**Case Numbers: 3301882/2020**
**3304225/2020**
**3300563/2021**
**3312857/2021**
**3323585/2021**
**3323608/2021**

# EMPLOYMENT TRIBUNALS

| **Claimants:** | | **Respondent:** |
|---|---|---|
| Mr N Field-Johnson (1)<br>Prof B Flyvbjerg (2)<br>Prof P Candelas (3)<br>Prof D Snidal (4) | **v** | The Chancellor, Masters and Scholars of the University of Oxford |

**Heard at:** Reading **On:** 28, 29 & 30 November, 1, 2, 5 & 6 December 2022 & 5 January 2023 (full hearings) & 4, 6, 26 & 27 January & 8 March 2023 (in chambers)

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

**Appearances**
**For the claimants:** The first claimant in person
Mr A Sugarman (counsel) (second to fourth claimants)
**For the respondent:** Mr S Jones KC (counsel)

## RESERVED JUDGMENT

The respondent's "Employer Justified Retirement Age" is not a proportionate means of achieving legitimate aims.

## REASONS

A. INTRODUCTION

**The preliminary issue**

1. Each claimant brings claims that challenge their dismissal under the respondent's so-called "Employer Justified Retirement Age" or "EJRA".

2. The first claimant was subject to the terms of the EJRA on the basis that he was a senior administrator employed by the respondent. The second to fourth claimants were subject to the terms of the EJRA on the basis that they were academics employed by the respondent .The scope of the EJRA and its application to the relevant individuals will be explored later in this decision.

3. This open preliminary hearing is to determine a preliminary issue, described in an order of 23 September 2021 as "*Whether the EJRA … is a proportionate means of achieving a legitimate aim or aims?*"

4. The framing of the question seems to suggest that there is only one answer to the question – either it is or it is not a proportionate means of achieving a legitimate aim. However, that was not the way it was dealt with by the parties. While there has only ever been one EJRA scheme in place at any particular time, it has applied across different categories of employees. In this case the relevant categories are statutory professors, associate professors and senior administrators. Subject to the point made in closing submissions by Mr Sugarman and noted below, the hearing proceeded on the basis that there may be different answers for different categories of employees affected by the EJRA.

5. A hearing of this nature does not require a full tribunal panel, but a full panel was convened for the reasons given at para 12 of the order of 23 September 2021.

6. Any matters arising from this decision and any necessary orders for the further progress of the claims will be addressed at a closed preliminary hearing listed for 17 May 2023 (if not resolved earlier by agreement between the parties).

**Previous decisions and the composition of the tribunal panel**

7. The lawfulness of the EJRA (in a previous form) was the subject of consideration by a tribunal in Pitcher v University of Oxford 3323858/2016 which, in a judgment promulgated on 16 May 2019, found that the EJRA was lawful. The opposite result was reached in a decision promulgated on 20 December 2019 in the case of Ewart v University of Oxford 3324911/2017. Appeals against both decisions were dismissed by the EAT in the combined case of Pitcher & Ewart v University of Oxford [2021] IRLR 946. In the Pitcher & Ewart appeal judgment, the EAT set out a description of the relevant background and law in forms we will refer to later in this judgment.

8. The respondent made an application that none of the employment judges or non-legal members who had previously sat on the Pitcher and Ewart cases should be allocated to this hearing. That application (and a cross-application by

the first claimant) was dismissed by the Regional Employment Judge in an order dated 13 June 2022.

9. We are the same tribunal panel that decided that an earlier version of the EJRA was unlawful in the Ewart case. The particular EJRA scheme we are dealing with in these cases is different, the evidence led by the parties and submissions made by them are not the same as in the Ewart case. Amongst other things, the academic claimants in this case adopted a different position in relation to the respondent's claimed legitimate aims than that adopted by Prof Ewart. It is inevitable that during the hearing the parties and to some extent us may refer back to matters discussed during the Ewart hearing. Our decision may have to refer back to points raised in Ewart as matters of background, but we regard our decision in this case as being independent of the earlier first-instance decisions in both Pitcher and Ewart.

10. The Regional Employment Judge has responsibility for the allocation of a panel to a case, hence he made the decision on the pre-emptive application by the parties. We do not consider that that absolves us of any individual responsibility to recuse ourselves from hearing a case if we consider that necessary or appropriate. We consider a decision by a judge or tribunal member to recuse themselves is a responsibility we retain, even given the earlier decision by the Regional Employment Judge (although no doubt any such individual decision will take note of the REJ's decision). In this case no application for recusal was made, and we did not consider any circumstances arose that suggested that we should recuse ourselves from conducting this preliminary hearing.

11. In common with both the Pitcher and Ewart cases, the respondent makes no criticism of the ability, credentials or reputation of the claimants in this case as highly distinguished scholars or (in Mr Field-Johnson's case) a very able administrator. The respondent's case proceeds on the basis that there is no individual criticism of the abilities of the relevant claimants, but that the automatic operation of the EJRA in their cases is justified as being in pursuit of broader aims pursued by the respondent. We also note that the respondent expressly disavowed any position that older academics or administrators may tend, over time, to become less able. This case is not about any individual or group of individuals being less capable than any other individual or group of individuals.

## The hearing

12. This hearing started on 28 November 2022 with the tribunal reading into the papers. That continued through to the end of 29 November 2022. As agreed with the parties, the respondent commenced its evidence on 30 November 2022. 30 November – 2 December was taken up with the evidence of Sarah

Thonemann, the respondent's Deputy Director of Human Resources at the relevant time. The first claimant had identified at the start of the hearing that he was unable to attend the hearing on Friday 2 December due to other commitments. He did not want the hearing to be adjourned and was willing for the hearing to continue in his absence. In order to accommodate this his cross-examination of Ms Thonemann (and the tribunal's questions to her so far as relevant to his case) were dealt with on 1 December 2022.

13. On the morning of 5 December 2022 the evidence of Dr Malgorzata (known as Gosia) Turner was dealt with, and in the afternoon we heard evidence from the fourth claimant. That continued until the morning of 6 December 2022, with the evidence of the third claimant and the first claimant following on. The second claimant had submitted a witness statement but did not attend the hearing to give evidence.

14. In discussions at the end of the day on 6 December 2022 arrangements were made for the exchange of written submissions, with oral replies to submissions to be made by CVP on 5 January 2023. The tribunal met in chambers on 4 January 2023 to read the written submissions and prepare for the oral submissions.

15. Any further oral submissions and oral replies to the written submissions were dealt with by video (CVP) on 5 January 2023 and the tribunal met in chambers on 6, 26 & 27 January 2023 to consider its decision, with a final draft being agreed during a chambers meeting on 8 March 2023.

B. THE FACTS

**Background and the introduction of the EJRA**

16. The background and matters leading up to the EJRA are extensively set out in the first instance decisions in Pitcher and Ewart. We now have the advantage of the EAT decision in those appeals, from which we take the following:

> *"**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. … 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."*

17. Pausing there, we note that in argument before us it was not in dispute that only statutory and associate professors were considered to be "academic" staff by the respondent, whereas other higher education institutions in the United Kingdom would typically take a wider view of who could be categorised as "academic". We also note that the "joint appointment" referred to by the EAT was limited (at least in that form) to associate professors. Statutory professors would typically have a college affiliation but this would not bring with it any teaching responsibilities for their college and their salary would be born entirely by the respondent. There was no suggestion that administrative staff would hold a joint appointment with a college.

18. Under the heading "The Background to the EJRA", the EAT records the following:

*"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* [Pitcher] *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 $6 billion 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.*

19. The respondent has always (at least in the modern era) had some form of compulsory retirement provision for academic and senior administrative staff – either the default retirement age (when that was permitted) or an EJRA scheme of some sort. That has been accompanied by the opportunity to apply for extensions of employment which have operated in various ways across time. We also note that the introduction of the EJRA came about on the Personnel Committee seeking to "*develop proposals that might enable the University to continue to implement a normal retirement age*", rather than on the Personnel Committee working from particular objectives or aims and concluding that the EJRA was an appropriate way of meeting or contributing to those aims. The introduction of the EJRA in 2011 meant (for most) an increase in their retirement age from 65 to 67, so for the first couple of years there would have been very few compulsory retirements under the EJRA.

20. The EAT continues, describing the original 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."*

21. Variations and refinements on these aims have continued across the various iterations of the EJRA scheme. In particular, the reference to "*invidious performance management*" was removed at an early stage. It is now no part of the respondent's case that older workers are likely to or may suffer deteriorations in their academic or administrative work. The respondent expressly disavows this, along with any suggestion that older workers may suffer any lack of original thought or creative or original ideas. As will be discussed below, the respondent does, however, refer to "new perspectives" as a concept inherent to an individual or their background that is distinct from creative or original ideas.

22. The EAT addresses the question of extensions, and continues as follows, describing 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."*

23. Although approved (or not objected to) by Congregation, the EJRA has been subject to various legal challenges from individuals from the start, initially in the respondent's internal court of appeal. In considering an appeal by Prof Galligan in the respondent's court of appeal Dame Janet Smith was critical of the EJRA and of the process for obtaining extensions (in its then form). Alongside its general commitment to keep the EJRA under review, this prompted further reviews of the EJRA by the respondent. A second version of the EJRA was adopted in 2015. As the EAT says:

> *"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 intergenerational 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."*

24. At least in part due to Dame Janet Smith's criticism, the 2015 policy tightened the criteria for extensions of employment beyond the retirement age.

25. An interim, five-year, review was commission in 2015:

*"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).*

*…*

*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."*

26. This five-year review was the subject of detailed consideration in both the Pitcher and Ewart tribunal cases, albeit with the relevant tribunals taking different views on how reliable the review's conclusions were.

27. Further criticism of the EJRA followed in a case brough by Prof Edwards in the respondent's court of appeal, heard by Sir Mark Waller. Subsequent changes to the respondent's statutes have had the effect that retirement cases are no longer within the jurisdiction of its court of appeal, and any subsequent legal challenges arose in the employment tribunal. The Pitcher and Ewart cases arise at this point.

28. We note that the introduction of and any later variations to the EJRA have always been either approved by or not opposed by Congregation. That has continued up to (and including) the latest changes prompted by the ten-year review, which we understand have now been approved. We understand that some types of change to the EJRA and its procedures require the positive endorsement of Congregation, and others can be called in for debate by Congregation on the petition of a very small number of members of Congregation.

**A timeline**

29. Since its original introduction, the EJRA has been subject to the following broad trends: (i) a tightening of the criteria for extensions, (ii) a gradual increase in the retirement age and (iii) a substantial reduction in the groups of employees to whom it applied.

30. This table is intended to set out a brief timeline of developments with the EJRA. In this hearing the retirement age has usually been described as being a particular age – for instance, 67 – but the formal expression of this has always been retirement on the 30 September prior to an individual attaining a particular age. That coincides with the end of the academic year. Thus a retirement age of 67 actually means retirement on the 30 September prior to the individual's 68th birthday.

| **Dates:** | **Developments:** |
|---|---|
| To 2011 | A default retirement age – typically 65 - with opportunities for extensions. |
| 2011 | An EJRA of 67 (with extensions). |

| | |
|---|---|
| 2014 | Galligan decision. |
| 2015 | New 2015 policy introduced. |
| 2017 | Five year review report published, 2017 policy comes into force (including the removal of grades 6 & 7 from the scope of EJRA and an increase in retirement age from 67 to 68 – this policy effectively left the scope of the EJRA matching those who were members of Congregation). |
| 2019 | Pitcher ET decision (May), Mr Field-Johnson retirement (30 September 2019), Ewart ET decision (Dec) |
| 2020 | Prof Candelas retirement (30 September 2020) |
| 2021 | Ten year review commences. |
| 2021 | All other claimants retire (30 September 2021) |
| 2022 | Ten year review report published, 2022 policy (incorporating recommendations of the ten year review) approved by (or not objected to by) Congregation. All administrative grades removed from the scope of the EJRA and retirement age increased from 68 to 69. |

31. The retirements of Professors Pitcher and Ewart took place under the 2015 policy. All of the retirements at issue in these claims took place under the 2017 policy.

32. Amongst other things, the 2022 policy removed all administrative staff from the scope of the EJRA, leaving only senior academic staff – statutory and associate professors and RSIVs (senior research-only employees) – within the scope of the EJRA.

**The circumstances of the claimants**

*Field-Johnson*

33. Mr Field-Johnson had a background in finance with various City institutions, eventually founding his own firm together with some colleagues. In March 2017 he took up a post as Head of Development for the Department of Continuing Education. This was a grade 9 administrative position and was subject to the EJRA. His retirement took effect at the end of September 2019, seemingly in the face of opposition from his managers and having sought and failed to

continue his work for the respondent under a consultancy agreement or other alternative working arrangements. Part of his case was that it was illogical to recruit someone in 2017 only then to retire them two years later.

*Flyvbjerg*

34. Prof Flyvbjerg did not attend the tribunal to give evidence, and so was not cross-examined on his evidence, but the basic facts of his case are not in dispute.

35. Prof Flyvbjerg was a statutory professor: the BT Professor and Chair of Major Programme Management at the Saïd Business School. He had held that position since 1 April 2009 and his employment ended by reason of the EJRA on 30 September 2021. His statement emphasised his considerable academic credentials, which are not in dispute. He was (as were the other academic claimants) a leader in his field. He made an application to extend his tenure beyond the EJRA, which was "fully" supported by his department but, as he puts it, his division was "not as supportive" of his application. The application was refused, as was a subsequent appeal.

36. Prof Flyvbjerg has moved on to work at a university in Copenhagen, although he emphasises that this was "*hugely disruptive to both family life and work*". He says:

> *"The University may say that I could have continued my work as an Emeritus Professor and continued to use the University's facilities. I completely disagree with this suggestion. It is insulting to tell someone who has value in the labour market that they are welcome to stay and work for free. I simply could not afford to lose my salary and so have been forced to find a job elsewhere."*

37. Prof Flyvbjerg talks of sacrificing a large pension at his former role in order to take up his position with the respondent. He says that he was assured on his appointment that he would be able to work as long as he wanted and thereby rebuild his pension (the respondent does not accept this). He goes on to discuss how he has been replaced, and the effect (or lack of effect) of his dismissal on the respondent's achievement of its stated aims.

38. Prof Flyvbjerg has consistently stated his desire to work on for a long period of time. In his statement he talks of a retirement age of 75 being "a lot more reasonable" but also of his personal expectation that he would "*continue to work at least ten more year*s" which would take him through to at least 80 years old.

*Candelas*

39. Prof Candelas was a statutory professor – the "Rouse Ball Chair of Mathematical Physics". It is hardly necessary to distinguish different levels of prestige that come with different statutory professorships, each of which carry prestige and considerable academic honour. However, it did not seem to be in dispute that that professorship is, as Prof Candelas puts it "very prestigious". An indication of this is that his predecessor in the post was Sir Roger Penrose, who has since received a Nobel Prize. The respondent was keen to emphasise that Prof Candelas only got the opportunity to take on this role because of the compulsory retirement of Sir Roger Penrose. Prof Candelas held this position from 1 September 1999 until his dismissal under the EJRA on 30 September 2020.

40. Prof Candelas studied for a DPhil at the respondent but, in keeping with what we have heard about the worldwide nature of academia (at least at the high level practiced by the respondent) he moved from there to the University of Texas at Austin, where he worked for more than twenty years, rising to full professor, the position he held prior to his appointment with the respondent. (We understand "full" professor to be an equivalent role in other institutions to what the respondent would term a statutory professor.)

41. Prof Candelas describes being so absorbed in his work (and also annoyed by the possibility of compulsory retirement) that he missed the deadline to apply for an extension of his contract. He says that if he had applied, he had been told that his department would have been "strongly supportive" of an extension.

42. Prof Candelas makes various points about the inadequacy of an Emeritus appointment, and goes on to make comments on the "Little's Law" analysis and Prof Ewart's calculations on staff turnover and the impact on the creation of academic vacancies.

*Snidal*

43. Prof Snidal describes himself as having been employed by the respondent as "Professor of International Relations" from 1 September 2010 until his compulsory retirement on 30 September 2021. It was agreed between the parties that he was a "Reader", which we were told was an obsolete or legacy job title no longer used by the respondent. No new "Readers" were being appointed, although there were a handful of Readers who had been appointed to that title and retained it.

44. The consensus between the parties seemed to be that "Reader" was a distinct position that was neither a statutory nor associate professor. It was (and remains) within the scope of the EJRA. It was the claimant's position that a Reader was akin to a statutory professor, but the respondent's view was that it

was closer to an associate professor. It is not necessary for us to resolve that dispute in this case. He held a joint appointment with Nuffield College, where he was a Professorial Fellow. As with the other academic claimants, his academic credentials are impeccable. He did not apply for an extension under the EJRA. He says that the terms of and requirements for an extension were "not worth pursuing". He points to the difficulties that academics may have in applying for roles after having been subject to the EJRA, saying that he has been refused positions in Florence and at the LSE based on (respectively) his likely age at the end of a fixed-term appointment and on him not being willing to commit to the long-term role that the institution was seeking. He goes on to comment on the EJRA and its impact (or lack of impact) on the respondent's purported aims.

45. Unless Prof Snidal can be considered to be an associate professor we do not have an associate professor in these claims. Mr Field-Johnson was an administrator, Profs Flyvbjerg and Candelas were statutory professors and Prof Snidal was a Reader.

*Themes*

46. While each individual claimant has their own particular circumstances, some broad themes emerge across their evidence:

- Some complain of having been misled on recruitment as to the possible effect of a retirement age, or to have had expectations that the respondent would no longer apply a retirement age following the abolition of the default retirement age. Whatever the rights and wrongs of this, it is not in dispute that the respondent was entitled as a matter of contract to apply the EJRA to them. Whether the EJRA is then justified cannot depend on their expectations, nor even on the question of whether they were misled or not.

- For the academic claimants, the worldwide nature of the academic community and job market (at least at the high end as practiced by the respondent) is clear. Each of them had worked outside the UK or (after the EJRA) applied for work outside the UK.

- Each of the academic claimants gave evidence to the effect that an Emeritus or similar position on retirement was not comparable to their previous employment. We will discuss this in more detail later. There has been no suggestion that there was any equivalent to an Emeritus role for the administrators, nor that there was any way for them to continue their previous work in an unpaid or honorary position following their retirement.

- All are clear that they were dismissed at the peak of their careers, when they still had much to offer the respondent and (in the case of the academic claimants) the broader academic world. How much longer they wanted to continue to work for varied.

- Some of the academic claimants made observations on what their dismissal meant for the achievement of the respondent's purported legitimate aims – and in particular what it did or did not mean for career progression within the respondent and diversity in general. While noting what has been said, the fact that the EJRA did or did not achieve a legitimate aim in any particular case is not what we are considering here. We have to consider more broadly whether the EJRA is capable overall of achieving the legitimate aims and then whether it is a proportionate means of achieving those aims, not whether those aims have been achieved in any individual case.

**The ten-year review**

47. The respondent said the EJRA was to be introduced "initially" for ten years. In fact it had no limit or "sunset clause" bringing it to an end after ten years, but it was subject to a full review after ten years (there had, of course, been previous interim reviews). The appointment of a Review Group was announced in the Gazette on 1 July 2021 and the Review Group met for the first time on 7 July 2021 with Prof David Paterson as chair. Its terms of reference describe its "purpose" as:

> *"… to submit a report and recommendations on the future of the EJRA at Oxford to Council, through the Personnel Committee"*

48. Its "scope" is described as follows:

> *"The Group has been asked to consider:*
>
> - *whether the current Aims of the EJRA Policy remain aims the University should pursue and whether others should be articulated;*
>
> - *the extent to which the Aims are being met or will be met in future through the EJRA, whether alone or in conjunction with other measures;*
>
> - *whether there are any alternative means by which the Aims could be met; and*

- *whether the Group's view is that the EJRA is, as at the date of the review, a proportionate and necessary means of achieving the aims, whether alone or in conjunction with other measures.*

*In so doing, the Group is asked to take into account the impact of the EJRA on those at different career stages, noting that those at earlier career stages and those who are already retired are under-represented on the Review Group itself and on decision-making bodies, such as Council and Congregation.*

*If the Group decides to recommend the retention of an EJRA, it is asked to recommend whether there should be any changes to:*

- *the age at which the EJRA is set or the circumstances in which it will apply;*
- *the groups to which the EJRA applies;*
- *the measures that are taken or could be taken in conjunction with the EJRA to achieve the aims;*
- *the existence and operation of the extensions procedure, including the parts of the procedure that apply to second and subsequent extensions.*

*If the Group decides to recommend that the EJRA is discontinued entirely, it is asked to recommend:*

- *the date from which the policy should cease to operate and any transitional arrangements;*
- *the alternative means by which those Aims that are considered to remain relevant and important will be achieved in future."*

49. The Review Group was not, as such, asked to assess the lawfulness of the EJRA, nor would it have had any particular standing to do so. To the extent that it did consider this, the respondent claims privilege on the advice received and matters arising from it. Nevertheless, the questions that were asked of the Review Group are very similar to those the tribunal will have to determine, and as a result the data produced for the Review Group, and the conclusions that it drew from that data, were central to all parties' arguments on the lawfulness of the EJRA.

50. No point arises as to the constitution of the Review Group, and we simply note that it comprised a range of representatives from different areas of the

respondent, including the Conference of Colleges, a trade union representative and "a recent retiree".

51. The Review Group were assisted by Ms Thonemann and drew on legal advice from the respondent's solicitors (as noted above, privilege is claimed in respect of that advice).

52. The Review Group conducted ten formal meetings from July 2021 to March 2022. The EJRA scheme that it was reviewing was the 2017 version under which each of the claimants had been subject to compulsory retirement. It produced its final report in May 2022.

53. We will refer in our discussion and conclusions to the data that the Review Group commissioned and drew on, and to its deliberations and conclusions on that data, but for now we will simply set out the executive summary of the Review Group's final report:

> *"a) Introduction*
>
> *The University's employer-justified retirement age (EJRA) requires employees in grade 8 and above to retire on the 30 September preceding their 69th birthday, in support of the Aims of the policy, which are, in brief: intergenerational fairness through maintaining opportunities for career progression, refreshment of disciplines/fields/expertise, succession planning, and diversity.*
>
> *After an extended process of investigation, consultation and analysis, the Review Group established by Council in Trinity term 2021 to conduct the 10-year review of the EJRA makes the following recommendations.*
>
> *b) Recommendations*
>
> *The Review Group recommends that:*
>
> *1. The EJRA is retained for those employed as Statutory Professors, Associate Professors and RSIVs (the most senior researchers), and for the Vice-Chancellor.*
>
> *2. Those in grades 8 to 10 and ALC6 (the senior administrative grade) are removed from the scope of the EJRA, together with employed Visiting Professors, the Professor of Poetry and committee members.*

3. *The Aims are retained, with some amendments to clarify the relationship with the University's Vision, Mission and Strategic Plan 2018-24.*

4. *Personnel Committee consider whether to recommend to Council an increase in the age of the EJRA of one year, given the benefits and drawbacks identified in this report.*

5. *The exceptions process be adapted to better support those whose careers have been impacted by caring responsibilities or other personal circumstances, to ensure space constraints do not prevent recruitment, and that it be communicated more effectively and transparently.*

6. *Transition arrangements for any changes to policy which are agreed are put in place, and the EJRA is reviewed again in five years' time, when more data are available and circumstances may have changed.*

7. *There should be a more strategic approach to retirement, including discussions well in advance of the EJRA and better understanding of the flexible retirement options in USS, in order to facilitate informed decision making by individuals and better departmental succession planning, together with better and more consistent support for staff who wish to remain part of the intellectual and social life of the University in order to support a dignified and phased approach to retirement.*

8. *Given that the EJRA contributes to vacancy creation, but cannot achieve the Aims in isolation, other approaches such as inclusive recruitment across all grades and divisions must continue to be pursued as a priority to accelerate progress.*

9. *The Group noted that the review was hampered by inadequate diversity data, particularly in relation to ethnicity and disability, and that this needs to be addressed."*

54. We understand that the formal recommendations that resulted from that report have now been passed (or not opposed) by Congregation.

55. As we have already noted, Mr Field-Johnson relied heavily on recommendation 2 and the analysis that led to that. The entirety of his case was to the effect that the Review Group did not consider the EJRA was justified in relation to people

holding his position, and that matters were no different at the time of the Review Group's report to how they had been at the time of his dismissal.

C. THE LAW

56. As with the background to the EJRA, we have the advantage of the EAT's statement of the relevant law from the Pitcher and Ewart appeal:

> *"**The Relevant Legal Principles***
>
> *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-s 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 & Jakes (a Partnership) [2012] UKSC 16, [2012] IRLR 590, [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, para [61] Seldon). In identifying those aims that might meet the general legitimacy requirement, at para [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. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" '.*

*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.*
>
> *[57] 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 para [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 & Hansons plc v Lax [2005] EWCA Civ 846, [2005] IRLR 726, [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 (Homer v Chief Constable of West Yorkshire [2012] UKSC 15, [2012] IRLR 601, [2012] ICR 704, per Lady Hale at para [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 Health and Safety Executive [2004] EWCA Civ 1317, [2004] IRLR 971, [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 para [50](5) Seldon and at para [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 v Land Hessen (Joined cases C-159/10 and C-160/10), EU:C:2011:508, [2011] IRLR 1043, [2012] ICR 93:*

> *'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, para 55, and Petersen, para 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 para 32 of Hardy & Hansons, supra). This principle was reiterated by the Employment Appeal Tribunal in Seldon v*

*Clarkson Wright & Jakes (No 2) (2014) UKEAT/0434/13, [2014] IRLR 748, [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 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 (Ingeniørforeningen I Danmark (acting on behalf of Andersen) v Region Syddanmark (Case C-499/08), EU:C:2010:600, [2012] All ER (EC) 342, [2010] ECR I-9343); otherwise, however, specific application of an otherwise justified policy will not usually require further justification; as Lady Hale observed, at para [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] EWCA Civ 346, [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 evidence required will depend what proposition the employer is seeking to establish.' (see per Bean LJ at para [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 paras [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 para [33]; Thomas LJ at para [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 para 51 of Age Concern England [R (on the application of the 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), EU:C:2009:128, [2009] IRLR 373, [2009] ECR I-1569] 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) EU:C:2015:480, [2015] IRLR 746, [2016] 1 CMLR 491, at para 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] IRLR 218, [1993] ICR 474, CA per Ralph Gibson LJ ([1993] IRLR 218 at 227, [1993] ICR 474 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), EU:C:2010:601, [2011] IRLR 51, [2011] 1 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 para 47). Similarly, in a domestic context, in Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd (2008) UKEAT/0156/08, [2008] IRLR 853, [2008] ICR 1348, at para 42 (quoted with approval in Lockwood v Department of Work and Pensions [2013] EWCA Civ 1195, [2013] IRLR 941, [2014] ICR 1257, at para [46]), Elias J recognised that an agreement made with trade unions was potentially relevant when considering proportionality (and see Seldon, in which, at para 65, Lady Hale acknowledged the role consent or agreement might play when considering the aim of intergenerational fairness).”*

D. DISCUSSION

**The aims - introduction**

57. The aims relied upon by the respondent are the same for each claimant. They are as follows, with the titles that follow them being taken from the respondent's closing submissions:

> *"(a) Safeguarding the high standards of the University in teaching, research and professional services (the "Overarching Aim");*
>
> *(b) 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 (the "Inter-generational Fairness Aim");*
>
> *(c) Refreshing the academic, research and other professional workforce as a route to maintain the University's position on the international stage (the "Refreshment Aim");*
>
> *(d) Facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate University's joint appointment system (the "Succession Planning" Aim); and*
>
> *(e) Promoting equality and diversity, noting that recent recruits are more diverse than the composition of the existing workforce, especially amongst the older age groups of the existing workforce (the "Promoting Equality and Diversity Aim")."*

58. Each aim was subject to refinement and clarification during evidence and argument. As we will refer to below, the aims were discussed almost entirely in the context of the academic rather than administrative staff.

**The aims in detail**

*The Overarching Aim*

59. As is suggested by its title, the "Overarching Aim" is not something that is said to be achieved of itself by the EJRA. Instead, the aims that follow either collectively or individually support the Overarching Aim. Mr Jones was clear that that did not mean that the respondent accepted that the individual aims could not be legitimate aims in their own right. They were said to be legitimate aims in their own right, but also individually or collectively to support the Overarching Aim.

*The Inter-Generational Fairness Aim*

60. In his written submissions Mr Jones refers to two aspects of inter-generational fairness previously identified by Baroness Hale. The first was "*sharing limited opportunities to work in a particular profession fairly between the generations*" and the second was "promoting diversity". In this case, the second is relied on as a separate aim in its own right, so it must be the first that the respondent is referring to when it talks of inter-generational fairness.

61. Picking out what this aim actually meant occupied substantial time during the tribunal hearing. This was because (as with the "Succession Planning" aim) it was not meant in its most obvious sense: providing opportunities for junior, younger employees within the respondent's organisation to succeed to more senior positions occupied by older employees.

62. We heard nothing about this aim other than in the context of appointment to the positions of statutory or associate professor. In those appointments the respondent is unashamedly seeking the best in the world. No advantage or preference is given to internal candidates. There is no "succession planning" in the sense of lining up junior employees to replace more senior employees on their retirement, nor is there inter-generational fairness in the sense of removing older employees to the benefit of younger employees within the respondent's organisation. If a more junior employee of the respondent succeeded to an associate or statutory professor's role on their predecessor's retirement, that was simply by virtue of the coincidence that they were the best candidate that could be obtained for that role. In practice, the substantial majority of appointments to statutory and associate professor roles were made from outside the respondent, and often from outside the United Kingdom.

63. That led at one point to an understanding that the respondent's "inter-generational fairness" intention aim was an attempt at inter-generational fairness across worldwide academia. There were obviously considerable practical problems as to whether this really was the intended aim or what contribution the respondent may be able to make to a worldwide problem, particularly in circumstances where their evidence was concentrated on the disadvantages facing early-career academics at Oxford, rather than worldwide.

64. In oral submissions Mr Jones described this by reference to the positions of statutory professor and associate professor being held on "lease" by the present occupiers of the positions. He said that whatever individual difficulties the postholders may have had, they formed part of a "golden generation" who had benefited from free tuition, other concessions and better pensions than their successors would. They had also typically succeeded to their posts on the compulsory retirement of their predecessors. In the speaking note from which

his oral submissions were derived, he says "*the point is fairness in the allocation of this past resource between present and future generations of senior Oxford employees*". Mr Jones also said that what mattered in this context was the opportunity for others to apply for the senior roles, not the fact that an internal candidate may ultimately be appointed or have priority for appointment. There were further complications in the respondent's reliance on senior appointments creating a chain of 3-4 appointments at more junior levels as people stepped up to replace those who had succeeded to more senior roles.

65. There was no evidence before us as to how this aim might apply or operate for administrative grades.

*The Refreshment Aim*

66. "Refreshment" had two aspects. The first was in giving the respondent the opportunity to expand into new areas of study (while at the same time dropping or de-emphasising other areas). For instance, to reflect global trends, the English department may wish to emphasise global literature and reduce its study of medieval literature. Experts in global literature may be appointed on the departure of experts in medieval literature. The second is in what was termed "new perspectives". It was said that the personal characteristics and background of a person could give them particular experience and insights that others did not have and could not achieve simply by some form of abstract thinking. So, for example, a person who grew up in a former colony may have very different views on post-colonial literature than someone whose experience was limited to residence and education in the former colonising state. The same could be said in different contexts for any other protected characteristic that an individual may hold. That could be seen as an aspect of the "Promoting Equality and Diversity Aim", with the respondent emphasising that increased diversity was likely to facilitate and encourage high standards of scholarship, as different views came to prominence. It was not simply pursuing diversity for the sake of diversity. This "new perspectives" argument was, however, not to be taken as any suggestion that older employees were not capable of original thought or new and creative approaches to their work.

67. We did not hear anything of how this aim may work for the administrative grades.

*The Succession Planning Aim*

68. The point with the Succession Planning Aim was not, as might sometimes be the case, mentoring or training junior employees with a view to them succeeding more senior employees. Instead, it was creating definite dates that the respondent could work to when employees would leave. This was particularly

by reference to the joint appointment system, whereby any replacement employee would have to be recruited in collaboration with a college, who may or may not have the same requirements as the respondent.

69. The joint appointment system only applied to associate professors, and we heard nothing on why having "predicable retirement dates" was important for administrative staff. There was also nothing on why the joint appointment system may be relevant to statutory professors. They did not hold joint appointments with colleges. They would typically have affiliations with colleges, but these seemed effectively to be "honorary" positions that carried no or minimal duties or remuneration. Perhaps some statutory professors would take on responsibilities within colleges, but there was no suggestion that the same kind of complexities that were said to arise for joint appointments for associate professors also applied to statutory professors.

*The Promoting Equality and Diversity Aim*

70. Equality and diversity was spoken of almost entirely in relation to sex or gender diversity for the statutory professors and associate professors. Reference was made to statistics on ethnicity and disability, but no other protected characteristics have been referred to on the question of promoting equality and diversity. We will approach this as the parties did – by reference to sex or gender diversity, rather than any other form of diversity. If this aim cannot be supported by reference to sex or gender diversity there is nothing in the evidence to suggest that it could be rescued by reference to diversity relating to any other particular protected characteristic.

71. There remains a substantial sex or gender imbalance in the statutory professor and associate professor roles.

72. For senior administrative staff, in its consideration of matters during 2021 the ten-year review group found "*These grades are already the more diverse with the proportion of women in them varying from 42% to 54.6% … and steadily increasing proportions of BME staff … and staff with disabilities"*. It is not part of the respondent's submissions that the position was materially different on the retirement of Mr Field-Johnson in 2019 (or 2020, if that was the year of his retirement).

*The Academic Freedom Aim*

73. The respondent also argued that there was a "Academic Freedom Aim" – that is "preserving academic autonomic and freedom". However, this was not as such an aim pursued by the 2017 scheme. It was (at most) a reason why some alternatives to the EJRA were not appropriate. Discussion of this touched on

the question of performance management, but we record that it was not suggested by any side that performance management was an alternative means of achieving any of the aims. To the extent that this was a concession by the claimants it followed from the respondent's position that the EJRA had nothing to do with any question of older workers having in any way declining or inadequate job performance.

*The claimants' position in relation to the aims – Mr Field-Johnson*

74. Mr Field-Johnson considered the position was so obvious that he did not need to address the aims in any detail. As he put it in his closing submissions:

> "*The University really has no case – as the data does not support EJRA for Admin Staff Grade 8-10 and the University itself has now admitted that the EJRA should not apply to the Admin Staff Grade 8-10 due to EJRA not contributing to the achievement of the Aims for these groups, and, as there is a steady flow of vacancies, and therefore had no impact on turn-over.*"

75. As we have mentioned, at the hearing the aims were discussed almost entirely in relation to academic rather than administrative staff. The examples that were given by the respondent about the need for and fulfilment of the aims were in the academic rather than administrative context. In his closing submissions, Mr Jones addresses Mr Field-Johnson's situation in the following way:

> *"Mr Field-Johnson points out that his grade 9 cohort no longer falls within the EJRA Populations. The Review Group in 2021 concluded:*
>
> > *"In considering the contribution that the EJRA makes to turnover and thus to the achievement of the Aims in these groups, the Group noted that other factors ensure a steady flow of vacancies, namely comparatively high turnover (in part because of the relatively high proportion of fixed-term contracts) and grade growth. A smaller proportion of leavers in these grade groups leave by reason of retirement, and few applications for employment beyond the EJRA are made by members of these groups."*
>
> *They go on to decide that:*
>
> > *"… there was no evidence that the EJRA is contributing to turnover in these grades or that it is impacting the Aims."*

> *If it is clear that there was insufficient impact on his cohort when the matter was considered in 2021, how, Mr Field-Johnson asks rhetorically can his compulsory retirement be justified in 2020?"*

76. We understand that Mr Field-Johnson retired in 2019, but nothing in the respondent's argument seems to depend on the difference between 2019 and 2020. Mr Jones goes on to answer that rhetorical question:

> *"The answer is that at the point of his termination, the 2017 Policy applied to him and it did so because of decisions taken by the Review Group, Council and Congregation in that year. At that point, one significant point was the view, expressed in Congregation debates about the introduction of a modified Statute XII, that senior academic-related staff ought not to be treated differently to academics. In some respects that was to their distinct advantage:*
>
> *(1) They were members of Congregation; and*
>
> *(2) They benefitted from the very high bar set for performance and redundancy dismissals that was understood to flow from the need to protect academic freedom.*
>
> *However, for academics the "quid pro quo" was compulsory retirement and it was therefore considered that continuing to include grades 8 to 10 (which matched the boundary for Congregation membership) "would provide a fair, practical and justifiable boundary for coverage""*

77. We had wondered whether this suggested a distinct legitimate aim in Mr Field-Johnson's case – something along the lines of solidarity or commonality between the academic and non-academic staff. However, Mr Jones explained that this was not the case, and that the legitimate aims relied upon in Mr Field-Johnson's case were the same as for the academic staff.

*The claimants' position in relation to the aims – the academic claimants*

78. The academic claimants' position on the Overarching Aim is that it is in principle capable of amounting to a legitimate aim but "*it adds little because it is wholly dependent on* [the respondent] *establishing other aims are legitimate and that the EJRA is a proportionate way of achieving them.*"

79. As for the Inter-generational Fairness Aim, the academic claimants accept that in principle such an aim can be legitimate, but that if it is expressed in worldwide terms it must also be justified on that basis.

80. The academic claimants accept that refreshment of perspectives and of areas of research can be legitimate aims (as regards the "Refreshment Aim").

81. The academic claimants do not accept that the Succession Planning Aim is a legitimate aim for the purposes of justifying direct age discrimination, as it is a "*purely individual reason particular to the employer's situation*" and therefore not a legitimate social policy aim.

82. The academic claimants accept that the Promoting Equality and Diversity Aim is a legitimate aim, but go on to make points in relation to proportionality.

**The aims in relation to administrative staff**

83. There are, in principle, separate steps of assessing the legitimacy of the aims, whether the EJRA is capable of meeting those aims and proportionality to be dealt with in assessing justification. We will do that in the case of the academic staff, but we consider it appropriate at this stage to consider in general the aims in relation to administrative staff such as Mr Field-Johnson.

84. The Review Group reached the striking conclusion in relation to "*other academic staff, ALC6 staff and staff in grades 8-10 research and administrative and professional roles*" (including Mr Field-Johnson) that *"… there was no evidence that the EJRA is contributing to turnover in these grades or that it is impacting the Aims.*"

85. The Review Group go on to say that:

> *"Opportunities for refreshment and career advancement for individuals are created by turnover and grade growth. These grades are already the more diverse with the proportion of women in them varying from 42% to 54.6% … and steadily increasing proportions of BME staff (except in the Other Academic group …) and staff with disabilities (except in the ALC6 category …). These grades are not subject to joint appointments or generally to unusually long notice periods, which makes succession planning easier.*
>
> *The Group considered whether it was likely that changes in pensions would result in a change in behaviour by staff in these grades and an increase in the proportion seeking to remain in employment beyond the EJRA. Given that the proportion of staff in these grades that will reach the EJRA in the next five years is small, except for among the ALC6 grade where there is no history of staff seeking to work beyond the EJRA, it was decided that this was unlikely.*

*The Group considered whether weight should be given to the desirability of consistency between the most senior academic, research and administrative and professional grades, as it was during the 5-year review in 2017. However, this would mean that these grades were retained within the EJRA even though the ten year data now demonstrates that the policy is not having a significant impact on turnover or the achievement of the Aims. As a result, the Review Group decided that in the interests of applying its principle of being data-driven, this argument should not take priority over the conclusions that could be drawn from the data.*

*As a result, the Review Group recommends that all of these grade groups – ALC6s, Other Academic, grade 8 to 10 research staff, and grade 8 to 10 administrative and professional staff - are removed from the coverage of the EJRA. Given that it is not anticipated that this will result in a substantial increase in the number of staff in these grade groups choosing to stay in employment beyond the age of 68 in the next five years, no alternative measures are recommended in support of the Aims."*

86. On the face of it this is a complete repudiation by the Review Group of any idea that the EJRA was justified in relation to senior administrators.

87. The Review Group's conclusions cannot be considered determinative as a matter of law on the issue of justification – that is a matter for the tribunal – but it is for the respondent to demonstrate justification, and it is the respondent who we would expect to produce the necessary evidence showing that the EJRA is capable of contributing to the aims and (at least for the purposes of proportionality) is contributing or can reasonably be expected to actually contribute to the achievement of the aims.

88. Mr Jones has not suggested that the Review Group was wrong in concluding that the EJRA was not impacting the aims in respect of administrative staff, nor has the respondent produced any evidence to suggest that this conclusion was wrong. It is not suggested that the Review Group's conclusion in 2021/22 was not an accurate description of the situation that applied at the time of Mr Field-Johnson's retirement in 2019.

89. Given that, we are at something of a loss as to how the respondent seeks to justify the EJRA in relation to senior administrative staff. We have set out above the totality of Mr Jones's written submission on the point. His answer to the question posed by Mr Field-Johnson is that Congregation (of whom Mr Field-Johnson was part) had decided that senior academic and senior administrative staff should be treated alike. That solidarity or common cause between the

academic and administrative staff might be seen by some as admirable, but it comes nowhere near justifying age discrimination.

90. There are a whole range of problems with this as justification. First, if that solidarity was the aim there is nothing about it that amounts to a social policy aim. Second, if that solidarity was the aim it has never been pleaded as such. Third, as pointed out above, Mr Jones said that this was not the aim and that the legitimate aims were the same in every case.

91. If we are to look at the legitimate aims in relation to senior administrative staff, there is very little for us to go on. The argument before us proceeded entirely in relation to academic staff. We understand that administrative staff might have the same pension restrictions as academic staff, which is said by the respondent to have some relevance to the Inter-Generational Fairness Aim, but there was nothing to suggest that senior administrative staff were appointed from a worldwide pool, and essentially we heard nothing meaningful about what Inter-Generational Fairness might mean for administrative staff. Similarly, there was no suggestion from the respondent as to how "Refreshment" (in the sense of new perspectives) or "Succession Planning" might apply in the administrative context. Administrative staff do not typically hold joint appointments with colleges. "Promoting Equality and Diversity" may be relevant in the case of senior administrative staff, but we have not been referred to anything from the respondent to show that that was a need they had in 2019 or anything to contradict the Review Group's conclusion that the EJRA is not impacting the Aims for the senior administrative staff.

92. Mr Field-Johnson appeared during the conduct of his claim to be somewhat surprised that the respondent had continued to oppose his claim given the conclusion of the Review Group. We share that surprise. With the Review Group having reached that conclusion there was clearly (in practical if not in strict legal terms) an onus on the respondent to show why the Review Group were wrong, but in reality the respondent has done nothing to contradict the Review Group's decision or to show that the Aims had some relevance to the position of senior administrative staff. At best the respondent's view seems to have been that what is good for the academic staff is good for the administrative staff, but that is no basis on which to justify age discrimination.

93. We can reach our conclusion in relation to Mr Field-Johnson at this point: for senior administrative staff such as him the EJRA was not a proportionate means of achieving a legitimate aim or aims.

94. In his submissions Mr Sugarman briefly suggested that this (and the accepted removal of around 60% of affected staff from the EJRA following the ten year review) meant that the EJRA as applied generally could not be justified. It was

"*plainly too wide*". We note that argument. However, the vast majority of the argument from the parties proceeded on the basis that the question of justification of the EJRA could and should be looked at separately across the different groups of employees caught by it, and that is what we will do.

**The aims in relation to academic staff**

*The legitimacy of the aims*

95. In order to be capable of justifying direct age discrimination, the aim in question must be a "*social policy objective …, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness*"".

96. While the academic claimants make various points in relation to the different aims and their definition, the only one that they do not accept to be a potential legitimate aim is the "Succession Planning Aim". The "Succession Planning Aim" is "*facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate University's joint appointment system*".

97. The respondent's reliance on "*the collegiate University's joint appointment system*" is clearly problematic. First, of the categories of employee we are dealing with, the only one it could be relevant to is the associate professors. In fact, none of the claimants in this case are associate professors, though it appears that Prof Snidal as a Reader did hold a joint appointment. Second, as Mr Sugarman points out, it is one of a number of areas where the respondent's esoteric processes are relied upon in support of possible legitimate aims or as ruling out alternative methods of meeting the aims. The respondent has throughout its history worked in collaboration with the colleges with which it is associated. These colleges are independent bodies, yet the respondent cannot do its work without the colleges and the colleges cannot do their work without the respondent. Each depends on the other, and both benefit from their association with each other. One of the ways they work together is by means of joint appointments. The respondent typically bears the majority of the cost of an associate professor (and benefits from most of their time) but the college also funds part of the associate professor's salary and the associate professor has a contract of employment with the college as well as the respondent. It is the respondent's case that complexities arise from this which require predictable retirement dates. Both the respondent and a college will have to agree on a new recruit and (it is said) there may be delays and difficulties if the college and respondent disagree on the areas that individual should be specialising in.

98. The joint appointment system is time-honoured, and many will see it as an attraction or benefit of the respondent's systems. However, it seems to us to be stretching a point too far to consider the facilitation of joint appointments to be a "social policy objective" of a "public interest nature". There is nothing to suggest that joint appointments are a matter of public interest or social policy. There appears to be no movement in favour of joint appointment or promoting joint appointments at other academic institutions. As far as we are aware there are no studies showing that joint appointments are inherently desirable or promote and advance society in some way. The respondent has traditionally had this means of appointing associate professors, and has chosen to continue to use it. Few other institutions do this. Most universities in this country are not collegiate, but continue to do their work. So far as the Overarching Aim is concerned, it has not been suggested to us that the respondent's high standards in some way require this joint appointment system. That cannot be the case, since the most senior grade of professor – statutory professors – does not use joint appointments.

99. We find that the respondent cannot rely on its joint appointment system for associate professors (or Readers) as part of the legitimate aim of succession planning, since this is not a social policy objective. It also does not promote the Overarching Aim of high standards.

100. Beyond that, the academic claimants object to the Succession Planning Aim as a whole being a legitimate aim. Beyond the question of joint appointments, they say that "*facilitating succession planning by maintaining predictable retirement dates*" is (if it is an aim at all) a private aim of the respondent, rather than a social policy objective.

101. We accept, in principle, that recruitment for such senior roles will be a difficult and lengthy task, involving a worldwide search. Even once a suitable candidate has been identified there may be delays in them taking up their post, as terms are negotiated and arrangements made for a possible international move. We note that on occasions the respondent will prefer to leave statutory professor positions vacant rather than appoint someone who does not meet the expected standards. However, there remains a question as to what about "predictable retirement dates" amounts to something other than a "*purely individual reason … particular to the employer's situation*". We know that the vast majority of British academic institutions do not consider "predictable retirement dates" to be something that they need in order to carry out their work. Perhaps there are greater difficulties in recruiting at the high level the respondent requires – but that seems to be a paradigm example of a "*purely individual reason … particular to the employer's situation*", rather than a social policy objective of succession planning through predictable retirement dates being achieved. If there is a

social policy objective of enabling succession planning through predictable retirement dates it is surprising that the statutory default retirement age was ever abolished by Parliament.

102. The Succession Planning Aim is not a legitimate aim capable of justifying direct age discrimination as it does not fall within the category of social policy objective such as would be required to justify direct age discrimination.

103. There remains the question of whether, even if not a social policy aim in its own right, it can contribute to the Overarching Aim.

104. As we have already said, there was no evidence before us as to how joint appointments lead to or facilitated high standards, but do "predictable retirement dates" lead to or facilitate high standards? There was no evidence before us that they do, and we do not regard it as Cockram-obvious that they would. The Succession Planning Aim is not a legitimate aim either in its own right or in support of the Overarching Aim.

105. That leaves the "Inter-Generational Fairness Aim", the "Refreshment Aim" and the "Promoting Equality and Diversity Aim" as being agreed (in some form or another) as legitimate aims in relation to academic staff, all said to be in support of the Overarching Aim.

*Is the EJRA capable of meeting the aims?*

106. Each of the remaining individual aims are, according to the respondent, fulfilled in the same manner - by the creation of vacancies into which other employees can be recruited. According to the respondent, that enables Inter-Generational Fairness, Refreshment and Promotes Equality and Diversity.

107. We do not think it is in dispute that the EJRA is capable of creating more vacancies than would exist without an EJRA. Exactly what that amounts to, and how many additional vacancies are created in proportionate and absolute terms remains to be discussed as a matter of proportionality, but in principle it is clear that the EJRA will create more vacancies and therefore is capable of promoting the aims of Inter-Generational Fairness, Refreshment and Promoting Equality and Diversity.

108. There remains the question of how this relates to the "Overarching Aim". This is "*safeguarding the high standards of the University in teaching, research and professional services*".

109. We accept in principle that both the Refreshment and Promoting Equality and Diversity Aim are capable of promoting the achievement of that aim. Although

we heard no evidence on the point, we regard it as Cockram-obvious that the academic environment is promoted by the diversity of thought and approach that both would tend to encourage, and we accept that in order to retain and promote its leading position the respondent may need to move into different areas of study.

110. We have previously expressed some difficulty in understanding what the "Inter-Generational Fairness" aim was in this case. It has typically been presented by the respondent in financial terms, as a kind of "levelling-up" effort to remedy or at least mitigate the financial disparity between the current generation of statutory and associate professors and their successors. There has been talk of the difference in house prices in Oxford and the cost of living generally that would have been faced by existing statutory or associate professors compared with their successors in the younger generation. We have also heard that pension changes have disadvantaged the younger generation, meaning their pensions are likely to be less favourable than those of the older generation. Beyond that, the argument seems to be that without an EJRA the younger generation would have to wait longer than their predecessors to enjoy the financial benefits and prestige that come with appointment to the senior positions in question.

111. What is not so clear is what the respondent says this means when it comes to "safeguarding high standards". Macro-economic conditions may well mean that in any industry or business the next generation of senior leaders is not so financially well-off as their predecessors (although the position is not so clear and practically impossible to assess if we take a worldwide rather than domestic view of matters). However, it is not part of the respondent's case that such financial levelling-up is necessary to attract the right candidates to the role, and if it was part of the respondent's case we have seen no modelling of how that might work or what alternatives there might be. The respondent's position on Inter-Generational Fairness appears largely to be that it is a virtue by itself, not that it leads to higher standards. Putting it bluntly, it has not been suggested to us that Inter-Generational Fairness promotes high standards.

112. There is also the problem, pointed out by some of the claimants, that compelling the retirement of the most senior and experienced people may well, at least in the short term, lower standards. Without suggesting that the replacements of retired professors are in any way intellectually less capable than their predecessors, a newly appointed professor at Oxford is unlikely to have the same reputation as someone who finds themselves being compulsorily retired with twenty or more years' experience in the role. In time the successors can be expected to equal or even surpass their predecessors, but it is reasonable

to expect that in many cases there will be a short-term reduction in standards while the successor develops their own role and professional reputation.

113. For the purposes of the EJRA, the promotion of high standards that the respondent seeks comes about through:

- opportunities for the respondent to expand into new areas of study (including possibly giving up areas of study that it considers to be lower priorities),

- "refreshment" in the sense of providing opportunities for people whose different backgrounds could give them different perspectives on their areas of study, and

- "promoting equality and diversity" in the sense of ensuring the respondent has the widest possible talent pool to recruit from and that those of high ability potential from groups previously underrepresented at senior levels in the respondent are able to apply and be appointed to these senior roles.

*Conclusions on the aims in relation to the academic claimants*

114. We find the following as regards academic claimants and the claimed legitimate aims:

- The Inter-Generational Fairness Aim

  This is a legitimate aim pursued by the respondent and the EJRA is capable of contributing to that aim. It does not support the Overarching Aim.

- The Refreshment Aim

  This is a legitimate aim pursued by the respondent and the EJRA is capable of contributing towards that aim. It supports the Overarching Aim.

- The Succession Planning Aim

  This is not a legitimate aim of the kind necessary to justify direct age discrimination and does not support the Overarching Aim.

- The Promoting Equality and Diversity Aim

This is a legitimate aim pursued by the respondent and the EJRA is capable of contributing towards that aim. It supports the Overarching Aim.

- The Academic Freedom Aim

  This was not an aim pursued by the EJRA.

- The Overarching Aim

  This is a legitimate aim pursued by the respondent. Nothing in the EJRA itself promotes this aim but as referred to above, other aims can support the Overarching Aim.

**Proportionality – the academic claimants**

*Introduction*

115. Much of the argument before us concerned the question of proportionality for the academic claimants. That is, was the EJRA an "appropriate and necessary" means of achieving the legitimate aims?

*The creation of additional vacancies - introduction*

116. The legitimate aims that we have found the respondent can rely on all depend on the EJRA creating vacancies. If we are wrong about the Succession Planning Aim not being a legitimate aim, this too depends on the EJRA creating vacancies. Justification of the EJRA depends on its contribution to the creation of vacancies.

117. The fact that the EJRA does create vacancies is not in dispute. The EJRA will speed up the creation of vacancies and, over time, this will result in additional vacancies being created. A simple example was given in argument: if each professor holds their role for 25 years before leaving then there will be four vacancies every 100 years. If, due to an EJRA, they hold their role for only 20 years before leaving, there will be five vacancies every 100 years. This is not a one-off bringing forward of vacancies. It is an ongoing and sustained creation of vacancies. However, if that example is anywhere near the true situation, it is clear that the number of additional vacancies created will not be large. In that example we have one additional vacancy created every hundred years, and the EJRA accounts for only 1/5$^{th}$ of the vacancies created. The other four arise irrespective of the EJRA.

118. We will look first at the extent to which the creation of vacancies generally contributes to the achievement of the aims, and then look at what the EJRA contributes to the creation of vacancies.

*The effect of additional vacancies on achieving the aims*

119. We have already found that the creation of additional vacancies will contribute to some extent towards the legitimate aims, but now have to assess how much it contributes. At this point we will look at this on the basis of how much vacancies generally contribute to the aims, rather than looking at how much the proportion of vacancies created by the EJRA contributes towards the aims. That step comes later.

119.1. The Inter-Generational Fairness Aim

Aspects of the Inter-Generational Fairness Aim are better dealt with under the Refreshment Aim and the Promoting Equality and Diversity Aim. The distinct element of the Inter-Generational Fairness Aim is "*fairness in the allocation of this past resource between present and future generations of senior Oxford employees"*.

Given this framing of the Inter-Generational Aim it is bound to be the case that the creation of vacancies contributes directly to the aim. Almost by definition those compulsorily retired are the present generation and those taking up the vacancies are the future generation. Whether this amounts to "fairness" is essentially a matter of proportionality.

119.2. The Refreshment Aim

The Refreshment Aim had two aspects – moving into new areas of study and recruiting individuals with "new perspectives".

The respondent has offered no specific evidence on the extent to which the creation of vacancies promotes this aim. We have accepted that it must do to some extent, but there is no evidence as to how far it has actually been fulfilled through either vacancies generally or the additional vacancies created by the EJRA.

We do have the "case study" example of the English department, which gives us two vacancies that have contributed to the Refreshment Aim (see below), but there is nothing to show the extent to which this applies more generally within the respondent's organisation. We do not know whether vacancies are used to move into new areas of study often, or hardly at all. We do not know whether those recruited to the vacant

positions offer new perspectives often or hardly at all. Is one in every 100 vacancies used to move into new areas of study and/or new perspectives, or is it 50 in every 100 vacancies? We have no idea and the respondent has offered no evidence on the point.

Recruiting into new areas of study ought to be capable of quantitative analysis. There may be room for dispute around the margins, but on the whole the respondent ought to be able to identify when a vacancy (however arising) has been used to recruit into a different area of work or specialism. It has not done so.

We accept that "new perspectives" are more difficult to measure. It cannot be assumed that simply because someone comes from a non-traditional background they are likely to bring new perspectives, and protected characteristics held by new appointees are not to be taken as the same as "new perspectives". However, given that this is a stated aim of the EJRA it is unfortunate for the respondent that it has taken no steps to measure anything towards the achievement of that aim. We accept as a general principle that a more diverse cohort of recruits would be likely, on the whole, to contribute new perspectives, but we have nothing more to go on than that.

Beyond a general idea that the creation of vacancies will tend to permit moves into new fields of study and the appointment of individuals with "new perspectives" we have been given no idea by the respondent of how much the creation of vacancies will promote either, and the respondent has not attempted to measure this.

119.3. The Promoting Equality and Diversity Aim

There is material that we can go on in looking at how far the creation of vacancies contributes to promoting equality and diversity.

We will look at this only on the basis of diversity of sex, since that is the only protected characteristic on which the respondent has any satisfactory statistics.

This is what the Review Group's report said:

*"The data on statutory professors demonstrates a slow improvement in gender diversity over the ten years of the EJRA from 10.4% women in 2011 to 20.2% in 2021, with a slight acceleration since 2013/14 when inclusive recruitment processes were introduced for this grade. The rate of improvement had been slower for the five years preceding the*

*introduction of the EJRA … 32.5% of those recruited as statutory professors in the last five years were women, and only 3.7% of those retiring …*

*Progress in improving diversity among Associate Professors has been slower, with the proportion of women increasing from 26.6% to 31.3% in the last ten years. The Group consider this to be frustrating, but once more decided that maintained turnover was contributing to the increase. The very low turnover rate (3-4%) among this group means that changes in diversity will always be slow, but women comprise 38.9% of new joiners to that grade and only 23.5% retirees."*

Mr Sugarman points out in his closing submissions that the Review Group may be taking a too optimistic view of progress. He says that the 2020-21 Equality Report from the respondent shows women make up 19% of statutory professors, with no improvement at all over the last 4 years. He points out that even a rise from 10.4% women to 20.2% women amounts to only 1 percentage point a year over a ten year period, and that takes into account any appointment to a statutory professorship, regardless of whether the vacancy was or was not created by the EJRA (and we know that the vast majority of statutory professor vacancies arise independently of the EJRA). Similarly the rise in proportion of women who are associate professors is only 0.5 percentage points a year over ten years, despite this being a population in the region of 10x greater than that of statutory professors.

It is not surprising to find that there is a greater proportion of women amongst new appointees to statutory professor and associate professor roles than there is in those who are leaving the roles (whether through retirement or other reasons). We also note that there is no sense in which it can be said that the gender or sex diversity in these roles is satisfactory. Even within the new appointees to both roles there remains a substantial imbalance between men and women.

Given that the appointees are a more diverse (in terms of sex or gender) cohort than those who are leaving the jobs, we accept that vacancies generally contribute to achievement of this aim, although both the Review Group and Mr Sugarman are right to point out that progress is very slow.

119.4. The Overarching Aim

We accept that it is impossible to measure the extent to which the creation of vacancies contributes to the Overarching Aim. The best we

or the respondent can do is to look to the extent to which vacancies contribute to the achievement of the aims that we have found to contribute to the Overarching Aim.

*The creation of additional vacancies by the EJRA - introduction*

120. The extent to which the EJRA contributes to the pool of vacancies that will already exist amongst statutory and associate professors is a key measure of its proportionality. It is for the respondent to demonstrate the proportionality of the EJRA. However, the respondent has not at any point over the past ten years taken any steps to keep any contemporaneous records of the effect of the EJRA. This is surprising given the ostensible importance of the EJRA to the respondent. An obvious way of monitoring the effect of the EJRA would be through exit interviews. We were told that academics were reluctant to undertake exit interviews, but it does not appear that this was ever something that was attempted with any determination by the respondent.

121. Given the lack of any contemporaneous records, the respondent has had to fall back on surveys either of future intentions or (to some extent) past experiences. These will always be less reliable than contemporaneous records. They suffer from self-selection, a high rate of "unknowns" and possibly wishful or inaccurate thinking by those completing them.

122. We also have, in Ms Thonemann's oral evidence, a small scale case study of what occurred in the English department.

*The creation of additional vacancies – mathematical models*

123. Two attempts to model the extent to which vacancies were created were prepared for the Review Group.

*The creation of additional vacancies – mathematical models – the Impact Tables*

124. The first was Ms Thonemann's "Impact Tables". When using the assumptions she considered most accurate, she concluded that "*35% of SP vacancies and 17% of AP vacancies are associated with the EJRA*".

125. Mr Sugarman criticised the Impact Tables on the basis that they did not take account of vacancies that would arise in the absence of the EJRA on account of later retirements. It is self-evident and accepted by the respondent that even if there were no EJRA no-one would remain in their position indefinitely. The EJRA brings forward vacancies that would have occurred later in any event. A product of that will be more vacancies overall, as described above. For instance, a professor who would have retired in 2022 under the EJRA, but who

wants to work on, may work on until, say, 2025. At that point they will leave and a vacancy will arise. The key measure is the *net* increase in vacancies. Any model must give credit for vacancies arising on someone leaving later than the EJRA. Ms Thonemann's did not. She accepted this, and it was the respondent's position that Ms Thonemann's Impact Tables were never intended to show the net increase in vacancies. We have some doubts about that given correspondence between Ms Thonemann and Dr Turner, during which Ms Thonemann questions why there is such a difference in outcomes between her and Dr Turner's "Little's Law" model (see below). The Review Group's final report does not identify the Impact Tables and Little's Law model as being attempts to measure different things. It says "*the modelling … provides a mixed picture*" and goes on to give the results of both the Impact Tables and the Little's Law analysis.

126. Ms Thonemann's Impact Tables do not measure the key question of the net creation of additional vacancies, and we do not consider them to be of assistance in answering that question.

127. We do, however, note that the Impact Tables are the analysis that is most favourable to the respondent in considering the creation of vacancies, and that even with those we see that for statutory professors 65% of vacancies arose independently of the EJRA and for associate professors more than 80% of vacancies arose independently of the EJRA.

*The creation of additional vacancies – mathematical models – Little's Law*

128. At some point the respondent had identified a paper by Larson and Gomez Diaz of the Massachusetts Institute of Technology (MIT) called "*Nonfixed Retirement Age for University Professors: Modelling Its Effects on New Faculty Hires*" as being potentially relevant to the Review Group's work. This applied "Little's Law of Queuing" to retirement of academics within MIT.

129. Dr Turner works in the respondent's Student Data Management and Analysis section as a Senior Statistical Analyst. She and a colleague were commissioned by the Review Group to conduct a similar exercise, applying Little's Law to retirement of the respondent's academics.

130. We were not referred in any detail to what Little's Law was, nor would we have been equipped to carry out any analysis of the detail of Little's Law. At points it was explained to us as being a more sophisticated version of the analysis Prof Ewart had undertaken in his case. We note that Dr Turner and her colleague were supplied with Prof Ewart's workings. (All parties offered commentary and observations on the statistics Prof Ewart had produced for his case, but those were not in evidence before us and we will say no more about them.) It is clear

that the Little's Law analysis carried out by Dr Turner and her colleague was addressing the correct question as regards net creation of vacancies, and took into account that we are talking about bringing forward vacancies that would always occur at some point.

131. There is scope for argument about the assumptions that went into the analysis, and what conclusions we draw from Dr Turner's figures, but based on what we have heard, if a mathematical model is to be used, Little's Law is appropriate. It is not suggested by the claimants that Dr Turner and her colleague made any errors in their application of Little's Law, and Dr Turner was at pains to emphasise that her role in the process was that of a technical expert. She was applying the agreed form of analysis to assumptions and data supplied by Ms Thonemann, without herself critiquing those assumptions, data or attempting to explain or analyse her conclusions.

132. There was at one point some argument about whether the study could properly be carried out given that the respondent lacked start dates before 1998 and also had no end dates for those currently in post, but that was explained by Dr Turner and it appears she has appropriately accommodated that in her study.

133. Dr Turner herself describes some of the difficulties with applying a mathematical model to the EJRA: "*it is never possible to model for hypotheticals. The best you can do is to model what the likelihood is of them behaving in a certain way, relying on how they behaved in the past. The problem with the EJRA is that there has always been a compulsory retirement age so past behaviour is not a reliable indicator of future behaviour.*" This is one of the reasons why a mathematical analysis such as this can only ever be second best to contemporaneous records such as may emerge during exit interviews.

134. Following various discussions and revisions, Dr Turner and her colleague submitted their final report. Table 4.1 of their report gives the effect of changing, or abolishing, the EJRA for associate professors. An EJRA of 72.5 was taken as equivalent to abolishing the EJRA. With no EJRA there is a decrease from 68.4 to 64.8 of the "annual recruitment rate". In other words, the EJRA contributes 3.6 vacancies a year out of 68.4. Around 5% of associate professor vacancies are attributable to the EJRA.

135. The figures for statutory professors are at table 4.8 of their report. The study concluded that the EJRA accounted for 1.7 of 20.7 annual vacancies. Around 8% of statutory professor vacancies are attributable to the EJRA.

136. The report contains sections emphasising how sensitive these figure were to different inputs, such as age on appointment, length of tenure and possible increases in faculty size.

137. The Review Group says this about the Little's Law study in its final report:

> *"The modelling based on Little's Law of Queuing, conducted by the Student Data Management and Analysis Team, attempted to look ahead and estimate the likely future impact on recruitment rates as a result of any changes in the EJRA. The modelling was only possible for the Statutory Professor and Associate Professor grade groups because a steady population is required. While both of these groups experienced some grade growth, their populations were considered sufficiently stable for these purposes. The modelling provides an estimate of the effects of the impact on these grades if the EJRA were to be abolished entirely. For Statutory Professorships there would be a decrease of 1.7 posts per annum (i.e. a decrease of 8.2% of yearly recruitment. For Associate Professorships there would be a decrease of 3.6 posts per annum (i.e. a decrease if of 5.3% of yearly recruitment). The higher the retirement age, the greater reduction in the recruitment rate."*

138. The respondent has never committed to a definitive statement of how much it believes the EJRA has contributed to vacancy creation, but this modelling is the closest it has come to that.

*The creation of additional vacancies – mathematical models – Little's Law - assumptions*

139. Dr Turner and her colleague did not take any part in collecting the data to which they applied Little's Law. This was supplied to them by Ms Thonemann.

140. The data assumed that 55% of associate professors and statutory professors would want to work beyond the EJRA age if they could. That percentage was called the "Continuation Probability". The respondent says it gets this figure from an online survey it carried out. The report on the survey given to the Review Group notes the following:

> *"242 responses were received, and 141 pieces of free text feedback were submitted. Of the respondents:*
>
> *- c.20% were from each of Humanities and MPLS, with all divisions represented. Relatively few were from Medical Sciences (43, 18.1% of responses)*
>
> *- 53% identified as academic, with 33% describing themselves as administrative and professional. Research staff were under-represented.*
>
> *- Over 80% hold permanent contracts and over 80% work full-time.*

*- The gender split was fairly equal (53%/47%).*

*- Cover a range of ages with older groups more heavily represented.*

*- 77% are subject to the EJRA (ie in grade 8 or above).”*

141. The claimants criticise the survey data as being from a small number of responses and, more substantially, as being self-selecting. Completion of the survey was voluntary. While publicised in the Gazette it may not have been well known, and those who felt strongly about the EJRA (on one side or another) may have been more inclined to complete the survey than others. A small sample size is not necessarily a problem if those responding are representative of the group as a whole, but there was no attempt by the respondent to ensure that the replies were representative of any group as a whole. Tellingly, the single most popular response to the question “*when do you think that you are most likely to want to retire?*” is “*I don’t know yet*” (around 30%).

142. It is difficult for us to see how this survey leads to the conclusion that 55% of academics would want to stay on if there was no EJRA. This figure first appears at “Assumption E” in support of Ms Thonemann’s Impact Tables. This is the assumption that was used for the Little’s Law calculations. Box 7 of the report on the survey has 42.5% of respondents indicating they would want to retire after 68. That is reflected in the report for the review group, which says “*43% of respondents would wish to retire at an age older than the current EJRA*”. We were told by Ms Thonemann that the 55% figure came from the raw data and (we think) was the proportion of those within the academic group who wanted to work on beyond 68. Mr Jones points out that this 55% figure was not challenged in evidence by the claimants, but the lack of any kind of transparency in that crucial figure does not give us much confidence that the figure is reliable.

143. The claimants point to a number of earlier surveys producing figures more in the region of 25% for Continuation Probability. It is not in dispute that the lower the Continuation Probability the lower the effect of the EJRA on vacancy creation.

144. The Continuation Probability is a crucial assumption for measuring the effectiveness of the EJRA in producing vacancies. In the absence of any attempt at contemporaneous record-keeping, surveys are the best the respondent has to fall back on, but regarding any particular survey as accurate is problematic, given that people are addressing hypothetical questions and where the predominant response is “don’t know”.

145. Another crucial assumption is how long, on average, someone who did not retire at the EJRA would stay on for. There would, in practice, be considerable differences in how long people may wish to stay on for. Some may be as ambitious as Prof Flyvbjerg, but for others it may simply be a matter of a few months to finish off work that they would not have been able to get an EJRA extension for.

146. The Little's Law calculations took a EJRA of 72.5 as being equivalent to no EJRA at all. In her witness statement, Dr Turner says this was derived from the survey, but it is not clear how, and on questioning she said she had simply been provided with the figure by HR. None of the collected answers to the survey questions would seem obviously to lead to that conclusion. The Little's Law report says: *"The value of 72.5 is derived from summary of responses of the 101 survey respondents to the EJRA questionnaire for current University staff who felt they knew when they want to retire. Specifically it is assumed that out of those post holders who decide to stay past 68, 37% will retire at 70, and 63% will retire at 74*". This is very peculiar, not least as there is clearly in the survey a category of people who have said they wanted to retire aged 76 or over (7.6%). It is also completely unclear how 242 respondents becomes "*101 survey respondents … who felt they knew when they want to retire*". We have referred before to the large number of "don't knows", but they do not account for 141 people, and everyone else seems to have given an age range within which they intend to retire.

147. The claimants also point out that the Little's Law analysis assumes that the numbers of statutory professors and associate professors is constant – that it does not increase or decrease.

*The creation of additional vacancies – case study*

148. Ms Thonemann gave us this case study in her witness statement:

> *"Case study: English Faculty*
>
> *The English Faculty employs 71 Professors (8 SPs and 63 APs) and includes about the same number again of Tutors and Research Fellows (some fixed-term and some permanent), who may be employed by the colleges rather than the University, but who are members of the Faculty. There are a small number of more junior posts, such as faculty lecturers and fixed-term post-doctoral researchers. At any one time, there are roughly a thousand students studying within the Faculty at undergraduate level, and another three hundred at graduate level, making Oxford the largest English graduate school in the country.*

*It is diverse in terms of sex (56% of APs and 38% of SPs (3 out of 8) are women), but less diverse in terms of other protected characteristics ... It is of particular concern to the Faculty that it lacks diversity in terms of race.*

*In the absence of the huge salaries offered to members of some faculties by US higher education institutions, which sometimes results in APs (and less often SPs) moving to the US, retirement is the main reason for turnover among academic staff in the Faculty. Turnover is low, at c. 2.2% p.a. for APs and 4.3% p.a. for SPs (a three-year average in each case).*

*This makes it challenging for the Faculty to refresh their offering and improve diversity. Oxford is under great pressure to improve the diversity of its student body and in order to do that, it must (among other things) diversify its curriculum and its teaching staff, the visible face of the faculty to prospective applicants and to students. Traditionally, teaching and research in the Faculty has covered the entire history of literature in English from the Anglo-Saxon period to the present day, along with language studies. Traditional strengths have included the medieval and early modern periods. These are less attractive to prospective students than in the past and there are few academic staff who research and teach in those areas that appeal to a diverse student body.*

*In response to this problem and in order to maximize the impact of the turnover they have, the Faculty has a ten-year plan to enable it to refresh its curriculum and Faculty by recruiting diverse staff to teach a broader curriculum. For example, the Faculty is attempting to grow its nascent strengths in world literature and film studies. It aspires to strength in post-colonial and 20th century literature. The funds available to grow the Faculty to achieve this are very limited: the ability to grow the student body to generate funds through fees is constrained … and English students tend not to become exceptionally high earners who donate to endow posts at their alma mater. There is a smaller 'pot' of research funding available for the humanities than for the sciences nationally. As a result, this refreshment of the Faculty can only be achieved by replacing those who leave with those who work in the areas the Faculty needs to grow. This must be done in a planned way, so that papers are only offered when there are postholders available and with the right knowledge and experience to meet the teaching needs. This succession planning is only possible with a retirement policy that provides certainty about when particular posts will become vacant.*

*Two case studies will serve to demonstrate how this works in practice.*

*Case study 1: Medieval literature to Global literature*

*A female Associate Professor who worked on medieval literature retired. In accordance with the ten-year plan, her post was repurposed to the modern end of the spectrum and was advertised as a specialist in global literature. After open competition, the post went to a female, BME professor from Liverpool University, who brought with her a research team comprising 3 post-docs and 2 DPhil students, all funded through an ERC grant on which she was the Principal Investigator.*

*As a result, the Faculty diversified its staffing, and refreshed its curriculum in a way that will make it more appealing to a diverse studentship, and five early career researchers were able to progress their careers by moving to Oxford. In addition, a vacancy was created for a professor at Liverpool; this would have been filled by someone in a mid-career post such as a lectureship; shortly afterwards one of Oxford's junior researchers was appointed to a lectureship at Liverpool.*

*Case study 2: Diversification, refreshment and chains of vacancies*

*Through their University contracts, academic staff provide lectures and seminars, examine and conduct research. All APTFs hold a joint appointment with a college, through which tutorial teaching is delivered. APNTFs and SPs also have a college association and play an active role in the academic life of their college. Most colleges who offer English as an undergraduate degree have two or more APs or SPs.*

*One such college had a small, mixed-gender team of academic staff, which included two white male academic postholders, who were due to retire under the EJRA in (a) 2013 and (b) 2016.*

*The postholder due to retire in 2013 successfully applied for an extension to his employment until 2016. His post was advertised and he was replaced by a gay man who works on African American literature. This diversified the Faculty and the curriculum, allowing the Faculty to offer courses and supervision in an area that appeals to a diverse range of students.*

*The new postholder had previously held a less senior academic position in the University; in this, he was replaced by a scholar who had previously held a tenure track position at a University in the United States; this position would, in turn, have been filled by another scholar, and this would, in the normal turn of events, have freed up a vacancy for*

*someone at the start of their career. Thus a 'chain' of vacancies is created by the retirement of one senior postholder.*

*The second postholder retired in 2016 and was replaced by a BME woman, of non-UK nationality, increasing the racial diversity of the Faculty. The new postholder also came from an Associate Professor post at an American university, providing another chain of vacancies."*

149. This is, ostensibly, a compelling account of the EJRA being successfully used for succession planning, a move into new fields of work and promoting diversity. We will consider it in more detail later on, but note for now that in common with much of the respondent's other material it proceeds both as if compulsory retirement is the only way in which vacancies arise, and on the basis that those vacancies will never arise without compulsory retirement. In fact, as we have seen, even on the respondent's best figures (the Impact Tables) a substantial majority of vacancies for both statutory and associate professors arise otherwise than via the EJRA, and a vacancy that is created by the EJRA is a vacancy that is created earlier than it otherwise would have been, not a vacancy that would never have arisen at all. (Albeit that over time consistent earlier creation of vacancies will amount to more vacancies, as with the earlier example we gave.)

150. If the Little's Law modelling is correct, in the case study 1 example, one in every 20 associate professor vacancies in the English department can be attributed to the EJRA. The case study says nothing about the other 19 vacancies that would have arisen in that time, or why they could not be used to the same effect.

151. The best that this case study does is to give us an example of how the EJRA is capable of supporting a number of the aims contended for by the respondent. We have already addressed the EJRA in relation to the aims.

*Conclusions on the creation of additional vacancies*

152. The respondent has not made any attempt to measure the effect of the EJRA on actual vacancy creation across the initial ten year period of the EJRA. That is unfortunate, since contemporary records would be a far better way of assessing this than resorting to surveys and mathematical models. We remain at a loss as to why the respondent has not made any attempt to measure this, even after the challenges to the EJRA in Pitcher, Ewart and other cases.

153. The Impact Tables are not a useful measure of the creation of additional vacancies. They assume that a vacancy that is not created by the EJRA is never created at all, and that cannot be right.

154. The Little's Law modelling is the best mathematical model available. On the assumptions adopted by the respondent it shows that the EJRA provides 8% of the available vacancies for the statutory professors and 5% of the available vacancies for the associate professors.

155. The Little's Law model relies on assumptions. In the absence of contemporary records, the assumptions used by the respondent rest on weak foundations. They rely on a self-selecting survey of individuals answering hypothetical questions, to which the largest single answer on the most critical question is that those surveyed "don't know". This survey is used to create assumptions of Continuation Probability and average length of work beyond the EJRA for which we have not seen the underlying figures or calculations, and, at least on the question of average length of work beyond the EJRA, where the explanation given does not seem to make sense.

156. It has always been for the respondent to justify the EJRA and demonstrate its proportionality. The best way they have of doing this is the Little's Law model. The Impact Tables and English department case study do not assist with this. We have given serious thought to whether the problems with the survey and the assumptions behind the Little's Law model are so substantial that we should regard it as of no evidential value at all. If we did that take that course of action, it would not be a criticism of Little's Law as a mathematical model, but of the inputs that were used by the respondent. We have considered that, on balance, we should take the Little's Law model into account as the best evidence the respondent has to offer of the EJRA's effect on vacancy creation, but we do so with considerable caution.

157. Given our doubts about the data that went into the Little's Law model we conclude that the best approach is to regard this as demonstrating an increase of up to, respectively, 8% (statutory professors) and 5% (associate professors) on the creation of vacancies attributable to the EJRA. We consider the true figures to be less than that because the Continuation Probability of 55% seems too large compared to that shown in previous surveys and because the Little's Law model neglects the small but appreciable increase in associate professor (but not statutory professor) positions that there has been over time. We are not in a position to put precise figures on this, but it seems to us that the true effect of the EJRA on vacancy creation will be less than 8% and 5%.

*Chains of vacancies?*

158. While we have focussed on the consequences of vacancy creation at the culmination of an academic career (statutory and associate professor level) the respondent has emphasised that the creation of a vacancy at such as senior level will create a "chain" of further vacancies at more junior levels – perhaps

as many as 4 or 5, as people step up to take vacancies left by those appointed to more senior jobs.

159. It is Cockram-obvious that this chain of vacancies will be created, but it is not at all clear what this contributes to the respondent's aims. The aims relied upon by the respondent and the evidence cited by the respondent in support of the EJRA achieving those aims were all focussed on the senior level. Lack of diversity is particularly pronounced at the senior level. New perspectives or areas of study could be said to be particularly significant at a senior level, where there are greater opportunities to set the agenda for areas of research or approaches to research. We acknowledge that vacancies at a senior level will lead to a chain of vacancies, but that does not assist the respondent in justifying the EJRA when the evidence as to the need for achievement of the legitimate aims has been on achievement of those aims at that senior level, rather than at more junior levels. We have been given no evidence to suggest how creation of vacancies at more junior levels contributes to the aims put forward by the respondent, and given the respondent's recruitment practices those more junior vacancies may occur anywhere in the world. For them to be created within the respondent's organisation would be the exception rather than the rule.

*The discriminatory impact – generally*

160. The EJRA means that an individual is dismissed on attainment of a particular age. That is, on the face of it, about the most extreme discriminatory impact possible in the realms of employment. However, the respondent has put forward a number of reasons that it says show the discriminatory impact is not as great as it might first appear.

*The discriminatory impact – extensions*

161. The first is that extensions are available in suitable cases.

162. Given the possibility (identified by Dame Janet Smith) for generous extensions to undermine the ostensible aims of the EJRA, extensions under the EJRA have had a difficult history. It appears that initially they were readily granted, though without an appropriately transparent procedure. Since then they have become more restricted.

163. The first point to note about any extension is that if it is offered it is not simply an extension of the existing role. The individual in question almost always has to give up their substantive role. The extension is only granted if they are completing a project or duties (they cannot take up new work) and have covered their full costs. There is no such restriction for those in substantive roles prior

to retirement. There is an additional requirement for "exceptional circumstances".

164. At most it seems that an extension provides some limited opportunity to complete work already underway and funded, subject to onerous approval requirements. That is at best a limited kind of convenience for completing work, and not an appropriate substitute for the substantive role the individual previously occupied

*The discriminatory impact – Emeritus and other continuing roles*

165. The second is that those who retire under the EJRA are able to retain Emeritus roles and carry out ad hoc teaching and supervision work for the respondent.

166. We understand that Emeritus roles are unpaid, but entitle the holder to access to library and social facilities operated by the respondent, along with office space, albeit that is likely to be shared office space as opposed to the private office they may have enjoyed well employed.

167. We also understand that teaching and supervision work is available to be taken and paid on an ad hoc – essentially casual – basis.

168. The "Emeritus" concept could perhaps only work in the field of academia. Essentially the idea is that the individual can remain at work to some extent on a voluntary, unpaid, basis. There may be some who find that attractive, and we can see how it would have benefits for both an individual and the respondent. However, we do not see it as being in any way comparable with the paid role that the individual would have given up. Most obviously, it is unpaid. Beyond that, the working conditions and privileges are less favourable than those that go with a substantive professorship, and it does not carry with it the same opportunities to apply for research grants and build a team around you that would usually be expected in substantive professorship. Emeritus status may have some appeal or be better than nothing, but it is not comparable with the substantive role that the individual will have given up. The teaching and supervision work that was available was essentially causal work, again without the opportunity to develop the team that will often be necessary to progress work and explore new areas of research. It is not a substitute for a substantive post.

169. It is also necessary to acknowledge that dismissal by the respondent does not necessarily mean the end of the individual's career. Prof Flyvbjerg is an example of someone who has been compulsorily retired under the EJRA but has gone on to take a substantive position at another institution, albeit at some personal cost.

170. Prof Snidal was not so fortunate in his applications, and we acknowledge that older workers are likely to find it difficult (but not impossible) to get alternative positions at other institutions. The prospect of working on elsewhere may provide some comfort to some who are retired under the EJRA, but we think it is difficult for the respondent to rely on this as mitigation of the discriminatory effect of the EJRA. The whole point is that the individual loses their career with the respondent. The respondent could not then freeze them out of academia entirely, but it will in many cases be difficult to find alternative work, and that that is found may be at personal cost (as in Prof Flyvbjerg's case).

*The discriminatory impact - quantitively*

171. We are to look at the discriminatory impact on both a qualitative and quantitative basis. In our analysis that follows we see 1.7 statutory professors a year and 3.4 associate professors a year being compulsorily retired under the EJRA when they would have wished to stay on. That is around five people a year.

*The discriminatory impact - conclusions*

172. Dismissal at a particular age has a great discriminatory impact which is not substantively mitigated by the possibilities for continuing work put forward by the respondent.

173. It might be said that having five people a year subject to that discrimination suggests that the discriminatory effect is not great. We disagree. It is certainly the case that not every statutory or associate professor will be subject to this discrimination. Some will have left earlier, and some will have willingly retired. However, there remains a number who will be subject to compulsory retirement against their will, and that number is sufficient to mean that overall the EJRA retains a significant and substantial discriminatory impact.

*The consent of Congregation*

174. The respondent has emphasised, and we acknowledge, its self-governing status. Those who are subject to the EJRA will all (or almost all) be members of Congregation. Every step taken by the respondent to adopt or change the EJRA has either been approved by Congregation or could have been called in for consideration if sought by a bare minimum number of members of Congregation.

175. We acknowledge that there is authority to the effect that that "consent" ought to be taken into account by us in considering proportionality, and we will do so.

*Alternatives*

176. A range of possible alternative ways of achieving the aims was canvassed in evidence and argument before us.

177. As regards "Refreshment", in terms of moving into different academic areas of areas of specialism, it was suggested by the academic claimants that as with any other form of work the appropriate way of addressing this would be by way of redundancies – either on a voluntary or, if necessary, compulsory basis.

178. The evidence from the respondent was the compulsory redundancies, although possible within its statutes, were very rare and were constrained by such onerous procedures as to be highly unattractive as an option. It had, however, recently made some compulsory redundancies of RSIVs in medical research on a change in the priorities of its funders.

179. The respondent went further and said this was a question of academic freedom, and that individuals should not be constrained in their field of study by fear that it may become unfashionable or unattractive and result in their redundancy.

180. For the reasons that follow, we find that the EJRA was not necessary for refreshment of areas of study. However, if it were, we find that making redundancies is a better, non-discriminatory alternative.

181. The respondent ought not to be able to plead the difficulties of its own self-constructed procedures in order to suggest that direct age discrimination was the appropriate way of managing refreshment of its areas of study. The respondent's reference to academic freedom in relation to this is misplaced. Principles of academic freedom are not offended by the idea that at some point the respondent's overall goals for areas of study do not match the individual academic's.

182. Other alternatives were floated by the Review Group, who took the opportunity to interview senior leaders at other institutions, two of whom were not named and the other was Imperial College London. On the whole, these leaders did not miss having a default retirement age at their institutions nor consider its absence a problem. At least one considered it a positive improvement. This evidence seems to have been dismissed by the Review Group with little consideration, as was a report it had itself commissioned from the Oxford Institute of Population Aging.

183. Alternatives put forward included flexible or phased retirement, financial inducements for retirement and earlier conversations about retirement intentions. These were said variously to contribute to vacancies or at least predictable retirement dates.

184. Although we consider that the Review Group was too quick to dismiss these alternatives we do accept that each of these alternatives brings with it its own problems. It appears that at least in principle some form of flexible or phased retirement was already available. Financial inducements were likely to be costly, if effective at all. Earlier conversations would no doubt be of some assistance, but it is difficult to see how they could end up binding an individual to retire if they later changed their mind.

185. The claimants also suggested a later age for the EJRA and the possibility of a more generous extension regime. However, what we are considering is the EJRA as it was at the relevant time, not some variation on that.

186. We think the respondent should have given greater consideration to these alternatives. Earlier conversations may have had some effect, but none have the obvious effect in creating vacancies that the EJRA does.

*Conclusions on proportionality*

187. We have said that we thought that the effect on vacancy creation of the EJRA would be less then the 8% and 5% suggested by the Little's Law study, but we will assume for these purposes in the respondent's favour that it does amount to 8% and 5%. This means that at least 9 in 10 of the vacancies across the statutory and associate professor roles will arise irrespective of the EJRA.

188. Looking at the legitimate aims:

188.1. Inter-Generational Fairness

The Inter-Generational Fairness Aim is in pursuit of "*fairness in the allocation of this past resource between present and future generations of senior Oxford employees*". As we have suggested before, we find this a somewhat difficult concept. Much emphasis was placed on the financial difficulties the younger generation of the respondent's employees may have in comparison to the older generation, but it is not clear what the respondent wants us to make of that when there is no preference given to internal candidates and the recruitment for the relevant roles takes place on a worldwide basis. It may be that junior academics in, say, Australia, are financially better off than their predecessors in Australia. We have no way of knowing this one way or the other, and the respondent has not put forward any evidence on that. As for the question of "fairness" in allocation of the roles, while we accept there are unlikely to be bright lines in establishing fairness, we have been given no indication of why an additional 8% or 5% of vacancies is necessary to establish fairness. Once the statutory exemptions for

compulsory retirement were abolished it can hardly be said that fairness requires the younger generation to have exactly the same opportunities that their predecessors had. There is nothing in the evidence we have seen that suggests that the additional vacancies created by the ERJA are necessary to establish such "fairness".

188.2. Refreshment

As identified above, beyond the general idea that at some points the respondent may wish to move into fresh areas of study or specialism, there is nothing in the respondent's evidence to suggest how pressing a problem this is or why the EJRA is necessary to meet it. As a minimum we know that at least 9 out of 10 vacancies at statutory professor or associate professor arise irrespective of the EJRA. There is no evidence that the respondent needs the additional vacancies that may be created by the EJRA to move into new areas of study. On the contrary, the fact that we have very limited evidence on this (only the case study) suggests that the EJRA's contribution to this is, at best, trivial. The vast majority of vacancies at statutory and associate professor level will arise irrespective of the EJRA, and there is nothing to suggest that those vacancies are not more than enough for the respondent to move into new areas of study.

Also as discussed above, there no direct evidence to suggest that the EJRA contributes substantially to the new perspectives that the respondent says it is looking for. The best that we can say on that is that promoting equality and diversity would tend to introduce new perspectives.

188.3. Promoting Equality and Diversity

The strongest area for the respondent is in the Promoting Equality and Diversity aim. As we have seen, many of the other aims at least partially relate to this. "New perspectives" is hard to measure, but promoting equality and diversity can be taken as a generalised proxy for it.

Having said that, the respondent's case on this is significantly weakened by any lack of reliable statistics outside diversity of sex. The Review Group itself identified this as a problem. The difficulties with the other statistics are such that we consider we can only look at promoting equality and diversity in terms of the protected characteristic of sex.

It appears to be accepted that the average number of statutory professor vacancies is a year was 20.7. The Little's Law study relied upon by the

respondent says 1.7 of these vacancies in a year arise through the EJRA. At current rates, 32.5% of the people recruited for those vacancies will be women. This means that the EJRA accounts for around (at most) 0.5 women being appointed as associate professors each year. (A fuller calculation would also account for the possibility of a woman having vacated the role. That number appears (at least at present) to be very small so far as statutory professors are concerned.) The EJRA means that an additional woman is appointed as a statutory professor every other year.

For associate professors, on average 68.4 vacancies arise each year. Around a quarter of those leaving are women and around 40% of those appointed to the roles are women. The Little's Law study puts this at 3.6 vacancies a year attributable to the EJRA. A woman will be appointed to 1.4 of those vacancies but 0.9 of those vacancies will have been created by a woman leaving. That means the EJRA accounts for (at most) a net increase of 0.5 women a year in the position of associate professor. As with the statutory professors, the EJRA means that an additional woman is appointed every other year.

189. We are somewhat hesitant about the calculations set above. Both sides may find something to criticise about them, and rounding means that they cannot be considered to be absolutely correct, but however those calculations are done we think the point remains that the overall contribution of the EJRA to promoting equality and diversity is very limited. That follows from two points that we consider to be clear:

    (a) the proportion of vacancies that are created by or would not otherwise arise apart from the EJRA is small in both cases (8% or less and 5% or less), and

    (b) women remain a minority of those appointed to the vacancies that do arise. In the case of statutory professors, new appointments remain overwhelmingly men and in the case of associate professors the increased appointment of women is offset to a considerable degree by women making up a substantial number of those leaving the roles.

190. There was some discussion as to whether the appropriate measure for achievement of this aim was a question of proportions or a question of absolute numbers - but measured either way the contribution of the EJRA to the aim is very small.

191. The only suggested legitimate aim that survives through to the last stage of the proportionality assessment is "Promoting Equality and Diversity", which we take

to also include the elements of the other aims that rely on a diversity of appointees, such as “new perspectives”.

192. The EJRA does contribute to the fulfilment of this aim, but to a very small degree, both in absolute and proportionate terms.

193. Given that achievement of the Overarching Aim is incapable of being measured and depends on achievement of the other aims, having assessed the effect on the Promoting Diversity and Equality Aim there is nothing to be gained by a separate assessment of the Overarching Aim and such an assessment would not be possible in any event.

194. The respondent has recognised its poor position in terms of diversity at statutory and associate professor level, and would argue that in such circumstances, with a limited range of options at hand, even a small increase in diversity is significant and meaningful: “every little helps”. However, we have to balance that against the discriminatory effect of the EJRA.

195. As we have identified, the EJRA has a highly discriminatory effect, removing people from their jobs simply because they have attained a particular age. The very small (we go so far as to say trivial) way in which the EJRA contributes to Promoting Equality and Diversity does not justify the highly discriminatory effect of the EJRA. Consent or a lack of objection from Congregation does not make something that is otherwise unlawful lawful in this case. The respondent has not shown that the EJRA is a proportionate means of achieving a legitimate aim.

196. We have not specifically addressed Prof Snidal’s position of “Reader” in this analysis, but there is no need for us to do so. A Reader is either to be treated as a statutory professor, an associate professor or somewhere in between, and on any of those analyses the EJRA has not been justified for a Reader.

E. CONCLUSION

197. The EJRA is not a proportionate means of meeting a legitimate aim in relation to any of the claimants.

198. Further case management orders will be given (if not agreed between the parties) at a closed preliminary hearing to take place at 10:00 on 17 May 2023.

**Employment Judge Anstis**

Date: 9 March 2023

Sent to the parties on: 13 March 2023

For the Tribunals Office