Do not make promises you cannot keep: employer prevented from dismissing employees in order to deprive them of a permanent contractual entitlement.

The Supreme Court has ruled that an implied term prevented a private sector employer from dismissing and offering to re-engage employees on new terms, where the objective was to withdraw a contractual payment that was intended to be a permanent benefit.

What happened in this case?

In 2007, Tesco restructured its distribution centres, which meant closing some centres, expanding others and opening some new ones. Staff at the closing centres were asked to relocate to different sites instead of being made redundant and receiving redundancy payments. To incentivise the staff to do this, Tesco agreed with the trade union, USDAW, that it would make a "retained payment" to those who agreed to relocate to a different site. The retained payment reflected the difference in value between the employees' contractual entitlements at the old and new distribution centres. In some cases, this was significant and represented between 30% to 40% of overall pay. It was agreed that the retained payment would be a permanent entitlement for those employees, and a term to this effect was incorporated into their employment contracts.

In 2021, Tesco sought to withdraw the retained payment. The affected employees were offered a lump sum payment in exchange for agreeing to the removal of the benefit. The employees were told that if they did not agree to this, they would be dismissed and offered a new contract of employment on identical terms but excluding the retained payment. In response, USDAW and several of the affected employees applied to the High Court for a declaration as to the meaning of the retained payment term, and an injunction to restrain Tesco from dismissing for the purpose of removing or reducing the retained payment.

USDAW and the employees succeeded at the High Court stage, with the Court deciding that there was an implied term preventing Tesco from terminating and offering re-engagement as a means of withdrawing the retained payment. However, this was overturned by the Court of Appeal, which held that such an implied term was not justified. USDAW and the employees appealed to the Supreme Court.

What was decided?

Tesco argued that the retained payment was permanent only for the duration of the employment contract and was subject always to Tesco's contractual right to dismiss on notice. This approach was rejected by the Supreme Court on the basis that this would render as meaningless the promise that the retained payment would be a *permanent* entitlement.

The correct meaning of the term was that it would continue for the duration of employment in the same role. Yet the term had value if Tesco could simply dismiss and offer to re-engage as

a route to unilaterally withdrawing it. Therefore, Tesco's right to terminate the employment contract on notice was subject to an implied term that it could not dismiss for the *purpose* of depriving the employees of the retained payment.

The Court noted that the affected employees had been incentivised by the retained payment to agree to otherwise "unpalatable" relocations. It simply could not have been the intention that Tesco would have the right to dismiss as a means of withdrawing the retained payment – that would *"flout industrial common sense".* However, this did not mean that Tesco could never terminate the employment of the affected employees; they could do so for other reasons, just not to avoid the retained payment. The Court said that the existence of an implied term restraining dismissal in this way was not new. Similar implied terms had been upheld in cases where an employee had a contractual right to permanent health insurance (PHI) benefits, and the dismissal would have deprived a sick employee of such benefits.

In deciding whether to reinstate the injunction preventing dismissal, the Court highlighted that "specific performance" of contractual obligations will not usually be ordered against parties to employment contracts. However, there is an exception to this rule, insofar as specific performance *may* be ordered against an employer provided there has been no breakdown of mutual trust and confidence. Given that Tesco was prepared to re-engage the employees on inferior terms, there had clearly not been any such breakdown in this case. The Court also noted that specific performance will not be ordered where damages were an adequate remedy for the wronged party. However, it was decided that damages would be inadequate in this case since it would have been limited to damages recoverable in an unfair dismissal claim.

Therefore, the Supreme Court restored the injunction preventing Tesco from dismissing the employees for the purpose of removing the retained payment term.

What does this mean for employers?

Employers stuck with a contractual benefit that they do not like should recognise that fire and rehire will not always come to their rescue – although it should be borne in mind that the facts of this case were unusual. Although it remains a highly unusual step for a Court to limit an employer's right to terminate a contract of employment, this case underlines that it is possible in certain situations. Here, a term was implied to prevent dismissals aimed solely at removing a contractual benefit intended to be permanent. A similar term may be implied where an employer dismisses a sick employee entitled to PHI benefits, thereby depriving them of the very benefit intended to help them when sick. In both cases it would be necessary to imply the term in order to make sense of the contract and/or to reflect the parties' actual intentions.

To avoid situations such as these, employers should exercise caution about promising contractual benefits which might be regarded as permanent. When entering into employment contracts, clear wording setting out the parameters of benefits are advisable, for example, by stipulating that they are time-limited and may be withdrawn by the employer.

However, it is important to remember that this decision does not go as far as preventing dismissal for other lawful reasons, for example, misconduct or redundancy. Although,

given the background of this case, there is a risk that a future dismissal by Tesco would be viewed as a sham designed to hide the true reason i.e. ending the retained payment.

Tesco Stores Ltd v USDAW and others

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Indirect discrimination: those without the protected characteristic in question, but who suffer the same disadvantage as the protected group, may bring claims

In the recent case of *British Airways plc v Rollett and others* the EAT has held that individuals may bring claims of indirect discrimination despite not sharing the protected characteristic of the disadvantaged group, provided that they suffer the same disadvantage.

What happened in this case?

The claimants are cabin crew members employed by British Airways (**BA**) who were adversely affected by scheduling changes following a restructuring exercise. The claimants argued that these changes unfairly disadvantaged groups with certain protected characteristics, namely: (i) non-British nationals who were required to commute to Heathrow Airport from abroad; and (ii) employees with caring responsibilities (who were predominantly women).

Some claimants had the relevant protected characteristic (i.e. they were non-British nationals and/or women), whereas others did not. Those who did not share the relevant protected characteristics nevertheless argued that they experienced the same disadvantage as those who did. For example, a *British* national commuting from France argued that she suffered the same disadvantage as her non-British colleagues, as did a *male* employee with caring responsibilities.

What was decided?

The Employment Tribunal (**ET**) held that claimants do not need to share the protected characteristic of the disadvantaged group, so long as they suffer the same disadvantage as a result of the employer's provision, criterion or practice (**PCP**). The PCP in this case was the scheduling change implemented by BA.

BA appealed, arguing that only those who shared the protected characteristic should be allowed to bring claims of indirect discrimination. BA argued that the ET's decision was incompatible with the statutory regime on indirect discrimination, since the Equality Act 2010 (**Equality Act**) requires claimants in indirect discrimination cases to have

the same protected characteristic as the group disadvantaged by the PCP.

The EAT dismissed the appeal, holding that the Equality Act could be read compatibly with EU case law, particularly the European Court of Justice's decision in *CHEZ Razpredelenie Bulgaria* (**CHEZ**), which allowed individuals who did not share the protected characteristic to bring indirect discrimination claims if they faced the same disadvantage. The EAT stated that this interpretation of the Equality Act was in line with its purpose, namely to strengthen the law and support progress on equality.

On 1 January 2024, the Equality Act was amended to reflect the decision in CHEZ. BA also sought to challenge the validity of the amendment but the EAT rejected that line of argument.

What does this mean for employers?

The indirect discrimination regime already requires employers to avoid PCPs which apply equally across the workforce, but which place groups with particular protected characteristics at a disadvantage. Claimants who share the relevant protected characteristic may bring indirect discrimination claims and will be successful if they can show that they were disadvantaged by the PCP, and the PCP cannot be objectively justified. The EAT's decision does not change this. However, the decision clarifies that Employment Tribunals also have jurisdiction to hear such claims even where the claimants do not share the protected characteristic of the disadvantaged group. Although this position was codified in the Equality Act on 1 January 2024, the EAT's decision remains relevant to claims predating that amendment (as well as also underlining that the amendment is valid).

Employers should remain cautious and consider the impact of any PCP on groups with different protected characteristics, but remember that the class of potential claimants in indirect discrimination cases is broader than it may first appear. For example, a policy of full-time office working may disadvantage workers with certain disabilities (e.g. CFS, depression or conditions affecting mobility), by causing them to suffer additional pain, exhaustion, distress or difficulty. Now, workers who do not meet the legal test of disability, but who experience the same types of disadvantages, may be able to bring indirect disability discrimination claims. For example, a menopausal worker whose symptoms were not considered to have a substantial enough effect on her day-to-day activities to amount to a disability, or a worker suffering from short-term reactive depression who did not pass the long-term element of the test might pursue claims for indirect discrimination on a "same disadvantage" basis. In theory, it might even extend to workers who are specifically *excluded* from the definition of disability, such as those suffering from alcoholism.

British Airways plc v Rollett and others and Minister for Women and Equalities (Intervener)

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New guidance for employers on how to support disabled workers with hybrid working

The Equality and Human Rights Commission (EHRC) has published new guidance for employers on how to support disabled workers with hybrid working. Aimed at managers and leaders, it provides practical tips, conversation prompts, questions and case studies, and covers both recruitment and employment.

On 5 September 2024, the EHRC published new guidance for employers on how to support disabled workers with hybrid working. The guidance recognises that working arrangements can bring benefits to disabled workers, including being better able to manage their health and wellbeing. However, it highlights that if it is not designed and implemented well it can also create difficulties like a lack of inclusion, isolation from colleagues or not having the necessary support or equipment in place to enable a worker to thrive in their role.

The guidance addresses the following topics in detail:

- What the law has to say about reasonable adjustments in employment.
- How to identify when a worker or job applicant may need reasonable adjustments.

- Identifying barriers to effective hybrid working.
- How to identify the adjustments needed to overcome the barriers.
- How to implement the adjustments.
- How to review how the adjustments are working.
- How to make your working environment inclusive and accessible for disabled workers.

It also discusses a number of types of adjustments to hybrid working arrangements for disabled workers including things like: digital support, IT equipment, furniture, online and hybrid meeting etiquette and travel to work. It includes various case studies designed to showcase different types of adjustments including:

- Adjusting a working pattern for a worker with depression to allow him to attend the office for 60% of his working time, rather than the standard 40%, as too much homeworking is exacerbating his condition.
- Providing specialist software and a large monitor for homeworking for a worker with a degenerative eye condition who is struggling to read emails and documents on his computer.

- Allocating a dedicated desk in a workplace which operates hotdesking to a worker with a musculoskeletal condition which necessitates specialist display screen equipment to minimise discomfort.

- Providing a quieter desk in an open plan office to an autistic worker who is struggling with the noise and recording the same in an "adjustments passport" to ensure future managers are appraised of her needs.

- Agreeing an accessible meeting standard for online meetings by turning on live captions and using the inbuilt accessibility checker on Powerpoint to enable workers with hearing and visual impairments to participate fully in such meetings.

Although non-binding, the guidance will be a useful reference document for all employers operating hybrid working arrangements.

Supporting disabled workers with hybrid working: Guidance for employers

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Labour Government scraps law allowing workers the right to request predictable working patterns

Just weeks before it was due to come into force, the Government announced it has no plans to introduce the new right for workers to request predictable working patterns. Read on to find out why and what is coming in its place.

What is the background?

On 18 September 2023 the Workers (Predictable Terms and Conditions) Act 2023 became law. The Act was intended to give workers (and agency workers) a statutory right to request more "predictable" working patterns.

Where eligible, workers would be able to request a more predictable working pattern where their current work pattern lacked certainty in terms of hours, days and/or times worked. "Work pattern" also covered the length of the contract, and a presumption was to be made that a fixed-term contract of under 12 months lacked predictability. However, employers would be able to refuse such requests on a wide range of grounds. You can read our full summary of the proposed right here.

Although the Act had passed into law, its provisions did not come into force straight away. The intention was that it would take effect on 18 September 2024. In readiness, Acas published a draft statutory Code of Practice which provided further guidance on how employers should handle such requests.

What has changed?

Earlier this month, a spokesperson for the Department of Business and Trade confirmed that the Government had "no plans" to bring the Act into force. The Government has its own plans to address insecure working and intends to go further than providing a mere right to request a fixed working pattern. Instead, it plans to legislate to give workers the right to a new contract that reflects the number of hours worked over a period of 12 weeks or more. The spokesperson said the Government did not wish to confuse employers and workers with two different models, hence the scrapping of the right to request.

The planned right to a new contract will be complimented by proposals to:

- ban "exploitative" zero hours contracts altogether; and
- require employers to give workers reasonable notice of changes to working times or shifts, with a right to compensation where late changes are made.

The full detail of these proposals remains to be seen but all are expected to feature in the forthcoming Employment Rights Bill, which Labour had promised to publish within 100 days of taking power (so by 12 October 2024).

What does this mean for employers?

Some employers may have already prepared new policy documents to reflect the right to request a predictable working pattern. It appears these are no longer needed. To the extent that they have been added to Staff Handbooks, they should be withdrawn, and staff notified.

Employers should watch out for the new Employment Rights Bill to understand the proposed scope of the new right to have a fixed working pattern. For those wishing to be as well prepared as possible, it would be sensible to review the working patterns of staff with variable working hours over the previous three months. This will help you identify the average working week of such workers and the potential scale of the changes you may need to make in future.

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