

Discriminatory changes made by a parent company to a group-wide LTIP award: was the subsidiary employer liable?

A senior executive missed out on a valuable LTIP award after the rules were amended by his ex-employer's parent company. He alleged the changes amounted to indirect age discrimination and argued that his ex-employer was liable for the discriminatory actions of its "agent" – the parent company. The Court of Appeal rejected the claim, finding no agency relationship between the two entities and concluding that, in any event, the amended LTIP rules were a proportionate means of pursuing the legitimate aim of retaining key staff during a turbulent time for the business.

What happened in this case?

The Claimant was employed by Reckitt Benckiser Health Ltd (**RB Health**), a wholly owned subsidiary of Reckitt Benckiser Group plc (**RB Group**). The Claimant was entitled to participate in a group-wide long-term incentive plan (**LTIP**), operated and administered by RB Group. The 2017 LTIP award was due to vest on 31 December 2019, conditional upon a certain level of growth of RB Group's earnings per share.

The Claimant entered into a settlement agreement with RB Health, under which he would retire on 30 June 2019. However,

it was agreed that he would be treated as a “good leaver” for the purposes of the 2017 LTIP award and his award would vest post-termination, provided the vesting conditions were met. The vesting conditions were not met; therefore, no awards were made. This was a problem for RB Health as the LTIP awards promoted staff retention. The absence of any award risked senior employees leaving the business.

On 18 September 2019, the Remuneration Committee of RB Group resolved to amend the vesting conditions of the 2017 LTIP award. The amendment provided that 50% of the award would vest regardless of the performance of RB Group’s shares, although the vesting was delayed from 31 December 2019 to May 2020. However, receipt of an award was made contingent on being employed on both 18 September 2019 and on the May 2020 vesting date, rendering the Claimant ineligible to receive an award.

The Claimant claimed that being deprived of the 2017 LTIP award was indirect age discrimination, on the basis that older people were more likely to have left the business by the new vesting date. He brought the claim against his ex-employer, RB Health, and against RB Group, arguing that it was the “agent” of RB Health. If this was correct, RB Health could be liable for the discriminatory actions of RB Group and RB Group could also be liable as the agent.

What was decided?

Decisions of the Employment Tribunal and EAT

The Employment Tribunal agreed that RB Group had acted as an

agent for RB Health. However, it went on to dismiss the age discrimination claim. Although it found that the requirement for LTIP participants to be employed on 18 September 2019 indirectly discriminated against those aged over 57 (including the Claimant), it was a proportionate means of achieving the legitimate aim of retaining staff.

The Claimant appealed the discrimination decision, while RB Health and RB Group cross-appealed the agency decision. The EAT upheld both appeals – meaning that the Claimant still lost. It found that the requirement to be employed on 18 September 2019 could not contribute to the retention of staff. It held that it was not a means of achieving that aim at all, let alone a proportionate means, because “good leaver” beneficiaries like the Claimant had already left employment and could not be retained. However, it ruled against the Claimant on the agency point, finding that RB Group was *not* acting as agent for RB Health since RB Health had no control over RB Group’s actions or decisions regarding the LTIP and nor was there any basis to say that RB Health had authorised RB Group to act on its behalf in relation to the LTIP.

Again, both parties appealed, this time the Claimant on the agency decision and RB Health and RB Group on the discrimination decision.

Decision of the Court of Appeal

On the agency point, the Court decided that RB Group was *not* an agent of RB Health. One of the reasons the Tribunal had concluded that RB Group was acting as an agent was because RB Health’s employees would benefit from the LTIP – but that was not enough on its own. There was no basis to say that RB

Health had authorised RB Group to act on its behalf in relation to the LTIP, nor any evidence of express or implied assent by RB Group to act as an agent. Further, there was no evidence that RB Health had any control over RB Group in making or amending the LTIP. Instead, RB Group's powers derived from the rules adopted by its shareholders and directors. In addition, they were separate legal entities, and the Courts have generally rejected the notion that agency relationships exist between different legal entities within the same group.

On the objective justification point, the Court agreed with the Tribunal, ruling that there was no age discrimination.

The requirement that LTIP participants had to be employed on 18 September 2019 was a proportionate means of achieving the legitimate aim of keeping staff in post between 18 September 2019 and May 2020. The EAT had also overlooked the wider context in which this requirement had operated, namely the desire to retain the top layer of senior employees during a period of turbulence for the business.

What does this mean for employers?

This ruling provides clarity for employers – especially those operating in group structures – on three key fronts:

- **Employers are not automatically responsible for the actions of a parent company.** HR teams in group structures should note that a parent company's decisions will not automatically make a subsidiary liable unless

there is a clear agency relationship. Shared group policies or benefits alone are insufficient to establish liability.

- **Design and operate incentive plans with care.** When administering LTIPs or similar schemes across a group, it is crucial to be clear about which entity is making decisions and how those decisions impact different employee populations. This may help to defeat an argument that a parent (or another group company) is acting as an agent for the employer entity.

- **Post-termination exclusions may be justified.** Excluding “good leaver” former employees from incentive schemes may be contentious but it should not be discriminatory if it supports legitimate business aims, such as retaining key talent, and is applied consistently and proportionately. However, it should be remembered that a disgruntled ex-employee in this position may be able to pursue other legal avenues, such as a breach of contract claim, which underlines the need for careful application of any changes.

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