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Tesco v USDAW – a new dawn or an open door?

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Noel Dilworth looks at the recent Supreme Court decision in Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and ors [2024] UKSC 28, in which it was decided that a power to terminate employment on notice could be circumscribed by an implied term not to do so with the specific purpose of removing a contractual entitlement to pay protection. Moreover, the Supreme Court approved the decision at first instance to grant injunctive relief in favour of the affected employees.

INTRODUCTION

1. In *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and ors* [2024] UKSC 28, the Supreme Court has restored an injunction preventing Tesco from using the tactic of "firing and rehiring" employees as a way of removing a retained pay term. Crucial to that decision was the fact that the retained pay term had been given as a "permanent" benefit as part of negotiations with USDAW, the relevant union. Whilst the preponderance of the Supreme Court's reasoning relates to the meaning and context of the relevant "permanent" benefit, which was ultimately held to preclude the employer from using "fire and rehire", there were also crucially important observations on the question of the adequacy of damages in a claim for injunctive relief amounting to indirect specific performance.

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FACTS

2. Tesco and USDAW (the union recognised by Tesco as the sole representative and negotiating trade union for certain staff at certain sites) had an agreed process for negotiations concerning employment conditions (including pay). If, after a ballot, USDAW members voted, by majority, to accept any offer made by Tesco, changes to contract terms were incorporated into the employment contracts of all employees at those centres.

3. In 2007, as part of its expansion programme, Tesco proposed to shut down certain sites, open new ones and relocate staff. In order to incentivise distribution centre workers to relocate to another site following the closure of certain affected sites, Tesco had negotiated with USDAW to offer retained pay clauses, as an alternative to the offer of lump sum redundancy payments. Once agreed at a collective bargaining level, the retained pay term was put to a ballot of USDAW members and accepted. Retained pay constituted approximately 32% to 39% of the affected workers' wages.

4. A striking feature of the contractual term was that it was expressed to be a "permanent feature", only removable in defined circumstances, namely (i) by "mutual consent"; (ii) "on promotion to a new role"; or (iii) on request for a change to working patterns, such as nights to days.

5. By 2021, Tesco wished to bring retained pay to an end. Employees on retained pay were offered an advance payment of 18 months of retained pay to agree to termination of their retained pay rights. If they did not agree to that, they were informed that they would be dismissed and re-engaged on the same terms but with their retained pay rights removed. This is commonly referred to as being "fired and rehired." The individual claimants, along with others, refused to consent to the removal of retained pay and therefore

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faced the threat of dismissal and re-engagement on terms that did not include retained pay. They therefore issued proceedings in March 2021 in the High Court, in which they sought declaratory relief as to the nature and extent of the employees' contractual entitlement to retained pay, and injunctive relief to restrain Tesco from removing their contractual entitlement to retained pay. Ellenbogen J granted their claim for injunctive relief, but that decision was overturned on appeal by the Court of Appeal (Bean, Newey and Lewis LJJ).

PRINCIPLES

6. The Supreme Court's starting point drew on settled principles of contractual interpretation drawn from Lord Hoffmann's leading speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. Thus, where a term of an unenforceable collective agreement is incorporated into employees' contracts, it is necessary to look at the context and objective construction of each to interpret the incorporated term unless union and employee disagreed on intention.

7. As Lord Burrows and Lady Simler, giving the lead judgment, put it, at paragraph [4] *"where it is not being suggested that the union and the employee had different intentions, the objective intentions initially of employer and union and, subsequently, of employer and employee may all be relevant in deciding on the correct interpretation of a term that was agreed in a collective agreement and incorporated into a contract of employment."*

8. In line with the authorities which flowed from the ICS case, it was confirmed, at paragraph [5], that *"various statements made, prior to the collective agreement, as explanations for employees of the express term in question, were admissible as aids to interpretation of that express term."* In doing so, the Supreme Court

acknowledged *"the need for flexibility in the context of collective agreements."* In this regard, Tesco's statements prior to the collective agreement – including that the retained pay would be "for life", "forever" or "for the remainder of your employment with Tesco" (see paragraphs [27] – [29]) - were held to be relevant (paragraphs [49] – [50]).

9. At paragraphs [34] – [35], Lord Burrows and Lady Simler reflected on the narrowness of the scope of implying terms by fact, as encapsulated in paragraphs [15] – [31] of the speech of Lord Neuberger in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742. As it was put at paragraph [35], *"It is sufficient for our purposes simply to reiterate that, to imply a term by fact, the term must be necessary for business efficacy or the term must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract."*

10. The Court of Appeal had viewed the concept of permanence only through the lens of subsequent negotiation away by collective bargaining. However, the Supreme Court noted the concern that such a narrow interpretation would entitle the employer to remove it at whim by dismissal to circumvent the continuation of the right (e.g. paragraph [41]). Accordingly, it was considered to be *"inconceivable that the mutual intention of the parties was that Tesco would retain a unilateral right to terminate the contracts of employees in order to bring retained pay to an end whenever it suited Tesco's business purposes to do so. This would have been viewed, objectively, as unrealistic and as flouting industrial common sense by both sides."* (paragraph [44]).

11. It was made clear, at paragraphs [45] – [46], that the employer remained entitled to rely on recognised grounds (e.g. conduct or capability) to

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terminate the employment relationship, provided the purpose was not to remove retained pay.

REMEDY

12. What, then, was the appropriate remedy – injunction or damages? Controversy arises where an injunction amounts to indirect specific performance, since an employee cannot be directed to require an employee to work and there is a general rule against the imposition of specific performance on an employer, albeit subject to exceptions. One of those exceptions was articulated by Ralph Gibson LJ in *Powell v Brent London Borough Council* [1988] ICR 176.

13. Nevertheless, the Supreme Court was clear that damages would not be adequate (paragraph [77]). Assessing how long employees would otherwise have remained employed by Tesco would involve speculations, as would the assessment of the prospects of mitigating loss by finding alternative employment in the event of lawful dismissal. Such an exercise would be resource intensive and costly. By contrast, an injunction, amounting to indirect specific performance, avoids all such difficulties and it was on that basis that injunctive relief was granted. In this regard, it is noteworthy that Tesco had not ventured an alternative form of injunctive relief.

THREE TAKE-AWAY POINTS

14. First, and fundamentally, it has now been confirmed, at the highest level in the UK, that an otherwise unqualified power of dismissal can be circumscribed by a term implied by fact. In this regard, the Supreme Court's endorsement of the judgement of Sedley J (as he then was) in *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521 settled a point that

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might otherwise have been the subject of ongoing debate. Some commentators have suggested that the underlying rationale of this decision is likely to be confined to cases where the concept of permanence is capable of being implied as a strict matter of interpretation in a private contract. However, a remaining area of debate is whether such a term survives a TUPE transfer where the statutory intent is to preserve existing fundamental terms. For now, the questions of practical interest in a TUPE context are over what period and how might pre-transfer negotiations feature in a new employer's post-transfer attempts to harmonise terms and conditions.

15. Second, the admissibility of pre-contractual materials sharpens the focus on how employers' communications, in particular, are drafted. If there was ever any doubt about it before, employers and their general counsel (and external advisors) have to be prudent and realistic in their public statements. The use of terms such as "permanent" and "forever" are appropriate only where the employer has really thought through the ramifications of the use of such terms and intends that their employment relations should have such a character.

16. Third, perhaps, one of the most interesting observations (for employment lawyers) appeared at paragraph [78], where it was noted that damages for wrongful dismissal had *"not traditionally reflected the non-pecuniary loss."* Noting the irrecoverability, under principles set out in *Addis v Gramophone Co Ltd* [1909] AC 488, of damages for mental distress caused by the manner of dismissal, the Supreme Court nevertheless upheld its relevance in assessing the adequacy of damages. In doing so, it explicit stated its awareness that this approach might leave it subject to criticism of *"side-stepping Addis v Gramophone Co Ltd"*, to which its pithy response was "so be it." It would not be unreasonable to assume that paragraphs [77] – [78] may

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feature more broadly in employment cases where injunctive relief is sought, specifically in the assessment of the adequacy of damages.

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