Neutral Citation Number: [2022] EWHC 201 (QB)

Case No: QB-2021-000988

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 February 2022

Before :

MRS JUSTICE ELLENBOGEN DBE

- -

Between :

(1) THE UNION OF SHOP, DISTRIBUTIVE AND ALLIED WORKERS
(2) MR CHRISTOPHER WEBB
(3) MR JAGPREET SINGH
(4) MR SANDEEP KUMAR

Claimants

- and –

TESCO STORES LIMITED **Defendant**

- -
- -

Mr Paul Gilroy QC and Mr Stuart Brittenden (instructed by **Thompsons Solicitors LLP**) for the **Claimants**
Mr Bruce Carr QC and Ms Talia Barsam (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: Wednesday, 5 and Thursday, 6 May 2021

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APPROVED JUDGMENT

Mrs Justice Ellenbogen DBE:

Introduction

1. This judgment follows the trial of a CPR Part 8 claim against Tesco Stores Ltd, brought by four claimants, respectively: (1) The Union of Shop, Distributive and Allied Workers ("USDAW"); (2) Mr Christopher Webb; (3) Mr Jagpreet Singh; and (4) Mr Sandeep Kumar. The Second, Third and Fourth Claimants are employees of the Defendant and union representatives. Each claims on his own account and as representative of other employees who have the same interest, under CPR 19.6, to whom they refer as 'Affected Members', the definition of which term is set out in the re-amended claim form, recited below. The Claimants are represented by Messrs Paul Gilroy QC and Stuart Brittenden and the Defendant by Mr Bruce Carr QC and Ms Talia Barsam. I am grateful to all counsel for their assistance.

2. Albeit framed in a number of ways, the essential issue in this case is whether the Defendant is entitled to terminate each Affected Member's contract of employment and offer re-engagement on terms which do not include an entitlement to Retained Pay, against the background of its earlier assurances (variously expressed) that each such employee would have a permanent entitlement to Retained Pay, itself affecting the value of other benefits.

3. Following amendment and re-amendment of their claim form (the applications for which were not resisted and I granted, respectively, at the outset of trial and at the end of the Claimants' opening submissions), the Claimants seek final declaratory and injunctive relief in terms set out in their claim form, in which amendments are shown in the conventional way:

   'The Claimants seek relief in the form of an Order in the terms set out below. The Second, Third and Fourth Claimants claim under CPR 19.6 as representatives of all Affected Employees.

   For the purposes of this Order, the following terms shall have the following meanings:

   "Distribution Centres" means the Defendant's Lichfield, Daventry Clothing and Daventry Grocery Distribution Centres.

   "Affected Member" means any member of the First Claimant employed by the Defendant at the Distribution Centres, who is in receipt of "Retained Pay".

   IT IS HEREBY DECLARED AND ORDERED AS FOLLOWS:

   1. The contract of employment between each Affected Member (including each of the Second, Third and Fourth Claimant) and the Defendant is subject to an express term that the Affected Member is entitled to the payment of Retained Pay.

   .

   2. The contract of employment between each Affected Member (including each of the Second, Third and Fourth Claimant) and the Defendant is subject to an implied term that the Defendant will not exercise the right it would otherwise enjoy to give notice to terminate such contract ~~so that new terms and conditions could be offered to the Affected Member, removing that entitlement~~ for the purposes of removing the right to Retained Pay.

   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.

In respect of (i) and/or (ii) it is inequitable to permit the Defendant to act in a manner inconsistent with such representations.

3. The Defendant shall be restrained from:

(a) compulsorily withdrawing, from any Affected Member (including each of the Second, Third and Fourth Claimant), the contractual benefit of "Retained Pay"; and

(b) serving or purporting to serve notice of the termination of the contract of employment of any Affected Member (including each of the Second, Third and Fourth Claimant) 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.

…'

4. Pending judgment in these proceedings, the Defendant has undertaken not unilaterally to withdraw Retained Pay from, or serve or purport to serve notice of termination of employment on, any Affected Member as part of a dismissal and re-engagement process by which to achieve the same result. Across the three distribution centres, 43 employees (including the Second, Third and Fourth Claimants), whose names appear in the Appendix to this judgment, have been unwilling to agree to a variation to their contracts of employment, to remove their entitlement to Retained Pay. The effect of its removal would be dramatic. For the Second, Third and Fourth Claimants in this case, Retained Pay represents between approximately 32% and 39% of their wages.

5. Whilst the Defendant initially challenged the locus of the First Claimant union in these proceedings, in oral submissions it acknowledged that each of the individual claimants was properly a party, such that the issues raised would have required consideration irrespective of whether the union was also a claimant, and that no additional costs had been incurred by reason of its involvement. In such circumstances, as the Defendant acknowledges, it is unnecessary for the issue to be determined and I do not do so.

6. This being a CPR Part 8 claim, the evidence was contained in the witness statements and the documentation to which I was referred, and, subject to one, narrow, point, was not in dispute. The Claimants relied upon witness statements from each individual Claimant and from Mmes. Joanne McGuinness and Pauline Foulkes, each a National Officer of the First Claimant. The Defendant did not serve any witness statement. I granted leave to the Defendant to cross-examine each of the three individual Claimants on the narrow point of dispute, in line with the parties' earlier agreement. In the event, it has not been necessary for me to resolve the issue to which it related.

The material facts

7. The First Claimant is recognised by the Defendant, for collective bargaining purposes, within the meaning of section 178 of the Trade Union & Labour Relations (Consolidation) Act 1992. By a Recognition and Procedural Agreement dated 2009, but signed on 18 February 2010, the Defendant recognised the First Claimant 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.

8. Between 2007 and 2009, arrangements for Retained Pay were the subject of collective bargaining negotiations between the First Claimant and the Defendant, against the background of an expansion programme by the Defendant which had resulted in the closure of certain existing distribution

centres; the expansion or restructuring of certain others; and the opening of new sites. In order to ensure that its distribution centre network could continue to operate effectively, at this time of significant change, the Defendant was of the view that it needed to make sure that it would not lose all of its existing employees through redundancy. An entitlement to Retained Pay was negotiated, as an alternative to a lump sum redundancy payment (which would otherwise have been payable, as staff could not have been compelled to relocate to a new distribution centre) and as an incentive to staff to relocate. The proposed terms as to Retained Pay were put to a ballot of members and were accepted. In summary, the contractual reward package, as it then existed, was given a monetary value and the difference between that value and the value of the new terms and conditions was protected. The arrangements as to Retained Pay have subsisted since, at the latest, 2009. Each of the Second to Fourth Claimants relocated from Crick, in Northampton, to one of the three distribution centres in England mentioned above; a distance of approximately 45 miles.

9. The Defendant 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'*.

10. Staff were further provided with a 'Q&A' document, published by the Defendant 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.'

11. A joint statement was published by the Defendant and the First Claimant 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…'

12. A further joint statement was published on 5 March 2007, which I need not consider in any detail. It included the statement, '*Retained pay will not decrease over time, and will increase in line with*

any future pay awards. It is also included in the calculation of earnings based benefits, such as Pension calculations and Shares in Success.'

13. The Defendant issued similar communications to employees who relocated to Daventry Clothing and Daventry Grocery Distribution Centres (all of whom, so Mr Gilroy informed me, originally had been based at Crick) and does not seek to distinguish their position from that of the staff who relocated to Lichfield, or suggest that its intention in connection with such employees was in any way different.

14. On 18 February 2010, the First Claimant and the Defendant entered into a collective agreement entitled 'Pay and Conditions, Lichfield', which included the following provision:

> '**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.'

Albeit, on its face, referring to Lichfield, it is common ground that the above was incorporated as an express term of each individual Claimant's contract of employment (by reference to the relevant new site) and it is not suggested that the contract of any employee named in the Appendix to this judgment did not contain the same term.

15. Each of the individual Claimants relocated rather than accept a redundancy payment of between £6,000 and £8,000. Since approximately 2007, the Second Claimant has worked at Lichfield; the Third Claimant has worked at Daventry Clothing; and the Fourth Claimant worked at Daventry Clothing, moving to Daventry Grocery in 2014. In his witness statement, each notes that he took out a mortgage obtained on the basis of an income which included Retained Pay, which he had no basis to believe would be withdrawn. Mr Kumar also took out two additional loans. Each notes the significant impact upon his family's finances which the withdrawal of Retained Pay would cause. Each asserts that the sole reason for his agreement to transfer to the new site, rather than accept a redundancy payment, was the offer of Retained Pay, which had been attractive because it had guaranteed his income for as long as he remained a warehouse operative. That, last, assertion was the subject of cross-examination by Mr Carr, the thrust of which was that, faced with the alternative of a relatively modest redundancy payment, each individual Claimant would have relocated

irrespective of whether it had been said that the entitlement to Retained Pay would endure for as long as he remained employed in the relevant role.

16. On 18 January 2021, the Defendant formally announced its intention to remove Retained Pay, having notified the First Claimant of that intention (on an embargoed basis) on 15 January. On 3 February 2021, the Defendant issued a document headed 'Questions and Answers', divided into a number of sections, containing the following text, so far as material:

16.1. Section 1, headed 'Rationale':

'**Why are you doing this now?**

We regularly reflect on how our business needs to change moving forward so as to ensure it remains competitive and sustainable for the long term for the benefit of all our stakeholders, including our colleagues.

Retained Pay arrangements achieved what they were designed to achieve, but we feel it is now the right time to phase those arrangements out. The main reason for this is the changing composition of the DC workforce caused by (among other factors) a shift away from agency staff to employed Tesco colleagues. These more recently employed Tesco colleagues do not have Retained Pay which means that these particular arrangements are no longer relevant for the business because they now only benefit a relatively small minority of DC colleagues. In addition, to simplify our payroll systems and to develop our new payroll system, we believe it is the right time for us to seek to phase out the remaining Retained Pay arrangements.

Are all colleagues in receipt of retained pay being asked to agree to its removal?

Yes, all colleagues who are in receipt of retained pay are being asked to agree in return for an advance payment equal to 18 months of retained pay.

…

Are you phasing out Retained Pay now because of the equal pay claims?

We feel now is the right time to phase out Retained Pay because of the changes we have seen within our distribution workforce including a shift away from agency staff to an increased number of employed Tesco colleagues, who have joined us without these terms. Retained pay also adds unnecessary complexity to the development of our new payroll system which we are hoping to roll out to distribution soon. We are also aware some colleagues in DCs and stores have raised issues about pay and terms, by phasing out Retained Pay this should help to address these concerns.'

16.2. Section 2, headed 'Legality':

'**Tesco is removing a term from my contract. Is Tesco allowed to do this?**

Yes. Retained Pay is a contractual term in the same way as any other and, as such, is something Tesco is entitled to review and discuss with colleagues at any time.

How are the company doing this when the terms of retained pay state that it is permanent and cannot be negotiated away by Tesco or the Union?

It is correct that terms of Retained Pay originally stated that it cannot be negotiated away by Tesco and the union, this was to ensure that colleagues' arrangements were not removed as part of a pay deal to uplift other colleagues' terms, and is why we are

discussing this with colleagues on an individual basis. Where we cannot reach agreement to remove this voluntarily, we will be proposing to terminate individual contracts and offer re-engagement on different terms (subject to appropriate collective and individual consultation, if required) which is a lawful means of achieving this change.

…

What are the grounds I would be dismissed on if I am dismissed and re-engaged?

We need to ensure that this change is enacted consistently across all affected colleagues, therefore for those who do not accept it voluntarily, we will be proposing to terminate their current contract and offering to re-engage them on a new contract which is identical to their previous terms except for Retained Pay having been removed (subject to appropriate collective and individual consultation, if required). The legal grounds for this dismissal will fall under 'Some Other Substantial Reason' as per s98(1)(b) of the Employment Rights Act (1996). The reason is as explained in your brief i.e. Retained Pay has achieved what we originally set out for it to achieve for the business and now only benefits a small number of colleagues and we want to simplify our pay structure in preparation for the implementation of a new payroll system.

As per the guidelines from ACAS on 'Changing an Employment contract' this refers to a possible breach in contract if an employer forces a change without an employee's agreement or a flexibility clause in their contract. Therefore, is this a breach of contract?

No, this is not a breach of contract. We are not relying on a flexibility clause to change colleagues' terms; we are seeking colleagues' agreement. Colleagues are being asked to agree to their retained pay rights being terminated in return for an advance payment equal to 18 months of retained pay.

Where in my contract does it say that retained pay is part of my T&C's?

It's an express term as detailed in your retained pay agreement.'

16.3. Section 3, headed 'The Process':

'…

Why have we only been given 3 weeks to make a decision?

We believe 3 weeks is a reasonable amount of time to allow colleagues to make a decision.

I want it noted that I am accepting the offer of the advance payment "under duress" and that I am continuing to work "under protest", am I able to do this?

Any documentation which is signed by you and noted as "under duress" will not be accepted as you agreeing to the change and we will not process either selected option (i.e., we will not pay you the 18 month advance payment or £10 (less required deductions) and the instalments). Where we cannot reach agreement with colleagues to remove Retained Pay voluntarily, we may then propose a process to terminate individual contracts and offer re- engagement on the same terms of employment but without Retained Pay which is a lawful means of achieving this change (subject to appropriate collective and individual consultation, if required).

What will you do if I don't accept voluntarily?

The aim of this process is to agree the change on a voluntary basis and we are proposing to incentivise our colleagues to accept – and to do so promptly (i.e., by no later than 13 February 2021) – by offering them an advance payment worth the equivalent of up to 18 months' Retained Pay (based on the Retained Pay they would have received during the period from 14 February 2021 until 13 August 2022).

The offer of an advance payment will only be held open for a short period of time, following which it will be withdrawn and not be reinstated. Our hope is that our colleagues will support us by agreeing to this change voluntarily. However, if we are not able to secure the agreement of all colleagues to this change on a voluntary basis by 13 February 2021, the Company will enter into a dismissal and re-engagement process with colleagues to remove Retained Pay (subject to individual and collective consultation where necessary), where no incentive will be offered.

…

I'm nervous about the process of being potentially dismissed and re-engaged. Following consultation if I'm issued with notice of dismissal what is the specific wording in regards to this notice of dismissal?

The wording on the dismissal and re-engagement letter specifically in regards to issuing notice of dismissal would be 'I can confirm that, as we were unable to come to an agreement regarding the cessation of your Retained Pay, I made the decision to dismiss you and issue you with X weeks' notice to end your employment on X, with an offer to re-engage you on the same contract but with no Retained Pay'.

What happens if I don't accept the offer of re-engagement but continue working?

We will need you to actively accept the offer of re-engagement if we are to continue employing you. If you do not accept the offer of re-engagement you will no longer be employed by Tesco.'

16.4. Section 5, headed 'Voluntary Offer':

'**What is the legal definition of "advance payment" in terms of what is being offered?**

An advance payment is pay you would otherwise have received had you continued to work as normal, just paid in one lump sum.

How is the lump sum advance payment calculated?

Your lump sum advance payment will be equivalent to 18 months' worth of your Retained Pay. For example:
Current weekly retained pay: £60
One-off advance payment = £60 x 78 weeks (18 months) = £4,680
(All figures are gross and subject to tax and national insurance deductions.)

If I accept when will I get paid the lump sum advance payment?

If you accept by 13 February 2021, this will be paid to you on Friday 5 March 2021, which is your March pay date. As the new terms are effective from 14 February you will receive Retained Pay as normal up to and including 13 February. From 14 February you will no longer receive any Retained Pay as part of your normal pay cycle as you will already have received it as part of the lump sum advance payment.

We would usually be receiving a pay rise in July, is this included in the calculation of the advance payment?

The current weekly value of your Retained Pay has been used to calculate the value of your individual advance payment; you can review this amount in the "advance payment individual statement" issued to you by your manager. Pay awards are discretionary, meaning that they are not guaranteed, and are therefore not included for the purposes of the advance payment calculation. In our view there is a cashflow benefit from receiving the advance payment.

…

Is the 18 months' payment a buy-out?

No, it is not a buy-out; instead, it is an advance payment of the Retained Pay you would otherwise have received had you continued to work as normal, just paid in one lump sum, rather than as part of the usual pay cycle over the next 18 months.

Is the lump sum advance payment tax-free?

No, it will be subject to tax and National Insurance contributions in the usual way.

Is the lump sum advance payment pensionable?

Yes, the advance payment would be pensionable and therefore the % contribution that you normally make would be applied to the advance payment lump sum.

…

Can I have more than 18 months' payment?

No. The proposed 18-month advance payment is an appropriate arrangement in the circumstances and is the most generous offer we will make. If not accepted by 13 February 2021, it will be withdrawn and not be reinstated.

…

Can I opt to be paid my retained pay amount monthly for the next 18 months rather than receive it in one lump sum?

Yes, you can opt to either accept the advanced payment lump sum or alternatively accept a one-off payment of £10 (less required deductions) and the same amount payable in equal instalments on our standard pay days over an 18 month period in respect of the period 14 February 2021 to 13 August 2022. Colleagues will need to accept one of these two options by 13 February 2021 in order to avoid a potential process of dismiss and re-engage. Please review the updated manager pack and letters which now reflect this additional option.

In the alternative option why am I being asked to accept £10?

To create a legally binding agreement between Tesco and each individual colleague there must be what is referred to as 'financial consideration' which, in this case, is a financial payment that Tesco is giving to colleagues over and above what they would normally have received. This payment is one of the aspects confirming that a binding agreement has been entered into between Tesco and you for your Retained Pay to be removed.

Why is £10 not being offered as part of the advance payment?

> The cash flow benefit of the advance payment is, in itself, the 'financial consideration' and therefore the £10 does not need to be offered.
>
> …
>
> **Why isn't redundancy being offered?**
>
> Redundancy only applies where "work of a particular kind" (or the need for colleagues to carry out this work) has ceased or diminished, in this case the "work or a particular kind" still exists and it is a change to contractual terms which is required.'

16.5. Section 6, headed 'Contracts & Benefits':

> '**If I am dismissed & re-engaged are my other terms, conditions and benefits affected in addition to retained pay?**
>
> No, you keep all other terms, conditions and benefits, with the exception of those that are directly linked to [your] pay e.g. % pension contributions, which will reduce accordingly to reflect the removal of your retained pay.
>
> **Will I receive a new contract to sign?**
>
> No, if you agree to the new terms you will receive a variation of terms letter which you will be required to sign.
>
> **Retained Pay was a payment that amalgamated a number of terms and benefits, with the removal of Retained Pay will you be reinstating any of these legacy terms or benefits?**
>
> No, Retained Pay will cease (as will those terms relating directly to pay) but all other terms that colleagues currently have will remain the same. Colleagues have been offered an advance payment worth the equivalent of 18 months' Retained Pay to incentivise them to accept this change.
>
> **Can I be given the choice to be dismissed and re-engaged on an older legacy contract?**
>
> No, you will stay on their existing terms without retained pay. Alternatively, you can choose to move onto a new Tesco contract.
>
> …
>
> **If I get dismissed and re-engaged, do I keep my length of service?**
>
> Yes, colleagues will retain their length of service.'

17. A document entitled 'Changing Terms & Conditions — Retained Pay Managers Pack' included the following statement:

> 'Retained Pay was introduced at a time when our DC network was going through a significant change. In order to ensure that the DC network could continue to operate effectively, we had to make sure we did not lose all of our existing colleagues through redundancy. Although many of our colleagues did opt for redundancy, Retained Pay, which we negotiated with our unions as an alternative to a lump sum redundancy payment - was crucial to us being able to retain enough colleagues to avoid serious disruption to our DC network and the wider business'.

18. Each of the individual Claimants and the employees named in the Appendix to this judgment has refused to consent to the removal of Retained Pay and, subject to the undertaking given by the Defendant in these proceedings, faces dismissal and the offer of re-engagement on terms which would not include Retained Pay.

The parties' submissions

For the Claimants

19. Mr Gilroy's primary submission was that the express term as to Retained Pay incorporated in each contract of employment ought to be construed to mean that, for as long as each affected employee remained employed by the Defendant in the relevant role, his entitlement to Retained Pay could not be removed, including by termination and re-engagement under a new contract which did not provide for that entitlement; the word 'permanent' could not be given any other meaning, in particular in the context of the circumstances in which the term had been agreed.

20. In the alternative, having regard to the principles set out in in **Marks and Spencer plc v BNP Paribas** [2016] AC 742, per Lord Neuberger, at [16] to [21] and **Ali v Petroleum Company of Trinidad & Tobago** [2017] IRLR 432 PC, per Lord Hughes, at [7], Mr Gilroy submitted that a term to the effect set out at paragraph 2 of the claim form (as re-amended) was to be implied, by reason of business efficacy, the officious bystander test, or by operation of the implied term of mutual trust and confidence. Acknowledging that a term cannot be implied to contradict an express term, Mr Gilroy submitted that there was ample authority, beginning with **Aspden v Webbs Poultry and Meat Group (Holdings) Ltd** [1996] IRLR 521, supportive of his contention that the Defendant's otherwise unfettered express power to give notice to terminate the contract of employment could be subject to an implied restriction in the circumstances of this case, so as to give effect to the parties' mutual intention at the time at which the entitlement to Retained Pay was introduced. In his submission, such an implied term would preclude the Defendant from dismissing any affected employee, other than for good cause which was altogether distinct from, or independent of, the removal of the entitlement to Retained Pay, such as (but not limited to) gross misconduct, in circumstances in which to do so would deprive that employee of a continuing entitlement to Retained Pay (see **Hill v General Accident Fire and Life Assurance Corporation plc** [1998] IRLR 641, CS; and **Briscoe v Lubrizol** [2002] IRLR 613, CA).

21. In Mr Gilroy's submission, the ordinary rules of construction applied to the collective agreement between the Defendant and the First Claimant (**Anderson & Ors v London Fire & Emergency Planning Authority** [2013] IRLR 459 CA, per Maurice Kay LJ at [14] to [16], and [22]). The question to be asked was, *'What meaning would the… agreement convey to "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were" at the time of the agreement?...'* The Court should avoid a construction which *'flouts industrial common sense'* [22]. All of the Defendant's communications to staff had been unequivocal that the entitlement to Retained Pay was intended to be permanent and, subject to a few clearly defined exceptions, would endure for as long as each recipient was employed by the Defendant in the relevant role; a guarantee, or protection, *'for life'*. It was clear that the parties had addressed their minds to *'future proofing'* the entitlement, which could only be changed by *'mutual consent'*. For that reason, staff had been given an assurance, akin to an undertaking, that their entitlement to Retained Pay would not be negotiated away, or unilaterally reduced, or removed, by the Defendant. That being so:

    21.1. it was essential, for the purposes of business efficacy, to imply the relevant term, without which the guarantee of permanence could not operate. That was consistent, submitted Mr Gilroy, with the approach adopted in **Villella v MFI Furniture Centres Ltd** [1999] IRLR 468, QB and in **Jenvey v Australian Broadcasting Corporation** [2002] IRLR 520, QB;

21.2. the officious bystander, if asked whether the Defendant could somehow secure the unilateral removal of a permanent entitlement by issuing notice and re-engaging on revised terms, would unhesitatingly reply *'No!'* (see **Jenvey**);

21.3. in circumstances in which an employer positively misleads its employees in order to secure various commercial imperatives and then seeks to renege on the positive assurances given to its workforce, it was difficult to see how that was not destructive of trust: see **Malik v BCCI** [1998] AC 20 HL, per Lord Steyn [47];

21.4. the Defendant's submissions did not engage with the above propositions.

22. In so far as the Defendant might suggest that the implication of such a term would fall foul of the so-called 'Johnson exclusion zone' (see **Johnson v Unisys** [2001] 2 WLR 1076, HL; **Eastwood v Magnox Electric plc** [2004] 3 WLR 322, HL; and **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2011] UKSC 58), such authority merely precluded a claim to recover damages for post-termination losses arising from the manner of an employee's dismissal, because '*Any such complaint was intended by Parliament to be adjudicated on by the specialist employment tribunal subject to the various constraints to which I have referred. Parliament did not intend that an employee could choose to pursue his complaint of unfair dismissal in the ordinary courts, free from the limitations carefully crafted by Parliament for the exercise of this statutory jurisdiction'* (**Edwards**, per Lord Dyson [40]). In this case, employment had not been terminated and no claim had been advanced for post-termination pecuniary loss. Furthermore, the **Johnson** line of authority had not considered or overruled the **Aspden** line of authority, which remained good law. In any event (per Lord Dyson in **Edwards** [44]), an injunction to prevent a threatened unfair dismissal did not cut across the statutory scheme for compensation for unfair dismissal and none of the objections based upon the co-existence of inconsistent parallel remedies applied. Accordingly, submitted Mr Gilroy, the Claimants in this case stood outside the Johnson exclusion zone.

23. In the further alternative, it was Mr Gilroy's submission that the Claimants could rely upon estoppel and/or forbearance. As to the former, the Defendant had made unequivocal representations to the affected employees (as summarised at paragraphs 9 to 14 above), to the effect that they would continue to receive Retained Pay, and it would be inequitable for the Defendant to enforce its legal rights in a manner inconsistent with those representations: **The Kanchenjunga** [1990] 1 Lloyd's Rep 391, per Lord Goff, at p399; **Virulite LLC (a limited liability company incorporated in Nevada, USA) v Virulite Distribution Limited, 1072 Technology Limited** [2014] EWHC 366, QB [120-21]. Detrimental reliance was not a necessary ingredient. Whilst it was acknowledged that a representation is, generally, revocable, that would not always be the case: *'…the determinative consideration is whether it is inequitable in all the circumstances for the representor to enforce his rights inconsistently with his representation. Those circumstances will include, but are not limited to, the precise terms of the representation, how the representee has responded to the representation, and whether it remains possible for the representee to comply with his original obligation.'* (**Virulite** [122]). The representation made here had been permanent in nature and analogous to a guarantee; a matter of critical importance, submitted Mr Gilroy — it was not revocable (**Virulite** [125]), but extinguished such rights as the Defendant might otherwise have to rely upon the termination clause.

24. Mr Gilroy pointed to the distinction in law between a contractually binding variation and forbearance: in the former case (said to be applicable here), the individual Claimants need not show reliance upon the relevant promise, or that it would be inequitable for the promisor to go back on it. The consideration provided by the affected employees was the practical benefit to the Defendant in enabling it to continue its operations, rather than lose experienced staff.

25. Finally, Mr Gilroy submitted that the declaratory relief sought was plainly appropriate, applying the principles in **FSA v Rourke** [2002] CP Rep 14, Ch.D, per Neuberger J (as he then was). The

issue affected the livelihoods of a large number of staff who were reliant upon Retained Pay to support their families and meet their outgoings. If granted, the declaration sought would cause the Defendant to change course. For the same reasons, final injunctive relief ought to be granted, in the interests of justice. The Claimants and affected members had no alternative available remedy. Should they be dismissed, proceedings before the employment tribunal for unfair dismissal were not guaranteed to succeed, having regard to the matters which would fall, respectively, within and outside its consideration in such claims and the relatively low threshold required to establish that dismissal had been for 'some other substantial reason of a kind such as to justify the dismissal' ('SOSR') under section 98(1)(b) of the Employment Rights Act 1996 ('the ERA'). Were a claim to succeed, damages would be subject to a statutory cap, in this case limited to one year's gross pay, which would not reflect the entirety of the employees' pecuniary loss. A hearing would be unlikely to take place before the end of 2022. In any event, the existence of a cause of action or remedy in a different jurisdiction does not itself preclude the implication of the relevant contractual term, or the Court from granting the relief sought in these proceedings, Mr Gilroy submitted.

For the Defendant

26. It was Mr Carr's overarching submission that each individual Claimant's contract of employment included an express term which was to be construed so as to entitle him to Retained Pay for as long as his employment continued under the terms of that contract. The Claimants were seeking a radical and unwarranted extension of the common law, whereby an implied term operating contrary to express terms in the relevant contracts of employment ought to prevent the Defendant from terminating their employment. In Mr Carr's submission, (1) there was no basis for the implication of the term for which the Claimants contended; (2) the Defendant was entitled to terminate the contracts in accordance with their express terms and its reason for doing so was irrelevant, save to the extent that it could be challenged in the employment tribunal; (3) that being so, it was illogical to imply any term which precluded the offer of re-employment under a new contract; (4) the remedy available to the individual Claimants was limited to that for which the ERA provides; and (5) in any event, the claim advanced by the Claimants was outside the scope of the common law, which could not properly be extended.

27. In Mr Carr's submission, the collective bargaining arrangements agreed between the First Claimant and the Defendant meant that changes to terms and conditions, including rates of pay, could be achieved by union members at the distribution centres in which balloting on acceptance of a joint negotiating committee's decision took place. Thus, unless "guarantees" were given in relation to Retained Pay, a situation could arise, in the future whereby a vote of the majority who were not in receipt of it could impact adversely on the minority who were. It had been the desire to avoid that situation which had been central to the implementation of Retained Pay. It was in that sense that the entitlement had been 'future proofed', which was consistent with the evidence of Ms Pauline Foulkes, National Officer of the First Claimant [14] and with the contemporaneous correspondence to certain employees, submitted Mr Carr, in which the Defendant had stated (with emphasis added by Mr Carr), *'…We have now formally agreed to the Trade Union's request that retained pay should be a permanent figure which is not subject to reductions or amendments. The only change to the figure would be the application of the annual pay increase. The only exception to this will be where individuals ask to change rotas or role, in which case the retained pay would be recalculated…'* Mr Carr also placed reliance upon:

    27.1. a document entitled, 'Questions From Briefings Commencing 21/01/07 Livingston Depot[1]' which included the following questions and answers (with Mr Carr's emphasis added):

[1] Whilst this case is not concerned with employees at Livingston, all parties contended that the intention behind the contractual entitlement to Retained Pay under consideration in this case is evidenced by the documentation relating to the same entitlement for staff who relocated to that distribution centre. It was Ms Foulkes' evidence [16] that it was her understanding that the Retained Pay agreement for Livingston was used as a template for Lichfield, Daventry Clothing and Daventry Grocery.

> 'Q6 Will Retained Pay be guaranteed forever?
>
> A6 Yes, providing your circumstances do not change. See Q7 and A7.
>
> …
>
> Q8 Why change the contract if we are not losing any money?
>
> A8 We want to introduce the concept of Retained Pay to ensure that there is long term protection for you.
>
> Making Retained Pay an individual contractual entitlement prevents any possibility of this being subject to negotiation or change in the future via a ballot of the membership of which existing staff would be in the minority.
>
> Retained Pay ensures that this will never happen.'; and

27.2. a document produced by the First Claimant for its members, in relation to the then proposed deal at Livingston, which noted that the latter satisfied the key principles that members at the existing site should not lose out financially by transferring to the new site. Amongst those principles was said to be, *'Guaranteed protection of these arrangements — they cannot be altered by Tesco, Usdaw or Usdaw shop stewards in future negotiations at the new site.'*

In Mr Carr's submission, Retained Pay was both guaranteed and permanent in as much as it was a feature of the contract of employment which could not be changed without consent, or via the collective bargaining process otherwise applicable to all terms of the contract. It was clear that phrases such as 'protection for life' (which could not have been intended literally) were to be so understood.

28. Mr Carr submitted that a contract of employment is ordinarily terminable on notice; in the vast majority of cases, as here, pursuant to an express term in the contract. An employer is entitled — as a matter of contract — lawfully to terminate the contract by giving proper notice and can do so for good, bad or indifferent reasons. The employee has no remedy unless the dismissal is in breach of contract and, then, only for that breach: **Malloch v Aberdeen Corporation** [1971] 1 WLR 1578. Damages are generally limited to the lost remuneration which would have accrued during the notice period. As was apparent from Lord Neuberger's speech in **Marks & Spencer plc v BNP Paribas**, at [17] and [21], no term will be implied into a contract on the basis of business efficacy if the contract is effective without it and, for a term to be implied, it must be so obvious as to go without saying and, as 'a cardinal rule' [28], must not contradict any express term of the contract. A recent summary of the stringency of the tests for implying contractual terms and the limited scope for doing so appeared in **Yoo Design Services v Iliv realty Pte Limited [2021] EWCA Civ 560**, per Carr LJ, at [47] to [51].

29. In Mr Carr's submission, the circumstances in which the courts had recognised a limitation on the power to dismiss were very limited and did not apply in this case. They had arisen in cases in which the parties had contracted for a particular benefit which was then payable under the contract and were not comparable to the instant circumstances. **Aspden** [13] and **Awan v ICTS** [2019] IRLR 212, EAT [46] recognised that, in the specific circumstances of a dismissal which would frustrate the purpose for which permanent health insurance (PHI) had been provided, there should be implied into the contract a term which restricted the employer's power to terminate it. What was remarkable about the present case was that the Claimants' original contention had been not that the Defendant lacked the power to dismiss but that, should it do so, it could not, as a matter of law, make an offer of re-employment on terms which did not include an entitlement to Retained Pay. That was said to be 'particularly bizarre' given that the acceptance or rejection of any such offer was not within the

Defendant's control and was a matter for the employee in question. If the offer were accepted, a new contract would apply to the ongoing/revived employment. On that case, the parties must be taken to have agreed that, whilst there was no contractual restriction on the power to dismiss, there was a restriction as to the terms on which new employment might be offered, by reference to a particular component of the former overall pay package. None of the tests applicable to the identification of implied terms in a contract supported such a proposition, submitted Mr Carr. In addition, as noted by Simler P (as she then was), in **Awan**, the Court should not imply such a term too readily and should tread warily in this area. Furthermore, in **Reda v Flag Limited** [2002] IRLR 747, PC, at [51], Lord Millett had indicated the strict boundaries within which the **Aspden** line of authority should be confined:

> 'Aspden… was not concerned with the implied term of trust and confidence at all. The question was whether the employer's express right of dismissal could be limited by implication arising from the unusual circumstances in which the contract had been entered into and the inherently contradictory terms which resulted. The better course might have been to rectify the contract to include the term contended for as an express term, an unusual course but one which would appear to have been justified by the evidence, but even if the case is taken as a rare example of a term being implied into a contract to qualify an express right, the justification for this course lay in the need to reconcile express terms of the contract which were mutually inconsistent.…'

In the instant case, submitted Mr Carr, there was no mutual inconsistency of terms; the express terms as to pay (including as to Retained Pay as a permanent feature of an individual's contractual eligibility) were in no sense inconsistent with the express right to terminate on notice.

30. As re-amended, the Claimants' case fared no better, Mr Carr submitted. First, it did not correspond with the declaratory relief sought. Secondly, if anything, it afforded less support for the implication of the relevant contractual term. Thirdly, it made the "permanency" argument considerably more difficult to run, in equating with a contention not that the relevant term constituted a permanent feature of the existing terms and conditions, but that employment itself was permanent.

31. Furthermore, Mr Carr contended, the Claimants' case would appear to admit of the Defendant's entitlement, as a matter of contract, to dismiss the affected employees and then offer to re-engage them on different terms, as long as the entitlement to Retained Pay was unaffected. That would admit of the reduction of other aspects of contractual remuneration, so as to achieve the same overall financial result. The Claimants relied for their submissions on the promises made by the Defendant, but those had been no different in character from any contractual promise as to remuneration, which cannot be reduced without consent whilst the contract subsists, but does not bar the employer from terminating employment and offering to re-engage on less favourable terms; a practice colloquially referred to as 'fire and rehire'. The 'fired' employee is free to accept or reject the 're-hire' and, in either event, retains his or her statutory unfair dismissal claim under the ERA. Outside the area of PHI, there had been one authority (**Jenvey**) in which the courts had been prepared to imply some restriction on the right to dismiss – but, even there, the right had operated only so as to prevent what amounted to a false basis for dismissal, designed to prevent access to an enhanced redundancy payment, in circumstances in which the true reason for dismissal had, indeed, been redundancy. By analogy with the PHI cases, in which an individual's right to such benefit had accrued, or been in the process of accruing, under a long-term sickness scheme, the restriction on dismissal through the mechanism of an implied term was said to apply equally to cases in which redundancy rights had accrued. Even then, it was said, the principle, if it were to apply, had to be 'narrowly circumscribed' and did not mean that an employer would be unable to dismiss an employee whenever a sickness or redundancy scheme was in place because of the possibility that, at some date in the future, employees might become subject to those schemes: *'that would turn the traditional principles of contract upside down'* [20]. At [26] Elias J (as he then was) had held,

> 'I would formulate the terms as follows: "Once an employer has determined that an employee will be dismissed by reason of redundancy, such that his dismissal for any other reason will defeat the employee's right to contractual benefits which accrue when the dismissal is by reason of redundancy, the employer may not lawfully dismiss the employee for any reason other than redundancy, unless the dismissal is for good cause." In my opinion this term can readily be implied whether on the officious bystander or the business efficacy tests of implied contractual incorporation.'

In Mr Carr's submission, the instant case did not fall within the above principles, nor did the term which the Claimants sought to imply fall within the limited restriction implied in the PHI cases, or in **Jenvey**.

32. Thus, submitted Mr Carr, the individual Claimants' remedy, if any, lay in the employment tribunal, before whom the Defendant's rationale could be challenged, whether or not any offer of re-engagement were to be accepted: **Hogg v Dover College** [1990] ICR 39, EAT. The reason for dismissal typically advanced by a former employer in such cases was SOSR, by reference to which the tribunal would determine the claim. Amongst the statutory remedies which a successful claimant could seek was reinstatement, on the terms and conditions which had applied prior to dismissal.

33. In any event, Mr Carr submitted, the effect of the House of Lords' decision in **Johnson v Unisys** had been to create the 'Johnson exclusion zone', such that, where the proposed cause of action at common law would duplicate the statutory right to claim unfair dismissal, the 'exclusion zone' operates to preclude recovery at common law; the employee is limited to his or her statutory claim under the ERA. In Mr Carr's submission, the instant Claimants were in a far better position than had been Mr Johnson, whose compensatory award for unfair dismissal had then been capped at £12,000, in the context of asserted losses in the region of £400,000, said to arise from the damage caused to his mental health by the manner of his dismissal. His state of health had precluded the options of reinstatement or re-engagement. In **Kerry Foods v Lynch** [2005] IRLR 680, the EAT held that the effect of the decision in **Johnson** was that it was not appropriate to apply the implied term of trust and confidence to a dismissal. That reasoning applied equally to the different implied term for which the Claimants contended in this case, submitted Mr Carr. How could it sensibly be said that the Defendant would be in breach of any implied term of the individual Claimants' employment should it dismiss with an offer of re-employment, when to dismiss simpliciter (without such an offer) would not engage any such term, by reason of the Johnson exclusion zone?

34. In so far as the Claimants relied upon the dicta of Lord Dyson in **Edwards**: (1) such dicta had been obiter and referable to express terms only; (2) his reasoning had gone to the primary question of whether to imply a term at all, rather than to whether, in the event that such a term fell to be implied, or was express, it should be enforceable by way of injunction, but not as an action for damages; (3) the other members of the Court either had reached the same ultimate conclusion via a different route or had made no reference to paragraph 44 of Lord Dyson's speech; and (4) Lady Hale and Lord Kerr had expressly doubted the possibility of a common law claim being maintainable by reference to the remedy sought. Whilst, in **Eastwood v Magnox**, the House of Lords had distinguished **Johnson** in relation to a claim which had existed independently and in advance of a dismissal, such that it had fallen outside the Johnson exclusion zone, the implied term for which the Claimants contended in this case operated directly on the power to dismiss.

35. The individual Claimants' case on estoppel and forbearance could not get off the ground, submitted Mr Carr. They could not point to any unequivocal representation to the effect that the Defendant would give up its right to terminate their contracts on notice, or establish that the documentation on which they relied had been sent to and/or received by them and all affected employees. The representation for which the Claimants in fact contended, to the effect that they would continue to receive Retained Pay, ignored the correct legal test; being whether the Defendant had made an unequivocal representation that, in the language of Lord Goff in **The Kanchenjunga**, cited at paragraph [120] of **Virulite**, *'it does not intend to enforce its legal rights'*. To answer that question,

one had to identify, first, the relevant contractual right and, then, the representation said unequivocally to have constituted its abandonment. The case also failed on reliance and suspensory effect. As to the latter, Mr Carr submitted, the Claimants had not demonstrated that the giving of notice to terminate at this stage would be so disadvantageous to the affected employees that the Defendant's right to do so should be regarded as extinguished, rather than suspended. Further, on the available evidence in this case, it was not possible to say that, approximately 12 years after the entitlement to Retained Pay had been agreed, it was unconscionable for the Defendant to dismiss the affected employees, in accordance with its express contractual right. The principle of forbearance did not avail the Claimants either, designed as it was to bridge a gap in relation to a variation for which there was no consideration. That was not this case. In any event, questions of estoppel and forbearance (introduced by amendment) were fact- and, hence, Claimant-sensitive and, for those purposes, it could not be assumed that the individual Claimants could properly bring representative proceedings on behalf of other employees under CPR 19.6.

36. For all such reasons, in Mr Carr's submission, the court should construe the express term as to Retained Pay in the manner for which the Defendant contended; there was no basis, in law or fact, for implying the term for which the Claimants contended; equity could not assist the Claimants and the relief sought should be refused.

Discussion and conclusions

The proper construction of the express term as to Retained Pay

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 Hoffman 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.

Is a term to be implied?

41. The law on implied terms has been summarised recently, by Carr LJ, in **Yoo Design Services** [47] to [51], set out below:

> '**The law on implied terms**
>
> 47. The implication of contractual terms involves a "different and altogether more ambitious undertaking" than the exercise of contractual interpretation which identifies the true meaning of the language in which the parties have expressed themselves: the interpolation of terms to deal with matters for which, ex hypothesi, the parties have themselves made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of the "extraordinary" power so to intervene (see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 ("*Marks & Spencer*") at [29] (citing Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481)).
>
> 48. Those constraints have been the subject of well-known scrutiny by the courts (see the classic statements in *The Moorcock* [1889] 14 PD 64 ("*The Moorcock*") at 68 per Bowen LJ; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605 per Scrutton LJ and *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206 at 227 per Mackinnon LJ). The later Privy Council decision in *BP Refinery (Westernport) Pty Ltd v The President Councillors and Ratepayers of the Shire of Hastings* ("*BP Refinery*") (1977) 180 CLR 266

deserves particular mention. There Lord Simon (delivering the majority judgment) stated (at 283):

> "…for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

49. The leading authority from recent times is *Marks & Spencer*, where the Supreme Court approved the remarks of Lord Simon in *BP Refinery*, albeit subject to qualification and observation. Amongst other things, (at [21]) Lord Neuberger questioned whether a requirement that the term to be implied had to be "reasonable and equitable" would usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Lord Neuberger also commented that he suspected that, whilst the requirements of business efficacy and obviousness could be alternatives in the sense that only one need be satisfied, it would be a rare case where only one of those two requirements would be satisfied.

50. Since the analysis of Lord Neuberger in *Marks & Spencer* (at [15] to [31]) the Supreme Court and Privy Council have consistently made it clear that whether or not a term falls to be implied is to be judged by reference to the test of business efficacy and/or obviousness (see for example *Hallman Holding Ltd v Webster* [2016] UKPC 3 (at [14]); *Airtours Holiday Transport Ltd v HMRC* [2016] UKSC 21; [2016] 4 W.L.R. 87; [2016] 4 All ER 1 (at [38]) and *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57; [2016] 3 WLR 1422; [2017] AC 73 (at [31]). In *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2 at [7], Lord Hughes commented:

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

51. In summary, the relevant principles can be drawn together as follows:

    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;

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 precondition 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.'

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. For the sake of completeness, I address **Jenvey**, briefly. As Elias J held ([25] to [26]), whilst the situations with which the PHI line of authority was concerned were not identical, they were analogous. The PHI cases had been concerned with a situation in which the employee had needed to remain in employment in order to obtain, or retain, the relevant contractual benefit. By contrast, the right to any contractual compensation for redundancy required that the contract be terminated. Nevertheless, in both situations the employer might have promised to cater for the particular circumstances by conferring a benefit on the employee according to an established scheme and, in his view, there were circumstances in which it would be contrary to the function and purpose of a redundancy scheme to permit the employer to exercise its power so as to deny the employee the very benefits which the scheme envisaged would be paid. In my judgment, there is no magic to the existence of a 'scheme'; the clear ratio of **Jenvey** is that a contract should not be construed so as to permit an employer to exercise a power in circumstances in which to do so would frustrate the function and purpose of the contract in denying the very benefit which it envisages will be paid. As a matter of principle, it matters not whether that benefit is PHI; a contractual redundancy payment; or the entitlement to Retained Pay for as long as the employee remains employed in the same role.

46. Nevertheless, Mr Carr rightly objects to the implication of any term which would have the effect of precluding an employer which is otherwise contractually entitled to give notice to terminate from offering to re-engage on different terms. Once terminated, the contract is at an end and it is a matter for the former employee whether s/he wishes to accept any offer of re-engagement by the former employer on the terms proffered. The difficulty in this case lies not in the intention to offer re-engagement but in the intention to terminate the original contract for the purpose of extinguishing or diminishing the right to Retained Pay, consistent with paragraph 2 of the claim form as re-amended. That also disposes of Mr Carr's objection that all an employer need do, if precluded from removing the right to Retained Pay, is reduce the value of other contractual benefits, so as to achieve the same overarching financial result. In the absence of consent, that could only be achieved by the same 'fire and rehire' mechanism which his client proposes to adopt and, as its purpose would be to remove or diminish the entitlement to Retained Pay, albeit by an alternative route, it would fall foul of the implied restriction on the right to terminate. In any event, the submission could equally

have been made in **Aspden** and the related PHI cases. That it apparently was not might be thought to provide some indication of its merit.

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.

The Johnson exclusion zone and the availability of tribunal proceedings for unfair dismissal

48. I reject Mr Carr's submission that the term which I find to have been implied in each contract falls foul of the **Johnson** line of authority, which did not overrule or otherwise cast doubt on the **Aspden** line. Equally, it would be curious if the need to revisit the **Aspden** line of authority in its light had not occurred, for example, to Simler P, as she then was, in **Awan**. Put simply, the instant circumstances are not concerned with the manner of dismissal, or the application to a dismissal of the implied term that the parties will not act in a manner which is calculated, or likely, to destroy or seriously damage the relationship of mutual trust and confidence between them. The term to be implied here restricts the employer's ability to dismiss, per se. The claims sit outside the Johnson exclusion zone.

49. That is not to undermine the principle (see **Kerry Foods Ltd** [21]) that *'an employer's service of a lawful notice of termination coupled with an offer of continuous employment on different terms cannot of itself amount to a repudiatory breach of contract. There is no present breach of the existing terms or an anticipatory breach in indicating lawful termination of the contract on proper notice.'* Rather, the point here is that the termination of the existing contract would be unlawful, constituting a breach of the existing terms by dint of the implied restriction on the circumstances in which it can be effected.

50. The availability, per se, of a claim for unfair dismissal (in the event of a dismissal) affords no answer or bar to the instant claims, or relief sought, in this jurisdiction. The focus of an unfair dismissal claim is very different from that of this Court; if the claim succeeds, the compensatory award will be capped; reinstatement under section 114 of the ERA is very infrequently awarded[2] and, in any event, non-compliance with any such order would result simply in an additional award of between 26 and 52 weeks' pay (if the former employer could not show that it was not practicable to comply with the original order: see sections 117(3)(a) and 117(4)(a) of the ERA). There is no machinery by which to compel reinstatement itself. The workload of the employment tribunal is such that the substantive hearing of any claim is unlikely to be listed for a lengthy period.

Estoppel/Forbearance

51. It follows that it is unnecessary for me to consider the alternative bases upon which Mr Gilroy puts his case. I have some sympathy with Mr Carr's position that, to the extent that reliance is in issue for such purposes, that is a Claimant-specific matter and, thus, is difficult for the individual

[2] See, for example, the annual official statistics produced by the Ministry of Justice for the last three years in which both the number of unfair dismissal claims disposed of at a hearing and the number of those claims in which an order for reinstatement or reengagement had been made were recorded: (a) in 2014/15 (et-and-eat-tables.xlsx (live.com)), of 18,387 claims, only 5 (0.03%); (b) in 2015/16 (employment-tribunal-and-employment-appeal-tribunal-tables-2015-16.xlsx (live.com)), of 14,549 claims, only 7 (0.05%); and (c) in 2016/17 (employment-eat-201617.xlsx (live.com)), of 9,039 claims, only 3 (0.03%), resulted in the making of either such order. The fact that the number of reinstatement/re-engagement orders made is no longer recorded might itself be thought to indicate that there has been no significant upward change to that pattern in subsequent years.

Claimants to advance on a representative basis. That said, it is not impossible for them to do so and one can readily envisage, on the particular facts of this case, that the evidence which each employee whom each individual Claimant represents would give is likely to be to the same effect. Indeed, all three individual Claimants gave essentially the same evidence on the point, both in their witness statements and under cross- and re-examination.

Relief

52. I turn, therefore, to consider the relief sought by the Claimants, which is discretionary. Acknowledging that the existence of the implied term is a necessary, but insufficient, basis for granting it, I note that, in this connection, Mr Carr's fire was, for the most part, directed at the asserted lack of merit in the Claimants' case on liability, rather than at whether the relief sought was appropriate, should that case succeed.

Declaratory relief

53. Dealing, first, with the Claimants' application for declaratory relief, I bear in mind the principles set out by Neuberger J in **FSA v Rourke**: *'It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration'.* Applying those principles to the instant facts, it seems to me that justice to the Claimants and those whose interests they represent lies in ensuring that the terms of all affected employees' contracts of employment are definitively declared, in circumstances in which the previously declared intention of their employer has been to dismiss them and to offer re-engagement on terms which would not include an entitlement to Retained Pay. In such circumstances, justice to the Defendant tends in the same direction. Such a declaration would serve a useful purpose in clarifying the extent of the parties' respective contractual rights. No special reasons have been advanced, or are independently apparent, as to why a declaration ought not to be granted.

54. In those circumstances and consistent with the conclusions which I have set out above, I consider that it is appropriate to grant declaratory relief to the Claimants, in the following terms:

    54.1. In the declarations which follow, 'Affected Employee' is defined to mean each of the Second, Third and Fourth Claimants and each employee named in the Appendix to the judgment of Ellenbogen J, handed down on 3 February 2022.

    54.2. The following express term ('the Retained Pay Term') is incorporated into the contract of employment under which the Affected Employee is currently employed by the Defendant:

> **RETAINED PAY**
>
> Certain staff under the arrangements for moving to [as the case may be, Lichfield/Daventry Clothing/Daventry Grocery] 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.

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.

Injunctive Relief

55. 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.'

Postscript

When circulating myApproved Judgment, I invited the parties to make submissions on the wording (but not the grant) of the injunctive relief which I then proposed to order. I invited those submissions because, until my conclusions, and the relief which I considered ought to flow from them, were known, the parties were not in a position to consider and address me on the precise form which any injunctive relief should take. The Claimants supported the draft wording. The Defendant suggested some variation to it. Subject to that, the parties were able to agree an order reflecting my draft judgment and making provision for costs to be payable by the Defendant, including an interim payment.

56. In those circumstances and having provided focused written submissions on the narrow point outstanding, the parties agreed that it would not be necessary for a further hearing to be convened and that I should decide the outstanding matters by reference to the written submissions received.

The wording of the injunctive relief

57. In summary, it was the Defendant's submission that the draft wording of the paragraph immediately following the injunctive relief, if intended to restrict the Defendant to dismissing an affected employee for 'good cause', would inappropriately preclude its right to dismiss for a reason which did not constitute good cause, but which, nevertheless, was '*unrelated or not directly related to the removal of Retained Pay'*. It proposed the following amendments to my original draft form of words:

'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~~ reasons unrelated or not directly related to the removal 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.'

58. In the event, I have revised the wording of the relevant paragraph, in order to make clear the extent of the relief granted. The intention is to preclude the giving of notice to terminate/termination for any reason which is in any way related to the removal, or diminution, of Retained Pay. That reflects the implied restriction on the right to terminate which I have found to be incorporated in the contract of employment of each Affected Employee. In so far as the Defendant's proposal differed from the wording as now revised, I reject it as failing to reflect the relief granted and its underlying rationale.

The Defendant's application for permission to appeal

59. The Defendant has sought permission to appeal on four grounds, summarised and considered below, each of which is resisted by the Claimants for reasons set out in written submissions dated 20 January 2022:

59.1. By ground 1, it challenges my construction of the express term as to Retained Pay and, in particular, of the word 'permanent'. It is not suggested that I have applied incorrect legal principles in order to ascertain the proper construction of the relevant express term; rather that I erred in rejecting the Defendant's construction in light of my conclusion that the parties' mutual intention had encompassed (but had not been limited to) an intention to remove the entitlement to Retained Pay from the collective bargaining machinery. This ground of appeal focuses upon my conclusion that, on the Defendant's construction, the word 'permanent' would be superfluous. It does not, however, engage with the other bases upon which I have determined the objectively assessed mutual intention of the parties, in accordance with **Chartbrook Ltd v Persimmon Homes Ltd** [2009] UKHL 38 [14], which have informed the proper construction of the term (see paragraph 40, above). Furthermore, the word 'permanent' does not itself provide for the removal of the relevant contractual entitlement from the collective bargaining machinery.

59.2. Ground 2 reasserts the Defendant's consistent position that the **Aspden** line of authority is not applicable, or analogous, to the facts of this case and that **Jenvey** had been concerned with a different issue. I have set out and explained my conclusions on both points at paragraphs 41 to 47 above. In short (and not in substitution for that analysis), I regard the caselaw to which I have referred as authority for the proposition that a term may be implied to restrict the circumstances in which an employer can exercise its contractual right to dismiss, if the latter would otherwise defeat the purpose of a separate contractual obligation. An unfettered right of dismissal in the circumstances of this case would mean that the purpose of the express term by which the permanent entitlement to Retained Pay is conferred, as I have construed it, would be frustrated, where the Defendant's stated intention is that each affected employee should continue to be employed in the role to which that entitlement relates. I reject the Defendant's submission that *'this is the first occasion on which a court has found that there is an implied term restricting the power to dismiss for reasons related to pay*'; contractual benefits such as PHI are elements of pay. In any event, there is no principled distinction between the unusual circumstances with which I am concerned and those which have given rise to the relevant caselaw.

59.3. Ground 3 relates both to my conclusions at paragraph 47, above, and to the draft wording of the paragraph which immediately follows the injunctive relief granted. There is nothing objectionable about paragraph 47, which accurately states, by reference to the caselaw cited, examples of dismissals which the implied term would not preclude (from which the Defendant, understandably, did not demur). Following the revision of the wording which clarifies the effect of the injunctive relief granted, the premise of the balance of ground 3 has fallen away.

59.4. Finally, ground 4 asserts, first, that I have erred in concluding that the claims before me fall outside the '**Johnson** exclusion zone', because they are not concerned with the manner of dismissal. It is said that that conclusion *'…is difficult to reconcile with the term implied by the court, which incorporates the reasons for dismissal'* and that, in any event, the claims relate to a dismissal for which the ERA provides a statutory remedy. It is important to have regard to my full reasoning, set out at paragraphs 48 to 50 above. The Defendant's first contention is unexplained and, in general, the contentions made simply repeat those which I have rejected, for reasons set out above. There is an important distinction between, respectively, the manner of and the reasons for dismissal. The claims fall outside the

Johnson exclusion zone because the term which I have found to be implied (in common with the restrictions implied in the **Aspden** line of authority, and in **Jenvey**) restricts the circumstances in which a dismissal would be lawful, as a matter of contract. That is distinct from the matters for which Parliament has provided a remedy under the ERA, in the event of a dismissal. Of course, no dismissals have, to date, been effected in this case.

59.5. The second part of ground 4 asserts that, in light of my conclusion that the claims fall outside the **Johnson** exclusion zone, I have erred in concluding that damages would not be an adequate remedy. On the basis of the former conclusion, it is said, a claim for damages in the High Court would lie. In my judgment, there are three answers to that proposition. First, as is clear from paragraph 55 above, the conclusion from which permission is sought to appeal has been taken out of context; the full sentence to which objection is taken (with emphasis now added) is *'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.'* In ordinary course (as the Defendant acknowledged[3]), damages for wrongful dismissal would be limited to the remuneration accruing during the contractual notice period. Any additional compensation to which an affected employee might be entitled could only follow from a finding of unfair dismissal, and, then, would be subject to the statutory cap on the basic and compensatory awards which would flow from such a finding. Secondly, in response to the Claimants' application for injunctive relief no submissions were made by the Defendant regarding the adequacy of damages as a remedy, whether orally or in writing[4]. Thirdly, even if correct, the point does not avail the Defendant in circumstances in which, when considering whether to grant a final injunction restraining a breach of contract, the adequacy of damages is not itself determinative. None of the other conclusions which has informed my decision to grant injunctive relief is the subject of criticism by the Defendant and, in my judgment, all justify the exercise of my discretion to do so.

60. For all such reasons, I consider that none of the Defendant's proposed grounds of appeal has a real prospect of success, or affords some other compelling reason for the appeal to be heard (CPR r.52.6(1)), and it follows that I refuse permission to appeal.

[3] See paragraph 4 of its outline submissions, dated 12 April 2021.

[4] The Defendant's outline submissions, dated 12 April 2021 (at paragraph 22), simply denied the Claimants' entitlement to the relief claimed and proposed alternative orders in the Defendant's favour. In its outline submissions in reply to those of the Claimants, dated 29 April 2021, the Defendant's submissions as to the final injunction sought (at paragraph 34) were limited to a consideration of the prospect (in the event of a dismissal) of a finding of unfair dismissal by, and the associated availability of alternative remedies in, the employment tribunal. In his oral submissions, Mr Carr did not address me regarding injunctive relief, save, broadly put, to submit that, in the form pleaded by the Claimants, the latter was not consistent with the declaratory relief sought, as re-amended (see transcript day 2, page 105, line 10 – page 108, line 2).

APPENDIX TO THE JUDGMENT OF ELLENBOGEN J

Daventry Clothing (22 employees)

1. Christopher Webb (the Second Claimant)
2. Barry Print
3. Ray Dickenson
4. Gavin Mallott
5. Mick Groucott
6. Ian Turner
7. Toni- Anne Stonell
8. Dave Clements
9. Dipak Rathod
10. Harminder Nijjar
11. Anthony Print
12. Duane Humphries
13. Sarbjit Mattu
14. Chris Chambers
15. Mohib Ali
16. Brian Bunting (N.B.)
17. Sulkvinder Kaur
18. Rajovan Cvetkov
19. Carlroy Lawes
20. Navtej Singh
21. Gavin Wright
22. John Potter

Daventry Grocery (1 employee)

23. Sandeep Kumar (the Fourth Claimant)

Lichfield (20 employees)

24. Jagpreet Singh (the Third Claimant)
25. Julia Holdridge
26. Lee Ferrie
27. Steve Ridley
28. Kevin Jones
29. Dave Warren
30. John Shanahan
31. Stuart Gibbons
32. Warren Evans
33. Kenny Lawson
34. Amrik Singh
35. Alex Cherian
36. Mohammed Masood
37. Manjit Gil
38. Baljit Gill
39. Tejinder Gill
40. Hardeep Singh
41. Iqbal Singh Mahil
42. Rashpal Singh
43. Juraj Gajdosech