

## **Supreme Court rules in favour of USDAW workers over Tesco ‘Fire and Rehire’ scheme**

The Supreme Court handed down judgment on 12 September 2024 in favour of USDAW and a number of its members employed as Warehouse Operatives who sought an injunction to prevent Tesco from engaging in a “fire and rehire” exercise in order to remove the right of employees to receive Retained Pay.

The judgment reverses the decision of the Court of Appeal, and confirms that the High Court was right to grant an injunction. All five judges agreed with USDAW and its members that in this case it was necessary to imply a term into the contracts of employment of those affected to prevent Tesco from dismissing them when the purpose of doing so was to remove their right to Retained Pay and that the grant of an injunction was appropriate on the particular facts that applied.

### **Background**

The origins of this case date back to 2007 when Tesco was embarking on an expansion programme which led to it closing existing distribution centres and opening new ones. Where particular sites were closing employees stood to be made redundant. However in order to incentivise some staff to stay with the business Tesco entered into a collective agreement with USDAW which provided that anyone who chose to relocate to work in one of the new distribution centres would receive an additional payment known as “Retained Pay” which would amount to a significant supplement to their wages. Tesco entered into this arrangement as it needed to retain the skills of existing staff at a critical time for the business rather than see them all leave on the grounds of redundancy. The collective agreement that was reached made it expressly clear that Retained Pay would be a permanent feature of an individual’s contractual

entitlement and could only be removed via mutual consent or if an individual was promoted to a new role.

By 2021 Tesco had decided it no longer wanted to pay Retained Pay and informed USDAW it wanted to phase the arrangement out. In order to do that employees were offered a lump sum payment in return for giving up their right to Retained Pay. Anyone who refused to accept this lump sum payment was warned they would be subject to fire and rehire. In other words, their existing contract would be terminated and they would be re-engaged on precisely the same terms, save that the Retained Pay element of their wages would be removed.

### **The High Court & Court of Appeal Proceedings**

A number of USDAW members did not want to forego their right to Retained Pay given that it made up a significant proportion of their salary. On this basis USDAW and three individual claimants issued proceedings in the High Court under CPR Part 8 against Tesco for declaratory relief as to their contractual entitlement to Retained Pay and for injunctive relief to restrain Tesco from removing their right to Retained Pay through the mechanism of fire and rehire. The proceedings were brought not only for the benefit of the three individual employees themselves but on behalf of affected members at its Daventry and Lichfield distribution centres who had not agreed to give up Retained Pay. A significant number of members are also affected by the issue in Scotland where proceedings are currently stayed pending the judgment of the Supreme Court.

In February 2022, the High Court granted an injunction that prevented Tesco from proceeding with its attempt to dismiss all those who were not willing to give up their right to Retained Pay and accept the buyout. The court ruled that an implied term prevented Tesco from serving notice to terminate the contracts when its purpose in doing so was to remove the right to Retained Pay.

However, in July 2022 the Court of Appeal overturned this decision, stating that Tesco retained the right to terminate the contracts of employment by serving

notice in the conventional way and that the entitlement to Retained Pay ended when those contracts were terminated. Furthermore, the Court of Appeal decided that even if the claimants had succeeded in establishing that the proposed dismissals were wrongful, when it came to the question of remedy, the Court was unaware of a final injunction having ever been ordered preventing a private sector employer from dismissing an employee for an indefinite period.

### **The Supreme Court Judgment**

All five judges in the Supreme Court disagreed with the conclusions of the Court of Appeal and have overturned its decision. In the leading Judgment from Lord Burrows and Lady Simler (with Lord Lloyd Jones concurring) they held that the employees in receipt of Retained Pay were employed under a contract with an express term which afforded them a right to Retained Pay on a permanent basis. This was what had been agreed in a collective agreement between USDAW and Tesco which was then incorporated into the individual contracts of employment under ordinary principles.

The Supreme Court was unwilling to accept Tesco's submission that this express term was still subject to its right to terminate the contract by notice at any time of its choosing and did not accept the word "permanent" had only been used for the purpose of ensuring Retained Pay could not be removed by means of a future collective agreement. As the Supreme Court concluded the logical consequence of accepting that rationale meant that it would have been open to Tesco to terminate the contracts of employment immediately after employees had relocated to remove Retained Pay. This could not have been the mutual intention of the parties and the fact that the parties had agreed the circumstances in which it could be removed did not lend support to the fact the word "permanent" had only been used to ensure it could not be removed via future collective bargaining.

On this basis it was recognised that the real question in light of that conclusion was whether it was necessary to imply a term by fact that would qualify Tesco's otherwise unrestricted contractual right to terminate the employment contract on notice in order to deprive employees of their right to Retained Pay. To do that it considered the term must be necessary for business efficacy or must be so obvious that "it goes without saying" it should be implied. They concluded that it was necessary to apply to such a term so that Tesco could not serve notice to terminate the contract, if the purpose for doing so was to deprive the claimants of their right to Retained Pay. That implied term was necessary in order not to undermine the promise that Retained Pay would be a permanent feature of those individuals' contractual entitlement. By doing this the Supreme Court considered it was giving effect to the intentions of the parties at the relevant time. The Court confirmed the decision they reached was consistent with the line of cases concerning employment contracts with long-term sickness or permanent health insurance (PHI) benefits where courts had concluded that an employer's right to terminate the contract was qualified by an implied term that the employer should not terminate the contract as a means of depriving the employee of such entitlements.

The Supreme Court also concluded that the High Court had been right to grant an injunction to prevent Tesco from firing and rehiring the employees for the purposes of removing a right to Retained Pay. They acknowledged that the general rule is that a contract of employment is not specifically enforceable but there are exceptions to this principle where it is just to make such an order and where damages would not be an adequate remedy.

On the facts of this case there had been no breakdown in mutual trust and confidence illustrated by the fact that the employees were going to be re-engaged on precisely the same terms and conditions after the proposed dismissals had taken effect, save for their right to Retained Pay. Therefore the court did not consider it would be unjust to make such an order. On that basis it was then necessary to consider whether damages would be an inadequate remedy. To calculate appropriate damages would require speculation as to how

long the employees would otherwise remain employed by Tesco, and what their prospects would be of mitigating any loss incurred which would be very difficult. Furthermore, damages for wrongful dismissal would not reflect non-pecuniary loss to compensate, for example, for the distress caused by losing a job. On that basis the leading judgment concluded an injunction was appropriate to prevent Tesco from dismissing the employees in question if the reason for doing so was to deprive them of their right to Retained Pay.

Lord Leggatt and Lord Reed both agreed with the leading judgment. Lord Leggatt added that, in order to determine what term must be implied, it was necessary to identify the “reasonable expectations” created by the language of the promise made by Tesco. He concluded that to give effect to the commitment made by Tesco on Retained Pay it was necessary to imply a limitation on the power to terminate in circumstances where that right was exercised purely for removing their right to Retained Pay.

### Conclusion

The Supreme Court judgment demonstrates the Court’s willingness to intervene to give effect to the parties’ intentions by implying a term in fact where two express terms conflict (in this case a Permanent Right to Retained Pay and an express Notice clause) to prevent a fire and rehire exercise from ensuing. It also acknowledges the correctness of the rulings in the PHI cases which had not previously been considered by the Supreme Court. Those PHI cases exemplify the principle that applied in this case, namely that an implied term by fact may be required to qualify an otherwise unqualified right to dismiss in circumstances where to do so would undermine the purpose of the very benefit that had been promised under the contract. The judgment stresses the circumstances in which a term can be implied in this way are narrow and arises only where two express terms are mutually inconsistent.

The judgment also reverses Bean LJ’s remark in the Court of Appeal that the remedy for wrongful dismissal is almost exclusively damages and confirms that

injunctions are available if damages are not an adequate remedy and it is just to award one in all the circumstances, namely where trust and confidence in the employee is maintained. To secure an injunction against a private sector employer preventing this fire and rehire exercise is a significant and welcome development in light of what the Court of Appeal had previously stated.

Lord Leggatt's speech leaves open the issue of whether the common law requires further evolution. In particular, he questioned whether it was time to revisit the old common law rule that an employer "*can act unreasonably or capriciously if he so chooses but the dismissal is valid*". Lord Leggatt questioned whether or not this approach remained consistent with "*community expectations and values*". The issue is whether this should now give way to the implication as a matter of law of a good faith term as recognised in the case of ***Braganza***. Lord Reed did not consider that it was necessary to decide this question on this appeal. The point will inevitably arise again in the future.