EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Prof P Ewart	**v**	The Chancellor, Master and Scholars of the University of Oxford

Heard at: Reading **On:** 29 & 30 August, 2 - 5 September 2019 (full hearing) & 23 & 24 September, 18 October & 22 November 2019 (in chambers)

Before: Employment Judge Anstis
Mrs A E Brown
Mr J Appleton

Appearances:
For the Claimant: Mr A Sugarman (counsel)
For the Respondent: Mr S Jones QC (counsel)

RESERVED JUDGMENT

1. The claimant was subject to unlawful age discrimination.

2. The claimant was unfairly dismissed.

REASONS

A. INTRODUCTION

The claims

1. The claimant brings complaints of unfair dismissal and age discrimination, which arise from his dismissal on 30 September 2017 and the events which lead up to it.

2. His dismissal came about when the fixed term contract he was employed under expired and was not renewed.

3. The claimant was subject to the respondent's "employer justified retirement age" (or "EJRA") procedure. We will give more detail of this later in these reasons, but in his case he was subject to it twice. He was

initially due to retire on 30 September 2015 (at which point he would have been 67) but applied for and obtained an extension which was granted by the respondent as a fixed term contract to 30 September 2017. A further application for an extension was refused, so his fixed term expired without being renewed.

4. The respondent accepts that the claimant was dismissed because of his age. That is inherent in the concept of an enforced retirement. However, it says that its actions were justified as being a proportionate means of meeting a legitimate aim. If so, it is not unlawful discrimination. For unfair dismissal purposes, the respondent says that the dismissal was for some other substantial reason, and that the dismissal was fair.

The hearing

5. This hearing followed from a case management order of 21 August 2017 in which a final hearing was listed for the purposes of liability only. It was listed on the basis that evidence and submissions would be concluded within four days, giving the tribunal then three days for deliberation and delivering an oral judgment with reasons.

6. At the outset of this hearing, both parties agreed that that was not achievable, and set out a timetable by which evidence could be completed within six days. While in principle this allowed one day to follow for submissions, both parties were of the view that there would be substantial and detailed argument on matters of law and that it would be beneficial for those to be dealt with in writing allowing time for the representatives to properly respond to the evidence that emerged during the hearing. Throughout the hearing there was discussion as to how this could best be managed taking into account the availability of the representatives and the tribunal. The outcome of this was that a first round of written submissions was to be exchanged by the parties and copied to the tribunal by 18 September 2019, with any replies to the submissions to be submitted by 09:00 on 23 September 2019 ahead of a chambers meeting scheduled for 23 & 24 September. As the parties were later notified, it required further chambers meeting days in October and November to conclude this judgment and reasons.

7. The first day of the hearing was taken as a reading day and to address any preliminary matters.

8. At the start of the hearing the tribunal raised the question of whether the claimant's age discrimination and unfair dismissal claims stood and fell together, or whether it was said by the claimant that the dismissal was unfair independently of any consideration of age discrimination. Partly at the prompting of the tribunal and partly at the prompting of the respondent, the claimant was invited to set out in writing the matters that he said meant that his dismissal was unfair.

9. On resuming the hearing on the second day, the respondent objected to a number of the particulars of unfair dismissal that had been produced.

10. The tribunal heard argument on the point, and allowed the claimant to rely on all but one of the particulars he had raised. Oral reasons were given for this decision at the time, but the essential points were that in the tribunal's view it was not generally necessary for a claimant to plead particular aspects of unfairness. The main point was that the respondent had to know the case it had to meet. All but one of the points of unfairness raised appeared to relate to aspects of the retirement process which the respondent either was or should be in a position to address at the hearing.

11. While acknowledging that a consideration of the fairness of the dismissal requires an assessment of many different factors, and that one point of unfairness would not necessarily render a dismissal unfair under section 98(4) of the Employment Rights Act 1996 the tribunal considered it of assistance to know what points the claimant was relying on as demonstrating that his dismissal was unfair, and allowed the claimant to rely on all but one of these particulars of unfairness. The point that was ruled out was on a question of the guidance and training heads of department and divisions had received in the implementation of the retirement process. This did not seem to us to be a point that has been raised in any manner previously, nor one that any of the witnesses to be called by the respondent were in any position to address.

12. The tribunal went on to hear evidence from (in order of appearance):

    12.1. Professor John Wheater, who was head of the department of physics at the relevant time.

    12.2. Dr Judith Maltby, who chaired the EJRA committee which decided on the claimant's application for a second extension (and which in refusing it caused the claimant's dismissal).

    12.3. Peter Bond, who chaired the University Appeal Panel which heard (and dismissed) the claimant's appeal against the EJRA committee's decision on his application for a second extension.

    12.4. Sarah Thonemann, who was at the time head of HR policy for the respondent, and as such had responsibility generally for the operation and review of the EJRA policy.

    12.5. The claimant.

The issues

13. The parties had agreed (and we adopt) a list of issues as follows. This uses a number of terms which we will discuss and define in more detail during these reasons.

    Age discrimination

1. Did the respondent treat the claimant less favourably because of his age within the meaning of s13(1) of the Equality Act 2010 ("EA") when it:

    a. Applied to him the 2011 policy requiring him to retire by 30 September 2015 unless he submitted a successful application to continue in employment beyond that date;

    b. Imposed, under the 2011 Policy, a fixed term contract for 2 years commencing 1 October 2015 at 0.8 FTE;

    c. Applied to him the 2015 Policy requiring him to retire by 30th September 2017 unless he submitted a successful application to continue in employment beyond that date;

    d. Dismissed him on 30th September 2017 following the refusal of his application for an extension beyond 30th September 2017; and

    e. Dismissed his appeal on 16th January 2018.

2. If so, within the meaning of s13(2) EA:

    a. What legitimate aim(s) does the respondent rely upon for such treatment?

        (1) Safeguarding the high standards of the University in teaching, research and professional services;

        (2) Promoting intergenerational fairness and maintaining opportunities for career progression for those at particular stages of a career, given the importance of having available opportunities for progression across the generations, in order, in particular, to refresh the academic research and other professional workforce and to enable them to maintain the University's position on the international stage;

        (3) Facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate University's joint appointment system, given the very long lead times for making academic and other senior professional appointments particularly in a university of Oxford's international standing;

        (4) Promoting equality and diversity, noting that recent recruits are more diverse than the composition of the existing workforce, especially amongst the older age groups of the existing workforce and those who have recently retired; and

(5) Minimising the impact on staff morale by using a predictable retirement date to manage the expected cuts in public funding by retiring staff at the EJRA.

b. Has the respondent established that its treatment of the claimant was a proportionate means of achieving the legitimate aim(s)? In particular:

i. Was the 2011 policy a proportionate means of achieving the legitimate aim(s) relied upon?

ii. If so, was it applied to the claimant properly and in a non-discriminatory way?

iii. Was the 2015 policy a proportionate means of achieving the legitimate aim(s) relied upon?

iv. If so, was it applied to the claimant properly and in a non-discriminatory way?

3. Are any of the claimant's complaints out of time?

a. Do the acts complained about prior to 5th February 2017 constitute conduct extending over a period, within the meaning of s123(3)(a) EA?

b. In respect of any acts that are out of time, is it just and equitable to extend time, within the meaning of s123(1)(b) EA?

Unfair dismissal

4. What was the reason for the claimant's dismissal?

5. Has the respondent established that the reason is a potentially fair one within the meaning of s98(1)(b) and 98(2) of the Employment Rights Act 1996 ("ERA")?

6. If the reason is potentially fair, did respondent act reasonably in treating it as a sufficient reason to dismiss the claimant, within the meaning of s98(4) ERA.

14. The particulars of unfair dismissal that we permitted to proceed as referred to above were (in addition to a claim that it was unfair as being age discrimination):

(1) The Respondent ("R") failed to inform C [the Claimant] when he made his first application that it would not welcome a further application or that it would consider it in a different light, despite knowing that to be the case at the time;

(2) R applied to C a new, very restrictive, criterion for second

extensions, tied to the reasons for the first extension, that was not in existence at the time he framed his first application;

(3) The process and documentation was defective as accepted by R's Working Group Review;

(4) The procedure applied to C's second extension application was unfair. There was a clear dispute of fact about the foreseeability of delays and/or completion of projects C was working on at the time of the first extension. R failed to adopt a fair procedure in order to resolve the disputed facts;

(5) The investigation into the issue of the unforseeability or otherwise of any delays was wholly inadequate;

(6) The Division performed an unexplained volte face in its support of C's second extension application;

(7) C was not informed of the volte face and there was no disclosure to him of relevant evidence, namely the Division's first position;

(8) If the Division's later response to C's second extension application is correct, there was no adequate discussion within the Division of the merits of C's application;

(9) The burden and standard of proof imposed upon C in his second extension application was unfair;

(10) The failure to consider criteria other than the foreseeability or otherwise of circumstances frustrating the presumed purposes of the original extension was unfair;

(11) The Panel that met on 16.12.16 gave inadequate consideration to C's application;

(12) There was no hearing;

(13) The Panel's decision was contradictory, flawed and contrary to the evidence before it;

(14) There was an unjustified and prejudicial delay in notifying C of the decision, which caused C to lose the right of appeal to the University's Appeal Court;

(15) The appeal process and procedure was unfair, as set out in C's Amended Claim [37a- b]. C was invited to pursue, and did, a process he ought never to have embarked upon. At the 11th hour, C was told the Appeal Court no longer had jurisdiction to hear his case;

(16) The process was grossly and unreasonably delayed at great personal cost to C. That delay was hugely significant as whilst he

pursued an appeal for over a year, his retirement date came and went and he was dismissed.

B. THE FACTS

Introduction

15. The basic facts concerning the introduction and development of the EJRA, and its subsequent application to the claimant are fully documented and not in dispute. We must, however, set them out in appropriate detail before moving on to consider what the law is and how it applies to these facts.

The respondent's constitution and structure

16. There are a number of aspects of the governance and structure of the respondent which are not in dispute but which are somewhat unusual and which it is appropriate to set out at the start of this section.

17. The respondent's governing body is known as "Congregation". This comprises around 4,500 senior academic and other staff, along with representatives of the colleges associated with the respondent.

18. An unusual feature of "Congregation" is that any 20 members can put forward a proposal which Congregation is then bound to consider and discuss. As well as this, where a proposal is made by Council (see below) it only takes 2 members of Congregation to call in that proposal for discussion and possible amendment by Congregation.

19. The executive body of the respondent is "Council", which itself has sub-committees including the Personnel Committee.

20. Both Congregation and Council operate on the basis of a number of "statutes" setting out provisions for the governance of the respondent.

21. There are 38 colleges associated with the respondent. All but two of them are independent and self-governing, but together with the respondent they form what Ms Thonemann described as a "type of federal system" that comprises the University of Oxford. They send delegates to the "Conference of Colleges" which is, amongst other things, the representative body for the Oxford colleges in any discussions with the respondent.

22. For administrative purposes, the academic part of the respondent's work is divided into four divisions, which are:

22.1. Humanities,

22.2. Mathematical, Physical and Life Sciences (or "MPLS"),

22.3. Medical Sciences, and

22.4. Social Sciences.

23. It also appears that outside the purely academic realm there are also divisions for Gardens, Libraries and Museums ("GLAM") and for the respondent's administration. Each division has a head of division.

24. Under the divisions there are departments. The claimant worked in the Department of Physics, which is part of the MPLS division. Each department has a head of department.

25. Under the departments are sub-departments. The claimant worked in the sub-department of Atomic and Laser Physics.

26. Within the respondent's structure there also appear to be multiple different working parties, panels, committees and sub-committees established either on a permanent or ad-hoc basis under the authority of Congregation or the Council, some of which will be referred to in the facts below.

27. The "Gazette" is the respondent's official publication of record in which formal announcements and notifications are published.

Job roles

28. It is common for academics employed by the respondent to hold what are called "joint appointments" whereby they work partly for the respondent and partly for a college, with their costs being divided between the respondent and the relevant college. While this concept of "joint appointment" has occasionally been raised as of relevance to the EJRA it is not an issue in the claimant's case. He had held a joint appointment with a college but relinquished this voluntarily on reaching the age of 67, and so all the matters we are concerned with relate to his employment by the respondent.

29. Setting aside the most senior administrative or leadership staff, in its academic roles the respondent had grades rising from 1-10, above which were associate professors and statutory professors. Although the figures varied we were told that at the relevant time there were around 120 statutory professors and 1,200 associate professors. These are considered the most influential and prestigious academic roles within the respondent.

30. The grade of "RSIV" (spoken as "RS4") was also referred to. These were senior (and therefore prestigious) posts, but those who held them were only involved in research rather than research and teaching.

31. There was some discussion before us as to what the description "academic" meant within the respondent. While it may be used (and often was before us) in a looser sense, it seems that in the strict sense as applied to staff in the respondent it meant staff engaged in both research and teaching. Thus the RSIV employees were not considered to be

"academics" in the strict sense. Unless otherwise referred to, where we use that word it will be in the looser sense of those undertaking either teaching or research roles with the respondent.

The respondent's retirement age

Before 2011

32. Up to 1985 the respondent had a compulsory retirement age of 67. In 1985 this was reduced to 65, but those already in post at the date of that change retained their right to retire at 67.

33. All of the argument before us tended to refer to a particular retirement age of, say, 67, but what this actually meant is retirement on the 30 September before reaching the age of 68. Compulsory retirement or retirement under the EJRA has always coincided with the end of the academic year on 30 September. For the sake of convenience we will continue to refer to retirement as if it is on reaching a particular age, when in fact it means the 30 September on which they are that age.

34. This compulsory retirement age of 65 persisted through the introduction of the Employment Equality (Age) Regulations 2006.

35. Despite having (and being legally permitted to apply) a compulsory retirement age there was alongside this an exceptions provision allowing people to apply to work on beyond their retirement age.

36. Legislative changes meant that the exemptions for retirement contained in age discrimination and unfair dismissal law would be removed from 1 October 2011 onward.

2011-2014

37. We were referred to extensive documents in the tribunal's bundle setting out the steps taken by the respondent in response to the abolition of a default retirement age. These initially dealt with a formal response by the respondent to the government's proposals, and moved on to what the respondent was to do when a decision was taken to abolish the various exemptions for retirement in age discrimination and unfair dismissal law.

38. Consideration of how to respond to these developments was prompted by the personnel committee. In minutes of its meeting on 30 September 2010 the following appears:

> *"The committee agreed that the university should respond robustly to the government consultation and asked the officers to develop proposals that might enable the university to continue to implement a normal retirement age once the DRA is phased out …*
>
> *Early communication … was felt to be a necessary first step to developing general support in the community for a continuing*

expectation that current retirement arrangements should be maintained; such support would be important in defence of the University's eventual EJRA …"

39. On 11 October 2010 Council approved the personnel committee's report on the matter. It is at this point that the question of legitimate aims for any such policy is identified, with several possible aims set out.

40. The personnel committee moved to develop the EJRA policy. This included consultation with colleges and staff (both directly and through the UCU trade union), as well as obtaining legal advice. The outcome of these consultations are set out in minutes of 19 May 2011. Consultation continued. An announcement of the intended new procedure was made in the Gazette on 9 June 2011. The form of the announcement was that of a recommendation by the personnel committee to the Council. Consultation continued and the proposal was eventually accepted by the Council and published again in the Gazette. No steps were taken by anyone to call this proposal in for discussion by Congregation, and it therefore came into force from 1 October 2011.

41. We note the following:

    41.1. The EJRA was properly adopted according to the respondent's governance procedures.

    41.2. The process of developing the EJRA included some discussion of the way in which other institutions (particularly in the US) dealt with retirement. It was understood by those undertaking the work that US institutions had no retirement age but would where it was considered necessary provide financial inducements to members academic staff to retire. That was said to be a costly process.

    41.3. Following the abolition of the default retirement age, no British university other than the respondent and the University of Cambridge continued to operate a policy of compulsory retirement. We understand that subsequently the University of St Andrews considered imposing an EJRA, but it is not clear whether it did impose one.

    41.4. As the respondent was governed by Congregation, which itself comprised people who were subject to the EJRA, those people had the opportunity to prevent the policy being adopted or could attempt to amend it, but did not do so. (Initially there were a large number of people who were not members of Congregation but who were nevertheless caught by the EJRA. However, throughout this process every (or almost every) member of Congregation has been subject to the EJRA.)

    41.5. There was no substantial opposition to it at the time. The only voices against the adoption of the EJRA seems to have been the local UCU representatives and the national UCU policy against

retirement ages. However, on consulting with their members in a ballot the representatives found that the local membership was (albeit with a very low turnout) in support of the EJRA and took no further steps to oppose it. Those in favour included the Conference of Colleges (by a substantial majority of colleges), and the claimant's own college (of which he was part of the governing body).

41.6. In some quarters within the respondent it seems that the EJRA process was seen as a preferable alternative to the introduction of a more general performance management regime. We understand that proposals to introduce formal performance management a few years earlier had caused great controversy within Congregation and were rejected as being incompatible with the respondent's status as a self-governing collective of scholars. This aim appears in the 2011 policy as "*avoiding invidious performance management and redundancy procedures*". This was, however, expressly disavowed by Ms Thonemann in her evidence and was later removed as an objective. The respondent's case is that the EJRA is not to be regarded as an alternative to performance management.

41.7. Despite what appears to be the early identification of possible legitimate aims, the tone of the discussions at this and indeed later stages is very much one of how a retirement age can lawfully be maintained, rather than having developed the retirement age as part of an overall plan for how to achieve the stated aims.

41.8. The policy itself was expressly to be subject to review after ten years, with the expectation of a interim review to take place after five years.

41.9. The claimant accepted that he had the opportunity to raise objections to the EJRA at this stage, but did not do so. He seems hardly to have been aware of the discussions around the introduction of the EJRA scheme at this stage – although the documents we have seen are clear that the respondent was open about its proposals. The proposals simply do not seem to have had a high profile or to have attracted much interest amongst the respondent's staff at the time. This is not a criticism of the respondent's approach, since every necessary procedure and more seems to have been followed for the introduction of the EJRA in 2011.

42. In his submissions Mr Sugarman urges us to adopt the findings of Dame Janet Smith in the Galligan case (referred to below) on the question of the approach adopted by the respondent in the discussion and introduction of the EJRA. He says that she had the advantage of evidence from Dr Goss, who had first-hand involvement in it.

43. Whilst noting Dame Janet's conclusions we must form our own view on these matters on the basis of the evidence we have heard. In respect of the earlier passages of her decision at paras 17-35 much of what Dame Janet says is also set out by us above with, perhaps, some difference of emphasis. In the later passages at paras 74-85 Dame Janet sets out the extension process and the tone of this is very much in accordance with the critical view she takes of the extension process and which permeates her decision. We do not consider it necessary to adopt Dame Janet's position on this – we will form our own view on the basis of the evidence we have heard.

44. We understand the point that Mr Sugarman intends to derive from this is that the initial consideration was very much focussed on how to maintain a retirement age (as opposed to any wider consideration of alternative means by which the aims could be achieved or the question of how retirement should be dealt with more generally), with the possibility of a generous extension regime held open for the purposes of reassuring employees. Broadly speaking, we accept this point, although it is another question as to whether that makes the EJRA unlawful, and such an approach does not necessarily imply to us that the respondent was seeking to be deceptive or underhand in this matter.

45. We will refer in more detail to the terms of the scheme adopted below, but it seems likely that one reason that the scheme did not attract much interest on its adoption in 2011 is that it applied at age 67 (and so for most people raised their retirement age) and as before contained provision for applications for extension which were presented and understood at the time as being relatively liberal. See, for example, the following from the notes of the working group on 12 May 2011:

> *"It was agreed that the paper should emphasis the liberalising nature of the proposals. The intent was not to rigidly enforce retirement at 67 for all, but to have a sensible procedure to enable discussion of how an individual might stay on beyond retirement age if they so wished. The key element would be the informal discussion of all possible options between the individual and the University/College. The expectation was that in most cases this negotiation would produce an agreed outcome …"*

46. That extract makes it clear that in general it would have been understood by those affected by the changes (if they had paid any attention to them) that they were no worse off than before and may be better off than before. The impression given was that respondent was moving from a regime of compulsory retirement at either 65 or 67, with provision for extension, to an "employer justified retirement age" of 67, with similar provision for extension.

47. Some indication of how extensions worked in practice is given by the figures cited in the personnel committee notes at p866r(p) of the bundle as follows:

	2011-12	**2012-13**	**2013-14**
Applications approved:	31	49	45
Declined:	1	6	1
Withdrawn/not heard:	0	0	2

48. The figures for approved applications are broadly in line with those that were approved in 2009-10 and 2010-11 under the old procedures, but there are no corresponding figures for those declined or withdrawn for that period. What this shows is that in the years immediately following the introduction of the EJRA almost all applications for an extension beyond the normal retirement age were approved. (We note from Dame Janet's decision that this required the endorsement of the relevant division or department. It may be that there were others who wished to apply but could not obtain the endorsement of their division or department and so did not do so, but it is clear that of those who applied, almost all were approved.)

49. The nature of that extension process, and the potential tension between that and the aims said to be pursued, was to become as much of an issue as the question of a retirement age in the first place.

The 2011 policy

50. The policy introduced in 2011 was itself subject to minor revisions year-on-year before a major overhaul in 2015. It was referred to by many different designations at the hearing, including "the pre-2015 procedure" and "EJRA1". We will call it the 2011 policy. By that we mean the version which applied in respect of the claimant's first application for an extension to work beyond 67. This is the version that applied in the 2013-2014 academic year. Because of the minor year-on-year variations this was different to the form in which it was originally introduced in 2011, but neither party suggested that those variations made any material difference so far as the claimant's position or the justification of the policy was concerned.

51. The 2011 policy starts by setting out the review provisions:

> *"The EJRA will operate for an initial period of 10 years from 1 October 2011. The application and outcomes of the EJRA and its procedures will be reported annually to the personnel committee and will be subject to an interim review after five years.*
>
> *These reviews will take into account all relevant considerations, including the continued relevance of the "aim of the EJRA" … to each of the groups of staff to whom the EJRA applies, the application of the EJRA and the procedure for exceptional limited extended employment, as well as relevant external developments in relation, for example, to pensions and longevity."*

52. The 2011 policy applied to staff at grade 6 and above, including statutory and associate professors.

53. The 2011 policy sets out the following aims (they are not numbered in the policy but we have given them numbering for reference purposes):

> *"The EJRA is considered to provide a proportionate means of:*
>
> 1. *safeguarding the high standards of the University in teaching, research and professional services;*
> 2. *promoting intergenerational fairness and maintaining opportunities for career progression for those at particular stages of a career, given the importance of having available opportunities for progression across the generations, in order, in particular, to refresh the academic, research and other professional workforce and to enable them to maintain the University's position on the international stage;*
> 3. *facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate university's joint appointment system, given the very long lead times making academic and other senior professional appointments particularly in the University of Oxford's international standing;*
> 4. *promoting equality and diversity, noting that recent recruits are more diverse than the composition of the existing workforce and those who have recently retired;*
> 5. *facilitating flexibility through turnover in the academic-related workforce, especially at a time of headcount restraint, to respond to the changing business needs of the University, whether in administration, IT, the libraries or other professional areas;*
> 6. *minimising the impact on staff morale by using a predictable retirement date to manage the expected cuts in public funding by retiring staff at the EJRA; and*
> 7. *in the context of the distinctive collegial process through which the University is governed, avoiding invidious performance management and redundancy procedures to consider the termination of employment at the end of a long career, where the performance of the individual and/or the academic or other professional needs of the University have changed."*

54. The policy continues by setting out the procedure that applies. In the extracts that follow we have ignored the provisions that refer to joint appointments.

55. The head of division is to notify the individual employee of their expected retirement no later than two years before it is due to occur. If the

individual wants to continue to work beyond their expected retirement age, they must discuss this with their head of department. The policy says (at p41 of the tribunal bundle):

> *"These informal discussions … will not result in a definitive decision … but may help inform any formal request which might subsequently be made by the individual. Such discussions are intended to provide opportunity for the formulation of a request with which all parties will be content."*

56. Any extension is to be formally requested by the head of division on behalf of the member of staff at least 18 months before the retirement is to take effect and:

> *"That submission should set out clearly: (i) the request as made by the member of staff … (ii) an account … of how the request relates to the considerations for extensions set out in Section VI below; (iii) the view of the division …"*

57. Such a request is then considered by a panel which "*will consider the request in the light of the aims of the EJRA, taking into account the considerations set out in section VI below …*".

58. Importantly, the policy provides at para 13 (p43) that:

> *"Where all parties representing the employers agree that an extension is appropriate, the expectation is that the panel will grant an extension provided that it is satisfied that the aims of the EJRA have been sufficiently addressed."*

59. There follows provision for what happens where the request is not supported by "*the parties representing the employers*" – the panel holds a meeting at which both the employee and the department/division can put their views forward.

60. Where an extension is granted, it will be on a fixed-term basis.

61. There was a general right of appeal, with any appeal being heard by the respondent's Appeal Court.

62. Section VI sets out the considerations that apply to an application for an extension. It says, amongst other things (p44):

> *"23. … applications will be approved only where the panel is satisfied that an extension of employment creates sufficient clear advantage to the university so as to justify an exception from the general rule. The panel will weigh the advantages of extended employment … against the opportunities arising from creating a vacancy or part-vacancy.*

> 24. *… all staff are expected to carry out their roles to a high standard … distinguished scholarship does not, in itself, necessarily constitute an exceptional contribution.*
>
> 25. *The list below outlines the type of matters that the panel will usually take into account in making their decision …*
>
>   a. *Would the employee's contribution be unusually hard to replace given his or her particular skills …*
>
>   b. *What is the likely impact of extended employment compared with the opportunity arising from a vacancy …*
>
>   c. *How would extended employment compared with the opportunity arising … from a vacancy fit with the future academic and business needs of the department …*
>
>   d. *How would any financial commitments or benefits which would accrue from extended employment compare with those which might accrue from the opportunity arising from a vacancy?*
>
>   e. *What is the likely impact on the promotion of diversity?*
>
>   f. *Is the duration of the proposed extended employment contract appropriate in terms of the benefits expected to the collegiate university?*
>
>   *…*
>
>   i. *Are there relevant personal circumstances that would properly justify exceptional treatment."*

63. Significantly, para 26 provides that:

    "A member of academic … staff whose retirement has been set later than the EJRA may apply for a further extension under the procedures in sections II-VI above."

64. Sections II-VI are the general provisions for extension that we have previously referred to – so applications for second and later extensions were to be dealt with according to the same rules as first extensions.

65. Whatever the original intention of those drafting the procedure, in practice the effect of this extension process was that those who had the support of their department or division could expect their applications to succeed and those who did not have the support of their department or division would not succeed.

The Galligan decision and its consequences

66. Given the general extension of the retirement age from 65 to 67 the EJRA seems to have had little practical impact in its first two years of operation.

67. In the summer of 2014, Dame Janet Smith, sitting in the respondent's Court of Appeal, heard an appeal brought by Prof Denis Galligan against his dismissal from the respondent on the ground of retirement at the age of 67. He had applied for, but not been granted, an extension of his employment beyond the age of 67. Dame Janet's decision is dated 1 September 2014. She allowed Prof Galligan's appeal, and made more general observations on the EJRA process.

68. This decision has been a matter of some controversy, and the parties were divided even at the hearing before us as to the nature and effect of Dame Janet's decision. The respondent's submissions contain a section on what were said to be errors of law in her analysis of the EJRA.

69. It seems that initially the respondent sought to view this decision as simply being a decision on the facts of Prof Galligan's case and of no value as a precedent for other cases. That may on some level be technically correct, but the respondent's response to Dame Janet's decision was strongly criticised by Sir Mark Waller, also sitting in the respondent's Court of Appeal, in a decision in the case of Prof Peter Edwards dated 16 June 2017.

70. Others, the claimant amongst them, had come to learn of the decision and regarded it as a fundamental rejection by the respondent's Appeal Court of the respondent's EJRA policy. Certainly Dame Janet herself felt that her decision had wider significance, commenting in it that, "*I hope that my analysis of the University EJRA policy will be of assistance when it decides on its future retirement policy*" and "*I have decided this appeal on issues of principle unrelated to the particular facts of the appellant's case*".

71. While making broader comments about the aims and operation of the 2011 policy, Dame Janet particularly criticised the procedure for extensions, saying that it effectively allowed the respondent to pick and choose which staff it wished to retain and which it wished to retire. That is an aspect of the operation of the 2011 policy that we have already noted – in practice those with the support of their division or department could expect that they would be granted an extension but those without such support would not receive an extension.

72. What is most significant for us at this stage is not the underlying reasoning, but the steps that the respondent took in response to this decision.

73. The personnel committee considered the Galligan decision in a meeting on 23 October 2014 with the issue for consideration being whether

changes in response to the decision should await the intended interim review after five years of operating the EJRA (which would take place in 2016) or whether there should be an immediate review. The committee decided that "*an enlarged annual review should take place this year and … should consider the process for extension*".

74. Ms Thonemann deals with the resulting process very simply in her witness statement, saying that "*the working group recommended to the Personnel Committee some clarifications to the aims and some adjustments to the exceptions procedure*". She then goes on to outline seven changes made, although omitting what was in practice the most significant change for the claimant, which was a new restriction on second extensions. These are the seven changes she identifies:

> *"(a) applications for extension of employment would only be approved in exceptional circumstances,*
>
> *(b) applications would be considered by an eight-member EJRA committee with fixed membership,*
>
> *(c) the timescales for applications were simplified,*
>
> *(d) the application forms were modified so that departments and divisions were asked to provide clearly defined sets of information, via a committee, rather than writing in support or against the application,*
>
> *(e) applicants were given the opportunity to have 'the last word' by commenting on the material,*
>
> *(f) contested case meetings were removed from the process, and*
>
> *(g) the opportunity for prospective applications to be made, for example at the time of appointment or promotion to a new role, was also removed from the process."*

75. Despite the wealth of material we have in relation to the original introduction of the EJRA and the five-year review we have been provided with very little material in relation to this review in 2015. Ms Thonemann refers to the summary outcome of the working group which appears at page 979y of the bundle and consists of 11 different recommendations. What we notably do not have is any report from the working group setting out why they made those recommendations, what the purpose of those recommendations was and what information they took into account in arriving at those recommendations. We raised this point during the hearing with Mr Jones. He took instructions and we were told that the respondent claimed privilege in respect of the report, given that it contained legal advice. The difficulty that creates for the respondent is that there is then no contemporary document setting out why the working

group decided to make these recommendations, and what their purpose and thinking was.

76. On reviewing the document at p979y it appears Ms Thonemann may be mistaken in referring to this as the recommendations from the 2015 review. This looks more like the outcome of the five-year review which followed the following year (see p822 onwards) – but if this is a mistake it simply serves to highlight how little contemporary information we have on why these changes were made.

The 2015 policy

77. The 2015 policy which resulted from this extended review took effect from 30 September 2015. It contains considerable changes of both substance and form from the 2011 policy.

78. The 2015 policy starts with the following aims. As before we have added numbering:

> *"In the context of the University's particular structure and procedures, the EJRA is considered to be an appropriate and necessary means of creating sufficient vacancies to meet the aims set out below:*
>
> 1. *safeguarding the high standards of the university in teaching, research and professional services;*
>
> 2. *promoting intergenerational fairness and maintaining opportunities for career progression for those at particular stages of a career, given the importance of having available opportunities for progression across the generations;*
>
> 3. *refreshing the academic, research and other professional workforce as a route to maintaining the University's position on the international stage;*
>
> 4. *facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate university's joint appointment system;*
>
> 5. *promoting equality and diversity, noting that recent recruits are more diverse than the composition of the existing workforce, especially amongst the older age groups of the existing workforce;*
>
> 6. *facilitating flexibility through turnover in the academic - related workforce, especially at a time of headcount restraint, to respond to the changing business needs of the University, whether in administration, IT, the libraries or other professional areas; and*

> 7. *minimising the impact on staff morale by using a predictable retirement date to manage any future financial cuts or constraints by retiring staff at the EJRA."*

79. The statement of aims has thus been recast from that in the 2011 policy. In particular:

    79.1. The EJRA is stated to be an "*appropriate and necessary means*" of creating "*sufficient vacancies*" to meet the aims. Thus the aims are said to be met by creating vacancies, and the EJRA is said to be a way in which sufficient vacancies are created.

    79.2. The previous second aim has been split into two aims for the 2015 policy.

    79.3. The previous aim of "*avoiding invidious performance management and redundancy procedures*" is removed.

80. Applications to work beyond retirement age are to be considered by an EJRA committee (as distinct from the previous EJRA panel under the 2011 policy), which was to meet twice a year.

81. As before, the process is commenced by informal discussion between the individual and senior departmental and/or division staff:

> *"6. The aim of these discussions is to ensure that all options have been explored. The staff member and head of Department… Should in all cases consider whether the individuals and/or departments aims could be achieved through use of a genuine non-employment arrangement following retirement … such as an … honorary research agreement or visitor's agreement.*
>
> *7. In circumstances where non-employment options will not achieve the individual's and/or the department's aims, an application for extended employment will be needed. The application should address the impact of the proposed extension on the aims of the EJRA and set out the case for an extension in the light of the matters for consideration at section VI.*
>
> *It is expected that in all but very rare cases, those who hold permanent posts would need, as a minimum, to step out of their current post into a newly-created, fixed-term post, on a grade appropriate to the duties to be delivered. This is to make it possible for their substantive post to be refilled, thereby reducing any negative impact of the extension on the aims of the EJRA.*
>
> *…*

> *8(ii) In all but very rare cases, the applicant will have secured grant or other funding to cover the full costs … while in employment beyond the EJRA …*
>
> *9. All post-EJRA employment will be on a fixed-term contract."*

82. Much of what is set out above amount to new requirements which where not present in the 2011 policy.

83. The individual is to submit an application which sets out clearly (para 13):

> *"(i) the request for extended employment, including a detailed explanation of the reason for the requested extension and the proposed working arrangements …*
>
> *(ii) the duties or project to be undertaken in the course of the proposed extension;*
>
> *(iii) the non-employment options that have been considered by the individual in conjunction with the head of Department, and why they were not thought to be viable;*
>
> *(iv) any grant or other income that will result directly from the proposed extended employment, the extent to which that income will cover the employment or other costs incurred as a result of the proposed extension, and the extent to which additional posts will be created;*
>
> *(v) details of any space, equipment or other resources that will be required in order to undertake the proposed duties or project, and confirmation that these will be available; and,*
>
> *(vi) any exceptional personal circumstances to which the individual would wish to draw the attention of the EJRA committee."*

84. Para 17 contains provision for a response to these points by the head of department. Para 18 contains provision for a response by the head of division. There is an appeal available to the Appeal Court.

85. As regards the matters that will be taken into account in the EJRA committee's decision-making:

> *"36. … Only in the most exceptional circumstances, in which it is clear both that the extended employment is required in order to ensure the accomplishment of a specific project or duties (or to get the full benefit of a project already completed) and the extension would not undermine the aims, will any application under this procedure be approved … In order to achieve the aims, it is expected that:*

> (i) *any extension of employment will, in any circumstance in which the applicant occupies an academic post of a permanent position of any other type … Involve the applicant vacating their permanent post and moving to a fixed term contract …*
>
> (ii) *The applicant must identify in their application all possible means of supporting the salary and other costs (including space, equipment and other resources) associated with their proposed role in extended employment. It is expected that in all but very rare cases, applications will only be approved where the individual has secured grant or other funding to cover their costs well in employment beyond the EJRA …*

37. *Applications will still be considered if the two expectations above cannot be met, but it would only be in very rare cases that individuals might expect to be successful* [in such circumstances] *…*

38. *In all cases, the committee will bear in mind that all staff are expected to carry out their roles to a high standard. In the case of academic and research staff, this includes distinguished scholarship and research. Senior academic and research staff will often be world-leaders in their field. The offer of distinguished scholarship does not constitute a relevant consideration for the purposes of the extension procedure.*

39. *The list below outlines the type of matters that the committee will take into account in making their decision:*

    a. *Is there a demonstrable need, for a defined period, to retain the applicant in employment in order to complete a specific project or duties, or to gain the full benefit of tasks already completed by him or her, which:*

       i. *Are of particular strategic importance to the University; and*

       ii. *could not be completed by any other individual who is not over the EJRA, either by a current member of the University staff or through a recruitment exercise; and*

       iii. *in the case of prospective or current grant funded research projects, could not, in accordance with the funder's rules, be*

completed in a non-employee or voluntary basis; and

iv. could not be completed on an employment contract with fewer working hours or of a shorter duration?

b. Will the proposed extension result in the creation of career development opportunities for others that would not otherwise have been created?

c. Is there a demonstrable need that arises in connection with a specific event or circumstance and that could only be met by retaining this particular employee in employment for a fixed period?

…

f. Are there any special personal circumstances that would properly justify exceptional treatment?

86. Finally, the policy deals with applications for a second extension:

> *"40. A member of academic or academic-related staff whose retirement has been set later than the EJRA may apply for a further extension under the procedures … above, provided they do so in accordance with the normal procedures and, where possible, observe normal deadlines. It should be noted that a further extension will only be granted if it is essential to address unforeseeable circumstances that have frustrated the purpose for which the original extension was granted."*

87. This last provision was to be particularly significant for the claimant.

The interim (five-year) review

88. It had always been intended that the EJRA would be subject to an interim review after five years. As set out in the 2011 policy, such a review was to:

> *"… take into account all relevant considerations, including the continued relevance of the aim of the EJRA … to each of the groups of staff to whom the EJRA applies, the application of the EJRA and the procedure for exceptional limited extended employment, as well as relevant external developments in relation, for example, to pensions and longevity"*

89. Council authorised the composition of the working party for this review in May 2015. It covers an appropriate range of people from within the respondent's organisation, and as Mr Jones pointed out, included at least one distinguished legal academic working in the field of employment law.

A notice published in the Gazette on 4 June 2015 sets out the working party's task as follows:

> *"The working party will be established to start work in Michaelmas term 2015 by overseeing the collection of the data and other information that it will need … full five-year data allowing analysis of trends will not be available until late 2016. Having collected and considered data on the operation and effects of the EJRA policy … it is proposed that the working party will report to the Personnel Committee during 2016/17 on:*
>
> - *The extent to which the EJRA is meeting the Aims identified when the policy was established, and thus can be justified in law.*
> - *Whether the EJRA is appropriately set at the 30 September before an individual's 68th birthday, and*
> - *Whether the policy is applied to the right staff groups.*
>
> *These considerations will take account of:*
>
> - *Internal data about the staff groups covered by the EJRA and about those who have applied to have their employment extended beyond the EJRA.*
> - *The experience of other higher education institutions operating without a default retirement age both in the UK and abroad, and*
> - *The views of stakeholders* [including staff and various representative bodies].
>
> *The working party will develop outline proposals to the Personnel Committee on the future of the EJRA, including whether it should be retained and, if so, whether it should be revised. Personnel Committee will make recommendations to Council which will then decide on subsequent action including consultation on the emerging proposals.*
>
> *The first substantial task to be undertaken by the working party will be the collation and analysis of data, both internal and external, about the impact of operating with and without an EJRA.*
>
> *The subcommittee that worked on the EJRA for Personnel Committee during Hilary Term 2015 considered a draft data specification for this project and provided advice to Personnel Services on the priorities for data collection. Some internal data seen as important by the subcommittee requires amendments and additions to be made to the Core HRIS system (the university's staff database) as well as extensions to the HRIS team's current*

reporting capability. This work as been started in readiness for the review."

90. The outcome of the five-year review and any subsequent changes to the EJRA process came too late for the claimant, who was dealt with entirely under the 2011 and 2015 policies. However, the work done by the working group, and their conclusions, are relevant to informing our consideration of whether the policies as applied to the claimant amounted to a proportionate means of fulfilling legitimate aims.

91. There is in the bundle at pages 873b (with sub-numbering that is not clear on our copy) a document headed "EJRA Review: Draft Data Specification". This is headed "strictly confidential and legally privileged". It is not obvious to us that this is properly considered to be a privileged document, but since it appears in our bundle apparently without any objection from the respondent we take it that to the extent it could properly be considered privileged that privilege has been waived. This must be the draft data specification referred to in the extract cited above. This sets out provision for statistics in the following areas (amongst others). The comments that follow against each category are notes which appear in the document against the category. The lettering is taken from the document itself:

> *"D. Number of leavers overall and number of leavers by reason of retirement (ie those who leave employment and give retirement as the reason), by division, staff category and age band, for each year since the introduction of the EJRA in 2011 and for five years prior to that. To be converted into turnover rate, to allow analysis of trend data in turnover.*
>
> *Onerous to produce but this should be resolved* [by a forthcoming software update] *…*
>
> *F. Number of appointments since 2011 by staff category and division and proportion of those appointments that in each case that resulted from (a) someone retiring from the post, (b) someone leaving for some other reason, or (c) a new post being created.*
>
> *TBC. This will require investigation of what can be produced from Core. We could do it manually for stat profs but it would be impossible for most categories due to the size of the task ...*
>
> *I. The Equality Impact Assessment undertaken in early 2011 should be updated, with data to demonstrate the change in diversity in each of the years since, by legal sex, ethnicity and disability. Age should also be included and, if possible, the original data updated to include this strand. This should include comparisons of the diversity of the retiring and recruited populations in the years 2011-present.*

> *This will be a substantial piece of work. It will be beneficial to begin this work soon, so that they data can be reviewed before the broader review begins for completeness and relevance, prior to a final cut in 2016/17."*

The document continues:

> *"The premise that there will be a reduction in turnover as a result of the abolition of the default retirement age will be tested by the collation of information on retirement rates and ages from other research-intensive, Russell Group universities."*

Five institutions thought to be particularly relevant for this purpose are then mentioned.

92. What appears to be the outcome of this data collection appears at pages 881b(a) onwards.

93. On the question of reason for leaving (point D above):

- Across the whole EJRA population, in 2015 94 people left by reason of retirement and 1,376 for other reasons (6.4% and 93.6% respectively). This appears broadly consistent with the proportions recorded from 2006 onwards.

- For statutory professors, in 2015 19 left by reason of retirement and 5 for other reasons (79.2% and 20.8%), although these figures seem to fluctuate widely between years with the 2014 figures being 3 and 6 (33.3% and 66.7%). 2015 and 2014 were the years in which respectively the highest and lowest proportions of leaving through retirement are recorded in the period covered (from 2006 onwards).

- For RSIVs, in 2015 the figures were 4 leaving through retirement and 9 for other reasons (30.8% and 69.2%). The numbers involved are low and it is difficult to discern any real pattern over the years, but figures in the region of 33.3% leaving by reason of retirement and 66.7% for other reasons appear typical.

- For associate professors (the claimant's position before moving onto a fixed-term contract) the figures for 2015 are 24 leaving through retirement and 20 leaving for other reasons (54.5% vs 45.5%). The figures fluctuate but something like a 50/50 split in reasons for leaving appears typical over the years covered.

The figures go on to address other grades, but the proportion leaving through retirement on other grades is typically low (less than 10% except for “other staff” in grades 9-10+, where it is around 20%).

94. A later presentation given by the working group summarised the data on creation of vacancies as follows (p881e(e)):

> *“In the last three complete years, 2012-2015, the % of posts vacated that were vacated by retirement was:*
>
> - *56% for statutory professors,*
> - *50% for associate professors,*
> - *41% for RSIVs …,*
> - *1.7% for academic and research staff in grades 6-10,*
> - *12.1% for administrative and professional staff.”*

95. There follows a section on “average age on retirement” – presumably this is the mean age but it is not explained as such. This is broken down by gender (or more likely legal sex, since that is the basis on which other sex or gender points are approached in the document), but on black and white copies it is not possible to say which gender is which on the graphs. Typically the average age given for retirement is at or very often below 67. For associate professors it was under 67 for each of the four years in which the EJRA had been in operation. For statutory professors it was never higher than 67, and was lower than 67 in 2015. RSIVs seemed to be the only group which consistently produced a figure higher than 67.

96. The report does not appear to contain any data on appointments.

97. The EJRA working group consulted with the divisions and departments, and also held open meetings which staff could attend to put forward their views. The EJRA working group also seems to have carried out some kind of survey of retired staff, although with a very small number of responses. Of 69 people surveyed, 29 responded. Of those, 7 (24%) indicated that they would have continue working if there had been no EJRA. The typical figure given for how long they would have wanted to continue working was three years. While these were the figures for all staff responding the proportions for the academic staff who responded were very similar to this overall response. An expanded version of this survey appears in Annexe C of the full report, by which time 169 people had been surveyed with 57 responding. Across this wider group, 25% said they would have wanted to continue working if there had not been an EJRA (the figure for academics only was 21%), with again three years being cited as a typical length of time they would have chosen to work beyond the EJRA.

98. The working group also took up data in respect of applications for extensions beyond the EJRA.

99. The working group published a detailed report in January 2017. A summary of its conclusions appears on the first page (p883):

> *"The Group considered each of the Aims in turn and decided that they remain important to the University's objective to sustain high standards in teaching, research and administration.*
>
> *They assessed the evidence concerning the EJRA's contribution, in the first five years of its operation, to the achievement of the Aims through the creation of vacancies and concluded that the evidence is showing, in the main, that the EJRA is contributing to: opportunities for career progression; refreshment; succession planning; the enhancement of diversity; and, inter-generational fairness. They found that, although these objectives remain important, it cannot be shown that the EJRA is contributing substantially to the University's flexibility in the academic-related workforce or ability to maintain morale in the face of financial constraints.*
>
> *The Group considered the coverage of the EJRA and decided that it should be adjusted to better reflect the staff groups where the data shows that the EJRA will continue to have the most substantial impact in meeting the Aims. They saw it as an additional benefit that this would largely align the coverage of the EJRA with eligibility for membership of Congregation, recognising the importance of consistency of treatment within that body.*
>
> *In considering the age at which the EJRA should be set, the Group sought to balance the importance of sustaining progress against the Aims with their wish to take into account increased longevity, changes to pension provision, and proportionality, so as to ensure fairness to employers of all ages, including those beginning and those approaching the end of their careers.*
>
> *The Group noted that there were a number of ways in which the process and supporting documentation for applying for extended employment beyond the EJRA could be improved, to better support individuals and their managers and to ensure that staff reaching the retirement age have clarity about their options, feel valued and have sufficient time to discuss their case. Better training for relevant line managers is required.*
>
> *The Review Group therefore recommends: that the EJRA be retained; that the Aims be adjusted to better reflect the areas where the EJRA can be shown to be having the most substantial impact upon them; that the coverage be adjusted to those who are eligible for Congregation; that the age for the EJRA be raised to the 30 September preceding the 69th birthday; that the procedure*

be revised to better support all those involved; and, that all these changes come into effect as soon as is practicable.

The Group further recommends that the age of the EJRA be raised to 30 September before the 70th birthday in 2022, to mirror changes in longevity, provided that the 10-year data confirms the trends identified in this interim review …"

100. At para 3.2.2 (p891) the group analysed the effect of the EJRA on the creation of vacancies, in the context of inter-generational fairness. The figures given in the data report (as set out above) for posts vacated by reason of retirement at various levels are set out in Table 1 in the report. The group go on to note that:

- Relatively few new posts are created in academic posts (meaning at statutory or associate professor level) so the creation of vacancies by people leaving existing roles is particularly important in those roles.

- By contrast, the number of roles at grades 6-7 arising from vacancies caused by retirement is very low compared to the number of vacancies created as new roles due to expansion of work.

- 25% of those who responded to a survey said they would have wanted to stay on beyond the EJRA if the retirement policy had allowed it.

- Across the sector as a whole there was a trend towards people choosing to retire at 68 or later, but the overall numbers involved remained small.

- Around 38% of those reaching retirement age applied for an extension to their employment. (Note: we are not sure where the group got this figure from. They describe it by reference to Annexe G (p956-959) of their report, but the only point at which we can find the figure of 38% in that section is as the proportion of applications to extend which were second applications to extend (under the 2011 policy).)

- At senior levels "*more than half of those who reach retirement age have applied to continue in employment and the success rate across all applications for extension has been high … In addition, many of those who retire make use of non-employment options that allow them to stay involved in the work of their department or to progress research projects, such as honorary research agreements*".

- *"The revised procedure ensures that the impact of extensions upon the Aims is minimised by encouraging*

those who apply to stay in employment to vacate posts and to cover their own costs, in order that their substantive posts can be refilled."

101. The group concluded that the EJRA was achieving the objective of creating opportunities for career progression, although "*making a smaller contribution to the creation of opportunities for career progression into lower graded research and administrative and professional posts*". The group was content that "*the exceptions procedure provides balance between the needs of individuals approaching retirement and of the Aims of the policy*".

102. In later paragraphs, the group analyse the aims of "refreshment" and "equality and diversity" by reference to the figures on retirement set out above. In particular, they say (p895):

> *"… the Group was very clear that no matter how effective the University is in improving its recruitment procedures and its ability to retain female staff and those from minority groups, if it is to improve diversity, it must create vacancies in order to be able to recruit and promote a more diverse workforce. The extent to which the EJRA contributes to the creation of vacancies varies by grade is substantial in many grades and is discussed* [in the passage referred to above]*."*

103. They note that at statutory professor level "turnover is low" and that over the previous three years the percentage of new appointments who were female was 37.5% (as against an existing population of statutory professors who were 13.7% female in 2015). They say (again referring back to their table 1) (p895):

> *"Given that very few chairs are created and about half of the vacancies created in the grade result from retirement … the Group concluded that the EJRA is making a substantial contribution to improvements in gender diversity at this key senior grade."*

104. They apply a similar analysis to the post of associate professor, where the existing population is said to be 27.8% female and they say that 40% of vacancies are created through retirement (again, by reference to their table 1).

105. Any subsequent revised process was not applied to the claimant, who was only subject to the 2011 and 2015 policy. We were not told what, if any, changes had actually been made as a result of the five-year review, but presumably most if not all of their recommendations were implemented.

106. Throughout its review, the group had been working on the basis of data provided by the respondent's HR department on the number and percentage of people leaving as a result of "retirement". Ms Thonemann said for these purposes retirement was recorded as the reason for

someone leaving if that was the reason they gave during an exit interview. As a result, the figures given for retirement and contained in the group's report:

- included those who had "retired" voluntarily prior to 67,
- included those who either did or would have voluntarily retired at age 67 anyway, and
- did not include those who were subject to the EJRA but who had successfully applied for an extension.

107. This problem becomes obvious when looking at the various tables throughout our papers on the age at which people retire. This gives a span of ages from under 60 to 70 and over. The figures appear to fluctuate widely over the years, but at p881j(d) we are given the figures for "academic and related staff". For 2014-15 these are:

Age:	**Numbers:**	
Under 60	8	
60-64	36	
65	19	
66	15	(total under 67: 78)
67	55	
68 to 69	9	(total over 67: 22)
70 & over	13	
Total:	155	

108. Thus we have 155 people retiring of whom 78 were never affected by the EJRA in the first place (except to the imponderable extent that they took it into account in making their own life decisions) as they left before 67. We have 55 retiring at 67 whose retirement may have been forced on them by the EJRA or may have been their own decision (the best we can tell about that is that across a small sample 25% said they would have wanted to stay on, which gets us to 14 who would not have left but for the EJRA). There are then 21 who leave after 67 but whose move to a fixed-term extension may or may not of itself have created a vacancy, depending on whether or not they were self-financing.

109. This gives rise to the fundamental problem that the respondent's figures for the number of "retirements" (and thus the subsequent creation of vacancies as a result of those retirements) have very little to do with the EJRA itself. What is critical for judging the success of the EJRA in creating vacancies is the number of people who were compulsorily retired at 67 but who would otherwise have remained in their roles. We will return to this point later, but we note for now that none of the figures produced for the interim review addressed that key point. The closest the figures come to that is the 25% of respondents to the survey who would have wanted to stay on if they had not been subject to the EJRA.

110. This difficulty is all the more acute when we note that:

- the respondent had always set out its intention to review the operation of the EJRA (on an annual, five-year and ten-year basis),

- the respondent could have put in place an accurate way of measuring the effect of the EJRA in creating vacancies (or at least in being the reason for dismissal of particular individuals, which has been taken to be synonymous with the creation of vacancies in this case), and

- it did not do so for reasons which have not been explained to us.

111. Ms Thonemann said that she had explained this problem to the review group in talking them through the statistics which went to make up table 1 in their report. If so, we are surprised that the group itself made no reference to this, and particularly so where the group was comprised of academics who would have been conscious of the need for rigour and accuracy in their report. Except for the passing reference to the 25% figure, the report entirely proceeds as if the figures in table 1 demonstrate vacancies attributable to the EJRA.

112. We note Ms Thonemann's evidence that in May 2016 and May 2017 there were various debates held in Congregation concerning the EJRA, all of which, when put to a vote, endorsed the respondent's existing position on the EJRA.

The claimant's work

113. Prior to his fixed term contract the claimant held the post of associate professor in the sub-department of Atomic and Laser Physics, which was in turn part of the Department of Physics and the MPLS division. He also held a post at a college, under the joint appointments system.

114. On starting his fixed term contract he voluntarily relinquished his college position and continued working in the Department of Physics on a part-time (80%) basis. This was the same time he had spent in working for the respondent before, but he had given up the 20% of his work that was for the college. From that point he bore the title of senior lecturer, although this change in title did not seem to have any practical effect on his work (or his remuneration, other than a pro-rata reduction to take account of his reduced working hours) and he continued to teach and carry out research as before.

115. His head of department at the Department of Physics was Professor John Wheater. This was, however, not a conventional relationship of line manager and employee. While there had to be a head of department for administrative purposes, to ensure the effective deployment of resources (including laboratory space) and to set the general strategic direction of the department, as we understand it the nature of the respondent's organisation was not such that Professor Wheater was in a position of

giving formal instructions or direction to the claimant, nor of delegating work to him. In his position the claimant would be expected to develop his own areas of work and interest, and to seek out his own funding for these, within the overall structure of the department.

116. When we asked the claimant to describe his areas of interest and specialism he said that it was in the physics of quantum optics and non-linear optics and its application in engineering, chemistry, energy and environmental applications.

117. What that seems to have meant in practice, at least in recent years, is work in the development of novel applications of laser technology in instrumentation, ranging from using lasers for precise and non-invasive measurement of temperature (as may be required when assessing thermal and other stress in engines) through to measuring atmospheric pollution.

118. There is no dispute that the claimant is a distinguished academic with an international reputation whose work continued to be on the cutting-edge of developments in his field. He had been responsible for pioneering many of the techniques in his field, and continued to be pushing the boundaries of their potential applications. Nothing in what occurred is any reflection on his academic credentials.

119. It was a common theme in some of the respondent's evidence – particularly that of Professor Wheater – that being of such distinction was not unusual in Oxford, and indeed it was expected that someone in the claimant's position would have such a reputation. Without wishing to detract in any way from the claimant's credentials we accept this. He was an academic of international reputation and a leading figure in his field, as would be expected of someone holding his position at the respondent.

120. It is inherent in the respondent's position on the EJRA that individual credentials or performance are not what the EJRA is about. The EJRA is a policy of general application that will apply (and potentially, on the respondent's case, provide benefits and achieve its aims) without consideration of whether the individual who is subject to it is themselves performing the role well and continuing to develop new techniques, or by contrast is underperforming and not pushing boundaries in their work.

121. A notable feature of the claimant's work is that it has immediate and direct practical application. We have mentioned its value for investigating thermal and other stresses in engines. Many of the projects we heard the claimant being involved in (or potentially involved in) were cross-disciplinary projects in collaboration with engineers in Oxford and elsewhere.

122. While that may be considered a strong point of the claimant's work, the other side of it was that his work was on the margins of other work typically being undertaken by the Department of Physics. As we will set out below, we heard, and accepted, from Prof Wheater that he wished

the department to pursue opportunities in quantum physics in accordance with a broad research agenda recently announced by the relevant funding bodies. Whatever the virtues of the claimant's work in its own right, it was not something that fitted in with the longer-term strategic goals of the Department of Physics. To the extent that the claimant's work was continued after he left the respondent, it was continued within the respondent's engineering division, not MPLS or the Department of Physics.

123. In summary:

123.1. The claimant was a distinguished academic with an international reputation and was continuing to conduct pioneering research.

123.2. That is what would be expected from someone holding his role within the respondent.

123.3. His academic credentials and distinction did not play a role (whether positively or negatively) in the application of the EJRA to him.

123.4. On his enforced retirement his work was not continued by the Department of Physics, which wished to expand its work in a different field rather than continuing with research in the claimant's field.

The claimant's retirement – the first application for an extension

124. Any discussion of the claimant's retirement must start by noting that while he was willing to relinquish his college position he did not want to step back at all from his work with the respondent. We heard suggestions that he would contemplate retirement on some terms at a later date, but in the period with which we are concerned he did not wish to give up any of his work for the university and continued to pursue with vigour new research areas and opportunities for collaboration with others and developments of his technology.

125. While recognising that of necessity he had to comply with the respondent's procedures, his preferred position would simply be to continue with his work until he felt willing and able to retire.

126. On 12 September 2013 the claimant's division issued him with a letter headed "reminder of retirement date" setting out that his retirement date would be 30 September 2015 and outlining his options, including making an application for an extension under the EJRA policy. Any such request would have to be made by 30 March 2014. He received a follow up letter reminding him of his dated 18 February 2014.

127. To start the necessary informal discussion with his head of department, the claimant wrote a letter dated 19 February 2014 to Prof Wheater, summarising the grounds for his request as:

> *"1. I wish to complete two major grants that have just begun and will run past the September 2015 date.*
>
> *2. I wish to honour my commitment to supervise three graduate students … two of these students are due to complete in the academic year 2017/18.*
>
> *3. A third major grant will terminate in 2015 but is producing results that will require follow-up work in terms of publication and potential knowledge transfer to industry.*
>
> *4. I have begun a partnership … to assist in the establishing of an optical diagnostics facilitation in the Hypersonic Facility at Osney.*
>
> *5. I am a key component of a Centre of Excellence being established in Engineering Science and Physics in combustion …"*

128. The letter goes on to give full details of these, with the claimant saying: "*I propose an 80% FTE contract for a term of 3 years*".

129. The outcome of his discussions with Prof Wheater were that Prof Wheater was willing to support an extension for two years, but not for three years.

130. The claimant prepared his application under the 2011 policy for an extension of two years. It is dated 24 March 2014 and addressed to the head of division.

131. In this letter he sets out "four main reasons" for requesting the extension:

> *"1. Completion of two research projects:*
>
> *(a) A study of thermo-acoustic instabilities in turbulent combustion.*
>
> *(b) Development of a novel sensing technology for multi-species detection.*
>
> *This will also enable supervision of two graduate students due to complete their DPhil in 2017/18.*
>
> *2. To complete a contract between ISIS and Dantec Dynamics to exploit my research.*
>
> *3. To support research initiatives with industry and linked to the Advanced Propulsion Centre … and low carbon vehicles.*
>
> *4. To help establish optical diagnostics at the Osney Hypersonics Facility."*

132. The reasons sought for the extension assumed particular significance when the claimant's application for a further extension came for consideration.

133. He goes on to set out the evidence in support of his application, and says:

> *"An extension of 2 years is the minimum that will be required to complete the research projects, deliver the ISIS/Dantec contract exploitation and establish the optical diagnostics capability for the Engineering Science research program."*

134. This application was supported by a letter from Prof Wheater "strongly supporting" the request and setting out the reasons for that support. This letter of support is dated 25 March 2014. In preparing this, Prof Wheater worked with Dr Saira Sheikh, the Divisional Secretary for the MPLS division. It seems she was formally responsible for making the submission to the panel on behalf of the division, and she offered comments to Prof Wheater on how he should express his support, presumably based on her experience from previous applications of how the panel had approached matters. In the meantime, the claimant had compiled a number of testimonials for his work from scientists around the world, which was also submitted in support of his application.

135. On 28 March 2014 Dr Sheikh submitted to Sarah Thonemann for the consideration of the EJRA panel the claimant's application along with the letter in support from Prof Wheater and other supporting materials, commenting that "*the division commends this ... application without reservation*".

136. On 30 May 2014 Ms Thonemann wrote to the head of the MPLS division on behalf of the EJRA panel saying:

> *"… the panel had a number of concerns about the case.*
>
> *The Department and Division argue that an extension would enable them to undertake succession planning but the case omits to explain why this planning is not already in train …*
>
> *The case does not address the impact of the extension upon inter-generational fairness and diversity within the department and more widely …*
>
> *The panel's main concern was that there is no immediate plan to fill Prof Ewart's post …*
>
> *The panel would be prepared to consider a new case on behalf of Prof Ewart, if an alternative approach can be identified to address the concerns outlined above."*

137. The letter asks the head of division to "*communicate this decision … to Prof Ewart*". This was not done, nor did the EJRA panel write directly to

the claimant. The claimant was unaware that the panel had raised these concerns.

138. There follows a series of emails between Dr Sheikh and Prof Wheater, none of which the claimant was aware of, in which they attempt to construct a submission which will address the panel's concerns. This includes the following:

> *"Prof Ewart's research on the analysis of combustion processes in internal combustion engines lies in the field of optical technology. The Physics Department's main theme in this field is the development of quantum technologies for information technology; as posts in optical technologies have fallen vacant over the past decade they have been used to reinforce the quantum physics theme. In the event that discussions with Engineering to be progressed in 2014-15 fail to secure a plan for a shared 'refilling' of the Ewart post, the Physics Department intends to use it to make a further appointment in quantum information … The proposed 2017 departure date for Prof Ewart, and consequent availability of the post, aligns well with the timing for the Quantum Technology Hub developments.*
>
> *The Division wishes to assure the panel that at this time in the planning process it is considered highly unlikely that the Department or the Division will be seeking any further extension of Prof Ewart's position beyond this proposed extension to 2017. Either a new post shared with Engineering will be in place or the post refilled in an area that is able to sustain itself within Physics' core areas of activity."*

139. This further submission was sent by Dr Sheikh to Ms Thonemann for the attention of the panel. It was approved in early July 2014 and the clamant was formally notified that an extension to his employment was granted in a letter of 23 July 2014 which provided that his employment would continue at grade 10 and 0.8 FTE for a fixed-term period until 30 September 2017.

140. Even during her earlier discussions with Prof Wheater, Dr Sheikh had repeatedly said that the panel was not in favour of second extensions (for instance, "*repeated extension is not something the EJRA panel favours at all*" (email 9 March 2014) and "*EJRA panel might 'worry' that the dept will come back for a second extension in 2017*" (email 25 March 2014)). This was not communicated to the claimant. While the application of the policy was, of course, a matter for the panel this appears to sit uneasily with the express terms of the 2011 policy which simply say that someone may apply again on the same principles that applied to a first extension.

141. Mr Sugarman draws on Dame Janet Smith's decision to say that this 'equal treatment' of first and subsequent applications must have been included on legal advice. It is not necessary for us to attribute a reason to this, but it is clear from the policy that it intends a second (and any

subsequent applications) to be assessed according to the same standards and procedure as a first application.

142. Thus while the claimant's eventual application for an extension was approved, this had come about only by way of a somewhat uneasy compromise between the different positions of the parties involved:

142.1. The claimant wished to remain employed and for his work to continue in as uninterrupted a manner as possible until he felt ready to retire, which was not in the near future.

142.2. The department and by extension the division wished the claimant to remain for a transitional period only in order to put in place a replacement either as a joint appointment with engineering or alternatively (and what actually occurred in practice) with an appointment in an entirely different area of physics.

142.3. The panel as guardian of the EJRA aims was persuaded to grant the extension only on the basis that it was necessary for succession planning and that no further applications for an extension would be made.

143. To compound the problems that this might lead to, the claimant was unaware that his application had initially been turned down, and was unaware that assurances had been given in respect of any further application.

144. These problems became particularly apparent in discussion before us as to the "purpose" of the extension under the second extension provisions in the 2015 policy. There was no common understanding of the purpose of the extension, nor any definitive statement of what that purpose was.

145. Mr Sugarman goes so far as to say in his submissions that "*The extension was not specified to be for any particular limited purpose. It was a general extension of his employment.*" The first element is true – the respondent did not specify that it was for a particular limited purpose. The second point may have been what the claimant wanted, but it was not what the respondent thought it was granting. However, in those two phrases he has at least captured something of the difficulties surrounding this initial extension and the parties' different understandings of it.

The claimant's retirement – events following approval of the extension

146. In June 2014 the claimant was granted a two-year fixed term contract as an extension beyond his retirement age. This was to take effect from 1 October 2015 and last to 30 September 2017.

147. Having obtained this initial extension, the claimant continued with his work.

148. As set out above, Dame Janet Smith's decision in Prof Galligan's case came out shortly after the claimant had been granted an extension, and

plainly raised interest in the question of the EJRA amongst a group of academics, including the claimant. The respondent considered the Galligan decision through the winter and spring of 2014/2015, with its proposals for a revised EJRA policy being adopted in summer 2015 and taking effect from 1 October 2015. The claimant (with others) was active in lobbying against these new proposals, but he and his colleagues were unsuccessful and the EJRA remained in a revised form under the new 2015 policy.

149. When applying for research grants, it is necessary for the proposal document to name a "Principal Investigator" (or "PI"). The Principal Investigator will effectively be the project leader, although we also heard evidence that sometimes this would be a facilitative role with the Principal Investigator not necessarily claiming rights of management or leadership over their colleagues on the project. All applications need a Principal Investigator, which is the most prestigious position in the grant application, and whose reputation may be significant in obtaining the grant. The proposal document would also name "Co-Investigators" (or "Co-Is"). They were named individuals who would be responsible for different specialisms within the overall project. No doubt there are more detailed formal descriptions of these roles, but we have explained them in the terms we understood them at the hearing.

150. In late 2014 and the first half of 2015 the claimant was involved (along with colleagues) in preparing an application for a grant under the "EMPRESS" project – a project being funded by the "European Association of National Metrology Institutes". In summer 2015 a colleague of the claimant's in engineering wished to include the claimant as a Co-Investigator on a grant application. In an email concerning this dated 25 August 2015 the claimant says:

> *"We are in uncharted waters here … I will be starting a 2-year fixed term contract on 1 October 2015 ending 2017. In principle an extension beyond this is (theoretically) possible but the full implications of EJRA are still being worked through …*
>
> *The engineers will need me on this proposal for the duration of the project – I would be responsible for guiding the postdoc for 3 years which would itself take me past the current end date of my contract."*

The claimant goes on to say that he is already a Co-Investigator on a project (the "Low Carbon Initiative") which runs to 31 January 2018, and floats the idea that he could continue to work beyond September 2017 on the basis of some sort of joint Physics/Engineering appointment.

151. Email correspondence followed between some of the claimant's colleagues (which he was not copied into) and Prof Wheater. It is said in that correspondence that the project he thought would last to 31 January 2018 actually contained provision for him to leave in September 2017.

On 2 September 2015 the claimant writes to his colleague in engineering saying:

> *"It might save a bit of time later on if the PI and other Co-I's are made aware of my status regarding retirement. This will need to be factored in to the way the grant is structured."*

152. On 9 September 2015 one of the claimant's colleagues replied to him and others saying:

> *"… we contacted the* [funding body] *to ask if a Co-I had to be employed for the whole of a programme grant project.* [They said] *… a co-investigator does not have to be employed for the whole of a project."*

She continued:

> *"Oxford Physics would not be able to commit to a contract beyond* [the claimant's] *current retirement date."*

153. On 21 September 2015 the claimant writes: "*I suspect that Physics wants me to leave and so the prospect of any future extension to my fixed term is uncertain i.e. unlikely*". He suggested that he may be able to continue on the project as a consultant. In an email the same day his colleague notes that the funding body have described that as "*not likely to be possible*".

154. The bid went ahead with the claimant identified as a Co-Investigator up to the end of his fixed-term contract.

155. In April 2016 the head of the department of engineering invited the claimant to be part of the selection committee for a new post of "Associate Professorship (Optical diagnostics for thermofluids)" within the department of engineering. The claimant declined, saying that the EJRA process put him in a difficult position, and also that he was likely to be "*closely associated with some of the potential candidates*".

156. At around the same time, the claimant became involved in discussions with a colleague at the University of Edinburgh about collaborating on a project the colleague was to bid for. In the course of discussions about this, on 13 May 2016 the claimant writes to a colleague saying:

> *"I understood the 'EJRA arrangements' were changed in 2015 so that anyone staying past the EJRA would have to cover "salary and on costs …" That is what I am trying to do. I intend to apply for further grants to cover the costs etc so 10% on this one plus the existing ones I have that go past the EJRA will contribute. The "Consultancy" route doesn't really work well for an experimentalist – I need infrastructure and support, PDRAs etc apart from the insurance issues."*

157. His colleague replies pointing out various provisions of the new 2015 policy. The claimant responds as follows:

> *"Thanks for directing me to the paragraph re further extensions. This seems to rule out, in advance, any possibility of starting anything new, which is what I feared and suspected. The only acceptable reason for extension, it determines, is some unforeseen delay in completing the work for which the original extension was granted. So, in effect, it is as I said at the beginning – they won't allow me to apply for funds to support further work even though it seems to say that you can stay if you cover your costs. A good example of Catch-22!"*

158. Ultimately the claimant was not included in the Edinburgh proposal, something that one of the claimant's colleagues attributes to "impatience" in Edinburgh about the various issues that arose (including the question of work beyond September 2017) with the claimant's involvement in the project. The claimant's colleague wrote to Prof Wheater saying that "*our EJRA underlies this*" (i.e. the problems in the collaboration with Edinburgh).

159. On 28 June 2016 the claimant writes to Prof Wheater saying that he wishes to apply for a grant together with a colleague in the department of chemistry but that he has been told me must get permission from him (Prof Wheater) for any such application given "*my current position in relation to the EJRA*". He outlines the proposal and its benefits, and says that "*the wider context of this proposal is to explore the possibility of a further extension of my current contract, due to end on 30 September 2017.*" He gives the following reasons for this:

> *"1. Two PDRAs have been appointed to my group on contracts that will run past my EJRA date (by about 6-12 months) owing to unforeseen circumstances beyond my control. The projects on which they work will also, of course, require my input* [EPSRC, Ultra-efficient engines project, EU-EURAMET Temperature standards project].
>
> *2. The contract to exploit commercially my research on … LIGS, with Dantec Dynamics has been delayed by 12 months owing to internal business reasons within Dantec.*
>
> *3. I have been asked and agreed to participate in a joint bid, with colleagues in Engineering Science to ESA … for a project to study thermal issues with the Arianne launch vehicle using the techniques of LIGS and MUMAS that I have pioneered. A pre-proposal has been submitted and we await an invitation to submit a full proposal. Any further involvement on my part would also then be subject to departmental approval.*

4. *The colleagues with whom I would collaborated on the Airanne project are also keen to have me join a project to provide optical diagnostics using LIGS for hypersonics research at Osney.*

5. *I wish to submit a proposal to EPSRC jointly with a colleague in Chemistry to develop MUMAS for time-resolved molecular energy transfer studies and plasma spectroscopy.*

6. *I am embedded in the recently established Jaguar Land Rover Centre of Excellence for research on compression ignition systems and wish to continue my involvement for the next 2 or 3 years whilst the new appointment in Engineering Science in Optical Diagnostics settles in …"*

The claimant says he had discussed this with the head of his sub-department and agreed that "*the activity can be fully accommodated within the existing* [laboratory space]".

160. The claimant subsequently met with Prof Wheater on 15 July and later 14 September 2016. Prof Wheater agrees that the claimant's account of these meetings in his letter of 16 July (as later amended following the September meeting) is broadly accurate. Amongst other things, that letter says:

> *"Your understanding of the current rules governing extensions to a current extension past the EJRA was that this would only be granted in the circumstances that the work, for which the original 2-year extension had been granted, had been thwarted owing to unforeseen circumstances. It had been decided by the Head of Physics and the Physics Management Committee that my research did not fit with the Department's strategic needs and that the work would be transferred, along with all the related equipment, to Engineering Science. Accordingly, my extension had been granted to allow the departments concerned to work out a strategy by which this transfer of activity would be effected."*

161. The claimant goes on to record that the decision to transfer the work and equipment to engineering had been made on 17 October 2014 – a few months after the claimant's original extension had been agreed by the EJRA panel. He continues:

> *"That being the case, the rules would not allow me to start any new research activity since I would not be in post beyond September 2017. Therefore I could not be a PI … on any research proposals … I could, however, be funded on a grant as a Co-I … but only until the termination date of my present contract, 30 September 2017. After that date it would only be allowed that I continue as a Consultant or other similar non-employed arrangement."*

162. The claimant then says that he was told that if he was to continue he would have to ensure that his post was fully funded by research grants, and that his university lectureship had been re-assigned to a different post in quantum information. He also records being told that "*my current laboratory space could not be guaranteed beyond about 2 or 3 years time.*"

163. The claimant continued to pursue and develop plans for further research in collaboration with others. In September 2016 he raised various questions concerning the EJRA with the respondent's HR director. He was told, amongst other things, that if he were to apply for a further extension this would need to be done by the end of September 2016.

The claimant's retirement – the second extension application

164. The claimant's second extension application was made under the 2015 policy. As such it was made on the prescribed EJRA1 form.

165. The claimant says in that application that he is seeking an extension to September 2020 on the basis of a 50% FTE contract. This would be a further three years on top of his previous two years, and so would take him through to age 72.

166. As required by the form, he goes on to describe alternatives to remaining employed, such as a consultancy or emeritus position, and explains why they would not be viable in his case. He then describes the work that he intends to undertake during the second extension as follows (p547):

> *"1. Completion of a contract with Dantec Dynamics …* [for] *the first two years after launch in mid-2017 …*
>
> *2. Completion of research project on 'ultra-efficient engines' on which I was a key investigator on the proposal – end date: 31 July 2018.*
>
> *3. Supervision of PDRAs … until end of contracts 30 April 2018 and 30 November 2017.*
>
> *4. Completion of research project on 'enhancing process efficiency' with NPL and EU partners: end date: 30 April 2018.*
>
> *5. Completion of project on 'transpiration cooling' with engineering science … end date 17 August 2021 …*
>
> *6. Research on applications of MUMAS … in plasma spectroscopy … This includes a new 3-year project to exploit MUMAS …*
>
> *7. Develop potential for international collaboration on, and for commercial exploitation of, applications of MUMAS* [examples given] *…*

> 8. *Participation on project to study thermal management on the Arianne Launch Vehicle …"*

167. There is a specific section of the form requiring the claimant to address why a second extension was necessary. He completed that as follows (p550):

> *"Several of the projects that justified the original extension have been subject to unforeseen delays. Specifically:*
>
> 1. *The project to exploit commercially my work on LIGS was delayed by Dantec Dynamics for a period of 12 months owing to internal business concerns …*
> 2. *Unforeseen and unavoidable delays in appointing PDRAs to current projects required extension of … grant periods and consequent supervision of* [the PDRAs] *beyond September 2017.*
> 3. *A major justification for my extension was to enable my participation in the 'ultra-efficient engines' project … the period of this grant now extends past the date imposed by the EJRA to 30 June 2018.*
> 4. *The 'work plan' for the EMPRESS project … schedules the Oxford contribution in the period running up to April 2018 …*
> 5. *Timelines of bringing research to fulfilment either in terms of research or exploitation do not always match schedules imposed by the EJRA. The projects to be undertaken during the requested extension are organic continuations of the current research and are necessary to ensure that the full benefit of the work is achieved …"*

168. The claimant appears to have fully completed the remainder of the form, including addressing how the extension would help the respondent to address the aims pursued by the EJRA policy, pointing out, amongst other things, that his substantive post has now been reallocated to a newly appointed individual.

169. Under the terms of the 2015 policy, this application was then sent on to Prof Wheater, for completion of an EJRA2 form in response to the application. This is signed by Prof Wheater apparently on behalf of a departmental committee. In comparison with the claimant's lengthy completion of the EJRA1 form the replies from the department are brief, saying, against various headings:

> *"This is an application for a second extension. In the department's view the purposes of the first extension have been met.*
>
> *The head of department has discussed with the applicant the emeritus option which he considers perfectly viable and has*

pointed out that there is no shortage of precedents that have worked successfully in the department. The HoD also discussed a consultancy option which he thinks is also viable ...

Space is allocated by the head of department and this has not been agreed. We expect that the laboratories that he currently occupies will be part of the planned major refurbishment programme for the Clarendon Laboratory. Lab space at the Clarendon Laboratory is at a premium and under demand and we are unable to guarantee the space requested."

170. We were told by Prof Wheater in relation to the question of space that at the date of the tribunal the department of physics had not yet been required to vacate the laboratory space the claimant had previously occupied.

171. The next step in the process was for the division to put forward its views on the EJRA3 form. There are two version of this. The first, dated 24 November 2016, provides some support for his application, in particular by noting the enthusiasm of the engineering division to retain the claimant as support for Dr Ben Williams, a former student of the claimant's who had taken up the new role in optical diagnostics in engineering. The claimant had not seen this version. The second, dated 1 December 2016 omits this, and instead quotes from para 40 of the 2015 policy in relation to second extensions. The previously supportive tone is missing from this document.

172. When the question of why there were two EJRA3 forms was raised with Ms Thonemann she said that this was because she had referred the first version back to the division as it did not seem to recognise that this was a second application to which different criteria would apply. We accept that explanation as being truthful, but at the same time it points to a lack of understanding of the 2015 policy within the division and equally a lack of care within the division in addressing and responding to the claimant's request for a second extension.

173. The claimant was sent the completed EJRA2 and (second) EJRA3 forms and given the opportunity to comment on them. He replied to the director of HR asking initially for information on how the requirement to cover his costs arose from Dame Janet's decision. The director of HR responded referring to the terms of the 2015 policy and maintaining that Dame Janet's decision was to be treated as confidential.

174. The claimant submitted a lengthy reply to both the EJRA2 and EJRA3 forms. This included a detailed response to his department saying that the purposes of the first extension had been met. Notably this includes a section in which the claimant says:

"The Physics department's view seems to be that the only purpose for the extension was to allow time for 'succession planning' …"

This does appear to be an accurate characterisation of the physics department's view, and is a clear example of what we have described above as being the differing purposes that the different parties had in respect of the original extension application. The claimant proceeds to set out his different understanding of the purpose of the initial extension. He says that in his EJRA1 form he set out "*eight separate projects or reasons for the extension*", and says:

> *"The department's response is inadequate since it does not address any of the scientific issues involved in the projects carried out during the current or benefits to be gained from the proposed further extension"*

Each point in opposition to his application is addressed in detail by the claimant in his response.

175. At around the same time as this the claimant wrote to Prof Wheater outlining opportunities he saw for collaboration with colleagues in Beijing. He also continued to write to various university officials in respect of Dame Janet's decision and the changes made to the EJRA policy following that.

176. The claimant's application for a second extension was considered by the EJRA committee, chaired by Dr Maltby, on 16 December 2016. Twenty applications, including the claimant's, were to be considered at that meeting. Dr Maltby said that this meeting lasted 2-3 hours. Mr Sugarman pointed out to her that if each application were to have equal consideration over three hours it would mean 9 minutes each. Dr Maltby said that some applications required very little time as they were straightforward, but she remembered the claimant's being one of the longer ones. Dr Maltby accepted that the committee did not have (and had not realised that it did not have) the outcome letter from the EJRA panel at which the first extension had been granted.

177. Notes of the committee's reasoning were prepared by Ms Thonemann. They record the following:

> *"Prof Ewart argued that five of his eight research projects were subject to unforeseeable circumstances. However, the committee noted that there was not strong evidence in the application to support this argument. The committee discussed the fact that, if approved, there would be no lab or office space available for Prof Ewart, and that the head of department was not supportive of his continued work at the department … As this was his second application for an EJRA extension, the committee noted that section VII was the only relevant consideration, and it was decided that there was not strong enough evidence in the application to support the claim that unforeseeable circumstances had frustrated the completion of his research during his first extension. The committee decided to not approve this extension application."*

178. Despite the fact that the committee met on 16 December 2016 the claimant was not sent an outcome letter until 18 February 2017. Ms Thonemann said that this was caused by her having been ill and also by some of the letters (including the claimant's) requiring particular care and legal approval before being completed. Taken together with Dr Maltby's view that all outcome letters should be sent at the same time this resulted in a considerable delay before the outcome letter was sent.

179. The date on which the decision was communicated was to become significant because it was sent a few days after the respondent changed its statutes so that appeals in respect of the EJRA no longer went to the Appeal Court but instead went to an appeal panel. We will refer to this in more detail, but as will appear below we accept that Ms Thonemann was not aware of this at the time and the delay in sending the letter was not an attempt to thwart or frustrate Prof Ewart's appeal rights.

180. The outcome letter put the committee's reasoning in this way:

> *"The committee took the view that you had not made the case that unforeseeable circumstances would prevent you from completing the purpose of the original application. It was noted that the length of the 'ultra-efficient engines' grant … was as proposed when your original application was considered and granted, and that the EMPRESS workplan … would also have been well known in advance. In addition, the committee took the view that delays in recruiting to roles … could not be characterised as unforeseeable. While noting that it may have been difficult to foresee the delays caused by internal business concerns at Dantec Dynamics … the committee decided that this was a sufficiently small part of your existing role that it would not justify continued employment, even at the reduced FTE you propose. If you wish to continue working in these four areas after your retirement, the committee recommends that you further explore non-employment options, or the possibility of alternative supervision arrangements for your PDRAs, with your head of department."*

181. One feature of the committee's decision is that it decided that the delays were not unforeseeable despite there being nothing from the department or division about the foreseeability of delays. The department's position was not that there had been foreseeable delays, but that the work involved had been completed.

182. In deciding that the delays had been foreseeable, the committee took the claimant at his word as to what the purposes of the original extension were. To some extent they had to as there was nothing in the department or division's submissions as to what the purposes were – just the department saying that whatever the purposes were, they had been satisfied – and they had nothing from the original panel recording what the purposes were. Even if the committee had realised that they were missing the original extension approval it was not a document which

would have helped them as it did not set out the purposes for which the extension was granted.

183. Dr Maltby's account of how the committee had felt able to reach this decision was that the committee included experimental scientists amongst its members, and they felt able to comment on what was or was not foreseeable in relation to the claimant's various projects. She said that they had not gone back to check on these points with the claimant. Mr Sugarman put it to her that Ms Thonemann had said that the committee goes back to the applicant for further information in approximately 30-50%. Dr Maltby acknowledged those figures but said that she thought 50% may be a little high. She accepted that the committee had not carried out any further investigation into, for instance, the reason behind the delays in the appointment of PDRAs, apparently taking the view that delays in such appointments are foreseeable regardless of what the reasons for the delay actually were.

184. It is striking that while the 2015 procedure contained a procedure for the claimant to reply to comments made by his department and division (and he exercised that right to reply), the panel found against him on a point that neither the department or division had raised and which he did not have the opportunity to respond to.

The claimant's retirement – the appeal

185. The claimant appealed against the panel's decision.

The appropriate forum for his appeal

186. Previous appeals against the operation of the EJRA procedure had been heard by the respondent's Appeal Court (or Court of Appeal). While only an internal forum this was evidently a body conducted with a considerable degree of formality and dignity, as exemplified by the fact that its judiciary were drawn from a panel of retired Lord and Lady Justices of Appeal. Dame Janet Smith was sitting in that court when coming to her decision in Prof Galligan's case. We have seen other instances in which judges sitting in that court have been critical of the EJRA procedures. The court was seen by some, including the claimant, as being sympathetic to challenges to the EJRA. There was no formal system of precedent in the operation of the Appeals Court, and not every decision had been in favour of appellants (in at least one case a judge had decided that the underlying principles of the EJRA were not justiciable in the Appeals Court), but starting with Dame Janet's decision the court was seen as being in opposition to the EJRA.

187. The claimant was originally offered an appeal to the Appeal Court, and took up that offer.

188. Before this, Congregation had approved amendment of the respondent's statutes to remove the jurisdiction of the Appeal Court from all but decisions in relation to academic freedom. In its place was to be a less

elaborate appeals panel, whose members were drawn from members of Congregation, rather than the retired judiciary. That amendment to the statutes had been passed but was awaiting the formal approval of the Queen in council. The formalities surrounding that meant that the respondent could not predict exactly when approval would be forthcoming.

189. The question of whether the Appeal Court was the correct venue for the claimant's claim was first identified by counsel instructed for the respondent shortly before a preliminary hearing of the Appeal Court due to take place on 27 September 2017. The preliminary hearing had originally been listed to determine whether the Appeal Court had jurisdiction to consider a fundamental challenge to lawfulness of the EJRA process. At that hearing Sir Jeremy Sullivan decided that the Appeal Court no longer had jurisdiction to hear appeals under the EJRA at all, on the basis that the necessary Order in Council had taken effect on 15 February 2017, a few days before the claimant received his outcome letter.

190. We accept Ms Thonemann's evidence that she was as surprised by this development as the claimant was. It was part of the claimant's case that the respondent had deliberately delayed notifying him of the decision in an attempt the thwart his right of appeal to the Appeal Court, who he saw as sympathetic to challenges to the EJRA. Both Ms Thonemann and Dr Maltby gave convincing evidence as to the reasons for the delay in notifying him, and we also accept that Ms Thonemann was not aware until much later of the possibility that the claimant may have lost his right to appeal to the Appeal Court.

Termination of employment

191. The claimant's employment with the respondent ended with the end of his fixed-term contract on 30 September 2017.

The appeal panel and its decision

192. The claimant's appeal was ultimately heard by an appeal panel (formally known as the University Appeal Panel) chaired by Mr Bond. Its role in respect of his appeal was set out in Council Regulations 1 of 2017. Under para 19(4) of those Regulations "*the appeal panel shall consider the grounds of appeal raised by the member of staff and conduct an appeal by way of review rather than re-hearing*".

193. The panel was constituted in November 2017 and met on 13 December 2017 to consider the claimant's appeal. As the claimant points out, this was almost exactly a year since the EJRA committee had met to consider his second application for an extension, although he also accepted in his cross-examination that this was no later than the Appeal Court would have heard his appeal, given that there was a preliminary hearing in the Appeal Court.

194. The claimant in his appeal made substantial criticisms of the committee's decision, and included evidence from colleagues as to the reasons for the delays in his projects, including that those were unforeseeable or (as it was put in one of the letters at p669) that the delays "*far exceed any reasonable expectation of the normal delay*".

195. The claimant's submissions (or "opening statement") to the panel are at p722-731. Ms Thonemann prepared submissions on the respondent's behalf supporting the EJRA committee's original decision (p732-736). The notes of the appeal hearing are at p737 onwards. They record Mr Bond remining the parties that the appeal is by way of review rather than re-hearing.

196. Mr Bond notified the claimant of the panel's decision to dismiss his appeal in a letter dated 16 January 2018. This sets out the panel's conclusion as follows:

> *"The first, third and fourth purposes of your 2014 extension had been met and that, in relation to the second purpose, the Dantec project should appropriately be continued on a consultancy basis.*
>
> *The EJRA committee had therefore reached a reasonable decision and the panel did not consider that any additional information presented provided a basis for the panel to interfere with EJRA committee's decision to decline your request for a second extension.*
>
> *The EJRA committee had acted reasonably in proposing that non-employment options were an appropriate way for you to continue to have input into the continuation of your work, if you so desired.*
>
> *The EJRA procedure had been applied appropriately and fairly by the EJRA committee and that there had been no procedural irregularities leading to substantive unfairness in consideration of your application to the EJRA committee for a second extension."*

197. Thus it appears that the appeal panel upheld the EJRA committee's decision on the basis that the purposes of the first extension had been achieved (as had been the position of the physics department) rather than any delays being foreseeable (which appears to have been the basis of the committee's decision).

Statistics

198. We have cited above various statistics which appear in the respondent's materials, and will refer to them later in more detail insofar as they are relevant to our decision.

199. The claimant himself had obtained (at considerable cost) his own statistical evidence. This, and his analysis of it, was set out in his witness statement.

200. In summary, it was the claimant's case, based on the statistics he had obtained, that:

    200.1. The proportion of female academics employed by the respondent had worsened (in comparison with other Russell Group institutions) since the introduction of the EJRA in 2011.

    200.2. Of those female academics employed by the respondent, the proportion employed on temporary (as opposed to permanent) contracts had increased since the introduction of the EJRA in 2011. By contrast the proportions had remained roughly equal in the wider Russell Group.

    200.3. There was no significant difference in the age profiles of academics employed by the respondent and by other Russell Group institutions, and in particular no significant difference in the proportion of academics who were over 65 years old.

201. The claimant went on to criticise the respondent's apparent view that appointment of academics was on a one-out one-in basis, saying that it was subject to the "lump of labour fallacy" which he described as "*assuming that there is a fixed number of jobs in a given market*", as opposed to acknowledging that growth in economies or institutions can create additional jobs without any implication that others have lost their jobs.

202. It was Mr Jones's position that such statistics did not assist us and were not necessary for our task, which could be conducted by reference to what was obvious and so required no statistical proof from the respondent or statistical argument from the claimant. Accordingly, he did not question the claimant in detail on his statistics, but confined himself to broad challenges concerning, in particular:

    202.1. The claimant's exclusion of Imperial College from his Russell Group statistics (explained by the claimant as being because its science and technology-only profile made it atypical), but not the LSE which did not cover science and technology-related subjects.

    202.2. That the claimant may not accurately be covering the same categories of "academic" when comparing his figures from the respondent and the wider Russell Group.

    202.3. Continuing expansion within the Russell Group from 2011 onwards which was not reflected at the respondent and which may account for the continuing increase in female academics within the Russell Group.

    202.4. The rate of growth in the 67 and older age group for academics within the Russell Group was considerably higher than for other age groups.

202.5. That the "lump of labour" approach was only a fallacy when applied to whole economies or wider groups than simply senior academics at the respondent. While it was evident that growth in activities created opportunities for junior academics the figures showed that in practice that was not the case (or only marginally the case) for those at statutory or associate professor level.

203. We will refer to these statistics below in our conclusion to the extent we consider necessary for our decision.

Time limits

204. Mr Jones spent some time in cross-examination of the claimant to ask questions in support of his position that the claimant's claims were out of time. In response the claimant:

204.1. Accepted that he had written a letter in November 2016 (following the Galligan decision) saying that the EJRA was "unlawful".

204.2. Said that at that time a number of his colleagues were contemplating legal action in respect of the EJRA, but he wanted to "*work within the system*" rather than challenging it externally.

204.3. Said he had not brought a claim before June 2017 as he thought it was possible that he would be able to stay on and wanted to go through that process before bringing a claim.

204.4. Said that he had brought the claim before his appeal had been heard as he thought he could withdraw his claim if his appeal was successful.

204.5. Accepted that he could have brought his claim earlier.

C. THE LAW

Basic principles

Unfair dismissal

205. There is no dispute that the claimant was an employee of the respondent, had more than two years' continuous service and was dismissed. As such he qualifies for the right not to be unfairly dismissed.

206. The question of whether a dismissal is fair or unfair is determined by reference to section 98 of the Employment Rights Act 1996:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

> (b) *that it is … some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *…*
>
> (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):*
>
> (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> (b) *shall be determined in accordance with equity and the substantial merits of the case."*

207. It is therefore for the respondent to show the reason for the dismissal and that that reason is (as they argue in this case) "*some other substantial reason of a kind such as to justify the dismissal*". If this is done then the tribunal must consider the fairness of the dismissal applying the principles set out in section 98(4).

Age discrimination

208. Under section 13 of the Equality Act 2010:

> *"(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."*

209. Where discrimination under s13(1) is admitted (as it is in this case) it is for the respondent to show that the discriminatory treatment is justified under s13(2).

Time limits for discrimination claims

210. No issue in relation to the time of submission of the claim arises in the unfair dismissal claim, but Mr Jones takes points in relation to time for the age discrimination claim.

211. Section 123 of the Equality Act 2010 provides (subject to extension under the early conciliation rules):

> *"(1) Proceedings on a complaint* [under the Act] *may not be brought after the end of:*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *…*
>
> *(3) For the purposes of this section:*
>
> > *(a) conduct extending over a period is to be treated as done at the end of the period ..."*

Justification for age discrimination

212. Mr Jones refers us to article 2 of Council Directive 2000/78/EC ("the Framework Directive") which defines direct discrimination as occurring:

> "*where one person is treated less favourably than another is, has been or would be treated in a comparable situation,* [on grounds including age]".

213. Article 6(1) provides for a specific defence of justification in age discrimination cases:

> "*… Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary …*"

214. Mr Sugarman continues the analysis by reference to the following extract from the judgment of Elias J in <u>MacCulloch v ICI</u> [2008] IRLR 846, EAT, where he set out four legal principles with regard to justification (which have since been approved by the Court of Appeal in <u>Lockwood v DWP</u> [2013] IRLR 941):

> *"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].*
>
> *(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the*

proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

215. Mr Sugarman goes on to emphasise the rigour of the approach the tribunal must adopt, pointing to the judgment of Pill LJ in Lax as follows:

"… the tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification ...

The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

216. Both sides place reliance on the leading case of Seldon v Clarkson, Wright and Jakes [2012] ICR 716. The following extract from the judgment of Lady Hale in that case was cited by Bean LJ in Air Products v Cockram [2018] EWCA Civ 346:

"50. What messages, then, can we take from the European case law?

…

(2) If it is sought to justify direct age discrimination under article 6(1), the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost

reduction or improving competitiveness" (Age Concern, Fuchs).

(3) *It would appear from that, as Advocate General Bot pointed out in Kücükdeveci, that flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives.*

(4) *A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims:*

(i) *promoting access to employment for younger people (Palacios de la Villa, Hütter, Kücükdeveci);*

(ii) *the efficient planning of the departure and recruitment of staff (Fuchs);*

(iii) *sharing out employment opportunities fairly between the generations (Petersen, Rosenbladt, Fuchs);*

(iv) *ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (Georgiev, Fuchs);*

(v) *rewarding experience (Hütter, Hennigs) ;*

(vi) *cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (Ingeniørforeningen i Danmark);*

(vii) *facilitating the participation of older workers in the workforce (Fuchs, see also Mangold v Helm, Case C-144/04 [2006] 1 CMLR 43);*

(viii) *avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned (Rosenbladt); or*

(ix) *avoiding disputes about the employee's fitness for work over a certain age (Fuchs).*

(5) *However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding*

experience or protecting long service (Hütter, Kücükdeveci, Ingeniørforeningen i Danmark).

(6) The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen (Fuchs).

(7) The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued (Age Concern).

…

56. Two different kinds of legitimate objective have been identified by the Luxembourg court. The first kind may be summed up as inter-generational fairness. This is comparatively uncontroversial. It can mean a variety of things, depending upon the particular circumstances of the employment concerned: for example, it can mean facilitating access to employment by young people; it can mean enabling older people to remain in the workforce; it can mean sharing limited opportunities to work in a particular profession fairly between the generations; it can mean promoting diversity and the interchange of ideas between younger and older workers.

…

59. The fact that a particular aim is capable of being a legitimate aim under the Directive (and therefore the domestic legislation) is only the beginning of the story. It is still necessary to inquire whether it is in fact the aim being pursued. The ET, EAT and Court of Appeal considered, on the basis of the case law concerning indirect discrimination (Schönheit v Stadt Frankfurt am Main, Joined Cases C-4/02 and C-5/02, [2004] IRLR 983; see also R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213), that the aim need not have been articulated or even realised at the time when the measure was first adopted. It can be an ex post facto rationalisation. The EAT also said this [50]:

> *"A tribunal is entitled to look with particular care at alleged aims which in fact were not, or may not have been, in the rule-maker's mind at all. But to treat as discriminatory, what might be a clearly justified rule on this basis would be unjust, would be perceived to*

be unjust, and would bring discrimination law into disrepute."

60. There is in fact no hint in the Luxembourg cases that the objective pursued has to be that which was in the minds of those who adopted the measure in the first place. Indeed, the national court asked that very question in Petersen. The answer given was that it was for the national court "to seek out the reason for maintaining the measure in question and thus to identify the objective which it pursues" [42] ... So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation.

61. Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce.

62. Finally, of course, the means chosen have to be both appropriate and necessary. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so."

217. Mr Jones takes the following from the EAT decision in Seldon v Clarkson Wright and Jakes (No 2) [2014] ICR 1275 (an appeal against the employment tribunal's decision following remission from the Supreme Court):

"The issue for the employment tribunal is to determine where a balance lies: the balance between the discriminatory effect of choosing a particular age (an effect which, as the employment tribunal noted, may work both ways, both against someone in the position of the claimant but in favour at the same time of those

who are associates, and thereby in the interests of other partners, whose interests lie in the success of the firm and it continued provision for them and its success in achieving the aim held to be legitimate). That balance, like any balance, will not necessarily show that a particular point can be identified as any more or less appropriate than another particular point."

218. Mr Jones placed considerable reliance on Cockram itself. He describes the facts of the case in the following way in his submissions:

> "… *the case concerned a long-term incentive plan or LTIP. The employer had a customary retirement age of 55. If employees left before they were 55, they would lose any entitlements under the LTIP that had yet to vest. Those who left at or after customary retirement age were, in contrast, entitled to retain their entitlements. The provision was, incontestably, directly age discriminatory. The legitimate aim relied upon by the employer was "strik*[ing] *a balance between encouraging retention up to the age of 55 and providing some incentive to retire in order to create opportunities for younger employees"*."

219. Mr Jones relies on para 31 of the decision, in which Bean LJ said:

> *"*[counsel for the claimant] *suggested that the company should have been in a position to place before the tribunal evidence of whether the customary retirement age clause in the LTIP had in fact led to a high retention rate; if they failed to do so the tribunal should have inferred from that omission that there was no evidence that the provision did in fact encourage retention. I do not consider that the employment tribunal should have required or expected the employers to adduce such evidence. It would be impossible to do so very soon after such a provision was introduced; and even at a later date the causative effect of a provision in the LTIP about customary retirement age would be difficult to isolate: employees in their early 50s make choices about whether to remain in the same employment, move jobs or take voluntary retirement for a whole variety of reasons.*

220. In passages immediately preceding that, Bean LJ says:

> *"28.* [counsel for the claimant] *submits, and the EAT held, that the employment tribunal should not have accepted the mere "assertion" by* [the respondent's witness] *that the aim of the provision was to incentivise retention up to the age of 55 and to disincentivise it thereafter. He reminded us of the emphasis placed in the authorities on the need for careful scrutiny of the evidence put forward by employers in cases such as Hardy & Hansons plc v Lax [2005] ICR 1565, CA where Pill LJ said that the tribunal must conduct a critical evaluation of the scheme in question (paragraph 33), and warned of the risk of superficiality (paragraph 34)* [note: as

cited above]. *I agree with those observations, but the detail and weight of evidence required will depend on what proposition the employer is seeking to establish.*

29. [counsel for the claimant] *referred us to MacCulloch v Imperial Chemical Industries PLC [2008] ICR 1334. In that case redundancy payments made under ICI's contractual scheme increased very sharply with age. The claimant was made redundant at the age of 36 after nearly eight years employment and received a redundancy payment of 55% of her gross annual salary, whereas an employee aged between 50-57 with ten years' service would have received 175%. It was conceded that the scheme was discriminatory. The employment tribunal accepted that the aims of the scheme, which included rewarding loyalty and giving older employees larger payments to take account of their vulnerability in the job market, were legitimate and held that the scheme was a proportionate means of achieving those aims. Although the findings that the aims were legitimate were plainly sustainable on the evidence, the EAT held on appeal that the tribunal had not grappled with the degree of difference in the payments made to the claimant and her comparator (55% as against 175% of annual salary), and had not properly considered whether that degree of difference in treatment had been justified as reasonably necessary to achieve the objectives of the scheme. The case was remitted to the tribunal for that issue to be resolved.*

30. But where the proposition is that a rule excluding retiring employees under the age of 55 from the right to take unvested options under a long term incentive plan tends to encourage them to stay with the company until the specified age, the proposition is surely so obvious that it barely requires evidence at all.

221. Mr Sugarman addresses Cockram in some detail in his submissions, including saying amongst other things:

> "*it cannot be said that the proposition that the EJRA is substantially contributing to the achievement of* [the respondent]*'s aims is so patently obvious that it barely requires evidence.*"

222. In Fuchs v Land Hessen C-159/10 [2012] ICR 93, as cited by Mr Jones, it was said that if a legitimate aim is established for a particular measure, consideration of proportionality required that the measure "*must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess*".

223. While Fuchs suggests that evidence is required, it has become clear that what has become known as "concrete evidence" is not required. For instance, in Seldon in the EAT, Elias J said:

> *"We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment."*

224. We take this to be an aspect of what is said in Cockram about some propositions being "*so obvious that* [they] *barely require evidence at all"*.

225. Mr Jones characterises the "main thrust" of the claimant's argument in this case as being "*whether the respondent is under an obligation to demonstrate that the aims are in fact being achieved*". His answer is 'no', by reference to para 31 of Cockram (cited above).

226. We think the claimant's position is more subtle than that. He accepts that at least some of the legitimate aims claimed to be pursued by the EJRA are legitimate aims, and that they are in fact pursued by the respondent. His statistical analysis proceeds on the basis that some additional vacancies will be created as a result of the EJRA. His point is that the number of vacancies or rate of increase of vacancies created by the EJRA is marginal or trivial, and as such does not justify the heavy discriminatory effect of the EJRA in requiring older employees to retire – dismissing them because of their age.

Our conclusions on the law

227. We take from the cases cited above the following propositions:

    227.1. The respondent must justify any discrimination, which requires it to show both that the discrimination is in pursuit of a legitimate aim and that it is proportionate, which means appropriate and reasonably necessary (Starmer, Rainey).

    227.2. While this burden is on the respondent, the respondent does not necessarily need 'concrete evidence' to meet that burden, as some propositions may be "*so obvious that* [they] *barely require evidence at all*" and "*tribunals have an important role in applying their common sense and their knowledge of human nature*". (Cockram, Seldon (No. 2)).

    227.3. It is not enough to say that there is a legitimate aim. That aim must be "*in fact the aim being pursued*". However, the legitimate aim

need not have been in the employer's mind at the time the measures were imposed (Seldon).

227.4. In the context of direct age discrimination, the legitimate aim pursued must be "*social policy objectives*", "*of a public interest nature*" rather than individual considerations in relation to a particular employer. However, such a legitimate aim must also be legitimate in the particular circumstances of the employment concerned (Seldon).

227.5. For the discriminatory measures to be justified they must "*correspond to a real need …* [and be] *appropriate with a view to achieving the objectives pursued and are necessary to that end*" (Bilka-Kaufhaus).

227.6. Measuring proportionality requires "*an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it.*" and "*the gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen.*" (Seldon).

227.7. The tribunal must "*weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter*" (Lax).

227.8. This requires a "*critical evaluation of the scheme in question*" and "*the means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.*" (Seldon).

227.9. The tribunal must conduct a balancing exercise, but "*that balance, like any balance, will not necessarily show that a particular point can be identified as any more or less appropriate than another particular point*" (Seldon (No. 2)).

Unfair dismissal

228. Neither party suggested that our consideration of unfair dismissal required consideration of anything other than standard principles in relation to the reason for and reasonableness of a decision to dismiss under section 98 of the Employment Rights Act 1996.

D. DISCUSSION AND CONCLUSIONS

Age discrimination - legitimate aims

Introduction

229. The legitimate aims relied upon by the respondent are as follows:

(1) Safeguarding the high standards of the University in teaching, research and professional services;

(2) Promoting intergenerational fairness and maintaining opportunities for career progression for those at particular stages of a career, given the importance of having available opportunities for progression across the generations, in order, in particular, to refresh the academic research and other professional workforce and to enable them to maintain the University's position on the international stage;

(3) Facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate University's joint appointment system, given the very long lead times for making academic and other senior professional appointments particularly in a university of Oxford's international standing;

(4) Promoting equality and diversity, noting that recent recruits are more diverse than the composition of the existing workforce, especially amongst the older age groups of the existing workforce and those who have recently retired; and

(5) Minimising the impact on staff morale by using a predictable retirement date to manage the expected cuts in public funding by retiring staff at the EJRA.

230. The aims relied upon are not in terms identical to the legitimate aims set out in the 2011 or 2015 policy. To the extent that those policies contain additional legitimate aims they are not relied upon by the respondent. What is important is not what was said at the time but whether:

230.1. These are in principle capable of amounting to legitimate aims (in the necessary sense of being social policy rather than purely private aims).

230.2. They were legitimate aims in the case of the respondent.

230.3. They were in fact the aim or aims pursued, even if not identified as such at the relevant time.

231. The claimant accepts only the following being legitimate aims of social policy which applied to the respondent and were applied by it in respect of the EJRA:

231.1. The "intergenerational fairness" aspect of aim 2 (which he describes as being "intergenerational fairness and maintaining opportunities for career progression"), and (to some degree) "refreshment", if understood as refreshment of ideas rather than people.

231.2. The "succession planning" aspect of aim 3, but only in the sense of knowing in advance when a vacancy will arise to allow the respondent to make succession plans.

231.3. The "promoting equality and diversity" aspect of aim 4 but with observations as to how the question of proportionality should be approached in respect of this aim.

Aim 1 – high standards

232. Despite the formulation in the list of issues, aim 1 is not relied upon by the respondent as a discrete aim, but instead it is described as an "overarching objective" and as under-pinning all the other aims.

233. While the claimant accepted that this could amount to a legitimate aim, his contention was that there was no link between this and the matters set out at aims 2-5. He said that aims 2-5 did not contribute to fulfilment of aim 1, since, as the respondent accepted, there was nothing to suggest that older academics were not equally capable of contributing to high standards at the respondent than their younger counterparts.

234. Mr Jones addresses this in his response by reference first to the broader question of diversity. As he puts it, "*unless it is assumed that the best academic talent is disproportionately concentrated in older white men, the present make-up of the senior academic cohort will inevitably be excluding significant talent.*" He goes on to say that "*refreshment means that the University stays at the cutting edge not just of the areas in which it has been involved for some time but in new areas.*" In principle we accept both of these propositions. Following the case of Georgiev v Technicheski Universitet Sofia [2011] CMLR 179 as cited by Mr Jones, we are bound to accept this as being a legitimate social policy aim and, given the way he describes it, a legitimate aim in the case of the respondent. We also accept that the respondent was not pursuing diversity or 'refreshment' simply for the sake of diversity or refreshment – these in turn served a number of wider goals one of which, following Mr Jones's argument, we accept as being safeguarding the respondent's high standards.

Aim 2 – intergenerational fairness, opportunities for career progression, refreshment

235. Given the authorities, the claimant was bound, and did, accept this to some extent as a legitimate aim. He did so only to the extent of saying that intergenerational fairness could be a legitimate aim. So far as 'refreshment' was concerned he accepted refreshment of *ideas* may be a legitimate aim but not refreshment of *people*. His point has consistently been that there is nothing in relation to age which means that you have any fresher or more creative ideas at a younger age than you do at 67. He also maintained that refreshment of ideas was not in fact the aim pursued by the respondent.

236. In response, Mr Jones emphasises the aspect of refreshment that is concerned with the respondent moving into new areas of work. He strikingly says, "[the respondent] *can only maintain its status if it continues to change.*"

237. We do not argue with the question of refreshment when put in this way: exploring new areas. This is a legitimate public interest aim that applied to the respondent and was pursued by it in the EJRA. The claimant's point about whether that actually required the dismissal of older workers will be relevant to a consideration of proportionality, not at this stage to the question of whether it is a legitimate aim.

238. As for the question of "offering opportunities for career progression", this is accepted by the claimant as being a legitimate aim, although as will appear below this appears to be more about offering opportunities for career progressions to those in the wider academic community, as opposed to internal appointments.

Aim 3 – facilitating succession planning

239. The claimant partially accepts this – in the sense of administratively knowing when vacancies are going to arise – but not in the sense it is often applied in retirement cases: allowing for internal promotion and a flow of senior vacancies into which more junior employees can be promoted.

240. It is not surprising that the claimant does not accept this, given that the evidence of Ms Thonemann and Prof Wheater was that at least at the level of associate and statutory professor the respondent wishes to recruit the best in the world. No preference is given to internal candidates, and there does not appear to be any system of career development operated by the respondent that would mean there was a body of junior employees who had an expectation of being promoted to a more senior role. Ms Thonemann gave an example of that when describing some of the efforts the respondent was making to encourage gender diversity. On the appointment of any statutory professor if a woman does not come forward for the role the respondent will conduct a worldwide search for the leading women in the field, who will then be sought out for consideration for the role. If the best candidate for a statutory professorship or associate professorship is a more junior academic in Oxford, that is simply coincidence, rather than anything the respondent was particularly looking to encourage.

241. To the extent that the respondent relies on this as being a question of internal succession planning we do not accept it. While this is capable of being a legitimate aim it was not one that the respondent sought to pursue in the EJRA, since it in fact had no particular policy or practice of internal promotions at such a senior level.

Aim 4 – promoting equality and diversity

242. This is accepted by the claimant to be a legitimate social policy aim applying to the respondent and pursued by it in the EJRA. To the extent that he criticises this aim his criticisms are relevant to proportionality, not whether it is a legitimate aim in the first place.

Aim 5 – minimising the impact on staff morale

243. This is something of a puzzle. We heard no evidence on this one way or the other. It appears to have been rejected by the working group as a legitimate aim although remains as a legitimate aim in the respondent's pleaded case.

244. There is no real answer to Mr Sugarman's submission that "*it is not a social policy aim of the kind required to constitute a 'legitimate' aim*". Mr Jones responds that the aim is "*rather unfortunately formulated*" and "*it is about being able to 'bank' vacancies so that there is room within budgets to avoid redundancies where funding is cut*". That does not answer the point that it is not a social policy objective, nor did we hear any evidence that the respondent actually did, or desired to, 'bank' vacancies in this manner. On the contrary, we formed the view that the respondent was eager to replace members of staff who retired as soon as they could. That is, of course, the reasoning behind the diversity, refreshment and predictability aims – that a person who leaves is replaced as soon as possible by someone with a new approach from a more diverse cohort of individuals.

245. This aim fails because (i) we do not see that maintenance of morale at any one particular institution can amount to a public policy aim, (ii) we have seen no evidence that this actually addressed a problem that the respondent had, or that it operated in the way described by Mr Jones.

Conclusions

246. We accept the following points only as being legitimate aims of a social policy nature applicable to the respondent and pursued by it in the EJRA:

    246.1. Safeguarding high standards,

    246.2. Intergenerational fairness (in the senses of (i) providing opportunities for career progression and (ii) adopting new ideas and new areas of study and research, which may be very different to what had gone before),

    246.3. Facilitating succession planning, in the sense of knowing when vacancies can be expected to arise, and

    246.4. Promoting equality and diversity.

247. The simple dismissal of older workers does not of itself directly assist with the achievement of any of these aims. In that sense the EJRA does not directly support any of the legitimate aims. The significance of the EJRA for each of these aims is not as such the dismissal of older

workers, but what the respondent says then follows from that: vacancies, arising at a predictable time, and in a predictable manner, into which a more diverse and younger cohort of academics, with new (or at least different) ideas, can be appointed.

248. In what follows we will refer to the creation of vacancies, by which we mean the creation of vacancies in a predictable manner so as to serve the various legitimate aims. As Mr Jones put it in his submissions, "*the creation of vacancies is the basic currency of achievement of the aims*". That is the case even with those aims which we have not accepted as being legitimate. The key point is the creation of vacancies (in a predictable manner) in support of the aims.

Age discrimination - proportionality

Introduction and background

249. It is for the respondent to show that its discriminatory treatment of individuals aged 67 and over is justified as an appropriate and reasonably necessary means of achieving the legitimate aims identified above.

250. This must be "*supported by evidence the probative value of which it is for the national court to assess*" but this need not be "concrete evidence" as some points are "*so obvious that* [they] *barely require evidence at all*".

251. We can at an early stage say that the measures taken through the adoption of the EJRA (in any form) are not proportionate to a goal of maintaining high standards. That is not just because the respondent is not relying on this as an individual aim, but also because if this was what the respondent was seeking to achieve then a much more obvious, effective and non-discriminatory way of doing is by performance management or, if it is a case of moving into new areas of research, redundancy of those undertaking areas of research no longer being pursued.

252. That leaves the aims of intergenerational fairness (career progression, 'refreshment'), succession planning and promoting equality and diversity.

253. As general background, it is clear from the evidence we have heard, and we do not believe it to be in dispute that:

253.1. In practice few vacancies are created at statutory or associate professor level through expansion in the number of statutory or associate professor posts, and

253.2. In general, the cohort of applicants for vacancies at statutory or associate professor level is more diverse in gender (and younger) than the existing cohort of post-holders. (We appreciate that there is more to diversity than gender diversity, but in practice the

argument before us concentrated almost entirely on gender diversity.)

The EJRA and proportionality – what is obvious

254. We consider it to be Cockram-obvious (or to put it another way, we use our common sense to conclude that):

254.1. As very few new positions are created, the most significant way in which new people can be appointed as statutory or associate professor is through someone leaving an existing role.

254.2. Each person who leaves such a role (for whatever reason) will generally be replaced in one way or another, so that a person leaving such a role will almost always mean that a vacancy is created for someone else.

254.3. Compulsory retirement is one way in which vacancies can be created, but not the only way. Staff may move on to other roles, be dismissed for other reasons, take retirement on ill-health grounds or voluntarily resign their role including by way of voluntary retirement (which may coincide with the age of compulsory retirement under the EJRA or be earlier).

254.4. Any vacancy created as a result of compulsory retirement will come about on a predictable date.

254.5. Dismissing post-holders at a particular age (and for present purposes it does not matter what age) will tend to bring forward the creation of vacancies. We say "bring forward" the creation of vacancies because these are vacancies that would arise anyway at some point. No-one will hold a position indefinitely.

254.6. The creation of vacancies through compulsory retirement is not the sole or most direct way in which the legitimate aims can be achieved. There are other measures that can be used to achieve the legitimate aims. For instance, in the case of gender diversity, the respondent had over 20 measures that it was taking in an attempt to achieve greater gender diversity (not including the creation of vacancies by means of compulsory retirement). Questions of moving into different areas of research could more directly be dealt with in the way they are in any other organisation – through redundancy of those working in areas which are no longer considered priorities for the respondent (avoiding redundancies had previously been stated to be an aim of the EJRA but is no longer relied upon). Intergenerational fairness of various kinds could be promoted through, for example, mentorship programs making sure that junior academics are better placed to compete for those vacancies that do arise. Succession planning could be dealt with by open discussions with the relevant members of staff about their future plans.

255. The effect of the EJRA is to, in some cases, bring forward the date on which the vacancy is created. Assuming people holding the role ever reach a retirement age (and we accept they do in the roles of statutory and associate professor) to some extent it increases the rate at which vacancies are produced.

256. By way of example, if every person enters a role aged 40 and stays until they voluntarily retire aged 80 a vacancy will arise every 40 years. If, instead of voluntarily retiring aged 80, they are compulsorily retired when they reach 60, that vacancy will arise every 20 years.

257. In a more likely case of, say, someone being compulsorily retired at 67 instead of voluntarily retiring at 70, the increase in the production of vacancies is much lower.

258. There will be many possible permutations of this, and this kind of calculation also assumes (which is unlikely) that retirement will ever be the only way in which vacancies arise.

The EJRA and proportionality - the discriminatory effect of the EJRA

259. The discriminatory effect of the EJRA is clear. Those who reach a particular age are dismissed. This discriminatory effect is not to any substantial degree moderated by the opportunity to apply for an extension. As Mr Sugarman points out in his submissions, the focus of the extension process under both the 2011 and 2015 policies is on the needs of the respondent, not the needs of their older employees. While consideration of "*exceptional personal factors*" remained possible under both the 2011 and 2015 policies we were given no instances of when this had actually been applied or made a difference to an application or of what particular personal factors may be considered relevant by the ERJA panel or committee.

260. This is a highly discriminatory effect. There can hardly be a greater discriminatory effect in the employment field than being dismissed simply because you hold a particular protected characteristic.

261. Mr Jones submitted that if the effect on creation of vacancies is so insubstantial as the claimant alleges (see below) then the discriminatory effect on older workers is equally low. If few vacancies are created through compulsory retirement then it must also follow that few older workers actually suffer the discriminatory effect of the measure.

262. In University of Manchester v Jones [1993] ICR 474 Ralph Gibson LJ described an assessment of the discriminatory effect of a measure as requiring two considerations (in that case in the context of an indirect sex discrimination claim):

> *"… both the quantitative effect, i.e., how many men and women will or are likely to suffer in consequence of the discriminatory effect, and, also, what is the qualitative effect of the requirement*

> *upon those affected by it, i.e., how much damage or disappointment may it do or cause and how lasting or final is that damage?"*

263. In this case every person aged 67 or over (which is the relevant protected characteristic) is caught by the EJRA, and the result of it is that they are all dismissed (subject to consideration of an extension, which as we have described relates almost entirely to the needs of the respondent). It is hard to think of a more severe discriminatory impact. This is a lasting and final impact on the basis that someone is highly unlikely to be able to return to an active research career at a university once dismissed at that age. Everyone sharing a particular protected characteristic is severely affected. That is the relevant consideration for assessing the discriminatory impact, not the raw numbers of people who may come to possess that particular protected characteristic and thereby fall foul of the EJRA.

The EJRA and proportionality - the extent to which the EJRA fulfils the legitimate aims

264. The extent to which compulsory retirement increases the rate of vacancy production is not Cockram-obvious or a matter of common sense, nor is the related question of whether this outweighs the discriminatory impact on older workers. That is at the heart of the question of proportionality and the challenge that the claimant brings in this case. As it was said in MacCulloch:

> "*the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it."*

265. Inherent in the question of "balance" and a requirement for more cogent justification is a consideration of the degree to which the measure in question achieves the legitimate aim. This is also relevant to the question of whether the measure is appropriate or reasonably necessary, and whether there are less discriminatory means by which the legitimate aim can be reached. If the discriminatory measure is highly effective at meeting the legitimate aim, then the respondent will have more on its side of the balance, will have demonstrated the greater "cogency" needed and will be better positioned to say that it is appropriate and no less discriminatory measure will be sufficient. Conversely, a trivial effect on the rate of creation of vacancies (and by extension a trivial effect towards achieving the legitimate aims) will not outweigh the strong discriminatory effect of the EJRA.

266. This is particularly significant in a case such as this where there are multiple different ways in which the legitimate aims can be achieved, and where the means adopted are only indirectly linked to the legitimate aim. The respondent does not say, for instance, that the bringing forward of vacancies itself creates gender diversity (indeed it appears it did not do

so in the claimant's case, since his replacements in engineering and in physics were both men). At most it creates an opportunity for gender diversity to increase.

267. To address this requires a comparison between the rate of vacancy creation with and without the EJRA process.

268. A large part of Ms Thonemann's evidence and Mr Jones's submissions were to the effect that it was still too early to assess the effectiveness of the EJRA or the extent to which it contributed towards achievement of the aims.

269. There is no provision in the Equality Act for such schemes to be permitted on a trial or experimental basis without the need for any justification. The respondent has a duty to justify the discriminatory measure right from the start. However, there is no one prescribed way of doing this. At the outset it may be by way of reasoned projections as to what the effect of the measure would be. In the middle of the scheme it may be by a combination of such reasoned projections and assessment of the outcomes so far. We do not have either in this case.

270. The one place in which such analysis may be expected is the equality impact assessment which was completed prior to the introduction of the EJRA. This records that 221 academics are expected to reach age 67 in the period 2011-17 and "*thus possibly fall subject to an EJRA*". In considering the gender-related effects of the EJRA it goes on to record that under the previous retirement regime 28% of female academics and 20% of male academics applied for an extension. It records that in 2009-10 36.8% of academic staff who left did so by reason of "retirement" (this appears to be the self-declared reason for retirement without any reference to whether this was voluntary or compulsory retirement). There is, however, no acknowledgement in this document of the discriminatory effect of the EJRA on older employees nor any attempt to calculate what the difference in gender diversity (or at least in the creation of vacancies) would be with or without the EJRA. The failure to consider age was partially acknowledged in the identification of point (I) in the five-year review data specification.

271. The EJRA is in principle capable of contributing to the legitimate aims, but that is not sufficient for a finding that it is a proportionate means of meeting those legitimate aims. An assessment of proportionality depends on the extent to which the measure contributes towards meeting those legitimate aims.

272. The claimant has attempted to carry out that assessment by reference to statistics he had obtained, concluding that the change in the vacancy rate caused by the EJRA would be 2%. This is an argument the claimant has been highlighting for some time, including a publication in "Oxford Magazine" in Hilary Term 2017. In this article (p978) he concludes:

> *"When taken all together, the benefits of this EJRA in promoting gender equality are indistinguishable from zero and at the cost of introducing a different form of discrimination – based on age. Dame Janet Smith, in her ruling, made the specific criticism that 'Unless the diversity promoting benefits to be derived from introducing the EJRA are very significant it does not seem to me to be justifiable to introduce one form of discrimination in order to combat another." … Since this EJRA cannot be shown objectively to be a proportionate means of achieving the aims it is therefore not justified in law."*

273. Leaving aside the question of whether Dame Janet has accurately stated the law, the claimant's challenge to the EJRA has been clear right from the start.

274. The respondent did not accept the claimant's calculations, but of course, it is not for the claimant to demonstrate that the EJRA is disproportionate. It is for the respondent to demonstrate that it is proportionate. There is no one prescribed way in which it has to do this. It could be by reasoned projections or estimates, by statistics, by demonstrating that it is obvious or a matter of common sense or any other satisfactory means, including possibly case studies in particular departments.

275. We accept the submissions of Mr Jones that (as with Cockram) the various legitimate aims bring into play many different factors, so that it is not to be expected that the EJRA would have a directly measurable effect on, say, the respondent's gender diversity. It is not necessary for the respondent to show that there is such a directly measurable effect to justify the EJRA. However, the way in which the EJRA is said to assist in achievement of the legitimate aims is through the creation of vacancies, and there ought to be no substantial difficulty in measuring its effect on the creation of vacancies – both in terms of absolute numbers and as a proportion of the total vacancies created.

276. Despite this, the respondent has never properly attempted to assess or measure the extent to which the EJRA achieves the creation of vacancies which would not otherwise arise.

277. The only real attempt we have seen to do this is the claimant's attempt, which he says shows the effect of the EJRA is at most a 2% change in the rate at which vacancies occur. This was later moderated in Mr Sugarman's submissions to take account of some of the respondent's criticisms, but even then he gets to a figure of only a 2-4% increase in the rate of production of vacancies, which is still very low.

278. The respondent does not accept this, but has not produced its own reasoning to show the effect on the rate at which vacancies occur.

279. It is not obvious or a matter of common sense that the EJRA creates additional vacancies above the 2-4% level calculated by the claimant, and if a heavily discriminatory measure results in the creation of only 2-

4% more vacancies than would otherwise arise, we do not see how that can be proportionate. The increase in the number of vacancies in support of the legitimate aim is trivial in comparison with the discriminatory effect.

280. There is reason to suspect that even from the respondent's own documentation it does not regard the EJRA as being a particularly significant part of its efforts to increase diversity amongst its senior academic staff. From pages 1022-1340 we have what are variously titled "equality overviews" or "equality reports" created by the respondent in the period 2012-2015. These cover the respondent's equality goals and the measures taken to achieve them for both staff and students. It includes information on the development of, for example, mentorship programs, scholarships and bursaries for students, along with special events targeting at particular groups within society. It also provides data on the gender and other makeup of staff and students at the respondent across different subject areas, with commentary on trends in the data.

281. In each year the EJRA is mentioned briefly under the heading "age", in which the basic fact of its existence (and the five-year review) is recognised.

282. For the 2014/15 document under the heading "*Staff objective 1: Increase the proportion of women in senior roles*" there are between 20-30 initiatives noted, with some attempts in some of them to assess their impact. For instance, in reference to "*improved procedures … for the recruitment of statutory professors*" it is said that eighteen people were appointed, of whom 6 were women (33%). The EJRA is not referred to at all as an initiative in support of this objective, despite the fact that it is the respondent's pleaded case that the EJRA would have been instrumental in (and appropriate and reasonably necessary for the purposes of) bringing forward some of those vacancies. As well as describing the gender of those appointed to the roles, it should in principle have been straightforward for the respondent to have added to this that a particular number of these vacancies only arose (or only arose at that time) because of the operation of the EJRA. They did not do this.

283. In the same report the EJRA appears only as one paragraph under "age" which itself is under "key data and activity by protected characteristic". This paragraph notes the establishment of the EJRA working party.

284. We conclude from this that at least to the author(s) of the respondent's official equality reports the EJRA was not seen as a significant means of achieving the goal of increasing the proportion of women in senior roles, or indeed of any relevance whatsoever to it.

The EJRA and proportionality - conclusions

285. The EJRA requires justification by the respondent. It has not justified it in this case because although has shown that it operates in pursuit of legitimate aims, on the question of proportionality the respondent has not shown that the EJRA contributes to or is expected to contribute to

achievement of those legitimate aims to a sufficient extent to justify the discriminatory effect of the measure on older staff.

286. The respondent has not shown justification of the EJRA for any point in the time period with which we are concerned. The means available to demonstrate justification (from reasoning or estimates through to outcome figures) may vary as time progresses, but no such material in relation to any relevant time has been produced to us by the respondent.

287. In those circumstances it is not necessary for us to go on to consider whether 67 is the appropriate age for the EJRA, as the respondent has not produced evidence to justify an EJRA at any age.

The extension processes and proportionality

288. Our finding that the EJRA is not justified means that we do not, strictly speaking, have to address the question of the extension process, but there are some points we can make in relation to it.

289. First, in relation to what Mr Jones described as the "Galligan point", we accept that there being such a process does not of itself prevent the EJRA process from achieving the legitimate aims.

290. Second, as we have pointed out above, the fact that there is such a process (predicated largely on the respondent's needs) does not of itself mean that the EJRA is proportionate.

291. The extension process does not of itself either prevent the EJRA pursuing legitimate aims or make it proportionate to the achievement of those legitimate aims.

292. The particular focus of the claimant's criticism at the hearing was in the new restrictive rules for second extensions. These were that:

> *"… a further extension will only be granted if it is essential to address unforeseeable circumstances that have frustrated the purposes for which the original extension was granted."*

293. This is against the background that a person who is on an extension will already have vacated their substantive post and will, "*in all but very rare cases … have secured grant or other funding to cover their costs while in employment beyond the EJRA*" with the result that, "*there is no financial detriment to the university as a result of the extension; and there is no financial impediment to the refilling of the applicant's permanent role*".

294. When judged against the legitimate aims claimed for the EJRA, there is a problem with this as if all of this has been done, then the vacancy has been created: the individual has vacated their substantive post and the money is available to refill it. Everything necessary has been done to create the vacancy in a predictable manner and so, on the face of it, the aims of the EJRA have been achieved and there is no need for the

additional qualification of “unforeseeable circumstances” for a second extension.

295. Ms Thonemann addressed that in her oral evidence by saying that in order to promote diversity it is necessary not just to bring forward the opportunities for people to be appointed to senior roles, but also to remove the existing less diverse cohort of employees. She went on to explain that this was because if the older generation of employees remained with the respondent, it may be that in practice power and influence within the particular department remained with them, limiting the opportunity for a new and more diverse cohort of staff to be seen as leaders and role models within their department.

296. We can see that in some circumstances gender diversity may be promoted not just by the creation of vacancies but also, to some extent, by the removal of the previous generation of senior employees and leaders. That would particularly be the case where there was a risk of power and influence remaining in the hands of an older generation who remained in employment despite no longer holding their substantive roles and who may, whether consciously or not, stifle a new generation of leaders.

297. The difficulty for the respondent in running this argument as a legitimate aim is not just that it is not part of its pleaded case, but is also that in practice it was very happy to retain the older generation of academics as part of its academic life. They were welcomed to remain and contribute, but it had to be on an emeritus (i.e. unpaid) basis, as consultants or as honorary researchers. We do not criticise this retention of an older generation of academics, who will in many cases have a lot to add to the ongoing academic life of the department, but where the respondent is willing to do this it seems to us that the removal of this older generation is not an aim that it in fact pursued. If it was, they would not be permitted to remain on an emeritus or consultancy basis. Since there is no legitimate aim pursued by the respondent in respect of this we find that it is not justified and the limitation on second extensions is itself an act of age discrimination.

Other points in relation to proportionality

298. Mr Sugarman took considerable time in his submissions to criticise the respondent for not taking into account the discriminatory effect on the individual in its application of the EJRA, as if this was a matter to be weighed individually by the panel or committee against the personal circumstances of each individual as they approached retirement.

299. We do not accept that it was necessary for the respondent to do this. What is to be measured and balanced by the respondent is not the discriminatory effect in respect of any one individual but the discriminatory effect on older individuals in general. The whole point of such a policy is that (except in relation to the extension process, which operates along different lines) the respondent does not have to make

individual judgments in respect of individual cases. However, the respondent must take into account the discriminatory effect in its overall development and adoption of the policy and must ultimately justify it against that discriminatory effect. For the reasons described above, the respondent has not done that in this case.

300. Mr Jones argued in his submissions that even a small increase in the number of vacancies would be significant in the context of a role in which staff turnover is very low.

301. We acknowledge that. To take an example, assume there are twenty relevant positions which operate on a one-out, one-in basis. Without a particular measure being taken, a vacancy arises once a year. With a particular discriminatory measure being taken, an additional vacancy arises each year. That additional vacancy may appear to be trivial in absolute numbers, but it represents a 100% increase in the number of vacancies available in that year.

302. The problem with this argument is that:

302.1. The respondent has offered no evidence either on the absolute numbers of new vacancies created or on the extent to which the EJRA has contributed to that. As we have pointed out above, this is surprising when at least the absolute number of vacancies created as a result of compulsory retirement ought to have been easy for them to assess if they had put in place the necessary recording mechanism at the point the EJRA was introduced. Even without this being done, it ought to have been possible for the respondent to, for instance, produce case studies in individual departments, such as showing how many full or associate professors had been compulsorily retired across a particular department or division, and the effect that had had on vacancy creation (and ultimately on diversity or the achievement of other legitimate aims within the department).

302.2. To the extent we have heard evidence on the point, it has been from the claimant, and his analysis that the effect on vacancy creation has been less than 2% shows a trivial effect. The effect is trivial whether it is a less than 2% increase from what would otherwise be ten vacancies a year or 100 vacancies a year.

303. Mr Jones also emphasised that the EJRA had enjoyed the support of Congregation and appeared to enjoy broad support amongst those of the respondent’s employees who were affected by it. We accept this as a matter of fact, but it adds little to our consideration of proportionality. The respondent cannot justify what would otherwise be unlawful discrimination by saying that those subject to it have broadly consented to or endorsed it. Employment law is full of cases where arrangements which appeared to enjoy broad support or consent have been found to amount to unlawful discrimination – for instance, many collective agreements or other agreed pay arrangements in the field of equal pay.

Age discrimination – less favourable treatment

304. The less favourable treatment alleged by the claimant is:

    a. Applying to him the 2011 policy requiring him to retire by 30 September 2015 unless he submitted a successful application to continue in employment beyond that date;

    b. Imposing, under the 2011 Policy, a fixed term contract for 2 years commencing 1 October 2015 at 0.8 FTE;

    c. Applying to him the 2015 Policy requiring him to retire by 30th September 2017 unless he submitted a successful application to continue in employment beyond that date;

    d. Dismissing him on 30th September 2017 following the refusal of his application for an extension beyond 30th September 2017; and

    e. Dismissing his appeal on 16th January 2018.

Time limits

305. Mr Jones argues that anything which occurred before 5 February 2016 is outside the primary time limit set in s123. He says that this covers points (a)-(c) above, and that this requires us, if we are to consider the complaints, to find that there was a continuing act or that it is just and equitable to extend time.

306. In support of his arguments he points to the 2011 and 2015 policies being different policies, with the decisions under them being the responsibility of different bodies (the EJRA committee and panel). He also points to the claimant's early allegations that the EJRA process was "unlawful", which the claimant did not act on until much later.

307. Mr Jones is correct that the 2011 policy and 2015 policy were not the same, and that the responsible bodies constituted under them were not the same. However, they appear to always have been regarded by the respondent as being "the EJRA process" or "the EJRA policy". The 2015 policy was not presented in terms as being a new policy. It was always seen (and correctly seen) as a revision to the 2011 policy. Since the abolition of the default retirement age in 2011 the respondent has always had a policy of dismissing individuals at age 67. That there have been variations in the detail or means of applying such policies is not of great significance for the purposes of this case or our findings above, which are largely based on the principle of the EJRA in the first place, rather than detailed consideration of the individual provisions of the original and revised policy.

308. This is a clear case of conduct extending over a period – that conduct being the application of an EJRA process to the claimant. As such, the treatment can be regarded as occurring "*at the end of the period*", which

is accepted to be well within time. Accordingly, we find we have jurisdiction to deal with each of the claimant's complaints of direct age discrimination.

309. Alternatively, had the question arisen, we would have found that it was just and equitable to extend time in this case. We accept the claimant's explanation that he had not brought his claim earlier because was trying to resolve the question of extensions to his employment internally, which would usually be the proper thing to do before bringing a tribunal claim. The respondent has not identified any prejudice that it had suffered as a result of delay in the claim, and in such a case we would consider it just and equitable to extend time in order to cover all of the age discrimination complaints.

Less favourable treatment

310. With the "imposition" of the fixed term contract being read as in contrast to permitting him to work on under his old contract, and "dismissing" in point (d) being read in the unfair dismissal sense of a dismissal by non-renewal of a fixed-term contract, we do not understand it to be disputed that each of these events occurred and amounted to less favourable treatment on the grounds of age. They are all natural consequences of the EJRA policy in its various forms, and being put on a fixed-term as opposed to an indefinite contract is less favourable treatment.

311. The respondent has not justified what would otherwise be discrimination, and accordingly on each of the points of age discrimination alleged we find that the claimant has been discriminated against unlawfully on grounds of his age.

Age discrimination - conclusions

312. The claimant's claim of direct age discrimination succeeds in respect of each of the five alleged points of age discrimination.

Unfair dismissal - reason

313. On our findings above, the claimant's dismissal by way of retirement amounted to unlawful discrimination. It is not suggested by the claimant that his dismissal came about for any reason other than retirement, but in a case where that retirement amounts to unlawful age discrimination we do not see that this can count as some other substantial reason justifying his dismissal. Accordingly, his dismissal is unfair as the respondent has not shown that it was for a reason permitted under section 98 of the Employment Rights Act 1996.

Unfair dismissal - reasonableness

314. For the sake of completeness, we will briefly address the particulars of unfair dismissal relied upon by the claimant. We will first address whether

they are made out (by reference to the facts we have found above), and then what the overall impact on the fairness of the dismissal is.

(1) *The Respondent ("R") failed to inform C when he made his first application that it would not welcome a further application or that it would consider it in a different light, despite knowing that to be the case at the time;*

This happened.

(2) *R applied to C a new, very restrictive, criterion for second extensions, tied to the reasons for the first extension, that was not in existence at the time he framed his first application;*

This happened.

(3) *The process and documentation was defective as accepted by R's Working Group Review;*

The Working Group Review proposed a number of changes to the 2011 policy and procedure.

(4) *The procedure applied to C's second extension application was unfair. There was a clear dispute of fact about the foreseeability of delays and/or completion of projects C was working on at the time of the first extension. R failed to adopt a fair procedure in order to resolve the disputed facts;*

There were disputes of fact about the foreseeability of delays which the respondent did not satisfactorily address.

(5) *The investigation into the issue of the unforseeability or otherwise of any delays was wholly inadequate;*

There was no investigation into the unforeseeability of delays.

(6) *The Division performed an unexplained volte face in its support of C's second extension application;*

The division did change its submission but we accept Ms Thonemann's explanation that this was because it had not addressed the criteria for second extensions.

(7) *C was not informed of the volte face and there was no disclosure to him of relevant evidence, namely the Division's first position;*

This is true but it was not necessary for the claimant to be told of the first position given that it appeared to be prepared in ignorance of the correct criteria for an extension

(8) *If the Division's later response to C's second extension application is correct, there was no adequate discussion within the Division of*

the merits of C's application;

We were shown no evidence of any discussion within the division concerning the claimant's application.

(9) *The burden and standard of proof imposed upon C in his second extension application was unfair;*

This is a reference to the need for "strong evidence" in support of a second application. We will discuss below whether this was unfair.

(10) *The failure to consider criteria other than the foreseeability or otherwise of circumstances frustrating the presumed purposes of the original extension was unfair;*

That criteria was something that bound the panel under the 2015 procedure in respect of second extensions.

(11) *The Panel that met on 16.12.16 gave inadequate consideration to C's application;*

We will consider the adequacy of the consideration below.

(12) *There was no hearing;*

Correct, as would be the norm under the 2015 policy.

(13) *The Panel's decision was contradictory, flawed and contrary to the evidence before it;*

The panel reached a decision that the delays were not unforeseeable without having investigated or understood the reasons for the delays.

(14) *There was an unjustified and prejudicial delay in notifying C of the decision, which caused C to lose the right of appeal to the University's Appeal Court;*

While there was a delay, we have accepted that there was good reason for this and it was not done to frustrate the claimant's opportunity to appeal to the Appeal Court.

(15) *The appeal process and procedure was unfair, as set out in C's Amended Claim [37a-b]. C was invited to pursue, and did, a process he ought never to have embarked upon. At the 11th hour, C was told the Appeal Court no longer had jurisdiction to hear his case;*

This is essentially another aspect of the complaints at (14) and (16) in respect of delay and the appeal process.

(16) *The process was grossly and unreasonably delayed at great personal cost to C. That delay was hugely significant as whilst he pursued an appeal for over a year, his retirement date came and went and he was dismissed.*

We think this is in relation to the appeal. The appeal did take a very long time – initially according to the appeal court procedure but then an appeal panel was convened quite quickly after realising that that was the appropriate forum.

315. The claimant's dismissal came about following the non-renewal of his first fixed-term extension. This in turn resulted from the new, more restrictive, rules on second extensions which were introduced in the 2015 policy. It is the fairness (or lack of it) in the operation of the 2015 policy that is most significant to our consideration of unfair dismissal, but this also relates back to the original EJRA panel's unwritten rule against second extensions, which the claimant was not told of or aware of. Because it is largely the 2015 policy we are assessing we do not consider that the working group's criticism of the 2011 policy adds to or is relevant to the unfairness of the dismissal.

316. In assessing this, we consider matters of substance to be more significant than matters of form. The delays in hearing the appeal, while regrettable, did not make the decision unfair or contribute to unfairness, nor did the fact (as such) that the EJRA committee made its decision without hearing from the claimant. We also do not consider that matters in relation to the apparent change of position by the division, or their lack of contact or discussion internally, made this dismissal unfair or contributed to any unfairness.

317. What does make the dismissal unfair, and in our view would make it unfair even if the EJRA were not a matter of unlawful age discrimination and there was a potentially fair reason for dismissal is the following:

317.1. The claimant was not notified of the EJRA panel's unwritten rule against second extensions.

317.2. The respondent changed its procedure to subject to claimant to a more restricted second extension regime part way through his first extension.

317.3. The finding by the EJRA committee that the delays in the claimant's work had been foreseeable, despite them not knowing or investigating the reasons for the delays.

318. The subsequent appeal process was simply a review, rather than a rehearing, and did not in any event have the ability to consider the underlying provisions of the EJRA. Its actions therefore did not and could not remedy this unfairness.

319. In his submissions, Mr Jones raised arguments in relation to a Polkey deduction from compensation for unfair dismissal. Mr Sugarman objected that these had not been plead or raised before.

320. This hearing has only been listed to determine liability. While considerations in relation to Polkey may often be taken by the tribunal at the liability rather than remedy stage, strictly speaking a Polkey deduction is a matter of remedy rather than liability. This was not identified as a matter to be dealt with at the liability hearing, so we will not say anything more about it at this stage, leaving any further arguments on the point to the remedy hearing.

Conclusions

321. The claimant was subject to unlawful age discrimination.

322. The claimant was unfairly dismissed.

323. At the conclusion of the liability hearing a remedy hearing was listed for 7-9 September 2020 in case the claimant succeeded on liability. The claimant has succeeded on liability. That remedy hearing will now proceed and separate directions have been given in a case management order of today’s date in respect of preparation for that hearing.

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Employment Judge Anstis
29 November 2019

Sent to the parties on: ....20.12.19......

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For the Tribunals Office

<u>Public access to employment tribunal decisions</u>:
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