In the Oxford University Court of Appeal

In the Appeal of Professor Denis Galligan

Dame Janet Smith

Introduction

1. This is the appeal of Professor Denis Galligan (the appellant) against his dismissal by the University from his post as the Professor of Socio-Legal Studies within the Faculty of Law purportedly on the ground of retirement at the age of 67. The appellant contends that the University's policy of compulsory retirement of academic and academic-related staff on 30 September prior to the employee's 68th birthday is discriminatory on the ground of age, cannot be objectively justified and is therefore unlawful. On 13 March 2014, at a preliminary hearing of this appeal, the University contended that the Court of Appeal did not have jurisdiction to consider the legality of this policy. On 8 April 2014, I ruled that the Court of Appeal had jurisdiction to hear an appeal from the decision to dismiss the appellant, whatever issues arose. At paragraphs 1-14 of that ruling, I set out the legislative and factual background to this appeal. I shall not repeat that background which should be read as part of the introduction to this decision. I say only that, subject to the outcome of this appeal, the appellant's employment with the University will be terminated on 30 September 2104 following the rejection by a panel of his application to be permitted to stay on after the University's designated retirement age.

2. The appeal was heard over a period of four days on 26 and 27 June and 1 and 2 July 2014. The University was represented by Ms Akua Reindorf of counsel; the applicant appeared in person. I permitted the parties to call or give evidence on factual matters as this was, in some respects, a hearing *de novo*. The University called Dr Stephen Goss, the Pro-Vice Chancellor (Personnel and Equality) and Chair of the Personnel Committee of the University. He had chaired the EJRA panel which rejected the appellant's application to

extend. It also called Professor Roger Goodman, the Head of the Social Sciences Division of the University and the Nissan Professor of Modern Japanese Studies in the School of Interdisciplinary Studies. The applicant gave evidence. Although many documents had already been disclosed, further documents were either requested or emerged during the hearing and these were admitted without objection. Full written arguments had been exchanged in advance of the hearing and it was open to the parties to put in further written submissions after the evidence had been heard. The appellant did so. Both parties sent in brief further submissions after the end of the hearing.

Preliminary matters

Burden and Standard of Proof

3. It is common ground that it is for the University to show that, in adopting and applying its policy of retirement at the age of 67, it was using proportionate means to achieve legitimate public policy and/or social interest aims. There is, however, a disagreement between the parties as to the nature and extent of the burden the employer carries.

4. The appellant submits that the burden on the employer is a heavy one. The right not to be discriminated against is, he says, a fundamental right which must be "heavily protected". The fence to be mounted by the University is a high one. The reasons for imposing a compulsory retirement age must be "compelling". The aims or policies by which a compulsory retirement age can be justified must be so important that they "significantly outweigh" the effect of interfering with the individual's right not to be discriminated against on the ground of age. The employer must produce clear evidence to support its contentions. Justification is a "stiff test".

5. The University disagrees. Ms Reindorf submits that the proper approach for the court is to strike a balance between needs and interests of the employer and the legitimate expectations of the group of people affected by the policy, in the light of the purposes of the anti-discriminatory legislation. She cites from *Rosenblatt v Oellerking GmbH* (C-45/09) [2011] 1 C.M.L.R. 32 where it was said that retirement with a pension "was a mechanism which was based on the

balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or conversely providing for early retirement". A similar statement was made in *Fuchs v Land Hessen* (C-159/10) [2012] ICR 93. Both of those cases concerned national retirement schemes and the criteria mentioned do not seem to me to be wholly applicable to the present case which involves a retirement scheme within a particular employment. However, I do accept that the decision-making process is a balancing exercise as Ms Reindorf submits.

6. I do not accept the appellant's submissions that the fence is high and the arguments must be compelling. The arguments may be quite finely balanced. In the context of the present case, the balance must be struck between the legitimate interests and expectations of the academic and academic-related staff of the University as to the length of their working lives and the legitimate aims and needs of the University. The University bears the burden of showing what those aims and needs are in its particular case. It must also show that the measure it has adopted is a proportionate means of achieving those aims. That means, in a nutshell, that the aim or aims are legitimate in the particular circumstances of the University and that the measure is likely to be effective in achieving the aim or aims in practice. It does not have to show that the measure was the only way to achieve the aims or that, without this specific measure the aims could not be achieved. The specific measure must also be appropriate in the sense of not being more intrusive than is reasonably necessary to achieve the aim. To show these things, it must produce evidence and not rely on bare assertion. I do accept that there are some issues on which it is difficult if not well-nigh impossible to produce hard evidence. Where that is so and the argument rests largely on assertion, the basis for the assertion must be scrutinised very carefully and I must be on guard in case the University seeks to exaggerate or over play some aspects of its case.

7. The employee does not bear a burden of proving anything in this context because his or her reasonable expectations are a reflection of the social policy behind the legislation. At both the EU and national level, it has been decided

that, in principle, there should be no compulsory retirement age. The reasons for that policy are several. There are economic advantages in lengthening the working life of a population which enjoys an increasing expectation of life. The burden on society of paying pensions for very long periods is becoming insupportable and it is desirable that it should be reduced. There are health and social benefits to be derived from continued employment. Last, but by no means least, it is recognised that it is desirable that an individual should have an element of choice about when he or she retires. These are important considerations to which the court must give full weight. However, if the employer's arguments outweigh them, by even a narrow margin, that will be enough to justify the scheme.

Date of Justification

8. Another preliminary issue which I must mention is the date at which the University has to justify its policy. This is the date of the act of unequal treatment: see *Seldon v Clarkson Wright & Jakes* [2012] ICR 716 SC. In the present case, the appellant's dismissal has not yet taken effect; it will take effect on 30 September 2014 if this appeal fails. However, it was assumed without argument that I would consider the issues as at the date of the hearing of the appeal, July 2014. This point is not without importance, at least in theory. The decision to introduce the EJRA was taken by the University on 10 October 2011. But the University is not limited to relying on evidence which was available to it at that date. It can rely on events which have occurred since that date and material which has come to its attention since then. It can rest its case on different reasoning from that which guided its deliberations in 2011.

Importance of the University's decision-making and legislative procedure

9. Because the University has to justify its policy objectively rather than subjectively, the processes and procedures by which it implemented its policy are not of crucial importance. The appellant has been very critical of these processes and procedures, in particular because the University did not seek the explicit endorsement of its policy from Congregation, the ultimate governing body of the University. Instead, it chose to adopt the procedure of publishing

its intention in the University Gazette and allowing members of Congregation, if they wished, to object and thereby to trigger the need for a vote. There were no objections and the measure was adopted without positive endorsement. The applicant at one stage suggested that the process was not lawful and effective but eventually accepted that it was. He still contended that the whole process by which the University reached its decision showed that the University was determined to adopt the measure, almost come what may. In my judgment, even if the procedures and the thinking of the University at the time were flawed, that would not necessarily mean that the policy adopted could not be objectively justified at the present time.

10. It does not follow from that that evidence about how the policy was adopted and what people thought and said about the issues at the time is irrelevant. Such evidence helps me to analyse the validity and strength of the arguments now advanced.

Need for justification in an individual case

11. The appellant contended that the University had to justify it policy of compulsory retirement at 67 in his individual case. Ms Reinhart submitted that it did not and relied on dicta to that effect in *Seldon*: see Elias P at paragraph 58 in the EAT and Sir Mark Waller at paragraphs 36 and 37 in the Court of Appeal. However, the rationale of that rule is that where all employees are to be subject to a general rule, once the general rule has been justified, there is no need to justify the application of that rule in an individual case. That makes good sense. However, Oxford University does not apply the general rule of retirement at 67 to everyone. Some people are allowed to stay on. In effect an employee who asks to stay on but is not permitted to do so is not dismissed simply by reason of having reached a compulsory retirement age. Instead, the reasons for dismissal are that, having reached the age of 67 (which the University has decided should be the normal retirement age) and having applied to stay on, he or she has been refused. The circumstances of that refusal are plainly relevant to the fairness of the dismissal.

The aims of the EJRA

12. With those preambles I turn to consider the aims on which the University relies to justify the imposition of an EJRA of 67. These were set out as follows in the EJRA policy disseminated in 2011 and remain unchanged at the present time:

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

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

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

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

    (5) facilitating flexibility through turnover in the academic-related workforce, especially at a time of headcount restraint, to respond to the changing business needs of the University, whether in administration, IT, the libraries or other professional areas;

    (6) minimising the impact on staff morale by using a predictable retirement date to manage the expected cuts in public funding by retiring staff at the EJRA; and

(7) in the context of the distinctive collegial 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 professional needs of the university have changed.

13. During the hearing, for ease of reference, we gave each aim a 'tag'. The first aim did not feature greatly in the evidence. As Ms Reindorf submitted, it serves as background to the other aims. In itself it is too vague to allow consideration of whether the introduction of an EJRA of 67 is a proportionate means of promoting it. That does not mean that it is unimportant. I shall bear in mind throughout that the University's overriding aim and duty is encapsulated in that first sentence.

14. The second aim, we called 'inter-generational fairness' but it also encompassed the need for a turnover or 'refreshment' of the academic staff. The third we called 'succession planning'; the fourth 'diversity'. The fifth did not apply as it related only to academic-related staff. The sixth scarcely featured at the hearing although Ms Reindorf made the point that budgetary considerations could be taken into account. We called the seventh, 'performance management'. I shall use those tags but will not forget the longer descriptions of the aims they represent.

15. In the end, it was accepted that all or any of these aims was capable of amounting to a legitimate public or social policy aim. At one stage, the appellant was minded to argue that the only legitimate aim which the University could pursue was the first, the promotion of high standards in teaching, research and professional services. However, I think that he came to accept that there could be other legitimate aims of a more practical nature related to the good governance of the University. In any event, even if the appellant did not accept it, it is my view that each of these aims is, in principle, capable of amounting to a legitimate aim for Oxford University.

16. In the course of the hearing, a further issue was discussed, namely the inter-relationship between the employment contracts issued by the University and those issued by the colleges. It is not entirely clear to me whether the University included this issue in the aims on which it seeks to rely. I think not as it is not included in the list of aims, even though the issue was present in the minds of those responsible for drafting the aims. Nor is this issue mentioned in Ms Reindorf's written argument. In any event, it seems to me that the avoidance of the practical problems created by the existence of split employment contracts cannot properly be described as a social or public policy aim. Nor do I think that the maintenance of the existing system of split employment contracts can be so described.

Documentary Evidence relied on to justify the EJRA of 67

17. I will examine first the considerations on which the University based its decisions in 2010 and 2011. This evidence came partly from the documents disclosed by the University although Dr Goss, who was closely involved in the process, gave further explanation of the process and the thinking. The University relies on the processes by which it arrived at its compulsory retirement policy as demonstrating not only its good faith but also the care with which it approached the issue.

18. The issues were first discussed at the meeting of the Personnel Committee on 30 September 2010. The Committee considered a paper summarising the government proposals on phasing out the default retirement age of 65 (the DRA). The paper summarised the situation, drawing attention to the policy considerations which underlay the proposed legislative change. These included the wish to encourage people to work longer, the proposed raising of the state pension age, the impact of demographic changes, the financial benefits to individuals and the wider economy and the health and social benefits many people gain from working later into life. The paper invited the Committee to consider whether there were cogent reasons for seeking to justify a contractual retirement age (an EJRA) and, if so, to authorise the officers to explore the feasibility of such a scheme. The minutes recording the Committee's discussion noted the significant advantages which had accrued to

the University in the past in being able to operate a compulsory retirement age, coupled with an extension scheme which had enabled the University to retain some employees if there was a good case for so doing. The advantages of such a scheme included aiding academic and financial planning, refreshing the workforce and achieving greater diversity within it. The provision for extensions provided welcome flexibility. Reference was made to the fact that, if there was no compulsory retirement age, an employer wishing to retire or dismiss an employee aged 65 or over would have to establish one of the other reasons which could justify a dismissal such as misconduct or incapability (health or performance). It was noted that, if there were to be no normal retirement age, it would only be possible to dismiss older employees as part of a non-age-discriminatory general process of redundancy or performance management. It was agreed that the current arrangements should be maintained if at all possible. To my mind, that was an important statement of the Committee's wishes.

19. The current arrangements were that most academic employees had a contractual retirement age of 65 although for a significant minority, the age was 67. That had come about because, until the late 1980s, Oxford academics had a contractual retirement age of 67. The rule was changed in the late 1980s for future appointments. Those already seized of the right to work until 67 retained it. Also some academics joining the University since that time had come from other employments where they were entitled to work until 67 and Oxford had permitted them to retain that right. As already mentioned, the usual arrangements included the possibility of keeping a member of staff on after retirement age. There was of course no legal difficulty attached to that. No one who had reached the age of 65 could complain of unfair dismissal if he or she were dismissed on the ground of having reached the age of 65. I should mention that the normal age at which the occupational pension could be drawn was and is 65 but it is likely to change in future in line with the state retirement pension age.

20. The Committee asked the officers to develop proposals which might enable the University to continue to implement a normal retirement age once the

DRA was phased out. The officers were instructed to seek the views of the colleges as soon as possible and to brief the University departments on the emerging situation. Early communication across Oxford on these issues was thought to be a necessary first step to developing general support for a continuing expectation that current retirement arrangements should be maintained; such support was thought to be important in defence of the University's eventual EJRA and would also be helpful in containing the consequences if the EJRA proved unsustainable.

21. In short, it appears to me that, from the outset, the Committee was concerned about the University's position when the DRA was phased out and very much wished to maintain the current arrangements if at all possible. It wished to encourage support for an EJRA across the University. The issues uppermost in the minds of the Committee appear to have been financial and succession planning, refreshment of the workforce, diversity and the difficulty of dismissing older employees.

22. Later on the same day, 30 September 2010, the issue was raised at a Council meeting. Council was told of the Personnel Committee's decision to investigate the feasibility of introducing an EJRA. It was noted that coordination with the colleges would be crucial; they were to be consulted. It was emphasised that there was no intention to introduce performance management as a non-discriminatory alternative to terminating appointments on the grounds of age. It was said that, if an EJRA could not be established, the University would need to seek to adopt a cultural norm for the retirement age, "a process which would require much consultation and debate". One suggestion was that the University might wish to consider fixed term appointments to iconic academic posts. Noting the potentially serious implications for the University, Council approved the proposals of the Personnel Committee.

23. In the ensuing weeks, legal advice was sought. The University has not disclosed the content of this advice, relying on privilege. A working group (with college representation) was set up to take matters forward. It was hoped that a plan would be mapped out by the end of the Hilary Term 2011.

24. By early February 2011, the working group had taken independent legal advice and had drafted a consultation paper proposing the introduction of an EJRA of 67. On 3 February 2011, the Personnel Committee considered a paper setting out the current position. In the discussion, the aims mentioned in support of adopting an EJRA were the facilitation of academic planning, the promotion of greater diversity and the avoidance of the alternative of mandatory performance management. The draft proposal incorporated provisions for what was intended to be a fair procedure to consider requests for exceptions to the EJRA. It was intended that the policy would be reviewed after ten years. There was discussion about whether the policy should cover all academic and academic-related staff, although the arguments for creating separate groups are not set out. As for the choice of age, it was reported that the age of 67 had been proposed in order to respond to the legal advice that "policy in this area should be dynamic to reflect increasing longevity since the age of 65 was set in the 1980s." It was mentioned that a different approach might be justified in Oxford as opposed to other higher education institutions because of the joint appointments system and because of the way in which academic progression depended on appointment to vacancies. It is on account of this reference to the joint appointments system that I conclude that it was present to the minds of the Committee; yet (sensibly in my view) they did not include this issue as one of the University's aims.

25. The first consultation paper was issued on 9 February 2011. It appears to have been directed mainly to the Divisional Boards, the Continuing Education Board, the ASUC Strategy Group, the Joint Consultative Committee with University Support Staff, the Joint Consultative Committee with the Oxford UCU and the Conference of Colleges. However, it was open to individuals to respond. The paper gave a full explanation of what was proposed and listed the aims of the policy in broadly the same terms as those of the final version which I have set out in paragraph 13 above.

26. Meanwhile, on 14 February 2011, Council discussed progress. The Pro-Vice Chancellor, Dr Goss, reminded Council that it had previously been of the view that an EJRA was "essential for maintaining career opportunities, for

academic and financial planning and for fostering diversity". The "severe implications" for the University on the abolition of the DRA were noted and, Council asked that the proposals be developed.

27. On 15 February 2011, there was a consultation meeting between representatives of the University and the UCU, the relevant trade union. Mr Undy, for the union, expressed the view that the proposed EJRA was unlawfully discriminatory on the ground of age. He favoured the use of mandatory performance management for all staff although he acknowledged that this view was not widely shared within the University. Mr Hoad agreed with Mr Undy. He said that the decision to retire should be a matter of individual choice and efforts should be made to ensure that opportunities remained available to those at an earlier stage of a career. He considered that the assertion that performance management processes would be necessary in the absence of the DRA was unfounded. (The minute does not explain why he thought that.) Mrs Cross, the University representative, put the University's point of view. The UCU agreed to respond to the consultation.

28. The first consultation paper was published in the University Gazette on 17 February. Responses were required by 18 March. During the hearing the appellant complained that this had not left sufficient time for busy individuals to prepare a considered response. I agree that four weeks is not long but the Government had set a very tight timetable for employers, having decreed that the new provisions abolishing the DRA would come into effect in October 2011. If the appellant intended to suggest that the University had not wished to give a real opportunity for opinions to be expressed, I reject that suggestion. I note however that very few individuals responded. Whether that was because they were too busy or whether they were not interested or whether they were broadly satisfied and did not see the need to respond I do not know. More than once during the hearings, the University made the point that the appellant did not respond. The suggestion appeared to be that it was unreasonable (or perhaps a bit rich) for him now to complain about the scheme as he did not do so when he had the chance. I think this was a wholly

unmeritorious point to make. If the policy cannot be objectively justified, it does not matter whether everyone complained or no one.

29. On 3 March 2011, the Personnel Committee received "the final version" of the consultation document and Dr Goss reported that he was finalising a note in response to queries already received. This note was to be circulated to the Colleges and Divisions. It is at page 584 of the bundle. I mention it because the appellant said he had seen it. The Committee observed that, if the proposal for the EJRA was supported, further work would have to be done on the criteria and procedures for consideration of exceptions (i.e. extensions beyond 67).

30. The working group met on 12 May 2011 to consider the results of the consultation. All the divisions and the four departments which had responded were in favour. All but three of the colleges were also supportive. There had been only 19 or 20 responses from individuals; these were about equally divided.

31. At page 176 of the bundle, there is a brief summary of the reasons given by people who were opposed to the EJRA proposal. In addition, a more detailed breakdown of reasons both for support and opposition was provided by the UCU. This is an interesting and revealing document. I must not burden this decision by a long exposition of the reasons given but some responses should be mentioned. Among the supporters, there was a strong current of opinion that there had to be an EJRA because if there was not, the University would have to introduce performance management. Some did not want so see a challenge to older workers on the ground of poor performance. Another strong strand was the perception that, if there were no EJRA, there would be fewer opportunities for younger staff. Some were of the view that working after the mid-60s was just a bad idea. One respondent expressed the view that "any sane person would want to change direction by the age of 67 and only the wrong people, the obsessives, those who can't think of themselves outside a committee room, will want to stay on". There were several references to the situation in America where there was no normal retirement age; some thought that this was disastrous and academics stayed on far too long. It appears that

others took a different view about the situation in the USA. Those opposing the proposal gave a variety of reasons; some simply relied on principle, saying that discrimination was wrong and that the aims and objectives advanced by the University could be claimed by almost any employer. Some said that it was wrong to discriminate on the ground of age in order to promote diversity in other ways such as gender. Some said that there were other non-discriminatory ways of achieving the University's objectives and wanted these to be investigated. Some suggested that the adverse impact on promotion opportunities would soon adjust naturally. On the question of whether, if there were to be an EJRA, it should be fixed at 67, there were many who said that 67 was too low. Of those who said yes to 67, some added the rider that a higher age would be better. One noted that, as many existing employees already had a retirement age of 67, there was not "much allowance" in the present proposal and an EJRA of 70 "would be better". I think this person meant that an EJRA of 67 did not provide much change from the *status quo*.

32. At the meeting of the working party on 12 May 2011, it was said that some of the detailed comments from those who opposed the proposal contained arguments which could usefully be addressed in the covering paper to accompany the final proposals. Some of these detailed comments related to the lessons to be learned from the American experience but, as these were widely differing, it was thought sensible not to refer to them. There was agreement that the covering paper should examine in more detail the alternatives to an EJRA. That sounded as if there was to be active consideration of alternatives (as suggested by some of those opposing the EJRA) but in fact, as was confirmed by Dr Goss in evidence, that did not happen. It appears that was meant by 'examining the alternatives' was the provision of further explanations in justification of the proposal, in other words, further explanation as to why there really was no sensible alternative to an EJRA. The covering paper was to "spell out what a general performance management regime would entail, noting that it was the clear view of Congregation that such a process was undesirable." This was a reference to an occasion in 2005 when Congregation had roundly rejected some fairly modest proposals for performance management on the ground that such a scheme

would interfere with academic freedom. It was said that the covering paper should also make clear that the University lacked the means, especially in the current environment, to manage its workforce through financial inducements to retire. The covering paper was also to emphasise what was called "the liberalising nature of the proposals". The intent was not to enforce retirement at 67 for all but to have a sensible procedure to enable discussion of how an individual might stay on beyond retirement age, if he or she so wished. The key element would be the informal discussions of all options between the University and the individual. The expectation was that in most cases negotiation would produce an agreed outcome. There must be a transparent procedure to deal with disagreements. The procedure should bring out more clearly the extent of the flexibility which would be available.

33. The rest of the discussion related to the proposed procedure for dealing with applications to extend. According to the note of this meeting, there was no consideration of any alternative to the proposed age of 67. Nor does there appear to have been any consideration of the reasons which those who were opposed to the proposal had advanced. In my view, one of the most important purposes of consultation is to create the opportunity for second thoughts in the light of responses. Of course it is possible that there was such consideration and that it was not recorded. However, if adverse responses were considered at all, there was no suggestion for any adjustment to the policy. The discussion of the responses to the consultation tends to confirm the impression I had formed from the early documents that the Committee was extremely keen to have an EJRA. I do not see any real consideration of any alternative.

34. On 19 May 2011, the Personnel Committee considered the responses to the first consultation. The support from the academic divisions and the vast majority of the colleges was noted. I interpose to observe that this support was hardly surprising in that all those bodies had management responsibilities which would tend to make them support the proposal. The divided opinions of the 19 or 20 individual respondents were noted, as was the UCU response, but there does not appear to have been any discussion of the merits of the reasons given by the objectors. Against this background, the Committee agreed to

move forward to a detailed discussion about the procedures for handling applications to extend. In effect, subject to approval by Council, the decision to adopt an EJRA of 67 had been taken.

35. The impression I have from these documents, not dispelled at all by the oral evidence of Dr Goss, was that the Committee was pleased and relieved that the majority of the bodies consulted were supportive. The Committee had after all said that it hoped to maintain the *status quo* if at all possible. The response enabled them to proceed to the next stage, discussion of the provisions for applying for an extension.

36. I will discuss those provisions in due course but first wish to consider the totality of the evidence relating to the justification of an EJRA of 67. In parenthesis, I say that, in considering that evidence, I will keep in mind that it was always the University's stated intention to retain a fair and transparent procedure for considering exceptions to the general rule of retirement at 67.

Evidence prepared for and given at the hearing

37. Dr Goss's written evidence on the reasons why the University wanted and needed an EJRA was largely an explanation of the actions and thinking of the time. In particular he explained the thinking behind each of the aims. He did not say much about events or changes in thinking since the proposal came into force.

38. The oral evidence of Dr Goss and Professor Goodman was very helpful in that they clarified some aspects of the University's position that I had not fully understood. They also dealt very fairly with the appellant's questions. They are both, it goes without saying, men of unimpeachable integrity and I accept the truthfulness of their evidence without hesitation. That said, there were some issues on which I cannot wholly accept the logic of their thinking. In the main, Dr Goss dealt with the University's aims, needs and problems and Professor Goodman spoke mainly about the appellant's individual case. However, he also contributed to some aspects of the general issues. I will deal briefly with their explanations of the importance of each of the University's aims.

Intergenerational fairness and the maintenance of opportunities for career progression

39. In respect of inter-generational fairness and the maintenance of opportunities for career progression, Dr Goss's view was that it was important for academic staff to feel that there were opportunities for promotion for them at Oxford. It was put to him that statutory professorships and other tenured posts were advertised globally and that many were filled from outside. It was suggested that an Oxford academic does not have any real expectation of promotion from within the University; academics knew that they might well have to apply elsewhere for promotion. Dr Goss accepted that this was so in respect of statutory professorships but did not agree in respect of more junior positions, for which, he said, appointments were often made from within. He said that people wanted to stay in Oxford once they had arrived. Asked what proportion of posts were filled from within, he did not know. He was able to provide some figures for the Medical School in which he worked. These showed that, in the Schools of Pathology and Physiology, about 50% of appointments were internal but in Pharmacology, only one in seven was internal. Professor Goodman accepted that, within the Social Sciences Division, 50% of appointments were made from overseas. Without the figures for the whole University, it is difficult to assess the extent to which Oxford academics have a reasonable expectation of promotion from within the University. It does seem to me that, particularly for tenured posts, Oxford is operating in a global market and, even if people would like to stay in Oxford, they cannot have any great expectations of being preferred over applicants from outside. The position does not seem to be like many commercial organisations where promotion is often from within. On the evidence before me, I do not think that a great deal of weight can be attached to "inter-generational fairness" and I feel that the University has tended to overplay its importance.

Refreshment of the academic workforce

40. I do however see force in the other aspect of this aim, the need for 'refreshment' of the academic workforce. Dr Goss stressed the need for the

University to maintain its position in the academic world. It needed to maintain its cutting edge and to avoid staleness. If there is a significant reduction in the number of posts becoming vacant, the rate of turnover or 'refreshment' will decline. I can see that. However, as Professor Goodman explained, there are other factors at play in the problems of 'refreshment' besides the number of appointments available. He said that Oxford could not compete for 'stars'. At statutory professor level, Oxford was competitive on salary but, at more junior levels, it was not. He was sometimes unable to appoint the people he wanted to mid-career positions because he could not offer a sufficiently attractive financial package.

41. I do accept that, without any compulsory retirement age, the University's ability to 'refresh' its academic workforce would be to some extent restrained. However, I think that the University has looked at this issue only or mainly by considering what would happen if it had *no* normal retirement age at all; in other words, if it was in the same position as the US Universities. Dr Goss and Professor Goodman told me that, although the University did not seek official or statistical information from the US Universities, they did have some anecdotal evidence about the rising age profile since the abolition, in 1994, of the default retirement age of 70 and the problems which that was causing. Further, Dr Goss told me that, although his Committee had not actually considered the published articles which were now before me, they reflected the general position of which his Committee was aware. These papers describe a rising age profile in the US academic workforce, a lower rate of turnover and fewer vacancies. He explained that, whereas US Universities could cope with the problem of a rising age profile by creating new posts and/or offering golden handshakes to persuade people to retire, these options were not open to Oxford as it did not have the funding. I accept that. I also accept that the need to maintain a reasonable rate of turnover so as to 'refresh' the academic staff is a legitimate aim and a sensible reason for wanting to have an EJRA. However, it must be borne in mind that the US problems have arisen since the abolition of the default retirement age of 70. It does not appear that Oxford took any steps to find out how the US Universities had fared while that age limit was in force. It appears from the published materials

that the US Universities were quite happy with that retirement age and with the age profile which it produced. It was the loss of that which they regretted.

42. The University did not seek the views of other UK Universities on this issue, although at informal discussions, Oxford had learned that Cambridge was the only other UK University which was contemplating an EJRA.

43. At the hearing, there was some dispute as to the effect on staff turnover of abandoning the DRA. The appellant suggested that there would be a temporary period of adjustment but that, once this was over, the rate of retirement and the opportunities for refreshment would settle down to what they had previously been. Dr Goss would not accept that and I think he was right. If the retirement age is abolished or raised, it is likely that some people will stay in post longer and that there will therefore be a permanent reduction in turnover. The University appears to me to have regarded that as a major problem and therefore an important reason for keeping as close as possible to the previous arrangements. It adopted this attitude without having made any attempt to find out or to estimate what would be the effect of different retirement ages. It cannot be thought that, if a retirement age later than the pension age (65) is brought in, everyone will stay on as long as they are permitted. Human beings are infinitely variable in their behaviour and it seems to me highly likely that, when offered the option of taking their pensions at 65 or of staying on until a later age, employees will make different decisions and for a variety of reasons. Without trying to ascertain or estimate roughly how many would wish to stay on and how many would go and at what stage, it is impossible to assess the extent to which the turnover in posts would be diminished by introducing any particular retirement age. The approach of the University seems to me to have been to assume that, if there was no EJRA, everyone would stay on a long time and there would be a serious reduction in turnover. There was no attempt to find out how great the effect would be of compulsory retirement at any particular age.

44. A further point made on the issue of reduction in turnover was the problem of the transitional period between the introduction of an EJRA and the time when the rate of retirement would settle to a steady state. Dr Goss said that the

University wanted to extend its retirement age gradually so that there would be no sudden reduction in the number of posts coming vacant. I understand the point but I think the gravity of the problems of the transitional period has been exaggerated by the University. Every other University in the UK besides Oxford and Cambridge has made the change from the statutory DRA (or whatever contractual arrangement they had) to the position of no compulsory retirement age at all. I have not been told that this has caused problems for them. In 1994, the American Universities moved from a retirement age of 70 to no compulsory retirement age. I have not been told of any difficulties they experienced during the transitional period. Even if it is reasonably necessary or desirable to avoid a sudden reduction in the number of posts coming available, the University's approach in moving only to 67, by levelling up to an age at which some staff were already entitled to work, seems to me to have been a very modest step indeed which would probably create quite a slight diminution in available posts.

45. In connection with this issue, the appellant pointed out that, when the rest of the academic world is moving or has moved to no fixed retirement age, it seems unnecessary (and possibly disadvantageous) to stay with a retirement age which (with Cambridge) will be lower than anywhere else. When it was suggested that having a low EJRA out of step with the rest of the world may turn out to be a disincentive to recruitment, Dr Goss replied that it would always be possible to extend an employment. If by that he meant that it would be possible to give an advance undertaking at the time of appointment that, when the appointee reached the age of 67, he or she would have his employment extended, it would suggest to me that the EJRA was not so much a general rule by which the aims and objectives of the University could be advanced but rather a means for the University to pick and choose who it wants to keep and who it wants to get rid of.

Succession planning

46. On the issue of succession planning, Dr Goss and Professor Goodman both spoke of the long lead times required for the replacement of senior academics, in particular statutory professors. I was told that it could take 18 months to

two years to appoint a senior academic. I accept that it is desirable and convenient for the University to be able to plan ahead for replacement and having an EJRA would assist in that respect. However, at the hearing, Dr Goss accepted that it would make no difference at what age the EJRA was set. For succession planning it was the certainty which mattered not the age at which the incumbent would depart. Dr Goss did not appear to have thought of that before and there is certainly no reference to this point in the documents. This aim cannot in my view be prayed in support of an EJRA of 67 although it can help to justify the general principle of an EJRA.

Diversity

47. On the promotion of equality and diversity, Dr Goss spoke very warmly of his personal commitment to gender equality. He felt that the University had not done well in the past in this respect and had a lot of ground to make up. He said that it was now making progress. More women were being recruited into senior positions. This trend had begun before the introduction of the EJRA and appeared to be due to changes in recruitment practice and a change in culture and attitudes. The trend had continued since the introduction of the EJRA in 2011 although he agreed that progress was slow. He also said that it was not possible to assess to what extent the introduction of the EJRA had helped. The view of the University was that any decrease in the turnover of posts would have an adverse effect on this promising trend.

48. At some stage during 2011 (I do not know exactly when as the document is undated) the University undertook an equality impact assessment in respect of the proposed introduction of the EJRA. The conclusion was that the introduction of an EJRA would promote gender diversity in the academic staff group. It would also benefit gender diversity in the academic-related staff group although less strongly. The thrust of the paper was that the removal of a retirement age would slow the turnover of staff (particularly in the academic group where 40% of all departures were on account of retirement) and the faster the rate of staff turnover, the greater the beneficial effect on gender diversity.

49. I accept, as a matter of logic, that now that more women are applying for senior posts and attitudes towards appointing them have changed, the more posts that change hands the more women will be appointed. Dr Goss accepted, however, that the advantageous effect of having an EJRA would be small. Even assuming that all the vacant posts had previously been occupied by a woman, not every post that became vacant would be filled by a woman.

50. The University assumed that the promotion of gender equality is a legitimate aim, as I accept that, in principle, it is. But there is a real problem to grapple with. This was highlighted by one of the respondents to the consultation paper. Is it right to impose age discrimination in order to alleviate the effects of historic gender discrimination? (The equality impact assessment did not deal with this question. That is not a criticism of the paper, which was not designed to consider policy, only to estimate the effect of the policy if adopted.) The rights not to be discriminated against on the grounds of any of the protected characteristics are all important rights. In *Seldon,* Lady Hale said that the promotion of gender equality was a legitimate aim in the justification of an EJRA. There does not seem to have been any discussion of this point of principle. Ms Reindorf's submission was that the right not to be discriminated against on the ground of race or gender was more 'important' than the right not to be discriminated against on the ground of age. That was because it is possible to justify direct age discrimination and it is not possible to justify direct gender or race discrimination. I accept that there is a distinction in that respect and that is why I am prepared to say that the promotion of gender equality may in principle be treated as a legitimate aim in support of an EJRA. However, that does not mean that the promotion of gender equality can completely trump the right not be discriminated against on the ground of age. Unless the diversity promoting benefits to be derived from introducing the EJRA are very significant it does not seem to me to be justifiable to introduce one form of discrimination in order to combat another. In any event, given the admittedly slight effect of an EJRA on improved diversity, the weight that could be given to this factor when balancing the importance of the University's aims against the reasonable expectations of the affected employees would be very slight indeed.

Performance management

51. Both Dr Goss and Professor Goodman spoke about the University's approach to this issue. They both explained the clear manifestation in 2005 of the Congregation's objection to any form of performance management. Both witnesses were of the view that there could be no question of introducing any such system. The appellant suggested to them that, by 2011, Congregation's attitude might have changed and it should have been asked again. Dr Goss and Professor Goodman did not agree; they were quite certain that there was a deep-rooted, almost visceral objection to any such idea. I accept what they say. I had the impression that they (and possibly others involved in the administration of the University) rather regretted the strength of the democratic control of Congregation. It made it difficult to introduce modern management practices. But that democratic control is well rooted and the consequences as regards its opposition to performance management seem to be accepted. When Professor Goodman was asked how many underperforming academics there were in his division, he answered, quite cheerfully, that he had no idea and no means of finding out. He added that he thought there were not many.

52. It appears therefore that the University starts from the position that there never has been any performance management of academics and, for the foreseeable future, there will not be. It took some time for me to unravel the importance of this situation in the context of the abolition of the DRA and the introduction of an EJRA. It is clear from the documents that, in 2010/11 there was a real fear that, when the DRA went, the University would find it difficult to get rid of ageing staff because it could not use performance management The University would have to rely on the grounds of misconduct (unlikely), ill-health (not a frequent occurrence) or seriously poor performance (the procedures for which are notoriously difficult to conduct and are demeaning to the employee). The implication behind this concern, although not spelled out, was that older employees would slow down and lose their energy and creative edge. Without performance management there would be no dignified way of removing them. The argument seemed to be that, if the University did not

have a normal retiring age, it would have to have performance management. As it could not have performance management, it would have to have an EJRA.

53. Ms Reindorf expressly accepted, however, that there was no evidence that performance declined with age. The way she put it was "certainly not up to the age of 70 or even afterwards". If that is the case, why is an EJRA necessary to avoid the need for performance management? The University has historically managed without performance management for employees up to 65 and 67. If the University functions perfectly well in respect of its employees aged up to 65 or 67 without the need for performance management and if there is no evidence that performance declines in the years between 65 and 70 or even beyond, I cannot see why the University should not manage just as well in respect of its older employees as it is content to manage with its younger ones.

54. It is clear, however, that the performance management 'problem' figured quite prominently in the University's thinking in 2010/11. It still figured prominently in Professor Goodman's thinking when giving evidence. When asked why he thought Oxford (and Cambridge) were different from other UK Universities (so as to explain why they had to have an EJRA and other UK Universities did not) he said that it was because other Universities had performance management and Oxbridge did not. However, for the reasons I have given, I think there is a logical flaw in his thinking and the University's. I do not think that the non-availability of performance management can be prayed in aid of the justification of an EJRA.

The collegial system

55. Finally, I turn to Dr Goss's evidence about the collegial system. He said that Oxford needed an EJRA because of its collegial system. This evidence emerged in response to a question from the appellant seeking to know why it was that Oxford needed an EJRA when all the other UK Universities (apart from Cambridge) had decided not to have an EJRA. What was different about Oxford? His answer was "the collegial system". Many academic staff had

joint appointments; a University appointment and a college fellowship, which carried separate duties. The salary was usually divided between the two entities; sometimes 50:50 sometimes 60:40. There were two separate contracts of appointment; in the past, each had stipulated the same retirement date and there was no problem; the employee would usually retire from both posts at the same time. If that system broke down and the University had no retirement date but the colleges imposed an EJRA (and particularly if different colleges stipulated different EJRAs) or vice versa and the University imposed an EJRA and the colleges or some them did not, he thought things could get 'out of sync'. Although it was clear from the documents that the University regarded it as important that the colleges should be in agreement with the University in respect of their developing policy on an EJRA, this problem did not feature as one of the aims of the EJRA. Indeed, as I have already observed, it is difficult to see how it could be framed as a public or social policy aim. It seems to me that the real point of this is that the University perceived a need to carry the colleges with it on its own policy whatever that was. It took some pains to try to ensure that it succeeded in that respect. In the event, most of the colleges were supportive of the proposal and they all agreed to a binding vote, which bound even those who had not wished to agree. However, I have not been shown or told of any evidence that the colleges would not have agreed to a different proposal. For all I know, the great majority of the colleges might have agreed to a different proposal; they might have done so because they recognised the need for a uniform approach. I just do not know. Accordingly, although I accept that, in Dr Goss's mind, it was important to carry the colleges with the University, it does not seem to me that the existence of the collegiate system with its split contracts of employment can be prayed in justification for the adoption of an EJRA, let alone an EJRA of 67.

The choice of 67 as the EJRA

56. Dr Goss said that the thinking at the time was that choosing the age of 67 would 'even up' the former disparity in retirement ages. Also, that age recognised the changing age-profile of the population and the Government's

intention to raise the state retirement age. In effect, the University would be ahead of the state. The thinking seemed to be that a retiring age of 65 was perfectly acceptable but some movement should be made to keep ahead of the position elsewhere. I see that the legal advice given had been that the proposal should be "dynamic". Without seeing the advice, I am not sure of the context of that word, although I think it must have meant 'forward moving'. However I would have expected that the advice would suggest that the University should have regard to the spirit and purposes of the legislation which were to recognise that people were living longer and should be permitted and encouraged to work longer. Even if the advice did not say that, I think that those factors should have been present in the University's mind. Yet this proposal hardly moved forwards at all. In fact, it took the University back to the position it had been in until the late 1980s and in that respect was not forward moving at all. In addition, it does not seem to me that the degree of forward movement took much if any account of the change in life expectation and the improved health of older workers which has occurred in, say, the last half century.

Discussion of the University's decision-making process in 2010/11

57. Looking at the University's thought processes as a whole it does not appear to me that there was in-depth consideration of the principles which should guide the Personnel Committee or the Working Group. In theory, these bodies knew that there was a possibility that the justification for their adoption of the policy might be scrutinised by an outside adjudicator. In theory, they knew that the process of scrutiny would entail a balancing of the interests, needs and aims of the University as against the interests and reasonable expectations of the affected group or groups of employees. Yet nowhere do we see any discussion of this balance. Instead we see from time to time the assertion that this EJRA of 67 will be "a proportionate way of achieving the University's legitimate aims". I do not have the impression that the Committee or working group actually applied their minds to what that meant in practice. I do accept that it is the task of this Court to carry out that balancing exercise, rather than the Personnel Committee or the University. But the fact that they did not

discuss the need to achieve that balance suggests to my mind that their priorities lay not there but with achieving the best solution that they could for the University. I have the impression that the Committee decided at the outset that it wanted to change its present arrangements as little as possible and that its efforts went to achieving that by what it hoped would be satisfactory and acceptable means. It was advised that its attitude must be 'dynamic'. I think the Committee understood that it could not be seen to make no forward movement at all. But it wanted to move forward as little as possible. In my view, the levelling up of the two different retirement ages (65 and 67) to the uniform level of 67 was just that, the least that the University thought would be acceptable.

58. I entirely accept that the Committee sincerely believed that a retirement age which would cause as little change as possible to the current arrangements would be in the best interests of the University. If Dr Goss represents their collective state of mind, I accept that they wished strongly, even passionately, to do their best for the University. I also accept that they genuinely believed that the consultation exercise gave the decision-making process validity. I agree that consultation is a useful exercise, particularly when it throws up reasoned objections and sensible alternative suggestions. I regret to say that I do not think that the Personnel Committee gave serious thought to either the reasoned objections or the sensible alternatives. Instead, it treated the general agreement as a kind of democratic approval of the proposal. One problem with this is that, as Dr Goss recognised when giving evidence, the age demographic of the University was not likely to produce a strong reaction against an EJRA of 67. But more important than that, I think that the University confused the idea of general approval with the balancing of interests which justification of an EJRA requires. I think they thought that if there was general approval, that would go a long way towards justification. I think that the strength of the University's belief that an EJRA would be in its best interests robbed it of objectivity. The approach was one-sided. The University wanted to achieve a situation as close to the previous position as it could. It settled upon an EJRA of 67 and worked towards justifying that position. It assumed or persuaded itself of serious difficulties which would be

caused by the lack of a normal retirement age and failed to find out what the true effects would be. In some respects, (in particular in respect of performance management) its thinking was illogical. There was no attempt to balance the needs of the University against the policy underlying the change in the law and the legitimate expectations that that policy created for workers approaching the previous retirement age. In short, I think that the University's thought processes at the time left much to be desired.

My own consideration of the issues

59. The EJRA has now been in force for three academic years. Statistics have been collected which are designed to inform the review of the policy which is due to take place in 2016. However, I was not given any analysis (or any other evidence) designed to demonstrate how the policy has worked up to now in terms of achieving its aims or to what extent any difficulties have occurred or benefits experienced. That is not intended as criticism but it means that, at the hearing, the University relied on its thinking at the time it brought the policy into force rather than any new thinking or experience since implementation.

60. Although I have been critical of the University's thought processes, I do accept that there were some valid reasons why the University wished to have a compulsory retirement age and that these reasons served legitimate public or social policy aims.

61. I accept that, if there is a significant reduction in the number of vacant posts, there will be fewer opportunities to refresh the workforce, as the University needs to do if is to retain its competitive edge and to be free to change direction. I accept too that Oxford cannot deal with that need or problem by creating more posts as the more well-endowed universities can in the USA. So, for senior posts, there is a genuine need to maintain a reasonable level of turnover. I accept too that, at the lower academic levels and for academic-related staff, there is a legitimate wish to keep up the level of vacancies for the maintenance of promotion prospects from within the University, in other words, inter-generational fairness. However, the evidence suggested that, notwithstanding financial constraints, there has been an increase in research

posts in recent years and I doubt that this problem is a serious as was suggested for lower grade academic staff. I do not think the aim of maintaining internal promotion prospects applies to the turnover of vacancies for statutory professors; such appointments draw interest on the global academic market. I am uncertain about the position in respect of other tenured posts. I have the impression that they too attract much outside interest. What this means is that different considerations apply to the lower academic and academic–related grades from those which apply to tenured posts and in particular to statutory professors. I read that there was some discussion about whether these grades should be 'lumped together' in the EJRA but I do not know why it was decided that they should be. It does not seem right to me to rely on the aim of inter-generational fairness when seeking to impose a compulsory retirement age on a group of statutory professors even though it may be a valid consideration for some other grades.

62. I accept that the lower the age of retirement the greater will be the rate of turnover. However, I am not persuaded that it is necessary to have an EJRA as low as 67 in order to achieve to maintain a reasonable level of turnover of senior staff or to avoid difficulties in the transitional period. At the time, the University made no attempt to find out what would be the likely effect on vacancies of an EJRA of any particular age. I think this could have been done in 2011. Nor has the University presented me with any material from which I could assess the size of the problem as of today. Any statistics as are available in respect of retirements since October 2011 would be blurred by the operation of the extension procedure. That is not a matter of criticism; it is a fact. However, other UK Universities must by now have had some experience of the effect having no fixed retirement age. How many people are staying on after the age at which they can draw their pensions? And for how long? The University has still not asked its staff approaching retirement what their wishes or intentions would be in the light of any particular retirement age. During the hearing, it emerged that of those staff in the Social Sciences Division who had requested an extension after the age of 67, the majority had asked to stay on for only two years or less; only one applicant had asked to stay on for more than three years. Also, the great majority of those who asked

to stay on had been permitted to do so, which suggests that there would be no great problem in having a compulsory retirement age of, say, 70.

63. I also accept that, for an organisation such as Oxford, which has and must have a limited number of important senior positions, there could be difficulties in planning for appointments if there is no normal retirement age for such people. This situation is quite different from that which exists with groups of employees of similar status. I accept too that it will take some time to fill a senior appointment of this kind. This is a factor which is capable of justifying a compulsory retirement age. I note, however, that both Dr Goss and Professor Goodman accepted that the need is for certainty of departure at a known age rather than for departure at any particular age. I must also observe that there are other steps which the University could take to mitigate any problems arising from uncertainties about when staff will retire. At present, the contracts of employment require only one term's notice to be given before departure. No thought appears to have been given to lengthening that period to, say, an academic year. Also, given that the problem exists only in respect of senior appointments, it would not seem difficult to ask senior academics to give an indication of their retirement intentions as soon as they are formed. We are, after all, speaking about a body of responsible people who are likely to cooperate with such a sensible and moderate request. I can say from experience that this works well in the senior judiciary where judges are asked to give as much advance warning of their intended retirement as possible.

64. I must make a further observation at this stage. When I come to discuss the provisions for applying for an extension, it will be seen that the University gives warning of the approaching EJRA two years in advance. It requests the employee to commence the process of application within a set time. Yet, when that time is up and nothing has happened, it does not appear to be the practice to write again to say that it will now be assumed that the employee will retire on the previewed date and that the process of replacement will begin forthwith. Such a practice would seem sensible if indeed it does take 18 to 24 months to make an appointment.

65. My conclusion is that the organisational need for predictability is capable of amounting to a justification for an EJRA. It cannot of itself justify any particular EJRA. However, I do not think it could ever amount to weighty justification because there are other steps which could be taken to reduce the difficulties caused by any uncertainty in the date of retirement.

66. I have already explained that I accept that, although the promotion of gender equality is a legitimate aim for the University, I consider that the actual benefits of an EJRA in promoting gender equality are very slight when one considers that they are achieved at the expense of causing a different form of discrimination.

67. I have already explained why I consider that neither the avoidance of performance management nor the existence of the collegial system cannot, for Oxford, amount to a legitimate aim or objective which an EJRA will help to promote.

Discussion

68. Although I have said that, in my view, there are some factors which justify the imposition of a compulsory retirement age at Oxford, I do not think that the policy of imposing retirement at 67 can be objectively justified. The aims and objectives which could justify any compulsory retiring age ('refreshment' and succession planning), have not been shown to be weighty. I have already discussed the various factors issues in relation to the time when the University reached its decision in 2011. At that time, the University was so determined to hold on as closely as possible to the previous situation that it failed to consider the issues openly and objectively. I have heard no new evidence or arguments other than those which apparently underlay the choice of 67 in 2010/11. I have not been shown either evidence or argument why it was reasonably necessary to select an age as low as 67 as opposed to some later age, which would clearly be less severe in its discriminatory effect. The legitimate aims and objectives to which I have just referred do not appear to me to be of such weight and importance as could properly outweigh the legitimate expectations

of academic staff to work longer and to have an element of choice as to their retiring age.

Can the existence of an extension procedure assist in justifying a policy which would not otherwise be justifiable?

69. As I have said earlier, the University was anxious to impress upon me that the effect of the choice of 67 would be greatly mitigated by what were described at various times as the fair, transparent and inclusive processes of extension. I now turn to consider whether that process is capable of making a significant difference to my assessment of the balance of interests which must go to objective justification of the policy.

70. The University's argument is that, because there is a procedure for allowing some employees to stay on after 67 and because some of those applying (in practice the majority) are allowed to stay on, the discriminatory effect of the policy is much reduced and this assists in justifying it as a proportionate means of achieving its aims. Because the rule does not 'bite' on all 67 years olds, it is less discriminatory and therefore more readily justified.

71. I do not accept this submission. The change which was effected by the Equality Act with effect from October 2011 was to provide older employees with the right not to be unfairly dismissed. Until 2011, any employee aged 65 or over dismissed on the ground of retirement had no right to claim unfair dismissal. The employer was 'fireproof' in respect of employees over 65. After 2011, an employer who dismissed an employee on the ground of retirement at a particular age would be discriminating against that employee and the dismissal would be automatically unfair unless the dismissal could be objectively justified. The Act does not make specific provision for a collective scheme whereby an employer adopts a retirement policy covering all its employees or specific groups of them and is able to justify that policy by reference to its legitimate public interest aims and objectives. However, the practice has grown up for such policies to be adopted and they have been sanctioned by the courts. So far as I am aware, the UK courts have only approved as objectively justified schemes which are applied across to the

board to all members of the relevant group. Where such a scheme can be objectively justified and it is applied across to the board, any employee dismissed under the terms of that policy will have been fairly dismissed. However, if the scheme is not applied in the same way across the board, it seems to me that the scheme or policy (even if in itself objectively justifiable) cannot give automatic protection to the employer. The reason is that, as soon as the employer applies the policy in a different way to different people (as here, by pursuing a process for allowing some but not others to stay on) the reason for an individual's dismissal ceases to be retirement at the EJRA and becomes a dismissal under the selection process. In other words, the dismissal is not causally connected to the EJRA policy. In the present case, if the appellant is dismissed with effect from 30 September 2014, he will have been dismissed not because he is 67 but because his application to stay on was refused. It is true that reaching the age of 67 is a pre-requisite for being at risk of being dismissed; the employee would not be dismissed unless he or she were 67 but the principal reason for the actual dismissal is the rejection of the application to extend.

72. To my mind, the existence of this extension procedure does not assist in the justification of a compulsory retirement age. Instead, it seems to me to undermine the whole purpose of having an EJRA. The University is in effect saying to its employees, when you reach the age of 67, you will enter a process for deciding whether you will be allowed to stay on. If that process results in rejection, the University cannot say that the principle reason for dismissal is that the employee has reached an objectively justifiable retirement age; it is because his application to stay on has been rejected. It follows that the University cannot rely on the EJRA to show that the dismissal is automatically fair.

73. There are a number of potentially fair reasons for dismissal. Failing to be accepted in a selection process is not one of the acknowledged potentially fair reasons. However, the law provides that "any other substantial reason" may amount to a potentially fair reason for dismissal. I find it hard to imagine that a selection process such as the one operated by Oxford would be regarded as a

potentially fair reason but I must examine the process before reaching a conclusion.

Procedures for applying for an extension beyond the age of 67

74. The second consultation paper was published in the Gazette on 9 June 2011. Consultation closed on 8 July 2011. An updated version was produced on 14 June. The introductory summary (page 215 of bundle) described the procedure for extension as seeking to provide a fair and inclusive process through which the collegiate University will be able to manage the future of academic and academic-related posts by retirement, or retention in the existing role, or through reaching agreement on a new set of duties and associated terms and conditions which are acceptable to the employer. Pausing there, it seems clear that what the University is aiming to do is to give itself the power to select who will be dismissed. At section 3.2, (on page 219 of the bundle) which introduces the new procedures and invites comments on them, it is said that "the procedure seeks to balance the wishes of the individual approaching the EJRA with the needs of the collegiate University ... by facilitating the timely discussion of options with a view to identifying possible future arrangements which are acceptable to all parties and by providing a clear decision-making and appeal process which allows account to be taken of all relevant considerations."

75. The consultation document itself envisaged that there would be informal discussions between the individual member of staff and his or her head of division or equivalent. Flexibility was to be encouraged, subject to the aims of the EJRA. These discussions would be intended to provide an opportunity for the formulation of a request with which all parties would be content. It was said that the outcome of these discussions would not result in a definitive decision but would help to inform the formal request which would be made later. The formal application would be submitted by the head of division or equivalent to the Director of Personnel and Related Services. The member of staff would have the opportunity to append any supporting material to the submission.

76. All this may have sounded quite reassuring to members of staff approaching retirement. Indeed it was intended to reassure. At page 213 of the bundle, the document inviting the University bodies to respond to the consultation stated: "The Personnel Committee believes that the details of the proposed arrangements may clarify the rationale for introducing an EJRA and reassure individuals and appointing bodies about the way in which serious consideration will be given to requests to work beyond the EJRA and the circumstances in which such requests will be approved if this is justified". However, it appears to me that the reassurance offered was not quite what it seemed. Although the introduction to the paper said that the procedure sought a balance between the interests of the employee and the University, it was not made clear how, when or by whom this balance was to be struck. The facilitation of early discussions with a view to reaching agreement does not in fact strike any balance of interests at all. When one looks at the draft procedure itself, annexed to the consultation document, one sees that there is no explanation as to how the head of division is to approach his or her task in such discussions, save that the aims of the EJRA are to be safeguarded. He or she is not enjoined to strike a balance of any kind.

77. The consultation paper also set out the procedures for consideration of an application. Where there was agreement, the application would be put the panel for approval after consideration whether the aims of the EJRA had been adequately addressed. Where there was no agreement between the parties, there would be a panel hearing at which each side would be able to present its case. At page 224 of the bundle, under the section headed "Consideration of requests to work beyond the EJRA", paragraph 31 stated "In order to ensure consistent treatment of employees and in furtherance of the stated aims of the EJRA, the panel will weigh the advantages of continued employment (whether in the same post or in only one part of a previous appointment, or on different terms and conditions or on a part-time basis following partial retirement to pension) against the opportunities arising from a vacancy. In reaching its decision the panel will take account of the intention regarding the future use of any such vacancy or part vacancy and of relevant considerations such as those

set out below." There then followed a list of the Considerations to be taken into account, the final version of which I will later set out.

78. I note that there is here no mention of a balancing exercise between the wishes of the individual and the needs of the University. Rather the weighing process would be to determine what outcome (extend or not) would be best for the University.

79. On 22 June 2011, there was a consultative meeting with the UCU to discuss the second consultation paper. The gist of the University's message, as recorded in the minutes of the meeting was to stress that the procedure would balance organisational aims with the individual's wish, taking into account the individual's contribution. It was said that, where an individual was productive and wished to stay on, it would be likely that an agreement would be reached through discussion so that the formal request would have the support of all parties. (This suggests that most people who want to stay on will be able to; but if that is so, the aims and objectives underlying the compulsory retirement age cannot be very significant.) The question would be whether the person's contribution was equal to or greater than that of the person who might replace them. It was also possible that the department might wish to hold the vacancy. There would be a strong obligation on the manager to accede to a reasonable request to take part in informal discussions. In cases where agreement had not been reached, the panel would consider whether all possible avenues had been explored and might, where appropriate, refer cases back to the department for further discussion. The aim of the panel would be to reach accommodation where possible. (Here again, if the aim is to reach agreement to permit an extension, why is a compulsory retirement age needed?)

80. At the Council Meeting on 27 June 2011, the most recent papers from the Personnel Committee were noted without discussion. By 22 September, the Personnel Committee was able to consider the results of the second consultation. The Divisions were supportive. Very few responses had been received from individuals. That seems to me unsurprising in view of the reassuring tone of the second consultation paper. The Committee resolved to recommend to Council the adoption of the proposal.

81. By this time a final version of the procedure had been prepared. It contained what appears to me to be a significant change of wording in the section dealing with consideration of requests. At paragraph 25, it was stated that applications to extend would only be approved 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 an extension of employment* (my emphasis). This alteration seems to me to place a burden on the applicant which goes well beyond that which had been envisaged in the earlier versions of the procedure. The use of the word "convince" suggests that the applicant will have to make the panel sure that the balance of advantage to the University lies with the continuance of the employment. At the hearing, I asked Dr Goss how that change had come about. He was unable to tell me and said that he had not realised that it might make a significant difference.

82. I note also that there is no suggestion anywhere in the final version of any attempt to balance the wishes of the individual with the needs of the University. As the Considerations which I will now set out demonstrate, the wishes of the individual have little place in the procedure. He or she has a right to be heard. Also, he or she may advance personal circumstances which may justify exceptional treatment. Other than that, the criteria are all related to the interests of the University.

83. The Considerations which have to be taken into account when determining an application to extend are as follows:

    - Is the individual, if extended in employment, expected to make an exceptional contribution to the collegiate University, for example through distinguished scholarship, and would the loss of this contribution be unacceptable to the collegiate University?

    - Would the employee's contribution be unusually hard to replace given his or her particular skill set and/or the employment market? For example, does the department or division need, for a defined period, to

retain expertise in order to complete a specific project, or to retain skills that are currently in short supply?

- How would continued employment compared with the opportunity arising from a vacancy fit with the future academic and business needs of the department or division over the proposed period (for example where there is a desire to develop a new field of research or a new course or to develop new business systems or approaches)?

- What is the likely impact of continued employment compared with the opportunity arising from a vacancy on the quality of work of the department or division, for example on its ability to respond to student needs, to meet research aims or to provide professional and administrative services of the highest quality?

- How would any financial commitments or benefits which would accrue from continued employment over the period proposed compare with those which might accrue from the opportunity arising from a vacancy?

- What is the likely impact of continued employment compared with the opportunity arising from a vacancy on opportunities for career development and succession planning, bearing in mind recent and expected turnover?

- What is the likely impact on the promotion of diversity?

- Is the duration of the proposed extension of employment appropriate in terms of the benefits expected to the collegiate University?

- In the case of a joint appointment, what are the implications of the wishes of the applicant for the joint nature of the post: for example, where the request involves only one part of a joint appointment, has some suitable means been found of managing the future of the joint appointment so as to protect the shared educational interests of the University and colleges?

- In the case of clinical academics is the NHS Trust concerned willing to renew the employee's honorary contract? The holding of an honorary contract is prerequisite for continuation in a clinical post.

- Are there relevant personal circumstances that would properly justify exceptional treatment?

84. Before continuing with this account, I interpose to stress that these Considerations are not, in the main, related to the aims and objectives which are said to justify the imposition of a compulsory retirement age. They are, in the main, criteria which will enable the University to assess the strength of the advantage to be gained by allowing an extension. The exception is the Consideration relating to diversity. The promotion of diversity is one of the aims of the EJRA policy. However, when one applies the promotion of diversity as a Consideration for allowing an extension, one sees that it is capable of being grossly unfair. A woman approaching retirement could say that she must be kept on because the effect of her departure on diversity may well be negative whereas a man may well be told (as we will later see that this appellant was) that there is a diversity advantage to the University in forcing him to retire. If this Consideration played any part in the decision, it would be direct gender discrimination.

85. After the preparation of this final version of the policy and procedure, matters moved swiftly to a conclusion. They had to; there was very little time left before the Equality Act came into force. Council approved the proposal on 11 October 2011 and notice was given in the Gazette on 13 October that the necessary changes would come into effect on 28 October, with retrospective effect to 1 October. The effect of this notice was that, unless at least 20 objectors called for a vote in Congregation, the measure would be come into effect.

Comment on the procedure as set out in the documentation

86. Assuming for the moment that it is theoretically possible for any selection procedure to result in a fair dismissal, I have significant concerns about this particular procedure. The first and most obvious is the burden and standard of

proof which the procedure lays on an employee who has not been able to reach agreement with his or her head of division. It is a very tall order to expect the employee to "convince" the panel that the detriment to the furtherance of the aims of the EJRA is offset by a balance of advantage arising from an extension of the employment. How is the employee to do this? He or she cannot be expected to know how to assess the detriment to the aims of the EJRA which will be caused by his or her retention. He or she cannot therefore see the height of the bar to be surmounted. All he or she can hope to do is to explain what advantages will be brought to the University by his or her continued employment as compared with an as yet unidentified replacement or even no replacement at all. I was not surprised to learn that, in the period since the EJRA and its procedures came into force, no employee has succeeded in convincing the panel that he should be retained against the wishes of the head of division. On the other hand, all the applications which had been the subject of prior agreement were approved by the panel.

87. My second specific concern is that the first stage of the process, which is clearly very important if an applicant is to be kept on, appears (at least on paper) to depend to a very large extent upon the subjective assessment of the employee by the relevant head of department or division. There is no guidance for this person other than that he or she must bear in mind the aims and objectives of the EJRA. I do wonder how much the heads of division and departments knew or know about these aims and objectives. I have not been told of any training provided for them. In the present case, the Dean of the Faculty of Law appeared to know very little about the process when the appellant asked him to discuss his wish to stay on after the EJRA. I do not suggest that any head of department or division would consciously make a 'partial' recommendation. But we are all subject to normal human influences. We tend to rate highly and to favour those whom we like; we tend to underrate those whom we do not like. I do not think that academics are immune from these normal human behaviour patterns. In my judgment, any system or process which depends heavily on the personal assessment of one individual carries a real risk of unfairness. However, in the event, the appellant's application was not considered only by the Dean and Professor Goodman.

Each had in fact consulted a Personnel Committee or an Appointments Panel. That consultation would or should tend to diminish the risk of partiality. However, I have not seen any note of the discussion of either the Personnel Committee or the Appointments Panel and I cannot say whether there was a real exchange of views or whether the committee adopted the views of the Dean and the Head of Division.

88. More fundamental than these two concerns is my clear impression that the whole procedure for applying for extensions is designed not to mitigate the discriminatory effect of the EJRA but rather to enable the University to pick out those members of staff which it wishes to retain while requiring any others to retire. I have already mentioned the reassurances that were given at the time of the second consultation paper and the disparity between those assurances and the terms of the procedure as eventually adopted. Staff were assured that the procedures would seek to strike a balance between the wishes of the individual and the interests of the University. In the event, there is no provision for striking any balance which takes the interests or wishes of the individual into account. The balance is entirely concerned with the interests of the University. In effect, the University can choose whom it wishes to retain. It can do so by reaching agreement with the employee and putting the agreed proposal to the panel for approval. In practice it is always approved. If the University does not wish to retain a particular employee, it can avoid reaching agreement and put the employee to the well-nigh impossible task of convincing the panel of the advantage to the University of allowing an extension in the face of opposition from those in charge of the department and the division.

How the procedures have worked in practice

89. It was not possible for the University to provide detailed information about how the procedures for extension had worked in practice because the applications were confidential and there were so few that, even if the names were redacted, the applicant would be identifiable. I accept that.

90. The statistics produced by the University for the purposes of the hearing show that there are now 74 academic and academic-related staff in employment over the age of the EJRA. The equivalent in terms of full time employment is 49. More detailed information was provided in respect of the Social Sciences Division. Since October 2011, there have been 37 applications for extension, 9 of which came from statutory professors. Of the 37, 32 were approved; four were refused and one was withdrawn. All those which were approved had been the subject of prior agreement. As I have said, no application which was contested succeeded.

91. Eighteen applications entailed a request to remain in the existing post; 15 applied for a move to part time working. There have been 14 applications to extend an employment already previously extended. One applied for extension at the time of appointment as part of the appointment negotiations in 2012/13. Nine applications have been made in connection with new appointments since the EJRA came into force. I have no information as to how they arose.

92. The great majority of applications entailed a request to stay on for between one and three years. Only one person had asked to say on for more than three years. Those particular figures, limited though they are, tend to suggest that the problems of managing without an EJRA might not be quite as severe as the University had feared. It appears that, of those who wanted to stay on, only one wanted to stay on for more than three years (so beyond 70).

93. The reasons or factors wholly or largely driving the applications were set out. More than one factor may have applied in some cases. The most common factors were listed as "REF" and "Grant Funding dependent on individual's continued employment". The importance of these factors was explained in oral evidence. Dr Goss stressed that the tie between a funding stream and the individual leading the team was of great importance. If a funding stream was tied to an individual, that individual would almost certainly be kept on for the term of the funding. This was a driver for retention in 14 cases.

94. Dr Goss also explained what was meant by the REF being a reason or driving factor affecting retention. This concept will be well understood by many of the readers of this decision but it was entirely new to me so I will explain it briefly.

95. Every five years, all UK Universities have to submit their academic staff's best research papers for the purpose of the assessment of the state funding which will be allotted to them. A University can submit the work of any academic employed by it in the October of the REF year. In order to maximize the number of high quality papers the University can submit, it is the practice of Oxford University (and, as I understand it, many other universities) to retain academic staff past their normal retirement date and also to take on their replacements by making proleptic appointments. Dr Goss said that, in this way, the University would get the benefit of the publications of two academics for the price of one. The statistics for the Social Sciences Division show that, in 2011/12, two academics were kept on for that reason and in 2012/13 there were eight such.

96. Other factors driving applications were research leadership (8 cases), short term teaching needs (6 cases) unique skills and a failure to find a replacement (5 cases). Other driving factors (such as 'retention') were not explained to me but they did not arise in many cases.

97. Dr Goss accepted that an applicant's best chance of being kept on arose if he or she was able to reach agreement with the head of department or division and to present an agreed case to the panel for approval. Dr Goss explained what appeared to him to be the important factors in reaching agreement and in obtaining the panel's approval. It was not enough that the applicant should have been doing his job to the complete satisfaction of the department. Something more was needed which would demonstrate that the applicant would, if extended, bring something special to the University. Dr Goss explained that this would often be a financial advantage. If the applicant's research had attracted substantial funding and this would continue only if the applicant remained in post, that would be a powerful reason for extending his or her employment. He also explained the advantages of keeping an academic

on when a REF year was approaching. Of course the opportunity to be kept on for that reason would be dependent on the chance of when the normal retirement would fall; for this appellant, who was due to retire in September 2014, it would be of no avail. He was still in post at the 2013 REF and there would not be another until 2018. Dr Goss also explained that the chances of an applicant (such as a statutory professor) being kept on would improve if he or she were prepared to relinquish the post so as to allow a replacement to be appointed. Agreement might well be reached for him or her to stay on (possibly on a part time basis) to do a reduced workload, presumably at a reduced rate of pay. This would in fact amount to a variation of the contract of employment.

98. Professor Goodman also stressed that it was not sufficient for an applicant to show that he or she would be able to continue to do his or her job satisfactorily. As he put it "Business as usual, however good, is not enough". Professor Goodman also expressed the view that the procedures were an extension of the old (pre-EJRA) procedures which had worked well. These procedures enabled the University to keep on some members of staff who wished to work after the contractual retirement age (65 or 67). However those procedures were able to operate against the background of a statutory provision which declared that a dismissal on the ground of retirement at the age of 65 was not unfair. That statutory provision has now been repealed. I find Professor Goodman's perception of the extension scheme revealingly frank.

99. The figures produced by the University and the evidence of Dr Goss and Professor Goodman confirm the impression which I had formed from reading the documents that the only realistic chance of an employee being kept on was for him to reach agreement with his head of department and to present an agreed case. In practice, the chances of succeeding before the panel in the face of disagreement were very limited indeed.

Conclusion

100. The evidence that I have heard has confirmed the clear impression I had gained from the documents that this procedure was not in reality designed to complement or improve the EJRA policy. Rather it was designed to allow the University to have the ha'penny of making some people retire at 67 (without having to be paid compensation for unfair dismissal) and the bun of allowing the University to retain those employees which it wished to keep. I accept that the University has some good reasons for wanting a compulsory retirement age and in some respects wanted an EJRA. But its overriding wish was for a means of choosing who stays on and who goes. As I have said earlier, I am quite satisfied that the University acted in what it believed were its best interests but it has created a process which not only has internal flaws but is fundamentally unacceptable as a means of deciding whether someone should be dismissed. In my judgment rejection of an application under this procedure could never amount to a potentially fair reason for dismissal.

101. It follows that this appeal must be allowed. The appellant has been told that he will be dismissed because he is 67; in fact the reason for his proposed dismissal is that his application to stay on has been rejected because he has been unable to convince the panel that, if retained, he will make an exceptional contribution and that he is, (in shorthand) indispensable to the University. Requiring an established employee to demonstrate that he is indispensable or be dismissed is an inevitably unfair dismissal.

102. In some respects, the issue of whether the University can justify the imposition of a compulsory retirement age has faded in importance because the appellant was not dismissed in pursuance of a compulsory retirement age. However, I hope that my analysis of the University's EJRA policy will be of assistance when it decides on its future retirement policy.

103. I have decided this appeal on issues of principle unrelated to the particular facts of the appellant's case. However, because a good deal of the hearing was taken up with discussion and argument about the conduct of the appellant's individual case, I feel that I ought to deal with the issues raised even though

the outcome of that consideration will not affect the result of this appeal. I will put that discussion in an appendix so that those who are not interested in the facts of the individual case need not trouble to read the detail.

Janet Smith

1 September 2014