Neutral Citation Number: [2022] EAT 105

Case No: EA-2021-000501-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 July 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR D PELTER	**Appellant**
- and -	
BURO FOUR PROJECT SERVICES LIMITED	**Respondent**

- -
- -

Rajiv Bhatt (instructed by Torque Law LLP) for the **Appellant**
Alice Mayhew QC (instructed by Keystone Law Ltd) for the **Respondent**

Hearing date: 14 June 2022

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JUDGMENT

SUMMARY

AGE DISCRIMINATION

The respondent agreed to provide access to the benefit of permanent health insurance to the claimant, rather than to pay the claimant sick pay if he became incapacitated from work. The respondent provided access to the benefit of permanent health insurance ("the PHI scheme") to the claimant for the period from when it entered into the PHI scheme with the insurer to the date upon which the claimant became incapacitated from work. During the period that the respondent provided access to the benefit of the PHI scheme, insurance that provided for payment of benefits that ended at 65 was lawful pursuant to paragraph 14 of schedule 9 EQA. The claimant's state pension age increased to 66 after he had become incapacitated. By that time the respondent was no longer providing the benefit of access to the PHI scheme; the claimant was obtaining payments under PHI scheme funded by the insurer. Under the terms of the PHI scheme benefits were paid in accordance with the terms in force at the date that the claimant became incapacitated. It was the insurer, rather than the respondent, that ceased payment when the claimant reached 65. The employment tribunal correctly concluded that the claimant had not been subject to direct age discrimination by the respondent.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of the employment tribunal, sitting at London Central, dismissing the claimant's claims of direct and indirect discrimination in relation to the cessation of permanent health insurance benefits when he reached 65. The appeal does not challenge the dismissal of the indirect discrimination claim.

2. The facts were, in large part, agreed.

3. The claimant was born on 7 March 1955.

4. The claimant was a founding shareholder and director of the respondent. The business was set up in 1985. In 2003 the claimant and the three other founding shareholders and directors sold their shares in the respondent.

5. On 7 March 2003 the claimant entered into a new Director's Service Agreement ("the DSA").

6. The DSA was subject to a 18 month notice period: Clause 2.2.1. The DSA provided for a normal retirement age:

> 2.3 Notwithstanding any other terms in this Agreement, the Director shall retire at the Company's normal retirement age for Directors which at present is 60 (the "Retirement Age") whereupon the Agreement shall terminate with immediate effect unless the Company in its absolute discretion continues to employ the Director after the Retirement Age upon such terms as the parties to this Agreement shall agree. Should the Retirement Age conflict with any statutory or regulatory provision applicable to the Company, the Retirement Age shall be varied to conform with such provision.

7. The DSA made provision for permanent health insurance:

> 8.2 The Company **shall effect permanent health insurance** ("PHI") **for the benefit of the Director** upon such terms as shall **provide for the payment to the Director throughout the period of his/her ill-health or disability with the exception of the first 26 consecutive weeks** thereof of sums at a **rate per annum equal to 75% of fixed annual salary on the date such absence commences** less any state sickness benefits received by the Director **provided always that such insurance is available at standard rates** and **subject also to the rules of such PHI Scheme** and **restrictions due to previous medical history**.
>
> 8.3 The PHI will include the payment of employer pension

> contributions with the fixed annual salary being increased during a claim period at a rate per annum equal to the lower of RPI or 5% provided always that such enhancements are available at the standard rates and subject also to the rules of such PHI Scheme and restrictions due to previous medical history. **[emphasis added]**

8. It is important to note that the parties agreed by clause 8.2:

8.1. the respondent would provide "permanent health insurance ("PHI")"

8.2. the PHI would provide for payment of benefit "throughout the period of … ill-health or disability"

8.3. save that the PHI would not provide payment for the first 26 consecutive weeks

8.4. the PHI benefit would be calculated on the basis of salary when the "absence commences"

8.5. the PHI must be available at "standard rates"

8.6. the PHI was provided subject to "the rules of such PHI Scheme"

8.7. the PHI was subject to any "restrictions due to previous medical history"

9. On 1 March 2011 the respondent renewed its permanent health insurance policy with UNUM (the operative policy for the purposes of the claim) ("the PHI scheme") which provided:

> 1.4 **Once a member is incapacitated the terms and conditions of the policy immediately prior to his incapacity will continue to determine his benefit**. …
>
> 2. Deferred Period means the period of time from the date that a member becomes incapacitated until the date the benefit becomes payable. The deferred period applicable to each eligibility category is specified in the schedule. …
>
> **Terminal age means for each member the age at which they will cease to be a member**. The terminal age applicable for each eligibility criteria is specified in the schedule.
>
> 4.7 Termination of membership
>
> 4.7.1. A member ceases to be a member on the earliest of the following:
> …
>
> (c) The date he attains his terminal age.
>
> 5.1 Entitlement for payment of benefit

> Benefit is paid when a member is incapacitated, was actively working on the day immediately prior to the start of the incapacity, and evidence has been provided to Unum which satisfies Unum of incapacity. Payment of benefit will begin on the first day after the end of the deferred period and will continue to be paid for the duration of the incapacity, as long as the individual in respect of whom the benefit is paid remains a member of this policy. **[emphasis added]**

10. The scheme specifically provides that the benefits payable on incapacity are determined by "the terms and conditions of the policy immediately prior to his incapacity".

11. The schedule to the policy provided a "terminal age" of 65. The benefits payable on incapacity are, in broad terms, 75% of "insured earnings", less certain deductions. Provision is made for payment of pension contributions.

12. At the time the PHI policy commenced the claimant's state pension age was 65.

13. In March 2011 the claimant underwent medical investigations for arrhythmia.

14. On 6 April 2011 the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 came into effect which abolished the default retirement age of 65 years.

15. In April 2011 the claimant underwent surgery to have a stent fitted.

16. The claimant continued working until he commenced sick leave on 3 July 2011. He did not return to work thereafter. On 2 September 2011 the claimant informed the respondent that he would not be returning to work. The respondent submitted a claim under the PHI policy for the payment of PHI benefits to the claimant in November 2011.

17. On 3 January 2012, Schedule 4 to the Pensions Act 1995 was amended by the Pensions Act 2011, with the consequence that the Claimant's state pension age was increased from 65 to 66.

18. The claim for PHI benefits was initially rejected by UNUM. The rejection was appealed on 26 January 2012. UNUM rejected the appeal on 16 July 2012.

19. On 16 July 2012 the claimant instructed Addleshaw Goddard to provide legal advice regarding his position.

20. An independent review was undertaken into UNUM's decision to refuse benefits under the

PHI scheme on 22 August 2012.

21. With effect from 26 November 2012 the claimant resigned as a director of the respondent but remained an employee.

22. On 5 March 2013 UNUM accepted the claimant's claim for PHI benefits. The claimant received benefits from that date and the payment was backdated so that the respondent recovered the sums that it had paid the claimant pending the resolution of the PHI claim.

23. It was stated in the Agreed Statement of Facts:

> 16. The Claimant was afforded access to the Third Party PHI Scheme as set out above on the date that the Claimant's sickness absence commenced, i.e. 3 July 2011.

24. In January or February 2016 the respondent took out extended PHI cover with UNUM with cover to 70. Two employees, Mr Birch (born on 8 March 1950) and Mr Offord (born on 1 November 1950) who were both actively at work, were provided with cover to age 70.

25. In March 2017 the respondent transferred PHI cover from UNUM to Aviva under a new policy that provided cover to 70. Aviva was not prepared to cover an employee, Sue Gunner, who was on sickness absence in the 26 week waiting period before being able to claim under the UNUM PHI policy.

26. At some stage in 2017 or 2018 the claimant stated that he had heard that his state pension age had risen to 66 when listening to Moneybox on Radio 4. In April 2019 the claimant questioned when his PHI payments should cease. On 30 June 2019 the respondent gave the claimant 18 months' notice of termination of his employment. On 7 August 2019 the claimant sought further legal advice and commenced ACAS early conciliation. On 13 August 2019 the claimant presented his claim for age discrimination to the employment tribunal. On 7 March 2020 the claimant was 65 and stopped receiving PHI benefits. The claimant's employment terminated on 31 December 2020.

The claim in the employment tribunal

27. The claimant contended that he had been subject to direct age discrimination in the manner in which he had been afforded access to PHI benefits. The specific detrimental acts of age discrimination

asserted were set out in the list of issues:

> a. The Respondent's decision to provide PHI in respect of which payments will cease on the Claimant's 65th birthday;
>
> b. The Respondent's failure to update the PHI policy applicable to the Claimant to comply with paragraph 14(1) Schedule 9 EA 2010;
>
> c. The Respondent's decision not to transfer the Claimant to a PHI policy that would pay out beyond his 65th birthday; and
>
> d. The Respondent's decision to cease PHI payments to the Claimant on the Claimant's 65th birthday.

28. The claimant asserted that he had been treated less favourably than an "employee aged under the age of 65 years who would be in need of PHI benefits", a hypothetical comparator or that the asserted detrimental treatment was "inherently discriminatory on the grounds of age".

29. The respondent asserted that if there was less favourable treatment because of the claimant's age it was not unlawful discrimination because it was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon were:

> a. staff retention
>
> b. succession planning
>
> c. fair distribution and/or implementation of benefits
>
> d. retaining competitiveness in the open labour market or at all
>
> e. ensuring the smooth transition of senior executive roles

The statutory provisions

30. Age is a protected characteristic for the purposes of the Equality Act 2010 ("EQA"). Discrimination against employees is prohibited by section 39(2) EQA:

> (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. **[emphasis added]**

31. Direct age discrimination is precluded by section 13 EQA, subject to the possibility of justification:

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

32. Section 23 EQA provides for the comparison required to determine if there has been less favourable treatment:

> 23 Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

33. Specific provision is made in respect of age discrimination in the provision of insurance by an employer by paragraph 14 of Schedule 9 EQA:

> 14.— Insurance etc.
>
> (1) It is not an age contravention for an employer to make arrangements for, or afford access to, the provision of insurance or a related financial service to or in respect of an employee for a period ending when the employee attains whichever is the greater of—
>
> (a) the age of 65, and
>
> (b) the state pensionable age. …
>
> (3) Sub-paragraphs (1) and (2) apply only where the insurance or related financial service is, or is to be, provided to the employer's employees or a class of those employees—
>
> (a) in pursuance of an arrangement between the employer and another person, or …

The decision of the employment tribunal

34. The employment tribunal held that PHI was available to all employees [6.2]:

> We find that the Respondent's obligation to provide 'access' to benefits in a non-discriminatory way applies to the provision of the PHI benefit to all employees regardless of their protected characteristics. We find that all employees were entitled to join the PHI scheme and the conditions for eligibility were not unlawfully discriminatory.

35. The employment tribunal considered that the "terminal age" in the PHI scheme was potentially discriminatory [6.2]:

> The benefit itself included a potentially age discriminatory element in that the terminal age for the receipt of benefits was 65.

36. However, the employment tribunal went on to conclude that this was permissible pursuant to paragraph 14(1) Schedule 9, EQA at the time the respondent agreed to enter the PHI scheme [6.2]:

> At the time the scheme was entered into, the Claimant's retirement age was 60 (under the terms of the DSA) and his state pension age was 65. The scheme, at that date therefore fell within the exception contained in paragraph 14(1) Schedule 9 of the Equality Act 2010 and did not amount to unlawful discrimination on grounds of age.

37. The employment tribunal considered that access to the benefit of the PHI scheme ceased when the benefit was "triggered" – by implication because the claimant became permanently incapacitated for work and so entitled to obtain benefits from UNUM pursuant to the PHI scheme [6.3]:

> We find that once the benefit is crystallised, it is no longer a matter of 'access' as the benefit has been triggered and access has been actualised

38. Accordingly, once the claimant was eligible to payment of benefits by UNUM under the PHI scheme there could be no ongoing requirement for the respondent to provide permanent health insurance to him [6.4]:

> We do not accept the claimant's contention that there is a continuing obligation to renew the terms of the benefits received by the claimant where the terms are those imposed by the insurance company providing the benefit.

39. When the claimant reached 65 UNUM stopped paying benefits under the terms of the PHI

scheme in place at the date he became incapacitated from work (as is provided by clause 1.4) [6.5]:

> We find that the reason the Claimant's payments under the PHI scheme stopped in March 2020 was because he had reached the age of 65. It was therefore directly connected to his age, which was the terminal age under the PHI policy. This was within the rules of the UNUM scheme which the Claimant was claiming under, since he made his PHI claim in July 2011. This was the act of UNUM who, in accordance with the provisions of the agreement with the respondent dated 2011, did not pay out to the claimant after his 65th birthday. Applying the decision of the EAT in Hall v Xerox, we find that the discriminatory act was that of UNUM, not the Respondent.

40. The employment tribunal accepted the respondent's contention that it would be impossible to transfer the claimant to a new scheme while in receipt of benefits under the PHI scheme [second 6.4]:

> We accept the Respondent's position that it would have been impossible to transfer him to another scheme while he was claiming benefits as he was a known liability and not a risk which an insurance company could assess. This was not directly related to his age but to his status as a person claiming a PHI benefit under the scheme. The claimant states that there was an element of unknown risk as the claimant could have got better or died. We find that these eventualities were sufficiently remote for an insurance company to regard them as insignificant in reducing the risk of paying out to the claimant.

41. There is a rather more fundamental way of making the same point – it is not possible to obtain insurance in respect of an event that has already occurred.

42. The employment tribunal considered that the claimant's terminal date was not extended because he was not actively at work [6.6]:

> The reason the Claimant was not eligible for his terminal age to be extended was that he was not 'actively at work'.

43. The employment tribunal held that if the claimant had been subject to discrimination because of age the respondent could seek to rely on paragraph 14 of Schedule 9 EQA or establish that the terminal date was a proportionate mans of achieving a legitimate aim for the purposes of section 13(2) EQA [6.7]:

> We find that the Respondent can, as matter of law, argue justification on both schedule 9 paragraph 14 grounds and under the normal justification provisions.

44. Of paragraph 14 of Schedule 9 EQA the employment tribunal held [6.7]:

> In this particular case, as the Claimant had a state pension age of 66, the withdrawal of benefits at age 65 does not fall within the schedule 9 paragraph 14 justification at the time the benefit was stopped although, as stated above, we find that it does apply to the scheme at the time the claimant's benefits crystallised.

45. The paragraph is not a clear as it might be, but I consider it is best read in the context of the judgment as a whole as holding that paragraph 14 of Schedule 9 EQA did apply because the material time is when the payment benefits crystallised.

46. If paragraph 14 of Schedule 9 EQA did not apply, the employment tribunal went on to consider section 13(2) EQA [6.8]:

> If the terminal age of 65 is discriminatory and not within the exception in paragraph 14 Schedule 9, we go on to consider whether the terminal age of 65 was a proportionate means of achieving a legitimate aim. We take into account that cost alone is not sufficient to justify discriminatory treatment and there must be a public policy element to the justification. We do not agree with the Respondent's contention that self-funding the difference in benefit by paying the Claimant what UNUM refused to pay would affect succession planning in that the Claimant was not 'blocking' a place on the board. However, we do accept that paying a large sum out of the company's income would affect the money available for bonus and other benefits to staff which would impact the fairness of distribution of benefits and competitiveness in the labour market. The financial position of the respondent has fluctuated but the liability to the claimant constitutes a considerable sum in the context of the finances of the respondent.

47. The employment tribunal concluded that limitation ran from when the respondent entered into the PHI scheme [6.15]:

> We find that the act of the respondent which gives rise to this claim was choosing the UNUM scheme to provide PHI to its employees and it is therefore a single act with continuing consequences. We accept that the claimant would not have known that there was a potential cause of action until he became aware that his state pension age was 66 and that the scheme did not, at that time, comply with Paragraph 14 of Schedule 9.

48. The employment tribunal concluded that it would not be just and equitable to apply a time limit in excess of 3 months to permit the claim to proceed:

> 6.16. We find that the Claimant was, or was likely to be aware, that his retirement age was increasing to 66 at the time these matters were being

> discussed in the media. …
>
> 6.22. If that is not correct, on the Claimant's own case, he was aware of the change to the state pension age to 66 when he listened to Money Box in 2017 or 2018 and the Claimant was definitely aware in April 2019 of the issue of the discrepancy between the PHI terminal date and his state pension age. However, he did not start early conciliation until 7 August 2019. We make no criticism of the speed of action after that.
>
> 6.23. We therefore find, on any reading, that the Claimant is out of time. Either seven years, one or two years or a few weeks. We then consider whether we should extend time on the basis that it would be just and equitable.
>
> 6.24. We find that there is some prejudice to the Respondent in examining events which took place in 2011, particularly if it is suggested by the Claimant that the Respondent should have made provision in its accounts. However, most of the facts are not in dispute and there is no major evidential prejudice, particularly as Mr Slade was in post at the relevant time.
>
> 6.25. We have taken account of the disability issue raised by Claimant as an explanation for delay but he has provided no explanation why he was able to act when he did but not earlier.
>
> 6.26. In any event, his original claim (before it was limited at the start of the hearing) was related to his allegation that the terminal age of PHI benefits being 65 was not in accordance with the contractual provision on retirement age, as retirement ages had since been made unlawful. This part of the claim does not require knowledge of his state pension age and therefore his awareness or otherwise of the state pension age is not relevant to the time limit of the claim he submitted.
>
> 6.27. If we are right, we do not consider that it would be just and equitable to extend time, bearing in mind that time limits are to be observed strictly and taking into account the prejudice to the parties, the merits of the claim and the length of the delay.

The appeal

49. The appeal was advanced on the following grounds:

> Ground 1: The ET erred in its construction of the word "access" in s39(2)(b) Equality Act 2010 ("EA 2010")
>
> Ground 2: The ET ignored the Appellant's legal argument that s39(2)(b) EA 2010 ought to be construed in line with EU law.
>
> Ground 3: The ET erred in its finding that the discriminatory act was that of the insurer and not the Respondent.

Ground 4: The ET's finding that it would have been impossible to transfer the Appellant to another scheme while he was claiming benefits and that this was not directly related to his age amounts to an error of law and/or is perverse.

a. The ET had no or insufficient evidence to justify its conclusions.

6. Ground 5: The ET erred in its construction of s13(2) EA 2010 and paragraph 14 schedule 9 EA 2010 at [6.7].

7. Ground 6: The ET's conclusions at [6.8] in upholding the Respondent's justification defence under s 3(2) EA 2010 amount to an error of law and/or are perverse.

a. The ET had no or insufficient evidence to justify its conclusions.

b. The ET's findings are not supported by how the Respondent put its case.

8. Ground 7: The ET's conclusion that the Appellant's claim is out of time and/or that it is not just and equitable to extend time amounts to an error of law and/or is perverse.

a. The Appellant makes a number of points in respect of the ET's handling of the limitation issue. For ease they have been grouped together under this ground. The criticisms are as follows:

i. The ET's construction of the word "access" in s39(2)(b) EA 2010 has infected its finding that the alleged discriminatory act was not conduct extending over a period as per s 123(3)(a) EA 2010

ii. The ET has mischaracterised the Appellant's case as originally being that the PHI benefit was not in accordance with the Appellant's contractual retirement age

iii. The ET has failed to make clear findings of fact as to when the Appellant was aware that his SPA had changed to 66 years

iv. The ET has erred in law as to its conclusions as to when the Appellant became aware of the facts which gave rise to his claim

v. The ET has reached a perverse decision on the exercise of its discretion as to whether it was just and equitable to extend time.

Ground 8: The ET has failed to give adequate reasons for its decisions - the ET's judgment is not Meek compliant

Limitation of the appeal

50. At the outset of the hearing I was informed that the claimant was no longer asserting that he had been subject to direct discrimination in two of the respect asserted in the list of issues in the employment tribunal:

> (b) The Respondent's failure to update the PHI policy applicable to the Claimant to comply with paragraph 14(1) Schedule 9 EA 2010
>
> (c)The Respondent's decision not to transfer the Claimant to a PHI policy that would pay out beyond his 65th birthday

51. Accordingly the asserted direct age discrimination is limited to:

> (a) The Respondent's decision to provide PHI in respect of which payments will cease on the Claimant's 65th birthday;
>
> (d) The Respondent's decision to cease PHI payments to the Claimant on the Claimant's 65th birthday.

52. The claimant no longer relied on Ground 4 of the Notice of Appeal challenging the finding of fact by the employment tribunal that it would have been impossible to transfer the claimant to another scheme while he was claiming benefits and that this was not directly related to his age.

53. The only remaining acts of direct discrimination asserted seem to me to offer a simple answer to the appeal. The "decision" of the respondent to provide PHI in respect of which payments will cease on the claimant's 65th birthday, must have occurred before the respondent entered into the PHI scheme on 1 March 2011. The version of paragraph 14 of Schedule 9 EQA in force at that time permitted such a scheme to provide for benefits to cease at 65. Accordingly, there was no age discrimination. The respondent did not decide to cease PHI payments to the claimant on his 65th birthday – the cessation of payments was a consequence of the terms of the PHI scheme that were frozen once the claimant became incapacitated from work on 3 July 2011. The respondent did not subject the claimant to a detriment on his 65th birthday.

54. Mr Bhatt asserted that I should not limit my consideration to the specific detriments asserted because the claim in the employment tribunal was more broadly framed on the basis of access to PHI/PHI benefits. While I cannot see why the claimant should not be limited to the specific detriments

asserted, I will consider the more general argument made on his behalf.

Discussion and conclusions

55. Under an employment contract the employee provides work in return for payment of salary, and other benefits. The benefits may include provision for circumstances in which, as a result of ill-health, the employee is not able to work. Some employers only offer statutory sick pay ("SSP"). Many employers offer company sick pay for a limited period, at full or partial salary, followed by SSP. Some employers offer to continue paying full, or partial salary, until retirement age. To do so is risky for an employer because it might have to pay full salary for a long period during which the employee is not able to work. An employer could choose to continue paying full, or partial, salary to retirement age funded by an insurance policy. Alternatively, an employer could agreed to provide access to its employees to the benefit of an insurance scheme pursuant to which the insurer will fund benefits should the employee become permanently incapable of work. This is more common than an employer itself agreeing to fund payment of ill-health benefits to employees.

56. Pursuant to paragraph 14 of Schedule 9 EQA it is not unlawful age discrimination for an employer to provide employees with access to the benefit of insurance that will provide for payment of benefits up to the latter of age 65, or state pension age.

57. Paragraph 14 of Schedule 9 EQA provides an exclusion from liability for age discrimination. It does not preclude the possibility that an insurance benefit that ends at an earlier date than 65, or the employee's state pension age, could be found to be a proportionate means of achieving a legitimate aim pursuant to section 13(2) EQA. Paragraph 14 of Schedule 9 EQA permits the provision of insurance by an employer for the benefit of its employees, pursuant to which benefits terminate at 65, or state retirement age, without having to undergo the rigours of establishing a legitimate aim, and that the age limitation on the provision of benefits is a proportionate means of achieving that legitimate aim. That does not mean that a scheme that does not gain the automatic protection of paragraph 14 of Schedule 9 EQA cannot be justified under section 3(2) EQA if it is a proportionate means of achieving a legitimate aim.

58. The authorities establish that there is a distinction of principle between an employer agreeing to provide access to the benefit of permanent health insurance to its employees and an employer agreeing that it will fund sickness benefits to retirement, or some other age, should the employee become permanently incapacitated, albeit potentially funded by insurance the employer has taken out for itself: **Smith v Gartner UK Ltd** UKEAT/0279/15/LA and **Hall v Xerox UK Ltd** UKEAT/0061/14.

59. I consider it is arguable that this case should properly have been analysed under section 39(2)(a) EQA as a claim in respect of the claimant's terms of employment, rather than section 39(2)(b) as a claim in respect of access to a benefit. However, in the employment tribunal it was analysed as such without challenge by the respondent. It has been argued on that basis in this appeal. Accordingly, I will analyse the appeal on the basis advanced by the parties.

60. I consider it is clear that this was a case in which the respondent agreed to provide the claimant with access to the benefit of the PHI scheme rather than agreeing that it would, itself, pay sickness benefit until his retirement age. Clause 8.2 of the DSA provided that the respondent was to effect permanent health insurance for the benefit of the claimant. The DSA set out the benefits that would be available under a PHI scheme to be paid by the insurer. The agreement to provide access to the benefit of a PHI scheme was subject to it being available at standard rates; although there might be some question of whether such a term was too vague to be enforced. The DSA stated that the provision of access to the benefit of a PHI scheme was subject to the rules of the scheme and subject to any restrictions due to the claimant's previous medical history.

61. Unsurprisingly, the PHI scheme provided that once a member became incapacitated the terms and conditions of the policy would effectively freeze on the date immediately prior to the incapacity.

62. It is in the nature of a permanent health insurance contract that the situation crystallises upon the employee becoming incapacitated for work so as to trigger the payment of benefits. Thereafter, payment of benefits is a matter for the insurer. An employer cannot provide renewed insurance cover in respect of an event that has already occurred.

63. The fact that benefits crystallise at the date of incapacity may have upsides or downsides for employees. Future payments are based on salary at the date of incapacity, subject to any provision in the insurance contract for uplift in relation to the rate of inflation or otherwise. After the employee becomes incapacitated better or poorer insurance provision may be available to other employees, but those changes will not affect an employee who is in receipt of benefits having become incapacitated.

64. The employer provides access to the benefit of the PHI scheme for the period that it is in place up to any claim being made under it. Access is not limited to the entry point, but continues through the period that the benefit of the PHI Scheme is provided: see the analysis of access to benefits in **Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust** [2016] ICR 903.

65. In the case of an agreement to provide access to the benefit of insurance the access to the benefit ends when the event against which the insurance has been taken out occurs. In this case, it was agreed in the list of issues that event occurred when the claimant went off sick on 3 July 2011.

66. During the period that the respondent provided the claimant with access to the benefit of the PHI scheme it was lawful to provide employees with access to the benefit of a PHI scheme that would provide payments that ended at 65. The version of paragraph 14 of Schedule 9 EQA in force at the time permitted benefits to cease at 65 (and made no provision for a later state retirement age) and, in any event, the claimant's state retirement age was 65 at the time. Accordingly, the respondent did not discriminate against the claimant because of his age during the period it provided access to the benefit of the PHI scheme. It was the insurer, rather than the respondent, that ceased payment when the claimant reached 65. That was a consequence of the terms of the scheme crystallising on the date that the claimant became incapacitated for work.

67. Turning to the specific grounds of appeal. Ground 1: I do not consider that the employment tribunal erred in its construction of the word "access" in section 39(2)(b) EQA. While it is correct that the employment tribunal referred to the act of the respondent that gave rise to the claim as being choosing UNUM to provide the PHI scheme. That has to be seen in the context of the specific act of discrimination alleged; the decision to provide a PHI scheme that provided that benefits terminate at

the age of 65. The tribunal found that the benefit crystallised once access under the PHI scheme was actualised. That was set out in the agreed facts as being the date on which the claimant went off sick rather than a later date, such as when the application for benefits was submitted or the date on which payment of the benefits commenced. The most important point is that it is clear that the respondent did not unlawfully discriminate against the claimant because of his age during the period that it provided access to the benefit of the PHI scheme up to the date he became incapacitated for work.

68. Ground 2: the claimant asserts that the employment tribunal ignored his argument that section 39(2)(b) EQA should be construed in accordance with EU law principles. The EU law principles said to be in play were that preventing age discrimination is important and that where it occurs there should be an effective remedy. While the employment tribunal did not refer to the EU law arguments, I cannot see that they had anything to add to domestic law. Protection against age discrimination is clearly important, and there should be an effective remedy for unlawful discrimination. The fundamental point is that the respondent did not subject the claimant to unlawful discrimination because of his age.

69. Ground 3: the claimant asserts that the employment tribunal erred in finding the discriminatory act was that of the insurer, not the respondent. I consider that the employment tribunal did no more than note that the cessation of payments when the claimant reached 65, was necessarily an act of the insurer rather than of the respondent. Under the terms of the PHI scheme once the claimant became incapacitated for work the payment of benefits would be a matter for the insurer.

70. Ground 4 was not pursued. The claimant no longer asserted that it would have been possible for the respondent to provide alternative insurance for the claimant once he had accessed the benefits under the PHI scheme because he was incapacitated from work. The employment tribunal was clearly entitled to conclude that new insurance could not be obtained once the event in respect of which insurance is sought has occurred.

71. Ground 5: the claimant asserts that the employment tribunal erred in its construction of section 13(2) and paragraph 14 of schedule 9 EQA. I do not accept that is the case. During the period

that the respondent provided access to the benefit of the PHI scheme, the terms of the scheme were permissible pursuant to paragraph 14 of Schedule 9 EQA. If the claimant had been at work at the date his retirement age increased to 66 it is strongly arguable that it would have been incumbent on the respondent to seek to obtain insurance under which payment were payable to age 66 if it wished to be able to rely on the exception in paragraph 14 of Schedule 9 EQA. That is what the respondent did for employees who were actively in work when it entered into the new scheme. If the respondent had not changed the PHI scheme so as to extend the period for which payment of benefits would be made to state retirement age, it is still theoretically possible that it could have been established that the provision of access to a scheme that did not provide benefits to state retirement age was a proportionate means of achieving a legitimate aim for the of purposes section 13(2) EQA.

72. Ground 6: as I consider that the employment tribunal was clearly right to find there was no discrimination, the issue of justification falls away. It is necessarily an artificial process to consider how one might justify treatment that was not discriminatory.

73. Ground 7: in considering whether the claim had been submitted out of time, I consider that the focus by the employment tribunal on the relevant date as being that on which the PHI scheme was entered into by the respondent was permissible as it was the basis upon which the detriment was asserted by the claimant; although I accept that there could be a claim during the period that the insurance remained in force prior to the claimant receiving benefits. I do not consider that the employment tribunal erred in law in its determination that the claimant could, or should, have been aware of the possibility of a claim well before he brought his claim such that it would not have been just and equitable to extend time. That was a factual determination for the employment tribunal.

74. Ground 8: I do not consider there is any merit in the assertion that the judgment was not Meek compliant. I consider that the employment tribunal's decision was commendably succinct and properly explained to the claimant why he lost his claim.

75. The appeal is dismissed.