Neutral Citation Number: [2024] EAT 7

Case No: EA-2022-000089-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 January 2024

Before:

HIS HONOUR JUDGE SHANKS

- -

Between:

MR A FASANO

Appellant

- and –

(1) RECKITT BENCKISER GROUP PLC
(2) RECKITT BENCKISER HEALTH LTD

Respondents

- -
- -

Ms. Lydia Banerjee and Mr. Alexander Bryant (instructed by Doyle Clayton) for the **Appellant**
Mr. Simon Forshaw (instructed by Linklaters LLP) for the **Respondents**

Hearing date: 30 November 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, AGE DISCRIMINATION

C was a senior employee of R2, a wholly-owned subsidiary of R1. As such he was eligible to participate in R1's long term incentive plan (LTIP) which had been approved by R1's shareholders and was administered by R1's remuneration committee (Remco). C was awarded shares and options under LTIP for 2017 whose vesting was dependent on the performance of R1's shares over the three years 2017-2019. On 30/6/19 he retired as a "good leaver" from his employment with R2. Under the LTIP he remained entitled to a pro-rated amount of the 2017 award that would ordinarily vest at the end of 2019.

In 2019 it became clear that the performance of R1's shares was such that no part of the 2017 awards under the LTIP would vest at the end of 2019. On 18/9/19 the Remco changed the terms of the 2017 award to allow it to vest in part notwithstanding the performance of R1 with the aim of retaining existing senior employees of the group who would otherwise have received nothing in respect of the 2017 award and would therefore have less incentive to remain in employment. Remco made it a condition of benefitting from this change in the rules that the relevant employee was still employed as at 18/9/19 when the rule change took effect. This meant that C did not benefit from the change and he received nothing in respect of his 2017 award.

C brought a claim for indirect age discrimination. The ET dismissed the claim deciding that:

(1) R1 was acting as agent for R2 when providing the LTIP for R2's employees and amending its terms and both companies were therefore potentially liable under ss 109 and 110 of EqA 2010;
(2) the requirement that LTIP participants had to be employed on 18/9/19 in order to benefit from the amended terms was a "PCP" for the purposes of s19 of EqA 2010;
(3) that PCP put people over 57 at a particular disadvantage compared with those under 57;
(4) it put C at that disadvantage; but
(5) it was a proportionate means of achieving the legitimate aim of retaining staff and was therefore justified.

C appealed against decision (5). In response the Rs maintained that the ET's decision (5) was correct but that decision (1) was perverse. The EAT held:

(a) that decision (5) was clearly wrong: although the changes to the LTIP were a means of achieving the legitimate aim of retaining staff, it was the PCP which had to be justified and the PCP itself was not a means (let alone a proportionate means) of achieving the legitimate aim, since the employees who were excluded by the PCP had already left employment and so could not be retained;
(b) that decision (1) was indeed perverse: that decision required the ET to find that R1 had been authorised by R2 and that it was acting on behalf of R2 in relation to the LTIP and there was no proper basis for such findings.

C's claim therefore failed but on a different basis to that relied on by the ET.

Rs' position on the appeal in relation to decision (1) was contained in its Answer but ought to have been the subject of a cross-appeal. However, C had not raised any procedural objection until the hearing of the appeal and no-one was prejudiced and it was therefore appropriate for the EAT to exercise its power under rule 39(2) EAT Rules 1993 to dispense with the steps involved in bringing a cross-appeal.

HIS HONOUR JUDGE SHANKS:

1. This is an appeal by the claimant, Mr Fasano, against a judgment of the employment tribunal sitting in Reading (EJ Anstis, Ms Crosby and Mrs H T Edwards) dismissing his claim for indirect age discrimination promulgated on 6 January 2022 following a six day hearing in October 2021. The appeal was set down for a full hearing by Judge Keith on the sift.

The factual background

2. Mr Fasano was born on 5 July 1961. He was employed by the Second Respondent ("RB Health"), a wholly-owned subsidiary of the First Respondent ("RB Group"), from 1 June 1997 until his retirement on 30 June 2019, latterly as Chief Supply Officer, a post at one level of management below the board of directors. As an employee of RB Health he was eligible to participate in RB Group's Long Term Incentive Plan ("LTIP").

3. The relevant LTIP Rules approved by RB Group's shareholders in May 2015 provided for the award by RB Group of shares and share options to employees of RB Group or its subsidiaries whose "vesting" would be conditional on the satisfaction of conditions determined by the RB Group Remuneration Committee (Remco). Such conditions had to include at least one related to the performance of RB Group over a certain period. RB Group with the consent of the Remco could waive or change such conditions in certain circumstances, provided they did not become more difficult to satisfy. If an employee who had received an award left his employing company before the award had vested it would lapse unless he left in circumstances described loosely as being a "good leaver", in which case the award would be reduced pro rata to reflect the period from the end of his employment to the end of the relevant performance period. In broad terms a "good leaver" was an employee who had left employment by reason of ill-health, been made redundant, or retired with the agreement of RB Group.

4. The award of shares and options under the LTIP in respect of 2017 was made on 1 December 2016. Vesting was conditional on the compound annual growth in RB Group's earnings per share (EPS) over the three years from 1 January 2017 to 31 December 2019: if that growth was 6%, one-fifth of the award would vest; if it was 7%, two-fifths would vest; and so on, such that if the growth was 10% the award would vest in full. The award would be treated as vesting at the end of the three year period (31 December 2019) although it would only be released in around May 2020 when the relevant annual accounts would be approved. As I understand it, Mr Fasano was awarded 32,000 RB Group shares and 64,000 share options on these terms.

5. By agreement with RB Health (and RB Group) as recorded in a letter dated 7 September 2018, Mr Fasano retired on 30 June 2019 following a period of garden leave. The letter recorded at paras 9.3 and 9.4 that his awards of shares and options under the LTIP for 2017 may vest in May 2020 subject to achievement of the performance conditions at the end of 2019 and that they would be "pro-rated for service up to retirement". Mr Fasano would therefore in normal circumstances have benefited from any award that vested in respect of the year 2017 as to 5/6ths in May 2020.

6. In practice the performance of RB Group's shares in 2018 and 2019 was such that it became clear that no 2017 award was going to vest for anyone. This was perceived to cause a problem because the awards made under the LTIP had historically comprised a large part of the remuneration of senior staff and if RB Group's performance was such that awards were going to be nil an important incentive for remaining in employment would be removed, since there would be nothing to lose by being a "bad leaver" (ie someone who left voluntarily, rather than because of ill-health or agreed retirement) in the meantime.

7. The Remco therefore resolved on 18 September 2019 to change the performance criteria for the 2017 LTIP award such that 50% of the award would vest regardless of the performance of RB Group's shares over the three year period. New conditions were also imposed that (i) in order to benefit from the changed criteria a participant had to be an employee as at 18 September 2019 (the

day the change came into effect) and (ii) awards would no longer be treated as vesting on 31 December 2019, so that (subject to the "good leaver" provisions) an employee would also have to remain in employment until May 2020 (described in the minutes as the "normal vesting date") in order to receive an award. It is plain that the overall aim of the changes was to help retain existing staff in senior management posts. So far as the first condition was concerned the Remco minutes recorded that: "exclusion of former employees (being good leavers) was appropriate, given the purpose of the waiver/change is to support employee retention".

8. I was told there were 294 participants in the 2017 LTIP award. Of these, 24 (including Mr Fasano) were "good leavers" who were no longer employed on 18 September 2019, and who therefore did not benefit from the changes made by Remco. There was also a group of six participants who were still employed at that date but who had already agreed to leave their employment in the near future as "good leavers"; these six did benefit from the changes although the changes would not have helped to retain them in employment.

Mr Fasano's claim to the employment tribunal

9. If there had been no requirement to be in employment on 18 September 2019 Mr Fasano would have received shares and options worth about £1.2 million under the changed criteria. He (but none of the other 23 in the same position) brought a claim in the employment tribunal against both RB Group and RB Health alleging that being deprived of this award amounted to indirect discrimination based on age under the Equality Act 2010.

10. The provisions of the Act relevant to his claim were as follows:

> **19. Indirect discrimination**
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

- **Age**

…

39. Employees and applicants

…

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

108 Relationships that have ended

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

…

109 Liability of employers and principals

(1) …

> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
>
> **(3) It does not matter whether that thing is done with the … principal's knowledge or approval.**
>
> **110 Liability of employees and agents**
>
> **(1) A person (A) contravenes this section if—**
>
> **(a) A is an … agent,**
>
> **(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's … principal … , and**
>
> **(c) the doing of that thing by A amounts to a contravention of this Act by the … principal ...**
>
> **(6) Part 9 (enforcement) applies to a contravention of this section by A as if it were the contravention mentioned in subsection (1)(c).**

11. The employment tribunal decided that:

(1) RB Group was acting as agent for RB Health when providing the LTIP for RB Health's employees and amending its terms and both companies were therefore potentially liable under sections 109 and 110 of the Act;

(2) the requirement that LTIP participants had to be employed on 18 September 2019 in order to benefit from the amended terms was a "PCP" for the purposes of section 19 of the Equality Act 2010;

(3) that PCP put people over 57 at a particular disadvantage compared with those under 57 (no doubt because those over 57 were more likely to have retired in the period between 1 January 2017 and 18 September 2019);

(4) it put Mr Fasano at that disadvantage; but

(5) it was a proportionate means of achieving the legitimate aim of retaining staff and was therefore justified.

Because of their decision on justification Mr Fasano's claim failed.

12. He now appeals against the decision on justification. The Respondents say in response that the ET was correct on justification. They also say that the claim should have failed in any event because the tribunal was wrong to find that RB Group was acting as RB Health's agent. I consider these two issues in turn.

Justification

13. Ms Banerjee's arguments on the justification issue concentrated on what were said to be erroneous findings of fact in relation to the six "good leavers" who were still employed on 18 September 2019 and on her submission that the tribunal had not properly carried out the weighing exercise required in assessing whether the PCP was a *proportionate* means of achieving the legitimate aim. With respect to her careful arguments, it seems to me that they really miss the essential point. Putting it simply, the requirement that a participant should have been employed on 18 September 2019 when the changes to the conditions relating to the 2017 LITP awards were introduced could not advance the aim of retaining staff and so was simply not a means of achieving that aim at all, let alone a proportionate means: only people employed at that date were candidates for retention so the requirement added nothing to the achievement of the aim.

14. The employment tribunal finding on the issue was encapsulated at para 217 of the judgment where they say this:

> **Having found that the respondents were pursuing a legitimate aim of retention we are satisfied that the PCP was a proportionate means of achieving that aim. The amended performance condition had to be subject to some sort of qualifying or cut off date to be effective as a retention tool and to avoid unnecessary payment to those who were no longer in a position to be retained.**

It seems clear to me that the tribunal's reasoning here is deficient. The change to the performance criteria and the vesting date for the awards both contributed to the legitimate aim of retention but it

was the specific PCP and not the changes as a whole that needed to be justified (as the tribunal recognised in a different context at para [185] of their judgment). Even if it was thought that there was a need for "some sort of qualifying or cut off date" in relation to the amended performance condition, the relevant PCP could not contribute to retention of staff. As the tribunal appear to recognise in the final phrase in this quotation, the only real justification for the PCP was to avoid unnecessary payments to those who could not be retained, ie to save the expenditure of money. But it was never part of the Respondents' case that the legitimate aim of the PCP was to save money or that they could not afford to pay the participants in the 2017 LTIP award who had left before 18 September 2019 what would otherwise become due to them.

15. Mr Forshaw was given fair warning that I had formed this provisional view by an email sent to the parties on 27 November 2023 and he was able to address the point even though it was not at the centre of Ms Banerjee's arguments. He valiantly defended the tribunal's conclusion. He said that the whole purpose of the changes made by the Remco on 18 September 2019 was to retain existing staff and that the Respondents were entitled to direct the payments (which were effectively "retention payments") towards those who could be retained and away from those who could not. Making a payment to Mr Fasano did not advance the aim of retaining staff and amounted in effect to a windfall to him since, if the LTIP terms had not been changed, he would have received nothing. Mr Forshaw said that if he was wrong his clients would not be making retention payments as they intended, but rather paying money away to people who could not be retained.

16. I am afraid that however many times he repeated these arguments I remained of the same view. I fully accept that the legitimate aim of the changes to the performance criteria under the LTIP was to retain staff who might otherwise leave before May 2020 and that payments to Mr Fasano and the other 23 would not assist in this aim. But this is no answer to the claim for indirect age discrimination. The Respondents chose to use the changes to the LTIP as a means of achieving their aim of retaining staff rather than, for example, introducing a free-standing scheme involving

straightforward "retention payments" to existing staff. As part of those changes, they introduced a PCP which did not itself contribute to the achievement of the aim at all. It was necessary to justify that PCP, not the overall changes to the LTIP.

17. Before the tribunal Mr Forshaw had also relied on the legitimate aim of incentivising existing staff but the tribunal rejected this as a legitimate aim for the reasons set out at paras [183] –[190] of the judgment. Before me he maintained that the tribunal were wrong to reject that legitimate aim and he relied on this as a ground for upholding the tribunal's decision on justification. I do not need to consider this argument further since the PCP was no more a means of achieving the aim of incentivising existing staff than the aim of retaining them.

18. At the end of his submissions on this point Mr Forshaw quite properly cautioned me against deciding the appeal on a basis which was not being advanced by the Appellant. As I have indicated I gave him fair warning of my preliminary view and he had ample opportunity to answer the point. Further, in any event, having looked back at the written submissions before the employment tribunal (see paras 63.5 and 6 in Supp Bundle at p82), the notice of appeal (para 19.2 at p 59 in Core Bundle) and Judge Keith's reasons for allowing the appeal to proceed to a full hearing (ground (3) at p139 of Core Bundle) I am quite satisfied that the point was clearly raised as part of the grounds of appeal; and, indeed, it seems to me that Ms Banerjee's skeleton argument at paras 74-81 is (albeit in a rather roundabout way) getting at the same point. I therefore see no difficulty in deciding the issue on this basis.

19. For those reasons I would allow the appeal in relation to justification. I also consider, unusually, that this is a case where it would be appropriate to exercise the power to make a new decision under section 35(1)(a) of the Employment Tribunals Act 1996 rather than remitting the issue to the employment tribunal. It seems to me that the employment tribunal's decision on the point was really misconceived and that there was only one possible result, namely that the Respondents had not shown that the PCP was a means (let alone a proportionate means) of achieving a legitimate aim.

Agency

The "cross-appeal" point

20. The Respondents' position on the agency issue was set out in their Answer to the appeal at paras 4.13 – 4.15 under the heading "*Further grounds for upholding the Judgment of the ET*". Ms Banerjee considered that these paragraphs in the Answer should have been advanced by way of "cross-appeal" and she therefore effectively ignored them and did not address them at all in her skeleton argument for the appeal. On reading the papers I insisted that she answer the substantive points raised by the Respondents in a supplementary skeleton which she was able to prepare before the hearing.

21. While addressing the substantive point she continued to maintain as her primary position that it was not open to the Respondents to run the argument that the tribunal was wrong on the agency issue since it amounted to a cross-appeal and they had failed to comply with the relevant procedures (which would have involved making it clear in the Answer that a cross-appeal was being advanced, a sift process, a reply by the Appellant and directions from the EAT: see rule 6 of the EAT Rules 1993). Mr Forshaw for his part maintained that he did not need to bring a cross-appeal to run the point but, if he did, he apologised and sought the indulgence of the EAT under rule 39 of the 1993 Rules, characterising Ms Banerjee's approach as "procedural gameplaying".

22. There is no definition of a "cross-appeal" in the 1993 Rules. Form 3 in the Schedule to the Rules sets out the form of the "answer" that a respondent to an appeal must deliver if he wishes to resist an appeal: from this it appears that a "cross-appeal" is brought against a "decision", which is to be distinguished from the grounds for making a decision. The case law of the EAT has established that the decision against which a cross-appeal is brought must be a decision adverse to the party cross-appealing it and that it must be made in the same proceedings as the decision appealed from, by the same tribunal and on the same date and occasion (see: **Basildon & Thurrock NHS Foundation**

Trust v Weerasinghe (Langstaff P, 19.5.15)). However, it does not appear that the issue of what constitutes a "decision" for these purposes has been considered by the EAT.

23. Mr Forshaw argued in effect that the relevant decision in this case was the decision that the claim of indirect discrimination had failed and that he was seeking to challenge the tribunal's determination (to use a neutral term) on the agency point so as to raise another ground for upholding that decision. He referred me to rule 1(3) of the ET Rules of Procedure which provides:

> **An order or other decision of the Tribunal is either—**
>
> **(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or**
>
> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—**
>
> **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);**
>
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);**
>
> **(iii) the imposition of a financial penalty under section 12A of the Employment Tribunals Act.**

This definition (as far as it goes) seems to me to be helpful on the issue of what constitutes a decision but it does not in my view support Mr Forshaw's position. If the determination in relation to agency had gone against the Appellant the claim would have failed regardless of the outcome on justification; it seems to me that that determination was therefore the determination of an issue which was " … capable of finally disposing of [Mr Fasano's] claim"; it was therefore a "decision" (indeed a "judgment") under rule 1(3)(b)(ii). Assuming, as Mr Forshaw maintained, that that classification is also relevant for the purposes of rule 6 of the EAT Rules, the determination in relation to agency had

to be challenged by way of cross-appeal and it was not sufficient to rely on the point as another ground for upholding the overall decision that the claim failed.

24. I therefore conclude that Ms Banerjee was technically correct in her contention that the agency point ought to have been raised by way of cross-appeal. However, given my view that the Appellant's legal team should have raised the matter with the EAT at the time the Answer was served rather than simply leaving it to emerge in the run-up to the hearing of the appeal and that no prejudice has been suffered by anyone as a consequence of the Respondents' failure to bring a formal cross-appeal, I was naturally inclined to exercise the power of the EAT provided by rule 39(2) of the 1993 Rules. That rule states:

> **The Tribunal may, if it considers that to do so would lead to the more expeditious or economical disposal of any proceedings or would otherwise be desirable in the interests of justice, dispense with the taking of any step required or authorised by these Rules, or may direct that any such step be taken in some manner other than that prescribed by these Rules.**

25. Nothing daunted, Ms Banerjee maintained that I could not use that power because no cross-appeal had been properly instituted and there were therefore no relevant "proceedings" over which the EAT had jurisdiction. I reject this submission: I am satisfied that I have power to make an order under rule 39(2) in this case, either on the basis that there is an extant cross-appeal by virtue of the contents of the Answer, albeit a cross-appeal which has not been brought in the proper form, or on the basis that the appeal itself constitutes the "proceedings" properly before the EAT from which my jurisdiction in relation to the putative cross-appeal arises. I therefore dispense with (a) the requirement for the Respondents to complete paragraphs 3 and 4 of Form 3 in the Schedule to the 1993 Rules (which deal with cross-appeal and grounds for cross-appeal) as required by rule 6(3); (b) a sift pursuant to rule 6(12); and (c) the requirement for a reply by the Appellant under rule 6(3). I turn then to the substantive issues in relation to agency.

The tribunal's decision on agency

26. It was accepted all round that Mr Fasano's employer was RB Health but that the body that operated the LTIP and decided on the change in September 2019 was RB Group acting through its Remco. In order to bring a claim against RB Health as his employer under section 39 of Equality Act 2010 it was therefore necessary for Mr Fasano to rely on section 109 to fix RB Health with liability for the application of the relevant PCP by RB Group. To repeat, section 109 provides:

> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
>
> **(3) It does not matter whether that thing is done with the … principal's knowledge or approval.**

The issue for the tribunal was therefore whether RB Group was acting as agent for RB Health when carrying out its functions under the LTIP in relation to Mr Fasano, an employee of RB Health, and in particular when applying the relevant PCP to him.

27. The employment tribunal considered this issue at paras [136] to [151] of the judgment. They record that it was common ground that the question whether RB Group was acting as agent for RB Health had to be decided in accordance with common law principles. They record that the claimant relied on a "purposive approach" to the issue. They record that the respondents relied on a "strict approach" requiring "control" in the agency relationship, while the claimant said that "consent" was at the heart of the relationship. They say that they accept the purposive approach, given the potential consequences of a finding of no agency in a case like this, ie that a parent company could carry out an act of "blatant discrimination" leaving the victim with no remedy.

28. They recite the relevant part of Mr Fasano's contract of employment with RB Health which states:

> **[Mr Fasano] shall be entitled to participate in retirement, welfare benefits, incentive compensation, perquisite and other plans and arrangements of [RB Health] applicable to**

> **its senior executives as in effect and on such terms as are prescribed by [RB Health] in its sole discretion from time to time. Such participation includes any awards granted under the "Long Term Incentive Plan" of a Group Company**

They state that Mr Fasano therefore has 'an entitlement to participation in benefit schemes including [RB Group's] LTIP "*on such terms as are prescribed by [RB Health] (sic) in its sole discretion from time to time*"'. They then say the following:

> **[146] It appears reasonably clear that in providing the LTIP scheme [RB Group] is acting on behalf of [RB Health] in providing a benefit to [RB Health's] employees …**
>
> **[148] Looking at the definition of agency from the first paragraph of Bowstead & Reynolds, [RB Health] has assented to [RB Group] acting on its behalf in the provision of the LTIP, and there appears to be no doubt that [RB Group] also assents to acting on its behalf … It was not argued on behalf of the respondents that the relationship (if it exists) is not a fiduciary one …**
>
> **[149] … it seems to us that … [RB Group's] handling of the LTIPs is liable to affect [RB Health's] relationship with third parties – its employees such as the claimant …**
>
> **[150] We have concluded that the LTIP scheme was offered by [RB Group] to [RB Health's] employees as agent for [RB Health]. … We draw this conclusion from the common law definition of agency, but it also seems to us that this must be the right conclusion if a properly purposive approach is taken to the definition of agency. To find otherwise would leave a large gap in protection against unlawful discrimination, where the action in question is taken by another company in a respondent's group.**
>
> **[151] The outcome of this is that if the application of the PCP did amount to unlawful indirect age discrimination, then:**
>
> **a. [RB Health] is treated as having carried out the action of its agent, [RB Group], by virtue of s109(2), and**

b. [RB Group] is also liable for that discrimination by virtue of s110(1).

The parties' positions

29. Mr Forshaw says that the contention that RB Group was acting as agent for RB Health was "always fanciful" and that the tribunal's conclusion to that effect is perverse. He points out the realities of the situation where RB Group is the parent of a large group of companies of which RB Health is a wholly-owned subsidiary which comes a long way down the chain and where RB Group runs the LTIP scheme for the benefit of group employees and none of the subsidiaries, including RB Health, has any control over it. He says in particular (a) that the tribunal erred in the adoption of a "purposive approach", (b) that they wrongly equated providing a benefit for RB Health with acting as RB Health's agent, (c) that they wrongly stated that his clients did not dispute that the relationship was "fiduciary" (Ms Banerjee accepts that this error was made), and (d) that they misconstrued the contractual position as between RB Health and its employee.

30. Ms Banerjee says that the tribunal was entitled to reach the conclusion it did for the reasons given and that it is not a perverse conclusion. She also relies on a short statement in the judgment of the EAT in a case called **Remploy v Campbell** (unreported 19.11.13) where Wilkie J said at para [39] " … we are reminded of the long established principle that in the employment context dealing with discrimination legal principles such as agency and ratification should be approached purposively to give effect to the requirement that those, the subject of discrimination, should have ready access to remedies."

The relevant law

31. It is clear that the parties were right to agree that the question of whether RB Group were acting as RB Health's agent was to be decided in accordance with common law principles: see **Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust** [2016] IRLR 878 per Underhill LJ at [57] and **Ministry of Defence v Kemeh** [2014] ICR 625, two decisions of the

Court of Appeal.

32. As with various legal relationships (like the employer/employee relationship or the landlord/tenant relationship), it is generally easier to recognise an example of a relationship of agency than to define it. Bowstead & Reynolds set out at Article 1 of their treatise a kind of definition in four short propositions which are then followed by 37 pages of commentary (which incidentally include at para 1-030 the (unpromising for Mr Fasano) statement that English courts have not looked favourably on arguments that companies within a group act as agents for one another and that such agency "would be required to be proved by normal criteria") (see Chapter 1 of *Bowstead & Reynolds on Agency* 22nd Ed).

33. Whatever else can be said, it seems to me that it must be an essential feature of agency (at least for the purposes of section 109) that (whether expressly or impliedly) the principal *authorises* the agent to do the relevant act and the agent does the act *on behalf of* the principal. The act of the agent may be for the benefit of the principal but that is not essential or indeed sufficient. The principal may control the way the agent does the act but control is also not essential. And it is not essential that the act of an agent affects the contractual position of the principal with a third party (see **Kemeh** per Elias LJ at [38]). But equally, it seems to me, the mere fact that the act of A affects the legal relationship of B with a third party cannot make A the agent of B: to take a simple example, there may be a provision in the contract of employment of a waiter with a restaurant that he is entitled as part of his remuneration to a particular share of the tips provided by diners; the tip given (or not given) by a diner may therefore affect the legal relationship between the restaurant and the waiter but that would not conceivably make the diner an agent of the restaurant in providing the tip.

34. As for the "purposive approach" to the construction of a statute like the Equality Act 2010, it is important to recognise the limitations on this as discussed by Elias LJ in **Kemeh** at [35] and [36]. First, it is a principle of *statutory* construction. Second, it does not enable a court or tribunal to extend the meaning of the statute because it is thought that the overall objective of the legislation would be

better achieved that way. Third, it is only if there are two equally plausible constructions of the statute available that the court or tribunal can adopt the one which better achieves the statutory purpose. With respect to Wilkie J, if there is any conflict between these propositions and the statement in the **Remploy** judgment on which Ms Banerjee relies, I am inclined to accept the guidance in **Kemeh**, a decision of the Court of Appeal which post-dates **Remploy**.

Applying the legal principles to this case

35. Standing back and putting to one side the undoubtedly unsatisfactory results that flow in this case from such a finding, I feel bound to agree with Mr Forshaw that it is indeed "fanciful" or perverse to categorise RB Group as RB Health's agent in relation to the LTIP.

36. It is plain (if not conclusive) that RB Health had no control over RB Group's actions or decisions in relation to the LTIP. Mr Fasano may well have had an entitlement under his contract of employment to participate in the LTIP and (as the tribunal found at para 149) the decisions of RB Group in relation to the LTIP no doubt had some effect on the legal relationship between him and RB Health, but that in itself cannot make RB Group the agent of RB Health. Of most relevance, I can see no basis in the facts found by the tribunal for saying that RB Health ***authorised*** RB Group to act in relation to the LTIP or that RB Group was acting ***on behalf of*** RB Health when it was making the changes to the LTIP rules and imposing the PCP. It seems to me that the tribunal are really just asserting those conclusions in paras 146 and 148.

37. I also consider that Mr Forshaw is plainly right to suggest that the tribunal have allowed themselves to be over-influenced in their decision by the unsatisfactory consequences of the opposite result and that they have adopted an impermissible "purposive approach". I have mentioned the limitations to that approach above: it is only if there are two genuinely competing interpretations of the relevant statutory provision that regard can be had to the general purpose of the statute to "deter and combat discrimination" in construing it and deciding which interpretation to adopt. In this case

I do not think that there is any scope for a "purposive" construction.

38. Unpalatable as the result is, I therefore do not see how it can be properly maintained that RB Group were acting as RB Health's agent in this case so as to fix them both with liability and I consider that the only possible outcome was a finding that RB Group were not RB Health's agent. It may be that the claim could have been put in some other way and it may be that there is a lacuna in the law that Parliament ought to be looking at, but it seems to me plain that the cross-appeal must succeed and that the ultimate conclusion of the tribunal must therefore be upheld.

Conclusion and disposal

39. For those reasons I consider that the decisions of the tribunal in relation to both justification and agency were plainly wrong and I substitute decisions to the effect (a) that the PCP was not justified but (b) that RB Group was not acting as agent for RB Health in imposing the PCP. This has the result that neither RB Group nor RB Health is liable to Mr Fasano. Technically I am therefore allowing both the appeal and the cross-appeal; however, since as far as the EAT office is concerned there is formally no "cross-appeal" in existence, the order will simply record that the appeal is dismissed and that the decision of the tribunal dismissing Mr Fasano's claim for indirect age discrimination is upheld.