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2023 DEVELOPMENTS IN

EMPLOYMENT LAW

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2023 saw the courts of Ghana decide a number of interesting decisions in employment law. These decisions not only provided clarity on existing legal principles but also introduced novel approaches to dealing with employment law questions that have far-reaching implications for both employers and employees. This update explores some of these decisions handed down by the Ghanaian Courts during the period under review.

Ascertaining the existence of an employment relationship

Frederick Abban & 9 Ors v Takoradi Flour Mills Co. Ltd (Civil Appeal No. J4/75/2021) [17 May 2023]

This case addresses the question of whether individuals who had worked for close to a decade (at the minimum) with a company could be anything other than employees. The Supreme Court did not think so. In the Court's view, the Plaintiffs' manner of work categorized them as independent contractors, as opposed to employees, irrespective of the duration of their engagement.

The Plaintiffs were engaged by the Defendant to load and unload goods. They argued that they were employees of the Defendant. In support of their case, they argued that the Defendant determined how work was to be done and highlighted that some of them had worked with the Defendant for durations between 10 and 30 years. As far as benefits go, the Plaintiffs were entitled to a minimum amount of money per bag of flour, medical treatment, food, and transportation. Dissatisfaction with the terms of their employment compelled the Plaintiffs to commence the action. The Plaintiffs asked the Court for a declaration that they be treated as permanent employees, an order directing the Defendants to pay their SSNIT Contributions, and an order that they be paid redundancy packages.

The Defendant challenged the validity of the Plaintiffs' claim. They argued that the Plaintiffs were not workers of the Defendant's company. The Defendant argued that the Plaintiffs, serving as loaders, worked in gangs; appointed their own leaders within these groups; and received payments for their work through the gang leaders, who subsequently distributed the earnings among them.

The High Court held the view that the Plaintiffs were not employees of the Defendant company. According to the High Court, “For a person to be declared as an employee of another, he must, as a matter of necessity, have control over the working contract and conditions of the employee.” The fact that the Defendants worked in groups was the persuasive factor here. As the High Court noted: “The evidence on record is that the Plaintiffs, as loaders, were under gangs; they [the gangs] determined when to come to work, how many hours per day to work, and how many bags to load per day.”

The Plaintiffs appealed and the Appeals Court sided with them. The Court of Appeal did not consider the gang working structure as determinative. Rather, it relied on certain written representations from the Defendant describing the roles played by the Plaintiffs as "casual loading jobs." It is in this light that the Court of Appeal took the view that the Plaintiffs were casual workers and, by the passage of time, had become permanent employees.

The Defendants appealed to the Supreme Court. The Supreme Court, in a majority decision, held that the Plaintiffs were not workers to start with. Being influenced by the gang nature of the operations, the Supreme Court – siding with the trial court - formed the view that the Plaintiffs were independent contractors offering services to the Defendant.

Other relevant factors influencing the decision of the Court included the fact that: (a) there were no official letters appointing the loaders as its workers; (b) the loaders worked as and when they pleased; (c) they are paid at the end of the month based on the number of loads by each person; and (d) most of the loaders have been in employment for over ten years. The Court, relying on the control test, formed the view that the Defendants had very little control over the Plaintiffs. Relying on the integration test, the Court further formed the view that the Plaintiffs’ role was merely accessory and not integrated into the main line of business of the Defendant.

The Supreme Court was further swayed by the evidence of a gang leader who appeared before the Court. In his testimony, he said: “We are not employees of the Defendant company since we do not clock in to work as all other junior staff do. This is because it is the leaders of our gangs who employ us, and we, individually, can choose what days we want to work.” He further pointed out that the workers were at liberty to allow their children or other persons to relieve them on some other days.

Employer's Right to Terminate on Notice

National Labour Commission v Barclays Bank of Ghana Ltd [2023] DLSC 16995

Nothing has clogged the employer's right to terminate an employment contract without reason in recent years other than the concept of unfair termination (or more aptly its misapprehension) under the Labour Act. To that extent, this decision deserves mention as one of the significant restatements on the law on termination on notice. This is so for a variety of reasons. First, it affirms the right of the employer to terminate without reason in the right context. Second, it resolves the terminological difficulties which litigants, and some Courts, have found themselves, regarding the legal significance of the phrases "fair termination" and "unfair termination". Further, it demarcates the boundaries of the unfair termination provisions under the Labour Act.

The introduction of the unfair termination provisions under the Labour Act, 2003 generated a lot of fanfare. An example of such optimism is seen in Kobea & Ors v Tema Oil Refinery; Akomea Boateng & Ors v Tema Oil Refinery (consolidated) [2003-2004] SCGLR 1033 where Ansah JSC declared:

> Now, the passing of the new Labour Act, 2003, (Act 651), hereinafter called the Act, has brought relief and hope to the employee, for now there are statutory duties and rights of the employer and the employee … Part VIII of the Act provided for fair and unfair termination of employment explained in section 63 (1)…Under 63 (3), a termination may be unfair if the employer fails to prove that the reason for the termination is fair; or it was made in accordance with a fair procedure under the Act.

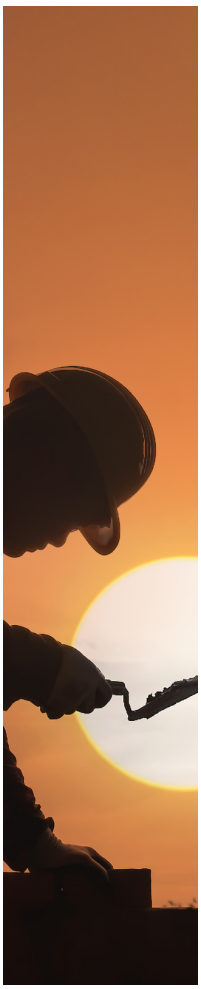
This has been interpreted by some as imposing an obligation on the employer to give a reason for termination at all times. Anyway, I digressed.

Back to the case. This is a fallout from a failed attempt to reach a mutual agreement towards the termination of an employment. The Plaintiff knew her time with the Defendant organisation was up. And the Defendant must have thought so. So, a decision was reached to mutually agree on terms of exit. Midway into the negotiation of the exit agreement, the Defendant changed its mind. It rather opted to simply terminate the employment on notice. The Plaintiff was displeased and filed a complaint at the National Labour Commission. The Defendant alleged that she was unfairly terminated. The National Labour Commission upheld the Plaintiff's complaint of unfair termination.

On a further appeal, the Supreme Court did not think that the substance of the complaint fell within the scope of unfair termination. As a key takeaway, the Court made it clear that what is fair or unfair termination has nothing to do with the ordinary usage or expression of the word "fair" or "unfair". Rather, fair termination is what section 62 of the Labour Act defines as fair termination; and unfair termination related to the specific instances listed in section 63 of the Labour Act, 2003. In other words, unfair termination relates to a close group of prohibited conduct as set out under Section 63 of the Labour Act.

As the Court rightly pointed out:

> Unfair termination, as just referred to, is statutorily defined, and unless an employee can fall within the scope of the statutory definition, the termination of the employee's employment with the employer cannot be characterised as unfair merely because of the absence of any reason so long as same is consistent with the contract of employment or prevailing statute



Burden of linking workers poor state of health to workplace conditions

James Ackon v Abosso Goldfields Ltd [2023] DLSC 15107

The Plaintiff was a bull-dozer driver in the Defendant mine. He was discharged from his employment because of redundancy. As part of the exit protocols, a medical examination was carried out. The medical examination revealed that he was suffering from glaucoma – even though the medical experts could not agree on the specific kind of glaucoma he was suffering from. The High Court took the view that since he did not suffer the condition at the time he was being employed, that condition could only have resulted from the condition of work. On a further appeal, the Court of Appeal and Supreme Court formed the view that the Plaintiff failed to establish a causal connection between the condition he complained of, and the conditions at the mining site that may have precipitated the injury. They held:

> Now this, without more, shows that the court was not presented with any proximate causative factor for the plaintiff's medical condition arising out of his conditions of work. Because if the cause of glaucoma is unknown, it can only mean that no workplace, no matter how sophisticated, can protect its employees from this disease. Again, when the cause of the disease is unknown, it cannot be legitimate to insist that it came out of a workplace at all costs.

Standard of Proof in Disciplinary Proceedings

Charles Kwadwo Gyasi v. Mining Building Contractors Limited [2023] DLSC 16106

This case raises the question of how a court should go about evaluating the findings of disciplinary proceedings under challenge. In here, the Respondent was accused of stealing. On the back of the finding, he was dismissed. He contested his termination. In evaluating the propriety or otherwise of his termination, the Court of Appeal relied on Section 13 of the Evidence Act, 1975 (NRCD 323) regarding the proof of crime in civil proceedings. The court went on to find that the Defendant company had not established that the Respondent was guilty of stealing beyond reasonable doubt.

Here is the point: Section 13 of the Evidence Act, dealing with the proof of crime in civil proceedings, is a standard set for courts, and courts only. As a result, a disciplinary body is not bound to establish the guilt of an employee accused of stealing beyond a reasonable doubt. Section 62 of the Labour Act only requires the employer to terminate an employee based on proven misconduct of the employee. This stands to reason that a court supervising the work or proceedings of a disciplinary committee ought not evaluate the soundness of the disciplinary committee's work based on evidential standards prescribed for courts. Suffice to mention that disciplinary committees are not bound strictly by the rules of hearsay, and other strict principles of evidence.

Contractual reliance

Isaac Alormenu v. Ghana Cocoa Board [2023] DLSC15000

The Supreme Court – in and out of employment cases – has demonstrated its willingness to accept an unsigned document as binding. However, the acceptance of an unsigned document must rest on some clear and unequivocal act of reliance and usage. Reliance here includes previous use of the unsigned document in making decisions regarding an employee. It was these lines of cases that the Plaintiff sought to anchor his case.

The Plaintiff was an accounts manager with COCOBOD. The case against him was that he had colluded with some persons to rig a bidding process in favour of a particular supplier. The winning supplier is said to have packaged some cash "gifts" to persons within the organisation. The gift raised questions, which subsequently led to an internal inquiry. The inquiry led to the dismissal of the Plaintiff. Challenging his dismissal, the Plaintiff stated that the basis for his termination was unlawful as the employer did not rely on the proper document to ground his dismissal. The employee rather argued that his appointment and terms of conditions were contained in an unsigned document.

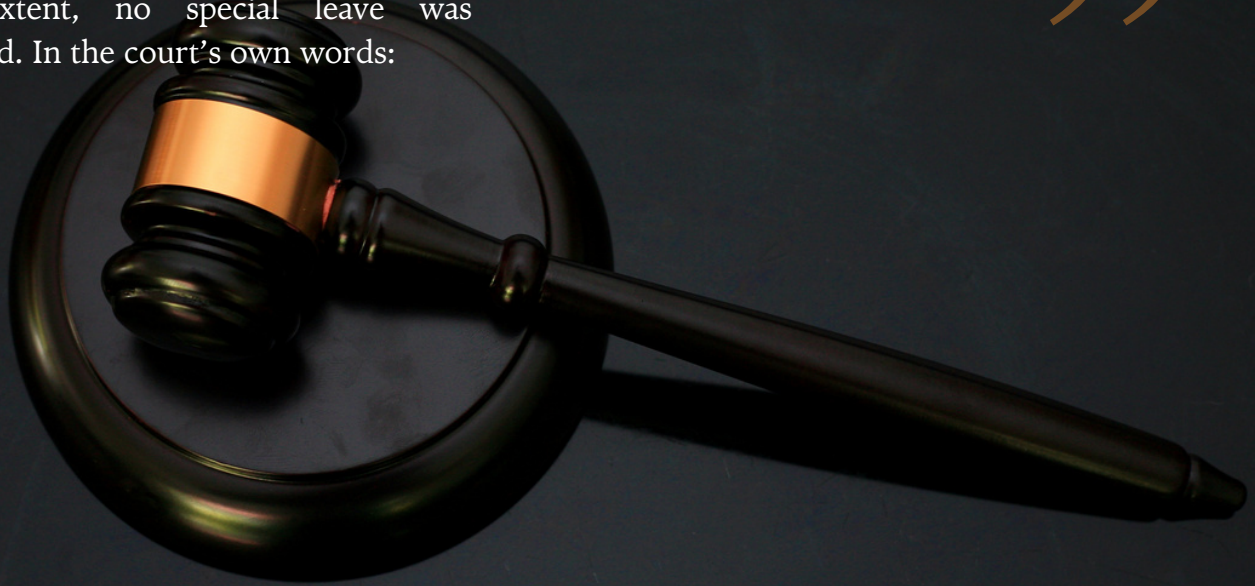
The Supreme Court dismissed the Plaintiff's claim. Reason: The plaintiff failed to establish, to the satisfaction of the court, that the unsigned documents on which he was relying were the operative documents in the defendant's organization.

Appealing Against Decisions of the National Labour Commission

Union Of Industry, Commerce and Finance vs. Harlequin International (Ghana) Limited [2023] DLHC16847

This case responds to the question of whether a person dissatisfied with the decision of the National Labour Commission requires leave of the Court of Appeal to appeal against a decision or order of the National Labour Commission. In response to this issue, the Court had to examine the words of Section 134 of the Labour Act which provides the forum and timelines for appealing against the decision of the National Labour Commission. There was no leave requirement in Section 134. This led the Court of Appeal to conclude that an appeal against the decision of the National Labour Commission to the Court of Appeal was as of right, and to that extent, no special leave was required. In the court's own words:

> Both the 1992 Constitution and the Labour Act, 2003 (Act 651) do not contain any provision requiring leave of the Court of Appeal in matters whose appeal emanate from lower adjudicating bodies such as the National Labour Commission. Under Section 134 of Act 651, the provision which clothes this Court with authority to adjudicate over decisions from the National Labour Commission in respect of unfair labour practice, such as the instant action, there is no leave requirement. We are therefore, emboldened by the provision under Section 134 of Act 651 to answer the jurisdictional issue raised by the Respondent in the negative.



Voluntary Arbitral Awards Not Decisions of National Labour Commission and Therefore Not Appealable.

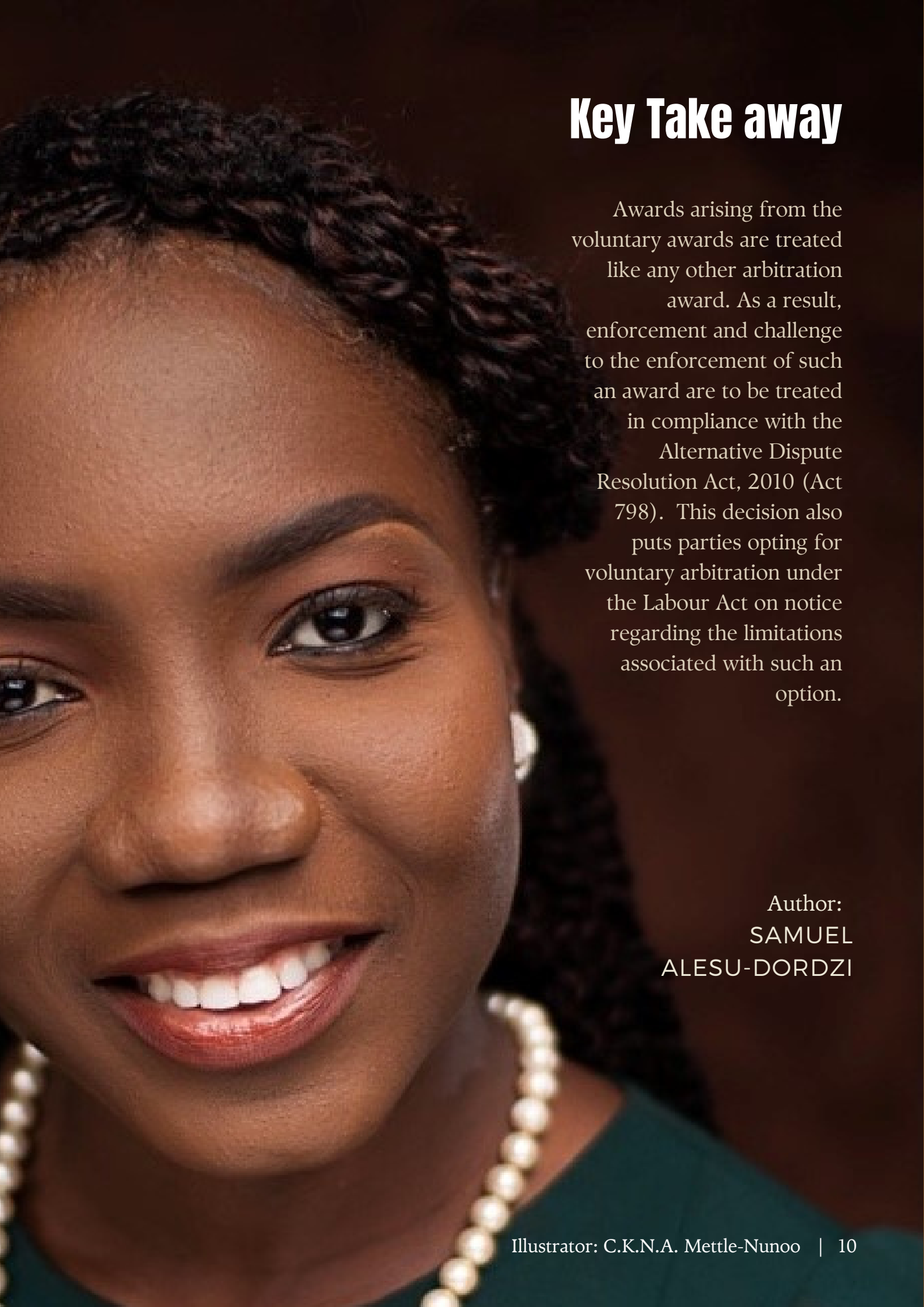
GCB Bank Limited vs. Jarvis Asiedu & 2 Ors [2023] DLCA 16832

The Labour Act, 2003 (Act 651), offers disputing parties the option of settling their disputes through arbitration. There are two types of arbitration. The first is compulsory arbitration, which takes place under the aegis of the National Labour Commission. The second is voluntary arbitration, under which the parties are at liberty to choose their own arbitrator and proceed as if they were acting under the Alternative Dispute Resolution Act, 2010 (Act 798).

To the contentious point: Section 134 of the Labour Act provides that a person may appeal against the decision of the National Labour Commission to the Court of Appeal. The question before the Court of Appeal in this case was whether an arbitral award from a voluntary arbitration was one that could be appealed against. The Court of Appeal explained that Section 134 was only concerned with appeals from decisions of the National Labour Commission. In the court's view, the outcome of the voluntary arbitration proceedings could not be said to be a decision of the National Labour Commission, and to that extent was not appealable.

According to the Court,

> …the Commission's role in a voluntary arbitration is that of a facilitator and not a decision-maker. The argument therefore that the award of the voluntary arbitrator was by extension the decision of the Commission is erroneous and ought to be rejected. It cannot be suggested, indeed, we have not come across a case where the Commission is in court seeking to enforce an award made by a voluntary arbitrator as it would, for its own award in a compulsory arbitration, which to all intents and purposes is its own decision and enforceable as such.



Key Take away

Awards arising from the voluntary awards are treated like any other arbitration award. As a result, enforcement and challenge to the enforcement of such an award are to be treated in compliance with the Alternative Dispute Resolution Act, 2010 (Act 798). This decision also puts parties opting for voluntary arbitration under the Labour Act on notice regarding the limitations associated with such an option.

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