


What does the Supreme Court decision in Tesco v USDAW mean for NHS employers?

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The Supreme Court recently delivered its judgment in the high-profile case of Tesco Stores Limited v USDAW. Below we consider the implications of the judgement for employers in the health sector.

Due to financial pressures, most NHS employers are considering or progressing workforce change programs that may result in changes to employees' terms and conditions of employment. For example, reduction of pay protection provisions, changes in shift working to reduce expensive out of house shifts and removal of historical incentives that do not align to Agenda for Change terms.

While it is always the hope that employees will agree to proposed variations, usually via a collective agreement, where that is not achieved, employers may have to consider terminating existing contracts of employment and offering new terms, if they are to avoid breach of contract claims. This case is a useful reminder of the caution that is needed when taking this approach.

It is an unusual case as most contracts of employment do not confer a permanent entitlement to a contractual benefit. As NHS employers are also bound by nationally agreed terms and conditions, it is unlikely that enhancements or benefits are offered to colleagues that would meet the threshold set in the Tesco case.

However, it is conceivable that retention payments or enhancements have been agreed at a local level or have been inherited following a TUPE service provision change from the private sector. NHS employers need to be alert that if such payments are expressed as being permanent, they will likely be subject to a term that notice cannot be given in the future for the purposes of depriving employees of that permanent right.

The decision does not signify the end of "fire and rehire". However, given the government's commitment to bringing about an end to the practice we may see legislation introduced either banning or restricting the use of this practice in the future.

Public bodies are at increased risk of criticism and scrutiny for engaging in "fire and rehire". This is set against a difficult financial climate where organisational change is becoming increasingly necessary to balance budgets. "Fire and rehire" should be the last resort and the primary focus should always be on reaching agreement, but it is important that those running workforce change programmes are adequately trained and skilled to understand and mitigate risks where agreement is not possible.

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