

PREGNANCY DISCRIMINATION AS A CAUSE OF ACTION IN GHANA: A COMMENTARY ON CHRAJ, GRACE FOSU & THELMA HAMMOND V. GHANA NATIONAL FIRE SERVICE & THE ATTORNEY GENERAL

Renee Aku Sitsofe Morhe¹ & Abena Agyeiwaa Asare²

ABSTRACT

The Ghana labour law (ACT 651) prohibits pregnancy discrimination. The law exempts from application the armed forces, the police service, the prison service and the securities intelligence agencies and hence by extension, the fire service. Despite these exemptions, the court in the case of CHRAJ, Grace Fosu & Thelma Hammond v. Ghana National Fire Service & the Attorney General (CHRAJ & others v. GNFS) declared a pregnancy clause in conditions of service of the Ghana National Fire Service (GNFS) discriminatory in its effect, unjustifiable and illegal. The objective of this case commentary is to examine the court decision in order to draw attention to the illegality of the practice of pregnancy discrimination at the workplace that adversely affects women. In analysing the court's decision, this case commentary finds, among others, that pregnancy discrimination could be perpetrated under the guise of freedom of contract. Also that, pregnancy clauses inserted in employment contracts are discriminatory and a violation of the constitution and a business practice that adversely impacts both employers and employees. The paper submits that a good precedence has been established in the case for future use by employers, employees and civil society for optimization of the rights of women at the workplace in Ghana. Major recommendations made to improve workplace conditions and human rights of women include (1) a women's charter to consolidate all laws on women's rights, (2) ratification and implementation of relevant conventions and principles on business and human rights and (3) education of all stakeholders on the laws including better monitoring of employment practices to ensure that all businesses abide by the decision in CHRAJ & others v GNFS to avoid costly law suits.

Keywords: Pregnancy discrimination, Ghana National Fire Service, Labour law (ACT 651), Ghana

¹ LL.B (Legon, Ghana), B.L. (Ghana), LL.M (Essex, UK), JSM, JSD (Stanford, USA).

² LL.B (KNUST, Ghana).

Introduction

In the case of *CHRAJ v Ghana National Fire Service & the Attorney General*³ (*CHRAJ & others v. GNFS*), the High Court (Human Rights Division), declared the dismissal of two female employees from a state institution on the ground of their pregnancy, illegal and constituting gender discrimination. Termination of employment on the basis of pregnancy and pregnancy related illness is pregnancy discrimination. Any workplace regulation or employment contract that seeks to restrict a female worker's prerogative to determine when or whether she may have children is discriminatory in nature.⁴ So also are discriminatory pregnancy clauses that are part of conditions of service and which forbid women from becoming pregnant during probationary periods of their employment. Only women become pregnant⁵ and within the European Community for example, cases like *Jurcic v. Croatia*⁶ and *Brown v. Rentokil Ltd.*⁷ established that it is discrimination to dismiss women because of pregnancy. Also, the United States as far back as 1978 passed the Pregnancy Discrimination Act (PDA).⁸ The PDA offered women paid maternity leave and the right to return to work post pregnancy.

But the fight for non-discrimination in these developed countries did not end with legislation and women continue to litigate for maternity benefits. Pregnancy discrimination at the workplace can be direct, indirect or both. Direct discrimination is often referred to as disparate treatment.⁹ Direct discrimination is easier to spot and occurs when an employer, under the same or similar circumstances, treats the pregnant woman less favourably than others. Indirect discrimination on the other hand occurs when a conduct or policy is facially neutral, commonplace or supposedly helpful but has

³ *CHRAJ, Grace Fosú & Thelma Hammond v. Ghana National Fire Service & the Attorney General* [2018] Suit No. HR 0063/2017.

⁴ B. A. Kansake, and others, 'Creating a gender-inclusive mining industry: Uncovering the challenges of female mining stakeholders', 70 *Resources Policy* (2021): 101962. See also, L. Grow, 'Pregnancy Discrimination in the Wake of *Young v. UPS*', 19 (2) *University of Pennsylvania Journal of Law and Social Change* (2016):133,139. See further, A. McGinley & J. Stempel, 'Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination', 46 *Fla L Rev* (1994):193, 237.

⁵ T. H. Barnard and A. L. Rapp, 'The Impact of the Pregnancy Discrimination Act on the Workplace – From a Legal and Social Perspective', 36 *U Mem L Rev* (2005): 93, 95.

⁶ [2015] E.C.H. R. Application No. 54711/15.

⁷ [1998] E.C.H. R. I-4185.

⁸ 42 U. S. C. 2000.

⁹ D. L. Brake and J. L. Grossman, 'Unprotected Sex: The Pregnancy Discrimination Act at 35', 21 *Duke J Gender L & Poly* (2013): 67, 76. Generally disparate is raised for discrimination based on age, race or sex/gender.

adverse impact on the pregnant woman. Indirect discrimination, also referred to as adverse impact discrimination, is subtler and more difficult to notice.¹⁰

The business practice of dismissing women from the workplace because of pregnancy is common in Ghana and anecdotal information glimpsed from media reports show that pregnancy discrimination continues to exist even after the decision in *CHRAJ & others v. GNFS* thereby necessitating this commentary. An example is the news report on two female legal interns who were suspended from a law firm when they became pregnant.¹¹ Pregnancy discrimination is not limited to the formal sector. Calleja and Boachie-Mensah¹² report that Ghanaian female apprentice seamstresses in the private / informal sector for example, are dismissed immediately they become pregnant.¹³ The same is true for female domestic workers.¹⁴

The prevalence of pregnancy discrimination calls into question the import of the court decision in *CHRAJ & others v. GNFS* and its significance for all stakeholders. The objective of this commentary is to examine the decision and advocate for law reform for better protection of women at the workplace against pregnancy discrimination that adversely affects the human rights and development of women. The importance of this case cannot be overemphasised especially since adjudication is necessary for promoting human rights and development.¹⁵ A review of Ghana Law Reports and published literature on workplace dismissal in Ghana indicated that the decision is the first of its kind in Ghana. In line with Atuguba's¹⁶ emphasis on the need for judicial activism in the enforcement of socio economic rights, we submit that this paper contributes to

¹⁰ C. M. Castille and others, 'Disparate treatment and adverse impact in applied attrition modeling', 12 *Industrial and Occupational Psychology* (2019): 310: 313, doi:10.1017/iop/ 2019.53. See also N. S. Erickson, 'Pregnancy Discrimination: An Analytical Approach', 7 (1) *Women's Rights Law Reporter* (1981): 11, 13.

¹¹ E. Appiah, 'Two Lawyers Suspended after Getting Pregnant', *THEGHANAREPORT* <www.theghanareport.com> (Accra, 14 January 2020). The author noted that on January 6 2020, the two women were handed letters asking them to go home and return only after the delivery of their babies.

¹² A. Calleja & F. Boachie-Mensah, 'Human Resource Practices in the Informal Sector in Cape Coast, Ghana' (2011) *Journal of Management Research* (2011) <<https://www.researchgate.net>> DOI 10.5296/jmr.v4i1.1160 accessed 2 February 2020. See also S. Kanoy, 'Pregnancy clauses in Female Athletic Contracts: Discriminatory, or Just the Industry Standard', 85 *UMKC Law Review* (2017): 1033.

¹³ *Id.*

¹⁴ C. Osei-Boateng, 'Is domestic work synonymous with slavery in Ghana' 6 (1) *Ghana Trades Union Congress Policy Bulletin* (2010) <ghanatuc.org/Policy-Bulletin-March-2010.pdf> accessed 2 February 2020.

¹⁵ R. A. Atuguba, 'The Fight Against Poverty and the Right to Development: The Ghana National Chapter. In *The Fight Against Poverty and the Right to Development*' Springer, Cham. (2021): 145-208.

¹⁶ *Id.*

highlighting *CHRAJ & others v. GNFS* as establishing a good precedence for future use by legal experts for optimization of the rights of women in the workplace in Ghana.

The Contextual Framework

Legal protections against pregnancy discrimination

In Ghana, the termination of employment of a pregnant woman is not in itself illegal unless the ground for the termination is her pregnancy. The Labour Act 2003, Act 651 specifically sets out the acceptable grounds for which an employer may dismiss an employee. It also specifically provides in section 63(2) (e) that termination is unfair in the case of a female worker where it is due to the pregnancy of the worker. Act 651 provides that no worker should be discriminated against on the grounds of gender.¹⁷ It goes further to state that the termination of employment of a female worker is unfair where it is due to her pregnancy.¹⁸ Employers are also prohibited from dismissing female workers because of absence from work during maternity leave.¹⁹ These provisions show that the disadvantage to women in the workplace due to their ability to have children has been recognised. The law in Ghana thus makes any form of pregnancy discrimination in the work place illegal.

Article 27 of the 1992 Constitution of Ghana also provides that women are entitled to special protections for a reasonable time before and after birth. Healthcare providers encourage women to have prenatal check-ups when pregnant and check-ups after giving birth. Maternity care in Ghana, including prenatal care is provided for under the National Health Insurance Regulations as minimum health care benefits.²⁰ This means that direct fees for antenatal care and delivery care are free. Act 651²¹ also prohibits employers from assigning pregnant workers night duties and overtime work²² as well as posting them to work away from their place of residence.²³ These provisions ensure that pregnant workers are not caused physical strain and have the best healthcare during pregnancy and after childbirth.

¹⁷ Section 14 of Act 651.

¹⁸ *Ibid* Section 63 (2)(e).

¹⁹ *Ibid* Section 57(8).

²⁰ Regulation 19(1) of the National Health Insurance Regulations 2004, LI 1809.

²¹ Labour Act 2003 (Act 651).

²² *Ibid* Section 55.

²³ *Ibid* Section 56.

The 1992 Constitution goes on to provide that working mothers are entitled to paid leave.²⁴ This constitutional provision is echoed by Section 57 of the Labour Act which provides that female workers are entitled to twelve (12) weeks of maternity leave with full pay. During that period, they are entitled to their full wages, which includes all benefits they are entitled to and which are to be paid by the employer. A pregnant worker is to provide her employer with a medical report issued by a medical practitioner or midwife²⁵ to prove her expected date of confinement.²⁶ This allows an employer to adequately prepare to fill her position in the workplace during that period. Act 651 also allows a leave extension of two weeks where the birth was abnormal or had complications or where there were multiple births.²⁷ A woman is also entitled to extended leave where she falls ill due to the pregnancy or confinement.²⁸ These provisions ensure that women have adequate time to recover after childbirth before going back to work. The legal provisions also ensure that women are not forced to return to work too quickly after childbirth if they are unable to and ensure that they still have an income to cater for themselves during the period that they are unable to work.

Discrimination is universally unlawful and this is evident not only from the fact that several countries have laws proscribing discrimination, but international bodies like the United Nations have also done same. The universal human rights documents²⁹ especially the Convention on Elimination of all forms of Discrimination against Women (CEDAW) and the Regional instruments like the African Charter on Human and People's Rights and its Optional Protocol (Maputo Protocol) are but a few international statutes which have provided standards for such protections. CEDAW and the Maputo Protocol for example, are two such documents that call for the elimination of all forms of discrimination against women and entreat states to take all appropriate measures to ensure the protection of the rights of all women in all spheres of life. In safeguarding women's function of reproduction CEDAW prohibits, subject to sanctions, the dismissal of a woman on the grounds of her pregnancy or maternity leave.³⁰

²⁴ Article 27 of the 1992 Constitution of Ghana.

²⁵ Section 57(1) of Act 651.

²⁶ The period of confinement is the period after birth during which the new mother's body is to recover from the pregnancy and childbirth.

²⁷ Section 57 (3) of Act 651.

²⁸ Ibid Section 57(4) and (5).

²⁹ Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR).

³⁰ Article 11 (2) of the UN Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 at OHCHR | Convention on the Elimination of All Forms of Discrimination against Women.

A woman has the right to control her fertility and the right to decide when to have children, how many she will have and even whether she wants to have children at all.³¹ Thus, any workplace regulation or employment contract which seeks to restrict a female worker's reproductive rights and determine when or whether she may have children is discriminatory in nature. The International Labour Organisation's premier labour standards on maternity protection covers all categories of workers from industrial to non-industrial and agriculture workers to domestic workers in private homes.³² Ghana is a party to this document but the country has not ratified the latest Maternity Protection Convention, 2000,³³ where the ILO considers protection against pregnancy and maternity discrimination a shared responsibility of the government and society.³⁴ The 2000 convention not only underscores the importance of maternity protection for equality at the workplace, health and safety of mothers and promotion of diversity at the workplace but also emphasised non-discrimination³⁵ and development of protection of maternity in national law and practice³⁶ and court decisions.³⁷

When a country is party to international labour standards and human rights principles, businesses are more likely to respect the workforce. It is unfortunate that Ghana is not party to the above convention which is echoed in the UN Guiding Principles on Business and Human Rights (UNGPs).³⁸ The UNGPs sets global standards on business and human rights based on three pillars of protect, respect and remedy.³⁹ The UNGPs expect business enterprises to respect human rights and address any adverse impact of their business activities and decisions. The principles also acknowledge the due diligence and oversight responsibility placed on countries to ensure that business practices and

³¹ See article 14 (1) (b) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique 11th July 2003 Entry into Force 25th November 2005.

³² Maternity Protection Convention (Revised), 1952 (No 103).

³³ ILO conventions ratified by Ghana at <https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103231> accessed 5 January 2020.

³⁴ See Preamble to Maternity Protection Convention, 2000 (No 183).

³⁵ Maternity Protection Convention, 2000 (No 183) at Art. 8.

³⁶ Id at art. 12 .

³⁷ See art. 12.

³⁸ UN Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) <<https://www.ohchr.org>> accessed 4 February 2020.

³⁹ K Grosser, 'Gender, business and human rights: Academic activism as critical engagement in neoliberal times. 28(4) Gender, Work & Organization. (2021):1624-37. See also <https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf> accessed 20 April 2020.

culture of corporate entities do not violate rights of individuals or society as a whole. The principles also emphasis obligation to provide adequate and swift remedy in cases of violation of rights. Implicit in the responsibility is protection of the rights of women workers as they relate to pregnancy and maternity-related discrimination.⁴⁰

The universal rule however is that before a claim for discrimination can succeed, the courts must be satisfied that the discriminatory act, conduct, clause or policy is not justified, objective or legitimate.⁴¹ Indeed, the Human Rights Committee General Comment No. 18 for example states that 'not every differentiation or treatment is discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.⁴² On the other hand, these constitutional and international human rights principles, guidelines and protections against pregnancy discrimination cannot be circumvented by contract. Hence, a contractual term in an employment contract, executed by the employee that restricts the reproductive rights of an employee and dictates when and or if she may get pregnant like was done in the *CHRAJ & others v. GNFS* case, cannot protect an employer from a claim of pregnancy discrimination.

Military and security services exception to pregnancy discrimination

The preliminary section, section 1 of the Ghana labour law (ACT 651), states that the Act applies to all workers and to all employees except the Armed Forces, the Police Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act 1996 (Act 526). The pregnancy clause (Regulation 33(6)) objected to by the applicants in the case of *CHRAJ & others v. GNFS* stated that:

'A female employee shall not be dismissed on the ground that she is pregnant, provided she has served the first three years'.

Historically, pregnancy clauses are inserted in employment contracts because of fear of loss of productivity due to absence caused by pregnancy.⁴³ Also, some companies,

⁴⁰ See R. Venkatesan, 'The UN Framework on Business and Human Rights: A workers' rights critique' 157(3) Journal of Business Ethics (2019): 635-52. See also The Danish Institute for Human Rights, Women in Business and Human Rights, <bhr_gender_mapping2018_web> accessed 9 April 2020.

⁴¹ See generally the following cases where this yardstick was applied; *Peel Law Association v. Pieters* [2013] ONCA 396.

⁴² See UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination* (point 13), 10 November 1989, available at: <<https://www.refworld.org/docid/453883fa8.html>> accessed 19 July 2021.

⁴³ See *Stockton-on-Tees Borough Council v. Brown* [1988] IRLR 263 as cited in *Mashava v. Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC) at p 405 [14] where Lord Griffiths aptly said that "It is often a considerable inconvenience to an employer to have to make necessary arrangements to keep a woman's job open for her whilst she is absent

private and public, do not want to employ pregnant women because of cost of engaging and training temporary workers.⁴⁴ Further, some employers do not want to pay maternity leave claims for workers on probation and pregnant women in such establishments hide their pregnancies for as long as they can and forgo maternity benefits for fear of losing their jobs.⁴⁵ In addition, pregnancy is said to affect women working in more physical jobs and affects their ability to perform these jobs.⁴⁶ For decades, female athletes for example were advised to delay pregnancy till after athletic contracts have been completed.⁴⁷ Much of the concern comes from wanting to protect the foetus.

Similar arguments are advanced for inclusion of women in the military and accommodations made for their special needs. Recently, one popular news anchor in the United States, Mr. Tucker Carlson decried special overalls for pregnant military women in these words

We've got new hairstyles and maternity flight suits. Pregnant women are going to fight our wars. It's a mockery of the U.S. military. While China's military becomes more masculine, as it assembles the world's largest navy, our military needs as Joe Biden says become more feminine...The bottom line is, it is out of control, and the Pentagon is going along with this.⁴⁸

Needless to say his words generated a lot of controversy but they aptly summed up negative attitudes of some towards inclusion of women in security services and accommodations made for their inclusion. Women in military are criticized on their ability

from work in order to have a baby, this is a price that has to be paid as part of the social and legal recognition of women in the workplace”.

⁴⁴ Id.

⁴⁵ B. Stumbitz and others, 'Maternity Protection and Workers with Family Responsibilities in the Formal and Informal Economy of Ghana. Practices, Gaps and Measures for Improvement' (2017) International Labour Organization: Geneva, Switzerland, <https://www.ilo.org/wcmsp5/groups/public/---reports/---gender/documents/publication/wcms_601900.pdf> accessed 10 April 2020.

⁴⁶ T. H. Barnard and A.L. Rapp, 'The Impact of the Pregnancy Discrimination Act on the Workplace –From a Legal and Social Perspective', 36 U Mem L Rev (2005): 93,95.

⁴⁷ S. Kanov, 'Pregnancy Clauses in Female Athletic Contracts: Discriminatory, or Just the Industry Standard' 85 UMKC L Rev (2017):1033,1053.

⁴⁸ See Pentagon Officials Blast Tucker Carlson's Comments On Pregnant Women Serving In The Military Ted Johnson 3/11/2021 at <<https://www.msn.com/en-us/tv/news/pentagon-officials-blast-tucker-carlsons-comments-on-pregnant-women-serving-in-the-military/ar-BB1eulJh>> last accessed 12 April, 2021.

to cope with rigours of training, the perceived threat they pose for distracting male counterparts with their femininity and interference with male bonding.⁴⁹

According to Kanov⁵⁰ however, the answer is not to dismiss pregnant women but to protect them. Due to modern techniques and medical advancements, pregnancy should not be a barrier for women at the workplace in any activity.⁵¹ MacKenzie⁵² argues that with proper training and necessary accommodations women can complete same physical tasks as men. Women's bodies are different from men so with proper adaptations and accommodations that help and not hinder their movements, women can be just as efficient as men on the battle field. Hence, gender is often not the problem but rather individual attributes and physic.⁵³

Impact of pregnancy discrimination on women

The way businesses and institutions treat workers has impact on productivity and the wellbeing of workers and entire communities.⁵⁴ Good employment culture enables female workers see themselves as valuable members of the workforce and they more readily reciprocate leading to high productivity.⁵⁵ Also, businesses with a culture of protecting women's employment during pregnancy and maternity leave and some period thereafter record 'high-retention rates, increased staff co-operation, reduced absenteeism, as well as improved motivation and performance'.⁵⁶ Conversely, discriminatory pregnancy clauses in workplace regulations or employment contracts adversely impacts women's progress and retard global fulfilment and achievement of sustainable development goals 1, 3 and 5 on eradicating poverty, ensuring good health and wellbeing, and gender equality respectively.⁵⁷ For example, in the USA, post enactment of PDA, women continue to fight discrimination associated with pregnancy like assumptions about their

⁴⁹ M. H. MacKenzie, 'Let Women Fight: Ending the U.S. Military's Female Combat Ban', 91(6) *Foreign Affairs*, (2012): 32-42,38 < <http://www.jstor.org/stable/41720932> > accessed 13 April 2021.

⁵⁰ S. Kanov, 'Pregnancy Clauses in Female Athletic Contracts: Discriminatory, or Just the Industry Standard' (2017) *supra* n. 45.

⁵¹ M. H. MacKenzie, 'Let Women Fight: Ending the U.S. Military's Female Combat Ban', n.49.

⁵² *Id* at 39.

⁵³ *Id*.

⁵⁴ See N. Z. Memon and L. K. Jena, 'Gender inequality, job satisfaction and job motivation: Evidence from Indian female employees'. 42(3) *Management and Labour Studies* (2017): 253-274.

⁵⁵ B. Stumbitz and others, 'Maternity Protection and Workers with Family Responsibilities in the Formal and Informal Economy of Ghana. Practices, Gaps and Measures for Improvement' *supra* n. 43. See also K. J. A. Boateng and E. Lauk. 'Multiskilled in many ways: Ghanaian Female Journalists Between Job and Home', 11(2) *Communication Today* (2020): 46-63

⁵⁶ *Id*

⁵⁷ UNDP, Sustainable development goals available at < http://www.undp.org_ > accessed 20 March 2010.

seriousness to work leading to many women losing senior positions and promotions.⁵⁸ In the case of *Sherry A. William, et al v. Morrison and Foerster LLP*⁵⁹ for example, female lawyers filed a class action employment discrimination lawsuit against their law firm for systematic gender discrimination because they were constantly denied promotion and suffered pay cut after childbirth and maternity leave. Similarly, in another class action case of *Talisa Borders et al v. Wal-Mart Stores Inc.*,⁶⁰ a judge approved a 14 million dollar settlement against Wal-Mart Stores in a pregnancy discrimination case.⁶¹ The pregnant employees had accused Wal-Mart Stores of denying them necessary workplace accommodations.⁶²

In Ghana, where the incidence of unemployment is high,⁶³ dismissal on the basis of pregnancy adds to unemployment and its attendant negative socioeconomic impact on the woman and her family, particularly children. Stumbitz et al.,⁶⁴ also note that in Ghana, fear of dismissal has generated a culture of silence surrounding pregnancy and pregnancy related matters leading to some female employees viewing pregnancy and maternity issues as 'private matters' which they do not want to burden colleagues or employers with.⁶⁵ The cost of pregnancy discrimination is therefore high and demands attention. This case commentary presents the facts and judgement delivered by the Ghana High Court (Human Rights Division) in the *CHRAJ & others v. GNFS* case. Hopefully, the analysis of this case and review of the literature would contribute to promotion of reproductive rights of women in Ghana and Africa as a whole.

⁵⁸ *Sherry A. William, et al v. Morrison and Foerster LLP* [2018] Case 3:18-cv-02542(JSC).

⁵⁹ *Id.*

⁶⁰ [2017] Civil Case No. 3:17 –cv-0506- MJR-MAB.

⁶¹ *Id.*

⁶² *Id.* Currently, in the United States, there is a proposed bill, the Pregnant Workers Fairness Act (PWFA), which has passed the House of Representatives and would soon be before the Senate. The bill would give eligible pregnant women the right to reasonable accommodations like restrictions on heavy lifting and frequent breaks before and after childbirth.

⁶³ M. A. Kpedator, 'Challenges and Coping Strategies of Migrant Women from Northern Ghana and Effects on the Wellbeing of their Children' (2018) Diss. University of Ghana, <<http://ugspace.ug.edu.gh/handle/123456789/33049>> accessed 2 November 2010.

⁶⁴ B. Stumbitz & others, 'Maternity Protection in Formal and Informal Economy Workplaces: The case of Ghana' *World Development* (2018): 110. <<https://www.sciencedirect.com/science/article/pii/S0305750X18301980?via%3Dihub>> accessed 20 March 2010.

⁶⁵ *Id.*

Methods

This paper is a case report which presents and discusses the judgement delivered by the Ghana High Court (Human Rights Division) in the *CHRAJ & others v. GNFS* case. The data for the study is the court proceedings which were obtained from the Registry of the court. This is a descriptive essay and for context and effective discussion of the case, relevant published materials were sought from digital records of Ghana Law Reports (Digital Attorney) and internet or online legal data bases including Hein on line and Jstor. Search words used included pregnancy discrimination, workplace dismissal of pregnant women in Ghana, and human rights of pregnant women in Ghana. The findings and subsequent discussion thereon are presented based on emerging dominant themes arising from our analysis of the case and relevant literature. Also, our discussion is made based on our understanding of these themes and the existing literature as well as how the court's decision could be utilised to better promote women's maternity rights in the workplace in Ghana.

***CHRAJ & others v. GNFS* (High Court, Human Rights Division)**

The Human Rights Division is one division of the High Court. The High Court is the third highest court in the hierarchy of courts in Ghana and its other divisions are Criminal Division, Land Division, Divorce and Matrimonial Division, Probate and Administration Division, Labour Division, Commercial Division, Financial Division and General Jurisdiction. Among its functions, the Human Rights Division hears, adopts and implements decisions in cases from the Commission on Human Rights and Administrative Justice. The Commission on Human Rights and Administrative Justice (CHRAJ) is a constitutional body established to, amongst others, investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services.⁶⁶ In the *CHRAJ & others v. GNFS* case, CHRAJ brought the case on behalf of the two applicants, the fire service employees, Grace Fosu and Thelma Hammond. The Attorney-General appeared on behalf of Ghana National Fire Service (GNFS) a public entity⁶⁷ and the respondent in the case.

⁶⁶ Chapter 18 section 216 of the 1992 Constitution.

⁶⁷ Article 190(1) of the 1992 Constitution.

Brief facts and holding

Under regulation 33 (6) of the Conditions of Service of the GNFS, female service personnel cannot be fired from their jobs on the ground of pregnancy provided that they have passed the three-year mark of employment in the fire service. Accordingly, female employees must defer their pregnancies until three years after their employment to avoid dismissal. The applicants were two fire service women who had been caught by this regulation and had been fired. In September 2014, Grace Fosu was in labour and about to give birth to her first child when she received a call informing her that she was going to be fired.⁶⁸ Her letter of dismissal, given to her after delivery, stated that Fosu was in violation of Regulation 33 (6). She reported the matter to CHRAJ and as CHRAJ prepared to bring an action against GNFS, the second applicant, Thelma Hammond came forward with a similar story stating that she had been fired on the same grounds and under similar circumstances a year prior.

The applicants prayed that the court declare Regulation 33(6) discriminatory, that they be reinstated and that the GNFS be made to pay damages for the wrongful dismissal. They also argued that there was selective enforcement of the regulation because the GNFS had previously allowed other fire service women who became pregnant during that period to return to work in other positions, to perform desk jobs and wear maternity clothes to work till they delivered the babies, after which they were to continue their training. The GNFS argued that their actions and the regulation were justified on the ground that during the first three years of employment all personnel go through rigorous training which would be detrimental to the health of a pregnant woman and her unborn child and that the restriction was to prevent this danger. They went on to argue that the regulations are made known to all workers and that the applicants had prior notice of the restriction placed on them by Regulation 33(6) when they entered the service.

Ruling in favour of the applicants, the court held:

1. That Regulation 33(6) is discriminatory in its effect, unjustifiable, illegitimate and illegal. Regulation 33(6) did not achieve any legitimate outcome contemplated under the 1992 Constitution and unduly impaired the applicants' constitutional rights when it was applied to them. There was no reasonable

⁶⁸ *CHRAJ v Ghana National Fire Service and The Attorney-General*, Suit No. HR 0063/2017 (23 April 2018) p 15. See also, K G Asiedu for CNN, 'She was fired over the phone while in labor. And she's fighting to get her job back.' <<https://edition-m.cnn.com/2019/03/07/africa/ghana-firefighters-court-case-asequals-iwd-intl/index.html?>> accessed 23 March 2019.

justification for its existence and by applying it, the GNFS had discriminated against the applicants on the ground of their gender.

2. That the applicants be reinstated without prejudice to any benefit that would have accrued to them during the period of their dismissal.
3. That the GNFS pay the applicants all arrears of their salaries and benefits that accrued to them during the period of their dismissal and pay each woman compensation in sum of GH¢ 50,000.00 for the trauma and the inevitable inconvenience of the wrongful dismissal.

Following the decision, the GNFS struggled to fulfil the court's decision especially the position on reinstatement. As at March 2019, Fosu and Hammond had still not been reinstated as directed by the court. Neither had the GNFS paid them the compensation awarded despite losing an appeal in January 2019. In the appeal, the Attorney General argued against the quantum of costs awarded each applicant and applied for a stay of execution on the judgement. CHRAJ fought against the appeal and on 22 January 2019, the court held that there was no basis for an appeal or for a stay of execution to succeed. The judge reasoned that all the relevant issues had been sufficiently deliberated and decided in the trial court. Even after this appeal ruling the women were still not reinstated. Consequently, CHRAJ sent the GNFS a letter demanding that they reinstate the women by February 28 or face a contempt of court suit, but the date passed without any action. Finally, in a letter dated March 13 2019 and addressed to CHRAJ, the Chief Fire Officer stated that the two fire service women 'have been reinstated into the service with immediate effect'. The letter then directed that the women report to the Greater Accra Regional Officer for reassignment and stated that necessary arrangements were being made to pay the women the compensation due them.

Pregnancy discrimination as a violation of constitutional mandate of non-discrimination

CHRAJ had argued that the dismissal constituted an infringement of the human right to non-discrimination under article 17 (1) and (2) of the 1992 Ghanaian Constitution. Article 17 provided that:

- (1) All persons shall be equal before the law
- (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.
- (3) For the purposes of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or

creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

The court, agreeing to this proposition, reasoned that the case bordered on the right to non-discrimination especially gender discrimination. The court identified the issues for determination as whether within Ghanaian laws the applicants had been discriminated against and whether if they had, there was reasonable justification for that discrimination. The court took judicial notice of international human rights law granting maternity rights. The court referred to the International Bill of Rights which are; the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. All these documents prohibit, subject to sanctions, discrimination against women for whatever purpose. Under these documents, the government of Ghana, through its agents and organs, has the obligation to fulfil and protect human rights of all.

The court laid special emphasis on CEDAW under which the right to non-discrimination, generally and particularly, on the ground of gender is protected. The court referred to article 11 of CEDAW on obligation of state parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on the basis of equality of men and women, the right to work and to the same employment opportunities including application of the same criteria for selection in matters of employment. The article also placed obligation on states to prohibit dismissals on the grounds of pregnancy, maternity leave or on basis of marital status. Lamenting the lack of Ghanaian judicial precedence on the matter, the court borrowed profusely from precedence from similar common law jurisdictions to explain the elements necessary to establish discrimination. Firstly, the court asserted that to fulfil the constitutional mandate of establishing discrimination as laid down in article 17, the women must satisfy the three pronged test laid down in the Canadian case of *Peel Law Association v. Pieters*.⁶⁹ Under the three pronged test, the women must prove that (a) they were members of one of the groups protected by article 17 of the constitution, (b) they had been subjected to adverse treatment and that (c) one of the protected or prohibited grounds of discrimination was a factor in their adverse treatment.

⁶⁹ *Peel Law Association v. Pieters* [2013] ONCA 396 (Date:20130613 Docket: C55734).

The court found that the women had fulfilled the tests because they fell within a prohibited ground for discrimination; which is gender. Being women they are protected under article 17 which prohibited discrimination on the ground of their gender or sex. The court reasoned that women have a right to family life which includes their right to be pregnant and to choose when to become pregnant. The court also noted that the women had suffered adverse treatment because unlike their male colleagues they suffer dismissal if they become pregnant within the first three years of employment. Finally, the court reasoned that gender was a factor in the adverse treatment because the GNFS itself had stated that the pregnancy clause was because the condition of female bodies may not be conducive for vigorous physical training if they became pregnant; an event which according to the court can only happen to women. With such reasoning, the court held that the women had successfully established a prima facie case of gender discrimination which is a violation of their constitutionally protected human right.

Taking judicial notice of the fact that discrimination can be permitted under certain circumstances, after establishing a prima facie case of pregnancy discrimination, the court reasoned that the next step was for the GNFS to justify existence of Regulation 33 (6) by showing that the clause was reasonably justified and legitimate as permitted by human rights law.⁷⁰ Firstly, the objective of the clause must be of such sufficient importance as to override the constitutionally protected right or freedom. Also, the objective must be related to concerns which are pressing and substantial. Secondly, Regulation 33 (6) must be a fairly proper means of achieving the objective. Hence, Regulation 33 (6) must be proportional to the ill or evil it was meant to address. According to the court, the proportionality test⁷¹ demands that the clause be only accepted when it is reasonably necessary or required for example, in the national interest and for public security.

The justification put forward by the GNFS is the usual excuse offered under the military and security services exception to pregnancy discrimination, which is that (1) during the first three years, employees are taken through very vigorous physical training to adequately equip them for their tasks (2) that the vigorous physical training new employees go through may adversely affect the foetus and the would be mothers. Also, that the pregnancy clause in Regulation 33(6) was a measure to prevent this danger, and that (3) new employees were made aware of this condition of service. The court refused to accept these reasons as legitimate justification under human rights law for

⁷⁰ The court based this point on the Human Rights Committee's General Comment No. 18.

⁷¹ Also known as the Oakes test applied in *Republic v. Tommy Thompson Books Ltd* (No. 2) [1996-97] SCGLR 484 at 500-501.

the dismissal of the two pregnant women. The court also found the reasons not sufficient to override the right of the women to be free from discrimination.

According to the court, the dismissal was not the best solution that would least impair the constitutionally protected right especially since evidence before the court revealed that training during the first three years could be interrupted till after the birth of a child conceived during that period. Indeed, the court was not convinced that there was any reasonable justification for excluding the women from the amnesty given their fellow pregnant employees. Based on the above considerations, the court did not see any reasonable justification or proportionality in the existence of Regulation 33 (6).

Impact of *CHRAJ & others v. GNFS*

Pregnancy discrimination is a human rights issue⁷² but despite Ghanaian law protecting maternity rights, the case reveals lapses in human rights protection for women workers because pregnancy discrimination could be perpetrated under the guise of freedom of contract. The respondent's argument that both women had prior knowledge of the restrictions placed on them by Regulation 33(6) calls to mind the doctrine of freedom of contract.⁷³ Contracts get their binding force from the fact that parties enter such voluntarily.⁷⁴ The GNFS had argued that all employees had express knowledge of the terms under which they had been contracted to work and should not be allowed to rescind the terms they had already agreed to freely. The problem with this view is that employers usually have the upper hand when it comes to negotiating terms in employment contracts.⁷⁵ This is especially the case in the Ghanaian economy where many people are unemployed with the majority being female⁷⁶ and getting a job, especially in the public sector,⁷⁷ is very difficult. Despite having the option to refuse

⁷² C. McCann, Carly, and D. Tomaskovic-Devey, 'Pregnancy Discrimination at Work', Centre for Employment Equity University of Massachusetts Amherst (2021): 1, 28 where the authors noted that overall, pregnancy discrimination remains a persistent problem for many women in their workplaces. See also Pluto Journals, Equality at work. Institute of Employment Rights Journal 3(1) (2020): 73, 80 <<https://doi.org/10.13169/insteplrightj.3.1.0073>> accessed 2 November 2021, where the paper noted that in the UK discrimination against pregnant women and those returning from childbirth is rife.

⁷³ The right of competent persons to legally bind themselves on their own terms without external (usually governmental) interference. Usually used in relation to commercial contracts.

⁷⁴ C Dowuona-Hammond, *The Law of Contract in Ghana*, Frontiers Printing & Publishing Ltd (2016).

⁷⁵ Per Lord Denning MR in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, where he used the *true construction of the contract* to give remedy under oppressive terms of contract..

⁷⁶ GNA, 'More than 1.2 million people in Ghana are unemployed.' <<https://www.myjoyonline.com/business/2017/March-26th/more-than-12-million-people-in-ghana-are-unemployed-report.php>> accessed 20 March 2019

⁷⁷ *Id.*

unconscionable terms of employment, some prospective employees, like the applicants in the case, are likely to take whatever opportunity they can get to earn a living.

Further, the decision revealed that law suits for pregnancy discrimination can be costly for all parties concerned in terms of time and money. The GNFS is a state institution but it took almost a year and further nudging and the threat of a contempt of court law suit for the GNFS to fulfil the judgment orders.⁷⁸ Such attitude raises concerns about victimization of these women when reinstated. There is no guarantee that the women will be returning to a safe work environment where there would be no bias against them or unfair treatment because of this suit. Klassen, writing on common concerns women have when deciding to hold employers accountable for gender discrimination noted that one concern was fear of retaliation.⁷⁹ Victimization and retaliation is highly probable especially for private businesses which may not be receptive to the remedy of reinstatement because these businesses tend to be smaller in size. Indeed, legal precedence shows that Ghanaian courts are more likely to order reinstatement for public than private institutions.⁸⁰ Reinstatement could also be costly for the employer because it forces businesses to work with employees that they do not want. Seemingly, it is punishment to force the employer to work with someone he does not like.

However, since the case shows that reinstatement is an inevitable albeit uncomfortable remedy for pregnancy discrimination, it is necessary that employers adopt good business practices in order to forestall and prevent difficulties for both employers and employees. The court's ruling reinforces the need for businesses to abide by human rights standards not only to ensure gender parity and equality at workplaces but also to prevent costly law suits by preventing discrimination from occurring in the first place. In addition to reinstatement, the court also ordered payment of compensation for the trauma and inevitable inconvenience caused by the wrongful dismissal. Compensation for emotional trauma as a remedy for unlawful termination of employment is a departure from the

⁷⁸ C. Boateng & E. E. Hawkson, '2 Fire women reinstated', Daily Graphic <<https://www.graphic.com.gh/news/general-news/2-fire-women-reinstated.html>> (Accra 22 March 2019). See also Kwasi Gyamfi Asiedu, 'Women dismissed for getting pregnant reinstated by Ghana Fire Service' CNN < <https://edition.cnn.com/2019/04/01/africa/ghana-firefighters-reinstated-asequals-intl/index.html>> (Accra, 30 March 2019).

⁷⁹ S. Klassen, 'Challenges in Bringing Gender Equity into the Workplace: Addressing Common Concerns Women Have When Deciding to Hold Employers Accountable for Gender Discrimination', 10 (1) Journal of Race, Gender, and Ethnicity (2021): 5, 16.

⁸⁰ *Owusu-Afriyie v. State Hotels Corporation* [1976] 1 GLR 247 where the court held that specific performance in respect of contract of service was a discretionary remedy which should be more readily acceded to in the public sector. See the following cases where similar sentiments were expressed by the judges: *Donkor and Others v Gliksten (WA) Ltd.* [1997-98] 1 GLR 799. See also *Lt Col. Ashun v. Accra Brewery and Felix Yaw Bani v Maersk Ghana Ltd.* (J4/48/2010) [2011]GHASC [30 March 2011].

common law rule which does not award damages for emotional trauma or hurt feelings for dismissals.⁸¹ By awarding damages for emotional trauma, the court acknowledged the debilitating effects of pregnancy discrimination on women's health.⁸² The decision in *CHRAJ v. GNFS* therefore sets a new precedence for damages as far as it relates to pregnancy discrimination.

Recommendations for the way forward

This case commentary shows that the following recommendations need to be adopted in order to enhance women's reproductive rights in Ghana:

A Women's Charter

Ghana needs a women's charter. The charter on women's rights is necessary because Ghanaian laws granting rights to women are fragmented. They are found in our constitution, the Labour Act and other laws, both domestic and international. There is need for all these laws to be consolidated in one document like was done for the rights of children. Ghana was the first country to sign and ratify the Convention on the Rights of the Child. Then in 1998 the country passed the Children's Act⁸³ which consolidated and expanded on all rights to be granted children in the jurisdiction. A similar law based on the Children's Act model is recommended for women. A charter on women's rights should contain elaborate provisions on employment protection, including protection against pregnancy discrimination.

Such a law would afford Ghana the opportunity to domesticate all its international human rights obligations to women as found in CEDAW and all other relevant human rights documents that the country has ratified. Apart from consolidating all rights accorded women in one document, such a law would create ease of reference and be a guide to all stakeholders: judges, policy makers, employers and employees and all who have to

⁸¹ See generally *Blay-Morkoh v. Ghana Airways Corporation* [1972] 2 GLR 254 the court established that 'where a servant is wrongfully dismissed from his employment, damages for his dismissal cannot include compensation for the manner of the dismissal or for his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain employment'. *Hemans v. Ghana National Trading Corporation* See *Hemans v Ghana National Trading Corp.* [1978] GLR 4 where in assessing damages for wrongful dismissal the court noted that 'an employee dismissed in breach of contract can recover nothing more than damages equal to what he would have earned in the proper period of notice, whatever the circumstances'

⁸² See N. Z. Memon and L. K. Jena, 'Gender inequality, job satisfaction and job motivation: Evidence from Indian female employees', (2017) *supra* n 54, for more information on debilitating effects of workplace discrimination on women's health.

⁸³ The Children's Act, 1998 (Act 560).

make decisions affecting women's lives. Further, the charter would not only lead to policy change but will alleviate the hurdle of women having to fight discrimination on case by case basis.

Ratification of ILO Convention and implementation of UNGPs

Ghana needs to ratify the 2000 ILO Maternity Protection Convention. Other African countries like Benin, Burkina Faso, Djibouti, Mali, Mauritius, Morocco, Niger, Sao Tome and Principe and Senegal have already ratified the ILO Maternity Protection Convention 2000 (Convention No. 183). In Mali, the first African country to ratify the Convention, maternity leave is a minimum of 14 weeks.⁸⁴ The ratification will further bring Ghana's laws in conformity with international standards. The country should also embrace and implement the UN Guiding Principles on Business and Human Rights (UNGPs).⁸⁵ As noted by Venkatesan,⁸⁶ the UNGPs prescribes that state policies and legislations be used to redress all forms of business-related adverse human rights impacts on women. Implementation implies monitoring of labour conditions and practices at workplaces. With ratification of the ILO Convention comes the due diligence obligation on states to check compliance of business entities with human rights standards. Ratification also gives legal basis for the country to check human rights abuses in corporate operation and offer remedies when such abuses occur through domestic laws and the judiciary. Another institution that can perform the monitoring task effectively is the National Labour Commission (NLC). The NLC has offices in regional capitals and is already in charge of monitoring compliance with labour laws in the country. Giving the pregnancy discrimination monitoring function to this state institution would therefore be at no additional cost to the country.

Education of stakeholders

Education on Ghanaian law proscribing pregnancy discrimination is also necessary for all stakeholders. The studies by Calleja and Boachie-Mensah⁸⁷ and Stumbitz et al⁸⁸ show

⁸⁴ Yale School of Public Health, 'Mali's Maternity Protection' (2018) < <https://ysph.yale.edu/news-article/malis-maternity-protection/> > accessed 2 November 2021.

⁸⁵ See UN (2011) GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS , Implementing the United Nations 'Protect, Respect and Remedy' Framework.

⁸⁶ R. Venkatesan, 'The UN Framework on Business and Human Rights: A workers' rights critique' 157(3) *Journal of Business Ethics* (2019) supra n 40.

⁸⁷ A. Calleja & F. Boachie- Mensah, 'Human Resource Practices in the Informal Sector in Cape Coast, Ghana' supra n. 12.

⁸⁸ B. Stumbitz, & others, 'Maternity Protection and Workers with Family Responsibilities in the Formal and Informal Economy of Ghana. Practices, Gaps and Measures for Improvement' supra n. 64.

great need for women to be better educated on their rights in order to bring more cases before the courts. More women need to know about their rights and ways to get help. Bearing in mind the costly nature of law suits, there is also need to educate employers about pregnancy discrimination. The government can easily absorb losses but private enterprises may not. Similar sentiments were shared by Trautman et al⁸⁹ who noted how the cost of defending employment discrimination lawsuits can quickly become very large and even result in the actual failure of small, thinly-capitalized enterprises.

It is also worth mentioning that after the decision in *CHRAJ & others v. GNFS*, CHRAJ took the lead to educate the public;⁹⁰ obviously because it is the institution's mandate to litigate on behalf of the indigent in society and engage in human rights education. It is our submission that human rights education can also be conducted by the National Commission for Civic Education (NCCE) and the Ministry of Gender, Children and Social Protection. Human rights education prevents discrimination from occurring in the first place and also saves cost for businesses.

Conclusion

The Ghana High Court (Human Rights Division) case of *CHRAJ & others v. GNFS* held any form of pregnancy discrimination in the workplace illegal. Despite the decision, anecdotal information revealed the persistence of pregnancy discrimination at the workplace in Ghana. This case commentary therefore analysed the decision in *CHRAJ & others v. GNFS* with the aim of establishing its import and its significance for all stakeholders.

The analysis of the case was made behind the backdrop of literature that established legal protections against pregnancy discrimination. The Ghana labour laws for example, proscribe termination of employment based on pregnancy and mandates employers to grant women maternity leave. A review of the literature also established that Ghana still has to incorporate more legal protections for women at the workplace by ratifying and domesticating international standards like the ILO Convention 183 into Ghanaian law.

The results revealed *CHRAJ & others v GNFS*, as the first pregnancy discrimination case in Ghana. The results also revealed that pregnancy discrimination could be perpetrated under the guise of freedom of contract. Further, the results show the case as presenting a good precedence for optimization of women's rights in Ghana to be utilised by

⁸⁹ See L. J. Trautman and others, 'Employment Law: The Basics', *SSRN 3765016* (2021).

⁹⁰ See C. Boateng & E. E. Hawkson, '2 Fire women reinstated' *supra* n. 78.

employees, workers and civil society because the case reiterated that pregnancy clauses in employment contracts are a violation of the constitutional mandate of non-discrimination. The results also revealed that termination of employment based on pregnancy, is a practice that adversely impacts both employers and employees.

Though the case is a win for women, the paper underscores the need, among others, for more protection through ratification and implementation or domestication of the ILO Convention 183 and the passage of a women's charter to consolidate all rights of women in the country to give better protection to women. In addition, the paper recommended the need for better monitoring of employment practices to ensure that all businesses abide by the decision in *CHRAJ & others v GNFS* to avoid costly law suits.

It is hoped that this paper engenders more research into improving business culture that supports women during pregnancy.

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