Neutral Citation Number: [2022] EWCA Civ 978

Case No: CA-2022-000240

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH DIVISION)**
**MRS JUSTICE ELLENBOGEN**
**[2022] EWHC 201 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2022

**Before :**

**LORD JUSTICE BEAN**
**LORD JUSTICE NEWEY**
and
**LORD JUSTICE LEWIS**

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**Between :**

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| **(1) UNION OF SHOP, DISTRIBUTIVE AND ALLIED WORKERS**<br>**(2) CHRISTOPHER WEBB**<br>**(3) JAGPREET SINGH**<br>**(4) SANDEEP KUMAR** | **Claimants/ Respondents** |
| **- and -**<br>**TESCO STORES LTD** | **Defendant/ Appellant** |

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**Anthony de Garr Robinson QC** and **Amy Rogers** (instructed by **Herbert Smith Freehills LLP**) for the **Appellant**
**Paul Gilroy QC and Stuart Brittenden** (instructed by **Thompsons LLP**) for the **Respondents**

Hearing date : 09 June 2022

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# Approved Judgment

## Lord Justice Bean:

1. In 2007 the Appellant company ("Tesco") planned an expansion and restructuring of its distribution centre network. This involved among other things the opening of new sites and the closure of others. The company was keen to ensure that it would not lose experienced warehouse staff through redundancy. It sought to persuade employees at its Crick distribution centre to move to Lichfield or Daventry. The incentive offered for them to do so was a significant enhancement of their pay, known as Retained Pay. The individual Claimants are among those who accepted the offer. If they had refused, the alternative was that they would have been dismissed on the grounds of redundancy, and would each have been entitled to redundancy payments of between £6,000 and £8,000.

2. As an example Mr Jagpreet Singh, the third Claimant, was one of those who agreed to move from Crick to Lichfield. His new contract of employment, signed on 26 September 2007, included the following paragraph.

> "Under the arrangement for moving to the new Lichfield site you are eligible to receive the sum of £134.70 per week as Retained Pay. This payment is part of your contractual terms and is included in your calculation of pensions and benefits, e.g. shares in success. Retained Pay will be uplifted by any future negotiated pay increases. Retained Pay can only be altered in agreement with yourself and ceases where you agree to a promotion or where you request a fundamental shift change, for example a move from nights to days when there will be an adjustment to the premium payment only. In the event of a company-initiated change there would be no reductions in Retained Pay."

3. Mr Singh's contract of employment contained other clauses of a more standard kind. One of these provided for the right of the company to give notice to terminate the contract and setting out a schedule of the periods of notice to be given: in fact these were the same as the minimum periods laid down in section 86 of the Employment Rights Act 1996. The company was not required to give any notice in cases of gross misconduct.

4. The Union of Shop, Distributive and Allied Workers ("USDAW") was and remains recognized by Tesco for collective bargaining purposes. By a Recognition and Procedural Agreement dated 2009, but signed on 18 February 2010, Tesco recognised USDAW as the sole representative and negotiating trade union for staff below the grade of Team Manager employed at so-called 'new contract sites', including those at Lichfield, Daventry and Livingston, Scotland.

5. This collective agreement was not legally binding as such (see s 179 of the Trade Union and Labour Relations (Consolidation) Act 1992), but it is common ground that it was incorporated by established custom and practice into the individual Claimants' contracts of employment at or shortly after the time it was signed. The critical paragraphs read as follows:-

> "**SITE SPECIFIC AGREEMENTS**
>
> **RETAINED PAY**
>
> Certain staff under the arrangements for moving to Lichfield from other Tesco sites may receive retained pay. Retained pay will be uplifted by any future negotiated pay increases.
>
> Retained pay is individually calculated and confirmed in individual statements of employment. It is an integral part of contractual terms and is included in calculations for pension and other benefits such as Shares in Success.
>
> 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."

6. More than a decade later, Tesco wished to bring Retained Pay to an end. In January 2021 the company gave notice to all staff in receipt of Retained Pay that it intended to seek their agreement to remove the Retained Pay clauses from their contracts in return for an advance payment equal to 18 months of Retained Pay. Where an individual did not agree to this change, Tesco intended to terminate the individual contract and offer re-engagement on different terms.

7. 43 employees at Lichfield and Daventry, represented in these proceedings by the second, third and fourth Claimants, have refused to give up their Retained Pay. The company indicated that their contracts would be terminated, although they would be offered re-engagement on altered terms.

8. A similar process has been going on in relation to employees at Tesco's Livingston Distribution Centre in Scotland. On 12 February 2021 Lord Armstrong, in the Outer House of the Court of Session, granted an interim interdict restraining Tesco "from serving or purporting to serve notice of termination of the contracts of employment" of any of USDAW's members employed at the Livingston distribution centre who were in receipt of Retained Pay and who had not consented in writing to its being withdrawn. We were told that the Scottish case has not yet come to trial.

9. A claim form in this jurisdiction was issued on 17 March 2021 by USDAW and three individual Claimants: Mr Webb, who is one of 22 members affected at the Daventry Clothing centre; Mr Singh, one of 20 at the Lichfield centre, and Mr Kumar, who is employed at the Daventry Grocery centre. There was no application for an interlocutory injunction in England since Tesco undertook not to terminate the contracts of the

individual Claimants or those whom they represent pending judgment in the High Court.

10. The claim form, as originally issued, was very short. It sought relief in the form of an order: firstly a declaration that the contract of employment between each affected member was subject to an express term that the affected member was entitled to a payment of Retained Pay; secondly, a declaration that each such contract was "subject to an implied term that the Defendant will not exercise the right it would otherwise enjoy to terminate such contract so that new terms and conditions could be offered to the Affected Member" (subsequently amended to a declaration that the Defendant will not exercise such rights "for the purpose of removing the right to Retained Pay"); and thirdly, an injunction restraining the Defendant from compulsorily withdrawing from any affected member the contractual benefit of Retained Pay, or serving or purporting to serve notice of termination of the contract, 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.

11. A further claim based on estoppel was later added by amendment in the following terms:-

> "2A Further or alternatively, by reason of the clear and unambiguous representations made by the Defendant to each Affected Member (including each of the Second, Third, and Fourth Claimant) and which are particularised in a skeleton argument dated 6 April 2021, in relation to the Defendant's expressed intention to unilaterally remove such entitlement to Retained Pay through the mechanism of issuing notice of termination and re-engagement on new terms and conditions:
>
> (i) the Defendant is estopped from seeking to unilaterally withdraw the entitlement to Retained Pay; and/or
>
> (ii) such representations amount to a forbearance precluding it from exercising any right it otherwise possessed to unilaterally withdraw the entitlement to Retained Pay.
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> In respect of (i) and/or (ii) it is inequitable to permit the Defendant to act in a manner inconsistent with such representations."

12. The claim form leaves open the question of which documents are relied on as forming part of the contract. However, the argument before us (and, it seems, before the judge) proceeded on the basis that the Retained Pay provisions of the collective agreement set out at paragraph 5 above are the ones on which the Claimants rely. The document we have relates to Lichfield but we were told that there was an effectively identical one for Daventry.

13. The bundle includes, and the judgment of Ellenbogen J refers to, a number of pre-contractual documents. It is convenient to set them out at this stage.

*Pre-contractual documents*

14. In February 2007 the company provided its employees with a 'Compensation Package Summary', setting out, in tabular form, entitlements were staff to move to Lichfield or 'any other Tesco site with the new Tesco contract' and the sums which would be paid were they to opt for redundancy. For those who chose to remain in employment, it was said, there would be 'new terms and conditions supported by individual retained pay - *protection for life* at new Tesco contract site…Please refer to previous joint statements for details'. [emphasis added]

15. Staff were further provided with a 'Q&A' document, published by the company on 20 February 2007, including the following questions and answers, numbered 32 and 33:

> "32. Will I receive any protection to support me moving to the new site with new terms and conditions?
>
> Yes, we will support you in this instance by applying our 'Retained Pay' policy.
>
> 33. What does 'Retained Pay' mean?
>
> If you transfer to a newly opened site in Tesco Distribution you will be on a new contract of employment. However, any difference in value between your old contract and your new employment contract will be protected by a concept called 'Retained Pay' *which remains for as long as you are employed by Tesco in your current role.* Your retained pay cannot be negotiated away by either Tesco, Usdaw or Usdaw Shop Stewards. Your retained pay will increase each year in line with any annual pay rise. All elements of retained pay will count towards the calculation of any current and future benefits. You will also benefit from any future improvements in terms and conditions at the new Depot.' [emphasis added[

16. A joint statement was published by Tesco and USDAW in respect of Lichfield on 23 February 2007, which included the following text:

> 'LICHFIELD DEPOT
>
> Retained Pay
>
> The new site at Lichfield will operate on the new Tesco Terms and Conditions which are different to those at Crick. In order to protect the existing employees staff who transfer to Lichfield will be entitled to "retained pay". This is an arrangement, which is designed to protect the difference between the value of employee's current contractual pay and the proposed contractual pay at the new site. This excludes casual overtime. *The retained pay is guaranteed for life* and will increase in line with any future pay increases. Retained pay also counts for the purposes of calculating benefits such as Shares in Success and Pensions…' [emphasis added]

17. Tesco issued similar communications to employees who relocated from Crick to the Daventry Clothing and Daventry Grocery Distribution Centres and does not seek to distinguish their position from that of the staff who relocated to Lichfield, nor to suggest that its intention in connection with such employees was in any way different.

*The trial and the judgment below*

18. The trial before Ellenbogen J took place on 5 and 6 May 2021. The only witness statements were from the claimants. The individual claimants were briefly cross-examined in relation to the argument based on estoppel (which, as will be seen later, the judge did not have to resolve) but with this exception the hearing consisted of submissions on facts which were essentially agreed. Judgment was reserved and, after a delay of nine months which can only be described as unfortunate, was handed down on 3 February 2022. It is reported at [2022] ICR 722 and [2022] IRLR 407.

19. On the argument about the proper construction of the express term as to Retained Pay, the judge said:-

> "37. The contract under which each of the individual Claimants and the employees named in the Appendix to this judgment is employed by the Defendant, incorporating the collectively bargained term as to Retained Pay, contains two material express terms:
>
> > 37.1. The first provides 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; and iv) if the Defendant makes shift changes, it will not be subject to change or adjustment.
> >
> > 37.2. The second is the notice provision, whereby (so far as material) the specified notice will be given if the Defendant terminates his or her employment other than in the event of gross misconduct.
>
> The first issue which arises is the proper construction of the first express term, read in the context of the second.
>
> 38. The starting point is the identification of the intention of the contracting parties, objectively assessed, having regard to '*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'* (per Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [14]). The natural and ordinary meaning of the words used, any other relevant provisions of the contract; the overall purpose of the clause and the contract and the circumstances as

known by the parties at the time at which the contract was concluded are all relevant considerations.

39. In the Oxford English Dictionary, the word 'permanent' is defined to mean 'continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent. Opposed to temporary.' It is a word in common usage. In the contracts with which I am concerned, its use in relation to Retained Pay might, devoid of context, be considered to confer an entitlement which is permanent for as long as the particular contract endures, other than in specified circumstances with which I am not concerned. So construed, it would not be in conflict with the Defendant's express unfettered right to terminate the contract on notice.

40. But to adopt such a construction of the word permanent would be to ignore the intention of the contracting parties in this case. In my judgment, a reasonable person, having all of the background knowledge which would have been available to those parties at the time at which the clause was incorporated would not have understood the word permanent in such a way, having regard to the context in which the clause was drafted. True it was that that intention encompassed an intention to remove the entitlement to Retained Pay from the collective bargaining machinery which would otherwise admit of the prospect that it could be removed at the will of a majority who did not benefit from it. But that was not the full extent of their intention. It is clear, from the undisputed evidence in this case, that the mutual intention of the parties was that the entitlement to Retained Pay would be permanent for as long as each affected employee was employed in the particular role, save in the circumstances expressly articulated in his or her contract. There is no other way in which to make sense of the use of expressions such as *'guaranteed/protection for life'*, and, in particular, '*for as long as you are employed by Tesco in your current role'*, all against the background of the Defendant's need and desire to retain a stable, experienced workforce, which it could only achieve by incentivising employees who were not contractually obliged to do so to relocate to a place of work some 45 miles away from that at which they had previously been employed. The clear mutual intention was to preserve the higher pay which each affected employee had enjoyed at his or her original distribution centre, without which relocation would not have been palatable. Accordingly, the word permanent would be understood by the reasonable person, having all of the background knowledge which would have been available to the parties in the situation in which they were at the time of the agreement, and should be construed, to mean for as long as the relevant employee is employed by the Defendant in the same substantive role. So construed, there is an inherent conflict

> between a right to terminate the contract for the purposes of removing the right to Retained Pay, in circumstances in which a fresh contract will be offered, in relation to the same substantive role, which will confer no such entitlement. The question arises as to whether the pleaded term (as re-amended) may and should be implied in order to resolve it."

20. After citing the survey of the law relating to implied terms contained in the judgment of Carr LJ in *Yoo Design Services Ltd v Ilive Realty PTE Ltd* [2021] EWCA Civ 560, the judge said:

> "42. Applying those principles to the unusual facts of this case (which Mr Gilroy rightly characterises as 'extreme'), for the reasons which follow and on the basis of business efficacy and/or the obviousness test, I am satisfied that it is necessary to imply into the contract of employment of each affected employee a term to the effect that the Defendant's right to terminate the contract on notice cannot be exercised for the purpose of removing or diminishing the right of that employee to Retained Pay.
>
> 43. As to business efficacy, it is clear that, without such a term, the employee's entitlement to Retained Pay would not be permanent (in the sense defined above) and the contract would lack practical coherence. For the same reasons, were the officious bystander to have been asked whether the implication of the term set out above were so obvious that it went without saying, I am satisfied that the answer received would have been, 'Of course!' That is consistent not simply with the actual intention of the parties, but with that of the notional reasonable person in the position of the parties at the time at which the entitlement to Retained Pay was agreed. Consistent with Lord Millett's analysis of the ratio of *Aspden* in *Reda v Flag Limited* [51], the question is whether the express right of dismissal may be limited by implication arising from the unusual circumstances in which the contracts had been entered into and the inherently contradictory terms which resulted. As in *Aspden*, here, too, the justification lies in the need to reconcile express terms which are mutually inconsistent.
>
> 44. In so concluding, I have borne firmly in mind the need to tread warily in this area (per *Awan*). No issue is taken by the Defendant with the affected employees' contractual right, long since accrued and ongoing, to Retained Pay. Absent the term which I conclude ought to have been implied, the agreed permanence of that entitlement and its underlying rationale, would be defeated. As I put to Mr Carr and he acknowledged in the course of argument, the logical consequence of his submission must be that, on the day following the agreed entitlement to Retained Pay, it would have been open to the Defendant to terminate the contracts with impunity. His position

> was that he did not shrink from that, 'But, of course, the reality here is that that was never going to happen in practice because [the Defendant] wanted these people to move across. They wanted to retain them. It's improbable in the extreme that the parties would have thought, 'Well, hang on a minute, this means that I am at risk of being terminated on day one when I move to Daventry because of Retained Pay. That would have been an improbable factual circumstance that the parties would have had in mind at the time that they reached the agreement.' In my judgment, that submission simply serves to underline the obvious mutual intention of the parties at the time of entering into the agreement for Retained Pay, as I have found it to be. On a proper construction of the contract, the term which I am satisfied is to be implied is capable of clear expression, reasonable in the particular circumstances of the case and operates to limit (rather than contradict) the express contractual right to terminate on notice by preventing the exercise of that right in circumstances in which it would frustrate the permanent entitlement to Retained Pay for which the contract provides. In short, the considerations which applied in Awan apply equally in this case.
>
> 45. It would have been open to the Defendant to seek to set a longstop date for the entitlement to Retained Pay and/or to make clear that it subsisted only for as long as the particular contract endured. I reject Mr Carr's submission that the effect of the termination provision was just that and note that the relevant employees' contractual entitlements to other aspects of their pay were not couched in terms of permanence. If Mr Carr's argument were correct, that word would be deprived of any meaning and, thus, superfluous, because, as with any other contractual benefit, the entitlement to Retained Pay would be co-terminous with the contract……
>
> 47. To be clear, it does not follow from the implication of the term which I have found to be implied that the Defendant may not exercise its power to terminate an affected employee's contract for good cause, albeit that the practical effect of so doing will be to bring the entitlement to Retained Pay to an end. As recognised in *Hill* and in *Briscoe*, and as the Claimants in this case acknowledge, an employee who, for example, is genuinely redundant, or has committed an act of gross misconduct, might be dismissed for that reason, albeit that the genuineness of the reason proffered undoubtedly would be scrutinised in any litigation which followed."

21. The judge rejected an argument by the Defendant that the implication of a term on the lines suggested by the Claimants was excluded by the decision of the House of Lords in *Johnson v Unisys Ltd* [2003] 1 AC 518. She was right to do so and Mr de Garr Robinson has not sought to challenge that ruling in this court. *Johnson* held that it

remains good law (as it has been since the decision of the House of Lords in *Addis v Gramophone Co* in 1909) that damages for wrongful dismissal at common law cannot include compensation for harm arising out of the manner of the dismissal. The so-called "*Johnson* exclusion zone" has nothing to do with the issues in the present case.

22. Part of Tesco's argument, however, was a broader contention that the Claimants' remedy, if any, in the event of their dismissal would be to bring claims for unfair dismissal in the employment tribunal. The judge rejected this at paragraph 50 of her judgment, saying that "the availability *per se* of a claim for unfair dismissal (in the event of dismissal) affords no answer or bar to the instant claims or relief sought in this jurisdiction." She noted that in an unfair dismissal claim the compensatory award is capped, reinstatement is very infrequently awarded, and non-compliance with any order has only limited consequences. She also referred to the delays in the listing of tribunal claims.

23. Having found in the Claimants' favour on liability the judge did not have to consider the arguments about estoppel or forbearance. She noted that estoppel was a "claimant-specific matter" and that it was therefore difficult for the individual Claimants to act in a representative capacity on this issue.

24. Turning to relief, she held at paragraphs 53-54 that it was appropriate and in the interests of justice to grant a declaration. This was that the Retained Pay clauses of the collective agreement set out at paragraph 2 above were an express term incorporated into the contract of employment of each of the affected employees. The declaration continued:-

> "54.3. In the Retained Pay Term, the proper construction of the word 'permanent' is that, subject to the four principles set out in the Retained Pay Term, the eligibility for Retained Pay endures for as long as the employee continues to be employed in the substantive role in respect of which he or she is currently entitled to Retained Pay.
>
> 54.4. The express (and/or any implied) term within the contract of employment under which the Affected Employee is currently employed by the Defendant, by which the Defendant is entitled to give notice to terminate the contract, is subject to an implied term whereby that right cannot be exercised for the purpose of removing or diminishing the right of that employee to receive Retained Pay."

25. Having granted a declaration the judge went on at paragraph 55 to add an injunction. She said:-

> "I am also satisfied that, in accordance with section 37(1) of the Senior Courts Act 1981, it is just and convenient to grant final injunctive relief in the terms set out below. As matters stand, the Defendant has made clear its intention to terminate the existing contracts of employment and to offer re-engagement on less favourable terms which would not include a right to Retained Pay. Such a course would operate to remove a significant proportion of the remuneration currently payable to the affected

> employees, causing significant injury to their legal rights. Damages would not be an adequate remedy in that event, given that (assuming that proper notice were given) their remedy would be limited to the losses recoverable in any claim for unfair dismissal, with all the difficulties attendant upon such a claim which I have summarised above. There is no other feature of these cases which, in my judgment, would make the imposition of an injunction oppressive to the Defendant, or otherwise unjust or unconscionable. Accordingly, I grant final injunctive relief in the following terms, which, in the ordinary way, will be subject to a penal notice:"
>
> 'In the orders which follow, 'Affected Employee' is defined to mean each of the Second, Third and Fourth Claimants in these proceedings and each employee named in the Appendix to the judgment of Ellenbogen J, handed down on 3 February 2022 ('the Judgment').
>
> The Defendant shall be restrained from, directly or indirectly:
>
> A. giving notice to terminate the contract of employment under which the Affected Employee is employed by the Defendant as at the date of the Judgment contrary to the implied term of that contract whereby the right to terminate cannot be exercised for the purpose of removing or diminishing the right of that employee to receive Retained Pay; and/or
>
> B. otherwise withdrawing or diminishing, or causing the withdrawal or diminution of, Retained Pay from any Affected Employee (including by unilateral variation of the contract of employment), other than in accordance with the express term in each contract by which the entitlement to Retained Pay is conferred (as that term is construed in the Judgment).
>
> For the avoidance of doubt, the above orders do not preclude the Defendant from dismissing any Affected Employee for reasons wholly unrelated (directly or indirectly) to the removal or diminution of Retained Pay, notwithstanding that the practical effect of so doing will be to bring that employee's entitlement to Retained Pay to an end."

26. Following the circulation of the judgment in draft the judge was asked to amend the terms of the final paragraph of the injunction so that it would read:-

> " "For the avoidance of doubt, the above orders do not preclude the Defendant from dismissing any Affected Employee for ~~good cause other than removing or diminishing the right of that employee to receive Retained Pay~~ <u>reasons unrelated or not directly related to the removal of Retained Pay</u>, notwithstanding that the practical effect of so doing will be to bring that employee's entitlement to Retained Pay to an end."

The judge made certain amendments to her draft, but not in accordance with this proposal, which she rejected as "failing to reflect the relief granted and its underlying rationale", She also refused permission to appeal for detailed reasons set out in the text of the judgment.

27. On 24 March 2022 Simler LJ granted the company permission to appeal, writing:-

> "Notwithstanding the submissions made by the Respondents I am persuaded that, even on the unusual facts of this case, it is arguable with a real prospect of success that:
>
> i) the judge erred in her interpretation of the express term as to Retained Pay and the meaning of the word "permanent" in context and;
>
> ii) erred in concluding that the two express terms (regarding Retained Pay and the right to terminate on notice) are inherently contradictory and/or that it is necessary to imply a term into the employment contracts restricting the Appellants' (unlimited) right to terminate the employment contract on notice."

28. Tesco's grounds of appeal may be summarised as follows:-

1) the judge erred in her construction of the express terms of the contracts of employment;

2) the judge was wrong to find that it was necessary to imply a term into the contracts limiting the Defendant's right to terminate them on notice;

3) the terms of the declaration were inappropriate;

4) the judge was wrong to grant an injunction.

29. By a Respondents' Notice dated 6 April 2022, Mr Gilroy and Mr Brittenden argued that for the avoidance of doubt the Respondents seek to rely on estoppel or forbearance as an additional or different ground on which the High Court ruling should not be disturbed on appeal. In the event we were addressed only on estoppel and not on forbearance.

*Ground 1: Construction of the express terms of the contract*

*The parties' submissions*

30. Tesco argue as follows:-

> "a. The Judge (correctly) found that the Contracts contained:
>
> > i. an express term 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; and iv) if the Defendant makes shift changes, it will not be subject to change or adjustment" (Judgment, paragraph 37.1);
>
> ii. an express term as to notice, whereby (so far as material) the specified notice will be given if the Defendant terminates his or her employment other than in the event of gross misconduct (Judgment, paragraph 37.2).

b. The Judge then (again, correctly) identified that the use of the word "permanent" in relation to Retained Pay might be considered to "confer an entitlement which is permanent for as long as the particular contract endures" (Judgment, paragraph 39);

c. The Judge then rejected such a construction for the reasons set out at Judgment, paragraph 40. In particular, she concluded that "the mutual intention of the parties was that the entitlement to Retained Pay would be permanent for as long as each affected employee was employed in a particular role" and that there was "no other way of making sense of expressions such as "guaranteed/protection for life" or "for as long as you are employed by Tesco in your current role."

d. In fact, there was a very clear and straightforward way of "making sense" of the expressions to which the Judge referred – the Judge herself in the same paragraph identified that the word "permanent" was used in a context in which Retained Pay was to be a permanent feature of an "individual's contractual eligibility" in order to "remove the entitlement to Retained Pay from the collective bargaining machinery which would otherwise admit of the prospect that it could be removed by the will of a majority who did not benefit from it."

e. The Judge then contradicted herself later in her judgment (at paragraph 45) in stating that references to "permanence" would be "deprived of any meaning and thus superfluous" if the construction for which the Appellant/Defendant contended were correct. The Appellant/Defendant's construction had been set out by the Judge at paragraph 27 of her Judgment and was on the face of it accepted by her at paragraph 40 where she acknowledged that it was the intention of the parties to take Retained Pay permanently out of the scope of collective bargaining. The Judge was therefore in error to conclude that the references to permanence which she had apparently accepted were superfluous on the Appellant's/Defendant's construction;

> f. The Judge erred (at Judgment, paragraph 40) in concluding that there was an "inherent conflict" between the express terms of the Contracts "in circumstances in which a fresh contract will be offered" which will confer no entitlement to Retained Pay. In concluding that the "inherent conflict" arose in circumstances in which the Defendant was offering to re-employ the Individual Claimants, the Judge implicitly recognised that, were such an offer not being made, there would be no "conflict" and that the Defendant/Appellant could simply dismiss. If, as the Judge appears to have accepted, on a proper construction of the Contracts, it was open to the Defendant/Appellant to dismiss simpliciter, it is plainly a misconstruction of such Contracts to conclude that it could not do so if it was intending to make an offer of re-employment under the terms of an entirely different contract."

31. The Claimants' response is well summarized in the skeleton argument of Mr Gilroy and Mr Brittenden:-

> "15. …It is not suggested that the Court erred or misdirected itself in law. D's contention that entitlement to Retained Pay only endured for as long as each Affected Employee is employed under that particular contract of employment is manifestly unsound. The parties' mutual intentions were clearly and unambiguously reflected in numerous communications issued to staff when Retained Pay was introduced. It was variously described as being something which was a "guarantee" which would endure "for life", as "protection for life", was something which remains for as long as you are employed by Tesco." and entitlement would endure for as long as each Affected Employee continued in the "same role" - i.e. as a Warehouse Distribution Operative rather than being coterminous with employment on that particular contract of employment. It was not something that could be unilaterally removed at the behest of D, but required mutual agreement. The Court's conclusion on this issue is analogous to a finding of fact and should not be disturbed on appeal.
>
> …
>
> 28. …The repetitive assertion that the Judge's conclusion was "wrong" or "simply wrong" amounts to nothing more than D disagreeing with the Judge's construction of the ordinary natural meaning of the words communicated by D, from which the Court ascertained the parties' mutual intentions. The fact that D disagrees with the Court's reasoning provides no basis for identifying any error of law. The Court was entitled to reach the conclusion that it did in light of the undisputed facts, communications, and unambiguous evidence as to mutual intention of the parties. Accordingly, applying *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [14]), there is no

discernible error of law. The Court's conclusion as to meaning is analogous to a finding of fact which this Court should be slow to disturb. Indeed, if there existed any doubt on these "extreme" facts, the Court's analysis reassuringly chimes with the plain and natural meaning of the words used.

29. D's error is to assert that the "permanent" entitlement to Retained Pay meant no more than it is removed from the sphere of collective bargaining and "… for so long as their contracts endured": D skeleton [4], [16], or otherwise for "… full duration of the Contract…": D skeleton [11]. This involves a distinctly partial reading of the communications issued to Affected Employees - to the exclusion of key components of the terms governing Retained Pay (summarised above). Indeed, as the Court found as a fact, the removal from collective bargaining formed only part of the relevant context, but materially: "… that was not the full extent of their intention…" [40]. D's suggestion that the judge somehow ignored this is misplaced: see D skeleton at [13(2) and 13(6)(d)].

30. D ignores the context of what it actually communicated to staff. Again, by way of illustration:

(i) Retained Pay was described as being "protection for life" [9].

(ii) Entitlement to Retained Pay was to continue "for as long as you are employed by Tesco in your current role" [10]. D's intention following the process of fire and re-hire was that the Affected Employees would continue to be employed in the same role as Distribution Warehouse Operatives.

(iii) Entitlement was "guaranteed for life" - not limited to the duration of the particular contract [11]. The use of the word "guarantee" is rarely if ever found in employment contracts but it is something which is well understood by ordinary people to connote some benefit or entitlement which has acquired special or enhanced protection.

(iv) It was described as a "permanent feature of an individual's contractual eligibility …" at [14] and also at [37.1].

(v) Entitlement to Retained Pay was promised to be "guaranteed forever" [27.1].

(vi) It could only ever be removed by "mutual consent" [37–1] - in other words, it could not be unilaterally withdrawn, this was precisely what D was seeking to do.

…

33. D's suggestion at Ground 1(d) that "permanent" means merely that it could not be removed by collective bargaining (but could be easily removed unilaterally by other means, which were never explained to anyone, and fell outside of the agreed conditions as to continuing eligibility referred to in Ground 1(a)), in the context of the overall communications, involves a kaleidoscopic approach to contractual interpretation. It is rather unattractive for D to essentially assert that the words used in the communications to staff do not mean what they say (and are in fact illusory).

…

35. Accordingly, D impermissibly places a gloss on the above communications to suggest that the individual employee "… would have a permanent entitlement to retained pay, on the conditions in the Retained Pay Terms , for so long as the Contract continued…": (D skeleton at [16]). That construction is unsustainable because of the following

(i) The language used to describe the nature and duration of the entitlement to Retained Pay (see above).

(ii) The construction now contended for by D was never explained to anyone at the time.

(iii) D wholly overlooks the point that entitlement was stated to endure "for as long as you are employed by Tesco in your current role" - i.e. not limited to or coterminous with being employed by reference to that particular contract of employment." …

37. The position advanced by D is inherently contradictory to the meaning and effect of the communications to staff and how entitlement was described: Ground 1(e).The mutual intentions of the parties are inexorably clear - this is not one of those rare cases where meanings or words or phrases - to adopt a phrase used by Lord Hoffmann in West Bromwich - have been "mangled". To find otherwise, as the Judge recognised at [39], would be to "deprive" the totality of the communications of their proper and ordinary meaning. Otherwise, this would not only fail to reflect the meaning that a reasonably informed observer would give to the language used in the express terms, but would be an inversion of their meaning. "Guarantee" would mean something far removed. "Permanent" would mean temporary, or otherwise for as long as D wished, whether for arbitrary or capricious reasons or otherwise. The reference to it being withdrawn only by "mutual consent" would bear the polar opposite meaning - that it can be removed unilaterally by D. Similarly, the reference to entitlement enduring while someone is employed in their "current role" which has not changed, would be deprived of any

> meaning. The Court was entitled to find that these various expressions would, on D's case, be rendered very much "superfluous" [45]."

*Discussion*

32. Before considering the effect of the pre-contractual documents the starting point should be to consider on ordinary principles of construction what the contract itself means. The important phrases in the collective agreement are that Retained Pay "will remain a permanent feature of an individual's contractual eligibility"; that it "can only be changed by mutual consent"; and that on "promotion to a new role" it will cease. This wording seems to me at least consistent with that contained in the original contracts of employment: in that of Mr Singh dated 26 September 2007 it is stated that Retained Pay "can only be altered in agreement with yourself and ceases when you agree to a promotion."

33. If the matter rested there the Claimants' case would be unsustainable. There is nothing in the wording of the Retained Pay provisions themselves, whether in the 2007 version in the individual contracts or the 2010 version in the collective agreement, which could prevent the employer from giving notice to terminate the contract in the usual way.

34. The judge found at paragraphs 38-39 of her judgment that the construction of the contractual documentation alone does not support the Claimants' case. She accepted that "devoid of context, the wording of the Retained Pay Provisions might be considered to confer an entitlement which is only permanent for as long as the particular contract endures". She went on, however, to hold at paragraph 40 that such a construction of the word "permanent" would "ignore the intention of the contracting parties in this case". The important question is then what role can be played by the pre-contractual documents to demonstrate the parties' intention, and what intention that was.

35. There is a great deal of learning, including several decisions of the House of Lords and Supreme Court, on the circumstances in which pre-contractual statements may be taken into account as aids to interpretation. It is unnecessary to go through the familiar list of authorities. In some circumstances pre-contractual statements which demonstrate the *mutual* intentions of both parties may be admissible, but it must be clear that both parties had the same intention.

36. Whether one focuses on the phrase "guaranteed for life" or the word "permanent" I cannot accept that it has been shown that it was the mutual intention of the parties to the collective agreement, or the parties to the individual contracts of employment into which the 2010 Retained Pay clauses were incorporated, that the contracts would continue for life, or until normal retirement age, or until the closure of the site concerned. Nor can I accept that it was the mutual intention of the parties to limit the circumstances in which Tesco could bring the contracts to an end. There is no evidence that anyone addressed their mind to the possibility that in the future the company might seek to "fire and rehire". Furthermore, it does not seem to me to make any sense to say that if, having given notice of termination, the company makes no offer of a new job it has no liability for breach of contract; if it then offers the employee a new job in a different role there is no continuing entitlement to Retained Pay; but that if it makes an

offer to re-engage the employee in the same role as before it can only be on the original terms.

37. It is true that the Retained Pay provisions incorporated into the contracts specified no time limit, nor what Parliamentary draftsmen would call a sunset clause. But that is not sufficient to get round the lack of clarity in the Claimants' case as to what *both* parties to the contract meant by "permanent".

38. The interpretation for which Tesco contend does not deprive the term "permanent" of all meaning. There was an obvious concern that the minority in receipt of Retained Pay might see their differentials eroded in future collective bargaining in the interests of the majority. The "Q&A" document issued at Lichfield on 20 February 2007 (see paragraph 15 above) emphasised that Retained Pay "cannot be negotiated away by either Tesco, USDAW or USDAW shop stewards".

39. If the 23 February 2007 "joint statement" had been issued alongside the collective agreement, or expressly referred to in it, there might be an argument to be made that its contents could be treated as explanatory notes: see Lewison, *The Interpretation of Contracts* (7th edition, 2021) at 3.38 to 3.42. But three years passed between the joint statement and the collective agreement, and there is no such cross-referencing in the latter document.

40. I therefore conclude that the express terms of the contracts should be interpreted in accordance with what the judge rightly found to be their natural and ordinary meaning, namely that Tesco would have the right to give notice in the ordinary way, and that the entitlement to Retained Pay would only last as long as the particular contract.

*Ground 2: implied term*

41. If "permanent" (or any other phrase contained in the pre-contractual documents such as "for life") meant what Mr Gilroy contends it means, then the Retained Pay clauses incorporated into the contracts in 2010 would be express terms on the basis of which the claims would succeed. But if, as I think, these words do not have a clear meaning, that creates similar difficulties for the Claimants' case on implied terms.

42. In *Yoo Design Services* Carr LJ reviewed the leading authorities on the implication of a term into a contract and at [51] summarised what she said those authorities established:-

> "i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;

> iv) *The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;* [emphasis added]
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred.
>
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

43. For my part I consider this an accurate summary of the law: Mr Gilroy did not contend otherwise. The judge cited it, but with respect I cannot agree with her conclusion that nevertheless the term contended for by the Claimants could be implied.

44. My principal difficulty with the Claimants' case on implied terms is that, just as the pre-contractual statements do not have a clear or precise meaning, so too it is far from clear what term is to be implied. Take as an example the sentence "the retained pay is guaranteed for life" contained in perhaps the best pre-contractual document from the Claimants' point of view, the joint statement of 23 February 2007. What does "guaranteed for life" mean? Mr Gilroy accepted that it would not be a breach of contract if an employee with retained pay were found to have stolen from the company and was summarily dismissed for gross misconduct. He also accepted that a dismissal on the grounds of permanent incapacity would likewise not be a breach of contract; and similarly a dismissal on the grounds of redundancy if the relevant distribution centre was to be closed. On the other hand, Mr Gilroy did not concede any other limit to his clients' entitlement. He was asked whether, if a retained pay employee in good health wished to continue working into his 90s he would be entitled to do so, and submitted that he would. In the case, for example, of Mr Singh, who was born in 1980, the clause

could still be operating half a century from now if the Lichfield centre remained open. Moreover, Mr Gilroy's concession about cases of the complete closure of a site was limited to just that example. If the staffing requirements for warehouse operatives at Lichfield or Daventry reduced by half, any attempt to select Retained Pay staff for redundancy on the basis that they were the most expensive would, he submitted, be a clear breach of contract. Indeed, if the judge was right in granting an injunction, it would be a contempt of court.

45. Mr Gilroy argues that if an officious bystander had asked immediately after witnessing the signing of the collective agreement in February 2010 whether Tesco could as a matter of law sack the Retained Pay employees by giving them notice the following week, the parties' answer would have been "of course not". But this is to blur the distinction between wrongful dismissal and unfair dismissal. If Tesco had given notice to terminate the individual contracts on giving a few weeks' notice in early 2010 they would have been met by tribunal claims for unfair dismissal from each of the employees concerned (provided only that they had the necessary minimum length of service) to which there could be no realistic defence. The dismissals could not be justified on the grounds of misconduct, incapacity, redundancy (on the contrary), nor of a reorganisation of the workforce constituting some other substantial reason for dismissal within the meaning of s 98(1)(b) of the Employment Rights Act 1996. The result in each case would probably have been an order for re-instatement, or a maximum compensatory award plus an additional award for failure to re-instate. If the same officious bystander had asked whether the Retained Pay employees had the right to remain in post (unless the site closed) for the rest of their lives, the Claimants might have answered "of course", but the company would certainly not have done so. In short, I do not consider that the obviousness test is satisfied. The inconsistency of the proposed implied term with the express term of each contract allowing termination on giving notice (as it happens, the statutory minimum) is a further serious obstacle in the Claimants' path.

46. Mr Gilroy relied on the established line of cases relating to permanent health insurance. In *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521 Sedley J concluded (at [15]) that: "It was … the mutual intention … that the provisions for dismissal in the contract of employment into which they entered … would not be operated so as to remove the employee's accruing or accrued entitlement to income replacement insurance at the sole instance of the [employer] (that is to say, otherwise than by reason of the employee's own fundamental breach)." Sedley J therefore held that an employer's otherwise unrestricted power to terminate the contract of employment was qualified by an implied term that the employer would not do so while the employee was incapacitated, and where this would prevent an incapacitated employee from qualifying for PHI benefit; and that a term could be implied in order to give effect to the mutual intentions of the parties at the time the PHI terms were introduced.

47. These observations were approved (though *obiter*) by Staughton LJ in *Brompton v AOC International Ltd* [1997] IRLR 639 at [32]. In *Briscoe v Lubrizol* [2002] IRLR 607, Ward LJ stated at [107]: "… the principle to emerge from [the PHI] cases is that the employer ought not to terminate the employment as a means to remove the employee's entitlement to benefit, but the employer can dismiss for good cause whether that be on

the ground of gross misconduct or, more generally, for some repudiatory breach by the employee."

48. According to Lord Millett, giving the advice of the Judicial Committee of the Privy Council in *Reda v Flag Ltd* [2002] IRLR 747, the result in *Aspden* was justified by "the unusual circumstances in which the contract had been entered into and the inherently contradictory terms which resulted". However, *Reda v Flag Ltd* was a case about share options, not permanent health insurance; and in this jurisdiction the welcome given to the decision in *Aspden* has been less grudging.

49. There is a useful review of the PHI cases by Simler P sitting in the Employment Appeal Tribunal in *Awan v ICTS UK Ltd* [2019] IRLR 212. She said at [55]:-

> "55. I fully accept that terms should not be implied too readily, and that courts should tread warily in this area. However, this is a case where the contract was known by both employer and employee to include a disability insurance plan which could only work if the employees eligible to receive such benefits remained in employment for the duration of their incapacity. The contract of employment is inherently contradictory. It seems to me that, on a proper construction of the contract, it is contrary to the functioning of the long-term disability plan, and to its purpose, to permit the Respondent to exercise the contractual power to dismiss so as to deny the Claimant the very benefits which the scheme envisages will be paid. In my judgment a term can be implied whether on the officious bystander or the business efficacy tests of implied contractual incorporation that "once the employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work." That term is capable of clear expression, reasonable in the particular circumstances and operates to limit (rather than contradict) the express contractual right to terminate on notice by preventing the exercise of that right in circumstances where it would frustrate altogether the entitlement to long term disability benefits expressly provided for by the contract."

50. I agree with these observations, including what Simler P said about the need to tread warily. It is now generally accepted, and certainly I would hold, that *Aspden* was rightly decided. If an employee has the benefit of permanent disability insurance under the employer's scheme, that benefit would be rendered entirely valueless if the employer could dismiss him on the grounds of that same disability.

51. If the collective agreement signed in February 2010 had included a clause such as "provided the site remains open Retained Pay will continue until you reach the age of 65" then the present case would be analogous to *Aspden* or to *Awan*. But it does not. I do not accept, therefore, that the PHI line of cases gets the Claimants home.

*Estoppel*

52. If the arguments as to the interpretation of the express terms for the incorporation of implied terms fail, the Claimants' fallback argument raised in the Respondents' notice is promissory estoppel. It is said that although the contract gave Tesco the usual unfettered right of termination, the pre-contractual statements give rise to an estoppel preventing Tesco from exercising that right.

53. A promise can only give rise to an estoppel if it is clear and unequivocal: so held the House of Lords in *Woodhouse Ltd v Nigerian Produce Ltd* [1972] AC 741. None of the pre-contractual statements relied on even mentions termination of the contract. Still less does any of them contain a promise that Tesco would not exercise its right to terminate. For the reasons already set out, the promises are not literally that (for example) each of the Claimants would receive Retained Pay for the rest of his life. They cannot be regarded as clear and unequivocal.

54. Another weakness in the estoppel argument is that a party arguing estoppel must be able to point to a statement on which he relied to his detriment. As Mr de Garr Robinson and Ms Rogers point out in Tesco's skeleton argument on this topic, "the relevant Claimants have had Retained Pay for more than a decade, the basic element of which alone exceeds £100,000, rather than redundancy payments amounting to a fraction of that sum. There is no unconscionability, and certainly not such unconscionability as could, exceptionally, extinguish Tesco's right of termination not just now but potentially for decades to come." I accept that submission.

*The injunction*

55. Even if the judge had been right to find for the Claimants on liability, that could not have justified the grant of an injunction. There are certainly cases, of which *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 is an example, in which courts have granted injunctions to prevent an employer from terminating the contract until and unless a disciplinary procedure required by the contract has been followed; and cases such as *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 where an injunction was granted to restrain the employer from invoking a public sector disciplinary procedure which was not applicable to the facts of the Claimants' case. But Mr Gilroy could not point to, and I am not aware of, any case in which a court has granted a final injunction to prevent a private sector employer from dismissing an employee for an indefinite period.

56. Moreover, it is axiomatic that an injunction cannot be granted unless it is clear beyond argument what the Defendant can or cannot do: in the words of a Scottish case from 1874 cited by Lord Hope of Craighead in *Attorney General v Punch Ltd* [2003] 1 AC 1046 "if an injunction is to be granted at all, it must be in terms so plain that he who runs may read". That cannot, with respect, be said of the injunction granted by the judge. The prospect that in the event of a reduction in the workforce at Lichfield or Daventry and a redundancy selection exercise occurring, perhaps many years from now, the company would be at risk of an application to seize its assets and/or commit its directors to prison is not a satisfactory one. The remedy for a wrongful dismissal at common law is almost invariably financial.

57. I would allow the appeal.

**Lord Justice Newey:**

58. I agree.

**Lord Justice Lewis:**

59. I also agree.