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IT is often advantageous for businesses to vary the contract of employment to the employee's detriment. In theory, contract law protects employees against such actions, by requiring that contractual variations be agreed by both parties. Employers can often undermine this protection, however, by exercising their contractual right to dismiss with notice, terminating the contract before offering to re-engage the employee on less favourable terms. Given the extent of employees' dependence on their work – to live, but also for job satisfaction and their sense of identity – however much an employee might want to avoid the contractual changes, few employees would be in a position to refuse.

While this practice of "fire and rehire" is subject to the statutory unfair dismissal regime, it is relatively easy for an employer to defend a claim, providing that they can point to a potentially fair reason for the dismissal and can demonstrate that they have followed a fair procedure. While the Labour Government's new Employment Rights Bill will make it automatically unfair to dismiss an employee for failing to agree to a contractual variation, this is subject to the caveat that the employer's reason for the variation was not to respond to or mitigate financial difficulties affecting its ability to carry out its business and/or that the variation could not have been reasonably avoided. It is thus likely to remain very easy for an employer to defend any claim for unfair dismissal in a fire and rehire situation.

The Supreme Court's decision in *Tesco Ltd. v USDAW* [2024] UKSC 28 demonstrates that the common law is also very restrictive when it comes to limiting the scope for fire and rehire. Here, the Supreme Court recognised a narrow exception to the legality of fire and rehire, while nonetheless endorsing the general premise that an employer is free to dismiss an employee and re-engage on less favourable terms. Having said this, the judgment and Lord Leggatt's concurring opinion in particular, intimates judicial dissatisfaction with this situation and the lack of protection for employees' interests in the context of fire and rehire, and wrongful dismissal more generally.

Most fire and rehire cases involve attempts by employers to change general contractual terms, such as pay and hours. *Tesco*, by contrast, involved an attempt by Tesco to remove the benefit of a "retained pay" clause that had been specifically negotiated with the affected employees, via their trade union, as part of an expansion programme being pursued from 2007. The aim of the retained pay was to induce some of Tesco's most experienced employees to forgo a redundancy payment, in favour of relocating to a new site. Pre-contractual material from 2007, as well as

a 2010 Collective Agreement, clearly stated that retained pay was to be a "permanent entitlement" and that the employees would continue to benefit from it for "as long as [they] are employed *in* [their] *current role*" emphasis. Despite this, in 2021, Tesco sought to terminate the retained pay, offering the employees a choice between accepting 18 months advance pay in exchange for terminating the entitlement or being dismissed and re-engaged on the same terms, but without the retained pay. The case arose when the union sought declaratory relief and an injunction against Tesco, on behalf of the affected employees.

The trial judge had granted the injunction, preventing Tesco from dismissing the employees, implying a term into the contracts to the effect that Tesco's right to terminate on notice could not be exercised "for the purpose of removing or diminishing the right of that employee to Retained Pay" ([2022] EWHC 201 (QB), at [42]). This implied term was necessary, Ellenbogen J. had argued, to reconcile an apparent conflict between the intention behind the retained pay scheme, namely that the employees benefit from the retained pay while they continued in the same substantive role, and the employer's express right to terminate the contract on notice. Court of Appeal ([2022] EWCA Civ 978) overturned this decision. It rejected the premise that any such conflict existed, on the basis that the reference to permanence in the pre-contractual material and the Collective Agreement indicated merely that the retained pay should not be modified by collective bargaining. It did not agree, moreover, that there was any underlying substantive role or relationship, to which retained pay could have been intended to attach, as distinct from, and beyond the termination of, the contract (at [36]). Nor could it be said that the tests of business efficacy or obviousness for implying terms in fact were met. Even had the trial judge been correct on the question of liability, moreover, the Court of Appeal argued that injunctive relief should not have been granted against a private sector employer, where such would involve compelling them to retain in employment someone on an indefinite term contract.

The Supreme Court overturned the Court of Appeal's judgment both on the question of liability and on the question of relief. In relation to the former, it emphasised the general rule that an employer is free to dismiss an employee on notice and re-engage them on less favourable terms. However, it argued that the right of the employer to dismiss with notice was incompatible with the clear intention behind the retained pay and that a term should be implied in fact, as Ellenbogen J. had suggested at first instance (at [43]). Drawing an analogy with cases relating to permanent health insurance (e.g. *Brompton v AOC International Ltd.* [1997] IRLR 639, at [32] (Staughton L.J.); *Adin v Sedco Forex International Resources Ltd.* [1997] I.R.L.R. 280), the Supreme Court endorsed the broader principle that "a term implied in 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 contact by denying the very benefit that was promised" (at [57]).

Agreeing with the rest of the court, Lord Leggatt went on to offer an alternative justification for this conclusion. Whereas the majority of the court decided the case on the basis of a "necessary" or "obvious" implied term in fact, Lord Leggatt reached the same result by suggesting that a term could be implied in law to the effect that discretionary powers, like the contractual "right" to dismiss with notice, ought to be subject to an implied requirement that the power be exercised in good faith (cf. *Braganza v BP Shipping Ltd.* [2015] UKSC 17). In the employment context, such a requirement tends to be framed through the lens of the employer's implied duty to uphold mutual trust and confidence (at [120]). Despite an apparent conflict between this conclusion and the judgment in *Johnson v Unisys* [2001] UKHL 13, which suggested that the implied duty of mutual trust and confidence had no application to the *manner* of dismissal, His Lordship distinguished *Johnson* on the basis that *Tesco* was not concerned with *how* the dismissal was conducted (the "manner of dismissal"), but the question of whether it was reasonable for the employer to dismiss on a particular ground (at [121]) and thus, whether there was even a valid dismissal at all. Lord Leggatt thus suggested that the implied obligation to uphold mutual trust and confidence requires in relation to the termination of an employment contract that employers not select as a ground to dismiss an employee, one that is incompatible with the *mutual expectations of the parties*' (at [125]). He then provided an important provocation to the rest of the court, that a right to dismiss with notice allows an employer to dismiss for whatever reason they like may "[no] longer [be] consistent with community expectations and values" (at [128]).

While the rest of the court did not articulate the same concerns as Lord Leggatt about the far-reaching implications of an unfettered right for employers to dismiss with notice, its discussion of the availability of injunctive relief revealed similar concern about the implications of such a right for employees. Having accepted the Court of Appeal's argument that an injunction in this case would amount to an order for specific performance, it went on to offer a series of arguments why an injunction would still be appropriate. First, it reiterated the conclusions drawn in cases like *Hill v C A Parsons & Co. Ltd.* [1972] Ch. 305 (C.A.) and *Powell v Brent London Borough Council* [1988] I.C.R. 176 that the rule against specific performance against employers was rooted in the dependence of employment on mutual trust and confidence between the parties, something which often (particularly in fire and rehire cases) persists, a dismissal notwithstanding. Second, and importantly, damages

will rarely be sufficient in the context of wrongful dismissal, given how restrictive the rules on recovery have become, in light of cases such as *Addis v Gramophone* 1909] A.C. 488 and (although not mentioned explicitly) *Johnson v Unisys* and *Edwards v Chesterfield* and *Botham v Ministry of Defence* [2011] UKSC 58. As the Supreme Court argued, in this context, damages will almost always fail to compensate for the full "non-pecuniary loss – for example, loss of job satisfaction the anxiety, the upheaval – caused by losing one's job" (at [78]).

Despite largely re-endorsing contractual orthodoxy in relation to fire and rehire, therefore, aspects of the judgments in *Tesco*, certainly indicate some judicial appetite for refining the law of wrongful dismissal in a way that better recognises the sheer scope and importance of what is at stake for employees when it comes to questions of dismissal. Whether this will encourage the court to revisit highly restrictive cases like *Johnson*, *Edwards* or, indeed, *Addis* – remains to be seen.

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