

# Withdrawing job offers: why “subject to” does not mean risk-free

In *Kankanalapalli v Loesche Energy Systems Ltd*, the Employment Appeal Tribunal (EAT) confirmed that a binding contract may be formed before employment starts. Standard conditions such as references or right to work checks may not prevent that. Where no notice terms are agreed, employers may still be required to give (and pay) reasonable notice to terminate.

## What happened in this case?

The Claimant was offered a project manager role on 23 September 2022, with a proposed start date of 1 November 2022. As is standard practice, the offer was stated to be subject to satisfactory references, a right to work check, and a six-month probation period. No notice provisions were set out in the offer.

On 26 September 2022, the employer confirmed additional terms, including a £3,000 relocation contribution repayable if the Claimant left within 12 months, and suggested that he secure a 12-month tenancy. The Claimant accepted the offer the same day and indicated that he would sign and return the relevant documents shortly. The next day the employer replied that it looked forward to him joining them. The Claimant began onboarding, providing personal details and referee information. On 6 October 2022, the employer requested right to work documents, which were provided that day.

On 7 October 2022, the employer postponed the start date to 3 January 2023 due to a delay in a client contract. The Claimant queried how he would be paid in the meantime, having already made travel arrangements. Then on 11 October 2022, the employer withdrew the job offer due to delays in the project. It proposed a new conditional offer dependent on a “notice to proceed”.

The Claimant brought a breach of contract claim. The Employment Tribunal found that the offer had been accepted by the Claimant’s email of 26 September 2022. However, it held that the conditions (namely the satisfactory references and right to work check) had not been fulfilled. This meant that the offer was conditional at the point it was withdrawn, meaning no binding contract was in place. Alternatively, if a contract was in place, there was an implied term that as the Claimant had less than one month’s service, the employer would not have been required to give him any notice. This was on the basis of the standard terms and conditions that the employer said it would have given to the Claimant.

The claim was dismissed. The Claimant appealed to the EAT.

### **What was decided?**

*Were the “subject to” terms conditions precedent or conditions subsequent?*

The conditions in question were the right to work checks, the employment references, and a six-month probation period.

The EAT found that the Tribunal had taken too narrow an approach in treating the conditions as “conditions precedent” i.e. conditions that prevent a binding contract from forming until they are fulfilled. Instead, the conditions relating to references, right to work and probation were properly characterised as “conditions subsequent” i.e. a binding contract had formed but could be terminated if the conditions were not met.

In reaching that conclusion, the EAT emphasised that the key terms of the role had been agreed and that both parties had begun taking steps towards the start of employment, including arrangements for his security pass. Further, the referee form stated that *“I understand that my employment may be terminated without...satisfactory references”*, rather than providing that there was no contract until these had been supplied. It also placed weight on the inclusion of a probationary period, which could only operate once employment had begun.

Taken together, this pointed towards a binding contract already having been formed, with the conditions operating as potential grounds for termination rather than barriers to formation.

Separately, the EAT noted that if the conditions *had* been conditions precedent, this did not mean there was an unrestricted right to withdraw the offer. Instead, the correct approach would have been for the Tribunal to have considered whether the employer was under an obligation not to withdraw before the date on which the conditions should have been fulfilled.

*Was a notice term implied?*

The EAT held that, in the absence of an express notice provision, a term of reasonable notice should be implied, and that this could exceed the statutory minimum period under the Employment Rights Act 1996.

The employer had referred to its standard conditions which offered one week's notice in the probationary period, but no notice if the employee has less than one month's service. However, the EAT said internal practices, and other employees' contracts, did not amount to a binding custom and practice capable of supplying a contractual term.

*What was reasonable notice?*

The EAT said that it is not the case that notice is presumed to start from zero and that there must be a reason to increase it. Section 86 of the Employment Rights Act 1996 (which sets out statutory notice requirements) only contains minimum thresholds – this should not be taken as meaning that they apply in the absence of any other provisions. What is “reasonable notice” may exceed those minimums.

On the facts, the EAT concluded that three months' notice was reasonable. This reflected the seniority of the role, the length and nature of the recruitment process, and the fact that the Claimant was to relocate. The employer's suggestion that the Claimant commit to a 12-month tenancy was also significant. The EAT rejected the employer's argument that this should have been reduced during the probation period – this had never been suggested to the Claimant.

In those circumstances, withdrawing the offer without notice

amounted to a breach of the implied term to give three months' notice.

### *Other claims*

The EAT rejected the Claimant's claims for holiday pay and the relocation payment. Employment had not commenced, so no entitlement to holiday pay arose. The relocation payment was conditional on starting employment and was, therefore, not payable.

The EAT substituted judgment in favour of the Claimant for three months' notice pay.

### **What does this mean for employers?**

This decision is a useful reminder that "subject to" wording is not necessarily enough to prevent a contract of employment from arising. Where an offer sets out the key terms and both parties proceed on the basis that employment will begin, a Tribunal may find that a binding contract is already in place.

What are the key practical takeaways for employers?

- **Be clear about the impact of conditions:** state clearly whether any conditions prevent a contract forming or apply after formation and set deadlines for satisfying them.

- **Include notice provisions in offer letters:** ensure offer letters specify notice rights that apply once a contract has formed, including any reduced notice that applies until the end of any probationary period.
- **Manage the process carefully:** onboarding steps and communications can indicate that a contract is already in place so be careful with the language used. HR should check any communications to be sent from managers.
- **Avoid relying on informal practice:** internal norms or other employees' contracts will not usually be enough to imply terms.

[Kankanalapalli v Loesche Energy Systems Ltd](#)

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# Government softens fire and rehire provisions in the Employment Rights Bill

The Government has proposed amendments which would soften the impact of the “fire and rehire” restrictions in the Employment Rights Bill.

On 7 July 2025, an [Amendment Paper](#) setting out a running list of proposed amendments to the Employment Rights Bill (the Bill) was published. The paper includes Government-backed amendments, which are likely to be pass into law, including plans to soften the “fire and rehire” provisions in the Bill.

## What did the Bill originally say about fire and rehire?

“Fire and rehire” is a shorthand used to describe the practice of dismissing an employee then offering to re-engage them on inferior terms and conditions. Before the election, the Labour Party had talked about wanting to end fire and rehire practices altogether. This was slightly watered down during the General Election, with a promise to end the practice, save in exceptional circumstances.

The first draft of the Bill delivered on that promise and proposed that it would be automatically unfair to dismiss an employee:

- for failing to agree to a change to their terms and conditions of employment; or
- in order to re-engage them (or someone else) under varied terms and conditions of employment, but where the role is otherwise substantially the same.

The sole exception was where the reason for the variation was to eliminate, prevent or significantly reduce or mitigate the effect of any financial difficulties which, at the time of the dismissal, were affecting, or were likely in the *immediate future* to affect, the employer's ability to carry on its business, and there was no way the need to make the variation could reasonably have been avoided. However, even where the exception applied, the dismissal could still be *ordinarily* unfair, even if not automatically unfair.

Shortly after the Bill was published, the Government consulted on extending the remedy of interim relief to employees who had fire and rehire dismissal claims. It was argued that permitting interim relief in this situation would lead to greater protection of employees and further disincentivise employers from using fire and rehire at all. However, the Government ultimately declined to extend interim relief to such dismissals. Instead, it confirmed that it planned to revise the [Statutory Code of Practice on Dismissal and Re-engagement](#) to reflect the new rights in the Bill. Importantly, where the Code is breached, a Tribunal may uplift

compensation by up to 25%.

### **What amendments have been proposed?**

#### *Automatic unfair dismissal for “restricted variations” only*

The most significant amendment would be to restrict the automatic unfair dismissal protection only to cases where the employee is dismissed:

- for failing to agree to a “restricted variation” to their terms and conditions of employment; or
  
- in order to re-engage them (or someone else) under varied terms and conditions of employment, where one of more of the differences between the two sets of terms constitutes a “restricted variation”, but where the role is otherwise substantially the same.

A “restricted variation” means variations relating to:

- pay;



considered by the Employment Tribunal to determine whether the dismissal is ordinarily unfair including the reason for the variation, any consultation carried out about the proposed variation (including with a trade union), anything offered to the employee in return for agreeing to the variation and any other matters specified in regulations.

### *Other proposed amendments*

Other proposed amendments to the fire and rehire provisions of relevance to private sector employers include limiting the scope of the automatic unfair dismissal protection:

- only to cases where the variation in question would result in a reduction of the employee's pay and benefits;
  
- to exclude minor and non-detrimental variations which do not relate to pay, working hours or place of work; and/or
  
- to exclude place of work redundancy dismissals (i.e. these would be subject to the ordinary unfair dismissal regime in the usual way).

A further amendment provides that an employee's dismissal would be automatically unfair if the reason for the dismissal was to enable the employer to replace the employee on a broadly like-for-like basis with someone who is not employed, for example, an agency worker or a self-employed contractor. The exception to this rule would be where the employer can show that the reason for the replacement was to address financial difficulties and the employer could not reasonably have avoided the need to replace the employee.

### **What will these changes mean for employers in practice?**

Given that many of the amendments have been proposed by a Labour Peer, including the "restricted variation" line of amendments, it seems likely that at least some of these changes will make their way into the final version of the Bill.

If the "restricted variation" amendments are taken forward, this will soften the impact of the fire and rehire provisions somewhat, but employers will still have a higher exposure to automatic unfair dismissal claims. The terms which would constitute "restricted variations" if varied are the very terms that would usually lead an employer to consider the extreme solution of fire and rehire in the first place – pay, benefits, hours and leave entitlements.

Nevertheless, it would be reassuring to employers to know that dismissals connected to other types of variations do not give rise to automatic unfair dismissal claims. It would also be helpful for the Bill to clarify that a place of work

redundancy dismissal does not give rise to a fire and rehire automatic unfair dismissal claim.

The amendments to the Bill were considered by the House of Lords on 14 July 2025 and will need to be reconsidered by the House of Commons. Although the Bill is expected to pass later this year, the fire and rehire provisions will not come into force straight away, meaning employers still have time to digest and adapt to the final rules. In its recently-published [roadmap](#) for implementing the Bill, the Government said it intends to commence consultation on fire and rehire-related regulations in Autumn 2025, with the regime expected to come into force in October 2026.

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## **Court of Appeal confirms that cases on breach of directors' duties will be highly fact-sensitive**

**In the recent case of *Cheshire Estate & Legal Limited (CEL) v Blanchfield & Ors* the Court of Appeal considered the issue of**

whether two directors were in breach of their statutory and fiduciary duties in preparing to set up a new competitor firm prior to resigning.

### What happened in this case?

Mr Blanchfield and Mr Montaldo (the **Directors**) were Directors of CEL, a corporate firm of solicitors. Prior to resigning from their positions, the Directors had taken preparatory steps to set up a new law firm in competition with CEL, including:

- registering a trading name;
- incorporating a corporate vehicle for the new company;
- seeking professional indemnity insurance for the new company;
- applying to the Solicitors Regulation Authority (the **SRA**) to register the company;
- setting up a website;
- opening a bank account; and
- entering discussions with litigation funders, including one with whom the Directors had previously negotiated with on behalf of CEL (albeit those negotiations had failed with CEL entering into an exclusive deal with another funder).

Upon discovering this, CEL applied for an interim injunction. This was granted pending an expedited trial of the issues. At that trial, the judge found that the Directors' preparatory steps had not "crossed the line" or put them in a position of conflict so as to breach their fiduciary duties, and that there was no conspiracy between them or intention to injure the firm. CEL appealed to the Court of Appeal.

### **What was decided?**

The appeal judge considered the case law in this area, which suggested that a director should resign as soon as his intention to compete becomes irrevocable. The judge concluded that this was too prescriptive. Instead, the court needed to consider whether preparatory steps, short of active competition, are consistent with a director's fiduciary duty to the company. This would be highly fact-sensitive in every case.

The judge described a spectrum with at the one end, discussing an intention to compete with friends and family (clearly consistent with a fiduciary duty) and at the other, actively soliciting clients from the company and diverting them to the director's new competing business (clearly inconsistent with a fiduciary duty). The court's role is to map the facts of the particular case onto this spectrum and make a decision accordingly as to whether the director is in breach.

In this case the appeal judge agreed with the trial judge that the Directors' actions had not crossed the line into breach of fiduciary duty. This was because:

- trading of the new company was not expected to start until six months after the Directors resigned;
- the venture was only capable of proceeding after getting clearance from the SRA;
- the Directors resigned four days *after* getting that clearance; and
- in the meantime, they served CEL faithfully and carried out all their duties.

CEL also failed to establish that the Directors' negotiations with the litigation funder were a conflict, as by that point CEL had entered into an exclusive relationship with a different funder and, in any event, the first litigation funder could have worked with both CEL and the Directors' new company.

### **What does this mean for employers?**

This case does not fundamentally change the law on directors' duties but is potentially unwelcome for employers as it illustrates how surprisingly far directors can go in taking preparatory steps to compete before they are deemed to be in breach of their fiduciary duties.

Given how fact-sensitive these cases are, companies will need to produce comprehensive evidence to persuade a court that

there has been a breach and that the company has, or will, suffer loss.

Companies should also consider whether the restrictive covenants in directors' service agreements provide adequate protection against this kind of scenario and ensure these are regularly reviewed so they are relevant to the individuals' positions in the company.

[Cheshire Estate & Legal Limited \(CEL\) v Blanchfield & Ors](#)

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## **The Employment Rights Bill: a closer look at the provisions concerning contracts and pay**

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the fourth article in our series analysing the Bill, we consider the proposals concerning contracts and pay.

Running to more than 150 pages, the [Employment Rights Bill](#) (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the fourth in our series of articles explaining the Bill, we consider all the proposals affecting contracts and pay.

## **Zero and low hours contracts**

A zero hours contract is one where the employer does not guarantee any number of hours of work, but the worker is obliged to accept work whenever it is offered, without any certainty of how much work there will be or when. Sometimes the contracts are less onerous, and the worker is permitted to reject the work offered if they wish. A low hours contract is similar, save the employer will guarantee some hours of work, but it will be at the employer's discretion as to when the work is performed. Before the election, the Labour Party promised to ban "exploitative" zero hours contracts.

Importantly, the Bill does *not* go as far as banning zero (or low) hours contracts. Instead, it introduces two key changes, which will restrict the use of such contracts and penalise employers who abuse them.

First, zero and low hours workers who have worked a certain number of hours regularly over a "reference period" will have a new statutory right to have those hours guaranteed in their contract. The meaning of low hours worker will be defined in regulations, as will the qualifying number of hours to be worked and the reference period (the [Next Steps to Make Work Pay](#) document talks of a possible 12-week reference period).

The rules governing this new right are extremely complex, but, in summary, require that at the end of *each* reference period, the employer *must* make a guaranteed hours offer to any worker within scope. That offer must meet certain minimum requirements set out in the Bill (and to be further set out in regulations), including that it must set out the proposed working days and hours (or specific working pattern) which must reflect the working hours over the reference period.

Further, in most cases, the terms of the offer may not be less favourable to the worker, for example, making an offer on a lower rate of pay. A failure to make the offer, or making one incorrectly, will give rise to an Employment Tribunal claim for which compensation may be awarded.

Second, employers will be required to give zero and low workers (and any other worker who does not have a set working pattern), reasonable notice of shifts and changes to shift, with a right to compensation where late notice is given.

Again, the rules are extremely complex. In a nutshell, they require employers to give affected workers reasonable notice of a shift that the employer wants or requires the worker to work, specifying the day, time and hours to be worked. Similarly, they must give notice of any *change* to, of cancellation of, a shift. Regulations will set out the minimum amount of notice that must be given. Where an employer cancels, moves or curtails a shift at short notice, it must make a payment of a specified amount to the worker. Regulations will set out how much that payment must be. A breach of any of the notice or payment requirements will give rise to an Employment Tribunal claim for which compensation may be awarded.

*What will these changes mean for employers in practice?*

- These changes do not make zero or low hours contracts unlawful, but they will make them considerably more difficult for employers to manage and introduce risks for getting it wrong. The requirement to monitor working hours within a reference period on a rolling basis will be administratively cumbersome, particularly where an employer has multiple zero or low hours workers. Similarly, the employer is required to make repeated offers of guaranteed hours contracts at the end of each reference period. The drafting of the Bill suggests that these offers must continue to be made even where a worker has made it clear that their preference is to remain on a zero or low hours contract. Could one unintended consequence of the Bill be that workers who genuinely prefer to work on a zero or low hours basis feel pressured to accept a guaranteed hours contract by virtue of the repeated offers from their employer?
  
- As far as giving notice of shifts and changes to, or cancellation of, shifts are concerned, it remains to be seen what the minimum notice required will be. If it is generous, this raises the risk of employers tripping up on the notice requirements, meaning they will be liable to make a specified payment to the worker and leave themselves open to an Employment Tribunal claim (which given the levels of public interest in these proposals would be likely to spark high levels of media coverage).

- All in all, employers may feel the benefit of a flexible workforce is not worth the potential cost and lead to a move away from the use of zero and low hours contracts, which is perhaps the intention behind these provisions. It could lead to a switch in the use of agency workers, who would not be covered by these rules (although the Bill reserves the right to introduce similar rules for them in the future).

## **Statements of particulars of employment**

Currently, employers must provide employees and workers with a statement of the particulars of their employment when they start work. The scope of those particulars is set out in section 1 of the Employment Rights Act 1996 (the **ERA**).

The Bill provides that employers must give workers a written statement that the worker has the right to join a trade union, and this must be given at the same time as the statement of particulars under s.1 of the ERA and at "*other prescribed times*". Regulations may prescribe what information must be included in the statement, the form of the statement and how it must be given to the worker. A failure to provide the statement will give rise to an Employment Tribunal claim. A Tribunal may determine and amend the particulars and, if the worker has been successful in certain other substantive claim before the Tribunal, compensation of between two to four weeks' pay (currently capped at £700 per week) may also be awarded.

*What will this change mean for employers in practice?*

- This is a small change that should be easy for employers to deal with. Although there is no obligation to include the statement within the statement of particulars of employment, in practice this will be the easiest way for employers to meet this requirement. In most cases, employers discharge the obligation to provide a statement of particulars by way of the contract of employment.
  
- It remains to be seen what is meant by providing the statement at *“other prescribed times”*.

## **Pay measures**

### *Statutory Sick Pay (SSP)*

The Bill makes some small tweaks to SSP regime. First, the “waiting days” will be removed, meaning that SSP will be payable from the first day of sickness, rather than from the fourth day as is currently the case. Second, the lower earnings limit for SSP – which currently sits at £123 per week – will be removed meaning that workers will be entitled to SSP regardless of income levels. However, nothing is said about raising the rate of SSP (currently £116.75 per week).

## *Tips and gratuities*

Legislation regulating the allocation of tips introduced earlier this year requires affected employers to have a written policy on how it deals with tips and gratuities. That policy must include information on whether the employer requires or encourages customers to pay tips, gratuities and service charges and how the employer ensures that all qualifying tips, gratuities and service charges are dealt with in accordance with the law, including how they are allocated between workers.

The Bill amends the law to provide that before producing the first version of the policy, an employer must consult with trade union or other worker representatives, or, if none, with the workers affected by the policy. Further, employers are required to review the policy at least once every three years, and as part of such reviews the employer must carry out further consultation with workers or their representatives. Whenever consultation is carried out, the employer must make a summary of the views expressed in the consultation process available in anonymised form to all workers.

*What will these changes mean for employers in practice?*

- Employers will need to adjust payroll practices to ensure that SSP is paid from Day 1 of sickness.

- Employers affected by the tips legislation will need to undertake consultation with staff about their tips policies and remember to diarise reviews as appropriate. There are no specific rules in the Bill governing what form that staff consultation should take, but, typically, it should include the provision of written information followed by one or more face-to-face meetings.

### **What are the next steps?**

The Bill has just started its passage through Parliament, which will take time. Even when passed, some of the provisions may not come in straight away. Regulations are needed in connection with all of the zero hours measures, and consultation may also be needed. As far as the SSP change is concerned, the Government has said it will consult on what the percentage replacement rate for those earning *below* the current flat rate of SSP should be.

Notably the Bill does not address changes to the National Minimum wage regime. Before the election, Labour promised that it would *"make sure the minimum wage is a genuine living wage"*. It planned to do this by changing the remit of the Low Pay Commission (the **LPC**), the independent body that advises Government about the minimum wage. The expanded remit would mean that the minimum wage rates should account for the cost of living. Labour also promised to remove the "discriminatory" minimum wage rate age bands, so that all adults would be entitled to the same rate. Although not addressed in the Bill, the Labour Government has already taken

steps to fulfil this promise by changing the remit of the LPC and asking them to recommend a new wage rate for 18-20 year olds. It is anticipated that these changes will come into force in April 2025.

Stay tuned for our fifth article in the series, where we will consider the provisions of the Bill affecting enforcement.

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**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](#)

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# Non-compete restrictions in employment contracts to be limited to three months

On 10 May 2023, the Government announced plans to reform the use of non-compete clauses in employment contracts. Legislation will be introduced which will limit such restrictions to three months. Other types of post-termination restrictions will not be affected.

**What is the background to this proposal?**

The reform of non-compete restrictions has been in the Conservative Government's crosshairs for some time. In May 2016 a [call for evidence](#) was launched which sought views on whether non-compete clauses stifled innovation and unfairly hindered workers from moving freely between employers. The responses to that consultation were fairly polarised with established businesses favouring the current law but new ones looking for more flexibility. The proposals were shelved by the Government at that time.

But it was back on the table again just a few years later. In December 2020, the Government launched a [consultation](#) on proposals for limiting, or potentially even banning, the use of non-compete clauses in employment contracts. The consultation was confined to non-competes and did not seek views on restricting the use of any other form of post-

termination restrictive covenant such as non-solicitation clauses.

The consultation put forward two alternative proposals:

- The first proposal was that non-compete restrictions should only be enforceable where the employer compensates the employee for the length of the restriction. This would mirror the approach taken in a number of European countries such as Germany, France and Italy. In addition, the Government sought views on supplementing this proposal with a new limit on the maximum length of such restrictions. At present, there is no maximum, but the clause must be reasonable and go no further than is necessary to protect the employer's legitimate interests. In practice, it is unusual to see non-compete restrictions exceeding 12 months and more usually they will sit around the six-month mark. The consultation sought views on whether the maximum limit should be three, six or 12 months.
- The second proposal was to ban non-compete clauses altogether, possibly with some exemptions. The consultation stressed the positive effect that such a ban could have on innovation and competition and pointed to California – where non-compete restrictions are void – as the home of the world's most innovative organisations.

## **What has the Government decided to do?**

Despite the consultation closing over two years ago (on 26 February 2021), the Government has not yet published a response. Nonetheless, the Government has announced that it intends to legislate to limit the length of non-compete restrictions contained in employment contracts to three months. The announcement makes no reference to any requirement to compensate the employee for the length of the restriction, and so it appears that this part of the first consultation proposal has been dropped. It is said that the limitation will not extend to other types of post-termination restriction, such as non-solicitation clauses or confidentiality restrictions (and, presumably, other types of restriction such as non-dealing clauses).

Otherwise the announcement is fairly scant, and the devil will be in the detail. For example, there are a number of important points that have yet to be made clear:

- **What is an “employment contract” for these purposes?** Will the law apply to contracts of employment only or also to other agreements which are collateral to the employment relationship e.g. shareholders’ agreements, long term incentive plans (LTIP) or carried interest agreements? In *Duarte v Black & Decker Corp* [2007] EWHC 2720 (QB), the High Court held that restrictive covenants contained in an LTIP agreement separate from the employment contract was no bar to the LTIP agreement being treated as an “individual

employment contract” for the purposes of deciding the governing law. It is possible that a similar approach will be taken in the new legislation.

- **Will “workers” be covered?** The announcement refers to “employment contracts” and “employees” only and makes no reference to individuals classified as “workers” who work under a contract to work or perform services for the employer. If it does *not* extend to workers then this would mean that longer non-competes could still be used for certain independent contractors or LLP members.
  
- **Will the law apply to existing employment contracts?** It is not clear whether the new law will apply retrospectively or only to new contracts. In the event that it applies retrospectively, employers will need to renegotiate non-compete restrictions which are in excess of three months (or simply accept that they are unenforceable). Thought should also be given to strengthening other terms to offset the reduction in the non-compete restriction. For example, notice periods, non-solicit and non-dealing covenants. However, in order to ensure the enforceability of any revised terms some form of “consideration” would need to be given to the employee in return for their agreement.

- **How will the new law work alongside garden leave clauses?** The Government's announcement says that the reforms will not affect an employer's ability to use paid notice periods or place employees on garden leave. However, the risk is that employers will respond to the loss of longer non-competes by extending periods of notice in order to place the employee on garden leave and keep them out of the market that way. This would undermine the stated intention of the new law and so it seems likely that the interplay of garden leave and non-competes will need to be addressed.

### **What are the next steps for employers?**

The Government has said the legislation will be introduced "*when Parliamentary time allows*". At the time of writing, no timeline for the introduction of the new law has been given. With a General Election looming, it remains to be seen whether the proposal will ever make its way on to the statute books.

Nevertheless, it would be sensible for employers to consider auditing existing employment contracts now to ascertain which contain non-compete restrictions in excess of three months. Employers will also need to review relevant template contracts to make sure that any new contracts comply with the new rules if, and when, they are introduced.

**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 Managing Associate Tom McLaughlin ([tommclaughlin@bdbf.co.uk](mailto:tommclaughlin@bdbf.co.uk)), Principal Knowledge Lawyer Amanda Steadman ([amandasteadman@bdbf.co.uk](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF contact.

[Policy paper: Smarter regulation to grow the economy](#)

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## **The King's Coronation bank holiday: are workers entitled to have the day off work?**

A national bank holiday will take place on Monday, 8 May 2023 to mark the Coronation of King Charles III. Do workers have the right to have the day off work? If so, does it need to be paid? The short answer is: it depends on what the employer's contracts and policies say.

**What does the law say?**

- The Working Time Regulations 1998 entitle workers to a minimum of 5.6 weeks' paid leave per year. For full-time workers, this equates to 28 days' paid leave per year.

- Contrary to widespread belief, bank holidays do not have special status and there is no statutory entitlement to time off work for bank holidays. However, employers may choose to include bank holidays as part of a worker's overall leave entitlement.
  
- When drafting employment contracts employers have freedom in how the minimum annual leave entitlement is distributed – this can be done in several ways with different consequences.

### **What do the contracts and policies say?**

As a starting point, employers should check the drafting of relevant policies and contracts. This will determine whether workers are entitled to leave, and pay, for this additional bank holiday.

Some possibilities of how the contract might set out the 5.6 weeks' annual holiday entitlement include:

- **“Four weeks plus eight standard bank holidays” (and in some cases, the bank holidays may even be specified).** In this scenario, there would be no automatic entitlement to have the Coronation bank holiday as an additional day off, but if the worker had some of their annual leave entitlement remaining then they may request to take it as a day's leave in the normal way.

- **“Four weeks plus all bank holidays”**. This wider drafting suggests that workers would be entitled to have the Coronation bank holiday as an additional day off. This means that full-time workers would get a minimum of 29 days’ paid leave this year instead of 28. If the employer needed the worker to work on the Coronation bank holiday it could offer the worker a day off in lieu at a later date instead.
  
- **“5.6 weeks inclusive of the eight standard bank holidays”**. This drafting means that there is no entitlement to have the Coronation bank holiday as an additional day off, since the leave entitlement is ultimately capped at 28 days for a full-time worker (i.e. a full-time worker would not get a 29<sup>th</sup> day of paid annual leave). However, as above, if the worker had some of their annual leave entitlement remaining then they may request to take it as a day’s leave in the normal way.
  
- **“5.6 weeks inclusive of all bank holidays”**. There would be no entitlement to have the Coronation bank holiday as an additional day off. Again, this drafting means the leave entitlement is ultimately capped at 28 days for a full-time worker. However, the worker could ask to take it off in the normal way. Further, this drafting would, in fact, allow employer to require that the day be taken as a day’s leave (whether the worker wants to or not) out of their usual paid leave entitlement.



- take paid annual leave on the day (assuming they have paid leave entitlement available);
- take unpaid parental leave on the day; or
- take unpaid time off to provide emergency care for dependants on the day (whether or not this type of leave is engaged will depend on the circumstances).

Employers should also consider what to do if a worker makes a request to have the day off where they have already used up their paid annual leave entitlement. Would you be prepared to let them take it as unpaid leave?

Some workers may actually prefer to work on the Coronation bank holiday. Can employers force workers to take the day off, and take the leave out of their annual entitlement? Can workers ask to take a different day off at some other time? Again, the answers will be found in the employment contract and relevant policies.

**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](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF contact.**

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**Using a PILON clause to bring forward employees' termination dates after they have resigned does not amount to a dismissal – for now, at least.**

In the recent case of *Fentem v Outform EMEA Ltd* it was decided that the employer's use of a PILON clause to bring forward an employee's termination date after he had resigned did not amount to a dismissal.

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**Look both ways before you cross the road: top tips for senior executives thinking of changing roles in 2022**

It's the start of another year and thoughts naturally turn to the new challenges and adventures that lie ahead – including in the world of work. You may be thinking about looking for a new role, or perhaps a job offer is already on the horizon.

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# **Acas publishes new “fire and rehire” guidance**

Employers sometimes try to enforce contractual amendments on their workforce by using a “fire and rehire” strategy – terminating employment and offering to hire staff back on the new terms. The Government has confirmed that it does not intend to legislate against such practices, but it asked Acas to publish new guidance for employers wanting to make contractual changes which Acas has now done.

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# **Look before you leap – does your employment contract prevent you from starting a new job?**

Look before you leap – does your employment contract prevent you from starting a new job? With the economy entering what we hope is a recovery phase we are seeing an increase in senior employees looking to start new jobs running up against restrictive covenants in their employment contracts.

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# **Company was entitled to terminate its relationship with a contractor without giving notice despite being in breach of contract itself**

A recent High Court decision demonstrates that where a Company has breached the express or implied terms of the contract, if the response or reaction from the other party itself amounts to a breach, the Company may still be able to rely on the other party's breach and terminate the contract with immediate effect.