

# Changing employee T&Cs – can we still “dismiss and re-engage”?

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## Background

In this recent case, USDAW brought a case on behalf of 42 Tesco employees who had an entitlement to ‘Retained Pay’. Retained Pay was introduced when Tesco undertook an expansion programme which would have involved the need for employees to relocate. Tesco recognised that it may lose a large percentage of its workforce and to incentivise employees to stay, introduced an additional element of pay called ‘Retained Pay’. During negotiations, the benefit was said to be “protection for life” and would be a “permanent feature” of an individual’s contract for as long as the individual remained in the same role. In early 2021, Tesco announced its intention to remove Retained Pay on the basis it was now “the right time to phase out”. Affected employees were offered an advance payment equal to 18 months of Retained Pay to agree to the removal. However, those who did not agree would have their contract terminated and offer re-hire on new terms (without retained pay).

USDAW applied for an injunction to prevent Tesco from terminating affected contracts. They also sought a declaration that affected employees had an implied contractual term which would prevent Tesco from exercising a right to terminate an employee’s contract for the purpose of removing or altering Retained Pay.

## High Court decision

In a controversial and unusual decision, the High Court granted an injunction preventing Tesco from terminating the affected contracts. The High Court held that damages would not be an adequate remedy and instead Tesco should be restrained from terminating affected employees’ contracts. The High Court held it was necessary to imply that Tesco’s right to terminate on notice could not be exercised for the purpose of removing the term of Retained Pay.

In reaching this decision the High Court found that a reasonable person would interpret “permanent” to mean for as long as the individual was employed by Tesco in that substantive role.

## Where does this leave us for changing T&Cs?

Changing terms and conditions (particularly related to pay) can be a tricky area for employers to navigate. Traditionally employers have sought to consult with employees, seeking consensual variation but, as a last case resort, dismissing them from their current contracts, and re-engage staff on new contracts with the change. The legal remedy for ‘fire and re-hire’ or ‘dismissal and re-engagement’ has until now, been for employees to bring claims for unfair dismissal provided they have requisite 2 years’ service. Provided a fair process has been followed, an Employment Tribunal will usually accept that the reason for termination was “some other substantial reason” (“SOSR”).

The facts of this case are unusual, and the High Court were persuaded that a reasonable person, having all of the background knowledge would have understood the word “permanent” to mean just that. The employees were told “Your retained pay cannot be negotiated away

by either Tesco, Usdaw or Usdaw Shop Stewards...” The benefit was said to be “guaranteed for life”.

As such, this case should not be seen as authority that the practice of “fire and re-hire” is now unlawful as the case turned on its facts and in particular the clause which entitled staff to enhanced pay on a permanent basis. However, it is likely to strengthen Trade Unions hands where large employers are seeking to remove such benefits. Employees, in theory, can now invite the High Court to grant declaratory and injunctive relief to protect their position.

This is another example of an emerging trend we are seeing of employees using injunctions more creatively. For example in *Gregg v North West Anglia NHS Foundation Trust* [2018] EWHC 390 (QB) a doctor was initially successful in obtaining an interim injunction preventing the Trust from continuing with its disciplinary investigation until a related police investigation was complete (which he said was a breach of the implied term of trust and confidence). It should be noted that this decision was overturned by the Court of Appeal. And in *Harrison v Barking, Havering & Redbridge University Hospitals NHS Trust* [2019] EWHC 3507 (QB), the High Court determined that a solicitor was entitled to a mandatory interim injunction allowing her to resume most of her duties after the High Court ruled that it was strongly arguable that her suspension was unreasonable.

## What to Take Away

If seeking to change T&Cs we would advise:

- Consult and listen – employees are more likely to agree the change if they feel their concerns are being addressed;
- Make it clear to employees why the change is needed – if the alternative is a more draconian alternative (i.e. potential job losses) employees should be made aware of this as they are more likely accept the change; and
- Consider if an incentive can be offered to agree the change? This doesn't have to be financial – and can be helped with some innovative thinking.

If you are in any doubt about the issues raised in this article or would like bespoke advice, please contact us.

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