

# On the limits of "firing and re-hiring"

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By [Alex Leonhardt](#)

3PB Barristers

In *USDAW & Ors v Tesco Stores Limited [2022] EWHC 201 (QB)* the High Court considered an application for an injunction restraining the Defendant from unilaterally withdrawing from an increased pay benefit which had been negotiated some years previously or from terminating the Claimants' contracts of employment for that purpose by "firing and re-hiring" the relevant employees.

## Background

The 43 individual claimants were all employees working at Tesco distribution centres having relocated from other sites prior to 2010. Tesco had made express commitments to those who transferred to benefit from what was called "Retained Pay". These commitments were included in a variety of FAQ and other documents provided to workers and in a collective agreement negotiated with USDAW and expressed in broad terms, such as, that it was to be a "permanent feature" of an individuals' contract of employment or that it was "guaranteed for life". This was, in part, to address concerns that the majority of the workforce who did not benefit from Retained Pay may in the future bargain it away during future collective agreement negotiations.

The Retained Pay term itself had been incorporated into the relevant employees' contracts of employment expressly.

In January 2021 Tesco had sought to remove the Retained Pay term, arguing, in effect, that it was no longer relevant and created discrepancies between the small minority of employees who benefited from it and the remainder of the workforce. They invited relevant employees to accept a payment in return for agreeing to the removal of the Retained Pay term, with the alternative being that they would be dismissed for "Some Other Substantial Reason" and re-hired on terms not including Retained Pay.

## Claim for Injunction

The Claimants argued that the contracts of employment were subject to an express term that Retained Pay would be in effect for as long as the relevant employees were employed by Tesco, or else that there was an implied term that Tesco would not use the right it otherwise had to terminate the contract of employment in order to remove the right to Retained Pay.

In the alternative, the representations previously made by Tesco prevented them from seeking to withdraw from Retained Pay, including through the use of any right it would otherwise have on the basis of estoppel and/or forbearance.

The injunctions sought included that Tesco be prevented from serving notice of termination “in circumstances whereby the Defendant offers to re-engage any such person on terms and conditions which do not include the provision of Retained Pay”.

The Claimant’s arguments were (broadly put) based upon the unequivocal nature of the language used by Tesco, and the fact that an agreement which did not prevent “fire and rehire” would not have served the obvious purpose of the parties when they agreed it.

The so-called “Johnson Exclusion Zone” (*Johnson v Unisys [2001] 2WLR 1076*) whereby common-law remedies which replicated statutory remedies (in this case, via the Employment Tribunal) did not apply as this was not – as *Johnson* had been – a claim for losses flowing from a dismissal.

Alternatively, the nature of the representations made by Tesco made it inequitable for them now to row back from given their promise of permanence.

## Defendant’s Case

Tesco argued that the representations made were limited to the employees’ terms *under that contract of employment* and could not extend to future contracts of employment, and that there was not a basis for the implied term not to terminate the contract. The reason for any dismissal was relevant only to a claim for Unfair Dismissal in the Employment Tribunal, and the employees’ remedies were those which the Tribunal could give.

The Johnson Exclusion Zone applied because, as in this case, it related to the purported breach of an implied term to the circumstances of a dismissal, where the appropriate route to a remedy was via the Employment Tribunal.

## Decision and Reasons

Mrs Justice Ellenbogen accepted that in the “extreme” circumstances of this case there was an implied term of the contracts of employment preventing Tesco from terminating the relevant contracts *for the purpose* of removing Retained Pay. The restriction did not strictly speaking apply to the offering of new terms under a contract (which an employer is entitled to do) but on the dismissal and, of course, Tesco were entitled to dismiss for other good cause.

The Johnson Exclusion Zone was not engaged in this case, which did not relate to the manner of dismissal or seek to frame such as a breach of the implied term of trust and confidence. Nor could a claim through the Employment Tribunal provide the relief sought through this claim.

No decision was made in respect of the estoppel/forbearance point, it being unnecessary. It was noted that some of the Claimants may plausibly be able to make such an argument but that would be sensitive to the particular facts of their case.

Relief was granted, including a declaration specifically stating that the express right to terminate was subject to an implied term that it “cannot be exercised for the purpose of removing or diminishing the right of that employee to receive Retained Pay”.

## Commentary

This was, as noted by both senior counsel for the Claimant and by the court in its judgment, an extreme example. It turned upon the particularly strong language used by Tesco in relation to the Retained Pay term when it sought to persuade employees to accept it and transfer to the new sit, and in subsequent collective bargaining agreements.

The case does, however, provide clear authority that such language (and the circumstances which likely prompted it) can potentially provide the basis for an implied term restraining the use of express contractual rights of employers to dismiss, even for good cause.

The Court was clear that the employer retained the right to dismiss where the purpose was otherwise than the re-engagement of that employee on new terms. The terms of the declaratory and injunctive relief are framed in terms of protection against dismissal for the purpose of re-hiring *that* employee on new terms which did not include Retained Pay.

This leaves open the possibility that a dismissal with no intention to re-engage *that* employee on

new terms may not be restrained, even where the overall purpose was to move the workforce as a whole onto those new terms (although such a dismissal may be harder to justify in an unfair dismissal claim than a “fire and rehire” case). It seems unlikely that the civil courts would grant relief of the kind granted in this case to a workforce as a whole.

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**Alex Leonhardt**

*Barrister*  
*3PB Barristers*

0330 332 2633  
alex.leonhardt@3pb.co.uk

3pb.co.uk