

High Court injunction granted to prevent “fire and rehire”

The High Court has granted an injunction against Tesco preventing the dismissal and re-engagement (‘fire and rehire’) of employees in an attempt to remove a contractual entitlement to enhanced payment terms.

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The High Court has granted an injunction against Tesco preventing the dismissal and re-engagement (‘fire and rehire’) of employees in an attempt to remove a contractual entitlement to enhanced payment terms (‘Retained Pay’).

Tesco agreed the payment of Retained Pay in 2007-2009 as an incentive for employees working in its distribution centres, encouraging them to relocate in order that Tesco could avoid mass redundancy during a reorganisation. The Retained Pay was stated to be ‘permanent’ for as long as the employees remained in their current role. In January 2021, Tesco announced an intention to remove Retained Pay and offered employees an advanced lump sum payment of 18 months’ Retained Pay in return for forfeiting their entitlement. Employees who did not agree would be dismissed and re-engaged on terms without Retained Pay.

USDAW made an application to the High Court seeking a declaration that the affected employees’ contracts included an implied term preventing dismissal and re-engagement, along with an injunction.

The Court determined that, taking into account the context and intention of the parties at the time the Retained Pay was agreed, a reasonable person would interpret the use of ‘permanent’ to mean for as long as the employee remained employed by Tesco in the same substantive role. As a result, on the facts of this specific case (which the court accepted are “extreme”), a term should be implied in the employees’ contracts, constraining the right of Tesco to dismiss and re-engage to remove or reduce the employees’ rights to Retained Pay. The Court also ordered an injunction preventing Tesco from terminating affected employees’ contract contrary to this implied term.

The specific and unusual facts of this case make it an exception and it remains very rare for implied terms to restrict an employer’s ability to terminate a contract in accordance with its terms or for injunctions to be used to prevent the termination of an employee’s contract. However, employers are more frequently turning to dismissal and re-engagement to implement changes in employees’ terms and conditions. Employers should therefore ensure they carefully consider any agreements they reach which provide enhanced pay or other benefits to employees to avoid over-commitment or long term consequences which may make removal of such benefits more difficult.

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