



Welcome to this edition of the "Working with Unions" bulletin designed to keep you updated with key cases and legal developments affecting trade unions and employee representative bodies.

This bulletin includes the long-awaited Supreme Court decision in *Tesco v USDAW* considering whether the High Court was right in granting an injunction against Tesco preventing it from dismissing and re-engaging employees so as to remove an element of contractual pay from their contracts, and also our recent vlogs where we take a deeper dive into the Labour government's proposals for collective rights and industrial relations.

We hope you find the bulletin useful.

Trending Topics

Post-election - A deeper dive into Labour's proposals around collective rights and industrial relations

The Baker McKenzie Industrial Relations and Collective Rights team are delighted to share their three-part on-demand vlog series, where they take a deeper dive into the new Labour government's proposals, including trade union recognition and trade union access in the workplace, changes to the collective redundancy regime and fire and rehire, and other industrial action and collective rights issues. The vlog series can be accessed [here](#).

In the courts

Supreme court reinstates injunction preventing employer from dismissing and re-engaging employees

The Supreme Court has reinstated an injunction granted by the High Court preventing an employer from dismissing and re-engaging employees so as to remove an element of contractual pay from their contracts. The payment had been collectively agreed with the recognized union some years earlier to incentivise employees to relocate some distance away, as an alternative to a lump sum redundancy payment. The payment was described as "permanent" in the contract and surrounding communications emphasized this aspect, referring for example to the fact that the payment would be "guaranteed for life". The court considered that in order to give effect to the express right to the permanent contractual payment, it was necessary to imply a term in the employment contracts that the employer could not dismiss the employees solely for the reason of denying them the contractual payment. The court also considered that an injunction was justified despite it having the (exceptional) effect of requiring specific performance of an employment contract.

In more detail

In 2007, Tesco embarked on an expansion programme that resulted in the closure of certain distribution centres and the re-opening of others. In order to incentivise employees to relocate to the new sites, they were offered “retained pay” (i.e., an additional contractual element of pay) as an alternative to a lump sum redundancy payment. The retained pay was collectively agreed with the recognized union and incorporated into the employees’ contracts of employment. Retained pay was expressly described as “permanent” in the collective agreement under which it was agreed (which provision was then incorporated into the individual contracts of employment of the Claimants) and, in surrounding communications, as (variously) “guaranteed for life” and something which would “[remain] for as long as you are employed...in your current role”.

In 2021, Tesco wished to bring the retained pay to an end. Tesco offered a one-off payment to buy out the right to retained pay but, if the employee didn’t accept the change, the intention was they would be dismissed and re-engaged on new terms, without the retained pay.

The employees were successful in obtaining an injunction from the High Court preventing Tesco from dismissing and re-engaging them so as to deprive them of the retained pay. The High Court considered it was necessary to imply a term that Tesco's right to terminate the employment contract cannot be exercised for the purpose of removing or diminishing the right of that employee to the retained pay.

Tesco was successful in its appeal to the Court of Appeal. The Court of Appeal dismissed the employees' argument that protection from dismissal should be implied into their contracts. It concluded that it was far from clear or obvious what term should have been implied. It also determined that, even if the High Court had been right to find for the employees on liability, this would not have justified the grant of an injunction, noting that specific performance would not normally be granted in an employment context. As an employee's remedy for breach of contract is invariably financial, the Court of Appeal considered that damages would have been an adequate remedy.

Supreme Court decision

The Supreme Court upheld the High Court's decision. It considered that in order to give effect to the express right to “permanent” retained pay, it was necessary to imply a term in the employment contracts that Tesco could not dismiss the employees solely for the reason of denying them the retained pay.

The implied term was really a product of how the right to retained pay had been expressed in the contracts and the pre-contractual communications that had been issued to employees. The Supreme Court noted that it would have been possible to negotiate a long-stop date for the entitlement to retained pay or to make it clear that it could be withdrawn if an employee was dismissed on notice and re-employed in the same role.

However, the right to retained pay had not been qualified in that manner. The contract set out three specific situations in which the right would be removed or modified (mutual consent, promotion or change of shift patterns). It would have undermined the purpose of the retained pay arrangement if Tesco had been able to give notice to terminate the contract and remove the retained pay once the employee had relocated. If that had been the case, the employee's position after having relocated

would have been more vulnerable, defeating the purpose of the retained pay arrangement, which was to incentivise employees to move.

The implied term would not restrict Tesco's right to dismiss for other reasons unconnected to the retained pay e.g., genuine redundancy, poor performance and misconduct. The Supreme Court therefore rejected arguments that it unreasonably fettered managerial discretion.

The Supreme Court also upheld the High Court's decision to grant an injunction against Tesco despite it having the effect of requiring specific performance of a contract of employment. Although the general principle is not to order specific performance in employment contracts, an exception may apply if there has been no breakdown of trust and confidence between the parties. Given Tesco was willing to re-engage the employees, this exception was satisfied.

The court also agreed with the High Court that damages would not be an adequate remedy given the difficulties of assessment. Calculating the quantum of damages would require speculation as to how long the employees would have otherwise remained employed by Tesco, and if they were lawfully dismissed, what their prospects would be of finding alternative employment so as to mitigate loss. This would be difficult, prone to error, resource intensive and potentially costly. The employees would also not be able to recover their non-pecuniary losses, for example, the loss of job satisfaction, and anxiety and upheaval caused by dismissal.

Tesco v USDAW, Supreme Court

Commentary

The facts of this case were unusual given the choice of wording used to describe the "permanent" nature of the retained pay and the circumstances in which it was offered.

Nevertheless, it illustrates that employers should think very carefully about both how they position any contractual entitlement and communicate a contractual change, in particular, not to make promises about the permanence of a benefit or term if there is a chance that flexibility may be needed later. Not only does this case demonstrate that the express wording of the contractual promise is critical, but also the surrounding communications, which here were used as aids to interpreting the parties' objective intention when implementing retained pay.

It is also a reminder to check for any past contractual commitments that may have been made before embarking on a large-scale contractual variation exercise.

This decision does not prevent an employer from undertaking a dismissal and re-engagement exercise in the ordinary course. However, as the Statutory Code on dismissal and re-engagement makes clear, this practice should generally be used as an option of last resort and the parties should try to reach agreement (as Tesco had sought to do here) before moving to dismiss and re-engage.

This case is unlikely to be the last word on the topic of dismissal and re-engagement as the Labour government has committed to ending the practice except where there is genuinely no alternative option and their manifesto commits to replacing the Code with something stronger.

Direct pay offer to employees was not a S145B TULRCA unlawful inducement

An employment tribunal has found that an employer did not breach section 145B of the Trade Unions and Labour Relations (Consolidation) Act 1992 in relation to two pay offers made directly to its employees during a period of collective bargaining with its recognised trade unions. The tribunal was persuaded that the sole or main purpose of making those awards was not to bring about the prohibited result that the workers' terms of employment will not, or will no longer be, determined by collective bargaining.

The first award (a one-off payment of GBP300) was made to ensure that that sum of money could be passed to the employees, which had been found from an existing budget, before the deadline for making that payment passed. Negotiations with the unions continued straight after the payment was made.

Although the position relating to the second offer (pay increase of 3.1%) was more nuanced, the tribunal preferred the evidence of the employer that the sole or main purpose of making that payment was to ensure that the workforce had the immediate benefit of the least amount of pay rise, which had already been budgeted for, that would have to be paid by the employer given that negotiations with the unions had been protracted. This amount was already 'baked in' for that financial year so the employer knew it could pay this level of increase irrespective of the outcome of the negotiations with the unions. The contemporaneous documents at the time explicitly referenced that the employer did not want the employees to be disadvantaged by not receiving pay at an increased level, as well as the 'ongoing' dispute, which reveals that the employer was intending to continue negotiating with the unions.

Adams v Walsall Housing Group, Employment Tribunal

Commentary

Decisions about whether there was an unlawful inducement related to collective bargaining will always be fact specific. In this case, the tribunal relied heavily on the contemporaneous documents to assess the employer's intention at the time.

Decisions following the Supreme Court's decision of *Kostal v Dunkley* have tended to focus on whether the collective bargaining process was genuinely exhausted at the time the direct offer to employees was made. This case is an interesting illustration that the point about 'intention' can be argued in a different way.

In other news...

Consultation on removing EWC legislation

On 16 May 2024, a consultation was launched by the previous government under which it proposed repealing the remaining post Brexit European Works Council legislation in the UK. The stated aim is to bring to an end what it considered to be a temporary reprieve for European Works Councils (EWCs) in the UK. Although the ability to create new EWCs in the UK was removed following the UK's departure from the EU, provisions were retained relating to the operation of existing UK based EWCs. The proposal would allow these employers to stop operating a UK EWC.

Despite the change in government, this consultation remained open until the closing date of 11 July, although it will be up to the new government to respond to it.

The TUC has published a response to the consultation strongly opposing the abolition of the legal framework for EWCs taking the view that EWCs remain a "hugely important means for UK workers and their representatives to engage with transnational employers."

Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils - GOV.UK (www.gov.uk)

Consultation on clarification to TUPE and abolishing the European Works Councils' legal Framework | TUC

Annual statistics on trade union membership have been published

The Department for Business and Trade has published 2023 statistics on trade union membership in the UK, primarily based on Labour Force Survey data. The statistical bulletin reveals that trade union members increased to 22.4% in 2023, up from 22.2% in 2022. Interestingly, the increase was partly driven by the increase in private sector members. The bulletin also sets out a number of long term and recent trends, and what changes may be responsible for them.

Trade Union Membership, UK 1995-2023: Statistical Bulletin | Department for Business & Trade

TUC urges new government to introduce laws on indoor temperatures at work

The TUC has called for new legal maximum work temperatures to improve protections for workers and avoid putting them at health-related risks. It proposes a new absolute maximum indoor temperature set at 30 degrees Celsius (or 27 degrees for those doing strenuous jobs). The TUC has also called for a change in the law so that employers must attempt to reduce temperatures if they get above 24 degrees and workers feel uncomfortable.

New government "must change law on hot workplaces", wants TUC | TUC

TUC poll reveals 8 in 10 zero-hours contract workers want regular hours

The TUC has published results of a poll it ran on workers on zero-hours contracts. The results reveals that 84% of workers on zero-hours contracts want regular hours of work compared to 14% who do not. 75% of zero-hours contract workers have also experienced difficulty meeting living expenses due to not being offered enough hours. The TUC says that these findings highlight the importance of the government's upcoming Employment Rights Bill, which the government has said will end "one-sided flexibility" and ban exploitative contracts.

Over 8 in 10 zero-hours contract workers want regular hours – TUC poll reveals | TUC

NASUWT calls for legal right to paid time off after a miscarriage

NASUWT | Call for legal right to miscarriage leave

GMB calls for more favourable treatment of organisations that recognise a trade union in public contracts

The GMB proposed a motion at the Labour Party Conference on 23 September 2024 calling for companies that recognise a trade union to be considered more favourably by public bodies when making decisions on contract awards.

Anger at contracts for ‘union-busters’ (thetimes.com)

DBT announces Strikes (Minimum Service Levels) Act to be repealed

The DBT has announced that the Strikes (Minimum Service Levels) Act 2023, which had been brought in by the previous government, will be repealed in the upcoming Employment Rights Bill.

Public services “back on track” as Strikes Act to be repealed - GOV.UK (www.gov.uk)

CAC cases at a glance

Applications under Part III of Schedule A1

IWGB

Parties	Date	Status
Royal Society of Arts (RSA) & IWGB	15 May 2024	Application accepted

Disclosure of Information Decisions

GMB

Parties	Date	Status
GMB & Wensum Trust	19 July 2024	Application withdrawn
GMB & Serco	9 August 2024	Application in progress
GMB & Securitas Security (UK) Limited	26 September 2024	Application withdrawn

UCU

Parties	Date	Status
UCU & The University of Aberdeen	23 July 2024	Application withdrawn
UCU & BIMM University	12 August 2024	Application in progress

European Works Councils

Parties	Date	Status
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British Council EWC & British Council	23 May 2024	Application in progress
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Information and Consultation Regulations

Parties	Date	Status
DHL eCommerce (1)	25 April 2024	Application in progress
DHL eCommerce (2)	29 April 2024	Application in progress
DHL eCommerce (3)	30 April 2024	Application in progress
Goldsmiths College, University of London (1)	25 June 2024	Decision issued
Goldsmiths College, University of London (2)	18 July 2024	Application withdrawn

Trade Union Recognition Decisions

BMA

Parties	Application	Date	Status
BMA & Fuller and Forbes (Reimagining General Practice/Plymouth Primary Care Group)	Trade Union Recognition	1 May 2024	Application withdrawn

Community

Parties	Application	Date	Status
Community & Euro Car Parts (2)	Trade Union Recognition	13 June 2024	Recognition decision issued
Community & WorldSkills UK	Trade Union Recognition	25 September 2024	Application accepted

CWU

Parties	Application	Date	Status
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CWU & See Change Technologies Ltd	Trade Union Recognition	22 August 2024	Application withdrawn
CWU & Saab UK Ltd	Trade Union Recognition	4 September 2024	Recognition decision issued

GMB

Parties	Application	Date	Status
GMB & Brake Bros Limited	Trade Union Recognition	8 April 2024	Application withdrawn
GMB & PUMA UK	Trade Union Recognition	13 May 2024	Application withdrawn
GMB & City Facilities Management (Distribution) Ltd (2)	Trade Union Recognition	20 May 2024	Recognition decision issued
GMB & PWS Distributors Ltd	Trade Union Recognition	21 June 2024	Application withdrawn
GMB & BCA Logistics Limited	Trade Union Recognition	9 July 2024	Recognition decision issued
GMB & Amazon UK Services Limited	Trade Union Recognition	24 July 2024	Recognition decision issued
GMB & W.H. Malcolm Limited	Trade Union Recognition	26 September 2024	Application accepted
GMB & Farmfoods Distribution Ltd	Trade Union Recognition	1 October 2024	Application in progress

IWW

Parties	Application	Date	Status
IWW & Escape Hunt Group Ltd	Trade Union Recognition	25 July 2024	Recognition decision issued

NUJ

Parties	Application	Date	Status
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NUJ & The Press Association Ltd	Trade Union Recognition	12 June 2024	Recognition decision issued
NUJ & Wilmington Healthcare Limited	Trade Union Recognition	3 July 2024	Application accepted

Prospect

Parties	Application	Date	Status
Prospect & Bubble Chamber Ltd, The Prince Charles Cinema (1)	Trade Union Recognition	12 April 2024	Application withdrawn
Prospect & Bubble Chamber Ltd - The Prince Charles Cinema (2)	Trade Union Recognition	15 July 2024	Recognition decision issued
Prospect & The British Academy for the Promotion of Historical Philosophical and Philological Studies (The British Academy)	Trade Union Recognition	3 July 2024	Recognition decision issued
Prospect & ECEBS	Trade Union Recognition	9 July 2024	Validity decision issued

RMT

Parties	Application	Date	Status
RMT & Medway Rail Limited	Trade Union Recognition	13 May 2024	Application accepted
RMT & East Coast Trains Ltd T/A Lumo	Trade Union Recognition	28 May 2024	Application withdrawn
RMT & Medway Rail Doncaster	Trade Union Recognition	28 May 2024	Application withdrawn
RMT & TransPennine Trains Ltd	Trade Union Recognition	28 May 2024	Application accepted

Parties	Application	Date	Status
RMT & Loram UK LTD	Trade Union Recognition	6 June 2024	Application accepted

TSSA

Parties	Application	Date	Status
TSSA & First Trenitalia West Coast Rail Ltd t/a Avanti West Coast	Trade Union Recognition	30 April 2024	Application withdrawn

Unite the Union

Parties	Application	Date	Status
Unite the Union & Redline Oil Services Limited	Trade Union Recognition	3 May 2024	Recognition decision issued
Unite the Union & The MCL Group (INT) Limited	Trade Union Recognition	3 May 2024	Application in progress
Unite the Union & Calor Gas Limited	Trade Union Recognition	7 May 2024	Application accepted
Unite the Union & EMCOR	Trade Union Recognition	5 June 2024	Application withdrawn
Unite the Union & Titan Publishing Group Limited	Trade Union Recognition	25 June 2024	Application in progress
Unite the Union & GIPSIL Ltd	Trade Union Recognition	12 July 2024	Application accepted
Unite the Union & Oscar Mayer Limited (1)	Trade Union Recognition	16 August 2024	Application withdrawn
Unite the Union & Oscar Mayer Limited (2)	Trade Union Recognition	30 August 2024	Application in progress

Parties	Application	Date	Status
Unite the Union & AB-Inbev	Trade Union Recognition	19 September 2024	Recognition decision issued
United the Union & Bottega Veneta	Trade Union Recognition	19 September 2024	Application in progress
Unite the Union & Human Rights Watch Inc.	Trade Union Recognition	20 September 2024	Application in progress
Unite the Union & Facility Management UK Limited	Trade Union Recognition	23 September 2024	Application in progress

URTU

Parties	Application	Date	Status
URTU & Industrial Chemicals Ltd	Trade Union Recognition	14 June 2024	Recognition decision issued

UVW

Parties	Application	Date	Status
United Voices of the World (UVW) & D Brice & Company Ltd-T/as D B Services	Trade Union Recognition	9 September 2024	Recognition decision issued

NEU & NASUWT

Parties	Application	Date	Status
NEU & NASUWT & St Edmund's School Canterbury, Kent	Trade Union Recognition	20 August 2024	Application accepted

PDA Union

Parties	Application	Date	Status
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The Pharmacists' Defence Association Union (PDA Union) & Superdrug Pharmacy (Superdrug Stores Plc)	Trade Union Recognition	25 September 2024	Application accepted
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UNISON

Parties	Application	Date	Status
UNISON & University Hospitals of Leicester NHS Trust	Trade Union Recognition	12 August 2024	Application withdrawn

Contacts

For further information please contact your usual Baker McKenzie lawyer or one of the Partners in the Collective Rights Practice:



Monica Kurnatowska
Partner
T: +44 0 20 7919 1870
monica.kurnatowska
@bakermckenzie.com



Jon Tuck
Partner
T: +44 20 7919 1706
jon.tuck
@bakermckenzie.com



Kim Sartin
Partner
T: +44 20 7919 1351
kim.sartin
@bakermckenzie.com



Richard Cook
Counsel
T: +44 20 7919 1316
richard.cook
@bakermckenzie.com