

**Do not make promises you cannot keep: employer prevented from dismissing employees in order to deprive them of a permanent contractual entitlement.**

The Supreme Court has ruled that an implied term prevented a private sector employer from dismissing and offering to re-engage employees on new terms, where the objective was to withdraw a contractual payment that was intended to be a permanent benefit.

**What happened in this case?**

In 2007, Tesco restructured its distribution centres, which meant closing some centres, expanding others and opening some new ones. Staff at the closing centres were asked to relocate to different sites instead of being made redundant and receiving redundancy payments. To incentivise the staff to do this, Tesco agreed with the trade union, USDAW, that it would make a “retained payment” to those who agreed to relocate to a different site. The retained payment reflected the difference in value between the employees’ contractual entitlements at the old and new distribution centres. In some cases, this was significant and represented between 30% to 40% of overall pay. It was agreed that the retained payment would be a permanent entitlement for those employees, and a term to this effect was incorporated into their employment contracts.

In 2021, Tesco sought to withdraw the retained payment. The affected employees were offered a lump sum payment in exchange for agreeing to the removal of the benefit. The employees were told that if they did not agree to this, they would be dismissed and offered a new contract of employment on identical terms but excluding the retained payment. In response, USDAW and several of the affected employees applied to the High Court for a declaration as to the meaning of the retained payment term, and an injunction to restrain Tesco from dismissing for the purpose of removing or reducing the retained payment.

USDAW and the employees succeeded at the High Court stage, with the Court deciding that there was an implied term preventing Tesco from terminating and offering re-engagement as a means of withdrawing the retained payment. However, this was overturned by the Court of Appeal, which held that such an implied term was not justified. USDAW and the employees appealed to the Supreme Court.

### **What was decided?**

Tesco argued that the retained payment was permanent only for the duration of the employment contract and was subject always to Tesco's contractual right to dismiss on notice. This approach was rejected by the Supreme Court on the basis that this would render as meaningless the promise that the retained payment would be a *permanent* entitlement.

The correct meaning of the term was that it would continue for the duration of employment in the same role. Yet the term had value if Tesco could simply dismiss and offer to re-engage as

a route to unilaterally withdrawing it. Therefore, Tesco's right to terminate the employment contract on notice was subject to an implied term that it could not dismiss for the *purpose* of depriving the employees of the retained payment.

The Court noted that the affected employees had been incentivised by the retained payment to agree to otherwise "unpalatable" relocations. It simply could not have been the intention that Tesco would have the right to dismiss as a means of withdrawing the retained payment – that would "*flout industrial common sense*". However, this did not mean that Tesco could never terminate the employment of the affected employees; they could do so for other reasons, just not to avoid the retained payment. The Court said that the existence of an implied term restraining dismissal in this way was not new. Similar implied terms had been upheld in cases where an employee had a contractual right to permanent health insurance (PHI) benefits, and the dismissal would have deprived a sick employee of such benefits.

In deciding whether to reinstate the injunction preventing dismissal, the Court highlighted that "specific performance" of contractual obligations will not usually be ordered against parties to employment contracts. However, there is an exception to this rule, insofar as specific performance *may* be ordered against an employer provided there has been no breakdown of mutual trust and confidence. Given that Tesco was prepared to re-engage the employees on inferior terms, there had clearly not been any such breakdown in this case. The Court also noted that specific performance will not be ordered where damages were an adequate remedy for the wronged party. However, it was decided that damages would be inadequate in this case since it would have been limited to damages recoverable in an unfair dismissal claim.

Therefore, the Supreme Court restored the injunction preventing Tesco from dismissing the employees for the purpose of removing the retained payment term.

### **What does this mean for employers?**

Employers stuck with a contractual benefit that they do not like should recognise that fire and rehire will not always come to their rescue – although it should be borne in mind that the facts of this case were unusual. Although it remains a highly unusual step for a Court to limit an employer's right to terminate a contract of employment, this case underlines that it is possible in certain situations. Here, a term was implied to prevent dismissals aimed solely at removing a contractual benefit intended to be permanent. A similar term may be implied where an employer dismisses a sick employee entitled to PHI benefits, thereby depriving them of the very benefit intended to help them when sick. In both cases it would be necessary to imply the term in order to make sense of the contract and/or to reflect the parties' actual intentions.

To avoid situations such as these, employers should exercise caution about promising contractual benefits which might be regarded as permanent. When entering into employment contracts, clear wording setting out the parameters of benefits are advisable, for example, by stipulating that they are time-limited and may be withdrawn by the employer.

However, it is important to remember that this decision does not go as far as preventing dismissal for other lawful reasons, for example, misconduct or redundancy. Although,

given the background of this case, there is a risk that a future dismissal by Tesco would be viewed as a sham designed to hide the true reason i.e. ending the retained payment.

[Tesco Stores Ltd v USDAW and others](#)

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