



# **ACCUMULATED LEAVE IN GHANA – DOES THE LAW FROWN ON IT?**

By

**ERNEST OSEI-AFFUL, ESQ**

**SUNDAY, 20TH MARCH 2022**



## *Introduction*

Leave or holidays are part of the compensation package or benefits to which all workers are entitled. Section 20 of the Labour Act, 2003 (Act 651) provides that every worker **shall** be entitled to leave (minimum of fifteen days per full year). The number of leave days a worker is entitled to, the manner and circumstances of enjoying such leave entitlements are matters that are subject to contract between the worker and his employer but shall not contradict the minimum provisions in Act 651. The issue of leave entitlement has become a heated matter in Ghana now following the President's directive to the Auditor-General to proceed on his accumulated leave and the latter's express disagreement with the directive. The ongoing debate is in two legs: whether the President has the power to direct the Auditor-General in the manner which he so did; and whether accumulated leave is countenanced under the employment laws of Ghana. This essay focuses on the latter question.<sup>1</sup>

I will discuss the nature of leave under Ghana law, delve into accumulated leave and how the law deals with it and proffer advice to both employers and employees; I will further take a journey through the Public Services Commission's treatment of the subject and conclude that under Ghana law leave accumulates so long as it remains unspent or unutilised except under specific exceptions.

## *Nature of Leave under Ghana Law*

Act 651 provides for two categories of leave. The first category is "event-based" leave and the second, "annual leave". The former is earned upon the occurrence of a specific event such as maternity leave and sick leave. However, some organisations out of magnanimity or agreement have other forms of leave such as compassionate leave, study leave, paternity leave and sabbatical leave, amongst others which are mostly event-based. This category is not prescriptive under the law but once it is awarded it becomes binding upon the employer. The significant point is that an event-based leave, whether prescriptive or voluntary, becomes due upon the occurrence of the event that gives rise to it. For instance, section 57 of the Act provides that upon certification, an expectant mother is entitled to a minimum of twelve weeks maternity leave. In a similar vein, section 24 provides for sick leave which is independent of the annual leave. It needs to be emphasised that a worker is entitled to any of these event-based forms of leave only upon the occurrence of the event giving rise to it. Thus, a non-expecting mother cannot be entitled to maternity leave, and so will a healthy worker not be entitled to sick leave. It is therefore my view that by its very nature, an event-based leave cannot be deferred or accumulated. This is more so because, an event-based leave is granted to the worker to afford her the time necessary to help her deal with a specific event-bound

<sup>1</sup> [The author chooses to focus solely on the subject of accumulated leave which is independent of whether the President's directive to the Auditor-General is lawful. It is my expectation that the other question will be treated in a separate article](#)

situation. Sick leave must be granted to enable the worker recuperate, study leave for studies and in that manner. In effect, once a worker fails to utilise the event-based leave, she forfeits it since the same cannot be deferred, postponed or commuted to cash.

In contrast, annual leave is of a different character. Leave is a health and safety as well as productivity matter and both worker and employer have roles to play in ensuring this is utilised. Article 24 of the Constitution and Part IV of Act 651 deal extensively with it. The law provides for the minimum threshold of fifteen working days per calendar year of full service.<sup>2</sup> This is only the minimum and organisations are at liberty to increase but not reduce this number. The worker is required to be paid his usual salary whilst on leave, in accordance with section 20(2) of Act 651.

### *Accumulation of Leave*

The controversy that has arisen is whether leave can be accumulated. First, we need to examine the nature of annual leave. Unlike an event-based leave, annual leave is not triggered by any exceptional circumstance but accrues to the worker just like any other benefit or right that accrues to the worker by virtue of her employment rights. The employment relation is a special type of contract governed by agreement between the employer and the employee. Act 651 provides the minimum threshold below which an employee cannot be engaged. In fact, section 105(4) provides that where a collective agreement is able to negotiate better terms more favourable to the worker, the same will prevail against what Act 651 provides. In terms of varying an employee's rights under Act 651, the law only allows the parties to negotiate more favourable terms for the benefit of the worker and not otherwise. Thus, an employer cannot provide a worker with terms that are worse than what is afforded under Act 651. In my view, it becomes difficult to anticipate how a better benefit will accrue to the worker where she stands to forfeit her annual leave.

Many proponents of leave forfeiture may be tempted to rely on section 31 of Act 651 which prohibits agreement to forgo leave. This was the argument of the appellant in the Court of Appeal case of *Samuel M. K. Adrah v. Electricity Company of Ghana (Adrah)*.<sup>3</sup> The respondent had accumulated 249 days of annual leave for which he was subsequently granted. However, this was terminated by the appellant company under the guise that accumulated leave is prohibited under Act 651. However, the Court of Appeal disagreed with this argument. The Court agreed with the trial judge that neither section 31 nor any other provision of Act 651 has outlawed commuting accumulated leave to cash. It therefore proceeded to commute the accumulated leave to cash which was equivalent to circa 10.6 months' salary. Regarding compiling the accumulated leave, the court purposively construed the leave provisions of Act 651. It concluded per Ofoe JA that "... legally it is not every agreement to forgo leave that is void simpliciter and for which accumulated leave yields no benefits for the worker."

---

<sup>2</sup> Section 20(1) of Act 651

<sup>3</sup> (2018) JELR 69728 (CA) (unreported)

In reaching this conclusion, the Court of Appeal partially reviewed the leave process in the appellant company, which is largely similar to that of many employers.

I have indicated earlier that the employer-employee relationship is a special type of contract. However, the balance of power in most cases tilts towards the employer who is likely to call the shots in many instances. Perhaps, that is the reason why section 27 places the burden of administering the leave processes and other functions on the employer. The rights of the employer as provided in section 8 includes assigning work, disciplining the worker, modifying work, extending or ceasing operations, transferring the worker, amongst others. Although, the rights of the worker include having rest in the form of break and leave days, such rights can only be enjoyed when approved by the employer. Typically, the worker will have to apply to the employer for her leave and the employer will have the discretion to approve, review or defer the same. In a situation where the employer defers the leave it can go beyond the current labour year. In some other instances, the employer may have under-employed, making it difficult to release workers to utilise their full leave days as was seen in the *Adrah* case. It will surely be unacceptable to deprive such workers, whose leave may have accumulated, the right to utilise same, especially through no fault of theirs.

Furthermore, there may be other instances where leave may accumulate including a worker taking an earlier event-based leave such as sick or maternity leave or even public holiday,<sup>4</sup> voluntary communal work and civil duties,<sup>5</sup> interruptions by the employer,<sup>6</sup> and where a suspended worker is restored to her employment.<sup>7</sup> Clearly, in all these instances leave may be accrued and the worker does not forfeit it upon the passage of that specific event. There is another category of workers who may not have utilised their leave not because of pressures of work but due to personal or other factors. For instance, a worker may not take any initiative towards utilising his leave due to toxic atmosphere at home arising from failed marriage. Some workers may also choose to accumulate their leave days for personal commitments outside their employment. It is therefore necessary that the employer takes charge of the leave administration and regulate how workers spend their leave days. This may partly be a reason why section 27 of Act 651 empowers the employer to manage the leave portfolio of its workers as discussed below.

Leave administration, is a management function which should be administered by the employer in accordance with section 27 of Act 651. It is therefore imperative that the employer exercises the responsibility of ensuring workers take their leave in a systematic manner. Where the employer allows for leave days to be taken but the worker refuses to utilise the same it may be difficult for that worker to raise non-utilisation of her leave and assert accumulation. This is more complicated by the fact that no one can be compelled to enjoy his right or benefit,

4 Section 22 of Act 651

5 Section 23 of Act 651

6 Section 25 of Act 651

7 Section 29 of Act 651

although a person can be compelled to perform an obligation. However, a careful scrutiny of section 27 of Act 651 affirms that the employer ought to facilitate the leave administration. It is therefore prudent that an employer will take positive steps to enable the worker to enjoy her leave. It therefore behoves on the employer to create the atmosphere for the worker to utilise her leave, otherwise the employer will be estopped from denying the worker in the future.

In the *Adrah* case, the Court of Appeal recounted the historical context for section 31 of Act 651. Specifically, workers were in the habit of agreeing with their employers to convert their outstanding leave days to cash. This made the workers richer, but had the propensity of putting these workers under immense stress. This risky practice had to be stopped. Indeed, it also had the additional disadvantage of reducing productivity due to poor rest as a result of not going on vacation. It stood to reason that leave be made mandatory to ensure such workers utilised their leave. Nevertheless, agreement to forgo leave is not the same as prohibition or forfeiture of unspent leave. It is not surprising that the plaintiff was allowed to convert his unspent 249 days of accumulated leave days to cash.

So, what happens if a worker is unable to utilise his leave days? Save for situations where the worker refuses to utilise his leave when granted, in almost all other cases, the leave will accumulate and the employer may stand the risk of having to convert same to cash as seen in *Adrah*.

A similar conclusion was reached in a South African case of *WJ Ludick v Rural Maintenance (Pty) Ltd*<sup>8</sup> where the South African Labour Court held that “... the employee is entitled to accumulate the annual leave as it accrues to him in each period ...” In that said decision, the court relied on a previous South African case of *Jardine v Tongaat-Hullet Sugar Ltd*.<sup>9</sup> that depriving the worker of the accumulated leave will be denying her of her right to leave. In reaching this conclusion, the court reasoned that the Act upon which the claim was made imposed a duty on the employer to grant the leave but no right on the worker to initiate or take the same.<sup>10</sup> Although this decision has no binding effect in Ghana, the principle is rich. Clearly, leave is a benefit, a right that cannot easily be taken away from a worker. The employer in accordance with section 27 of Act 651 has to manage the leave process. It is its responsibility to ensure it facilitates the leave process as much as possible. In effect, the employer cannot play the ostrich and seek later on to deprive the worker of annual leave even where the same accumulates. That may be tantamount to ridding her of a benefit without justification.

### *Advice to Employers and Employees*

To the employer, there is the need to maintain an active leave plan and insist the workers utilise their leave. One truth is that a worker who refuses to take her leave may be a risk to the organisation. Such risk may be in relation to performance, fraud or health. I will prefer the

8 JS 633/07 [2013] ZALCJHB 291; [2014] 2 BLLR 178 (LC) (accessed via <http://www.saflii.org/za/cases/ZALCJHB/2013/291.html> on 3 July 2020).

9 [2003] ZALC 33 (accessed via <http://www.saflii.org/za/cases/ZALC/2003/33.html> on 3 July 2020).

10 See paragraph 18

employer making utilisation of leave an appraisal issue for both the worker and her supervisor, for instance, to ensure workers go on vacation. Employers must specifically communicate leave periods and document them properly. Finally, they should maintain documentary evidence that will confirm they duly required the worker to take his leave or approved the same.

The worker, on the other hand, must apply for the leave where the employer does not initiate it. Where leave is interrupted, the employer is required to reschedule it and pay the cost associated with the interruption. Moreover, the worker should not intentionally refuse to utilise her leave unless specifically prevented or recalled by the employer. In such situations, it will be appropriate to keep proper records of same.

### *The Public Services Commission's Policy*

The Public Services Commission was spot on when it concluded that “[C]urrently, the uncontrolled level of accrual of annual leave and its attendant requests for committal to cash is not only a drain on State coffers, but more importantly, may be silently creating unfavourable health conditions among public servants.”<sup>11</sup>

Its antidote as enshrined in its Revised Policy Framework on Leave Entitlements and Management for the Public Services of Ghana (the Policy) includes the restriction of accrual of annual leave within the public service. The Policy limits such accruals to a maximum of two years, beyond which a person can only be entitled to “appropriate approval” and ought to seek the same from the Governing Boards and Councils. With the backdrop of the challenges enumerated in the Policy such as high levels of leave accruals, high rate of absenteeism and unethical conduct by staff, this Policy is generally lawful. However, specific issues may arise where the management of the institution fails to ensure the proper application of the terms of the Policy. For instance, the Policy attempts to shift the responsibility so much on the worker as against the employer in the leave administration. This is against the clear intents of section 27 of Act 651 which places the obligation on the employer to administer the leave. I maintain that where the employer fails to ensure the worker takes her annual leave it will be unlawful for that employer to deprive the worker of such accumulated leave under the guise of the law or policy. It is common knowledge that policy cannot be used to trump the law, especially so in employment relations where workers are expected to have a more favourable treatment than employers.

On the flip side, the Policy makes some reasonable provisions, which if complied with will make it easier for the employer to succeed in invalidating such accrued leave. The Policy requires workers to apply for their leave within specified time for same to be compiled into a roster by the institution’s Human Resources Manager. I will add that the Human Resources

---

11 [Revised Policy Framework on Leave Entitlements and Management for the Public Services of Ghana, p.2.](#)

Manager or a designated officer of the employer should by duty ensure that she has communicated the procedure, process and approvals to the worker. She should specifically communicate to the worker the effective date of the leave and record it. Once all these are done, the worker will have no basis to dispute utilising the leave whether she actually does so or not, unless specifically proven. However, where the employer fails to create the opportunity, leave will accrue and remain outstanding.

What is uncertain is how the Policy concluded on a two-year cap regarding accumulation. From the foregoing, it is blatantly clear that in the light of the decision in *Adrah* and the clear intentions of Act 31, the two-year cap is a policy not mirroring the law. There is no indication that a two-year maximum annual leave accumulation was the intention of the drafters of Act 651. Had it been so, same should have been stated categorically in the Act. In the absence of any such categorical limitation, the Public Services Commission or any employer covered by section 1 of Act 651 cannot seek to limit leave utilisation through such unilateral policies or even by mutual agreement. The only justification for forfeiting annual leave is where the worker failed to utilise the opportunity after it was presented to him.

### *Conclusion*

Leave is a benefit that cannot easily be deprived of a worker just as any other right. In my view, a purposive interpretation of the Labour Act (without more), does not lead to the conclusion that annual leave is forfeited at the end of the current labour year. That will amount to depriving the worker of an accumulated right which in itself is against the principles underpinning the Act. I am well convinced that the current state of our employment laws in Ghana permit employees to accumulate their leave unless the same was previously rejected when granted or legitimately excused. The law places an obligation on the employer to administer the leave and where it fails to do so, it will be estopped from depriving the worker the right to the accrued leave.