

Court of Appeal overturns “fire and re-hire” injunction

The Court of Appeal overturned the “fire and re-hire” injunction, finding that there was nothing in the express contractual provisions preventing Tesco from giving the notice to terminate employment in the usual way.

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In February 2022, the High Court 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”) (see [here](#) for our previous legal opinion on this). By way of reminder, the Retained Pay was stated to be ‘permanent’ for as long as the employees remained in their current role. However, in 2021, Tesco offered employees an advanced lump sum payment of 18 months’ Retained Pay in return for forfeiting their entitlement. Employees who did not agree were to be dismissed and re-engaged on terms without Retained Pay.

The Court of Appeal has now overturned this decision, finding that there was nothing in the express contractual provisions which would prevent Tesco from giving notice to terminate employment in the usual way. The CoA went on to consider the wider context of the discussions and, in particular, whether pre-contractual negotiations could be relied upon to shed light on the intended meaning of ‘permanent’. However, it took a different view to the High Court, finding that there was no ‘mutual intention’ that contracts would continue for life, until normal retirement age, or until site closure; and no mutual intention to limit the circumstances in which Tesco could serve notice. As a result, the contractual words needed to be given their ordinary meaning – namely that the employer could terminate the contract in the usual way, and that the rights to Retained Pay would subsist only for as long as that contract did.

In addition, the CoA found that terms could not be implied into the contract because it was far from clear exactly what terms would be implied. For similar reasons, arguments relating to estoppel also failed – there was no clear and unequivocal promise which would fetter the contractual right to terminate.

Lastly, the CoA held that issuing of the injunction was itself inappropriate. Whilst there have been employment cases in which injunctions have been issued, these have tended to relate to obligations to follow (or not to follow) a particular contractual process. The CoA flagged that it was not aware of any other case where a court had issued a final injunction preventing a private sector employer from dismissing an employee for an indefinite period of time.

Whilst the issue of ‘fire and rehire’ is not going away any time soon - a new statutory Code of Practice has been [proposed](#) to ‘clamp down on controversial tactics’ – this decision will still be welcomed by employers as reducing the risk of future threats of injunctions.

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