

Supreme Court re-instates injunction in Tesco fire and re-hire case

24 September 2024  Claire Rosney

The Supreme Court has re-instated the injunction preventing Tesco from terminating and re-engaging employees in order to remove a “permanent” right to retained pay.

Brief facts

In 2007 Tesco re-organised its distribution network. This involved closing existing distribution centres and opening new ones some distance away which created a redundancy situation. As Tesco needed to retain the experienced staff who worked at the existing centres, they sought to encourage them to relocate to the new centres (or to existing centres that were being retained). As an alternative to redundancy Tesco negotiated with USDAW (the recognised Trade Union for collective bargaining purposes) a permanent enhancement called “Retained Pay”. This was a monthly payment for staff who stayed and agreed to relocate. As a result, a number of staff agreed to relocate and became entitled to Retained Pay.

In 2021 Tesco attempted to remove the Retained Pay by terminating contracts and offering to re-engage on new terms which did not include Retained Pay. The High Court initially granted an injunction restraining Tesco from terminating the contracts on the basis the contracts were subject to an implied term that Tesco would not terminate in order to remove Retained Pay. This decision was overturned by the Court of Appeal on the basis that there was no such implied term and Tesco had the right to give notice in accordance with the express notice clause contained in the contracts.

Supreme Court decision

The Supreme Court disagreed with the Court of Appeal and restored the injunction. The Supreme Court was satisfied that it was necessary “to imply a term in the contracts to qualify Tesco’s right to dismiss on notice so that it cannot be exercised for the purposes of depriving the [employees] of their right to permanent retained pay”. Without this implied term Tesco’s promise would have been undermined. The Supreme Court were satisfied that it was “inconceivable” that the parties intended that Tesco would retain a unilateral right to terminate the contracts to end Retained Pay whenever it suited them in circumstances where it had been agreed in order to retain experienced employees and those employees had relocated on the basis that their pay would be uplifted. It was also noted that it had been open to Tesco to negotiate a longstop date for the entitlement or expressly provide that it could be withdrawn in the future following termination and re-engagement, but they had failed to do so. Therefore, the injunction was restored. This is an unusual decision as it effectively amounts to specific performance which generally isn’t ordered in relation to contracts of employment. However, as damages were considered an inadequate remedy and there was no breakdown in mutual trust and confidence (evidenced by the fact Tesco had offered to re-engage the employees) the Supreme Court were satisfied that an injunction was appropriate in the circumstances.

What does this mean for employers?

This case is unusual as most contracts of employment do not confer a permanent entitlement to a contractual benefit. On the contrary, contracts usually state that benefits are timebound or can be varied, amended or withdrawn at any time (although this discretion should be exercised reasonably). Therefore, whilst similar scenarios may not be common, it is worth bearing in mind for employers who are going through change management processes and may be minded to offer incentives in return for agreement to the proposed changes to

include a long stop or exit. Following this ruling, any contractual terms which are expressed as being permanent will likely be subject to a term that notice cannot be given in the future for the purposes of depriving employees of that permanent right.

The decision does not signify the end of “fire and rehire”. However, given the government’s commitment to bringing about an end to the practice we may see legislation introduced either banning or restricting the use of this practice in the future.

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