

# Validity of Mutual Separation Agreements in Labour & Employment Law

By

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## 1.0 Introduction

Employment relationships are not intended to continue ad infinitum, and as such the contractual relationship may be ended in several ways. Employer-employee relationships may be ended by various means including by notice, summary dismissal, effluxion of time, operation of law, repudiation and subsequent mutual agreement of the parties. While Nigerian academic texts and caselaws are replete with discussions on determination of contracts of employment generally, very little has been written or discussed about termination of contracts of employment by mutual agreement of the parties. This paper attempts an appraisal of the validity and enforceability of mutual separation agreements in Nigerian labour and employment law.

## 2.0 What is a Mutual Separation Agreement?

A Mutual Separation Agreement is an agreement between an employer and employee to terminate the employment relationship under a mutual and freely agreed terms and conditions. The legal basis of mutual separation agreement is rooted in the doctrine of freedom of contract. A contract of employment is created by the agreement of the parties, and as such, same may also be terminated by the mutual agreement of the parties.

Mutual separation agreements is a legal devise commonly used by employers, especially multinational companies, to manage post employment legal risks especially law suits on wrongful terminations and dismissals, including constructive dismissals<sup>1</sup>.

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<sup>1</sup> Constructive dismissal occurs when an employee resigns because his/her employer's behaviour has become so intolerable that the employee cannot be reasonably expected to cope with it, and is left with no choice than to resign. See generally, Bimbo Atilola, Recent Developments in Nigerian Labour and Employment Law, Hybrid Consult, Lagos (2017) p. 53.

Where the separation is not free from rancour, misgivings or disagreements, the execution of a mutual separation agreement between the parties is a useful option in managing post termination legal and reputational risks. A commonly found clause in most mutual separation agreements is a provision to the effect that the employee waives his/her right to seek legal redress in court, and the agreement is taken to be a full and final settlement of whatever claims the employee may have against the employer.

### **3.0 Validity and Enforceability of Mutual Separation Agreements**

The most contentious legal issue surrounding mutual separation agreements is the employee's waiver of the right to seek legal redress in Court. The question has arisen as to whether or not mutual separation agreements are valid, enforceable or contrary to public policy and therefore void. The law is now fairly settled that mutual separation agreements are generally valid and enforceable in the absence of duress, undue influence or other vitiating elements in the general law of contract. Since a contract of employment is a product of a mutual agreement of the parties, then same may also be ended by the agreement of the same parties.

The voluntariness of mutual separation agreements has always been a recurrent issue on the question of validity and enforceability of Mutual Separation Agreements, and this is understandably so because of the real unequal bargaining powers between the employers and the employees. While a mutual separation agreement may be executed at the instance of either party, it is often at the instance of the employer. Where the agreement is executed at the instance of the employer, a mutual separation deal that offers terminal benefits unreasonably far lower than what the employee's contract of employment ordinarily offers, or which contains unconscionable provisions, will be a *prima facie* evidence of undue influence but not a conclusive proof. The onus of proving duress or undue influence lies on the party who alleges it. Thus, the presumption is that a mutual separation agreement is voluntary, unless and until duress, undue influence or other vitiating elements are established. In determining the voluntariness or otherwise of a mutual separation agreement, the

Court will consider the grade level of the employee in the company, his educational qualifications, and the general circumstances leading to the agreement.

There is no known reported Nigerian judicial decision, to the best of my knowledge, on the question of validity and enforceability of mutual separation agreements, even though caselaws from other jurisdictions abound. In **Gbenga Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd & Anor**<sup>2</sup>, a South African case involving a Nigerian, the South African Courts had the opportunity of pronouncing on the validity of mutual separation agreements in labour and employment law. In this case, the plaintiff was in the employment of Unilever in Dubai and in January, 2013, he was approached by a recruitment agency for an opportunity in Reckitt Benckiser in South Africa but he declined. He then left the employment of Unilever for Standard Chartered Bank, also in Dubai. While in the employment of the bank, he re-opened negotiations with Reckitt Benckiser through the agency and eventually joined the company as the Regional Human Resources Director in July 2013. At the interview with Reckitt Benckiser, and in his Curriculum Vitae, he had given his then current employer as Unilever, when in fact he was in the employment of Standard Chartered Bank. Reckitt Benckiser discovered this fact few months later and the plaintiff was dismissed for material misrepresentation.

The plaintiff now requested for a “softer landing” and the company agreed to execute a mutual separation agreement with him. The agreement provided that the agreed terms represented “a full and final settlement of all claims of whatever nature and however, arising between the parties”. The plaintiff further acknowledged in the agreement that he executed the agreement without duress or undue influence and that he voluntarily and unconditionally waived his right to payment in lieu of notice, including his right to seek redress in any Court of law.

The plaintiff later approached the Labour Court that the agreement was not voluntary, and that his waiver of right to seek redress in Court was contrary to public policy and therefore void abinitio. The Labour Court held that the agreement was

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<sup>2</sup>. (2016) 37 ILJ 2723 (CC)

valid and his application was dismissed accordingly. The Labour Court found that his claim of duress or undue influence was not supported by evidence, and that the agreement was a valid compromise since the circumstances were created by his own misrepresentation. He appealed to the Labour Appeal Court which also dismissed his appeal. The appeal Court held that a separation agreement is valid just like any ordinary agreement freely entered into by parties.

The employee further appealed to the Constitutional Court of South Africa which also dismissed his appeal. The Court held that mutual separation agreements are not illegal or contrary to public policy simply because a party waives his right to seek redress in Court. The Court reasoned that the plaintiff, a very senior manager of the defendant company, had a full understanding of the consequences of the agreed waiver. The court further held that full and final settlement clauses are common place in contracts, and lawful and not contrary to public policy.

#### **4.0 Practical Guides for Legal Advisors and HR Managers**

While mutual separation agreements are generally valid and enforceable in law, sufficient care must be taken by the employers of labour to avoid common potential loopholes that may vitiate the agreement. Below are some useful practice guides.

- (i) A mutual separation agreement must be in writing, signed by both parties, and preferably witnessed by another party.
- (ii) The employee must be advised of his right to seek legal opinion before executing the agreement.
- (iii) Mutual Separation Agreements should only be executed with relatively senior staff, ideally not less than a manager cadre who are reasonably expected to appreciate and understand the nature and consequences of the agreement.
- (iv) Where the agreement is at the instance of the employee (as in the Reckitt Benckiser case) such request should be made in writing. This helps to reduce the risks of allegation of duress or undue influence.

## **5.0 Conclusion**

Mutual Separation Agreements are valid and enforceable in law except in proven cases of duress, undue influence or other vitiating elements. It is a useful device in managing post-employment legal risks especially in cases where the parting of ways by the parties is not on a friendly note. Employers of labour must however ensure that the deal is freely entered into by the employee.