter Sangbe-Der (supra)** the court stated that the statement in Bani v Maersk denying jurisdiction to the High Court to grant reinstatement was made *per incuriam* for not taking into account Article 140 of the 1992 Constitution.

My Lords, the defendant before us however argues that the case of the plaintiff does not come within the scope of the right against unfair termination since he was dismissed for proven misconduct which, by the provision of section 62(b) of Act 651, amounts to fair termination. The provision is;

"A termination of a worker's employment is fair if the contract of employment is terminated by the employer on any of the following grounds:

……

(b) the proven misconduct of the worker;"

This argument at first sight has some attraction however, when sections 62,63 and 64 are properly interpreted applying correct principles of interpretation including their construction by courts that have considered similar legislation and the full ambit of the right is set out, it becomes plain that a dismissal for proven misconduct may still be unfair depending on the circumstances. To fully appreciate the statutory framework in Act 651 on the right against unfair termination the three sections must be read and

construed together against the background of the other provisions of the Act. See **A-G v Prince Augustus of Hanover [1957] AC 436.**

Furthermore, in **Hill v. William Hill (Park Lane) Ltd. (1949) A C 520, H.L at 546-547** Viscount Simon said.

"[I]t is to be observed that though a Parliamentary enactment (like. Parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before."

Similarly, in **Ditcher v Denison (1857)11 Moo PCC 324 at 337** the Privy Council said;

"It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, shall not be prompt to ascribe, should not without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use"

When the provisions are examined closely with the above cautions in mind it would be realized that Section 62 provides that a termination of a worker's employment is fair if it is done by the employer on any of the following grounds; incompetence, lack of appropriate qualification, proven misconduct, redundancy and legal prohibition. It is however essential to understand that the section refers to "**grounds"** which relate to what are normally grounds for dismissal. But the fact is that a termination may be made under any of those grounds but the actual "**reason"** for the dismissal will differ from case to case. Misconduct ranges from a negligent act such as a security man failing to lock the door of an office which may not have caused any loss to the employer, to grave dishonest act like a cashier stealing sales from the cash machine. So the **ground** for termination in both of the above scenarios would be misconduct but the **reason** for termination would be different. So it would be realized that Section 63 of the Act which confers the right against unfair termination talks of **"reason"** for

the termination and not just the **ground.** Thus, if the reason for the termination falls within the grounds under section 62, that would make the reason for the termination only potentially fair but not automatically fair. While it is section 63(1) that confers the right of a worker against unfair termination, it is subsections (2), (3) and (4) that explain what is meant by unfair termination. Subsection (2) provides a category of automatically unfair reasons for termination by the employer while subsection (3) provides for reasons for constructive dismissal which are automatically unfair. Subsection (4) is where all other reasons for terminations, both dismissal and termination properly so called fall and it places the burden on the employer, when challenged, to prove that the reason for the termination is substantially fair.

Under a similar statutory regime provided in the **Industrial Relations Act, 1971** of Britain, Sir John Donaldson, J (as he then was) in the case of **Earl v Slater and Wheeler (Airlyne) Ltd [1973] 1 WLR 51 at pages 55-56** of the Report explained the operation of the provisions on unfair termination as follows;

"It (section 24 of the Act of 1971) operates in two stages. In the first stage, it is for the employer to show what was the principal or only reason for the dismissal and that it was a potentially valid reason, that is to say, a reason falling within section 24(1)(b) 'or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.' If the employer fails to discharge this burden, the tribunal must find that the dismissal was unfair. In the present case the employers proved that the principal reason for the dismissal related to the incapability or conduct of the employee. The tribunal therefore, quite rightly, proceeded to the second stage which consists of determining whether the dismissal was fair or unfair in accordance with the provisions of section 24(4) (5) or (6)."

That was a case where an estimating engineer was dismissed for unsatisfactory work output. This was only discovered during a period he was not at work so he was dismissed upon resumption of work without a hearing. He sued for unfair dismissal and the industrial tribunal held that failure to give him a hearing made the dismissal unfair despite that the dismissal was on a justifiable ground. This case supports the point I made earlier that the dismissal of the plaintiff for matters that were never

raised for his reaction before dismissing him would have amounted to an unfair procedure and therefore unfair termination.

In the recent case of **Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16,** Lord Wilson restated the two stage consideration of unfair dismissals in the following words at paragraphs 16,17 and 18 of the judgment of the UK Supreme Court;

"16. A tribunal's inquiry into whether a dismissal is unfair is governed by section 98 of the Act. The first part of the inquiry, governed by subsections (1) to (3), is whether the employer has shown both the reason for the dismissal and that the reason relates to the employee's conduct or falls within another part of subsection (2) or otherwise justifies dismissal. In this case the employer showed the reason for the dismissal, namely the non-disclosure, and that it related to Ms Reilly's conduct.

17. The case turns on the second part of the inquiry, governed by subsection (4) of section 98 of the Act. It provides that the tribunal's determination of whether a dismissal is unfair "(a) depends on whether in the circumstances … the employer acted reasonably or unreasonably in treating [the reason shown by it] as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

18. A tribunal's inquiry into whether the employer acted unreasonably in treating the reason as sufficient for dismissal seems simple enough in principle, albeit no doubt often difficult in application. The later reference to a determination in accordance with the merits of the case might have suggested that the tribunal somehow had a more direct function in appraising the dismissal;"

See also the South African case of **Sidumo and Anor v Rustenburg Platinum Mines Ltd and Ors [2007] ZACC 22.**

In the case of Act 651, where the termination is for misconduct, as we are concerned with in this case, the first stage of considering the fairness or unfairness of the termination is to determine if the reason for the termination is covered by the grounds stated under section 62, namely whether the misconduct has been proven, and the second stage is covered by section 63(4)(a) and (b) which are whether having regard

to the reason, dismissal was a fair punishment or the procedure adopted in arriving at the decision to dismiss was fair. Subsection (4)(a) is in respect of the substantive fairness of the reason for termination provided by the employer while subsection (4)(b) relates to procedural fairness, either of which may render a dismissal unfair. It is important to note the point Sir John Donaldson, J makes in **Earl v Slatter & Wheeler (supra),** namely if the reason for the dismissal does not pass the first stage, that is if the misconduct is not proven, then the decision to dismiss apart from being unlawful, is automatically unfair. That will mean that an aggrieved employee in that situation who seeks re-instatement as a remedy may sue for unfair termination which would entitle her to pray for relief under section 64 of Act 651.

From the above explanation of the scope of the right against unfair termination, it becomes clear that the defendant herein is in error when it argues that because the plaintiff's dismissal is covered by section 62(b) of the Act (proven misconduct), it makes the termination *ip so facto* fair. After all the mischief intended to be curtailed by the provisions on unfair termination as noted in the ILO instruments is "the idea that workers should be protected against arbitrary and unjustified dismissals." From the persuasive authorities referred to and a proper construction of sections 62,63 and 64 of Act 651 on unfair termination, the proven misconduct of the plaintiff in this case only made the dismissal potentially fair and should lead to the second stage which is a consideration of the substantive fairness of the actual or principal reason for the dismissal, whether it was sufficient to merit the ultimate sanction of dismissal.

Unfortunately, Act 651 does not offer any guide for assessing the substantive fairness of a reason for termination given by an employer that falls outside the automatically unfair reasons. What this calls for is that the courts shall flesh out the provision using their power of interpretation. We earlier on observed that Act 651 falls in the category of technical legislations so, in interpreting "the reason for the termination is fair" and "with a fair procedure" which are the words employed in section 63(4) of Act 651, I shall once again have recourse to the meanings ascribed to those words in comparable legislations on the subject and the interpretations of judges given on those terms.

The **Industrial Relations Act of 1971** provided a guide for determining the substantive fairness or unfairness of the reason for termination in section 24(6) of the Act in the following words;

"Subject to subsections (4) and (5) of this section, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case."

It is no doubt the discretion of the employer in a particular case that falls within grounds contained in an employment contract or statute permitting dismissal or termination to decide whether to impose that sanction or a lesser one. What the statutory right against unfair termination does is that it restrains the employer from acting arbitrarily in exercising her discretion on case by case whether to dismiss the worker or impose a lesser punishment. In the case of **Earl v Slater and Wheeler (Airlyne) Ltd (supra)** Sir John Donaldson J said as follows at page 57 of the Report:

"The question in every case is whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the employee and it has to be answered with reference to the circumstances known to the employer at the moment of dismissal."

Accordingly, if a worker acts in a manner that entitles the employer to sanction her the employer normally has at her disposal a band of alternative sanctions ranging from reprimand to the severest sanction which is dismissal. It would not be reasonable for an employer to dismiss a worker for any the least misconduct but an employer is reasonably expected to consider the severity of the misconduct before deciding that it is a sufficient reason to impose the extreme punishment of dismissal. However, in determining the reasonableness of a termination, the Labour Commission or the court would have to maintain a balance between the interest of the worker and that of the employer. Thus, in the South African case of **National Union of Metalworkers of**

SA v Vetsak Co-operative Ltd and Others, [1996] ZASCA 69, the Labour Appeal Court stated the following:

"Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (NUM v Free State Cons at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair."

What it means is that in determining the fairness or unfairness of a reason for termination, the commission or the court ought to have regard to the provisions of sections 8,9,10 and 11 of Act 651 on the rights and duties of workers and employers, the terms of the contract of employment and all the circumstances of the case before coming to the conclusion whether dismissal was a fair and reasonable punishment to impose.

In **Sidumo and Anor v Rustenburg Platinum Mines Ltd (supra),** the first applicant was a security officer stationed at a strategic area of the respondents mine and had the duty of controlling access to the area. He was dismissed because he failed to follow the detailed random search procedure instituted by the employer. He filed a petition and complained that his dismissal was unfair. The Commissioner after conducting an arbitration came to the conclusion that the applicant was guilty of misconduct but held that dismissal was too harsh a punishment so he ordered his reinstatement. The respondent appealed and the case finally went before the South African Constitutional Court, the apex court of that country. The court had to consider whether the Commissioner was wrong in his determination that the dismissal of the applicant was unfair. The factors the Commissioner stated as the basis for his finding that the reason given by the employer was not sufficient to merit dismissal were as follows;

"While I agree that this conduct was misconduct, I am not convinced that the dismissal was an appropriate sanction. In my view dismissal under the circumstances

would be too harsh when taking into account the following: There were no losses suffered by the employer. The violation of the rule was done unintentional or "a mistake" as argued by the employee. Lastly the level of honesty of the employee is something to consider.

Based on the evidence before me the employee has had a clean record of service with the employer for the past fourteen (14) years. This, in terms of the code of good practice cannot be ignored. The labour court has endorsed the concept of corrective or progressive dispute. Employees' behaviour is to be corrected through a system of graduated disciplinary measures such as counselling (sic) and warning.

It is therefore my view that the type of offence committed by the employee does not go into the heart of the relationship, which is trust. I therefore believe that the continued employment relationship is still intact. To deprive the employee of his employment in this circumstance would be wholly unfair."

By unanimous decision, the Constitutional Court approved of the reasoning of the Commissioner and upheld his conclusion that dismissal as punishment in the circumstances of the case was unfair and that the worker was rightly re-instated.

My Lords, it is with the above principles on unfair termination in mind that I now consider the substantive and procedural fairness or unfairness of the dismissal of the plaintiff on the facts and circumstances of this case. I will begin with the issue of the reasons for which the Executive Management Committee substituted dismissal for demotion as recommended by the Disciplinary Committee. The respondent has argued in support of the holding by the trial judge that the plaintiff bore the burden of proof on whether the Committee complied with Article 14(h)(iii) and provided reasons for the departure but that is erroneous and does not take into consideration the applicable rule of evidence which is section 17 of the **Evidence Act, 1975 (Act 323)**. It provides as follows;

"17. The burden of producing evidence

Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence."

In the absence of evidence showing that the Committee provided reasons for not accepting the recommended punishment by the Disciplinary Committee, the finding will go against the defendant so by law the burden was on the defendant to lead evidence in proof of providing a reason and notifying the Union of the reason. In the case of **Total Ghana Ltd v Thompson [2011] 1 SCGLR 458** this court, speaking through Anin Yeboah, JSC, (as he then was) said as follows at page 463 of the report;

"We think that by its conduct of neither calling the police alleged to have investigated the complaint against the plaintiff nor the person who had allegedly made statements that had implicated the plaintiff, the defendants may be said to have admitted plaintiff's claim that the allegations made against him were untrue. In the particular context of this case, in our thinking, an obligation was placed on the part of defendant company to lead credible evidence to the trial court that would render the allegation on which its suspension of plaintiff was based, more probable than the version of a denial by plaintiff."

In that case, though Total Ghana Ltd was the defendant, it carried the burden of proof on the averments they made in their defence regarding the grounds for dismissal of the plaintiff. They tendered only the police investigation report without calling the investigator to testify, which the Supreme Court held did not amount to sufficient proof. See also the case of **In Re Krah (Decd); Yankyeraah v Osei-Tutu [1989-90] 1 GLR 638, SC.**

Furthermore, it ought to be noted that section 17 of Act 323 has a proviso to the general rule of evidence therein and states that except otherwise provided by law. In this instance Act 651 has specifically placed the burden on the employer to prove that the termination of the employment of a worker is fair. That would mean that it is the employer and not the worker who ought to give the actual reason for the dismissal and further proof that it is fair. Section 63(4) of the Act states as follows;

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

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

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

Therefore, because the defendant failed to lead any evidence to the effect that it notified the union about any reason for varying the recommendation of the Disciplinary Committee, I take the view that no reasons were provided to the union. Consequently, the defendant breached Article 14(h)(iii) of the CBA. This is also borne out by the fact that the reasons stated in the letter of dismissal are the same reasons the Disciplinary Committee advanced to support their recommendation of demotion. The committee concluded their report as follows; **"It was Akpass who signed with the Retail Manager, the letter pledging the bank to honour the post-dated cheques as they fall due.**

George Akpass also passed the entries disbursing the loan facility for the purchase of the pick-up in the manner contrary to the Executive Credit Committee's instructions, albeit under the Manager's instructions.

We do not find his direct involvement in the uncredited lodgments saga but we find that he and the other staff appear to relate to Gyimantwi in a way that is beyond the official level. For example, Akpass passed entries directly debiting his account with GHS3,891.10 and crediting Gyimantwi account. When asked why he did so, he said it was to help clear Gyimantwi's cheques, which would otherwise have been returned unpaid. We recommend that George Akpass should be demoted to the grade of Seniour Clerk."

The question that has to be answered is, is the above reason that the Disciplinary Committee considered to merit demotion sufficient to justify the dismissal of the plaintiff having regard to all the circumstances in this? The record shows that the Disciplinary Committee established that the plaintiff worked with the bank for 26 years without any disciplinary record and was one of the most experienced workers at the Bole branch. The Committee cleared him of any dishonest conduct and when at the trial in court the defendant tried to smear him with corruption allegations, the judge saw through it and cleared him of any fraud or dishonesty. The act that landed the plaintiff in this trouble was not done out of any dishonest motives but he found himself between the rock and the hard place; his immediate superior, the branch manager had signed the instructions for the disbursement of the loan before calling him to sign because the second-in-command was unavailable and he had no reason to doubt that

it was not in the interest of the bank since the manager was his immediate boss. What is even of greater weight is the fact that the Disciplinary Committee who heard all the evidence came to the conclusion that the reasonable punishment to give to the plaintiff on all the circumstances was demotion and that dismissal would be unreasonable. Using the view of the Disciplinary Committee as a guide of fairness and reasonableness in the circumstances of this case, I am very clear in my mind that the dismissal was substantively unfair.

I will now consider the procedural fairness of the dismissal as provided for under section 63(4)(b). The CBA binding on the parties in this case insists that the disciplinary authority must assign reasons for varying the punishment recommended by the Disciplinary Committee. In the construction of deeds and statutes, the purpose of a provision must always be kept in mind and the construction must be such as to achieve that purpose. So, what is the purpose of Article 14(h)(iii) of the CBA? It is obvious to me that the purpose is to bring transparency into the disciplinary process of the bank and prevent the management from acting arbitrarily in the punishment that is imposed in each case. In my thinking, that provision is in line with the modern concept of fairness of disciplinary sanctions to be imposed by employers on workers in individual cases and this is the same aim as of section 63 of the Act. Therefore, the defendant's failure to comply with that part of the provisions of the CBA in my opinion renders the procedure by which the plaintiff was dismissed clearly unfair.

CONCLUSION.

In conclusion, I am of the considered opinion that the plaintiff has made out a case of unfair termination of his employment against the defendant and would be entitled to remedies open to him at law. The plaintiff prayed for re-instatement and compensation which are remedies the court can grant under section 64 of the Act. The relief of re-instatement must not be lightly decreed by the Commission or the court and the interest of the employer has to be given serious consideration before it is ordered. But this is a special case where there is little direct personal interaction between the worker and the employer who is a large bank with branches throughout Ghana. From the findings of the Disciplinary Committee, trust between the plaintiff and the defendant as an organisation has not been lost so that foundation of the

relationship of worker and employer, trust, that must at all times be present for the relationship to exist is still present between the parties. The Disciplinary Committee recommended demotion for the plaintiff, but I have taken into account the punishment that the plaintiff has so far suffered between his dismissal and this judgment in his favour and consider that he has been sufficiently punished for his indiscretion on the facts of the case. I therefore grant the plaintiff's prayer for re-instatement and order that the defendant shall re-instate the plaintiff to the position he held at the time of his unfair dismissal.

In the case of **Nartey-Tokoli & Ors v Volta Aluminum Co Ltd (supra)** the Supreme Court upheld the finding of the trial judge (Benin J as he then was) that the termination of the employment of the appellants was in breach of provisions of the **Industrial Relations Act, 1965 (Act 229)** and consequently void. By way of what the appellants were entitled to be paid, the court stated as follows in Holding (2) of the Headnote of the Report;

"2) The measure of damages for wrongful dismissal from employment was not to be confined to only loss of wages or salary but in addition the employee was to receive his entitlements under the contract of employment. The plaintiffs were therefore entitled to receive their salaries from the dates they ceased to receive them to the dates of their respective de facto termination, including an additional twelve months' salary (as awarded by the High Court in the exercise of its discretion) as damages for wrongful dismissal as at the respective dates of the de facto termination of their employment. As the termination of their employment was held to be void and of no legal effect they remained employees de jure and would therefore, be entitled to earned leave allowances, bonus, long service awards, including food packages and all other benefits said to be enjoyed on a so-called gentleman agreement basis; all of which should be converted into cash if feasible as at the respective dates of the plaintiffs' de facto dismissal."

This case is similar to the above referred case as I have concluded that the dismissal of the plaintiff was in breach of section 63 of Act 651 and he is entitled to re-instatement. The consequences are therefore that the plaintiff would be deemed not to have been dismissed so he shall be paid all remunerations, entitlements,

emoluments and benefits that he would have been entitled to had he not been unfairly dismissed.

Having granted the plaintiff re-instatement with all benefits, it does not appear to me that he is entitled to compensation. I will therefore dismiss all the other reliefs the plaintiff prayed for.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

EUNAS KOFI ESHUN FOR THE PLAINTIFF/APPELLANT/APPELLANT.

KWAME D. S. ASIRI FOR THE DEFENDANT/RESPONDENT/RESPONDENT.