

In the University of Oxford Appeal Court

In the Appeal of Professor Denis Galligan

Ruling on Preliminary Issue following a hearing on 13 March 2014

Dame Janet Smith:

Introduction

1. For many years until 2006, employers in the United Kingdom were entitled to require their employees to retire on a date specified in the contract of employment. Very commonly this was the employee's 65th birthday and no claim for unfair dismissal could be brought in respect of a dismissal after that age. That state of affairs was to be changed by Council Directive 2000/78/EC. This established a general framework for equal treatment of employment and occupation. For the first time, the EC prohibited discrimination on the ground of age and required Member States to introduce legislation to achieve that end. However, by Article 6, the Directive provided that Member States may provide for differences in treatment on the ground of age if, within the context of national law, they were 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 were appropriate and necessary.
2. The UK's initial response to the Directive was to pass the Employment Equality (Age) Regulations 2006 which defined and outlawed age discrimination unless objectively justified. I shall not set out the provisions of those regulations as that legislation has been overtaken and the relevant provisions are now to be found in the Equality Act 2010 (EA), which came

into force on 1 October 2011. However, it must be noted that, although the 2006 Regulations outlawed many forms of discrimination on the ground of age, there was an express exception in regulation 30(2) which provided that there would be nothing unfair in dismissal at the age of 65 on the ground of retirement.

3. Section 13(1) of the EA provides that 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. Age is a protected characteristic. Section 13(2) provides that, 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 (or as lawyers now say, can be objectively justified). So far as relevant, section 39 of the EA provides that an employer (A) must not discriminate against an employee (B) as to the terms of B's employment or by dismissing B. The exception contained in regulation 30(2) of the 2006 Regulations was not re-enacted in the EA. Accordingly, to be lawful, a dismissal on the ground of retirement based on age must be objectively justified.
4. The University of Oxford had for many years imposed a retirement age of 65 on most of its academic staff. When national consultation began in respect of the Government's proposals under the EA, the University realised that, from the date when the EA was due to come into force, its retirement arrangements for academic staff would (if continued) become potentially unlawful and would have to be justified as a proportionate means of achieving a legitimate aim. The Personnel Committee of the University recognised that it faced what

it described (in the minutes of a meeting dated 30 September 2010) as “extremely challenging questions”. It wished to retain its present arrangements if at all possible. It noted that it would be possible for an employer to justify a compulsory retirement age and resolved to develop proposals which might enable the University to continue to implement a normal retirement age once the current arrangements were phased out. It recognised that justifying such a scheme (which would bring in what would be known as an Employer Justified Retirement Age (EJRA)) would be likely to be a “stiff test, which would need to be supported by robust evidence”. Further, “it would ultimately be a matter for the courts to determine whether an EJRA was justified if challenged”.

5. On 11 October 2010, Council approved the Committee’s approach. A working group was established to take the matter forward. By February 2011, the group had taken legal advice and had drafted a consultation paper to gauge reactions to its proposals to introduce normal or compulsory retirement at 67. The legitimate aims which were to be achieved by the proposed EJRA were, *inter alia*, to maintain excellence in teaching and research and specifically to maintain opportunities for career progression, to facilitate academic planning, to promote greater diversity, to facilitate flexibility through turnover of staff, to minimise the impact on staff morale, to manage the expected cuts in public funding and to avoid the alternative of mandatory performance management. The proposal for a normal retirement age of 67 was coupled with what was intended to be a fair procedure to consider requests for exceptions to the general rule.

6. Consultation covered the academic divisions and groupings of the University and the colleges. It included a meeting with the UCU. There was also an opportunity for individual members of staff to respond. The results of the consultation were considered to be broadly but not unanimously in favour of an EJRA at the age of 67.
7. A second consultation paper was then issued dealing with the procedures to be followed for requests to continue after the age of 67. Broadly speaking, an employee who wished to seek an extension should enter into informal discussions with his or her head of division. Flexibility in the continuation of contracts would be encouraged subject to the overall aims of the EJRA. Following such discussions, a formal letter of request should be submitted setting out the proposals and any agreement in relation to them. These would be considered by a panel which would assess each request on its own merits in the context of the aims of the EJRA. The panel was to consider the request in the light of specified considerations, taking account of the views of the individual staff member, the relevant division or department and other interested parties. If there was agreement, the expectation would be that the panel would approve the request, provided that the EJRA aims had been sufficiently addressed. Where there was no agreement, the employee would be entitled to make his or her case for an extension at a meeting of the panel. The division or department, representing the employer, would also be able to present its case. If the panel decision was to reject the request, the employee would have a right of appeal in accordance with Part H of the University's Statute XII.

8. The consultation paper explained that the procedure sought to “balance the wishes of the individual approaching the EJRA with the needs of the collegiate University (including the legitimate career aspirations of other staff) by facilitating the timely discussion of options with a view to identifying possible future arrangements which are acceptable to all parties and providing a clear decision-making and appeal process which allows account to be taken of all relevant considerations.” The intention was to provide for decisions on retirement to be taken “in a positive context focused on an individual’s future contribution to the collegiate University rather than on issues of the inadequacy of individual performance”.
9. The considerations by which the panel would decide whether to agree to an extension were set out in full. The main point made in the preamble to this section was that the panel would weigh the advantages of continued employment against the opportunities arising from a vacancy. In reaching its decision, the panel would take account of the intention regarding the future use of such a vacancy and of other relevant considerations as set out. I do not intend to set out those other considerations in full in this ruling.
10. Consultation took place and the scheme apparently met with approval. Some suggestions for fine tuning were advanced. A final proposal was approved by the Personnel Committee on 22 September 2011 and by Council on 10 October 2011. The mechanism for bringing the scheme into effect was by amendment of Council Regulation 3 of 2004. The decision of Council was published in the University Gazette. No objections were received and the

amendment and the scheme came into force with retrospective effect from 1 October 2011.

11. One aspect of the ‘fine tuning’ must be mentioned. In the preamble to the ‘considerations’ section of the scheme as adopted, it was said that “Applications will be approved only where, having taken account of the considerations set out below, the panel is convinced that any detriment to the furtherance of the aims of the EJRA is offset by a balance of advantage arising from the extension of employment”. Further, “the panel will weigh the advantages of continued employment … against the opportunities arising from creating a vacancy or part vacancy including the intention of recruiting someone else, using the vacancy for a different purpose or leaving the post vacant for a period which may apply”.
12. No doubt the University was of the view, that having consulted on its proposals, the scheme as promulgated could be justified as a proportionate means of achieving legitimate aims. However, as the Personnel Committee had recognised at the outset, in the final analysis it is for the Courts to decide whether the scheme can be objectively justified and is therefore lawful. The University itself cannot so decide.

Factual background

13. On 23 January 2012, the appellant, Professor Denis Galligan (Professor of Socio-Legal Studies within the Faculty of Law) was ‘reminded’ by the University that he was to be retired with effect from 30 September 2014, pursuant to Council Regulation 3. The appellant wished to extend his employment by two years but the informal discussions did not produce

agreement. On 24 May 2013, the appellant made a formal request for an extension of two years. The request was to be considered by a panel appointed by the Personnel Committee. Evidence was collected for consideration by the panel. The Head of the Social Sciences Division Professor Roger Goodman MA DPhil did not support the request; nor did Professor Timothy Endicott, Dean of the Faculty of Law. The request was supported by Dr Fernanda Pirie, the Director of the Centre for Socio-Legal Studies, within which the appellant worked.

14. At the hearing of the request on 8th October 2013, the University presented its opposition to the appellant's request. When his turn came. The appellant sought to raise the issue of whether the EJRA scheme was lawful; he alleged that it was discriminatory. However, the panel focussed on the question of whether the appellant had convinced them that any detriment to the furtherance of the aims of the EJRA would be offset by a balance of advantage arising from the extension of employment. In their decision dated 28 October, the panel decided that it had not and the application was refused.

The appeal

15. On 26 November 2013, the appellant lodged a notice of appeal against that refusal. I was appointed to hear the appeal and a date was fixed following the customary exchange of skeleton arguments.
16. Although the appellant's initial notice of appeal claimed an appeal against the panel's decision of 28 October, the appellant made it plain that he was challenging the legality of the underlying policy of Regulation 3, by which the University had adopted the default retirement age of 67, subject to a request

for an extension. It was clear that the appellant was complaining that the panel had not properly considered his argument that the EJRA policy was discriminatory and could not be objectively justified. He also wished to challenge the panel's procedures (in particular the fact that he had been expected to bear the burden of proof) and its reasons for refusing to extend his employment.

17. In response, the University contended that the Appeal Court did not have jurisdiction to consider the lawfulness of the EJRA policy and that its jurisdiction was limited to an appeal from the panel's refusal to extend the employment. However, the University went on to contend that the EJRA was, in any event, lawful as it could be shown to pursue legitimate aims by proportionate means. With the *caveat* that the appellant was not entitled to take the point, the University set out its case on justification as well as the issues of burden of proof and the panel's refusal to extend. The University's written argument did not, however, set out its contentions in support of its argument that the Court had jurisdiction only to hear an appeal from the panel's refusal to extend.
18. On Tuesday, 11 March 2014, that is two days before the hearing, the University wrote to say that it wished to make a preliminary application on the issue of jurisdiction. However, no argument in support was attached. Plainly, the scope of the appeal had to be determined before the substantive hearing could begin. It was soon apparent that the question was far from straightforward. The whole morning was spent on submissions on this issue. Ms Reindorf, for the University, took me to several parts of the University's

statutes and regulations which I had not previously seen. The appellant, acting in person, was also, to some extent, taken by surprise by the detailed contentions advanced. Because I had not had the opportunity to read all the relevant parts of the statutes and regulations and because I wished to consider the contentions against the background of the whole statutory scheme, I felt it necessary to reserve my ruling. Ms Reindorf undertook to put her arguments in writing. The appellant has also provided further written submissions. This is my ruling on the preliminary issue.

Submissions

19. Ms Reindorf's main contention was that the University's Appeal Court is bound by the body of law governing the University, just as a domestic court or tribunal is bound by laws passed by Parliament. The EJRA is part of the University's body of law and it is not open to the Appeal Court to consider whether any aspect of that body of law is in conformity with the law of England and Wales. In short, it is the duty of the Appeal Court to assume that amended Regulation 3 and the EJRA policy are lawful. That would include the procedure by which applications for an extension are to be dealt with, including the requirement that an applicant should bear the burden of "convincing" the panel that any detriment to the furtherance of the aims of the EJRA would be offset by a balance of advantage arising from the extension of employment.
20. In more detail, Ms Reindorf relied first on the absence of any express power in the statutes or regulations granting the Appeal Court a power of review over University legislation.

21. Next, she submitted that the proper constitutional mechanism for a challenge to any aspect of the University's legislation is by the exercise of Congregation rights.
22. Finally, she submitted that there is nothing in the statutes or regulations which gives the Appeal Court greater powers or a wider jurisdiction than the body from whose decision the appeal is brought – in this case the EJRA panel. The powers of the court are to allow or dismiss in whole or in part the decisions of that panel. The scope of the panel's decision is limited to the merits of the application to extend.
23. The appellant submitted that the intention of the University's Statute XII (which provides the powers of the Court of Appeal) is to give an employee an internal appeal mechanism against decisions affecting his employment, applying the principles of fairness and justice. In order for him to have a meaningful appeal against his enforced retirement at the age of 67, which he contends is an act of discrimination on the ground of age, the appellant must be allowed to air the issue of justification before the University's Appeal Court. He accepted that, if he is not permitted to argue that issue in this Court, he has the right to pursue the argument in the public courts, probably by bringing a claim in the Employment Tribunal. But, he submitted, the intention of the University Statute XII is to provide a full internal appeal. He submitted that this Court is just as well equipped to deal with the issue of justification as are the Employment Tribunals and Employment Appeal Tribunal. He submitted that there is an advantage to both parties in dealing with the issue internally; if any changes have to be made to the EJRA, this can be done

without potentially protracted litigation in the courts. He pointed out that it would be a real disadvantage to him if he is obliged to pursue his remedy through the courts. It has occurred to me that there are two aspects to this disadvantage. Not only may he feel obliged to pay for representation, if the playing field is to be level, there may well be delay beyond the date currently set for his retirement which could have the effect of depriving him of his chosen remedy (continued employment) even if he were successful.

24. The appellant also argued that the University is wrong to say that the EJRA is a decision of Congregation and that his proper remedy is by the exercise of his Congregation rights.
25. Finally he submitted that his appeal from the decision of the panel is not limited to the merits of his application to extend. He raised the issue of the legality of the EJRA scheme before the panel and the panel did not suggest that it could not hear such arguments; it simply dismissed them. In any event, he submitted, once an appeal from the panel decision has been lodged, there is no limit on the grounds of appeal which may be advanced. It is the duty of the Appeal Court to determine all issues of law and fact which arise under the notice of appeal.

Discussion

26. It is common ground that nowhere in the University's statutes or regulations is there a clear answer to the question in issue, namely whether the jurisdiction of the Appeal Court in a case such as this is limited to an appeal from the panel's rejection of the appellant's request to extend or whether the Court is also able to undertake a wider examination of the reason for his dismissal, in

particular, the legality of the EJRA scheme. Both parties contended that the position is clear, in their favour, by inference from the relevant Statutes (XI and XII), the employment practices of the University and the policies underlying the operation of the Appeal Court. I shall have to examine the relevant parts of Statutes XI and XII in an attempt to discern what an impartial observer would have understood to have been the underlying intention of the University in respect of the scope of an appeal such as this, the circumstances of which were almost certainly not foreseen at the time when the relevant statutes were enacted.

27. The Court is the creature of the University's Statutes XI and XII and its jurisdiction must be founded in the powers granted by those two statutes. Although the word statute is used, it seems to me that these are simply the rules by which the University has decided that it will run itself. I understand that some statutes (including Statute XII) can only be amended with the approval of Her Majesty in Council. I am not sure of the relevance of that in the context of this discussion.
28. Taken together, the two Statutes provide a code of discipline for members of the University (Statute XI Part A) and (in Statute XII) a framework for the procedures to be followed in cases of dismissal for redundancy, misconduct and incapacity. It seems to me that the intention behind these provisions is, for the University, to provide the means by which it can impose and enforce its requirements on staff and, for the staff, to provide safeguards against unfair treatment. In short, the provisions are a two-way street, imposing rights and obligations on both the University and the staff.

29. The scheme of the provisions governing academic staff is that minor disciplinary matters may be dealt with informally but more serious matters are referred for decision by the Visitatorial Board. Redundancy decisions are taken by Council. Decisions based on incapacity are taken by a medical board. Appeals from all those decision-makers lie to the Appeal Court with certain limitations, one of which I will mention later.
30. The constitution of the Visitatorial Board (which deals with disciplinary issues at first instance) is laid down in Part C of Statute XII. The chairman must not be a member of the University and must have suitable legal qualifications or experience. The four other members of an individual board are drawn from a panel of 12, all members of the University, with no requirement for legal qualification. Thus, the panel is numerically dominated by members of the University. Decisions on the issue of redundancy are taken by Council, which is plainly a University body. The medical board which resolves contested decisions on incapacity comprises one person nominated by Council, one person nominated by the member of staff involved (or in default by Council). These two may well be members of the University. The chairman is to be medically qualified and is nominated by agreement between the parties or in default by the President of the Royal College of Physicians.
31. The policy underlying the constitution provisions seems to be that first instance decisions are primarily a matter for non-lawyer members of the University, to be assisted and possibly guided where appropriate by chairmen with relevant expertise. The Appeal Court on the other hand, comprises legally qualified persons who are not members of the University. They must have

high legal credentials; in practice they are retired members of the Supreme Court or Court of Appeal. It seems to me that the policy is that, whereas the first instance bodies are dominated by members of the University, the Appeal Court is intended to be independent of the University. I should mention that, although the judge of the Appeal Court usually sits alone, he or she may, in the interests of justice and fairness, sit with no more than two assessors. These will be members of the University with relevant knowledge and experience. They may advise the Court but take no part in the decision.

Statute XII

32. Statute XII is entitled "Academic Staff and the Visitatorial Board". Part A deals with Construction, Application and Interpretation. Section 1 contains some guiding principles by which the statute and any subordinate legislation made under it must be construed. One such principle requires that the provisions shall be construed applying the principles of justice and fairness.
33. Section 2 provides that no provision in Parts B, D, E or G shall enable any member of the academic staff to be dismissed unless the reason for dismissal may in the circumstances (including the size and administrative resources of the University) reasonably be treated as a sufficient reason for dismissal. The wording of this provision is similar to the wording of the test to be applied by employment tribunals when considering a claim of unfair dismissal as set out in section 98(4) of the Employment Rights Act 1996. It appears to me to import a test of fairness and reasonableness into the decision.

34. Section 5 defines the expression 'good cause' in relation to a dismissal related to conduct or capability or qualifications. Section 6 defines dismissal by reason of redundancy in the same way as it is defined in domestic law.
35. Section 7 provides that, in the case of conflict, the provisions of Statute XII shall prevail over those of any other statute and the provisions of any regulation made under Statute XII shall prevail over those made under any other statute.
36. Part B makes provisions for redundancy. Section 10 provides that it is for Congregation to decide whether there should be a reduction in the academic staff or the University as a whole or any part of it. Once such a decision has been made, it is for Council to select those members of staff who are to be made redundant, in the light of the recommendations of a Redundancy Committee. I interpose to observe that, when we come to Part H which deals with appeals, it will be seen that the right of appeal to the Appeal Court is limited to a challenge to the decision of Council. The decision of Congregation to declare that there shall be a reduction in numbers cannot be challenged on appeal to the Appeal Court.
37. Part C deals with the constitution and function of the Visitatorial Board, which is the body which hears and determines allegations of misconduct. Part D provides the procedure for dealing with misconduct allegations. Part E provides for dismissal or removal from office on medical grounds (incapacity). Part F provides for grievance procedures. Part G deals with the process for the removal of the Vice-Chancellor.

38. Before turning to Part H, it should be noted that provision has been made for most of the usual reasons underlying the dismissal of an employee, but there has been no reference to dismissal by reason of retirement.
39. Part H establishes procedures for hearing and determining appeals by academic staff who are dismissed or are under notice of dismissal or who are otherwise disciplined. Section 40(1) provides that Part H applies to (a) any appeal against a decision of Council to dismiss in the exercise of powers under Part B (redundancy); (b) any appeal arising under Part D (misconduct) other than against a disciplinary warning; (c) any appeal against dismissal otherwise than in pursuance of Part B, D, E or G; (d) any appeal against a decision under Part E (incapacity); and (f) any appeal under Part G (removal of the Vice-Chancellor).
40. Section 40(2) provides for some limitations on the provisions in subsection (1). The only one (already mentioned above) of relevance to the issue I have to decide is (a) which provides that there shall be no appeal against a decision of Congregation under section 10(2), which is a decision that there shall be a reduction in staff numbers.
41. Sections 41 and 42 of Part H deal with the requirements of launching an appeal. Sections 43 and 44 provide for regulations to be made governing the hearing of appeals and specifying matters which must be covered by such regulations.
42. It appears to me that Section 40(1)(c) is a residual provision, allowing for an appeal against dismissal for any reason other than those otherwise already specifically covered, namely those dismissals arising under Parts B, D, E and

G. It seems clear to me that dismissal on the ground of retirement must fall into that residuum and there must therefore be a right of appeal against dismissal on that ground. That in effect is the heart of the appellant's case, although he did not articulate quite as I have done.

43. The University submits, however, that the appellant's right to an appeal arises only under the terms of the document which sets out the procedure for considering requests to work beyond the EJRA. Paragraph 18 of that procedure provides that where a request to continue working beyond the EJRA is rejected, the individual will be notified of the right of appeal. Paragraphs 20 to 23 provide that procedure for bringing an appeal will be in accordance with the provisions of Part H Sections 41 and 42 and that the appeal will be conducted in accordance with Part H.
44. There can be no doubt there is a right to appeal against the rejection of a request to continue working. However, the fact that he has that right of appeal does not mean that he should lose his right of appeal against dismissal under section 40(1)(c). On the contrary, it appears to me that he has two distinct rights of appeal; one against the decision to dismiss him arising under section 40(1)(c) and another arising under the procedure for considering requests for an extension. As, in the event of any conflict, the provisions of Statute XII are to prevail over those of any other statute or regulation, there can in my view be no question of the appellant losing his right to an appeal against his dismissal, on account of the existence of his right to an appeal against the panel's refusal to extend.

45. The University accepted that the appellant's failure to spell out his claim to two distinct rights of appeal in his notice of appeal should not deprive him of the right to an appeal which he would otherwise have. Ms Reindorf said that she would not wish to take a 'pleading point' against him and accepted that the appellant had made its sufficiently plain that he was complaining about the legality of the amended Regulation 3 under which he had been dismissed.
46. Before expressing my conclusion on this aspect of the problem, I must deal with Ms Reindorf's other submissions. She submitted in oral argument that there was an analogy between the provisions for an appeal in cases of redundancy and the provision for an appeal in a case of this kind. She drew attention to the fact that an employee may appeal to the Appeal Court against his or her selection for redundancy by Council but may not appeal against the decision of Congregation to declare a reduction in staff numbers. She submitted that the decision of Council to adopt the EJRA scheme and to amend Council Regulation 3 of 2004 should be deemed to be a decision of Congregation. As Statute XII Part H ruled out an appeal from the decision of Congregation under Section 10(2) (declaration of reduction in numbers) I should infer (by analogy with the redundancy provision) that it was intended that there should be no appeal from the deemed decision of Congregation adopting the EJRA. She submitted further that the proper way of objecting to that decision was by the exercise of Congregation rights.
47. It seems to me that there are at least two answers to that submission. First, I do not think that the decision to adopt the EJRA can be deemed to be a decision of Congregation. It appears to me to be a decision of Council which

came into force automatically after it had been gazetted and no objections had been raised. If there had been objections, there would have been a referral to Congregation. There was not and amended Council Regulation 3 came into force without any such referral.

48. Even if I were wrong about that and the resolution to amend Regulation 3 was, in effect, a decision of Congregation, I would not be prepared to draw the inference that it was the intention of the University to deprive an employee such as this appellant of his right to appeal under Section 40(1)(c). Statute XII deals expressly with the limitation on the rights of appeal in relation to a dismissal for redundancy; an employee cannot appeal the decision of Congregation to reduce staff numbers. If it was intended that there should be any limitation on the right to an appeal against dismissal for retirement, one would expect to find it expressly provided for.
49. I wish to add that I do not think that it makes any difference whether the resolution in question was a decision of Congregation or of Council. Whichever it was, the resolution created a measure which is part of the legislation of the University. If this Court cannot question the legality of an aspect of that body of legislation, the precise status of the measure in question does not matter. I also think that, whatever the status of the measure, it would be open to challenge in Congregation. However, I do not think that the exercise of Congregation rights (which are essentially collective rights rather than personal ones) could ever be an appropriate way of determining the legality of the EJRA. A vote in Congregation cannot make lawful that which is unlawful. By making a declaration that the EJRA was lawful,

Congregation, being the embodiment of the University, would be seeking to act as judge in its own cause. If the legality of the EJRA is to be challenged, it must be done by a person or body independent of the University. At an early stage, the Personnel Committee recognised that the legality of any proposed EJRA might be open to challenge and that justifying it might be a "stiff test". The University cannot seriously think that that stiff test could be satisfied by a vote in Congregation.

50. My conclusion is that Statute XII provides the appellant with the right to an appeal against the decision to dismiss him and not merely against the refusal of the panel to extend his employment. In my view, it must be possible for that appeal to include grounds which allege that the reason for the dismissal (namely compulsory retirement at the age of 67 pursuant to the EJRA scheme) could not reasonably be treated as a sufficient reason for dismissal: see Section 2 of Statute XII. I can see no reason why an appellant cannot allege in such an appeal that the reason for dismissal cannot be treated as sufficient because the EJRA scheme is discriminatory and unlawful because it cannot be objectively justified. When I speak of the EJRA scheme, I mean the whole scheme, including the right to request an extension.
51. In the light of that conclusion, Ms Reindorf's other argument falls away. She submitted that the Appeal Court cannot have greater powers than those of the body from which the appeal lies, namely the panel. In so far as the appeal is from the panel decision, I agree with that submission. She noted that I had observed, during the hearing, that the panel was not a suitable body to enquire into the legality of the EJRA policy. I did indeed say that and I remain of that

view. However, the appellant has the right not only to appeal against the decision of the panel but also against the decision to dismiss him. That was not a matter for the panel; it was the consequence of the amendment of Council Regulation 3 of 2004.

52. The result of this deliberation is that I have concluded that the Appeal Court does have the jurisdiction to consider whether or not the EJRA policy is objectively justified. I can see no other way in which the appellant's right under section 40(1)(c) of Statute XII can be satisfied. I do accept that it is counter-intuitive to say that an internal appeal body should be able to go behind a provision which the University has adopted by its usual procedures. However, it is common ground that the appellant is entitled to challenge the legality of the EJRA in the employment tribunal or possibly on judicial review. The Personnel Committee recognised in 2010 that any decision made by the University would be subject to scrutiny in the courts. I can see no reason of principle why the Appeal Court, being wholly independent of the University, should not first consider that issue. Indeed, I can see reasons of justice and convenience why it should. First, I think that any judge of the Appeal Court will be competent to decide the issue. Second, if the decision of the Appeal Court is accepted by both parties, the issue will have been resolved more quickly and cheaply than would be the case in the public courts or tribunals. If the decision were to be that the scheme is unlawful, not only would this appellant have a remedy before his dismissal takes effect, but the University would have the opportunity to consider any criticisms the Court may make before positions become entrenched by litigation in the public domain.

53. It will be necessary to give directions for the further conduct of this appeal. I hope this can be done quickly. Although the parties have dealt with the issue of objective justification in their written arguments, they may wish to add to those arguments now that they know the scope of the appeal. In addition, the parties may wish to ask for or provide further disclosure of documents. For example, I am aware that the appellant has asked for disclosure of the legal advice taken by the University when the EJRA scheme was in development and that the University has refused. I know not on what ground.
54. I direct that both parties should advance short written submissions as to any directions they seek. I also ask them to give their best estimate to the time which must be set aside for the hearing of this appeal.

Janet Smith

8 April 2014