



Press Summary

12 September 2024

Tesco Stores Ltd (Respondent) v Union of Shop, Distributive and Allied Workers and others (Appellants)

[2024] UKSC 28

On appeal from [2022] EWCA Civ 978

Justices: Lord Reed (President), Lord Lloyd-Jones, Lord Leggatt, Lord Burrows, Lady Simler

Background to the Appeal

This appeal concerns whether Tesco Stores Ltd (“**Tesco**”) can terminate the employment contracts of its employees, for the specific purpose of depriving them of “retained pay” (“**RP**”), a financial contractual entitlement which was agreed to be permanent. The appeal raises fundamental questions about an employer’s right, under contract law, to terminate a contract of employment by giving the requisite notice to the employee and about an employee’s remedies for breach of an employment contract.

In 2007, Tesco decided to close certain of its distribution centres, to expand or restructure others, and to open new sites. Tesco sought to incentivise existing employees at the centres being closed to relocate to another site. Tesco and its recognised trade union, the Union of Shop, Distributive and Allied Workers (“**USDAW**”), made a collective agreement under which Tesco agreed to provide RP to employees who agreed to relocate.

The right to receive RP was then incorporated into the relevant employment contracts as an express term. The RP term stated that RP would “remain a permanent feature” of an employee’s contractual entitlement, subject to certain qualifications. A separate term in the employment contracts gave Tesco a contractual right to dismiss the employee without cause, on provision of specified notice.

In 2021, Tesco sought to end RP. It informed employees that, if they did not consent to the removal of their right to receive RP, they would be dismissed and offered re-engagement. The re-engagement terms would be identical, save for the removal of the RP term.

Together with USDAW, several employees in receipt of RP applied to the High Court, seeking declarations as to the true meaning of the RP term, and an injunction to restrain Tesco from terminating their employment to remove the RP term. In the High Court, Ellenbogen J allowed

the claim, and granted the injunction. The Court of Appeal, however, unanimously allowed Tesco's appeal. The claimants now appeal to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal and restores the injunction granted by *Ellenbogen J.* The employment contracts contained a term implied by fact with the effect that the employer's right to terminate could not be exercised for the purpose of depriving the employees of their right to RP. Lord Burrows and Lady Simler give the leading judgment, with which Lord Lloyd-Jones agrees. Lord Leggatt and Lord Reed give concurring judgments.

Reasons for the Judgment

Lord Burrows and Lady Simler begin by interpreting the express RP term. Tesco argued that the RP term simply meant that the entitlement to RP would be "permanent" for the duration of the contract, ie. it was subject to Tesco's unqualified right to dismiss on notice. This argument is rejected as giving no substance to the express promise that the entitlement to RP would be "permanent". The correct interpretation of the RP term is that the right to receive RP will continue for as long as employment in the same role continues, subject only to the qualifications within the RP term. But that right is deprived of its value if there is nothing to prevent Tesco unilaterally terminating the employment to defeat it. [36] – [42].

Tesco's right to terminate the employment contract by giving the requisite notice is therefore qualified by a term implied by fact that Tesco's right to dismiss cannot be exercised for the purpose of depriving employees of the right to RP. That implied term is necessary applying the test of business efficacy or, alternatively, it is so obvious that it goes without saying. [43], [57]. The RP term was an incentive for employees to undertake an otherwise unpalatable relocation. It is inconceivable that the objective mutual intention of the parties was that Tesco should retain a unilateral right immediately to dismiss these employees for the purpose of removing the right to RP. That would flout industrial common sense. Importantly, Tesco's right to dismiss for any reason other than to remove the right to receive RP remains entirely unaffected by this implied term. [43] – [48].

The existence of this implied term is supported by analogous cases, including cases in which employment contracts, providing for permanent health insurance benefits, were held to contain an implied term to the effect that the employer was restrained from dismissing the employee to deprive them of such benefits. [51] – [56].

Lord Burrows and Lady Simler then consider the correct remedy. The employees sought an injunction restraining Tesco from acting in breach of the implied term by dismissing them. In practice, such an injunction would amount to indirect specific performance of Tesco's obligation to continue to employ the employees on RP. It is a general rule that specific performance will not be granted: (i) of an employment contract; or (ii) where damages are an adequate remedy. [58] – [62].

However, an exception to (i) is that specific performance may be ordered against an employer (though not an employee) where there has been no breakdown of mutual trust and confidence. Clearly there was no such breakdown here: Tesco was prepared to re-engage immediately the relevant employees. The exception is therefore engaged. [63] – [72].

As to (ii), damages would be inadequate in this case. Any damages assessment would involve significant speculation, uncertainty, additional costs and possibly expert evidence, and would exclude any non-pecuniary loss (eg. loss of job satisfaction) suffered by the employees being dismissed in breach of the implied term. [73] – [83]. The injunction granted by *Ellenbogen J.* is therefore reinstated. [84].

Lord Leggatt, in his concurring judgment, gives additional reasons why the implied term arises. In his view, the right to terminate is a contractual power and there is no difficulty in implying a restriction on the purpose for which that power may be exercised when, as here, the restriction is necessary to prevent the purpose of a promise made in the contract (here the RP term) from being defeated. [114] – [129].

Lord Reed agrees with the judgment of Lord Burrows and Lady Simler. In particular, he agrees that, where a contractual term is incorporated into an employment contract from a collective agreement, the intentions of the parties to that agreement may be relevant to the contextual interpretation of the contractual term. [150] – [153].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)