

# Promises of permanence and limits to the right to dismiss: Tesco Stores Ltd v USDAW [2024] UKSC 28

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## [Tesco Stores Ltd v USDAW \[2024\] UKSC 28](#)

1. This was the Supreme Court decision in a case concerning a contractual obligation by Tesco to pay certain employees “retained pay”, the limits on the contractual right to terminate with notice, and the willingness of the courts to make injunctions of specific performance in employment contexts.
2. A summary of the High Court decision previously appeared in the 3PB Newsletter in February 2022, and can be read [here](#).

### Summary of Facts

3. In short, in 2007 Tesco had made various commitments that certain employees would receive additional pay if their employment moved to new distribution centres, following a business re-organisation. Those commitments were made as part of collective bargaining agreements, but were incorporated into individual contracts of employment.
4. The express term included that:

*“Retained pay will remain a permanent feature of an individual’s contractual eligibility subject to the following principles:*

- (i) Retained pay can only be changed by mutual consent*
- (ii) On promotion to a new role it will cease*
- (iii) When an individual requests a change to working patterns such as nights to days the premium payment element will be adjusted*
- (iv) If Tesco make shift changes it will not be subject to change or adjustment*

5. The parties agreed (and the court accepted) that various contemporaneous documents produced by Tesco, some of them jointly with USDAW, were relevant to contractual interpretation. These included documents in which the additional payments were described as being “guaranteed for life”. In light of the employees receiving retained pay likely being in the minority in the new workplace, a document also sought to reassure employees by saying that Retained Pay being an individual contractual entitlement “prevents any possibility of this being subject to negotiation or change in the future via a ballot of the membership of which existing staff would be in the minority”.
6. By 2021, Tesco sought to bring Retained Pay to an end. In a Q&A document it said “Retained Pay arrangements achieved what they were designed to achieve, but we feel it is now the right time to phase those arrangements out”. It proposed to do so, if necessary, by dismissing and re-hiring on new terms (which did not include Retained Pay).

### **Decisions of Lower Courts**

7. At first instance, in the High Court, Ellenbogen J found in favour of the Claimant trade union and individuals. She determined that there was an implied term restricting the use of Tesco’s express right to terminate, and also granted an injunction preventing the dismissal of the relevant employees for the purpose of removing or diminishing the right of that employee to receive retained pay.
8. Tesco (successfully) appealed to the Court of Appeal. The Court of Appeal noted that there was nothing in the wording of the provisions relating to retained pay which prevented notice of termination being given, and that it could not be shown that there was a mutual intention to limit the circumstances in which the contracts could be terminated, or that the contracts were intended to last until retirement or the closure of the site, for example. While the retained pay was stated as being “permanent”, that could (therefore) last only as long as the contract of employment.
9. In response to the suggestion that this interpretation robbed all meaning of the word “permanent”, the Court of Appeal agreed with the submission of Tesco that the particular arrangements came to prevented the negotiation away of Retained Pay as part of collective bargaining.
10. Nor did the Court of Appeal consider there was a sufficiently clear implied term preventing the termination of contract: this argument was said to blur the distinction between the *fairness* of a dismissal with the contractual right to do so.

11. It also indicated it would not have granted an injunction even if the interpretation points had been won by the Claimants: the Court was not aware of any employment case in which a permanent injunction to that effect had been granted, and it considered the issue of what precisely Tesco could do, or could not do, was not sufficiently clear to allow an injunction to be made.

## Decision of the Supreme Court

### Contractual Interpretation

12. The Supreme Court, with the leading judgment being given by Lord Burrows and Lady Simler, disagreed with the Court of Appeal on the fundamental question of whether a restriction on notice agreements could properly be an implied term as a result of the negotiation on Retained Pay and express terms that were agreed.
13. The Supreme Court considered that it was “inconceivable” that the mutual intention of the parties was that Tesco would retain its unilateral right to terminate the contracts of employment, in order to bring retained pay to an end. There was an implied restriction on the right to give notice, in order to give effect to the promise that Retained Pay would be “permanent”. Without such an implied restriction, the right to permanent retained pay would be capable of being immediately defated by Tesco making use of its contractual right to give notice (and then re-hire).
14. The Court also drew from an analogy to cases where a similar restriction has been implied, in relation to permanent health insurance benefits (“PHI cases”). In cases such as ***Aspden v Webbs Poultry & Meats Group (Holdings Ltd) [1996] IRLR 521***, there was found to be an implied term preventing dismissal for the purposes of depriving an employee of the benefit of such entitlements, although it also noted that this principle “should be sparingly and cautiously used to avoid turning the traditional principles of contract upside down” and in particular should not be used to imply a term that conflicts with the express term of the contract.
15. It considered that this implied term was not in this case inconsistent with the express term allowing termination on notice: it qualified the right to terminate, rather than contradict it.
16. The leading judgment summarised the principle when discussing the PHI cases:

*“These cases exemplify the principle that a term implied by fact may be required to qualify an employer’s otherwise unqualified contractual right to dismiss in*

*circumstances where to do so would defeat or undermine the purpose of the contract by denying the very benefit that was promised”*

### Granting of Injunction

17. The Court then turned to remedy, and whether to grant an injunction preventing the giving of notices of dismissal.
18. It was not in dispute between the parties that such an injunction was, indirectly, an injunction requiring specific performance and that the same principles applied. It was recognised by the court that there was “a general rule against specific performance that is long-established”. The Court considered some cases where such injunctions had, exceptionally, been granted.
19. This included ***Powell v Brent London Borough Council [1988] ICR 176*** where Ralph Gibson LJ had indicated that such an injunction will not be granted unless it is just to do so, and “there exists sufficient confidence on the part of the employer in the servant’s ability and other necessary attributes for it to be reasonable to make the order”. Whether that condition is to be satisfied is dependent upon the circumstances of the case, including the nature of the work and the effect upon employee and employer of the injunction being granted.
20. The Supreme Court agreed with the submissions of the Claimant, that this was a case where there was no lack of breakdown of trust and confidence between the parties : Tesco had sought to re-hire the relevant employees and there was no complaint about performance or conduct.
21. It was just to make an injunction, as damages were an inadequate remedy. Any assessment of damages would be “very difficult and prone to error”, and would not reflect any non-pecuniary loss. The Supreme Court did not accept submissions on behalf of Tesco that difficulty in assessing damages did not thereby make such damages an inadequate remedy. It noted there was contrary authority to that relied upon by Tesco, and relied upon a general principle in Treitel’s Law of Contract that “it must be correct that, when considering specific performance, damages are inadequate where there is grave doubt about whether they will put the claimant into as good a position as if the contract had been performed”.

## Commentary

22. This case was, as has been noted in the first instance decision in the High Court (although interestingly not in the leading judgment of the Supreme Court), a fairly exceptional case, that turned in part upon the nature and force of the language used by the parties when the terms were negotiated and agreed. It is certainly not authority for a general restriction on an employer's (contractual) right to terminate.
23. There will, no doubt, be future cases turning on whether termination serves to "defeat or undermine the purpose of the contract by denying the very benefit that was promised" (as per the Court's summary of the PHI cases). Arguably, any termination of employment has that effect, in respect of the benefits promised under the contract.
24. It could be countered that such promises are subject to the proviso that they were to last only as long as the contract of employment, but that was essentially Bean LJ's justification in the judgment of the Court of Appeal refusing the interpretation contended for by the Claimants in this case which was not followed by the Supreme Court
25. Claimants seeking to rely upon this case may well find that it is one which, in respect of the contractual interpretation point, future courts will find were limited to the particular facts in question and did not establish any general principle.
26. In respect of the question of specific performance, the case may also be useful in any argument in favour of an injunction for specific performance where the period of loss is potentially lengthy, and where it can plausibly be argued that the employer retains trust and confidence in the employee.

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