

NEWS BRIEF

Dismissal and re-engagement: High Court blocks Tesco's fire and rehire plans

The dismissal and then re-engagement of employees on new contract terms, often referred to as "fire and rehire", is not unlawful but is likely to be an option of last resort for most organisations as it carries significant risks (see box "Fire and rehire risks"). This controversial practice has received recent press attention after the High Court granted an injunction against Tesco, preventing it from dismissing and rehiring employees in order to remove an element of contractual pay from their contracts (*USDAW and others v Tesco Stores Ltd* [2022] EWHC 201 (QB)). The court implied a term into the employees' contracts to give effect to the permanent nature of the contractual pay.

Retained pay

USDAW is a trade union and is recognised by Tesco for the purposes of collective bargaining. Between 2007 and 2009, Tesco undertook an expansion programme which resulted in the closure of certain distribution centres, the expansion or restructuring of certain others and the opening of new sites. As part of this exercise, and in order to incentivise staff to relocate to a new distribution centre as an alternative to redundancy, Tesco agreed arrangements for "retained pay". This is a monetary value that protects the difference in value between employees' former employment contracts and their new contracts.

Tesco made a number of communications and statements in the 2007 to 2009 period relating to the nature of the retained pay. This included a joint statement with USDAW that the retained pay was guaranteed for life, that it would not decrease over time and that it would increase in line with any future pay awards. They also stated that retained pay would remain with employees for as long as they were employed in their current role and that it could not be negotiated away by either Tesco or USDAW.

In 2010, Tesco and USDAW entered into a collective agreement, which included a provision relating to retained pay. This stated, among other things, that retained pay would remain a "permanent" feature of an individual's contractual eligibility, subject

Fire and rehire risks

On 21 November 2021, Acas published updated advice on employers' responsibilities when making changes to employment contracts (www.acas.org.uk/changing-an-employment-contract/employer-responsibilities). As part of its advice, Acas set out some of the risks that can arise when changing employees' contracts, including:

- Creating tension in the organisation and damaging working relationships.
- Increasing employees' levels of stress and absence, and decreasing their commitment and performance.
- Legal claims for breach of contract, constructive dismissal and discrimination.
- Reputational damage to the organisation or brand.
- Strikes or other industrial action.
- Valued employees leaving the organisation.

to the following principles:

- Retained pay can be changed only by mutual consent.
- On promotion into a new role retained pay would cease.
- If an employee made a requested change to working patterns, the retained pay would be adjusted.

In January 2021, Tesco formally announced its intention to remove retained pay. It offered a lump sum payment in return for giving up the entitlement. However, if employees did not agree to this, they would be dismissed and offered new terms that excluded the entitlement to retained pay. USDAW, along

with certain named employees, applied to the High Court for:

- A declaration that the employees' contracts contained an implied term that prevented Tesco from terminating the employees' contracts for the purpose of removing or diminishing retained pay.
- Final injunctive relief preventing Tesco from terminating the affected employees' contracts.

High Court decision

The High Court found in favour of USDAW and the other claimants, and granted the relief sought. Looking at the overall context and the intention of the contracting parties, the court found that a reasonable person would construe the use of the term "permanent" to mean for as long as the relevant employee is employed by Tesco in the same substantive role. It therefore identified a conflict between this and the right of Tesco to terminate the contract for the purpose of removing the right to retained pay in circumstances where a fresh contract was to be offered in relation to the same substantive role.

The court then considered whether there was an implied term that prevented Tesco from giving notice to terminate the contract for the purpose of removing or diminishing the right to retained pay. The court acknowledged that the facts of the case were unusual and "extreme", and held that, in the circumstances, it was necessary to imply into the contract of each affected employee a term to the effect that Tesco's right to terminate on notice could not be exercised for the purpose of removing or diminishing the right to retained pay.

From a business efficacy perspective, the court held that, without implying this term, the employee's entitlement to retained pay would not be truly permanent and the contract would lack practical coherence. The court held that the implied term was capable of clear expression, was reasonable in the particular circumstances of the case and operated to limit, rather than contradict, the express contractual right to terminate the contract on notice. The court emphasised that

the implication of this term did not prevent Tesco from exercising its power to terminate an employee's contract of employment for good cause, such as a genuine redundancy or gross misconduct, even if the practical effect of doing that would be to bring the entitlement to retained pay to an end.

In relation to injunctive relief, the court held that damages would not be an adequate remedy given that terminating employees' contracts would remove a significant proportion of the remuneration payable to employees and their remedy would be limited to the losses recoverable in any claim for unfair dismissal. Therefore, the court granted final injunctive relief restraining Tesco from giving notice to terminate the contracts of

employment contrary to the implied term preventing termination for the purpose of removing or diminishing the right to retained pay, or otherwise withdrawing or diminishing retained pay other than in accordance with the express term in each contract.

Key takeaways

Although the court made clear that the facts of this case were unusual and extreme, the decision is a stark reminder to employers that they should think carefully about how to communicate any contractual changes or agreements. Although statements, agreements and communications around the long-term or permanent nature of contractual terms will not always be as stark and definitive as they were in this case, the decision

underlines the risks of making promises on the nature of contractual terms where there is a chance that flexibility will be required later down the line. This is particularly the case where there is significant industrial pressure and employers should ensure that collective agreements contain sufficient flexibility.

Given the controversy surrounding the practice of fire and rehire, it is likely that trade unions and employees will cite this case when negotiating changes to terms and conditions, or during any negotiations and consultation in relation to a dismissal and re-engagement process.

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