IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)
DORDZIE (MRS.) JSC
PROF. KOTEY JSC
TORKORNOO (MRS.) JSC
AMADU JSC

CIVIL APPEAL
NO. J4/44/2021

29TH JUNE, 2022

IRENE TETTEY-ENYO ……. PLAINTIFF/RESPONDENT/RESPONDENT

VRS

ELECTRICITY COMPANY GH. LTD. … DEFENDANT/APPELLANT/APPELLANT

TORKORNOO JSC:-

The points of contention in this suit that has reached up to the second appellate court are

a. whether or not the dismissal of the Plaintiff from the employment of the defendant for being filmed receiving money from a third person was wrongful or not.
b. if the dismissal was wrongful, whether or not an order for damages for the said wrongful dismissal, as well as an order for the reinstatement of her employment granted by the high court, and affirmed by the court of appeal, are supported by law.

Background

Until April 2012, the Plaintiff/Respondent/Respondent (Plaintiff) was employed by the Defendant/Appellant/Appellant (Defendant) as a Senior Customer Relations Assistant at the defendant's Afienya office. The grounds for the dismissal of Plaintiff from the employment of Defendant rested on the provision found in **Appendix 'C'. A. ix** of defendant's **Collective Agreement** with the Public Utility Workers' Union in the words '*Any offence or act deemed to bring the company's name into disrepute'*. This condition is repeated in **Appendix 'A'. A. ix** of the defendant's **Manual of Staff Regulations and Conditions of Service for Senior Staff**

A well- known investigative journalist called Anas Aremeyaw Anas aired a film on national television as part of an alleged exposition of corruption in the defendant company. Part of the film included the image of the Plaintiff receiving a reddish piece of paper during working hours. The video did not reveal the full body of the one who gave her the item captured on film.

In reaction to this video, the Plaintiff was summoned to the conference room of the Managing Director of the Defendant company on 25th January 2012, and made to watch a copy of the video. Thereafter, the Plaintiff was given a written query. The query first pointed to the fact that the exposition of malpractices within the defendant company by staff, including the plaintiff, had brought the defendant's name into disrepute. Second, the query raised the fact that plaintiff had been identified in the video clip collecting money even though she is not a cashier, and third, the query raised the question why disciplinary action should not be taken against her for the two earlier reasons stated.

In her response, Plaintiff denied that the scene showed on video depicted the '*collecting of money*'. She said it showed the '*receiving of a reddish substance*' which could have been an ECG folded bill or a one cedi Ghana note.

She asserted that owing to her hectic schedule that did not allow her to have a lunch break, she often sent various persons to buy her food and other necessaries of life. She was sure that the image was derived from one such situation where someone

she had sent was returning money as change to her, or it could also be an ECG bill that she often worked with.

A committee of enquiry was instituted to investigate the possibility of wrong doing by the Plaintiff in the film. Plaintiff was interdicted and placed on 50% of her salary pending the outcome of further investigations into the matter.

At the enquiry, Plaintiff identified herself in the video, including the fact that she was captured receiving money. She however denied that it was a bribe, and reiterated the position that she had given in her first explanation, particularly the likelihood that the money was given to her by someone she had sent on an errand.

The committee of enquiry decided to interview two of the persons she named as part of the group of persons she often sent out to make purchases on her behalf. Although they admitted being often sent by the plaintiff to do errands involving money, they denied being the persons in the film, because the dress worn by the person in the film did not conform with their uniform. Following the work of the committee of enquiry, its' final report set out three relevant findings on the plaintiff which included

a. A conclusion that the plaintiff's collection of money as seen in the video clip was from a customer
b. her job description does not allow her to handle money during working hours and
c. her inability to provide credible evidence on the identity of the giver makes her liable for collection of money from unauthorized source during official hours.

On 18th April 2012, Defendant dismissed her on the grounds that '*as a non-cashier, she was fully aware that she was not supposed to collect money from customers during the performance of her duties*'. It urged that she disregarded all laid down rules and regulations and misconducted herself. It claimed that as a frontline employee, her conduct as captured in the clip had tarnished the image of the company and brought its name into disrepute. The defendant dismissed her

pursuant to **Appendix 'C' A (ix)** of the Collective Agreement between defendant and the Public Utility Workers Union.

Plaintiff appealed against the dismissal to management of the defendant company, in accordance with the Collective Agreement, and received a response refusing to rescind the decision to terminate her appointment. Instead of continuing appeals within the hierarchy of the defendant organization provided for in the internal regulatory instruments, Plaintiff commenced a suit in the high court.

The case of plaintiff

Plaintiff rested her plaint in this suit on the ground that her dismissal was unlawful. She urged that she was given a hearing that violated principles of natural justice. She alleged that the committee of inquiry failed to produce a witness to testify on the allegations made against her, and she was not given an opportunity to question the maker of the film to substantiate the allegation that the money she was seen receiving on the video was a bribe. For the above reasons she sought the following reliefs:

1. An Order declaring the termination of the plaintiff's employment as unlawful.
2. An Order of certiorari quashing the interrogations and findings of the Committee of Enquiry constituted on the plaintiff by the defendant company.
3. An Order directed at the defendant company to re-instate the plaintiff.
4. An Order compelling the defendant to pay to the plaintiff all deductions made from her received salary during enquiries into this matter from the 10th of February 2012.
5. An Order compelling the payment of all salary arrears due the plaintiff.
6. General damages.
7. Costs.

The case of the defendant

Defendant denied that the plaintiff's dismissal was unlawful. Its case was that to the extent that the Plaintiff had been given the opportunity in a hearing constituted in

accordance with the appropriate grievance procedures, and she had admitted that she was the one filmed on camera receiving money, and she was dismissed on the ground that her appearance on the film had brought the defendant's name into disrepute, her dismissal from employment was not wrongful. Due process was followed, and the rules of natural justice observed in the work of the committee of enquiry. Further, the termination of employment was grounded on Appendix 'C' A. ix of the Collective Agreement between the Defendant and the Public Utility Workers Union.

The Court admitted six issues for resolution in the suit. They were:

a. Whether or not the plaintiff's employment with the defendant was unlawfully terminated
b. Whether or not the plaintiff was officially permitted to take working breaks during the day
c. Whether or not the nature of the plaintiff's work schedule compelled her to give monies to some people to shop for her
d. Whether or not the tape or clip on the alleged malfeasance relied upon by the defendant is authentic
e. Whether or not the plaintiff has done anything to allegedly bring the image of the defendant company into disrepute
f. Whether or not the plaintiff's appeal against her dismissal was brought in accordance with the applicable provisions of the CBA of the defendant company

Judgment of the high court

At the end of the trial, the trial judge resolved all the issues raised in the dispute in plaintiff's favor. Regarding whether the defendant was right in asserting that by the nature of her functions and the rules and regulations of the defendant, the plaintiff was not allowed to handle money during working hours, the trial judge made the finding on issues (b) and (c) that she was officially not permitted to take working breaks and so, she was compelled to give money to people to shop for her.

On the issue (d) on whether the video was authentic, the trial judge found that the video had been procured from GBC and not the original source and was not authentic. On page 14 of his judgment the trial judge found that on account of the failure to call the maker of the video to clarify the incidents in the video, the assertion that the hand giving money to the plaintiff in the video is that of a customer based on the evidence adduced before the committee is wrong, and of no legal effect.

Further, since the evidence showed that plaintiff could not go out for lunch and was sending people to run errands for her; and the rules and regulations in the company did not preclude plaintiff from receiving money at all at work, even if she was not allowed to receive money from customers; and Defendant could not prove from the video that plaintiff was collecting money from a customer, it was not a crime for her to receive change from a person she had sent on an errand. The court held that plaintiff could not be faulted for what was seen in the video and the defendant had failed to prove that plaintiff's conduct had brought their name into disrepute. The position that defendant had stood on to dismiss the plaintiff was therefore baseless.

On the issue of compliance with the rules of natural justice, the court reviewed the requirement for fair trial and administrative justice under **Articles 19 (3) and 23 of the 1992 Constitution** and the dicta in cases such as **Awuni v West African Examinations Council [2003-2004] SCGLR 471**, **Aboagye v Ghana Commercial Bank Ltd [2001-2002] SCGLR 797**, and **Justice Awuku Sao v Ghana Supply Company Ltd [2009] SCGLR 710**. He recognized the following identifiable principles from these cases

a. The right to administrative justice demanded the observance of the rules of natural justice including the audi alteram partem rule
b. Where a body or officer has an administrative function to perform, the activity must be conducted with, and reflect the qualities of fairness, reasonableness and legal compliance
c. That duty to act with fairness required that the person against who a decision is taken must be directly given an opportunity to be know what grievance

stood against him and be heard in their defence against the grievance in the proceedings through which the decision is taken

d. Where there is no specific disciplinary procedures through which the proceedings may be undertaken, the employer is under an obligation to act fairly and reasonably and to comply with the rules of natural justice

His conclusion was that *'the sum total of the holdings in the various cases cited is that with or without any laid down procedures to ensure and enforce discipline in an organization, the basic rules of natural justice have to be observed.'* In applying this test to the facts before him, the trial judge was satisfied that the Committee of Enquiry had given the plaintiff opportunity to be heard on an explanation for her acts in the video. However, the failure to allow plaintiff to directly hear the testimonies of the two security men she had identified as the persons who were likely to be the one captured in the video giving her money, and who testified as to whether they were the persons seen in the video with plaintiff, and the failure to allow her to interrogate their testimonies constituted a breach of the rules of natural justice and the right to administrative justice guaranteed under Article 23 of the 1992 Constitution.

On the issue of collecting money from customers, it was the evaluation of the court that Defendant could not prove on a balance of probabilities that the money the plaintiff was seen collecting in the clip was from a customer. Further, the fact that the plaintiff was precluded from receiving money from customers does not mean she could not receive money in the form of change from people she sent to run errands for her. The court concluded that the plaintiff had done nothing to breach Appendix 'C; A (ix) of the Collective Agreement and so her dismissal was wrongful. The trial judge granted the declaration that the dismissal of plaintiff was unlawful.

He however refused the relief to quash the proceedings of the committee of enquiry on the premise that the relief available to a claim of wrongful dismissal was damages, unless there were public law considerations.

The court went on to hold that because defendant is a public utility owned by the Government of Ghana, a statutory organization with no profit motive, the defendant

company is a public service identifiable under **Article 190 (1).** Pursuant to **Article 191(b)** of the **1992 Constitution**, its employees shall not be dismissed or removed from office or reduced in rank or otherwise punished without just cause. The plaintiff's dismissal was therefore in breach of article 191 (b).

On account of his evaluation that the defendant is part of public services, he granted Plaintiff's reliefs 3, 4, 5 being re-instatement with all benefits she was enjoying as an employee from the time of her dismissal. He also awarded her damages in the value of 15 months of salary for the wrongful dismissal.

Defendant appealed against the judgment on the following grounds:

a. The learned judge erred when he held that the evidence adduced in court as Exhibits 1 and A1 could not be classified as being authentic.
b. The learned judge erred when he held that the failure of the Defendant to give the plaintiff the opportunity to hear the security men and cross-examine them amounts to the breach of natural justice.
c. The learned judge erred when he held that the failure of the committee exhibited bias and ill will against the plaintiff during the hearing.
d. The learned judge erred when he held that the dismissal of the plaintiff by the defendant was unlawful.
e. The learned trial judge erred in fact and in law when he ordered the re-instatement of the plaintiff.
f. The learned judge erred when in addition to an order of re-instatement and consequential reliefs, he ordered the Defendant to pay to the plaintiff 15 months' salary as general damages.
g. That the judgment is against the weight of evidence.
h. Further grounds of appeal would be filed on receipt of the judgment.

Reliefs sought from the Court of Appeal were for the court to set aside the entire judgment of the High Court which held that the dismissal of the plaintiff by the defendant was unlawful and also set aside all the consequential reliefs granted by the Court as a result.

The court of appeal disagreed with the Defendant on all the grounds of appeal, expressed their agreement with the evaluation of the high court, and upheld the decision of the trial judge.

The defendant has appealed to this court on the following grounds

a. That the Court of Appeal erred when it held that the learned trial judge did not err in fact and law when he ordered the **reinstatement** of the plaintiff/respondent/respondent.
b. That the Court of Appeal erred when it held that the learned trial judge did not err when in addition to an order of reinstatement and consequential reliefs, he ordered the Appellant to pay to the plaintiff/respondent/respondent 15 months' salary as general **damages**.
c. That the judgment is against the weight of evidence on record.

Reliefs sought from the Supreme Court are for this court to set aside the order of reinstatement confirmed by the Court of Appeal and the order of the Court of Appeal upholding the trial judge's decision to grant general damages of 15 months' salary in addition to reinstatement of the plaintiff/respondent/respondent among other consequential reliefs.

Consideration

We will begin with ground c, because it answers the issues raised in the first two grounds of appeal. Was the judgment of the high court that was affirmed by the court of appeal against the weight of evidence?

Wrongful dismissal

The learned trial judge premised his holding that plaintiff was wrongfully dismissed on the constitutional direction in Article 191 (b) that persons working in the public services shall not be dismissed or removed from office or punished without just cause. He further ordered reinstatement as a relief on the same premise and his evaluation of the directions in cases such as **GNTC & Another v Baiden 1991 1**

GLR and **Ghana Cocoa Marketing Board v Agbetor & Others [1984-86] 1 GLR 122**

Clearly this is why the defendant in this appeal has focused his initial energies on addressing us on whether the defendant is a member of the public services or not. Our view is that since the real matter in issue is the question whether the plaintiff's dismissal was wrongful, that ground of appeal ought to be dealt with first.

We must first clarify that the law has always asserted, as a matter of public policy that a contract of service is not a contract of servitude. This common law position has been expressed in Section 8 (a) and 15 (a) of the **Labour Act 2003 Act 651.**

Rights of Employer

8. Subject to this Act and any other enactment, the rights of an employer include the right to

a. Employ a worker, discipline, transfer, promote and terminate the employment of the worker;

Grounds for termination of employment

15 A contract of employment may be terminated,

a. By mutual agreement between the employer and the worker
b. By the worker on grounds of ill-treatment or sexual harassment;
c. By the employer on the death of the worker before the expiration of the period of employment
d. By the employer if the worker is found on medical examination to be unfit for employment;
e. By the employer because of the inability of the worker to carry out his or her work due to

i. Sickness or accident; or

ii. the incompetence of the worker; or

iii. proven misconduct of the worker

After setting out the statutory framework for termination of employment, Act 651 goes on in Part 111 of the statute to set out what constitutes fair and unfair termination of employment, in order to establish the circumstances of termination that will or will not provoke liability for an employer's termination of employment.

The principle has further been settled through jurisprudence that despite the freedom from servitude that the law implies into employment law, an employer who terminates the employment of a worker outside of the statutory conditions outlined for fair termination of employment does so unlawfully. Further, if the contract between the parties regulates conditions for dismissal of an employee, then unless the dismissal decision and process are premised on the agreed terms of contract, the dismissal is wrongful. Also implied into the requirement to comply with the statutory conditions for termination or contractual provisions for termination of contract or dismissal from employment are the constitutionally guaranteed rights to fair hearing, administrative justice, and freedom from arbitrariness, capriciousness or bias, during the exercise of the procedures leading to dismissal. Thus every termination of employment or dismissal from work must comply with substantive law and due process of law. Among the plethora of decisions on these principles are **Aboagye v Ghana Commercial Bank Ltd [2001-2002] SCGLR 797,** and **Kobi v Ghana Manganese Co Ltd [2007-2008] SCGLR 771**,

As was articulated in **Kobi v Ghana Manganese Co Ltd [2007-2008] SCGLR 771**, when the right to terminate a contract of service is dependent on the terms of a contract, the termination process must be exercised in accordance with the said terms. Where under a collective agreement binding on the parties, the right to terminate is linked to the commission of an offence identified in the agreement and the following of particular disciplinary procedures outlined under the agreement, the dismissal decision must pass the test of being anchored in the contractual terms and being arrived at after the due implementation of the parameters outlined in the contract, or it will be considered wrongful.

So was the trial judge right in his evaluation of the process and evidence that led to the dismissal of the plaintiff? It is our consideration that he was.

Appendix 'C' of the Disciplinary Code in the Collective Agreement between the parties to this appeal allows the defendant to dismiss an employee on account of inter alia

INTOLERABLE OFFENCES

ix. *Any offence or act deemed to bring the company's name into disrepute*

This is replicated in **Appendix 'A'.A. ix** of the defendant's **Manual of Staff Regulations and Conditions of Service for Senior Staff**

The relevant facts in this case include the fact that the Plaintiff was an employee of the defendant whose functions did not include receiving money as part of her work. Second, the plaintiff admitted to being the person in a film in which she was captured receiving money. That film was presented on national television as part of an exposition on corruption in the defendant company. The case of the defendant was that its name was brought into disrepute by this film.

This is the sticky bone in throat. Could the above set of facts simpliciter constitute sufficient ground to justify the dismissal of the plaintiff by the defendant? In his submissions to this court on the ground of appeal that the judgment is against the weight of evidence, learned counsel for defendant has presented the following arguments:

Citing the cases of **Alex Onumah Coleman Anor v Newmont Ghana Gold & Others** which is reported in [**2021]171 GMJ 261**,**Awuku-Sao v Ghana Supply Co Ltd [2009] SCGLR 710** and **Lagudah v Ghana Commercial Bank [2005-2006] SCGLR 388**, he opined on page 18 of his submissions that: '*the only basis for which one can say that his or her dismissal is unlawful is on the basis that is that he or she was denied any opportunity to be heard and/or to mount a defence to the allegations levelled against him or that the procedures undertaken and disciplinary actions were breached or not complied with*'.

He also pointed to the case of **Razak Abdul-Siddique Alhassan v SSNIT [2019] 139 GMJ 52** in the position held therein that where a disciplinary committee is merely investigatory or exploratory and does not determine the rights and

obligations of the person affected, it would be wrong to regard such a body as if it were a court where parties should be given the right to cross examine those giving evidence. '*Their duty is to act in good faith and listen to both sides before deciding*

Thus to the extent that the committee of enquiry in the instant case exhibited goodwill, fairness and transparency in its dealing with the Plaintiff, and there was prima facie evidence against the Plaintiff, the burden shifted unto Respondent whose office did not involve receipt of money to explain why she was captured receiving money from a person **believed to be a customer** (emphasis mine).

We are afraid that the weakness of this submission is to impute a principle that once there has been due hearing of a party, the quality of evidence and sufficiency of that evidence which forms the basis of dismissal or termination of employment is irrelevant. That conclusion or position has no basis in the constitutional, statutory or common law edicts on protections against unfair termination of employment and wrongful dismissal from employment. That position also forgets that to the extent that the decision taken to dismiss the plaintiff was challenged by her in court, a burden was placed on defendant to discharge the duty to provide evidence that the dismissal was not wrongful and was justified by the commission of '*an act or offence*' that had actually brought the name of the company into disrepute.

The right to fair hearing, administrative justice and freedom from bias that are guaranteed in Articles 19, 23 and 296 of the Constitution demand that decisions taken that affect the rights of citizens always comply with law. It is from the same basket of law that we must determine the duties placed on those who take decisions and the standards to be applied to the evidence on which they take decisions. In the instant case, an important relevant question is not just that the defendant arrived at the decision to dismiss plaintiff after following due process, but also whether the allegation that the plaintiff had brought the defendant's name into disrepute – the contractual basis for the dismissal – was proved to exist.

It is a trite knowledge that proof in law does not occur only on the say so of one party to a dispute. It requires the establishment of facts by proper legal means. Whether the standard of proof is by the establishment of the fact beyond reasonable

doubt, as in criminal cases, or on a preponderance of probabilities, is determined by the type of matter in contention, and the forum the contention is in.

It is true that the committee of enquiry that investigated the allegation against the plaintiff was not even an administrative tribunal that took a decision on her rights, and so the standard of proof of the matters alleged that should have led to their conclusions cannot be that demanded by judicial proceedings, such as proof beyond reasonable doubt. This is the clarity given by cases such as **Alex Onumah Coleman** cited supra and **Kofi Senkyire v Abosso Goldfields Ltd Civil Appeal No. J4/20/2005** delivered on 26th June 2006.

However, the courts have directed times without number that notwithstanding the forum, every decision that affects the rights of others must have the constitutionally directed basic qualities of fairness, lack of caprice and lack of perversion. And when a party is brought to court to defend their decision, the duty to prove the basis of the decision up to the required standard cannot be shelved.

Part 11 of the **Evidence Act 1975 NRCD 323** provides standards for allocations and discharge of the burden of proof when a party presents a case against another in a civil case. This includes a burden of persuasion and a burden for producing evidence.

Section 10 (1) *For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.*

(2) *The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.*

11 (1) *For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue*

11 (4) *In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence*

12(1) *Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities*

(2) *'Preponderance of the probabilities' means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence*

14. *Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.*

These provisions set a legal framework that demands that evidence seeking to establish any fact against any person to warrant a decision that affects their fundamental right to work guaranteed under Article 24(1) must be of 'sufficient' quality supported by law. The tribunal of fact must be 'persuaded' of the probability of the fact in issue, in order to arrive at a finding, and where one set of facts is established, and another set of facts is placed before them that displaces the probability of the first set, it falls into the quality of 'perversion' to ignore the second set of facts.

In evaluating the evidence submitted to the defendant through both it's management and committee of enquiry, the trial judge was satisfied that the evidence failed to reach the standards required to merit the allegations levelled against the plaintiff, and the video did not have the quality that should have led to the decision taken by the defendant. And this is true. Short of the voice recorded over the action shown in the video, there was no other evidence to explain who the plaintiff was receiving money from, and what the money was for. How did this person who explained what was happening in the video come to the conclusions they stated? Further, the plaintiff had given a reasonable, legitimate and plausible explanation for how she could be receiving money from a human hand during working hours.

In **Total Ghana Ltd v Thompson [2011]1 SCGLR 458**, a case with similar antecedents to this one, the plaintiff was suspended on the basis of police investigation and allegation by another person which were alleged to have implicated him in offences, and which he denied. He contested the suspension in an action in court claiming inter alia, a declaration that the suspension was a nullity. The police investigation report which formed the basis for the decision to suspend him was tendered without the defendant calling the investigator to testify. Neither was the one who made the allegations called on to testify. This court ruled that '*in the peculiar context of the case, there was an obligation on the defendant company to provide credible evidence to the trial court that would render the allegation on which its suspension of the plaintiff was based, more probable than the version of a denial by the plaintiff*.

The view of this court was that by failing to do so, the defendant had failed to discharge its burden of producing evidence to justify the suspension of the plaintiff, and the defendant could be deemed to have admitted the plaintiff's denial of the allegations.

In the instant case, as much as it was accepted that the plaintiff's work did not include the handling of money, and the video showed that she had accepted money from someone at work, the plaintiff provided a reasonable explanation for how she could have been captured giving or receiving what looked like a one cedi note to another person. Her explanation showed that because she often had no opportunity to take a break during lunch time, she gave money to people to do things for her during working hours and those people brought her money during working hours. The burden of countering that evidence shifted to defendant, and it was not enough to ignore her explanation as not supported by positive evidence from her.

It is the well established position of the law derived from Section 14 of NRCD cited supra that the burden of persuasion is not fixed but shifts, if the person originally bearing the burden of providing evidence is able to do so sufficiently. The burden then shifts to the next party to introduce sufficient evidence to avoid a ruling against them on that relevant issue. See the decisions in cases such as **In Re Ashalley**

Botwe Lands; Adjettey Agbosu and Others v Kotey and Others [2003 – 2004] 2 SCGLR 420.

Indeed, **Section 40 of the Labour Act 2003 Act 651** provides in **Sub-Part 111** titled **Rest Periods**:

Undertakings to which this Sub-Part applies

40 In any undertaking

a. *Where the normal hours of work are continuous, a worker is entitled to at least thirty minutes break in the course of the work, the break forms part of the normal hours of work; and*
b. *Where the normal hours of work are, in two parts, the break should not be of less than one hour duration and does not form part of the normal hours of work.*

It should be recognized that the above statute provides for employees to have a break during the working day. So with the explanation that Plaintiff had sent people to bring her food at her work station instead of going out for her break, because she was prevented from taking such a break, public policy cannot impute wrong to her for buying food without clear evidence of a positive act of malfeasance.

After the rendering of this plausible explanation, the burden of proof shifted back to the defendant to establish that the person the plaintiff was captured with was someone she could not have had financial transactions with in the normal course of her work – such as someone sent to buy food for her.

The defendant was faced with difficulties in this venture. Primarily because they were not the authors of the video and so could not speak directly to the identity of the person shown in the video with the plaintiff. Second, the original conversations of the parties in the video were obscured by the 'voice over' recording heard in the video. Indeed it is critical to state that the contents of the 'voice over' were clearly hearsay evidence by Section **116 (c)**, of NRCD 323 and cannot serve to be accepted as evidence that explains what was happening on the video under Section

117 of NRCD 323, without ensuring that exceptions to the hearsay rule are complied with.

Section 116 (c) provides

'*hear say evidence is evidence of a statement, other than a statement made by a witness while testifying in the action at the trial, offered to prove the truth of a matter stated*.'

Section 117. *Hearsay evidence is not admissible except as otherwise provided by this Decree or any other enactment or by agreement of the parties.*

Defendant therefore carried a duty under Sections 118 to 125 of NRCD 323 to ensure that the hearsay evidence was authenticated and made admissible in the various ways set out therein. This they failed to do in their internal enquiries and also in court. It seems that they made no effort to find the creator of the video, who had clearly edited it to place a third person's voice into the action shown to testify as to what was going on in the video and also to testify as to the origination of the video and the contents of what they said.

Every case that comes to court stands on major pillars. These include capacity of a party to commence same, the cause of action claimed on, the quality of evidence presented to sustain the claim, and the legal antecedents of due process – such as jurisdiction - and other incidents of competence. Failure to satisfy any of these pillars means the case cannot hold up.

Thus the assertion by the defendant that the plaintiff had gone foul of Appendix 'C' of the Disciplinary Code in the Collective Agreement between the parties and what she had been seen doing in the video constituted an intolerable offence or act placed a firm obligation on the defendant, under the law of evidence, to prove that this act was what it was supposed to be – taking money from a customer. The defendant failed woefully in discharging that duty in law.

The trial judge was therefore right in concluding that following the explanation given by the plaintiff for her obscured act in the video, the committee of enquiry's private interviews with the two security men could not suffice to discharge the continued

burden to produce evidence of the allegation in the video that the defendant company carried, if it wanted to dismiss the plaintiff for the conduct alleged by the person who produced and aired the video.

Further, the trial judge was right in concluding that the interviews with the security men did not carry the requisite quality of fair hearing, because the plaintiff was not given the opportunity to listen to their testimonies, whether for or against her, and establish any new set of facts in rebuttal of whatever they said, if she considered it necessary. This was a right due her under the audi alteram partem rule of natural justice, because it was on the basis of those testimonies, that the committee of enquiry concluded that those security men could not be the persons in the video, and that the person in the video could not be anyone legitimately connected to the plaintiff during her work schedules.

In a society saddled with the kind of endemic corruption that is constantly published about in the media, it cannot be a proper application of public policy for institutions to be blithe about establishing how their staff were conducting corrupt acts, and what administrative steps can be taken to stem the tide of such events. To the extent that the plaintiff's explanation for giving and receiving money at work was plausible, and supported by the general dictates of her humanity, as well as the law on taking refreshments during working hours, the burden remained on defendant to introduce sufficient evidence of misconduct before the dismissal of plaintiff could be justified in law. This it failed to do.

We agree that the evidence on which the defendant stood to determine that the plaintiff had been involved in conduct that breached her duties at work, did not satisfy the threshold of sufficiency of proof required. The judgment of the trial judge that the plaintiff was wrongfully dismissed was not against the weight of evidence.

Re-instatement

We must first state for the purpose of clarifying the law on reinstatement that of important reminder are the words of Date-Bah JSC in **Bani v Maersk** cited supra at page **807**. '*A re-instatement would be equivalent to specific performance of a contract of employment, which is not permissible. Thus, 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.'

Having said this, the question whether or not the defendant is part of public services is the first ground of appeal that has been argued at length by counsel for defendant. It is a matter that was not set down for resolution in the high court. Neither was it a relief sought by either party. Thus the determination by the high court that the defendant company is part of public services is a determination that was meant to assist him in determining what reliefs to grant

However, we do not see that the jurisdiction of the high court was properly invoked for a determination of whether or not the defendant company forms part of public services. That determination that the defendant is part of public services is therefore per curiam. However, having affirmed the decision of the trial court on wrongful dismissal, we do not see any proper reason for reversing the court's orders of reinstatement.

Damages

The next issue for consideration is the fact and quantum of damages that were awarded to the plaintiff. Counsel for defendant has urged strongly that the award of damages of fifteen months of salary was premised on principles from case law that have essentially been corrected. These earlier line of cases included **Nartey-Tokoli & Others v Volta Aluminium Co Ltd No 2 [1989-90] 2 GLR 341**, **Ankorful v State Fishing Corporation [1991] 2 GLR 348**, **GNTC & Anor v Baiden [1991] 1 GLR 567** and **Ghana Marketing Board v Agbettor & Others [1984-86] 1 GLR 122.**

It was his submission that recent relevant decisions included **Ashun v Accra Brewery Ltd [2009] SCGLR 81** where this court pointed that as in any consideration of damages, an employee whose employment had been wrongfully terminated had a duty of mitigation of his losses by taking steps to find alternative employment. A court should therefore consider losses within a reasonable period after such termination, during which time the aggrieved party was expected to find

alternative employment. `*In other words, the measure of damages was the quantum of what the aggrieved party would have earned from his employment during such reasonable period determinable by the court, after which the employee should have found alternative employment. That quantum was subject to the duty of mitigation of damages*`.

This position was reiterated in **Klah v Phoenix Insurance Ltd [2012] 2 SCGLR 1139** on the need to appreciate that the principles applicable to damages in contract remain foreseeability of the damages arising fairly and reasonably from the breach. We agree with counsel for defendant on these statements on the applicable legal principles. However, having upheld the reinstatement of the Plaintiff, there is no premise for the award of damages.

Conclusion

The appeal against the decision of the court of appeal dated 21st May 2020 which decision upheld the judgment of the high court dated 19th November 2013 is allowed in part. The judgment of the Court of Appeal affirming all the reliefs claimed by the Plaintiff is varied by setting aside the award of 15 months salary as damages for wrongful dismissal of the Plaintiff. No order is made as to costs.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)
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