Case No: EA-2019-000638-RN (previously UKEAT/0083/20/RN)
EA-2020-000128-RN (previously UKEAT/0032/20/RN)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 27 September 2021

Before :

THE HONOURABLE MRS JUSTICE EADY DBE
MR D G SMITH
DR G SMITH MBE

- -

Between :

EA-2019-000638-RN
PROFESSOR JOHN PITCHER **Appellant**
- and -
(1) THE CHANCELLOR MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD
(2) THE PRESIDENT AND SCHOLARS OF THE COLLEGE OF SAINT JOHN THE BAPTIST IN THE UNIVERSITY OF OXFORD
Respondents

EA-2020-000128-RN
THE CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD **Appellant**
- and -
PROFESSOR PAUL EWART **Respondent**

- -
- -

Mr S Jones QC and **Ms J Coyne** (instructed by Worden Richmond Solicitors) for **The Chancellor, Masters and Scholars of the University of Oxford**
Mr O Segal QC and **Mr M Islam-Choudhury** (instructed by Debenhams Ottaway Solicitors) for **Professor John Pitcher**
Mr A Sugarman and **Ms M Martin** for **Professor Paul Ewart**
Ms N Motraghi and **Ms M Stanley** (instructed by Mills & Reeve LLP) for **St John's College**

At the Tribunal
Hearing date: 29 June – 1 July 2021

- -

JUDGMENT

SUMMARY – *Age Discrimination – Unfair Dismissal*

Direct Age Discrimination – Justification – Proportionality - Unfair Dismissal
Professor Pitcher was an Associate Professor of English Literature at Oxford University and an Official Fellow and Tutor in English at St John's College. At 67, he was compulsorily retired from both employments by operation of the Employer Justified Retirement Age ("EJRA") that the University and the College both operated, his application under the extension provisions of the EJRAs having been refused. An ET dismissed Professor Pitcher's claims of direct age discrimination and unfair dismissal, finding that the EJRAs were justified and the dismissals fair. Professor Pitcher appealed. Professor Ewart was an Associate Professor in Atomic and Laser Physics at the University. The EJRA was also applied to him but he initially obtained an extension of his employment, vacating his substantive post and taking up a fixed-term position. Upon his application for a further extension, Professor Ewart was unsuccessful and also faced compulsory retirement. A differently constituted ET upheld Professor Ewart's claims of direct age discrimination and unfair dismissal, in particular finding that the University had not shown the EJRA to be justified. The University appealed the decision on the age discrimination claim.

On the combined hearing of the appeals, the EAT dismissed both appeals, holding:
The University and the College had the following legitimate aims: (1) inter-generational fairness; (2) succession planning; and (3) equality and diversity. The EJRA was said to facilitate other measures in achieving those aims by ensuring vacancy creation was not delayed and recruitment into senior academic roles might take place from a younger, more diverse cohort.
In Professor Pitcher's case, the ET acknowledged the limited evidence demonstrating impact but considered this was because the EJRA was relatively new (**Air Products plc v Cockram** [2018] IRLR 755); giving weight to survey evidence regarding those who would have continued in employment absent the EJRA, and to the mitigating effects of the extension provisions, the discriminatory impact (also mitigated by post-retirement opportunities for senior academics) was justified. The ET further found Professor Pitcher was dismissed for a fair reason (the application of an EJRA that was not unlawfully discriminatory), and the University and College had acted within the band of reasonable responses. These were conclusions open to the ET on the evidence; no error of law was revealed.
In Professor Ewart's case, a statistical analysis showed the rate of vacancies created by the EJRA was trivial (2-4%); although disputed by the University, the ET found it had not produced sufficient evidence to show the EJRA could contribute to the realisation of the legitimate aims; further finding the discriminatory impact was severe, and not significantly mitigated by the extension provisions, the EJRA was not shown to be proportionate. As for the additional requirement for a second extension (unforeseeable circumstances delaying project completion), as the desired vacancy had been created, the ET found this was not linked to a legitimate aim. The ET again reached conclusions open to it on the evidence; it did not err in its approach and there was no error of law.
Although reaching different conclusions on proportionality, neither ET erred in law. The nature of the proportionality assessment meant it was possible for different ETs to reach different conclusions when considering the same measure adopted by the same employer in respect of the same aims; the task of the EAT was not to strive to find a single answer, but to consider whether a particular decision was wrong in law. Although justification related to the policy and not its individual application, the presentation of the claims and the evidence before the ETs differed in material respects. Neither ET erred in the decisions reached.

The Honourable Mrs Justice Eady DBE:

Contents:

Introduction

1. This is our unanimous Judgment in joined appeals relating to the application of the Employer Justified Retirement Age policy ("EJRA") operated by the University of Oxford ("the University") and, in the case of Professor Pitcher, St John's College ("the College").
2. The appeal in UKEAT/0083/20 ("the Pitcher appeal") is that of Professor Pitcher against a Judgment of the Watford Employment Tribunal (Employment Judge Bedeau, sitting with lay members Mr Kapur and Mrs Betts, over some 18 days in 2018 and 2019; "the Bedeau ET"); that Judgment was promulgated on 16 May 2019. The Pitcher appeal was permitted to proceed after a hearing under Rule 3(10) **Employment Appeal Tribunal Rules 1993** before His Honour Judge Shanks on 16 March 2020. It is resisted by the University and the College.
3. The appeal in UKEAT/0032/20 ("the Ewart appeal") is that of the University against a Judgment of the Reading Employment Tribunal (Employment Judge Anstis, sitting with lay members Mrs Brown and Mr Appleton, over 10 days in 2019; "the Anstis ET"); the Judgment being promulgated on 20 December 2019. The University's appeal against that decision was permitted to proceed after an Appellant-only Preliminary Hearing before His Honour Judge Auerbach on 22 September 2020. Professor Ewart resists the University's appeal and seeks to uphold the decision of the Anstis ET.
4. Representation before the Employment Appeal Tribunal was as below, save that Mr Islam-Choudhury, who represents Professor Pitcher, is now led by Mr Segal QC, and that Ms Coyne, Ms Martin and Ms Stanley did not appear in the ETs below.

The Factual Background

Initial Observations

5. Both appeals relate to the application of the University's EJRA. There are, however, material differences between the two cases. Professor Pitcher was unsuccessful in his application for an extension of employment, whereas Professor Ewart initially made a successful application and only retired when a second extension was refused. In Professor Pitcher's case, he also complained of having to retire from his position with the College as a result of the application of the College's own EJRA; in contrast, Professor Ewart brought no claim against his former College. Moreover, although both cases included claims of both age discrimination and unfair dismissal, the latter only remains in issue in the Pitcher appeal. Professor Ewart was successful in his claims of age discrimination and unfair dismissal and only the former finding is challenged by the University by way of appeal.
6. The hearings before each of the ETs were lengthy. The Bedeau ET heard evidence from eight witnesses and considered documentation from a bundle exceeding 2,800 pages; the Anstis ET heard five witnesses and had a bundle of over 1,800 pages. Both had the benefit of lengthy written submissions from the parties and the resulting Judgments are extensive, with each ET taking conspicuous care in reaching its decision, making detailed findings of fact, from which we have drawn in writing this Judgment.

Relevant Background Context

7. The University is the oldest University in the English-speaking world, dating back to 1096. It is recognised as a world-class teaching and research university and has the largest volume of world leading research in the United Kingdom. The University employs some 13,000 staff, of which

nearly 2,000 are academics and around 5,000 are involved in research; professional, administrative and clerical positions, as well as technical and support staff, make up the remainder of its workforce. It competes internationally on the world stage to attract the most talented academic and research staff as well as the most able students; approximately 48% of academic and research staff, and 41% of students, are from countries outside the United Kingdom.

8. Setting aside the most senior administrative or leadership staff, academic grades in the University rise from 1-10, above which are associate professors and statutory professors. At the times material for these appeals, there were around 120 statutory professors and 1,200 associate professors; these are considered the most influential and prestigious academic roles within the University (albeit there are also prestigious senior research-only positions that fall outside the description of an "academic" role for these purposes). It is common for academics employed by the University to hold what are called "joint appointments", whereby they work partly for the University and partly for a college, the costs being divided between the two.
9. Within the University there are 38 colleges; all but two are financially and legally independent, and they are self-governing, operating within a federal type structure. Each college is granted a Charter, approved by the Privy Council, and is governed by a Head of House and a Governing Body which comprises of a number of Fellows, many of whom also hold University positions. The Conference of Colleges is the mechanism whereby the colleges come together to deal with matters of shared interests and common purpose.
10. The University's academic departments, facilities and research centres are grouped into four divisions: humanities; mathematical, physical and life sciences ("MPLS"); medical sciences; and social sciences. Under these divisions are departments. Professor Pitcher was a Professor of English Literature, which fell within the Humanities Division; Professor Ewart worked in Atomic and Laser Physics, which was part of the Physics Department, within the MPLS Division. Each

division has a full-time head who also sits on the University's Council, which is the principal executive and policy making body for the University. The Council has five main standing committees, including (relevant for present purposes) a Personnel Committee.

11. The sovereign body of the University is the Congregation which has 4,500 members including the academic staff of the University, Heads of Department and other members of Governing Bodies and Colleges, and those in senior research, computing, library and administration. The Congregation decides on proposals submitted to it by Council but will also consider any resolution submitted any 20 or more of its members and, where a proposal has been made by Council, any two members can call for a discussion and amendment of that proposal by Congregation.
12. The University's official publication of record is the "Gazette", in which formal announcements and notifications are published.

St John's College

13. The College is a registered charity and, like other colleges, is governed by statute. It is legally constructed in an Act of Parliament and is a member of the Conference of Colleges. The sovereign body of the College is the Governing Body, which consists mainly of permanent academic staff and is able to enact by-laws and governs the College's activities. The Governing Body meets three or four times during each of the three terms of the academic year and mainly operates through committees, with recommendations then being decided by the Governing Body.
14. Most Official Fellows or Professorial Fellows of the College hold a joint appointment with the University; typically advertised jointly. The University and the College separately offer contracts of employment, which cross-refer, and usually tie the halves together, so the holder cannot give up one of the two halves. There are also several College Officerships, usually held by Official Fellows or Professorial Fellows alongside their substantive posts. The Officerships do not form

part of a contract of employment, but are used to assign responsibilities within the College; appointments are made by the Governing Body, on recommendation by the President.

15. Three main College posts are President, Principal Bursar and Senior Tutor. The President and Principal Bursar are full-time roles, although the holders of those posts may also carry out academic activities. Informally, the three Officers make up the College management team.

The Background to the EJRA

16. Prior to 2011, the University operated a contractual default retirement age ("DRA"), which was a standard feature of its employment contracts. For academic staff, this required them to retire on the 30 September immediately preceding a specific birthday (so, a retirement age of 65 would require a person to retire on the 30 September preceding their 66th birthday). Prior to 1985, the retirement age was 67, but that was then reduced to 65 (although those already in post retained the right to retire at 67).
17. The University's operation of a DRA had persisted through the introduction of the **Employment Equality (Age) Regulations 2006** (which allowed for the operation of a DRA of 65 or over, subject to certain conditions being met) but, in or around 2010, legislative changes were proposed that would mean the operation of a DRA would no longer be lawful; the relevant legislative changes were to come into effect from 1 October 2011.
18. On 30 September 2010, the University's Personnel Committee met to consider the implications of this proposal to abolish the statutory DRA; this was of concern as it was considered that predictable retirement dates aided academic and financial planning and enabled the University to refresh the workforce and achieve greater diversity. Most employees retired at their normal retirement age, but the University had developed a procedure for considering extensions to employment beyond the DRA that was considered to have worked well. The Personnel

Committee agreed that the existing arrangements should be maintained if at all possible.

19. It was further noted that, while the removal of the DRA would not preclude employers from seeking to objectively justify a compulsory retirement age, an EJRA would have to be justified as a proportionate means of achieving a legitimate aim, which would need to be supported with robust evidence. The Personnel Committee agreed to ask its officers to develop proposals that might enable the University to continue to implement a normal retirement age, expressing the concern that it would otherwise have to manage a situation in which a potentially significant number of staff continued to work indefinitely, beyond the DRA. In relation to academic appointments, it was felt this would make planning extremely difficult and would mean it was only possible to dismiss older employees as part of a non-age discriminatory general process of redundancy or performance management. Acknowledging that the justification for an EJRA might not be straightforward, it determined to seek expert legal opinion on the strength of any justification and, in the case of joint appointments, to obtain the views of the colleges. It was also suggested that the University should look at other leading universities' intentions in relation to the abolition of the DRA.

20. A joint working group was set up by the Personnel Committee, approved by Council, and specialist legal advice was obtained before proposals were put forward for an EJRA with a retirement age of 67.

21. The proposals were the subject of extensive consultation, including with the Oxford University and College Union ("UCU"), and an Equality Impact Assessment ("EIA") was undertaken. The EIA noted that retirement had been an important mechanism for facilitating the turnover and diversification of University employees, particularly academic staff; it concluded that abolition of the DRA would tend to slow down departures from the older, less diverse groups and thus had the potential to set back the trend to greater diversity. An EJRA was seen as a means of redressing

this, albeit the EIA acknowledged the need to keep this under review.

22. The results of the consultation were subsequently reported to the Personnel Committee in May 2011 and revealed broad support for the EJRA proposals. All divisions supported the maintenance of a retirement age; the majority of the colleges were also in favour of maintaining an EJRA for joint appointments; academic staff and the Oxford UCU broadly supported the proposals (albeit based on a low response (16%) to its consultation with members), and there was clear resistance to the introduction of performance management as an alternative.

23. Having considered the responses, the Personnel Committee concluded that a predictable normal retirement age should be maintained, together with clear provisions for those approaching that age who wanted to continue in employment. It considered alternatives, such as offering financial incentives to encourage retirement or increasing the opportunities for promotion, but concluded these were unaffordable and were unlikely to be seen as justifiable use of public funds. In this regard, the Bedeau ET observed:

> "109. … alternatives were considered but found little support. They considered the experience in the United States of America where mandatory retirement was abolished in 1987 but in order to induce academics to leave, a significant sum of money is offered as the universities are financially well endowed. … we were told … that one university was able to raise $6billion and normally their termination package includes an inducement of 1.5x the salary. The University would be unable to adopt such an approach due to funding constraints. The University's academics also turned their backs against the introduction of performance management as the consensus was that it would be demeaning to those who are at the end of their academic careers. …."

24. At the end of the summer term, the Conference of Colleges voted in favour of an EJRA for joint appointments. Meanwhile, in June and July 2011, there was further consultation, focussing on procedures for considering requests to continue in employment beyond the EJRA.

25. All these matters were considered by the Personnel Committee on 22 September 2011, when it determined to recommend to Council the adoption of an EJRA of 67 for an initial period of 10

years for academic and academic-related staff, with an interim review after five years, and with an associated procedure for considering requests to continue working beyond the EJRA.

26. On 10 October 2011, the Council adopted the Personnel Committee's recommendations. Notice was placed in the Gazette on 13 October 2011; although 20 members of Congregation could have asked for this matter to be discussed at that body, this did not occur.

The 2011 EJRA Policy

27. The aims of the EJRA adopted by Council in October 2011, were specified to be as follows:

> "The EJRA is considered to provide a proportionate means of:
>
> • safeguarding the high standards of the University in teaching, research and professional services;
>
> • promoting inter-generational 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;
>
> • 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.
>
> • Promoting equality and diversity, noting that recent recruits are more diverse on the composition of the existing workforce, especially amongst the older age groups of the existing workforce and those who have recently retired.
>
> • Facilitating flexibility through turnover in the academic-related workforce, especially at a time of head count restraint, to respond to the changing business needs of the University, whether in administration, IT, the libraries, or other professional areas;
>
> • 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
>
> • In the context of the distinctive collegial processes 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."

28. The 2011 EJRA Policy allowed for exceptions by way of an extension procedure. Under this procedure, the Head of Division, or equivalent, would write to an academic member of staff two years before their retirement date to inform them of the process if they wished to request continuation of employment beyond that date (there was a similar provision for academic-related staff). Any employee who wished to continue in employment beyond the EJRA would then be invited to discuss the situation informally with their Head of Department and academic members of staff could also have an informal discussion with the Head of Division; holders of joint appointments were to consult their college. Early exploration of all options was encouraged, and it was recognised that some employees might only wish to continue working on one part of what was formally a joint appointment, or that only one employer might agree to their continued employment. Where an employee wanted to pursue a request to work beyond the EJRA, following consultation with all interested parties, the Head of Division (or equivalent) would submit the request to the Director of Human Resources and, if relevant, a similar request would also need to be made to a college, according to its procedures. Within the University, requests would then be considered by a panel appointed by the Personnel Committee; in the case of a joint appointment, the Chair of that panel would liaise with the Chair of the equivalent college body.

29. It was explained that the panel would consider the request in the light of the EJRA aims, taking into account the views of the employee, the division, department and college. In cases where the parties representing the employers considered an extension to be appropriate, it was expected the application would be granted, provided the panel was satisfied the aims of the EJRA were addressed. In other cases, the employee would be invited to a meeting and the division, department and college would also be given the opportunity to make their case. It was, however, made clear that it was the University's policy that academic and academic-related staff should

have a fixed retirement date to support the EJRA aims, and requests to continue working beyond the EJRA would be considered in that context; applications would only be approved:

> "… where the panel is satisfied that an extension of employment creates sufficient clear advantage to the University so as to justify an exception to the general rule. The panel will weigh the advantages of continued employment (whether in the same post, or in only one part of a previous employment, or on different terms and conditions, or on a part-time basis following partial retirement to pension) against the opportunities arising from creating a vacancy or part-vacancy."

More generally, given the high standards of scholarship and research prevalent in the University, distinguished scholarship would not, of itself, constitute an exceptional contribution.

30. The procedure then set out various considerations (albeit, not fixed criteria) that would usually be considered relevant in determining an application, as follows (so far as material):

> "a) Would the employee's contribution be unusually hard to replace given his or her particular skills set and/or the employment market? For example, has the department or division demonstrated a need, for a defined period, to retain expertise in order to complete a specific project, or to retain skills that are currently in short supply both in the University and elsewhere?
>
> b) What is the likely impact of extended employment compared with the opportunity arising from a vacancy on opportunities for career development and succession planning, bearing in mind recent and expected turnover?
>
> c) How would extended employment compare with the opportunity arising (if relevant) from a vacancy fit with the future academic and business needs of the department or division over the proposed period, for example, in relation to: i) an identified need to develop a new field of research or meet other specific research aims; ii) the department's ability to respond to student needs; iii) the provision of professional and administrative services of the highest *[sic]*; or iv) any exceptional contribution to the collegiate University the employee is expected to make, for example through unusually distinguished scholarship, such that the loss of that contribution would be unacceptable to the collegiate University?
>
> 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 appropriate in terms of the benefits expected to the collegiate University?
>
> g) In the case of a joint appointment, what are the implications for the joint

> nature of the post: for example, where the request involves only one part of a joint appointment, has some suitable means been found of managing the future of the joint appointment so as to protect the shared educational interests of the University and colleges?
>
> h) …
>
> i) Are there relevant personal circumstances that would properly justify exceptional treatment?"

31. Where an extension was granted, it would be on a fixed-term basis and there was provision for a subsequent application to be made for a further extension to be determined by the same provisions as the first; where not granted, a right of appeal was provided to the University's appeal court.

St John's College EJRA

32. The College had voted in favour of an EJRA at the Conference of Colleges and, at the meeting of its Governing Body on 11 January 2012, By-law XL1 was passed, which meant College would adopt the EJRA; the retirement date would be 30 September preceding the employee's 68th birthday. The College also determined that the EJRA would operate for an initial period of 10 years, from 1 October 2011, with an annual report being given to the Governing Body on its effectiveness, and an interim review after five years. The aims of the College's EJRA were the same as those of the University and it would apply to all academic staff employed by the College including holders of joint academic appointments with the University. The College also adopted the same policy as the University in respect of requests to work beyond the EJRA.

The One-Year Review

33. When the EJRA was introduced it was determined that there should be annual reporting of its effectiveness to Council, via the Personnel Committee. On 29 October 2012, Ms Thonemann, the University's Deputy Director of Human Resources, undertook this evaluation but felt it was too early to identify any trends or draw any firm conclusions; in particular, as the University had

raised the retirement age from 65 to 67, she felt it would take a number of years, and much more data, to properly measure any achievement of the aims.

34. Ms Thonemann further noted that the majority who applied for an extension of their employment were successful: in the first year, 55 staff had made formal applications to work beyond the EJRA, 52 were supported by their departments and divisions and, of those, 49 were approved. Of the 55 applicants, 49 were due to retire on or before 30 September 2014; the other six applied in advance of the EJRA as part of a recruitment negotiation. As an application for an extension had to be considered in light of the question whether the individual "*if extended in employment, expected to make an exceptional contribution to the collegiate University*", Ms Thonemann concluded that many had erroneously taken this to mean that the standard of research distinction expected of an Oxford academic was sufficient to justify continued employment and the EJRA was not functioning as anticipated in freeing up vacancies. She recommended that there be clarification of the process; the burden would rest on the applicant to make a case to be treated as an exception from the normal rule of retirement at the EJRA.

35. Ms Thonemann's recommendations were approved by the Personnel Committee on 28 November 2013.

The Galligan Decision and the University's Response

36. In 2014, Dame Janet Smith, a retired judge sitting in the University's court of appeal, heard an appeal brought by Professor Galligan against his dismissal from the University on the ground of retirement at the age of 67. Professor Galligan had been unsuccessful in his application for an extension of his employment beyond the EJRA. By her decision ("the Galligan decision"), dated 1 September 2014, Dame Janet Smith concluded that the University's EJRA of 67 years could not be justified and the extension provisions were "*fundamentally unacceptable*", effectively

allowing the University to pick and choose which staff it wished to retain. Allowing Professor Galligan's appeal, Dame Janet Smith expressed the hope that her analysis might "*be of assistance when [the University] decides on its future retirement policy*".

37. Following the Galligan decision, the Personnel Committee set up a working group to consider whether any changes should be made to the EJRA's aims or to the extension procedure prior to the five-year review. The working group recommended that the aims should be clarified, and adjustments made to the extension procedure. These came into effect on 30 September 2015 and are referred to as the "2015 Policy" (as to which, see below).

38. The Anstis ET was troubled by the lack of any evidence as to why the working group made the recommendations it did; as it recorded:

> "75. … 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 [University] 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."

The 2015 Policy

39. The aims of the 2015 Policy replicated those previously identified (see paragraph 27 above), save that the aim of "*avoiding invidious performance management and redundancy procedures*" was removed, and what was previously the second aim was divided into two (promoting inter-generational fairness, and refreshment as a route to maintaining the University's international position).

40. It was further stated that the EJRA was an "*appropriate and necessary means*" of creating "*sufficient vacancies*" to meet the identified aims.

41. As before, applications could be made to work beyond the EJRA, albeit these would now be considered by an EJRA committee (as distinct from the previous EJRA panel), and it was emphasised that extensions would only be granted in the most exceptional circumstances (bearing in mind that distinguished scholarship would not constitute a relevant consideration), in which it was clear both that the extended employment was required to ensure the accomplishment of a specific project or duties (or to get the full benefit of a completed project), and that the extension would not undermine the aims of the EJRA. As for the matters that would be taken into account when determining any such application, these were listed, (relevantly) as follows:

> "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?"

42. It was further explained that, save in very rare cases, extensions would be made only if the applicant had secured funding for the full costs of the continued employment, and they would be required to vacate their existing post and move into a newly-created, fixed-term post, on a grade appropriate to the duties to be delivered; this would make it possible for the substantive post to be refilled, thereby reducing any negative impact of the extension on the aims of the EJRA.

43. The 2015 Policy also addressed the possibility of a further extension of employment:

> "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."

The Interim (Five-Year) Review

44. As already mentioned, the 2011 EJRA was always intended to be the subject of an interim review after five years, which 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."

45. In May 2015, a working party was authorised by Council to undertake this review. A notice in the Gazette explained that the working party would oversee the collection of data and other information on the operation and effect of the EJRA, and would have regard to internal data, to the experience of other higher education institutions operating without a DRA, both in the UK and abroad, and to the views of stakeholders (including staff and various representative bodies).

46. The Anstis ET noted that a document headed "*EJRA Review: Draft Data Specification*" had provided for statistical information to be obtained, including:

> "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."

And it observed that the document also referred to collating data in relation to other universities:

> "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."

47. Referring to what appeared to be the outcome of this data collection, the Anstis ET set out the information provided relating to the reason for leaving, (relevantly) as follows:

> "- 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 associate professors … 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."

48. In a later presentation given by the working group, the data on creation of vacancies was summarised as follows:

> "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 [research only] …,
- 1.7% for academic and research staff in grades 6-10,
- 12.1% for administrative and professional staff."

49. The Bedeau ET observed that these figures showed that retirement was a key driver in the creation of vacancies at senior academic grades. The Anstis ET, however, noted that the data showed that the average age given for retirement was either at, or often below, 67, observing:

> "95. … 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."

It further observed that the report did not appear to contain any data on appointments.

50. Referring to a survey of retired staff carried out by the working group, the Anstis ET recorded:

> "97. … Of 69 people surveyed, 29 responded. Of those, 7 (24%) indicated that they would have continue *[sic]* 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."

51. On this point, the Bedeau ET concluded that the figures demonstrated that:

> "188. …if there was no EJRA then the turnover would be significantly lower."

52. In its detailed report, published in January 2017, the working group stated that each of the aims was important to sustain high standards and the evidence led it to conclude that, in the first five years, the EJRA had contributed to opportunities for career progression, refreshment, succession planning, enhancement of diversity and inter-generational fairness. It could not reach the same conclusion regarding flexibility or the ability to maintain morale. More specifically, no matter

how effective other measures might be, the University needed to create vacancies to improve diversity; although the extent to which the EJRA contributed to this varied, in many grades it was substantial. The working group recommended the EJRA be retained, adjusting the aims to better reflect those in respect of which it had most impact. It made further recommendations in terms of coverage and training, and, subject to consideration of the 10-year data, for the age of the EJRA to be raised in 2022, to 30 September before a 70th birthday, mirroring changes in longevity.

53. In its assessment of the working group's analysis in relation to statutory and associate professors, the Anstis ET observed:

> "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 …:
>
> "*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."

54. The Bedeau ET also referred to this part of the group's analysis, noting:

> "189. In relation to gender diversity, the data gathered in relation to Statutory Professors showed that there had been a steady improvement in the proportion of women in that population between 2012 and 2016, increasing from 11.6% to 14.8%. Since the introduction of the EJRA, the average turnover was 6.2%. Following a project to improve the search and selection procedures, 37.5% of new appointments to Statutory Professor grade in the period 2012 to 2016, were women. In this current year, according to the evidence of Ms Thonemann, more than half the Statutory Professor posts offered have been to women and the proportion of women in each grade has continued to improve by around 1% each year."

55. The working group had proceeded on the basis of data provided by the University's human resources department, which gave the number and percentage of those leaving as a result of "*retirement*"; the Anstis ET observed that, as a result, the figures used:

> "- 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." (Anstis ET Judgment paragraph 106)

This, it noted, gave rise to a difficulty as it was apparent that there was a span of ages when people retired, from under 60 to 70 and over, with the figures fluctuating widely over the years. On the figures for 2014-15, of a total of 155 academic and related staff, 78 had left while under the age of 67 and were thus not affected by the EJRA except to the (imponderable) extent they took it into account in making their own life decisions. The Anstis ET observed:

> "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 [University] had always set out its intention to review the operation of the EJRA (on an annual, five-year and ten-year basis),
>
> - the [University] 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."

The College EJRA Review 2016-2017

56. In 2016, the College established an EJRA review panel. At its meeting in May 2017, the panel considered the statistical data available and agreed that retaining the EJRA would increase the number of female Official Fellows and that inter-generational fairness was a key legitimate aim of the EJRA. The panel produced its interim report on 8 June 2017.

57. In September 2017, the College carried out a survey, which showed 84% were in favour of maintaining an EJRA at the same age as the University to encourage inter-generational fairness. In a final report produced in October 2017, the panel recommended discarding the aim of "*avoiding invidious performance management*" and made recommendations for minor changes to the procedure. These recommendations were approved by the Governing Body on 7 March 2018 and a revised By-law was implemented later that month.

Events in 2016-2017 and Professor Edwards' Appeal

58. Professor Edwards, a Statutory Professor of Inorganic Chemistry, was given notice of retirement in September 2014. He was not supported in his application for an extension of his substantive post, but accepted another role on a 0.8 Full-Time Equivalent basis, for three years.
59. Professor Edwards had proposed a motion before Congregation to suspend the EJRA pending the publication of the findings of the EJRA Review. The motion was debated in Congregation on 17 May 2016 but was defeated. In May 2017, Congregation had further opportunity to debate the EJRA after amendments were proposed to raise the retirement age to 69 or 70; these were again defeated and a legislative proposal to implement the recommendation of the five-year review was approved. Subsequently, Congregation debated a 20-member motion put forward on 17 May 2017 that the EJRA for the University should be abolished; this was also defeated.
60. Meanwhile, Professor Edwards had pursued an appeal challenging the lawfulness of the University's EJRA policy and extension provisions. This was heard by Sir Mark Waller (retired judge) in May 2017, with a decision promulgated in June 2017. Allowing the appeal, Sir Mark Waller concluded that Professor Edwards had been treated unfairly and recommended he be reinstated to his statutory chair. More generally, Sir Mark Waller found that the EJRA process had been "*condemned*" by Dame Janet Smith such that it was wrong for the Council to continue

to apply it, and he was critical of the University's dismissal of the Galligan decision as not binding and as confidential: although not binding on another appeal court, it was still important for consistency. That said, Sir Mark Waller accepted that retirement was a key driver in the creation of vacancies at the University. Noting that 25% of respondents to a survey of retired staff had stated they would have continued to work in the absence of an EJRA for an average of three years (a figure in addition to those granted an extension), Sir Mark Waller considered that, without an EJRA, the sizeable group leaving by reason of retirement at 67 would become largely unpredictable in terms of leaving date, which would impact on the University's succession planning as well as career planning and progression for individual staff members. He concluded that maintaining a retirement age enabled the University to generate vacancies with a view to achieving the EJRA aims and that, absent an EJRA, there would not necessarily be the same "*spike*" in the numbers of those leaving at age 67.

Professor Pitcher's Position

61. Professor Pitcher had been employed by the University and the College, as a joint appointment, since October 1980. At the material time he was an Associate Professor of English Literature at the University and an Official Fellow and Tutor in English at the College, with the costs of his appointment being split between the two institutions on a 60:40 basis. In 2014, the College had appointed Professor Pitcher to the Officership of Founders Fellow, responsible for College alumni, for two years, up to 31 August 2016, with the possibility of renewals, potentially up to 2020, subject to the College's EJRA processes.

62. The application of the EJRA meant that, absent any extension, Professor Pitcher's appointment would end by reason of retirement on 30 September 2016. The University reminded him of this in June 2014 and, in the following October, Professor Pitcher indicated that he would like to

continue in his employment. In June 2015, he made a formal application to extend his employment to September 2020.

63. Professor Pitcher's application was not supported by the English Department or the Humanities Division; although there was no question as to his academic distinction, it was not considered that an extension of his employment would create a sufficiently clear advantage to outweigh the opportunities arising from creating a vacancy. More specifically, it was explained:

> "… the Division does not consider that his contribution in teaching or research would be unduly difficult to replace. Within Oxford alone, the English Faculty has 16 Associate Professors specialising in the early modern field, many of whom are of international standing. More widely, English modern period is flourishing. It routinely forms part of the core curriculum in English studies at Universities both in the UK and internationally, and continues to attract larger numbers of doctoral students and post-doctoral researchers, forming a thriving early career community."

64. Acknowledging Professor Pitcher's particular experience of Shakespearian commentary, it was felt this could also be delivered by other post-holders and that, in the employment market at that time, the Faculty would be able to make a high-quality new appointment.

65. As for the likely impact on opportunities for career development and succession planning, it was noted that the English Faculty had a very low staff turnover at Associate Professor level: in 2009-2010, one to two vacancies a year had arisen due to retirement, and one additional vacancy arose due to resignation; Professor Pitcher's post was the sole Associate Professorship expected to become vacant due to retirement in the Faculty until 2020; if his application was approved, the English faculty would be unable to make further appointments at that level before 2020, which was felt would have a severely negative impact. This was also seen as relevant to the promotion of diversity as the very low staff turnover in the Faculty meant that such an extension of employment would reduce the opportunity to increase diversity through recruitment.

66. Acknowledging Professor Pitcher's distinguished scholarship, it was, nevertheless expected that

a large proportion of senior academics approaching retirement would continue to be engaged in high quality research after retirement, and could retain membership of their Faculty to access facilities such as the Bodleian Library; they were also able to be involved in applications for research grants as non-employees. The Division was otherwise unaware of any personal circumstances that would properly justify exceptional treatment in Professor Pitcher's case.

67. Professor Pitcher indicated that he wished to proceed to a meeting of the EJRA panel and subsequently requested a copy of the internal University court of appeal's decision in the case of Professor Galligan. This request was declined by Dr Goss, Pro-Vice Chancellor, Personnel and Equality, on the bases that the appeal was internal and not public, that the decision was confidential as between the parties, and that the decisions of the internal court of appeal were not intended to be considered as binding on another appeal court.

68. The University's EJRA panel met on 26 January 2016, chaired by Dr Goss. Professor Pitcher, who had confirmed that he wished his application to be considered under the 2011 procedure, attended and read out a statement in support of his application, making clear his concern as to the legality of the EJRA and setting out his case on the basis of his own work.

69. The panel determined that Professor Pitcher's application should be refused; its decision was communicated to Professor Pitcher by letter dated 3 March 2016.

70. Considering first whether his contribution would be unusually hard to replace, the Panel answered this question in the negative, in particular given the Division's confidence that a replacement appointment "*of a high quality*" would be possible. More specifically, the Panel did not consider there was a demonstrable need to retain Professor Pitcher's expertise to complete a specific project. Turning to the likely impact of an extension, it was felt key that this was the only anticipated vacancy at Associate Professor level in the English Faculty until 2020, with financial considerations meaning that no new posts could be created; the Panel considered that the

opportunities for career progression and refreshment arising from a vacancy would be invaluable to the Faculty. The Panel also noted that the Division had explained that the limited nature of turnover in the Faculty meant this post would provide the only opportunity to improve diversity through recruitment in the next few years. Professor Pitcher had not put forward any relevant personal circumstances that would properly justify exceptional treatment and the Panel determined that an exception to the general rule, that academic and academic-related staff should retire at their EJRA, could not be justified in his case.

71. Professor Pitcher appealed against this decision, contending the EJRA was discriminatory on grounds of age (relying on the internal court of appeal decision in Galligan), and that the EJRA panel's findings were flawed and without evidential support. Prior to the appeal hearing, Professor Pitcher again asked the University to release the Galligan decision, eventually obtaining a copy in August 2016 following the decision of Sir Jeremy Sullivan (a retired judge) in another appeal that the Galligan decision should be disclosed in that case.

72. Sir John Goldring (also a retired judge) was appointed to hear Professor Pitcher's appeal and, on 6 September 2016, heard submissions on the legality of the EJRA policy. On 14 September 2016, Sir John Goldring decided that the court did not have the authority to consider whether the EJRA was discriminatory. Having received that ruling, Professor Pitcher decided to withdraw his remaining grounds of appeal.

73. Although Professor Pitcher had also submitted a formal grievance alleging age discrimination under the University's Statutes, he agreed that process should be stayed pending the outcome of his ET case.

74. As for Professor Pitcher's position in relation to his appointment with the College, in October 2015 (under the College's procedure, this was five months late), he had been reminded of his retirement date and the options open to him. There were then communications between Professor

Pitcher and the Senior Tutor of the College, Professor Allen Grafen, with Professor Pitcher proposing he should be kept on in the College's employment as Founders Fellow on his full salary; he believed the Governing Body would agree to this proposal, given the earlier decision that the role be renewed after two years.

75. Professor Grafen did not, however, consider this would be something the College Governing Body or Remuneration Committee would agree; Professor Pitcher was effectively asking for full-time pay for a College Officership role, which was not seen as involving a major time commitment. Professor Grafen suggested alternatives, including continuing as Founders Fellow while holding an Emeritus Research Fellowship, but these were rejected, with Professor Pitcher submitting an application for an extension to his College employment on the basis that he would continue in post as an Official Fellow and as Founders Fellow until 2020.

76. In January 2016, the College EJRA panel interviewed the College President (Professor Snowling), as well as Professor Grafen, the Acting Principal Bursar (Professor Sobey), and the Principal Bursar (Professor Parker), and sought to investigate how the Founders Fellow role might develop in light of the fact that a Director of Development and Alumni Relations had been appointed by the College in December 2015; it also met with Professor Pitcher.

77. As well as receiving the views of those interviewed regarding Professor Pitcher's request, the panel sought information relating to the question of diversity. This confirmed that only two Official Fellows had retired since the introduction of the EJRA, that women were a minority amongst Official Fellows, and that no female Official Fellow would reach the EJRA within the next 10 years whilst 10 male Official Fellows would.

78. The panel also had regard to the position adopted in relation to Professor Pitcher's application to the University; it was aware this was not supported by the English Faculty or the Humanities Division and was likely to be refused. Professor Pitcher's application had been the first to involve

a joint appointment and the Bedeau ET accepted Professor Grafen's evidence that the close mirroring of the University's EJRA process reflected the importance to the College of the joint appointment arrangements and in having a joined up EJRA process. It further accepted that single employer positions were far less attractive for the most able academics who might consider working in Oxford: the attraction of the University being the opportunity to work in a research-intensive environment with some of the world's leading academics; that of the College being the opportunity to work in a close-knit academic community, with the social privileges that entailed, as well as the well-established tutorial system. It was also highly desirable to have the same person delivering both University lectures and College tutorials; the importance of joint appointments was thus of significance in considering any application for extension.

79. Subsequently the College EJRA panel met on 27 February 2016, ultimately determining to recommend that Professor Pitcher's application be refused. In communicating that decision to Professor Pitcher on 1 April 2016, it was explained that the panel had concluded that the aims of the EJRA remained proportionate and that this application did not meet the detailed criteria set out in By-law XL1. It was noted that Professor Pitcher's University post would not be continuing, that the Governing Body was unlikely to want a Founders Fellow for the period 2016-2020, and the cost to the College of continuing the appointment would be considerable. Detailed reasons for the panel's decision were attached in the form of a report and annexes, reviewing Professor Pitcher's case against the aims of the EJRA and the substantive criteria set out in By-law XL1.

80. At the meeting of the College Governing Body on 20 April 2016, the panel's recommendations were approved. Professor Pitcher was informed of the Governing Body's decision by letter of 20 April 2016, which also advised him of his right of appeal.

81. Professor Pitcher duly appealed, and Ms Jane McNeill QC was appointed to conduct this hearing under the College's procedure. By his first ground of appeal, Professor Pitcher contended the

EJRA was discriminatory on the ground of age; the College argued, however, that was not a matter that could be determined under the internal appeals process. On 24 June 2016, Ms McNeill heard submissions on this preliminary point. In her decision of 14 July 2016, she ruled that she did not have jurisdiction to determine the legality of the College's EJRA. Following that ruling, on 10 October 2016, Professor Pitcher abandoned his appeal.

82. Meanwhile, on 30 September 2016, Professor Pitcher's employment ended by way of retirement. As the Bedeau ET noted, as he was aged over 65, the Universities Superannuation Scheme ("USS") gave Professor Pitcher the option of taking his full pension on retirement from the University or later, if he continued to work. He could also be put forward for an Emeritus Professorship and, notwithstanding his retirement, could continue living in College property (subject to payment of 50% of the fair rent), enjoy full social and dining rights and would be given a room if he wanted to engage in research.

Professor Ewart's Position

First Extension

83. Professor Ewart had held the post of Associate Professor in Atomic and Laser Physics, part of the Department of Physics, within the MPLS Division. He also held a post at a college, under the joint appointments system. Professor Ewart's particular area of interest is in the physics of quantum optics and non-linear optics and its application in engineering, chemistry, energy and environmental applications. As the Anstis ET noted, there is no dispute that Professor Ewart is a distinguished academic; he is a leading figure in his field with an international reputation, as would be expected of someone holding his position at the University.

84. On 12 September 2013, the MPLS Division wrote to Professor Ewart reminding him that his retirement date would be 30 September 2015 and outlining his options, which included applying

for an extension under the EJRA policy. Professor Ewart duly started discussions with his Head of Department, Professor Wheater, with a view to seeking a three-year extension of his employment. The outcome of those discussions saw Professor Wheater supporting an extension of two years when Professor Ewart subsequently made his formal application.

85. On 28 March 2014, Professor Ewart's application was submitted to Ms Thonemann for the consideration of the EJRA panel, along with a letter in support from Prof Wheater and other supporting materials.

86. The panel had reservations about the application, which did not explain why succession planning was not already in train and failed to address the impact of the extension upon inter-generational fairness and diversity. On 30 May 2014, on behalf of the panel, Ms Thonemann wrote to the Division, raising these concerns but stating the panel would be prepared to consider a new case on behalf of Professor Ewart which addressed these issues. Although Ms Thonemann asked the Head of Division to communicate this decision to Professor Ewart, that was not done.

87. Without Professor Ewart's knowledge, a further submission was sent to the panel by the Division, explaining the particular difficulties in succession planning given the nature of Professor Ewart's work, which was on the margins of other work typically being undertaken by the Physics Department, and the Department's desire to pursue opportunities in quantum physics, which meant the work that Professor Ewart was undertaking would in future be continued within the Engineering Division, not MPLS or the Department of Physics. It was emphasised, however, that the Division would be unlikely to support any further extension of Professor Ewart's employment.

88. In June 2014, Professor Ewart's application was approved and he was granted a two-year fixed-term contract beyond the EJRA, albeit, as the Anstis ET found, this had come about by way of a somewhat uneasy compromise - on the basis that it was necessary for succession planning and that no further applications for an extension would be supported – which had not been

communicated to Professor Ewart.

89. Upon starting his fixed term contract, Professor Ewart 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 University before (he had given up the 20% of his work that was for the college). From that point he held the title of senior lecturer, although this had no practical effect on his work or remuneration (other than a pro-rata reduction due to his reduced working hours) and he continued to teach and carry out research as before. That said, there was evidence before the Anstis ET that being employed on a fixed-term contract impacted upon Professor Ewart's ability to collaborate in longer-term projects, with funding being limited to his term of employment (the possibility of a future consultancy apparently not meeting the requirements laid down by the relevant funding bodies).

Second Extension

90. Professor Ewart's second extension application was made under the 2015 Policy. He sought a three-year extension on a 50% Full-Time Equivalent basis, and stated why alternatives, such as a consultancy or Emeritus position, would not be viable. Having described the work he would undertake, Professor Ewart explained why a second extension was necessary, as several of the projects that justified the first extension had been subject to unforeseen delays.

91. Under the 2015 Policy, Professor Ewart's application was sent to Professor Wheater, who provided the Department's response, stating that it did not support the application; it took the view that the purposes of the first extension had been met and that either an Emeritus position or a consultancy would be a viable alternative. The application was then forwarded to the Division, which also did not consider that a second extension would meet the terms of the 2015 Policy.

92. Professor Ewart had the opportunity to provide a response, and his application was then

considered by the EJRA committee on 16 December 2016. The committee did not accept Professor Ewart's contention that completion of his work had been frustrated due to unforeseeable circumstances and, as this was his second application, under the 2015 Policy that was determinative; the committee decided not to approve the application.

93. Although the committee's decision was made on 16 December 2016, it was not communicated to Professor Ewart until 18 February 2017. That was significant as this was a few days after the University had changed its statutes so that appeals in respect of the EJRA no longer went to the appeal court but to an appeal panel. The Anstis ET accepted, however, that the delay had arisen for reasons entirely unrelated to this change and there was no attempt to thwart or frustrate Professor Ewart's rights in this regard.

94. In any event, Professor Ewart submitted an appeal against the decision, which was ultimately heard in December 2017 (after the termination of his fixed-term contract (and, therefore, his employment) on 30 September 2017). By letter of 16 January 2018, the appeal panel rejected Professor Ewart's appeal on the basis that the purposes of the first extension had been achieved.

The Relevant Legal Principles

95. Both Professor Pitcher and Professor Ewart pursued claims of direct age discrimination and unfair dismissal. We first set out the legal principles relevant to those claims, before turning to consider the reasoning of each of the ETs.

Direct Discrimination Because of Age

96. Sub-section 13(1) of the **Equality Act 2010** ("EqA") defines direct discrimination, as follows:

> "(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."

97. Where the claim is one of direct age discrimination, however, sub-section 13(2) allows for a defence of justification:

> "(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."

98. These provisions implement **Council Directive 2000/78/EC** ("the Framework Directive"), which sets out a general framework for combating discrimination on, amongst others, the ground of age, with a view to putting into effect the principle of equal treatment in the Member States. Article 2 of the **Framework Directive** 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 any of the grounds referred to in Article 1 [which includes age]".

Article 6 then provides for a specific defence of justification in age discrimination cases:

> "1. Notwithstanding Article 2(2), 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 …"

99. In considering whether a compulsory retirement policy has legitimate aims, in **Seldon v Clarkson, Wright and Jakes** [2012] UKSC 16; [2012] ICR 716, the Supreme Court recognised there are two different kinds of legitimacy potentially at issue. The first - general legitimacy - is concerned with broad types of aim that might justify an otherwise discriminatory policy. The second - particular legitimacy – raises the question whether the aim is "*legitimate in the particular circumstances of the business concerned*" (per Lady Hale, paragraph 61 **Seldon**). In identifying those aims that might meet the general legitimacy requirement, at paragraph 50(2) **Seldon**, Lady Hale suggested that the aims must be:

> "social policy objectives, such as those related to employment policy, the labour market or vocational training". They 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'".

Going on to identify two broad categories of potentially legitimate aims:

> "56. … the first kind may be summed up as *inter-generational fairness*... 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.
>
> The second kind may be summed up as *dignity*. This has been variously put as avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and as avoiding the need for costly and divisive disputes about capacity or underperformance."

100. In order to be justified, however, an otherwise discriminatory policy must also be an "*appropriate and necessary*" means of achieving the aim. This is the proportionality question, at the heart of which is a balancing exercise, described in Lady Hale's Judgment in **Seldon** in the following terms (see paragraph 50(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".

101. Where an employer seeks to justify the operation of what would otherwise amount to discriminatory scheme or policy, it is the task of the ET to conduct a critical evaluation of the scheme in question; as Pill LJ observed, in **Hardy and Hansons Plc v Lax** [2005] EWCA Civ 846); [2005] ICR 1565, CA:

> "32. … The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal … is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular

circumstances."

102. Thus, in carrying out the required balancing exercise, the ET does not have to defer to the employer's assessment; it must come to its own judgement (**Chief Constable of West Yorkshire Police v Homer** [2012] UKSC 15; [2012] ICR 704, per Lady Hale at paragraph 20). Indeed, as the test is objective, there is no requirement that the justification must have consciously and contemporaneously featured in the employer's mind (**Cadman v HSE** [2005] ICR 1546, CA), but an otherwise discriminatory policy, which the employer cannot show to be either necessary or appropriate, cannot sensibly be thought to balance the harm.

103. As for what is "appropriate", in this context, this means that a policy must be capable of achieving the aim; where a measure is inappropriate to the aim in question, discrimination arising from its application will not be justified (see the examples cited by Lady Hale at paragraph 50(5) **Seldon** and at paragraph 22 **Homer**). The question for the ET is whether the means could achieve the legitimate aim in question or whether they are unconnected to it. The appropriateness of a measure may also be undermined by the inclusion of exceptions that are inconsistent with the aim in question; as was noted by the Court of Justice in **Fuchs and anor v Land Hessen** Joined cases C-159/10 and C-160/10 [2011] IRLR 1043:

> "85. It must be observed, in accordance with settled case law, that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (case C-169/07 *Hartlauer* [2009] 3 CMLR 143, paragraph 55, and *Petersen*, paragraph 53).
>
> 86. Exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law …."

In **Fuchs**, it was held that the exception in question (the continued employment of prosecutors until the age of 68 when they were involved in an on-going criminal case) was unlikely to undermine the aim pursued (an age-balanced workforce), but could mitigate the otherwise rigid nature of the law

being applied (the requirement that prosecutors retire at 65).

104. As for the concept of necessity, this focuses scrutiny on whether there were other non, or less, discriminatory ways of achieving the same legitimate aim. That does not mean that other aims should have been adopted; necessity in this context means '*reasonable necessity'* (see paragraph 32 of **Hardy & Hansons**, *supra*). This principle was reiterated by the Employment Appeal Tribunal in **Seldon v Clarkson Wright and Jakes (No 2)** [2014] ICR 1275. In that case, it had been suggested that because a retirement age of 68 or 70 would adversely affect fewer partners than one of 65, the firm could not justify the lower age; the EAT disagreed:

> "27. … 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 its 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. This is not to accommodate the band of reasonable responses rejected in *Hardy & Hansons plc v Lax* but to pay proper and full regard to its approach to what was reasonably necessary, given the realities of setting any particular bright line date."

105. A blanket policy that takes insufficient account of different employee circumstances might fall to be treated as disproportionate (**Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark** C-499/08; [2011] 1 CMLR 1140); otherwise, however, specific application of an otherwise justified policy will not usually require further justification; as Lady Hale observed, at paragraph 65 of **Seldon**:

> "… where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it".

106. The burden of justifying an otherwise discriminatory act falls on the employer. In **Air Products plc v Cockram** [2018] IRLR 755, the Court of Appeal considered the evidential burden

on the employer in the context of a Long Term Incentive Plan ("LTIP") that allowed an employee who left employment after the customary retirement age to retain any unvested awards under the LTIP, when these sums would otherwise be forfeited on termination of employment. The ET in that case had accepted this was direct age discrimination, but held that the discriminatory effect was objectively justified. In upholding that decision, the Court of Appeal agreed that there was a need for careful scrutiny of the evidence put forward by the employer (per Pill LJ in **Hardy & Hansons**, *supra*) but cautioned that "*the detail and weight of the evidence required will depend what proposition the employer is seeking to establish*." (see per Bean LJ at paragraph 28).

107. In **Cockram**, the employee argued that the ET should not have accepted the employer's "*assertion*" that the aim of the provision in issue was to incentivise retention up to the age of 55 and to disincentivise it thereafter. The Court of Appeal disagreed, holding that:

> "30. … 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."

108. More particularly, Bean LJ (with whom Leggatt LJ agreed) rejected the proposition that the employer was required to adduce evidence that the customary retirement age clause in the LTIP had in fact led to a high retention rate and that, if it failed to do so, the ET ought to have inferred that there was no evidence that the provision encouraged retention, observing that:

> "31. … 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."

109. There is a dispute between the parties in the present appeals as to what the Court of Appeal was saying in **Cockram**. For the University and the College it is contended that the observations

cited above are of general application to the question of justification; for Professors Pitcher and Ewart, it is argued that these related to the question whether the employer had demonstrated a legitimate aim, noting that Bean LJ addressed proportionality later on in his Judgment and did not make the same points relating to the sufficiency of evidence.

110. It seems to us that the points made by Bean LJ at paragraphs 30 and 31 of **Cockram** are capable of being understood as relating generally to the evidential burden placed on the employer when seeking to establish objective justification. In some cases, some matters will be "*so obvious*" - ***Cockram****-obvious* - that they will barely require evidence. Moreover, whilst the requirement to objectively justify the discriminatory measure arises from the start of its application, evidence of impact on legitimate aims may sometimes be hard to come by soon after the implementation of a particular measure, or, more generally, it may be the case that causative effect is genuinely difficult to isolate; an ET should not require from an employer evidence which it cannot reasonably be expected to produce.

111. We do not consider, however, that these observations detract from the requirements placed upon the ET, as laid down in **Hardy & Hansons**: if the ET's assessment is to demonstrate the requisite critical and thorough evaluation (per Pill LJ at paragraph 33; Thomas LJ at paragraph 54), it will necessarily look for evidence rather than mere assertion (albeit that evidence may take the form of reasoned projection rather than demonstrable result) and will require a degree of cogency in the employer's case. In this regard, we note the guidance provided by the Court of Justice in **Fuchs** on this issue (raised by the second question referred to it):

> "77. It is clear from paragraph 51 of Age Concern England [R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform Case C-388/07 [2009] ICR 1080] that mere generalisations indicating that a measure is likely to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of derogating from the principle of non-discrimination on grounds of

> age and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are likely to achieve that aim.
>
> 78. The Court has also pointed out, in paragraph 67 of that judgment, that Article 6(1) of Directive 2000/78 imposes on member states the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification."

112. The principle of proportionality requires an objective balance to be struck between the discriminatory impact of the measure in issue and the needs of the employer; the more serious the disparate adverse impact, the more cogent must be the justification (see the observations of the Court of Justice in **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia** Case C-83/14 [2015] IRLR 746, at paragraph 123). In assessing the discriminatory effect of a measure, the ET will need to consider that question both qualitatively (the amount of damage done and/or how long lasting or final that damage is) and quantitatively (the number of people who will or are likely to suffer the discriminatory effect); see **University of Manchester v Jones** [1993] ICR 474, CA per Ralph Gibson LJ at 497.

113. In carrying out the requisite balancing exercise, however, an ET may consider it relevant to take account of agreements between an employer and those who represent employees; thus, in **Rosenbladt v Oellerking GmbH** Case C-45/09 [2011] CMLR 1011, when considering the proportionality of a clause providing for automatic termination when the employee became entitled to a retirement pension, it was seen as relevant that the origin of the term was based in a collective agreement (see paragraph 47). Similarly, in a domestic context, in **Loxley v BAE Systems Land Systems Ltd** [2008] ICR 1348, at paragraph 42 (quoted with approval in **Lockwood v Department of Work and Pensions** [2013] EWCA Civ 1195, at paragraph 46), Elias J recognised that an agreement made with trade unions was potentially relevant when considering proportionality (and see **Seldon**, in which, at paragraph 65, Lady Hale acknowledged the role consent or agreement might play when considering the aim of intergenerational fairness).

Unfair Dismissal

114. By section 98 **Employment Rights Act 1996** ("ERA"), it is (relevantly) provided:

> "(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 either a reason falling within subsection (2) or 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…"

115. The University and the College thus had the burden of showing the reason for Professor Pitcher's dismissal, that is: "*the set of facts known to the employer, or it may be of beliefs held by [the employer] which cause him to dismiss the employee*" (**Abernethy v Mott Hay & Anderson** [1974] ICR 323, 330B).

116. In determining the fairness of the dismissal for the reason shown, the burden is neutral as between the parties. The test that applies at this stage is well-established and asks whether the decision to dismiss "*falls within the band of reasonable responses which a reasonable employer might have adopted*" (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439).

Appeals from ET Decisions and the Role of the EAT

117. In **Hardy & Hansons**, in considering the respective roles of the ET and the EAT in the

determination of objective justification in claims of discrimination, Pill LJ observed that the appraisal to be carried out by the ET is one that requires considerable skill and insight, thus:

> "33. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind… the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment 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.
>
> 34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. …"

118. A similar point was made in the context of claims of age discrimination in **Lord Chancellor v McCloud and Secretary of State for the Home Department v Sergeant** [2019] ICR 1489 CA, where it was held found that the EAT had wrongly disturbed the ET's conclusions on the evidence, the Court of Appeal observing:

> "94. Finally and importantly these matters are essentially for the employment tribunal judge to assess and this court (and indeed the Employment Appeal Tribunal) should, in our judgment, be slow to substitute our own judgment about the mass of evidence which there was before the tribunal for that of the employment judge. Moreover, as Lady Hale observed in *Essop v Home Office* [2017] UKSC 27; [2017] ICR 640, para 47, we must be able to detect an error of law. …"

See also **British Airways v Starmer** [2008] IRLR 863, EAT, where, in the context of an ET's finding on the question of objective justification, it was held that the test for interference by an appellate court will be one of perversity (see per Burton P, at paragraph 34).

119. Where an appeal is pursued on the ground of perversity, it is clear that there is a high hurdle to clear; as Mummery LJ held in **Yeboah v Crofton** [2002] IRLR 634 CA, there must be an "*overwhelming case… that the employment tribunal reached a decision which no reasonable*

tribunal, on a proper appreciation of the evidence and the law, would have reached". It is not open to the EAT to find perversity simply because it might have reached a different decision to that of the ET; even if it has "*grave doubts*" it must proceed with "*great care*" (**Yeboah**, paragraph 93). Furthermore, the ET's role as the relevant fact finding tribunal is to be respected (see **Aslef v Brady** [2006] IRLR 576 EAT, per Elias J at paragraph 55), and its reasoning read as a whole (**DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, per Popplewell LJ at paragraph 57). In **Meek v City of Birmingham DC** [1987] IRLR 250, the Court of Appeal explained that an ET must provide a *"sufficient account of the facts and of the reasoning*" to enable an appellate decision maker to ascertain whether any question of law arises (such reasons being *"**Meek**-compliant"*) but, consistent with **UCATT v Brain** [1981] ICR 542 CA, at 551, this need not be a comprehensive or detailed analysis of all the facts and law but must "*tell the parties in broad terms why they lose or, as the case may be, win*".

120. More generally, while a party may appeal on the basis that there was no evidence to support a particular finding (this would be an error of law, see **Piggot Bros and Co Ltd v Jackson** [1991] IRLR 309 at paragraph 17), the EAT cannot interfere on the basis that there was insufficient evidence or that the ET gave inappropriate weight to particular evidence.

The ET Decisions

Justification: Legitimate Aims

121. Both the Bedeau and the Anstis ETs found that the following were legitimate aims: (1) promoting inter-generational fairness; (2) facilitating succession planning (in the sense of knowing when vacancies could be expected to arise); and (3) promoting equality and diversity. They further found that these three aims helped achieve an over-arching objective (upon which the University did not directly rely) of safeguarding high academic standards.

122. In addition, the Bedeau ET concluded there was an additional legitimate aim in minimising the impact on staff morale by using a predictable retirement date. The Anstis ET rejected this as a legitimate aim as it was not a public policy aim and, in any event, there was no evidence that this actually addressed a problem that the University had.

Justification: Proportionality

123. On this question, the conclusions reached by the Bedeau ET and by the Anstis ET differed.

(1) The Bedeau ET

124. The Bedeau ET had regard to the background to the EJRA, as follows:

> "404. … we have taken into account that the legitimate aims relied upon by the University are the product of case law as set out by Lady Hale in *Seldon*. They were also accepted as legitimate by Sir Mark Waller in Edwards. The age of 67 was arrived at following consultation with staff, union and other groups within the University. Alternatives to and *[sic]* EJRA were considered, such as a financial inducements scheme, performance management, and a negotiated departure, but were held to be either expensive or unviable. The University did not have the funds to pay those it wished to retire. Staff were not in favour of performance management at such a late stage in a senior academic's life. A negotiated departure scheme would not guarantee an agreed departure date and as such, would affect succession planning."

125. It noted that, had there been any significant objection the EJRA, it would have been open to 20 members of Congregation to put down a motion so as to require a debate, but this did not happen. It further considered it material that:

> "406. A retirement age of 65 [*sic*] years, now 68, is not fixed because the review process allows for changes to be made. It is likely that retirement at 70 will come into effect in 2020. The review process adds to proportionality. We know there will be the 10-year review in 2021 with possible changes to follow. The extension provisions also add to proportionality, though the 2015 policy is stricter than the 2011 one. It was held in *Fuchs* that a retirement age of 65 with the possibility of an extension, was considered proportionate as it helped to achieve the legitimate aim of encouraging recruitment and promotion of younger people. The EJRA and the extension provisions create vacancies allowing the University to move toward realising the legitimate aims. This was also recognised by Sir Mark Waller in Edwards. The extension provisions

> mitigate the effects of the EJRA policy by providing those 67 years the opportunity of applying to extend their employment."

126. Although Professor Pitcher had been unsuccessful in his application for an extension of his employment, and had thus been required to retire pursuant to the EJRA, the Bedeau ET considered this detriment had to be seen in the light of the following factors:

> "407. … he had the right to his USS pension at 65 years. His benefits pre-dates April 2016 when career average pension was introduced. Being retired does not mean that he is divorced from university academic life. He is entitled to acquire the title of Emeritus Professor and be allowed to use the University's facilities to do research work. He can also apply for research funds to carry out his work."

127. These were all matters the Bedeau ET had in mind when considering the proportionality question in respect of each aim (see its statement to this effect at paragraph 404 of its Judgment).

128. In relation to the promotion of inter-generational fairness, it concluded that this required vacancies to become available; compulsory retirement was one way the University achieved this:

> "363. … It is about the younger generation both outside and inside the University being given the opportunities for career progression."

129. Noting that, in the review group survey, 26% of retired staff had said they would have continued for an average of three years absent the EJRA, the Bedeau ET considered the number of those retiring would have been much lower if there was no EJRA. Although there had been an increase in staff aged over 67 (as reported to the Personnel Committee in 2018), that was explicable due to the lifting of the retirement age:

> "370. … It is, in our view, still early days before we see any significant changes under this legitimate aim. The University is endeavouring to change decades and possibly centuries old traditions and practices by providing opportunities for the younger generation, not necessarily limited to those in this country but internationally. As the University competes in the global market, it has to create opportunities to advance by way of career progression."

Taking the view that retirement remained the key driver in the creation of University vacancies at senior grades, and noting that the EJRA sought:

> "364. … to balance the wishes of the individual approaching the EJRA with the needs of the collegiate University (including the legitimate career aspirations for other staff) by facilitating the timely discussion of options with a view to identifying possible future arrangements which are acceptable to all parties, and by providing a clear decision-making and appeal process which allows account to be taken of all relevant considerations."

the Bedeau ET concluded that the EJRA, taking into account the extension provisions, provided a proportionate means of achieving this aim, being both necessary and appropriate.

130. As for succession planning, the Bedeau ET found that the EJRA policy, including the extension provisions, allowed for this:

> "378. … The prospective retiree is told over a year in advance of the expected date when they are due to retire. They can either agree to retire on the given date or apply for an extension. If they accept retirement, it allows the University to engage in succession planning. If, however, they apply for an extension, after exhausting the procedure, including the appeal stage and if unsuccessful, the University could still engage in succession planning. The notice given by the University allows it sufficient time to complete the extension process, including appeal. Younger academics may not be inclined to leave if they are aware of a potential vacancy through the EJRA."

Again, the Bedeau ET considered the EJRA, including the extension provisions, was both necessary and appropriate to achieve this aim.

131. In relation to the aim of promoting equality and diversity, the Bedeau ET noted that the University's EIA had revealed that, in 2010, men made up 85.2% of academic staff aged 60-64 and 90.2% of those aged 65 and older but only 67.4% of academics in the age group 30-39; the EJRA working group's conclusion was that the EJRA policy was contributing to improvements in gender diversity. The Bedeau ET concluded:

> "388. … progress in this area is likely to be slow having regard to the extension of the retirement age by 2 years from 65 to 67 years. By the date of the decision on the claimant's extension application, the EJRA policy had been in place for nearly 5 years. Statistical evidence of significant changes in this area of equality and diversity is unlikely to be realised. The exceptions policy resulted in high retention of those making applications. This extended the tenure of the more senior staff who are the least diverse as they were mainly white and male. In 2015 the University revised the policy to enable it to create more vacancies

> to facilitate this aim. The retirement age also increased to 68 years following the Working Group's recommendation. We agree that this will further delay improvements of equality and diversity."

In the circumstances, it again found that, on balance, the EJRA (including the extension provisions) was a necessary and proportionate means of achieving this aim.

132. As for staff morale, whilst accepting that the application of the EJRA policy was likely to cause those affected a considerable amount of anxiety and concern about their future, the Bedeau ET considered this had to be seen in the light of the potential impact of funding cuts:

> "395. … Rather than, for example, embark on a redundancy exercise, which would give rise to considerable apprehension among the affected staff, the funds freed up by the vacancy, could be used in ways which may secure their employments thereby enhancing staff morale. …"

This meant that the EJRA was similarly a proportionate means of achieving this aim.

133. In reaching its view on proportionality, the Bedeau ET noted (per **Cockram**) that ETs should be slow to look for evidence of the achievement of legitimate aims when a recently implemented policy had not had time to take effect. It considered it would be unrealistic to expect the EJRA to have brought about real and significant change during the five years under consideration (that is, to the date of the decision not to extend Professor Pitcher's employment):

> "502. ... The under representation of women, BAME, and those with disabilities, just to name a few groups with protected characteristics, has been the result of past practices going back many decades. Change will take time. An example is the 2 years extension of retirement date from 65 to 67 which meant that there was unlikely to be a large number of people retiring during the five years leading up to the decision on the claimant's application.
>
> 503. In relation to gender diversity, in 2010, 85.2% of academic staff aged between 60-64 were men and of the academic staff older than 64, 90.2% were also men. To achieve an acceptable proportion in relation to gender diversity, will take time."

134. It was also noted that: (i) the extension provisions in the initial three years had resulted in a number of (mainly male) applicants being successful, delaying the creation of vacancies in those cases; (ii) diversification of the workforce was also delayed as a result of raising the EJRA to 68;

(iii) in any event, even with an EJRA in place, turnover was low. Observing that it was important that the aims, and the EJRA, were kept under review, the Bedeau ET accepted the University's case that it would take time to demonstrate achievement of the aims and, even then, it would not be a straightforward exercise to pinpoint causal effect.

135. The Bedeau ET also considered whether the choice of 67 as the EJRA was justified, concluding that it was. Having regard to **Seldon (No.2)**, and noting that 67 had been chosen as it was after the normal retirement age in existence at the time and reflected greater longevity, and further having regard to the fact that 59% of UCU members who had responded to the consultation survey had supported it, the Bedeau ET was satisfied that the selection of this age was a proportionate means of achieving the aims.

136. As for the claim against the College, the Bedeau ET was satisfied that, from a practical point of view, it made sense, particularly in relation to joint appointments, that there should be correlation in the EJRAs between the University and the College. Negotiated departures would not have provided a fixed leaving date, and redundancy and performance management were not options supported by staff. If there had been a viable alternative to an EJRA, the Bedeau ET was satisfied it would have been discussed and approved. Considerable time and effort had gone into consultation and the Governing Body, of which Professor Pitcher had been a member, had overwhelmingly supported an EJRA of 67 (each member knowing that it would potentially apply to them in due course). Those, such as Professor Pitcher, who had commenced employment before 2011 could choose to retire at 65 and claim a pension, and for many the contractual retirement age had increased. The EJRA also had in-built flexibility to take account of the views of staff in determining whether the retirement age should be increased. The Bedeau ET was satisfied that the College EJRA of 67 was both necessary and proportionate.

137. As for Professor Pitcher's various complaints about how he had been treated by the College

during the EJRA process, the Bedeau ET was satisfied that the application of the EJRA in his case had not amounted to unlawful direct age discrimination as the EJRA was, as it had found, proportionate and justified. Although the College had failed to give Professor Pitcher notice in accordance with the EJRA timetable, this did not amount to direct age discrimination and he had, in any event, been given additional time to make his application. More generally, the College had not simply relied on the decision of the University in determining his application; it had itself taken into account matters pertinent to his work as an Official Fellow and as Founders Fellow – positions that were not under the University's control – and concluded that (applying the College's own EJRA) his application should not be granted.

(2) The Anstis ET

138. The Anstis ET first considered the overarching goal of maintaining high standards, but did not consider the EJRA was a proportionate means of achieving this aim: first, the University had not relied on this; second, because a more obvious, effective and non-discriminatory way of meeting this goal would be:

> "251. … 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."

139. More generally, the Anstis ET noted that the mere dismissal of older workers did not, of itself, assist with the achievement of any of the legitimate aims; rather, the key point was the creation of vacancies in a predictable manner:

> "247. … 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."

140. Noting that: (i) few vacancies were created at statutory or associate professor level through expansion in the number of posts, and (ii) in general, applicants for vacancies at this level were more diverse in gender (and younger) than the existing cohort, the Anstis ET considered the following propositions to be **Cockram**-obvious:

> "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). Inter-generational 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."

141. As for the effect of the EJRA, the Anstis ET concluded this was "*highly discriminatory"*:

> "259. … those who reach a particular effect are dismissed. This discriminatory effect is not to any substantial degree moderated by the opportunity to apply for an extension. … the focus of the extension process under both the 2011 and 2015 polices is on the needs of [the University], not the needs of their older employees. …"
>
> 260. … There can hardly be a greater discriminatory effect in the employment field than being dismissed just because you hold a particular protected characteristic."

142. For the University it was submitted that if the effect of the EJRA in creating vacancies was insubstantial (as Professor Ewart argued) then the discriminatory effect must also be minimal. The Anstis ET rejected this view, observing that there was a distinction between the quantitative and the qualitative effect of a measure (**University of Manchester v Jones**); here:

> "263. … 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 University]). 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."

143. The Anstis ET did not consider the extent to which the EJRA increased the rate of vacancy production, or whether this outweighed the discriminatory impact on older workers, to be **Cockram**-obvious. Balancing the University's needs against the EJRA's discriminatory effect, it was troubled by the degree to which it could be said that the EJRA achieved the legitimate aims. This was significant given there were multiple ways in which the aims could be achieved, and the EJRA was only indirectly linked to them. Thus, it was no part of the University's case that bringing forward vacancies directly created gender diversity; at most, it created an opportunity for gender diversity to increase. The balancing exercise required a comparison between the rate of vacancy creation with and without the EJRA but that evidence was lacking.

144. The University argued that it was too early to assess the effectiveness of the EJRA, or the extent to which it contributed towards achievement of the aims; albeit, as the Anstis ET observed:

> "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."

145. Allowing that there was no one prescribed way for an employer to meet this evidential burden, the Anstis ET considered that it might be possible to do so at the outset, by way of reasoned projections as to what the effect of the measure would be, or, subsequently, by a combination of such projections and assessment of the outcomes so far; neither was available. Although the University had carried out an EIA prior to the introduction of the EJRA, it had not distinguished between voluntary and compulsory retirements, and there was no acknowledgement of the discriminatory effect of the EJRA on older employees, and no attempt to calculate what the difference in gender diversity (or in the creation of vacancies) would be without the EJRA. The Anstis ET agreed that the various legitimate aims would bring into play many different factors, such that it was not to be expected that the EJRA would necessarily have a directly measurable effect on a particular aim, but observed that the way in which the EJRA was said to assist in achievement of the legitimate aims was through the creation of vacancies and, as such:

> "275. … 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."

146. The Anstis ET found that the University had never properly attempted to measure the extent to which the EJRA achieved the creation of vacancies that would not otherwise arise. Professor Ewart had attempted to do so and, on his statistical analysis, the increase in vacancies as a result of the EJRA was only 2-4% (a trivial effect). Although that figure was not agreed by the University, it had not produced its own analysis to show the effect of the EJRA on the rate at

which vacancies occurred. On the information thus available, the Anstis ET concluded that:

> "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."

147. Moreover, the University itself did not appear to regard the EJRA as being a significant part of its efforts to increase diversity amongst its senior academic staff; in various equality reports, the EJRA was only briefly mentioned under the heading "age", it was not otherwise relied on as increasing diversity. Although the EJRA was, in principle, capable of contributing to the University's legitimate aims, that was not sufficient to establish that it was a proportionate means of doing so. Allowing that the means by which justification might be demonstrated (from reasoning or estimates through to outcome figures) could vary as time progressed, no such material for any relevant period had been produced by the University and it had not demonstrated that the EJRA had contributed to the achievement of the legitimate aims (or was expected to do so) to a sufficient extent to justify its discriminatory effect.

148. In reaching this conclusion, the Anstis ET accepted the submission of the University that even a small increase in vacancies would be significant, given very low staff turnover. The University had, however, offered no evidence either on the absolute numbers of new vacancies created or on the EJRA's contribution; the Anstis ET considered this was surprising:

> "302.1 … 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 University] 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)."

149. The Anstis ET also accepted that the EJRA had enjoyed the support of Congregation and appeared to enjoy broad support amongst those of its employees who were affected by it but considered this did not greatly assist in determining proportionality:

> "303. … [The University] 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."

150. Further considering the question of justification in relation to the extension process under the EJRA, the Anstis ET concluded that this did not, of itself, either prevent the EJRA pursuing legitimate aims or make it proportionate to the achievement of those aims.

151. The focus of Professor Ewart's case was on the more restrictive rules for second extensions, which provided that a further extension would only be granted if "*essential to address unforeseen circumstances that have frustrated the purposes for which the original extension was granted*". The Anstis ET noted that the relevant rules for second extensions operated:

> "293. … 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*".

When judged against the legitimate aims claimed for the EJRA, this gave rise to a problem: the vacancy had already been created when the individual in question had previously vacated their substantive post, with no financial impediment to refilling it. The University had sought to address this difficulty in oral evidence, with Ms Thonemann saying:

> "295. … 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."

The Anstis ET noted, however, that such an aim (to remove the older, less diverse, cohort of employees) was not part of the University's pleaded case. Moreover, this evidence was contradicted by the fact that, in practice, the University was happy to retain older academics as part of its academic life; on the evidence, the removal of the older generation was not an aim that the University pursued. As this was not a legitimate aim, it was not justified; the limitation on second extensions was an act of age discrimination.

Unfair Dismissal

152. Both cases also included claims of unfair dismissal. This is no longer an issue in Professor Ewart's case: he succeeded on this claim before the ET and the University has not sought to challenge that decision on appeal. What follows in this section is therefore solely concerned with Professor Pitcher's appeal against the Bedeau ET's rejection of his claim in this regard.

153. In reaching its decision on this claim, the Bedeau ET accepted the University had established a reason for Professor Pitcher's dismissal that was capable of being fair: he had been dismissed for some other substantial reason, namely that he did not meet the requirements for an extension of his employment. The extension provisions were an integral part of the EJRA policy, which the Bedeau ET had found to be justified.

154. The Bedeau ET further accepted that the EJRA panel had had to be satisfied that retaining Professor Pitcher would be an advantage to the University's aims, but found no evidence that the it had engaged in "cherry picking" applicants and there was no suggestion that those who were successful had not benefited the University. The decision in Professor Pitcher's case had been determined against set criteria and the Faculty and Division were best placed to determine the

value of his contribution and whether he should be retained; acknowledging his expertise, the panel was bound to have regard to the considerations set out in the EJRA policy and, as Professor Pitcher had accepted, the University was not short of Shakespearean scholars. It had been within the band of reasonable responses for the University to refuse Professor Pitcher's application for an extension to his employment; there was no substantive unfairness in the decision.

155. The Bedeau ET also found the dismissal was procedurally fair. It did not accept Professor Pitcher's arguments that, following the decision of Dame Janet Smith in the Galligan case, the EJRA process ought to have been stopped, or that Dr Goss, who had given evidence in the Galligan appeal, should have stepped down as chair of the EJRA panel. Although Dame Janet Smith had concluded that the EJRA policy could not be justified and was unlawful, that decision was not binding on the University: its genuinely and honestly held view was that Dame Janet Smith had exceeded her authority and there was, therefore, no reason why Dr Goss could not continue to be involved as chair of the EJRA panel. The Bedeau ET further noted that Professor Pitcher had been able to appeal against the panel's decision but had withdrawn from that process following the ruling on jurisdiction by Sir John Goldring.

156. As for the claim of unfair dismissal brought against the College, the Bedeau ET was again satisfied that Professor Pitcher had been dismissed for some other substantial reason, namely retirement. For the same reasons as set out in relation to the claim against the University, the Bedeau ET concluded that Professor Pitcher was not unfairly dismissed, either procedurally or substantively, by the College.

The Appeals

The Appeal in Professor Pitcher's Case

157. Professor Pitcher pursues nine grounds of appeal against the University; three against the

College. Initially, the age discrimination appeal was put as an attack against the findings of particular legitimacy and proportionality; in reply, however, Mr Segal QC made clear that the legitimacy challenge was no longer pursued.

(1) Professor Pitcher's Appeal Against The University

158. Before addressing the specific grounds of appeal, Mr Segal submitted that the Bedeau ET's reasoning revealed two general fallacies: (1) that adopting the EJRA created a significant number of vacancies when the most that could be said is that it would create a "*spike*" (per Sir Mark Waller) of retirements on the introduction of the EJRA, which would even-off over time; (2) that the EJRA created predictable vacancies, when it was not obvious that it would do so more than if the University agreed a leaving date with the employee. The University disagrees, observing: (1) even after the initial impact of the EJRA (the "*spike*" in retirements), a compulsory retirement age reduced delaying the creation of vacancies; and (2) the Bedeau ET had been entitled to find it was **Cockram**-obvious that the EJRA created predictable vacancies, which mutual agreement could not, and was a lever by which the legitimate aims might be realised.

159. Ground 1: by his first ground of appeal, Professor Pitcher contends the Bedeau ET conflated the different parts of the justification test, confusing: (i) absence of evidence that the EJRA had achieved its aims (which might not be fatal), with (ii) there being no evidence to support the University's case on proportionality (which would), and failed to give proper consideration to whether any less discriminatory measure would have been a more proportionate means of achieving the same aims. It had, moreover, restricted its analysis in respect of each aim to a consideration of the extension provisions and reached conclusions on proportionality before, and independently of, any consideration of balancing the discriminatory effect on those in Professor Pitcher's position against the anticipated advantages in furthering any legitimate aim. In response,

the University observes that the Bedeau ET first considered proportionality after each finding on legitimate aim, correctly separating out the question whether there was evidence to show that the EJRA had achieved that aim, in contrast to evidence to support the University's case on proportionality. It then weighed the evidence on proportionality for each aim other than maintaining high standards (not relied on by the University) and had considered, but rejected, the alternatives identified by Professor Pitcher (and the University had only to show the EJRA was reasonably necessary to meet the aims, not that there were no other alternatives; **Hardy & Hansons**, *supra*). As for the extension provisions, these were material to the balancing exercise: to the extent extensions were granted, and progress towards the aims lessened, discrimination, proportionately, reduced.

160. Ground 2: the second ground of appeal relates to the aim of safeguarding high standards. Professor Pitcher objects that there was no attempt to address proportionality in this respect and there were more obvious, non-discriminatory ways of pursuing this aim, such as performance management or redundancy. For the University, it is observed that this point is moot, given that it had not placed specific reliance on this as a legitimate aim.

161. Ground 3: by this ground, Professor Pitcher argues that the Bedeau ET erred in its approach to the aim of inter-generational fairness. Having held that compulsory retirement was *"one way"* for the University to create vacancies, it failed to consider whether other less discriminatory measures could achieve the same end; a failure exacerbated by its acceptance of the marginal impact of the EJRA (only a small proportion of posts being vacated by retirement and only a quarter of those who retired would otherwise have wished to stay on and then only for an average of three years). Moreover, in finding that the extension provisions were necessary and appropriate to achieve this aim, the Bedeau ET failed to address the prior question, whether the EJRA itself was (reasonably) necessary to do so, in particular given that recruitment at the relevant levels was

largely from the international market. In contrast, the University says the Bedeau ET expressly considered, but rejected, the identified alternatives, including having no retirement date, financial inducements, performance management, and negotiated terminations. Recognising full impact would take time, it had not found the EJRA's impact was marginal but had accepted that, absent an EJRA, the numbers retiring would have been much lower, with retirement remaining a key driver in creating vacancies at that level (understanding that recruitment was from both internal and external markets). More generally, the Bedeau ET was right not to artificially analyse the EJRA and the extension procedure separately: extensions were part of the EJRA, and arose through it, directly contributing to the proportionality of the EJRA by providing flexibility.

162. Ground 4: the fourth ground of appeal addresses the Bedeau ET's findings on succession planning; Professor Pitcher contends this could not justify choosing 67 as the EJRA, as opposed to another age (say, 70), which would similarly give certainty. Moreover, there was no evidence of a policy or practice of internal promotions at these levels, so the aim had to refer to the wider, international community, but the Bedeau ET had failed to consider whether other less discriminatory measures could achieve the same end. That would have required evidence that the EJRA, including the provision for possible extensions, provided more certainty as to the date of retirement than, say, simply agreeing (in good time) a termination date with each senior academic. In finding that the extension provisions were necessary and appropriate to achieve this aim, without explanation as to why alternatives could not, the Bedeau ET failed to address the prior question whether the EJRA was reasonably necessary for this aim, or to balance any supposed advantage in adopting the EJRA against its discriminatory impact. In response, the University again submits the Bedeau ET gave proper consideration to whether there were less discriminatory means of meeting this aim, permissibly concluding there were none. The University had not suggested succession planning related to internal promotions but that younger academics might

be encouraged to stay by the greater certainty of vacancies due to the EJRA. More generally, it was not obvious this aim would be furthered by a policy of negotiated departure, which would not be enforceable absent an EJRA. As for the extension procedure, this was (again) part of the EJRA; the two aspects of the policy could not be (and were not) analysed separately.

163. Ground 5: this ground relates to the aim of promoting diversity. It is said that the conclusion reached was manifestly unsound given that female academics were less likely to apply for, and be granted, an extension under the EJRA policy than male academics, and the evidence showed that the University did not consider the EJRA (in contrast to other measures) materially contributed to gender diversity at senior academic levels (and it had long experience of operating a forced retirement age with no evidence of diversity in recruitment). In the context of attempting to justify discrimination against those with one protected characteristic (age), by reference to the hope, supported only by assertion, that this might marginally contribute to a positive impact by reference to another protected characteristic (gender), the failure to properly address proportionality was perverse and objectionable. Moreover, in finding that the extension provisions were necessary and appropriate to achieve this aim – without explanation why alternatives could not – the Bedeau ET failed to address the prior question whether the EJRA itself was reasonably necessary to do so. The University disputes the suggestion that the Bedeau ET's decision was based on unsubstantiated assertion: it found progress towards diversity was likely to be slow (particularly given the increase in retirement age) but that it was nonetheless positive as a result of the EJRA, accepting that it was a necessary condition for the recruitment of a more diverse cohort of academic staff that there should first be vacancies into which they could be recruited. To the extent this was delayed as a result of the number of extensions allowed under the 2011 EJRA, there were fewer enforced retirements and the discriminatory impact was therefore less.

164. Ground 6: this ground of appeal relates to the staff morale aim. Professor Pitcher contends it was not **Cockram**-obvious that: (i) the University might have to consider redundancies at some future point, when it had not in the past; (ii) the EJRA would be likely to avoid, or mitigate, that risk; and (iii) that the actual, accepted adverse effect on staff morale of the EJRA and the uncertain extension process was less serious than the possibility of an adverse effect on staff morale a redundancy process might cause. Again, the Bedeau ET had also failed to consider whether less discriminatory measures – in particular, agreed retirement – could achieve the same aim. The University observes that this aim related to the need to be able to respond flexibly to anticipated funding cuts, allowing for the holding open of vacancies as might be appropriate. Reading its reasoning as a whole, the Bedeau ET gave due consideration to whether there was a less discriminatory way of meeting this aim but reasonably concluded there was not.

165. Ground 7: this ground is essentially parasitic on the earlier arguments: it is Professor Pitcher's case that if (as he contends) the EJRA was unlawful then the process as applied to him must equally have amounted to unlawful direct age discrimination. For the University it is contended that this ground must fail for the reasons set out in respect of the earlier grounds.

166. Ground 8: by this ground, Professor Pitcher argues in general terms that the Bedeau ET erred in considering the question of proportionality divorced from each legitimate aim. More specifically, its reliance on the consultation with staff groups did not support its conclusion; that merely demonstrated a preference for the EJRA in contrast to performance management but that was a false dichotomy and shed little or no light on proportionality. There was no analysis showing that a financial inducements scheme was properly considered (other than by way of anecdotal evidence), and it was wrong to say that a negotiated departure scheme would not guarantee an agreed departure date when it was more likely to do so than the EJRA policy and the process of applying for extensions. For the University, it is observed that proportionality

relates not to the aims but to the means of achieving those aims (here, the EJRA); the Bedeau ET had understood this and had reached its conclusions on the basis of the evidence before it (permissibly having regard to staff consultation), fully considering the alternatives to the EJRA and factoring those into its overall analysis on each aim. It had reasonably concluded that a negotiated or agreed departure would not guarantee a termination date and it had reached its view on financial incentives not on the basis of anecdotes but on witness evidence as to the required level of incentive.

167. Ground 9: by this ground, Professor Pitcher challenges the rejection of his unfair dismissal claim: (1) because if the EJRA was unlawful (see previous grounds), any resulting dismissal must be unfair; (2) as the extension process had been highly subjective; (3) because the process was procedurally unfair, in not staying the procedure pending review post-Galligan and in Dr Goss acting as EJRA panel chair when his reasoning (in evidence in Galligan) had been rejected by Dame Janet Smith; (4) because Sir John Goldring was wrong to hold there was no jurisdiction to consider whether the EJRA was lawful (a different view having been taken in other appeals).

168. For the University, it is contended: (1) as the EJRA did not amount to unlawful age discrimination, the application of that process to Professor Pitcher could not render his dismissal unfair on this basis; (2) it was wrong to say the extension process was highly subjective - it had been codified in the 2011 EJRA, involved a specialist panel that worked methodically through the criteria, and was subject to appeal; (3) as for not staying the extension process after the Galligan decision (thereby effectively extending Professor Pitcher's employment), as the University considered Dame Janet Smith had exceeded her jurisdiction, it was within the band of reasonable responses for it to continue to operate the EJRA, and as there was no suggestion of impropriety or bias on the part of Dr Goss (merely that his evidence had not been accepted by Dame Janet Smith in her critique of the extension provisions in Galligan), it had been within the

reasonable range for the University to continue to involve him in the EJRA process; (4) as for the decision reached by Sir John Goldring, the Bedeau ET was not required to find whether that was correct, only whether the University's decisions had fallen within the reasonable band.

(2) Professor Pitcher's Appeal Against The College

169. Ground 2 (Professor Pitcher having withdrawn ground 1 in oral submissions): by this ground, Professor Pitcher contends the Bedeau ET erred in accepting correlation with the University as justifying the College's EJRA of 67. Although **Seldon No. 2** provided a measure of discretion in choosing the appropriate age within a range, that must reflect a balance between its discriminatory effect and its success in achieving the legitimate aim(s). The reason for choosing 67 was to keep alignment with the University (notwithstanding that the College had removed a retirement age (of 70) for its President), which did not correlate to any of the stated legitimate aims. The College submits that, on the contrary, the Bedeau ET had regard not only to the practical importance of alignment with the University (a further way for the College to achieve its aims), but also to the consensus within the Governing Body and to the fact that this was above state pension age and was an increase in retirement age for many employees, who had more time to pay into pension schemes and make provision for retirement (albeit many would have access to an employer's pension from age 65). The position of the College President was not analogous and, correctly applying **Seldon No. 2**, the Bedeau ET had regard to a range of factors and made no error in its approach or in reaching conclusions open to it on the evidence.

170. Ground 3: the third ground of appeal sets out Professor Pitcher's contention that, if the EJRA was unlawful, the various steps taken by the College in applying that EJRA to him must similarly have been acts of unlawful direct age discrimination. For the College it is observed that the Bedeau ET did not find that Professor Pitcher had made good his case on all the matters alleged

to have been less favourable treatment, but, in any event, this ground was parasitic on the earlier points, and if (as the Bedeau ET had found) the EJRA did not constitute unlawful age discrimination, this ground must also fail.

171. Ground 4: by this ground, Professor Pitcher seeks to challenge the Bedeau ET's finding on unfair dismissal: (1) because if (as he contends) the EJRA was unlawful for being directly discriminatory, any dismissal following on from that would similarly be unfair; (2) because the test applied when considering his application for an extension of employment was subjective; (3) because the Bedeau ET had failed to consider whether it was reasonable to continue with the EJRA process after Professor Pitcher had lodged a grievance, or whether the process should have been stayed pending the review that was to be undertaken. More generally, it is complained that the ET's reasoning in this regard was wholly inadequate. The College contends that the Bedeau ET did not err in finding this was a fair dismissal: (1) it had correctly identified the reason for dismissal (some other substantial reason, namely retirement) and was entitled to find that the element of discretion permitted in the extension decision did not mean this fell outside the band of reasonable responses; as for the procedural matters (2) and (3), the Bedeau ET permissibly found that the College had acted reasonably in its approach; there was no proper basis of challenge to its assessment in these respects.

The Appeal in Professor Ewart's Case

172. The University pursues two grounds of appeal against the Anstis ET's Judgment; the first relates to the findings in relation to the EJRA and raises four separate points (Ground 1 (a)-(d)), the second to the conclusion relating to the extension provisions for second applications.

173. Ground 1(a): looking first at the proportionality balancing exercise, accepting the need to consider matters both qualitatively and quantitively, the University contends that the focus of the

Anstis ET in respect of the legitimate aims was purely quantitative, concluding that the EJRA had not been shown to create sufficient vacancies to be justified but failing to take into account that fewer compulsory retirements would mitigate any discriminatory effect; it was thereby effectively penalising the University for steps taken to avoid compulsory dismissal, creating a perverse incentive to increase the EJRA's quantitative impact. On this point, Professor Ewart observes that, as it was the University's case that the creation of vacancies was the basic currency for the achievement of the aims, the Anstis ET was entitled to consider whether there was evidence that the EJRA was in fact creating vacancies to any meaningful (more than a trivial 2-4%) extent, and had permissibly concluded that (i) this was not **Cockram**-obvious, and (ii) the University had not adduced the evidence to show that the EJRA's effectiveness was sufficient to outweigh its severe discriminatory impact.

174. Ground 1(b): the University contends that the Anstis ET wrongly assumed "*there ought to be no substantial difficulty in measuring its effect on the creation of vacancies …"* (Anstis ET Judgment, paragraph 275; supra paragraph 145). There was some evidence that bore on the issue: (i) the numbers of employees required to vacate their posts after having an extension application rejected (1 in 2011-12, 6 in 2012-13, and 1 in 2013-14); (ii) the headline figures relating to the number of those within the EJRA-affected population who left by reason of retirement between 2012-2015; and (iii) the results of two surveys from the EJRA working group, finding that around a quarter of those surveyed would have continued working for an average of three years had there not been an EJRA in place. The EJRA had, however, only been in operation for a short period (since 2011) and the raising of the retirement age for most staff (from 65 to 67) prevented early realisation of the legitimate aims. The Anstis ET had fallen into the error identified in **Cockram**, of requiring evidence that could not reasonably be produced, failing to explain what would constitute a "*reasoned projection*" capable of satisfying the justification test. Although the

evidence was incomplete, it was not rationally open to the Anstis ET to find the University had failed to produce sufficient evidence to show that the EJRA could contribute to the realisation of the legitimate aims, or that its effect was such as to justify the discrimination.

175. In response, Professor Ewart notes that the Anstis ET accepted that the aims brought into play many different factors and that it was unnecessary for the University to adduce evidence of the EJRA's directly measurable impact; it had, however, permissibly held that the University should have been able to adduce evidence showing the EJRA's effect on the creation of vacancies: there ought to have been no substantial difficulty in measuring the effect on vacancy creation, by putting in place the necessary recording mechanism when the EJRA was introduced, or by using case studies from individual departments or divisions (Anstis ET Judgment paragraph 302.1, supra paragraph 148). The EJRA working group had purported to find the EJRA was contributing to the achievement of the aims through the creation of vacancies but that conclusion was flawed, given the failure to distinguish between compulsory and voluntary retirements. As for the criticism of the finding in respect of reasoned projections of the EJRA's impact, it had not been the University's case that such projections were impossible and other reports evidenced a well-developed resource for the provision of data. The onus was on the University to provide evidence in support of what was otherwise an unlawful discriminatory measure; if such evidence could not be provided, and it was not obvious that the policy was likely to achieve its aims, it was open to the ET to find the EJRA was not justified.

176. Ground 1(c): the University thirdly contends that the Anstis ET erred in its determination of the degree of impact caused by dismissal in this case; failing to address the specific context, namely, the employment of senior, distinguished academics at a world-class university, often at the cutting edge of their disciplines, who could (and did) take up a variety of roles, such as consultancy or honorary positions, after dismissal from the University. On any reasonable view,

this prevented the impact of dismissal under the EJRA from being severe as status, remuneration, and research activities might continue to be realised, and employees had generous final salary pension benefits under the USS. In the premises, the finding that academics under the EJRA were "*severely affected*" (Anstis ET paragraph 263, supra paragraph 142) was perverse. For Professor Ewart, it is said that the Anstis ET well understood that academics (comprising only part of the relevant EJRA population) might be able to stay at the University and contribute in some limited, unpaid ways in an Emeritus position or (subject to need and the University's agreement) as a consultant; indeed, it expressly referred to these factors when considering the University's case. It was, however, also entitled to have regard to Professor Ewart's evidence (set out in his application for a second extension) as to why such options were not viable alternatives for someone in his position (requiring access to laboratory facilities and a research team in order to continue experimental research). The Anstis ET permissibly found that the discriminatory impact of dismissal from an employment contract in a prestigious institution such as Oxford, with the consequent loss of security and status, at a time not of the employee's choosing, was severe, irrespective of these mitigating features.

177. Ground 1(d): by its fourth point of challenge under this ground, the University contends that the Anstis ET erred in its analysis of the impact of the EJRA extensions provision. The existence of such provision mitigated the EJRA's rigidity and the discriminatory impact on older employees and the Anstis ET's finding to the contrary was inconsistent with **Fuchs** and perverse, as: (i) to the extent the extension provisions lessened the impact of the EJRA in promoting the legitimate aims, its discriminatory effect was also reduced; (ii) at the relevant time, the majority of applicants under the 2011 EJRA extension provisions were successful and so were not compulsorily retired at the age of 67 (necessarily moderating the EJRA's impact). Although the 2015 EJRA constrained the University's ability to grant extensions, this was in line with **Fuchs**. The Anstis

ET justified its finding on the basis that the focus of the criteria to determine extensions was on the interests of the University, and not those of the employee; that, however, was permissible: the purpose of the EJRA, and of its extension provisions, was to pursue the legitimate aims, which extended beyond the individual circumstances of a particular applicant. For Professor Ewart, it is pointed out that the extensions policy sought to balance the benefits to the University of dismissal and retention; it was not designed or intended to reduce the discriminatory effect on employees. As noted in **Fuchs**, such an exception could undermine the consistency of the underlying rule if it might lead to a result contrary to the objective pursued (albeit, that was not the case in **Fuchs** because the limited exception was unlikely to undermine the aim pursued (guaranteeing a balanced age structure)). The question in the present case was whether the existence of the University's extension regime (very different to **Fuchs**) mitigated, to any substantial degree, the EJRA's discriminatory effect. Considering that question, the Anstis ET had regard to the extension procedure and attached the weight to it that it thought appropriate in determining whether (and to what extent) it assisted in justifying what was otherwise a discriminatory scheme, permissibly holding that it did not.

178. Ground 2: separately, the University argues that the Anstis ET erred in concluding that the EJRA provision for second extension applications was not a proportionate means of meeting a legitimate aim. In so doing, it had erroneously considered that the only possible justification for a second extension was whether it would create a new vacancy or new funding. This was an impermissible gloss on the EJRA, which comprised three related stages: (1) a compulsory retirement age of 67; (2) an opportunity to apply to extend employment for specified reasons under the extension provisions policy, for a fixed term; and (3) an opportunity to apply for a second extension, for specified reasons and for a fixed term, but only (at the material time) on the basis of the 2015 criteria. Stage (3) could not reasonably be considered apart from (1) and (2),

not least as a staff member would not be in the position to apply for a second extension (nor a first) without the primary application of the EJRA. In this context, a second extension could only be understood as a mitigating device for the EJRA. This was consistent with **Fuchs**, which made clear that exceptions to a compulsory retirement policy had to be closely tailored to its legitimate aims, ensuring they did not undermine those aims, and were thus to be treated as part of the policy. The consistency of the EJRA could not be undermined by extension provisions that were (consistent with **Fuchs**): (i) enacted when the employee affected requested an extension; (ii) in the interests of the University; (iii) unlikely to undermine the legitimate aims pursued; (iv) limited to the completion of already allocated tasks. Moreover, following the decision in the Galligan appeal, the 2015 EJRA significantly tightened the extensions provisions and moved them still closer to the guidance in **Fuchs**, necessarily reducing the scope of the University's discretion to 'pick and choose' those who were granted extensions.

179. For Professor Ewart, it is submitted that the Anstis ET's conclusion, that the circumstances necessary for vacancy creation were achieved once an employee had vacated their role and secured funding to pay for their salary, was unimpeachable. As such, it was right to critically examine the need and relevance of the additional requirement to show the frustration (by unforeseeable circumstances) of the purposes for which the original extension had been granted. Doing so, it was apparent that the extra hurdle for employees was unnecessary and inappropriate in light of the University's aims. Similar to **Fuchs** (where there was a good reason for allowing state prosecutors to stay on to finish a case), there was good reason to allow academics stay on to finish projects, without having to satisfy a separate test of unforeseeable delay, when completion of that work would have no impact on the achievement of the aims (notably, there was no similar requirement in **Fuchs**). It was, further, clear that the Anstis ET had seen the second extension provision as part of the 2015 Policy, having considered other aspects of the policy and the

interplay between them; in so doing, it had permissibly concluded that it created a needless hurdle for older workers to remain in employment without making any progress towards achieving the legitimate aims and without any obvious benefit to the University, the employee or wider society. The fact that the University had tightened the policy post-Galligan did not mean it had created a justified policy; it was still required to demonstrate that the 2015 Policy as a whole was a proportionate means of achieving its legitimate aims; that it might have been less objectionable than an earlier iteration was nothing to the point.

Discussion and Conclusions

Conclusions Applicable to both Appeals

180. In advance of addressing the individual appeals, it is helpful to set out the following conclusions, which relate to both matters before us.

181. First, as was common ground, the EJRA (whether that of the University or the College) will not, of itself, be sufficient to achieve any of the legitimate aims; the most it can do is to support or facilitate other measures in order to promote or achieve those aims. It was the University's case that the EJRA does this by creating vacancies at a predictable time, but in oral submissions Mr Jones QC accepted that the position is somewhat more nuanced: the EJRA does not *create* vacancies as such, it seeks to ensure they are not delayed. We do not suggest that is not a material consideration for the University or the College, but it is important to acknowledge the issue the EJRA was introduced to address, namely, the concern that, absent a compulsory retirement age, a potentially significant number of staff might continue to work beyond what had been the DRA, without any certainty as to when they might decide to leave their employment. In relation to academic appointments, it was felt this would make planning difficult (in particular, in relation to joint appointments), would mean it was only possible to dismiss older employees as part of a non-

age discriminatory process of redundancy or performance management, and would delay the achievement of greater diversity at more senior levels.

182. Second, and relatedly, the achievement of vacancies (and, therefore, ensuring that vacancy creation is not delayed) is important for both the University and the College in seeking to further their legitimate aims. Given that few new senior academic positions are created, most appointments at statutory or associate professor level will be consequent upon someone leaving an existing post. Allowing that inter-generational fairness has to be seen across the academic community (not just within the University or the College), more senior posts have to become vacant if the career aspirations of the younger generation are to be realised. Equally, given that the younger cohort is more diverse, vacancies are needed if other measures, pursued to achieve greater diversity, are to have the desired impact. Although retirement is not the sole driver in this regard, at statutory or associate professor level, for the relevant periods, this was the reason given for around half of those who left their employment with the University. In saying this, we do not confuse retirement as a reason for leaving in general terms with the operation of an EJRA: some employees will, in any event, retire at or below an EJRA and the existence of that EJRA may be immaterial to their decision.

183. Third, the nature of the assessment that has to be undertaken by ETs when determining the question of objective justification is such that it is possible for different ETs to reach different conclusions when considering the same measure adopted by the same employer in respect of the same aims. Although some expressed the view that this was an undesirable outcome in the present cases, none of the parties demurred from the truth of this proposition. We can, of course, appreciate that it is undesirable for an employer to be faced with what appear to be conflicting ET decisions relating to a particular policy, but we have to keep in mind that our task is not to strive to find a single answer, but to consider whether either the Bedeau ET or the Anstis ET erred in

law. An error of law would arise if the conclusion reached was perverse, but if it was otherwise open to that ET, on the evidence before it, the fact that another ET reached a different decision will not give the EAT jurisdiction to interfere.

184. In some cases, a difference in result may be a consequence of differences in the evidence adduced or in the focus of the evidence, but, even if that is not so, save in cases that are properly to be described as **Cockram**-obvious, it is possible that two ETs may reach opposing conclusions on the same facts without either having committed any error of law. In the present appeals, there are, however, two particular issues on which the presentation of the evidence differed in a material respect and it is helpful to deal with those points at this stage.

185. First, in relation to the degree to which the EJRA impacted upon the creation of vacancies, the Anstis ET had the benefit of a statistical analysis carried out by Professor Ewart that was not available to the Bedeau ET. This enabled the Anstis ET to conclude that it was "*not obvious or a matter of common sense that the EJRA creates additional vacancies above the 2-4% level calculated by [Professor Ewart]*" (Anstis ET Judgment paragraph 279, supra paragraph 146). We do not accept Mr Segal's submission that the Bedeau ET erred by not adopting a similar approach. First, because this statistical analysis was not part of the evidence before it. Second, because, as Mr Jones has pointed out, the analysis relates to the rate of vacancy increase; it was one way of analysing the potential impact of the EJRA (and part of Professor Ewart's case before the ET) but it was not the only way of analysing that impact. Third, because the approach of the Anstis ET to this analysis was nuanced, seeing it as a means of testing the University's case that it was **Cockram**-obvious that the EJRA increased the rate at which vacancies were created. We do not consider that the Anstis ET erred in adopting this approach on the evidence before it, but neither do we find that the Bedeau ET was wrong in giving greater weight to other factors in the absence of a similar statistical analysis.

186. Secondly, in respect of the detriment suffered by those to whom the EJRA applied, although both ETs were alive to the fact that a retired Oxford University and college professor would be able (if they chose) to have a continuing relationship with their former employers that would be unusual in other contexts, they received different evidence as to the extent to which that might mitigate the detriment arising from forced retirement. As a scholar of Shakespearian commentary, Professor Pitcher did not work in the same way as Professor Ewart, and the focus of his extension application was on his appointment with the College; that inevitably impacted on the way the evidence was presented before the Bedeau ET. Professor Ewart, on the other hand, was seeking to continue working in a University role, as part of a project team, and requiring greater use of University facilities, which raised different issues in terms of the potential detriment arising from the operation of the EJRA and inevitably meant the focus of the evidence before the Anstis ET was different. We do not consider that either ET lost sight of the fact that the issue of detriment needed to be viewed in general terms (justification relating to the policy, not individual examples of its application), but they both received different evidence in this regard and were entitled to give different weight to the mitigating factors relied on.

The Pitcher Appeal

187. Turning to the specific grounds of appeal raised by Professor Pitcher, as will be apparent from our summary of the submissions, there is considerable overlap in the points advanced and we have therefore adopted a thematic approach rather than addressing each ground in turn.

188. First, we make clear that we do not consider any complaint can arise from the way the reasoning of the Bedeau ET is structured (a point raised by both grounds 1 and 8 in the appeal against the University). Although the issue of proportionality is to be considered separately from the question whether the employer has demonstrated legitimate aims, it was not wrong for the

Bedeau ET to first analyse the evidence relevant to proportionality in respect of each aim before going on to assess, under a separate heading, general evidential questions, such as the particular alternative mooted by Professor Pitcher of a negotiated departure scheme, the selection of an EJRA of 67, whether there had been an opportunity to debate the EJRA in Congregation, and the particular impact on Professor Pitcher himself.

189. As for the acceptance of the University's case in respect of the impact of the EJRA on the achievement of the legitimate aims (raised by ground 1 against the University but also underpinning other points of challenge), we note that the Bedeau ET was alive to the evidential problems arising in this case. Thus, it recorded that "*only a small proportion of posts is vacated each year through retirement and as such it is difficult to reach any firm conclusions*" (paragraph 368), finding that it was "*still early days …*" (paragraph 370), and emphasised its concern that the EJRA be reviewed, in particular as to its contribution to the achievement of the legitimate aims (paragraph 509). Although the observation that "*Retirement remains the key driver in the creation of University vacancies at senior academic grades*" (paragraph 371): (i) fails to address the point that not all retirements resulted from the application of the EJRA and (ii), has to be seen in light of the earlier finding that retirement was the cause of only around half the vacancies in question, we do not infer that the Bedeau ET was unaware, or lost sight, of these points. It was entitled, however, to give weight to the evidence from the review group's survey of retirees, indicating that around a quarter of respondents said they would have continued in employment for a further three years had it not been for the EJRA, and we cannot say that it was perverse for it to then find that, absent an EJRA, "*turnover would be significantly lower*" (paragraph 188, supra paragraph 51). Having thus assessed both the strengths and the weaknesses of the evidence on impact, as had been adduced before it, we equally cannot say that the Bedeau ET did other than reach a permissible conclusion that the EJRA sufficiently contributed to the creation of vacancies (or, at

least, sufficiently prevented those vacancies being delayed) as to be an appropriate measure adopted to facilitate the achievement of the aims in question. Adopting a different approach to the analysis of impact, and with the benefit of evidence of a statistical analysis demonstrating a 2-4% increase in the rate of vacancy creation, the Anstis ET found that the University had not demonstrated a more than marginal impact but, as we have already stated, the Bedeau ET did not err in failing to adopt a similar approach or reach the same conclusion, and there is no proper basis for us to interfere in its finding in this regard.

190. Moreover, in reaching its decision in Professor Pitcher's case, the Bedeau ET appropriately considered the impact of the extension procedure as part of the EJRA (an issue raised by most of the grounds of appeal against the University). Noting that this had initially seen "*a substantial number of applicants, mainly men, … extending their employment*" (paragraph 504), the Bedeau ET also had regard to the subsequent changes made to the procedure and permissibly concluded that the "*extension provisions mitigate the effects of the EJRA*" (paragraph 407). We do not say this was an inevitable conclusion (indeed, we are equally satisfied that the Anstis ET was entitled to find that the extension provisions did not sufficiently mitigate the discriminatory effects of the EJRA), but the Bedeau ET was not wrong in choosing to afford some weight to the fact that the procedure at least provided an opportunity to apply for an extension of employment beyond 67.

191. More than that, however, we are satisfied that the Bedeau ET was entitled to find that the EJRA (including the extension procedure) provided a degree of predictability that could not readily be secured by other means. This is a point that again arises in respect of almost all of the grounds of challenge against the University; it being Professor Pitcher's case that there was a failure to properly consider the alternative means by which this might be achieved. We disagree. The Bedeau ET found as a fact that different alternatives had been considered, but rejected, by the University but, even if that had not been the case, that would not have been fatal as it was, in

any event, satisfied that other alternatives would not have provided the predictability sought: "*A negotiated departure scheme would not guarantee an agreed departure date …*" (paragraph 404). Although Mr Segal sought to persuade us that it might be possible to have a scheme under which agreement might be reached for a fixed retirement date, we do not consider that the Bedeau ET's finding in this regard could be described as perverse. After all, the EJRA itself encouraged the reaching of an agreement through pre-retirement discussions and, where such agreement could not be reached, absent some means of compulsion to retire, it is difficult to see how the desired certainty would be achieved. Although the ability to apply for an extension introduced some uncertainty in individual cases, this was mitigated by the timetable set down in the procedure and by the guidance against which applications would be considered. Even if it was assumed that applications for extensions might take time to be determined, a degree of prediction was thus possible in contrast to negotiations in which there was no possibility of compulsory termination.

192. Similarly, in respect of other possible options (financial inducements, performance management, redundancies), the Bedeau ET: (i) found these were considered and rejected by the University, and (ii) reached its own conclusion that these did not provide alternatives such that the EJRA could not be seen as reasonably necessary to achieve the aims of inter-generational fairness and promotion of diversity by ensuring vacancies were not delayed, and by using such vacancies to avoid redundancies (and, therefore, a negative impact on morale), and of facilitating succession planning by maintaining predicable retirement dates. These findings were not reached on the basis of mere assertion but on evidence before the Bedeau ET: of the likely amounts involved in any financial inducement to retire (attested to in the witness evidence; see paragraph 109, supra paragraph 23); of the response from staff consultation, demonstrating resistance to performance management (again, paragraph 109); and of the potential concern regarding redundancies arising from funding constraints (paragraph 395, supra paragraph 132).

193. As for Professor Pitcher's arguments relating to the overriding objective of maintaining high standards (the second ground of appeal against the University), we acknowledge that the Bedeau ET did not expressly consider the question of proportionality in this regard, but that was because this was not an aim relied on by the University; it was thus not put in issue at the hearing and we cannot see that the Bedeau ET erred in how it dealt with this point.

194. Otherwise, we agree with the University that, in holding that the selection of an EJRA of 67 was justified, the Bedeau ET properly applied the guidance provided in **Seldon No. 2** and reached a conclusion that was open to it on the evidence (contrary to the suggestion made within ground 4 and elsewhere). In particular, when considering inter-generational fairness, the Bedeau ET permissibly had regard to how a higher EJRA would impact on opportunities for younger generations and, more generally, was entitled to see it as relevant that 67 was the age favoured by most in the consultation process (a not irrelevant consideration, see **Loxley** *supra*).

195. Acknowledging the need to balance the directly age discriminatory effect of the EJRA against how it might impact on the achievement of the identified aims, the Bedeau ET was clearly aware this was not a precise science but that it was required to critically appraise the evidence before it and to exercise judgement in carrying out its own assessment. Professor Pitcher's appeal is seeking to encourage us to substitute our own view of where the balance should fall in this case but that is not our role. On grounds 1-8, we find no error of law on the part of the Bedeau ET, either in its approach to the question whether the EJRA (including the extension process) was justified (grounds 1-6 and 8) or in the application of the EJRA to Professor Pitcher (ground 7). We accordingly dismiss each of these grounds of appeal.

196. As for the appeal in this regard in respect of the College, we are satisfied that this too must fail. As Professor Pitcher accepted below (see Bedeau ET Judgment, paragraph 441), the legitimate aims of the College were the same as those of the University. In adopting an EJRA as

a means of facilitating the achievement of those aims, the Bedeau ET permissibly had regard to the importance of joint appointments and to the practical ways this impacted upon the College's selection of 67 as the appropriate EJRA (thus aligning with the University). As Ms Motraghi observed, however, the Bedeau ET's reasoning went beyond this, appropriately having regard to the guidance provided in **Seldon No. 2** and to the consultation process independently conducted by the College, and to the consideration of alternatives; it also permissibly concluded that the College's approach to the issue of retirement in relation to its President was not analogous. There is nothing in the challenge to the decision in relation to the College EJRA (ground 2), or in its application to Professor Pitcher (ground 3), and we dismiss these grounds of appeal.

197. Turning then to the grounds of challenge to the Bedeau ET's findings on the claim of unfair dismissal, given the view we have formed in relation to the age discrimination appeal (as against both the University and the College), Professor Pitcher's contention that the EJRA could not provide a fair reason for his dismissal, because it was an unjustified act of direct age discrimination, must also fail. As for the remaining points of complaint under this head, we keep in mind that the question the Bedeau ET had to determine was whether the actions or decisions taken by the employer (whether the University or the College) fell within the band of reasonable responses of the reasonable employer in the relevant circumstances. Applying this test, we do not consider the Bedeau ET erred in finding the application of the extension process in Professor Pitcher's case fell inside the range that would thus be permitted.

198. The factors taken into consideration were not so subjective as to be unreasonable: as Professor Pitcher had accepted, others could take on his teaching duties and there was a legitimate concern that the vacancy his retirement would yield should not be delayed, given that no other vacancy at associate professor level was expected within the Faculty until 2020. Both the University and the College were mindful of the greater diversity new appointments might allow (as suggested by the

statistical evidence available, both in relation to senior academic posts at University level and in respect of Official Fellows within the College) and were entitled to have regard to concerns of inter-generational fairness, in particular given the expectation that a high quality appointment could be made. The focus of Professor Pitcher's application was, moreover, related to his College Officership and the College was entitled to consider that the need for this role had been reduced by the appointment of a Director of Development and Alumni Relations.

199. As for the procedural points raised in Professor Pitcher's case, we do not consider the Bedeau ET erred in finding that it was within the band of reasonable responses for the University to proceed with the EJRA process notwithstanding Dame Janet Smith's decision in Galligan. It had taken the view that the decision reached in one case was not binding on a subsequent court of appeal in another; that was not an unreasonable position and the University was not bound to effectively grant Professor Pitcher an extension of his employment by staying the process pending any review. As for the position of Dr Goss, nothing has been identified such as could reasonably give rise to any concern as to his ability to carry out his role as Chair of the EJRA panel but, in any event, this would have been rectified by the independent appeal stage. Similarly, although there might have been some scope for arguing that the Galligan decision should have been made available to others, any failing in this regard had been rectified by the time of Professor Pitcher's appeal and he had been able to refer to Dame Janet Smith's decision when making his case that the EJRA process was unlawful. The independent decision-taker at the appeal stage (Sir John Goldring) had found, against Professor Pitcher's arguments, that this was not a point that could be determined on the internal appeal. The Bedeau ET was entitled to find that the fact that the University adopted this position was not outside the range of reasonable responses.

200. Similar points can be made in respect of the complaints relating to the actions and decisions of the College. The decision to proceed with the EJRA extension procedure, notwithstanding

Professor Pitcher's submission of a grievance or any review, was one that fell within a range of reasonable responses: the College was not obliged to afford Professor Pitcher a de facto extension of his employment by staying its EJRA procedure pending resolution of other processes. More generally, we cannot see that it can be said that the Bedeau ET's reasoning in this regard was inadequate to its task. The position of the College was clear: it reasonably took the view that Professor Pitcher's case for an extension of his College role did not outweigh the considerations to the contrary. The Bedeau ET set out its findings in relation to the process followed by the College and the decisions taken at each stage; its final conclusion on unfair dismissal might have been short but needs to be seen against the very full findings preceding it. Adopting the holistic approach required, there can be no complaint that the reasons are other than **Meek**-compliant.

201. For these reasons, we dismiss the grounds of appeal against the Bedeau ET's conclusions on unfair dismissal and, therefore, dismiss Professor Pitcher's appeal in its entirety.

The Ewart Appeal

202. The University's first ground of appeal relates to the proportionality balancing exercise. By Grounds 1(a), (c) and (d), it is complained that the Anstis ET erred in its approach to the question of impact: by viewing the small numbers of vacancies created by the EJRA as weighing against the University rather than as mitigating discriminatory impact; by wrongly finding that impact to have been severe; and by failing to have proper regard to the mitigating effects of the extension provisions.

203. We do not accept these criticisms of the Anstis ET's approach and are satisfied that it made no error in these respects. As the reasoning makes clear, regard was appropriately had to both the quantitative and qualitative impact of the EJRA (including its extension provisions). The Anstis ET expressly acknowledged (see paragraph 261 of its Judgment) the University's argument that

any reduction in the creation of vacancies (or, more accurately, in the rate at which those vacancies would arise) must mean that the discriminatory effect of the EJRA was proportionately reduced. It was entitled to find, however, that, whilst this might mitigate the quantitative impact of the EJRA, it did not have a similar qualitative effect.

204. Although the grant of an extension would both reduce the numbers of those compulsorily retired at the EJRA, and mitigate the discriminatory effect of the policy on the particular individual concerned, all those to whom the policy applied (those approaching the age of 67) would either face the compulsory loss of their employment or, if they were able to successfully apply for an extension (determined by criteria that, it is not disputed, almost entirely related to the needs of the University), would be required to vacate their former post and move to a fixed-term contract. On the evidence before it, the Anstis ET concluded that the discriminatory impact on the employees concerned was "*severe*", observing that this directly discriminatory measure gave rise to "*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*" (paragraph 263). That was a conclusion it was entitled to reach. First, because the Anstis ET appropriately considered the qualitative impact of the policy not merely the raw numbers. Second, because there was evidence before it (as part of Professor Ewart's application for a second extension) that an Emeritus position or possible consultancy might not be a workable way of continuing research and, more generally, was not a substitute for a contract of employment for a statutory or associate professorship at the University. Third, because even those who were granted an extension suffered a detriment in having to vacate their substantive post and move to a time-limited position, which could (as the evidence demonstrated in Professor Ewart's case) impact upon their ability to obtain funding for (and thus participate in) particular research projects.

205. In reaching its conclusions, the Anstis ET was not (as Mr Jones put it) punishing the

University for operating an extensions policy that reduced the numbers who were compulsorily retired at the EJRA of 67. As was acknowledged in **Fuchs**, exceptions to a policy can impact upon consistency and might undermine its objective, but that was not a finding made in this case. Equally, however, the Anstis ET did not find that the extension provisions sufficiently mitigated the discriminatory impact of the EJRA such as to make it a proportionate means of achieving the legitimate aims. That conclusion did not demonstrate an approach inconsistent with **Fuchs**; inevitably, such decisions will be case, and fact, specific and the Anstis ET was entitled to have regard to the particular criteria applied in this case (focussed on the interests of the University and thus allowing it greater discretion than, say, a more straightforward requirement of continued involvement in a particular piece of work (in **Fuchs**, the on-going criminal proceedings)) and on the conditions that would attach to any extension (again, a very different factual scenario to that in **Fuchs**). We do not consider the Anstis ET erred in its approach to the mitigating effects of the extensions provisions; it expressly acknowledged the resulting reduction in forced retirements but permissibly concluded that this did not sufficiently mitigate the qualitative discriminatory impact of the policy overall.

206. By Ground 1(b), the University focuses on the finding that it had failed to produce sufficient evidence to show that the EJRA could contribute to the realisation of the legitimate aims and thus that its effect was such as to justify any discriminatory impact. To the extent that evidence was available, it is said that this ought to have led to the conclusion reached by the Bedeau ET, that sufficient had been shown to demonstrate objective justification: to have required more was to fail to see that which was **Cockram**-obvious and to require evidence that could not reasonably be produced.

207. Save in one regard, we again consider that the Anstis ET's approach in these respects reveals no error. Although not a focus of the University's submissions, to the extent that no weight was

given to the evidence of employee support for the EJRA (paragraph 303 of the Anstis ET Judgment, supra paragraph 149), that was wrong; although not determinative, this was potentially relevant evidence on the question of justification (see **Loxley**, supra). Even taking that evidence into account, however, we are unpersuaded by the University's submissions. The Anstis ET had been entitled to find that justification was not **Cockram**-obvious in this case and, further, that the University had failed to demonstrate proportionality, given the absence of evidence that it might reasonably have been expected to adduce.

208. As for what was, or was not, **Cockram**-obvious, it was no part of the University's case that there was a direct causal relationship between the EJRA and the legitimate aims: this directly discriminatory measure was relied upon as facilitating other steps that were intended to bring about those aims (rather different to the provision in issue in **Cockram**). Thus, the focus of the University's argument was on the EJRA's ability to create vacancies (or, more properly, to prevent vacancies being delayed); described in its submissions as "*the basic currency of the achievement of the aims*". In considering this question, the Anstis ET looked to see evidence of the EJRA's impact on the rate of vacancy-creation. The University does not suggest that it was wrong to do so; indeed, given the way the case was put, this was plainly a permissible approach: in order to assess the potential contribution of the EJRA to the achievement of the aims, it was appropriate to ask whether it had given rise to an increase in the rate of vacancies over and above that which would have existed without it. On Professor Ewart's analysis (even taking on board points raised by the University), the increase was a trivial 2-4%. Given that the issue was one of degree (*when*, rather than *whether*, vacancies would arise), the Anstis ET was entitled to conclude that it was not **Cockram**-obvious that the EJRA increased the vacancy rate, and thus contributed to the legitimate aims, to an extent that outweighed its discriminatory impact.

209. In considering the evidence that was available, the Anstis ET accepted that there was no one

way of demonstrating the appropriateness of the means in question, and that this might vary over time. As for the objection that it was too early to assess the EJRA's contribution or effectiveness, however, as the Anstis ET observed, it would have been open to the University to produce reasoned projections or estimates of its impact, or to have relied on case studies from particular departments. Although the EJRA had been introduced in 2011, the University had past experience of operating a DRA, with an extensions policy, and could reasonably be expected to draw on earlier data when considering the likely impact of an EJRA for the future. And, as Mr Sugarman points out, it had not been said that such projections were impossible; indeed, in introducing the EJRA, and in the various reviews that had been undertaken, it had been suggested that these kinds of assessments would be undertaken (see, for example, the data analysis suggested as part of the interim (five-year) Review). In the evaluations that followed, however, the Anstis ET found there had been a failure to distinguish between compulsory and voluntary retirements – between those vacancies arising by operation of the EJRA and those that would have arisen in any event – when it had plainly been open to the University to put in place the necessary means of recording the impact of the EJRA in this regard. Similarly, we consider it was a permissible expectation that the University might adduce evidence of case studies showing the potential effect of the EJRA. In setting out the Faculty position in Professor Pitcher's case, for example, it is possible to see the EJRA's impact on the creation of a high-level vacancy in that particular specialism (see supra, paragraph 65); given the detailed assessment undertaken of extension applications during the relevant period, it was not unreasonable for the Anstis ET to consider that such case study evidence might have been adduced to demonstrate the impact of the EJRA.

210. The question whether the University had satisfied the burden of demonstrating the proportionality of the EJRA concerned both the Bedeau and the Anstis ETs. In this regard, the weight to be given to particular aspects of the evidence will, however, be for the individual ET

and has to be seen in context, which will include the way the case is argued on the facts of the particular case. The Bedeau ET considered there was sufficient evidence (in particular, given the responses to the surveys conducted by the review group) to enable it to conclude that the EJRA was a proportionate means to facilitate the achievement of the aims in question, but warned that this would need to be kept under review. The Anstis ET also had regard to the review group surveys but gave less weight to that material, permissibly looking to the University for evidence demonstrating an increase in the rate of vacancies resulting from the EJRA; having appropriate regard to the relevant circumstances, it found the University had failed to discharge the burden upon it in this regard. Notwithstanding the alternative view of the Bedeau ET, we cannot say that the Anstis ET erred in reaching this conclusion.

211. For the reasons we have provided, we therefore dismiss the various challenges under the first ground of appeal.

212. Turning to the second ground of appeal, the University complains that the Anstis ET adopted a flawed approach, failing to analyse the second extension provisions in the broader context of the EJRA. It further contends that these more restrictive provisions ought properly to have been seen as aligning this case more closely to the facts of **Fuchs** and, therefore, as mitigating the rigidity of the EJRA.

213. Whether or not the changes to the extension provisions under the 2015 Policy were intended to more closely mirror the exception in **Fuchs** (and we note the Anstis ET was told the reasons for those changes were covered by legal privilege), the question was whether the applicable EJRA policy, taken as a whole, was justified. As the University has observed, the extension provisions were part of that policy, and the rules relating to second extension applications were only engaged in cases where the prior aspects of the policy (the potential application of the EJRA and the first extension process) had already been applied. In applying the policy to those who had already had

one extension, however, the University did not just require that the further extension was needed to complete a particular project but that this was due to unforeseeable circumstances, absent which the applicant's employment would be terminated because they were older than the EJRA.

214. Accepting the need to see this requirement in the broader context of the EJRA policy, it was not wrong for the Anstis ET to consider how this might impact upon the EJRA's achievement of the legitimate aims and, given that the employee in question had already vacated their substantive post and would have secured the funding necessary to cover any further extension of their employment, it did not err in questioning how this related to the issue of vacancy creation at the heart of the University's case. The vacancy that the EJRA was designed to achieve having been created upon the employee's move to a fixed-term post on the original extension, the Anstis ET was entitled to look to the University for some explanation as to why, if a particular project was on-going, this further condition was required if the employee in question was to avoid the otherwise directly discriminatory application of the EJRA.

215. In addressing this question, the Anstis ET was not directly assisted by **Fuchs**. In that case, the employee remained in post to complete the work they were undertaking on an on-going prosecution; there was no additional requirement that the work was continuing due to unforeseen delays. The issue for the Anstis ET was whether the extension provisions – including the additional requirement for second extensions – mitigated what it had found to be the otherwise discriminatory impact of the EJRA. Accepting that any exception to a policy would still need to be closely tailored to the legitimate aims pursued by that policy, it permissibly found that this was not the case in relation to the treatment of second extensions; in that regard, the EJRA policy imposed a requirement apparently unrelated to the achievement of any of its legitimate aims.

216. In seeking to address this difficulty, the University's witness, Ms Thonemann, suggested that the promotion of diversity required not only the creation of vacancies (to enable new

appointments to be made from a more diverse market) but also the removal of the existing, less diverse, cohort. As the Anstis ET observed, however that was not part of the University's pleaded case and was inconsistent with its evidence regarding the encouragement of older academics to continue to participate in University life (through Emeritus positions or consultancies) after the application of the EJRA.

217. On appeal, the University did not seek to pursue this potential revision to its case but criticised the Anstis ET for judging the additional requirement for second extensions in isolation. We do not think that is a fair characterisation of the approach adopted. In considering the EJRA policy overall, the Anstis ET made clear its finding that, whilst the extension provisions did not fatally undermine the EJRA, they also did not materially mitigate its discriminatory impact and, taking the EJRA as a whole (including the extension provisions), the University had not been able to discharge the burden upon it to demonstrate justification. In Professor Ewart's case, the relevant application of the EJRA had included the additional requirement imposed for second extensions. This was part of the policy applied in the case before the Anstis ET and it did not err in considering how that impacted (if at all) on the EJRA's achievement of the legitimate aims. We duly dismiss this ground of appeal.

Disposal

218. For all the reasons we have provided, we therefore dismiss both appeals.