



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Professor John Pitcher v

**1. Chancellor, Masters and Scholars of
the University of Oxford**

**2. Saint John the Baptist College in the
University of Oxford**

Heard at: Watford

On: 13-15, 17-23 August 2018;
27 September 2018; 17 December 2018;
21-25 January 2019, 25-26 March 2019,
and 7 May 2019 (in Chambers)

Before: Employment Judge Bedeau

Members: Mr A Kapur
Mrs F Betts

Appearances

For the Claimant: Mr M Islam-Choudhury, Counsel

For the First Respondent: Mr S Jones, Q.C.

For the Second Respondent: Ms N Motraghi, Counsel

JUDGMENT

1. The claimant's direct age discrimination claims are not well-founded and are dismissed.
2. The claimant's unfair dismissal claims are not well-founded and are dismissed.

REASONS

1. In a claim form presented to the tribunal on 4 July 2016, the claimant made claims of direct age discrimination against the respondents arising out of his employment as a professor, tutor and lecturer in English, from 1 October 1980 to 30 September 2016. He asserted that he had been subjected to the application of their Employer Justified Retirement Age policies, "EJRA",

which were discriminatory under section 13 Equality Act 2010, "EqA". He also claimed section 47B Employment Rights Act, "ERA" 1996, public interest disclosure detriment; and victimisation, section 27 EqA.

2. In the response presented by the first respondent on 1 August 2016, it avers that subjecting the claimant to the EJRA policy was direct age discrimination, but it could be justified. All other claims it denies.
3. In the second respondent's response presented to the tribunal on 2 August 2016, it avers that its treatment of the claimant was justified and denies the other claims.
4. On 8 September 2016, the claimant amended his claim form by adding unfair dismissal against both respondents. On 25 November 2016, he re-amended his claims to take into account both respondents' decision not to consider whether the EJRA was discriminatory because of age.
5. The first and second respondents, on 19 and 20 December 2016, respectively, responded to the re-amended claim, repeating their earlier positions and adding that the claimant was neither procedurally nor substantively unfairly dismissed.
6. For ease of reference we shall refer to the first respondent as "the University" and the second respondent as "the College" and collectively as "the respondents".
7. At the preliminary hearing held on 7 April 2017, the claimant was represented by Mr Islam-Choudhury. The University at the time was represented by Ms C Richmond, of counsel, and the College by Ms Motraghi, of counsel. The case was set down for a final hearing over 10 days from 5 to 16 March 2018. Employment Judge Hill dismissed an application to consolidate these claims with that Professor Paul Ewart who has a similar case at Reading Employment Tribunal against the University. The judge also refused to list the case for a preliminary hearing on the issue of the lawfulness of the EJRA. The parties agreed a list of both the legal and factual issues in the case. They are set out below in paragraph 9.
8. The judge ordered that there should be a joint bundle of documents served by 5 September 2017 and mutual exchange of witness statements by 27 October 2017. They are relevant to the claimant's application to adduce in to evidence his additional witness statement. The final hearing did not proceed as listed. It was, however, listed to be heard from 10 August 2018.

The issues

9. The following are the issues agreed between the parties, R1 is the University; R2 is the College; and C is the claimant:

A Direct Age Discrimination [EqA s13]

Merits

9.1 Did R1 and R2 treat C less favourably than it treats or would treat others by:

9.1.1 Dismissing him on 30 September 2016; and

9.1.2 Subjecting him to their respective EJRA's":

In relation to R1, C relies on matters pleaded at paragraphs 5a to 5d, 5f to 5h, 5k, 5m and 5n (all inclusive) in C's Further Particulars of Claim dated 12 May 2017 at [51] to [57], namely:

In relation to R2, C Relies on matters pleaded at paragraphs 6a, 6g, 6i, 6j, 6l to 6n, 6q, 6r, and 6t to 6w (all inclusive) in C's Further Particulars of Claim dated 12 May 2017 at [51 to 57]

In relation to these claims against R1, the "others" to whom C should be compared (applying s23 EqA) are Associate Professors (all of whom hold posts jointly with R1 and a College) aged under 65 as at 30 September 2016 and to whom the EJRA rule (that academics shall normally retire from employment not later than the 30 September immediately preceding his or her 68th birthday) was not applied (the "**College Comparators**").

In relation to these claims against R2, the "others" to whom C should be compared (applying s23 EqA) are Official Fellows (all of whom hold posts jointly with R1 and R2) aged under 65 as at 30 September 2016 and to whom the EJRA rule (that academics shall normally retire from employment not later than the 30 September immediately preceding his or her 68th birthday) was not applied (the "**College Comparators**").

R1 and R2 accepts that dismissing C was, in comparison with the University Comparators and College Comparators respectively, less favourable treatment because of the Claimant's age.

9.2 Can R1 show that this treatment of C in comparison with the University Comparators was a proportionate means of achieving a legitimate aim? In particular:

9.2.1 What aims was R1 pursuing? [Seldon v Clarkson Wright & Jakes [2012] 3 All ER 1301, SC, at [59]]

9.2.2 Can those aims count as legitimate objectives of a public interest nature within the meaning of a Directive that are consistent with the social policy aims of the state? [Seldon at [55]]

9.2.3 Were those aims legitimate in the particular circumstances of the employment concerned? [Seldon at [61]]

9.2.4 If so, was the EJRA rule, as the means of achieving such aims, appropriate and reasonably necessary? [Seldon at [62] and [68]]

9.3 Can R2 show that this treatment of C in comparison with the College Comparators was a proportionate means of achieving a legitimate aim? In particular:

9.3.1 What aims was R2 pursuing? [Seldon v Clarkson Wright & Jakes [2012] 3 All ER 1301, SC, at [59]]

- 9.3.2 Can those aims count as legitimate objectives of a public interest nature within the meaning of the Directive that are consistent with the social policy aims of the state? [Seldon at [55]]
- 9.3.3 Were those aims legitimate in the circumstances of the employment concerned? [Seldon at [61]]
- 9.3.4 If so, was the EJRA rule, as the means of achieving such aims, appropriate and reasonably necessary? [Seldon at [62] and [68]]

B Jurisdiction

- 9.4 In relation to any age discrimination claim that relates to any event other than dismissal, was the claim form submitted more than 3 months after the alleged unfavourable treatment (taking into account any extension of time to facilitate early conciliation through ACAS)? [EqA s123]
- 9.5 If so, does the ET think it just and equitable to extend time? [EqA s123]

C Unfair dismissal

Merits

- 9.6 What was the reason (or if more than one, the principal reason) for each dismissal, and was it a fair reason under ERA s98? [ERA s98(1)]
- 9.7 The R's case is that the C was dismissed for some other substantial reason, namely retirement.
- 9.8 If the reason or principal reason for each dismissal was a fair reason under ERA s98, were the dismissals fair under ERA s98(4)?

The evidence

- 10. The tribunal heard evidence from the claimant.
- 11. On behalf of the University evidence was given by Dr Stephen Goss, former Pro-Vice Chancellor for Personnel and Equality; Professor Christopher Wickham, former Head of Division; Ms Sarah Jane Thonemann, Deputy Director of Human Resources.
- 12. On behalf of the College evidence was given by Professor Andrew Parker, Principal Bursar and Official Fellow; Professor Maggie Snowling, Chair of the College's Governing Body; Professor Charles Batty, Official Fellow and Tutor; and Professor Alan Grafen, Official Fellow and Senior Tutor.
- 13. In addition to the oral evidence the parties adduced joint bundles of documents comprising in excess of 2,800 pages. References will be made to the documents as numbered in the bundles.

Claimant's application to adduce further evidence

14. The claimant is a well-respected academic, a Professor in the field of English and English literature. He has written extensively on William Shakespeare as well as on the poems and plays by the Elizabethan poet and historian, Samuel Daniel (1562-1619). He is a literary historian and textual editor who was awarded a Distinction title by the University in 2014 and had held numerous academic positions. He held a joint appointment with the University as Lecturer in English and with the College as a Tutor in English under the Common University Fund under which the funding of a post is apportioned between the University and College, normally 40% and 60% respectively.
15. On 31 July 2018, the claimant applied to adduce in to evidence an additional witness statement in which he analysed data provided to the Higher Education Statistics Agency "HESA". He asserted that his analysis of the data was relevant to his claims and the issues in this case. If allowed, he intended to rely on his interpretation of the data to demonstrate that the EJRA policy, as applied by the respondents, could not be justified.
16. We were told that the data was on the 24 Russell Group of universities, including the University, Cambridge, London School of Economics, Imperial College and others. For obvious reasons we were not shown the statistical evidence but understood it to be on the composition of the Universities' staff by reference to a number of factors.
17. The unchallenged evidence was that on 27 April 2018, Professor Ewart obtained the HESA data which comprised of 20 million individual items and 827,000 rows of information. This was by all accounts, a large amount of information to digest. A report was prepared on the data relevant to Professor Ewart's case by Professor Daniel Lull. We understand that Professor Lull is a retired Professor, who worked at the Department of Statistics at the University.
18. Around mid-June 2018, the claimant received a copy of Professor Lull's report which was later disclosed to the respondents.
19. On 22 June 2018, witness statements were mutually exchanged.
20. In the claimant's first substantive witness statement, he challenged the aims of the EJRA policies and referred to the HESA data. He stated that the other universities, the majority of which form the Russell Group, do not have an EJRA policy, therefore, there was no enforced retirement on ground of age.
21. On 29 June the University objected to the admission of Professor Lull's report into evidence as it was in the nature of expert evidence and argued that the claimant should seek leave from the tribunal to admit it.

22. On 24 July 2018, the HESA data was disclosed on a memory stick to the University.
23. The claimant, as we understood it, was not seeking to rely on Professor Lull's report, instead he looked at the HESA data, analysed it and drew several conclusions from it which were in his additional witness statement. On 31 July 2018, he applied for that statement to be put in evidence.
24. From reading the tribunal's file it appeared that the respondents were not copied in the claimant's application to the tribunal. The respondents' counsel submitted that the application, as far as they were aware, was disclosed to them late in the day.
25. Mr Islam-Choudhury submitted that the additional witness statement was in response to the evidence to be given by Ms Sarah Jane Thonemann, Deputy Director of Human Resources, at the University. Ms Thonemann refers to the data provided by the EJRA Working Group, set up in July 2015. The analysis was based on a review of the application of the EJRA and her interpretation of the data as set out in her witness statement.
26. Mr Islam-Choudhury further submitted that the additional witness evidence was probative and relevant to the issues in the case, the other issue was the weight to be given to that evidence.
27. Mr Jones and Ms Motraghi objected to the admission of the additional witness statement. Mr Jones' objections were because of lateness; that it was unnecessary as there were already reports on gender and diversity in the bundle of documents; the relevant policy was the application of the EJRA 2011 policy and the information relied upon post-dated 2011; and it would be unfair for it to be admitted as it was in the nature of opinion evidence by the claimant who is not a statistical expert and the respondents have not had the opportunity of engaging in a detailed analysis of the HESA data.
28. Ms Motraghi, submitted that it would be unjust for the respondents' representatives to cross-examine the claimant, "on the hoof", as she described it, with little preparation. The evidence was unreliable in parts as it excluded Imperial College London and the London School of Economics, without any credible explanation. Factors not included were performance management and redundancy. Ms Motraghi further submitted that the statement ignored the unique position of Oxford and Cambridge Universities and the contractual relationships with their staff. In this case there are two contracts of employment, one with the University and one with the colleges. Oxford and Cambridge were world renowned universities and have been in existence for hundreds of years. These factors, she submitted, are relevant when interpreting the HESA data.
29. For all those reasons the respondents' counsel submitted that the claimant's additional witness statement should not be adduced into evidence.

The tribunal's ruling

30. We took into account the submissions of counsel and were satisfied that the additional witness statement from the claimant, who is not an expert in analysing statistical data as his expertise is in English and in English Literature, was in the nature of expert evidence. He was inviting the tribunal, however it was dressed up, to make findings of fact in relation to the evidence contained in his additional witness statement in support of his case. He was trying, in our view, to introduce expert evidence when clear objections were raised to the admission of Professor Lull's report.
31. The respondents were not given adequate time to properly analyse the HESA data which would take, we were told, several weeks and they would be prejudiced in putting questions to the claimant in relation to his interpretation of the data.
32. We accepted the objections raised by the respondents' counsel. We have come to the conclusion that the admission of this witness statement was prejudicial to the respondents for the reasons they have given and for the reasons we have given. Accordingly, the application was refused.
33. If the claimant was insistent on using the data, the preferred course of action would be to agree with the respondents on a joint expert to analyse the HESA data following joint instructions to that person. There would obviously be a delay involved and costs would be incurred.
34. After giving our ruling Mr Islam-Choudhury asked for a brief adjournment to take instructions from the claimant on whether to agree with the respondents to instruct a joint expert. He later informed the tribunal that the claimant was not minded to pursue that course of action for perfectly understandable reasons, namely the costs and the delay involved. His only source of income being his pension

Findings of fact

35. This case exemplifies the much vexed question of how does an employer, in a fair and transparent way, allow for changes to take place by creating opportunities for the advancement of those in its workforce from different backgrounds to achieve their full potential while at the same balancing the needs and interests of those in senior positions who desire to remain employed?
36. Regulation 30, of the Employment Equality (Age) Regulations 2006, made it non-discriminatory on the grounds of age for an employer to compulsorily retire an employee aged 65 years or over if the procedure set out in schedule 6 of the Regulations was followed. The Regulations created a Default Retirement Age "DRA" of 65 years and was permissible age discrimination.

37. The Regulations led to a considerable amount of controversy as they did not accord with increase in life expectancy and the government's intention to increase the state pension age.
38. In or around 2010, the government proposed the abolition of the DRA from 1 October 2011. This proposal caused both the University and the College to consider the introduction of a scheme which would comply with the proposed changes in the law. The discussions eventually led to the implementation of what is described as the Employer Justified Retirement Age, "EJRA" policy by the deadline.

The University's EJRA

39. The University is the oldest University in the English-speaking world, dating back as early as 1096. It is recognised as being a world class teaching and research university. It was ranked first in the world in the Times Higher Education World University rankings for 2017 and 2018. It has the largest volume of world leading research in the United Kingdom and offers more than 300 different graduate degree programmes. It has around 24,000 students, approximately half of those are undergraduates.
40. It employs 13,000 people of which nearly 2,000 are academics and about 5,000 are in research. Professional, administrative and clerical positions as well as technical and support staff, make up the remainder of its employee workforce. It competes internationally on the world stage to attract the most talented academic and research staff as well as the most able students. Approximately 48% of academic and research staff and 41% of students are from countries outside of the United Kingdom.
41. Within the University there are 38 colleges, and apart from Kellogg College and St Cross, the colleges are financially and legally independent, self-governing, and operate within a federal type structure that makes up the University.
42. Each college is granted a Charter that is approved by the Privy Council. It is governed by a Head of House and a Governing Body which comprises of a number of Fellows, many of whom also hold University positions. The Conference of Colleges is the mechanism whereby the colleges come together to deal with matters of shared interests and common purpose.
43. The sovereign body of the University is the Congregation which has 4,500 members including the academic staff of the University; Heads of Department and other members of Governing Bodies and Colleges; and those in senior research, computing, library and administration. Its functions and powers are set out under Statute IV and these are as follows:

“1. Congregation shall have the following legislative and other functions, powers and duties:

- (1) To decide on proposals submitted to it by the Council for amending, repealing, or adding to the statutes or regulations;

- (2) To decide on resolutions submitted by any 20 or more of its members that the Council should be instructed to make proposals for amending, repealing, or adding to the statutes or regulations;
 - (3) To consider any other resolution submitted to it by Council or by any 20 or more of its members;
 - (4) To exercise the powers in relation to regulations assigned to it in section 18 of statute vi;
 - (5) To take note of the replies to questions asked by any 2 or more of its members;
 - (6) To confer degrees;
 - (7) To make the elections laid down for it in any statute or regulation;
 - (8) To approve the appointment of the Vice Chancellor;
 - (9) To perform any further duties or to exercise any further powers laid down for it in any statute or regulation.
2. (1) Any resolution passed by Congregation or other act of done or decision taken by Congregation in accordance with the statutes and regulations shall bind the whole University.
 - (2) A decision taken by Congregation to amend, repeal, or add to any of the following statutes shall not take effect without the approval of Her Majesty in Council.” (pages 126A to 126D of the bundle)
44. Council is the University’s principal executive and policy making body. Its powers and functions are set out in Statute VI which states:
- “(1) Council shall be responsible, under the statutes, for the advancement of the University’s objects, for its administration, and for the management of its finances and property, and shall have all the powers necessary for it to discharge these responsibilities.
 - (2) In the exercise of its functions and powers Council shall be bound by all resolutions passed by Congregation and all other acts done or decisions taken by Congregation in accordance with the statutes and regulations, and shall do all things necessary to carry them into effect.
 - (3) (1) Subject to the provisions of the statutes and regulations Council may from time to time delegate responsibility for any matter to any other body or person and may delegate such powers (other than the power to put statutes to Congregation) as it may consider necessary for the discharge of this responsibility, but any such delegations may be withdrawn (either generally or in respect of a specific item) at any time, nor shall such delegations relieve Council of general responsibility for the matters delegated.

- (2) Any Body to which or person to whom Council has delegated responsibility and powers under sub section (1) above may, unless Council otherwise determines, sub-delegate them to another body or person.” (126 E to 126L)

45. Council has five main standing committees and they are:

- Education Committee;
- General Purposes Committee;
- Planning and Resources Allocation Committee;
- Research Committee, and
- Personnel Committee

46. The University's academic departments, facilities and research centres are grouped into four divisions: humanities; mathematical, physical and life sciences; medical sciences; and social sciences. Each division has a full-time head who also sits on Council and its main committees.

47. On 30 September 2010, the University's Personnel Committee met to consider the implications of the government's proposal to abolish from 1 October 2011, the DRA of 65 years. Speed was of the essence as both the University and the College had a year to consider and implement changes to their retirement policies.

48. As far as the University is concerned, it had a retirement policy with a retirement age. For the previous 25 years, up to October 2011, it was at age 65, that being on the 30th September preceding the employee's 66th birthday. Some employees, however, had a retirement age of 67.

49. The Personnel Committee noted that the removal of the DRA would not preclude employers from seeking to objectively justify a compulsory retirement age and an EJRA would have to be justified as a proportionate means of achieving a legitimate aim. It acknowledged that this would need to be supported with “robust evidence” and it would ultimately be a matter for the courts to determine whether an EJRA could be justified, if challenged. It agreed to ask its officers to develop proposals which might enable the University to continue to implement a normal retirement age once the DRA was phased out. It suggested that the University should respond to the coalition government's proposal as part of consultation expressing concern about the timetable; potential impact on career opportunities for younger staff; financial and succession planning; workforce diversity; and flexibility in the definition of an EJRA.

50. The Personnel Committee's further concerns were that if the government proposals were implemented the University “will be faced with having to manage a situation in which a potentially significant number of staff continue to work indefinitely beyond the current retirement age. This will make planning extremely difficult, particularly in relation to academic appointments. On the face of it, it would then only be possible, under current arrangements, to consider dismissing older employees as part of a

non-age discriminatory general process of redundancy or performance management (i.e mandatory performance management of all academics.” (1886-1891)

51. It was asked to consider, in relation to the abolition of the DRA, a number of matters: the government’s proposals and the potential implications for the collegiate University; endorse the continued operation of the University’s existing arrangements in relation to retirements due to fall before 1 October 2011; consider whether there were cogent reasons for seeking to justify a contractual retirement age for all or some categories of staff, if so, to explore the feasibility of developing an EJRA in consultation with the colleges with expert legal advice; the University’s response to the consultation exercise; and give initial consideration to possible scenarios if the proposals were implemented as planned.
52. It considered the government’s proposal as part of the government’s consultation exercise and proposed the introduction of EJRA setting out five legitimate aims. It was acknowledged that an EJRA would not be straightforward but expert legal opinion would be required on the issue of justification. In relation to joint appointments, the views of the colleges would be sought. The committee also suggested that the University should look at other leading universities’ intentions in relation to the abolition of the DRA. It recommended that its officers should explore the feasibility of developing an EJRA consultation with the colleges and obtaining legal advice. (1887-1891)
53. Council met on 11 October 2010 and considered the Personnel Committee’s report. In particular, the feasibility of an EJRA. (1892-1896)
54. A joint Working Group was set up by the Personnel Committee and approved by the Council. Its members were: Dr Stephen Goss, Pro Vice Chancellor, Personnel and Equality; Dr Marc Brodie, Senior Tutor, Keeble; Professor Mark Freedland, Fellow in Law, St Johns and a member of the Conference of College Legal Panel; Mr Simon Lloyd, Bursar; and Miss Alison Cross, Acting Director of Personnel and related services. Ashtiany Associates, to give advice on employment law matters.
55. In the Personnel Committee’s minutes for 25 November 2010, it was noted that the Working group had met and that it intended to take advice from counsel in relation to the retirement age. The Group would liaise with senior tutors, estate bursars and the Colleges Legal Panel and hope to map out a way forward by the end of Hilary Term 2011 (March 2011). (1898)
56. On 3 February 2011, the Personnel Committee decided that further consideration should be given to the drafting of the potential justification for an EJRA in relation to academic-related staff. (1903)
57. The Working Group, after taking legal advice, drafted proposals on an EJRA with the retirement age being 67 years. The proposals would be subject to consultation.

58. On 9 February 2011, a consultation paper was published on the Staff Gateway webpages on the possible introduction of an EJRA. It was also made available to academic and support staff as well as to the Oxford Union, Presidents and Heads of Colleges. In the consultation paper it stated that the Working Group sought legal advice from leading counsel, Robin Allen QC, on the justification for an EJRA as well as advice on the associated processes for promulgating and operating an EJRA. It stated that the advice was that it would be legitimate for the collegiate University to take a policy approach to the issue, namely to declare an EJRA where it could be objectively justified and to operate a process under which requests to continue working beyond the retirement age would be considered against defined criteria to ensure that the policy was relevant to a specific decision. The Personnel Committee invited responses by 18 March 2011. (1904-1910)
59. In an extract from the minutes of the Council's meeting held on 14 February 2011, it referred to the meeting of the Personnel Committee held on 3 February 2011 and noted that a consultation exercise was in progress across the collegiate University on the proposal to maintain an EJRA of 67 years for all academic and academic-related staff together with a procedure under which requests from staff to continue employment beyond EJRA would be considered against agreed criteria and with a right of appeal where such requests were turned down. The operation would be reviewed after 10 years. The proposals would apply to those staff on Grade 6 or above. (1919 -1926)
60. Views were obtained from representatives of Oxford University and the College Union on 16 February 2011. (1927-1928)
61. In an excerpt from the minutes of the meeting of the Personnel Committee held on 3 March 2011, it recorded the following:

“...The Chairman drew attention to the position of other universities on this matter, and to an article in the Oxford Magazine on the retirement age by Professor Cooper. It was reported that there had been a preliminary discussion of the consultative paper in the Joint Consultative Committee with the Oxford UCU; some UCU Committee members had spoken on a personal basis against the University's proposals, but the union was consulting its members and would respond more fully and formally by the closing date. It was noted that if the proposal to retain a normal retiring age was supported, further elaboration would be needed of the precise criteria and procedures for the consideration of requests for exceptions: the intention would be to work with the grain of opinion on this in order to foster a shared view of the issues across the collegiate University. Appropriate consistency of approach between divisions and across staff groups would be desirable. Particular cases would no doubt arise in which a decision not to extend an appointment was challenged; this would be considered through the University's internal processes in the first instance – only cases determined at the higher external legal levels would set binding precedence.

It was also confirmed that the proposal for a normal retiring age of 67 would more precisely mean a normal retirement date of 30 September proceeding the 68th birthday.” (1938)

University's Equality Impact Assessment 2 April 2011

62. The University's Human Resources Department together with Sarah Jane Thonemann, who at the time was Head of Human Resources Policy, were involved in an Equality Impact Assessment on the introduction of an EJRA. The report was produced on 2 April 2011. In its analysis it concluded that an EJRA would have significant effect on academic staff. It stated:

“

- Retirement is currently by some way the most significant cause of academics leaving the University. In each of the last two years normal retirement has been given as the reason for leaving by nearly 40% of the academics who left the University. This is much higher than any other reason for leaving. Retirement is a less significant cause of staff turnover for academic-related staff. Potentially, therefore, the removal of the retirement age would have a greater effect on the dynamic of academic careers and turnover.
- Significant numbers of academics are approaching the proposed EJRA: 18% of academic staff in July 2010 were aged 60 or older (5% were aged 65 or over). Relatively fewer academic-related staff are approaching the EJRA; 7% of the academic-related staff were over 60, but less than 1% were aged 65 or more.
- In the period 2011-17, 221 academics are due to reach their 67th birthday and thus possibly fall subject to an EJRA. This is over 13% of all academics in post in July 2010. Over the same period, 79 research staff (2.4%) and 153 academic-related staff (5.8%) will reach 67.”

63. In relation to the impact of an EJRA on gender diversity, the younger age bands were more diverse than the older ones but the proportion of female staff decreased with age. It was reasonable to assume, according to the assessment, that overall, there would be a beneficial effect from an EJRA as it would tend to reduce the older, less diverse groups in favour of younger, more diverse staff. The assessment noted that of the 221 academics due to reach the EJRA age in 2011-17, 186 (84%), were male and only 35 female. The academic-related staff group was relatively gender diverse in the younger age bands but less so amongst staff aged 60 or more. Of the 153 academic-related staff due to reach their 67th birthday in 201-17, 92 (60%) were male and 61 (40%) were female. In only one year, 2012 to 2013, were females in the majority of those due to reach 67 years.

64. It noted the following:

“Women have been in a minority among academic new starters over the past three years, but in proportion which is nonetheless greater than that of women academic staff as a whole or among those due to retire over the next few years. Women have been the majority of new starters in academic-related staff in each of the last three years. It is therefore reasonable to assume that in both groups new recruits will be more diverse than the retirees they replace.”

65. The assessment acknowledged that the University did not hold data to show whether male and female employees have typically built up different lengths of service before taking retirement. It stated that during 2008-10, only 28% of female academic staff who reached retirement age, requested an extension. This was a higher percentage than men, 20%, and did not indicate a high demand from either gender for working beyond retirement age. Of the 97 academic and academic-related staff working beyond normal retirement age in July 2010, only 17 (17.5%) were women. This percentage fell in each year since 2007. The assessment also noted more women than men took early retirement. Over the last three years 9 of 15 academic or academic-related staff who took early retirement were women. Among the more complex issues were women entering and leaving the workplace, the assessment noted that an EJRA was unlikely to have a significant different gender based impact.
66. On the impact of an EJRA on disability and ethnicity, the assessment acknowledged that the University did not hold complete data on staff disability or ethnicity. There was no clear trend in the proportion of staff by age band who have declared a disability nor was there a significant difference across age bands among those whose status was unknown. There was no evidence that an EJRA would have a disproportionate adverse impact on disabled staff.
67. In relation to ethnic groups, there was a clear pattern in all staff groups of greater diversity in the younger age bands but the proportion of black and minority ethnic staff fell with age. This suggested that an EJRA was likely to have a beneficial effect on the representation of BME staff as older, less diverse age bands are replaced by younger and more diverse ones.
68. In conclusion, it stated the following:
- “Retirement has been an important mechanism for facilitating the turnover and diversification of University employees, especially in the academic staff group. The abolition of the Default Retirement Age will tend to slow the departure from the older, less diverse groups and therefore has the potential to set back the trend to greater diversity. The introduction of an EJRA would contribute to redressing this. This assessment will be kept under review and amended as necessary to take account of actual experience under an EJRA and of changing behaviours brought about by broader societal and economic developments.” (1992-1997)
69. It is clear to us that both the University and the colleges were looking at how to address significant under-representation at staff level of the groups identified above.
70. In an excerpt from the minutes of the Personnel Committee meeting held on 19 May 2011, the chairman reported that he was finalising a note to the colleges and divisions addressing some queries which arose in early discussions. It was reported that some Universities College Union “UCU” members had spoken on a personal basis against the University’s proposals, but the union was consulting its members and would respond more fully.

71. It was noted that if the proposal to retain a retiring age was supported, further clarification would be needed as to the criteria and requests for exceptions. The excerpt stated that, “the intention would be to work with the grain of opinion on this in order to foster a shared view of the issues across the collegiate University. Appropriate consistency of approach between divisions and across staff groups would be desirable.” It confirmed the proposed retirement age of 67 years, being retirement on 30 September before the 68th birthday. (1938)
72. In the more detailed minutes it was reported to the Personnel Committee the responses to consultation. They revealed broad support for the EJRA proposals. All the divisions supported the maintenance of a retirement age. The majority of the colleges were also in favour of maintaining an EJRA for joint appointments. Colleges’ academic staff and the Oxford UCU supported the proposals.
73. A paper was presented that summarised the responses to consultation. Pembroke and Nuffield Colleges were opposed in principle to a mandatory retirement age. A small number of individuals were also strongly opposed to the proposals. The Committee noted that their concerns would need to be addressed if the University proceeded with its proposals.
74. Medical Sciences Division suggested linking the EJRA to the state pension age. Another view was to maintain the retirement age of 65. It was noted that 67 years was chosen as some had that age written in the contracts of employment. The proposal would be in alignment with that age.
75. Many who responded to the consultation were of the view that the EJRA should cover both academic and academic-related staff. The vast majority of the colleges were in favour of maintaining an EJRA for joint appointments and college-only academics.
76. The main objections, as noted, were: a principled objection to the notion of enforced retirement; the EJRA conflicted with the aim of anti-age discrimination and may be vulnerable to legal challenge; there were concerns that outstanding academics would be lost to the University because of enforced retirement as many would decide to go to the United States where there was no mandatory retirement age; scepticism about the relevance of the diversity argument or that to maintain a retirement age would lead to a more balanced workforce; that alternatives to managing with an EJRA were not properly evaluated; the impact on career opportunities for younger staff would be short-lived as the workforce adjusted naturally over a period of time to a new normal retirement age; and the abolition of the DRA could be handled without performance management processes, for example, greater flexibility in partial retirement arrangements and the use of schemes to offer financial inducements to retire.
77. It was further noted that Cambridge University had embarked on a consultation exercise in relation to similar proposals for an EJRA of 67 years for academic-related staff.

78. The report referred to the Equality Impact Assessment on the proposals to introduce an EJRA and the results were shared with the Oxford UCU representatives. It noted:

“The EIA considered the potential impact on staff of the proposed introduction of an EJRA of 67 for academic and academic-related staff for a period of 10 years, particularly in relation to age, gender, disability and ethnicity. The impact of the proposal was considered from a number of angles, taking in to account the proportion of staff from minority groups in the different age-bands which will be affected (or not affected) in different ways. The impact upon those who take leave for childcare reasons (and who may therefore have fewer years in the workplace to accrue pension entitlement) has also been considered. A comparison has been undertaken of the diversity profile of staff in post, those who have joined recently, and those who have retired from the University during the same period. The EIA indicates that the EJRA will have a positive effect on the proportion of women and BME [black, minority ethnic] staff in the workforce has been identified. No adverse impact related to the disability status of staff has been identified.”

79. It was agreed that the Committee would work to continue developing a procedure for considering requests to work beyond the EJRA with a view to presenting its final proposals to Council at the end of Trinity Term, June 2011.
80. Attached to the report was an annex, namely a table of the responses from the Divisions in the University to an EJRA. The Humanities Division, Medical and Sciences Division, Mathematical, Physical, and Life Sciences Division, Social Sciences Division, Continuing Education Board, were in favour of an EJRA for academic staff and academic-related staff but differed on the pensionable age.
81. In relation to Departments and Faculties, Bodleian Libraries, Mathematical Institute, Biochemistry Strategy Group and Philosophy Faculty Board, were also in favour of an EJRA. Academic-related staff and the Philosophy Faculty Board, considered that a retirement age of 70 would be more appropriate.
82. From the information provided by the Colleges, 31 were in favour of an EJRA with 5 against.
83. As regards the responses from the trade unions, 95 academic and 59 academic-related members of UCU responded to consultation. 70% were in favour of an EJRA for academic staff and 59.8 were in favour of an EJRA for academic-related staff. (1941-1963)
84. There were strong views against the introduction of performance management as a way of removing staff in place of an EJRA. (1950-1951)
85. An extract from the notes of a consultative meeting, held on 1 June 2011 between representatives of the University and representatives of the Oxford UCU noted:

“The Committee considered a second consultation paper on proposals to introduce an Employer Justified Retirement Age (EJRA) of 67 for academic and academic-related staff on the abolition of the Default Retirement Age (DRA) from October 2011... Responses to the first consultation... were broadly, but not unanimously, in favour of an EJRA. The second consultation paper focussed on the procedures for considering requests to continue in employment beyond the EJRA. The proposed procedures emphasised early discussion between the Department/College and the individual with a view to identifying mutually acceptable arrangements”.

86. The second consultation paper was issued by the Personnel Committee on the 9 June 2011 in the Gazette on the EJRA extension provisions. Consultation ended on 8 July 2011. This was again a comparatively short period but the University and the colleges were working against the clock as the DRA was due to be abolished on 1 October 2011, and new provisions had to be in place before then.
87. It was also noted that the second consultative paper did not fully represent Oxford UCU's responses to the first consultation as it failed to take into account the proportion of those who had responded to the union's internal survey, namely 16%.
88. The University and the UCU representatives stated that they would value a further meeting to discuss the proposals prior to the closing date of 8 July 2011. It was also noted that the National UCU did not favour employers operating an EJRA. However, the majority view within the Oxford UCU supported maintaining a retirement age. (1964)
89. In a communication from the Personnel Committee on the proposed arrangements for implementing an EJRA, the consultation being with the Divisional Boards, Continuing Education Board, ASUC Strategy Group, Joint Consultative Committee with the Oxford UCU, and Conference of Colleges, it stated that in light of their responses the Personnel Committee would recommend to the Council the adoption of an EJRA of 67 years for academic and academic-related staff with effect from 1 October 2011. It would be seeking the views of the bodies participating in the consultation exercise on a proposed procedure for considering requests from individuals to continue employment beyond the EJRA. This proposed approach reflected the comments and suggestions received during the previous consultation. It was noted that all Divisions and the Oxford UCU supported the proposal for an EJRA for both academic and academic-related staff.
90. The Committee considered the responses to consultation and concluded that a predictable normal retirement age should be maintained together with clear provisions for those approaching that age and those who wanted to continue in employment. It also considered other alternatives to an EJRA, such as offering financial incentives to encourage retirement or increasing the opportunities for promotion, but these could not be afforded and were unlikely to be seen as justifiable use of public funds.

91. It was further noted that an additional aim of the EJRA was to maintain the slow but steady increase in the diversity of the workforce:

“Given the relative lack of diversity amongst our older staff, the absence of a retiring age would be detrimental to the progress which the collegiate University is making in this respect. The diversity consideration, like other strands of justification for an EJRA that rests on maintaining opportunities for new recruitment and career progression, would be lessened in better financial circumstances. This is another reason for keeping the EJRA under review. We find the EJRA and the associated procedures, which have now been developed in the light of the consultation and with expert legal advice, are proposed as proportionate means of achieving a legitimate aim of sustaining excellence in teaching, research and administration.”

92. The final recommendations for the implementation of an EJRA together with a procedure for considering a request to work beyond that age, would be presented to Council for approval at the start of Michaelmas Term, October 2011. If implemented the EJRA would be incorporated into the contracts of existing academic and academic-related staff and those with a current retirement age of 65 years would be deemed to have a retirement age of 67 years. The standard contracts for the new academic and academic-related staff would be amended to reflect the EJRA. The University would be considering implementing an EJRA of 67 from 1 October 2011. (1965-1970)
93. The Personnel Committee met on 16 June 2011 and in the record of its meeting noted that a consultative paper had been issued in relation to the proposal to establish an EJRA of 67 for all University academic and academic-related staff and a procedure for extending employment beyond the retirement age. It stated that the Conference of Colleges would be taking a binding vote at its ninth week meeting on implementing the EJRA for all holders of joint appointments. (1998)
94. The Oxford UCU was consulted on 22 June 2011, on the proposed arrangements for implementing an EJRA and on extension provisions. The UCU’s representatives expressed concern that the focus appeared to be on the business objectives rather than on individual capability. It was stated that where the individual was productive and wished to stay beyond the EJRA, it would be likely that an agreement on future working arrangements could be reached through discussion such that the formal request would have the support of all parties. One UCU representative preferred that the procedures be based on an assessment of an individual’s performance but felt that the request for extension of the retirement age seemed sensible. (1999-2001)
95. The Personnel Committee met on 22 September 2011 and in its minutes noted that it had considered the final proposals for adopting an EJRA for academic and academic-related staff. This followed two extensive consultations across the collegiate University and had support from the Divisions. It further noted that the Conference of Colleges had taken a binding vote in favour of the Colleges adopting an EJRA for the Colleges’ joint appointments. Legal advice had been taken from leading counsel,

Robin Allen QC. The Committee invited Council to approve the recommendations at its meeting on 10 October 2011 with a view to putting the amended regulations in place. It proposed that the EJRA should be kept under regular review, after five and ten years. It was also discussed the desirability of maintaining an active community of retired academics and that consideration be given to developing appropriate arrangements, for example, by honorary appointments, to enable retired academics, with the agreement of their departments, to remain involved in research and other academic activities. The minutes noted:

“The Committee agreed to recommend to Council the adoption of an EJRA on the terms set out, the associated procedure for considering requests to continue working beyond the EJRA, and the enabling amendment to Council regulations 3 of 2004.”

96. It, therefore, recommended to Council the adoption for an initial period of 10 years, an EJRA of 67 for academic and academic-related staff; that the application and outcomes of it would be reported annually to the Personnel Committee with an interim review after 5 years; the adoption of amendments to Council Regulation 3 of 2004 to give effect to the EJRA; and the procedures for considering requests to continue working beyond the EJRA. It also dealt with the rationale for an EJRA as well as the consultation process followed and confirmed that it had taken legal advice from Ashtiany Associates and Robin Allen QC. Attached to its proposals were a number of annexes. Annex A set out the aims of the EJRA; Annex B was the procedure to be followed when dealing with a request to work beyond the EJRA; Annex C dealt with the consequential revisions to Regulation 3; and Annex D set out the responses to consultation. (2004-2024)
97. On 10 October 2011, the Council adopted the Personnel Committee's recommendations to be effective from 1 October 2011. The EJRA of 67 years was adopted for a period of 10 years. Notice was placed in the Gazette on 13 October 2011 informing staff of the changes. (2045-2047)
98. There was no objection to the EJRA as recorded by the Personnel Committee on 27 October 2011. (2048)
99. All that was required to trigger a debate in Congregation was for 20 out of the 4,500 members, to raise an objection which did not happen. Conversely, Council did not put before Congregation a motion to debate on the introduction of a EJRA.
100. The aims of the EJRA adopted by Council are:

“3. The EJRA is considered to provide a proportionate means of:

- safeguarding the high standards of the University in teaching, research and professional services;
- promoting intergenerational fairness and maintaining opportunities for career progression for those at particular stages of a career,

given the importance of having available opportunities for progression across the generations, in order, in particular, to refresh the academic, research and other professional workforce and to enable them to maintain the University's position on the international stage;

- Facilitating succession planning by maintaining predictable retirement dates, especially in relation to the Collegiate University's Joint Appointment System, given the very long lead times for making academic and other senior professional appointments particularly in a University of Oxford's international standing.
- Promoting equality and diversity, noting that recent recruits are more diverse on the composition of the existing workforce, especially amongst the older age groups of the existing workforce and those who have recently retired.
- Facilitating flexibility through turnover in the academic-related workforce, especially at a time of head count restraint, to respond to the changing business needs of the University, whether in administration, IT, the libraries, or other professional areas;
- Minimising the impact on staff morale by using a predictable retirement date to manage the expected cuts in public funding by retiring staff at the EJRA; and
- In the context of the distinctive collegial processes through which the University is governed, avoiding invidious performance management and redundancy procedures to consider the termination of employment at the end of a long career, where the performance of the individual and/or the academic or other professional needs to the University have changed.”

(99)

101. Under the new procedure the Head of Division or equivalent would inform the academic member of staff, in writing, two years before their retirement date, of their formal retirement date and the process to be followed when requesting continuation of employment beyond that date. There is a similar provision for academic-related staff.

102. Any staff member who wishes to continue in employment beyond the EJRA should first discuss his or her situation informally and in good time with his or her Head of Department or equivalent. An academic member of staff may also wish to have an informal discussion with his/her Head of Division. Holders of joint appointments should also consult their College, normally the Head of House and Senior Tutor. Early exploration of all options was to be encouraged.

“5 Early exploration of all options is encouraged. In the case of joint appointments, it is possible that the staff member may wish to continue working in only one part of the joint appointment, or one employer might

wish to agree continued employment while the other does not. When an application for a period of extended employment is being considered, flexibility in the continuation or variation of contracts should be encouraged, subject to the aims of the EJRA. In this context, the staff member wishing to continue to work might wish to consider variation or a new contract issued by one employer that would be compatible with retirement from the other part(s) of the joint employment. In such cases, the employers will wish to discuss how their respective interests in the future of the substantive joint appointment should be protected.

6. These informal discussions, which may take place at any time, will not result in a definitive decision by the department or College but may help inform any formal request which might subsequently be made by the individual. Such discussions are intended to provide opportunity for the formulation of a request which all parties will be content.
9. Any request to continue working for the University beyond the EJRA in a university appointment or a joint university and college appointment should be submitted formally (on behalf of the member of staff) in writing, following consultation with all interested parties, by the Head of Division or equivalent to the Director of Human Resources. In addition, any request relating to the college part of a joint appointment should be made to the relevant college according to its procedures. The submission should set out clearly:
 - (i) the request was made by the member of staff, including the proposed working arrangements and the length of extension requested;
 - (ii) an account, agreed where possible, of how the request relates to the considerations for extensions set out in Section VI below;
 - (iii) the view of the division; and
 - (iv) in the case of joint appointments, the views of the college and any other associated employers (eg the NHS), including, in particular, comment on any special arrangement which would result in the parts of the joint appointment being treated differently. The member of staff should be invited to append to the submission any supporting material he or she may consider appropriate.
8. The normal deadline for such requests to reach the Director of Human Resources 18 months before the retirement date for academic staff and 12 months for academic-related staff. Later requests may be considered in exceptional circumstances but only with the agreement of the relevant employers (e.g division, department, college, NHS Trust) as well as the agreement of the chair of the EJRA Panel”
103. The procedure for considering requests to work beyond EJRA states that the request would be considered by a panel appointed by the Personnel Committee. Normally the Chair, the Pro Vice Chancellor, Personnel and Equality or his or her nominee, normally the Vice Chair of the Personnel Committee plus two members of the Personnel Committee.

104. In case of joint appointments, the Chair of the Panel would liaise with the Chair of the equivalent college body over matters of process, including the relative timings of the work of the two panels and the communication between the panels of their decisions as may best suit the individual case and allow for issues relating to the joint nature of the post to be addressed.

105. The procedure also provides:

“The panel will consider the request in the light of the aims of the EJRA, taking into account the relevant considerations set out in Section VI the views of the individual staff member, the division, department, college, and NHS Trust, as appropriate. The panel will seek any clarification it deems necessary.

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

Where the parties representing the employers do not support the request for an extension, or where there is a difference of views between these parties, the panel will invite the staff member to a meeting to make his/her request for an extension in person, if he/she so chooses. The division, department and college, as appropriate, will also be able to present their case(s). Relevant documentation would be provided to all parties in advance of the date of any meeting of the panel arranged to address the request. The staff member will have the right to be accompanied by a trade union or colleague from within the University.”

106. The panel would then decide on the request for an extension of employment including the length of time of the extension. In the case of joint appointments, the college would make its decision according to its own regulations and procedures.

107. There then followed a provision for informing the employee of the Panel's decision, in writing, and where the request to continue working beyond the EJRA is rejected, the individual would be notified of their right of appeal. Any appeal against the decision of the panel must be made by the staff member to the Registrar within 28 days of receipt of the letter confirming the Panel's decision in accordance with Statute XII, Part H, paragraphs 41 to 42. (100-103)

108. In relation to considering requests to work beyond the EJRA, the policy provided for a number of “Considerations” be taken into account. It states:

“23. It is the policy of the University that academic and academic-related staff will have a fixed retirement date in order to support the aim of the EJRA. All requests to continue working beyond the EJRA submitted in accordance with Section II above will be considered in this context. Accordingly, applications will be approved only where the panel is satisfied that an extension of employment creates sufficient clear advantage to the University so as to justify an exception to the general rule. The panel will weigh the advantages of continued employment (whether in the same post, or in only one part of a previous employment, or on different terms and conditions, or on a part-time basis following partial

retirement to pension) against the opportunities arising from creating a vacancy or part-vacancy.

24. In all cases, the panel will bear in mind that all staff are expected to carry out their roles to a high standard. In the case of academic and research staff, this includes distinguished scholarship and research; senior academic and research staff will often be world-leaders in their field. Given the high standards of scholarship and research prevalent in the University, distinguished scholarship does not, in itself, necessarily constitute an exceptional contribution.
25. The list below outlines the type of matters that the panel will usually take into account in making their decision. They are not 'criteria'; some will be of more importance in particular cases than others and in many cases some of these considerations will be of little or no relevance and others will be pertinent.
 - a) Would the employee's contribution be unusually hard to replace given his or her particular skills set and/or the employment market? For example, has the department or division demonstrated a need, for a defined period, to retain expertise in order to complete a specific project, or to retain skills that are currently in short supply both in the University and elsewhere?
 - b) What is the likely impact of extended employment compared with the opportunity arising from a vacancy on opportunities for career development and succession planning, bearing in mind recent and expected turnover?
 - c) How would extended employment compared with the opportunity arising (if relevant) from a vacancy fit with the future academic and business needs of the department or division over the proposed period, for example, in relation to:
 - i) an identified need to develop a new field of research or meet other specific research aims;
 - ii) the department's ability to respond to student needs;
 - iii) the provision of professional and administrative services of the highest; or
 - iv) any exceptional contribution to the collegiate University the employee is expected to make, for example through unusually distinguished scholarship, such that the loss of that contribution would be unacceptable to the collegiate University?
 - d) How would any financial commitments or benefits which would accrue from extended employment compare with those which might accrue from the opportunity arising from a vacancy?
 - e) What is the likely impact on the promotion of diversity?

- f) Is the duration of the proposed extended employment appropriate in terms of the benefits expected to the collegiate University?
- g) In the case of a joint appointment, what are the implications for the joint nature of the post: for example, where the request involves only one part of a joint appointment, has some suitable means been found of managing the future of the joint appointment so as to protect the shared educational interests of the University and colleges?
- h) In the case of clinical academics in the NHS Trust concerned willing to renew the employee's honorary contract? The holding of a honorary contract is prerequisite for continuation in a clinical post.
- i) Are there relevant personal circumstances that would properly justify exceptional treatment?" (104-105)

109. As we have stated earlier, the University always had a retirement age, in the majority of cases it was 65 years and in others, 67. We find that its propensity was toward maintaining a retirement age when the government expressed its intention to abolish the DRA by 1 October 2011. This does not mean that either the Working Party or the Personnel Committee was blind to other alternatives. We heard evidence from Dr Goss and Ms Thonemann, who told that alternatives were considered but found little support. They considered the experience in the United States of America where mandatory retirement was abolished in 1987 but in order to induce academics to leave, a significant sum of money is offered as the universities are financially well endowed. In evidence we were told by Ms Thonemann that one university was able to raise \$6billion and normally their termination package includes an inducement of 1.5x the salary. The University would be unable to adopt such an approach due to funding constraints. The University's academics also turned their backs against the introduction of performance management as the consensus was that it would be demeaning to those who are at the end of their academic careers. The notes of the meetings are not verbatim but simply record the outcomes. Had the EJRA been unacceptable to academic and academic-related staff, as stated earlier, only 20 had to object to invoke a debate in Congregation.

110. We are satisfied that consultation with all interested parties on the proposed introduction of an EJRA and the extension procedure was meaningful and extensive. Responses were obtained from February to March 2011 on an EJRA at 67 years with further consultation responses on the extension provisions, from 9 June to 8 July 2011. The proposals received widespread support. Alternatives to an EJRA were discussed but considered to be unviable. (1977-1980)

111. Ms Thonenmann said and we accepted her evidence, that she spent during the consultation process, most of her time in consultation with the various groups already referred to, staff and interested parties on the EJRA.

112. Ms Thonemann conducted an evaluation on the effectiveness of the EJRA one year after its implementation on 29 October 2012 as it was decided when the EJRA was implemented, that there should be annual reporting to

Council via the Personnel Committee of its effectiveness. She concluded that it was too early to identify any trends and draw any firm conclusions. The slight difficulty was that the University had effectively extended its retirement age from 65 to 67 years. It was apparent to her that it would take a number of years and much larger data, to properly measure any achievements of the aims.

113. She reported that from 1 October 2011 to 30 September 2012, 32 academic and academic-related staff, made formal applications to continue working beyond the EJRA. Of the 32 applicants, 31 were supported by their department and division and were granted approval to work beyond the EJRA. The remaining application was not supported by the department and division. Of the 32 applicants, 10 were due to reach the EJRA on 30 September 2012. The remaining 22 applied in advance of the EJRA. Of the 31 applications approved, 26 (83.9%) were from men and 5 (16.1%) from women. 2 of the female applicants were academic-related staff, 2 were researchers and 1 was an academic. In 2010 to 2011, 13 (27.6%) of the 47 applicants were women.
114. Ms Thonemann was of the view that the group was too small to conduct an analysis by ethnicity or disability but noted that one successful applicant cited his minority ethnicity as a supportive factor in his application.
115. The main reasons cited for wishing to continue in employment beyond the EJRA were: to provide continuity for ongoing projects (7 cases); the individual was named on a new or ongoing grant (7 cases); the individual had specific skills that could not easily be replaced (6 cases); to contribute to the Research Excellence Framework (6 cases); for recruitment and retention purposes (4 cases); and to cover a period of leave (1 case). 11 cases (35.5%) of the successful applications were for an extension of 1 year or less and 12 (38.7%) were for part-time working. (2234a to 2234f).
116. Ms Thonemann presented her report at the consultative meeting on 6 November 2012 with representatives of the University and representatives of the Oxford UCU. (2235)
117. What the figures show was that the majority who applied for an extension of their employment with the University were successful and that the University was not overly selective in the applicants who applied to extend their employment under the EJRA provisions.
118. In the minutes of the Personnel Committee dated 24 October 2013, Ms Thonemann reported on the position of the EJRA covering the period 2012 to 2013. She stated that during that year 55 staff made formal applications to work beyond the EJRA. 52 were supported by their departments and divisions and of those 49 were approved. The 3 cases which were not supported were declined after panel meetings. Of the 55 applicants, 49 were due to retire on or before 30 September 2014. The other 6 applied in advance of the EJRA as part of a recruitment negotiation. 41 (74.5%) of the 55 applicants were male and 14 (25.5%) were female. In 2010-2011, the figure was 27.6% female.

119. As an application for an extension had to be considered in light of the question whether the individual “if extended in employment, expected to make an exceptional contribution to the collegiate University”, Ms Thonemann concluded that this requirement had been erroneously taken by many staff members to mean that the standard of distinction in research expected of an Oxford academic was sufficient to justify their continued employment. She recommended that there be clarification of this requirement. The burden would rest on the applicant to make an exception from the normal rule of retirement at the EJRA. It was apparent that the EJRA was not functioning as anticipated by the University in freeing up vacancies. Her recommendations were approved by the Personnel Committee on 28 November 2013 (2243-2248, 2256-2269)

The Galligan judgment-2014

120. In a judgment dated 1 September 2014, Dame Janet Smith, a retired Lady Justice of Appeal, who chaired the University’s Court of Appeal, now renamed the University Appeal Panel, heard the appeal in the case of Professor Denis Galligan, against his retirement under the EJRA. She concluded, on the evidence before her, that the University’s EJRA policy of 67 years could not be justified and extension provisions were “fundamentally unacceptable” and also could not be justified. The process rendered Professor Galligan’s dismissal unfair. (429-494)
121. Professor Galligan was employed only by the University and was not engaged in a joint appointment under the Common University Fund.
122. We bear in mind that this was an internal employer appeal hearing but the implications of the decision were far-reaching for the University having spent some time in consultation and in discussions on the EJRA.
123. Following on from the Galligan decision, the Personnel Committee set up a Working Group to consider whether any changes should be made to the EJRA’s aims or exceptions procedure prior to the five-year review due to take place in 2016-2017. The Working Group recommended to the Committee that the aims should be clarified and there be adjustments to the exceptions procedure. These came into effect on 30 September 2015 and are referred to as the “2015 Policy”. The recommendations were 11 in number and they were:

“Recommendation 1:

The Group recommends that the *Aims* be recast in order to make clear that the first *Aim* is an overarching objective which relies on the achievement of the other *Aims*, and not a free-standing objective in itself.

Recommendation 2:

The Group noted that they had not been able to draw conclusions about the impact of the EJRA on ethnicity and disability because of the number of staff known to belong to these minority groups is smaller than the number for whom

their status is unknown. It is recommended that steps be taken to address the high proportion of “unknowns” if at all possible before the 10 year review of the EJRA in 2021, in order that a fuller analysis in relation to these minority groups can be undertaken.

Recommendation 3:

The Group recommends that the sixth aim be removed, on the basis that there is little evidence that the EJRA is contributing to it.

Recommendation 4:

The Group recommends that the seventh aim be removed, on the basis that there is no evidence that the EJRA is contributing substantially to it, and that the University is currently using other means to achieve it.

Recommendation 5:

The Group recommends that the EJRA be retained, with the purpose of safeguarding the high standards of the University in teaching, research and professional services through its contribution to the achievement of the revised set of *Aims*.

Recommendation 6:

The Group recommends that the coverage of the EJRA be aligned with the group of staff who are eligible for membership of Congregation, ie to academic staff, research and administrative and professional staff in Grades 8 and above.

Recommendation 7:

The Group recommends that (with due notice) the EJRA be moved by one year to 30 September before the 69th birthday (ie an EJRA of 68) for all staff that it covers. It further recommends that the age of the EJRA be raised by another year to 30 September before the 70th birthday (ie an EJRA of 69) in 2022, to mirror changes in longevity, provided that the 10-year data confirms the trends observed in this new interim review.

Recommendation 8:

The process, and particularly paperwork supporting it, should be reviewed to ensure that it protects the dignity of applicants, is relevant to each staff group, and emphasises the value that the University places on those who have been in its employ.

Recommendation 9:

Further support, perhaps in the form of training and guidance, should be given to heads of department to ensure that they can carry out their role in the process effectively and supportively. This should include further information on the alternatives to extended employment.

Recommendation 10:

Thought should be given to whether further guidance is necessary in relation to the funding of extensions, to assist those for whom less grant funding is accessible to identify other legitimate funding sources in support of applications for extensions.

Recommendation 11:

The deadline for applications for extended employment for all staff should be moved to 2 years prior to the EJRA date.” (2536)

124. There were further revisions to the EJRA. Of note was that an application for extension of employment would only be approved in exceptional circumstances and would be considered by an eight-member EJRA panel. In relation to the revised aims and the EJRA proposals, they were implemented on 30 September 2015. The University stated:

“In the context of the University’s particular structure and procedures, the EJRA is considered to be an appropriate and necessary means of creating sufficient vacancies to meet the aims set out below:

Safeguarding the high standards of the University and teaching, research and professional services;

Promoting intergenerational fairness and maintaining opportunities for career progression for those at particular stages of a career, given the importance of having available opportunities for progression across the generations;

Refreshing the academic, research and other professional workforce as a route to maintaining the University’s position on the international stage;

Facilitating succession planning by maintaining predictable retirement dates, especially in relation to the Collegiate Universities Joint Appointment System;

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;

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

Minimising the impact on staff morale by using a predictable retirement date to manage any future financial cuts or constraints by retiring staff at the EJRA” (105A-105J)

The claimant’s EJRA extension application to the University

125. The claimant was born on 10 February 1949. On 1 October 1980, he commenced employment with the respondents at the age of 31 years. At the material time he was employed as a Professor of English Literature at the University, a Founder’s Fellow, and Official Fellow and Tutor in English at the College.

126. In a letter dated 4 June 2014, by Professor Shearer C West, Head of the Humanities Division, sent to the claimant on behalf of the University, he reminded him that his retirement date would be 30 September 2016 as he would be 67 years of age. The purpose of writing was to give him time to consider his options and to discuss them with the University and with his College. Professor West informed him that he could retire, take his pension either on the retirement date or earlier if he so chose. He, however, had the option of making a request to continue to work at the University beyond his retirement date and the procedure under the EJRA policy was set out. He was advised to put a request by no later than end of June 2015, 15 months before his retirement date. The letter was also copied to the University's English Faculty and to St John's College. (397-398)
127. As the claimant wanted to continue to work beyond his retirement date, on 28 October 2014, he informed Professor West that he would like to continue in his employment. On the same day Professor West informed him that an application to extend beyond the retirement date would need to be made against the published EJRA exemption criteria. (501).
128. The claimant did not want to retire against his wishes and made an application, in June 2015, under the EJRA, to extend his employment to September 2020, by four years. He summarised his curriculum vitae and his external work on a number of bodies. He also gave a list of his publications and stated that a continuing substantive post until 2020 would make applications for innovation awards from certain bodies much more likely to succeed and that the same would apply to applications to expand the Publishers and Writers Project which he and his collaborator were planning to submit in 2017. If his applications were successful they would enhance further his profile at the next Research Excellence Framework "REF". He set out his extensive work on the poems and plays by the Elizabethan poet and historian, Samuel Daniel, 1562-1619, and on Shakespeare. He gave an account of his involvement at St John's College and stated that he took over the role of College Office of Fellow for Alumni in 2012 and oversaw some of the decision-making regarding the Alumni Relations Office, edited the College's magazine, and attended many University student functions. In 2013-14, he was made a Founders Fellow and described his role in that regard. He stood in for the Director for Development and Alumni Relations in 2014-15.
129. He also wrote that the University's English Faculty was not particularly short of Shakespeareans but there were two areas in which he had special interests: the first being "introducing students to the principles and practice of writing Shakespeare commentaries"; the second was "the positioning of Shakespeare in terms of genre, both dramatic genres in transition and fusion (romance out of tragedy, romance as parody of tragedy and genre..".
130. He then gave an account of his work at St John's College. He wrote that he had been standing in as Director of Alumni Relations until the appointment of a full-time professional Director in the autumn of 2015. He would

continue in his role as Founder's fellow, a five-year appointment until 2020. (596-601)

131. On 10 July 2015, his application was considered by the Appointments, Finance, and Planning Committee, effectively the English Faculty's executive committee, at a meeting chaired by Professor Seamus Perry, Chair of the English Faculty Board. The claimant was not invited to attend but was written to on 3 August 2015 by Professor Perry, who stated that the Faculty would not be supporting his application and that he had taken advice from the Humanities Division. Having taken into account the various considerations in relation to an application to extend beyond the EJRA, the Faculty felt that it was extremely unlikely that it would persuade the Divisional Committee or the University's EJRA Panel, to recommend the claimant's application for an extension. He wrote:

"I took advice from the Division about the process, and one thing that was stressed is that it is fundamentally *not* about recognising academic merit. It is stated quite explicitly in the 'Considerations' of the EJRA that: 'Given the high standards of scholarship and research prevalent in the University, distinguished scholarship does not, in itself, necessarily constitute an exceptional contribution'. So, it is quite unlike the Recognition of Distinction exercise, that is to say, in that its purpose is not to establish scholarly excellence but, much more narrowly, to assess whether the continuation of a particular postholder in their particular existing post is likely to be of significant advantage to the University (as defined against the terms laid down in the list of 'Aims' of the EJRA). And it goes without saying that the assumption is that retiring at the EJRA is the normal thing to do (or it wouldn't be an EJRA). So, the decision we are called to make is whether the case made by the applicant is so overpowering as to constitute an exception to what is otherwise the general rule.

We went very carefully through the various considerations listed by the University, and I regret to say that we came unanimously to the view that any recommendation we might make for you to continue in your current post beyond the EJRA was extremely unlikely to persuade the Divisional committee to whom we make our report, or the University's EJRA panel. We did not consider, for example, that we could reasonably make a case that it would be 'unusually hard to replace' a postholder with expertise in the early modern period; we could not identify any sufficiently 'specific research aims' that depended on the continuation of the post; nor an ability 'to respond to student needs', nor the supply of 'administrative services of the highest quality'; and it did not seem to us that we could make a persuasive case that your retirement according to schedule would constitute the loss of 'unusually distinguished scholarship' in a way that would be 'unacceptable to the collegiate University'. These bars are deliberately set extremely high and the expectation is that most of us – including the extremely distinguished – are not going to clear them.

.....

To state the obvious: we are unambiguously persuaded of your 'distinguished scholarship'; everyone recognises your immense academic distinction; but that is not what we are called upon to assess. We have no doubts whatever that the edition of Daniel will be a major achievement. It would certainly be a significant contribution to REF 2020. But, setting completely to one side how much is likely to ride on REF next time anyway, we cannot really claim that continuing in

your CUF post is a necessary condition for the completion of that edition. Nor could we see how we might allow your intention to apply for research money as an exceptional argument for extension. (If a colleague were already to hold a research award at the point of retirement it is still expected that he or she would leave his or her lectureship and move to a new research-only post, funded by the grant.) We acknowledge with genuine gratitude the popularity and brilliance of your Shakespeare teaching, especially for the commentary part of the paper; but we could not think that that was going to make a sufficiently convincing argument for a continuation in post, or that we could make a case to the University that appointing someone who was capable of that teaching was likely to be 'unusually hard.' ”

132. Professor Perry then referred to their discussion on other options, such as, retiring as normal but if St John's College was willing, the claimant could be retained in his post in the College as Founders Fellow. If there was to be a research element the Faculty would be able to include a college-only postholder in REF. (543-545)
133. The above approach was consistent with the policy provisions as it allows for one half of a joint appointment to continue under certain conditions.
134. Professor Christopher John Wickham, who was formerly Chichele Professor of Medieval History and who retired in September 2016 at the age of 66 years, as Head of Division, was responsible for signing off on matters concerning the Humanities Division. He aware of the claimant's intention to apply for an EJRA extension but had become formally involved when, on 5 October 2015, Professor Perry wrote to him informing him of the English Faculty's decision not to support the application. (559)
135. On 6 October 2015, Ms McKiernan emailed the Division's panel members informing them of the application by the claimant and seeking their views. She attached his application; the letter from Professor Perry setting out the Faculty of English position and the letter from Professor Perry to the claimant on behalf of the Faculty. She stated that she had not had formal communication from the College but would be seeking its views and had asked that it respond by 8 October 2015. She further stated his application would be considered under the old EJRA procedures applicable as at 30 September 2015. That meant the 2011 policy not the 2015 policy which was revised on 30 September 2015. (562)
136. As the claimant had employment at St John's College, a response was requested from Professor Maggie Snowling, President of the College by Ms McKiernan. (565-566)
137. On 14 October 2015, Professor Snowling responded to the request. She stated that the claimant's role at the time was as Fellow of Alumni and Development Relations, 2 years to August 2016. After that date the role could be renewed for a further two years and then for a further two years thereafter but was subject to both the University panel's approval of the claimant's request to work beyond the EJRA and also the College's own EJRA process, as well as a satisfactory evaluation of his performance in the role. He required teaching remission for 2014/2015. She also made

reference to the appointment of a supernumerary teaching Fellow from 1 October 2015. (569)

138. Contrary to what Professor Wickham said to the tribunal, it was Ms McKiernan who took the calls from the panel members and not him. She then conveyed to him their views on the claimant's application which were not in support of it. No notes were taken of the discussions. By then Professor Wickham said to the tribunal that he was aware that the claimant was asserting that the EJRA was discriminatory because of age.
139. Professor Wickham considered the information from the English Faculty and the views of the Humanities Division panel members. With the assistance of Ms McKiernan, they finalised the Division's response to the claimant's application. The application was not supported. He noted that the claimant had met with Professor Perry, to discuss potential options for continuing employment. Having made reference to Professor Perry's letter, Professor Wickham wrote that it was the Humanities Division's expectation that academics would usually retire on 30 September preceding their 68th birthday. The Division considered that the claimant's "application has not demonstrated that an extension of his employment as an Associate Professor creates sufficient clear advantage to the University to outweigh the opportunities arising from creating a vacancy."
140. In relation to the EJRA considerations, on the issue of whether the employee's contribution would be unusually hard to replace given the claimant's particular skills set and/or the employment market, Professor Wickham wrote that the claimant was a highly respected scholar of Early Modern English and there was no question as to his academic distinction as he was awarded the title of Professor in 2014. He continued:
- "However, the Division does not consider that his contribution in teaching or research would be unduly difficult to replace. Within Oxford alone, the English Faculty has 16 Associate Professors specialising in the early modern field, many of whom are of international standing. More widely, English modern period is flourishing. It routinely forms part of the core curriculum in English studies at Universities both in the UK and internationally, and continues to attract larger numbers of doctoral students and post-doctoral researchers, forming a thriving early career community."
141. He also noted that while the claimant "had experience of Shakespearian commentary", such experience can be delivered by other post-holders. "The division is confident that, in the current employment market, the Faculty would be able to make a new appointment of a high quality".
142. In relation to "What is the likely impact of extended employment compared with the opportunity arising from a vacancy on opportunities for career development and succession planning, bearing in mind recent and expected turnover?", Professor Wickham's response was that the Faculty of English had a very low staff turnover at Associate Professor level. In the academic year 2009-2010, one to two vacancies a year had arisen and had been refilled due to retirement. One additional vacancy arose due to resignation. He noted that there were no senior research posts in the Faculty to provide alternative routes for career

advancement bearing in mind that the claimant's post was the sole Associate Professorship expected to become vacant due to retirement in the Faculty until 2020. He then wrote:

“In view of this exceptionally low staff turnover, the ability to use vacancies arising from retirement for career development, and to enable the Faculty to make strategic choices about its size and shape, is absolutely essential in a faculty and divisional environment of considerable financial constraint... The Faculty is currently recruiting to an Associate Professorship in English Literature 1760-1830. Were Professor Pitcher's request to extend employment approved, English would not be able to make any further appointments at this level before 2020. In this environment, the Division feels strongly that the negative impact of extended employment upon the Faculty would be severe.”

143. Professor Wickham also referred to the following considerations:

“How would extended employment compared with the opportunity arising (if relevant) from a vacancy fit with the future academic and business needs of the Department or Division over the proposed period, for example in relation to:

- (i) An identified need to develop a new field of research or meet other specific research aims;
- (ii) The department's ability to respond to student needs;
- (iii) The provision of professional and administrative services of the highest quality; or,
- (iv) Any exceptional contribution to the Collegiate University the employee is expected to make, for example through unusually distinguished scholarship, such that the loss of that contribution would be unacceptable to the Collegiate University?”

144. He noted that if the claimant's application was accepted and he remain employed until 2020, there would be no opportunity to effectively respond to (i) to (iii). In relation to (iv), he acknowledged the claimant's distinguished scholarship but, by itself, it did not necessarily constitute an exceptional contribution and its loss should be deemed as acceptable to the University. It meant that he considered that the loss of the claimant's contribution fell within the normal consequences of retirement. The Humanities Division expected a large proportion of senior academics approaching retirement to be engaged in high quality research after retirement which may result in subsequent publications. Retired academics may retain membership of their Faculty to allow then access to facilities such as the Bodleian Library and they also had the opportunity to be involved in applications for research grants as non-employees. The Division did not consider work published at that point as a loss to the University.

145. As regards “How would any financial commitments or benefits which would accrue from extended employment compare with those which might accrue from the opportunity arising from a vacancy?”, Professor Wickham wrote that the financial commitments accruing from extended employment were comparable to

those arising from a vacancy. As the claimant's appointment was at the top of the Associate Professor scale, he was in receipt of the award for a professorial title. It was possible that a replacement appointment might be made at a lower scale point or without the title and that some small savings would accrue in the initial years of that appointment but the quality of the expected application field meant that savings may not arise.

146. Although the claimant's application mentioned that he intended to apply for external research funding, the Division was of the view that such funding would potentially benefit the Faculty but it would expect that any new appointee would also be in a position to apply for research funding and that an extended appointment would not increase the potential financial benefits. Further, although the claimant suggested that his planned programme of research would benefit the Faculty in the next REF but given the uncertainty of the date of the next REF and the anticipation that the next exercise would not fall until after the claimant's proposed extension, the Faculty potentially would not benefit from the investment via the REF.

147. Professor Wickham then referred to the other considerations and wrote:

“(5) What is the likely impact on the promotion of diversity?”

In view of the very low staff turnover in the Faculty, any extension of employment in a post at this level will have a negative impact on the promotion of diversity', through reducing the opportunity to increase diversity through recruitment.

(6) Is the duration of the proposed extended employment appropriate in terms of the benefits expected to the Collegiate University?

The Division does not consider that the duration of the proposed extended employment is appropriate in terms of the benefits it would bring to the collegiate University.

(7) In the case of a joint appointment, what are the implications for the joint nature of the post: 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?

Discussions with St John's College are ongoing. The Division notes that any extension of Professor Pitcher's employment with St John's would be contingent on the College's own EJRA procedure. In the event that the university did not extend Professor Pitcher beyond September 2016, but the college were not in a position to refill the tutorial fellowship, the Faculty would wish to discuss the future of the joint appointment with the College. English currently carries several vacant joint appointments and have been suppressed due to lack of university funds.

(8) Are there any relevant personal circumstances that would properly justify exceptional treatment?

The Division is aware of no personal circumstances that would properly justify exceptional treatment.” (602-604a)

148. It follows from the above that both the Humanities Division and the Faculty of English were not in support of the claimant’s application to extend his appointment to 2020. The decision did not mean that they were in any way diminishing his academic and scholarly achievements in the field of English literature, but having considered the University’s EJRA policy and procedures, they could not justify retaining him beyond his retirement date. There was no suggestion that there was an ulterior motive behind their decisions. This was the initial part of the EJRA process seeking the views of the Faculty and Division.
149. On 14 October 2015, Ms McKiernan emailed the claimant informing him that the Humanities Division did not support his application and that the next stage was for his request to go forward to the University’s EJRA panel. He would be invited to attend the panel meeting to discuss his application in person. There would also be a representative from the University. He was informed of his right to be accompanied by either a trade union representative or a colleague from within the University and would receive copies of the submissions from Division and Faculty as well as a copy of his application. (570)
150. On 22 October 2015, Ms Thonemann wrote to him stating that she had received a copy of his application to continue working for four years until September 2020 and enclosed a cover letter from Professor Wickham; the submission from the Humanities Division in response to his application; a letter from Professor Perry, Chair of the English Faculty Board to the Head of Division setting out the Faculty’s view on the claimant’s application; and a letter from Professor Perry to him. She stated that a statement from St John’s College was expected. She also enclosed a copy of the full procedure for considering an application to work beyond the EJRA as applicable up to 30 September 2015. She confirmed that as the Faculty and Division did not support his application, there would be a hearing before the EJRA Panel. He again was informed of his right to be accompanied and was invited to confirm by 6 November 2015, whether it was his intention to pursue his application. (617-618)
151. Dr Stephen Goss, Pro Vice Chancellor, Personnel and Equality, University’s EJRA, wrote to the claimant 12 November 2015, inviting him to decide by 20 November 2015, whether he intended to pursue his application after reading the submissions from the Faculty and Division. (655)
152. The claimant responded on 16 November 2015, asking for a relaxation of the deadline as he had sought advice from an employment lawyer and also wanted to know whether or not the University’s EJRA Panel would be considering submissions from the College. (659)
153. Dr Goss replied by email on 17 November, stating that it was normal practice for the University to seek comments on EJRA applications from the

College in the case of joint appointment holders and it was up to the College how to respond.

154. The claimant replied on 23 November 2015 stating that he intended to proceed to a meeting of the EJRA Panel and had been advised that the College's position would be made available to him before his final grounds were delivered. (664)
155. On 9 January 2016, he emailed Dr Goss requesting a copy of the internal University Court of Appeal's decision in the case of Professor Denis Galligan given on 1 September 2014. It is understandable why this was requested as it held that the University's EJRA and extension provisions were discriminatory because of age and could not be justified. He was of the view that the EJRA should not apply in his case and that he should be allowed to work beyond 30 September 2016.
156. In relation to his request for a copy of the decision, it was declined by Dr Goss on 14 January 2016, because the appeal was internal and not public; the decision was confidential as between the parties; and the decisions of the internal Court of Appeal were not intended to be considered as binding on another Appeal Court. (766, 772)

The EJRA Panel meeting

157. The University's EJRA panel met on 26 January 2016, chaired by Dr Goss. The panel members were: Professor Irene Tracey; Professor Neil MacFarlane; Professor Helen Small, representing the Faculty of English; Miss Lynne Hirsch, representing the Humanities Division; and Ms Thonemann, as note taker. The claimant attended and was not represented.
158. Dr Goss outlined the structure of the meeting to all those present. The claimant asked and Dr Goss confirmed that the draft minutes, although not verbatim, would be circulated for comment. As the claimant had given prior notice that he intended to read a statement, he was invited by Dr Goss to do so. The statement read out was his challenge to the legality of the University's EJRA following the Galligan decision. Dr Goss informed him that his arguments were noted but the panel would not be able to take a view on the legality of the EJRA as that was beyond its remit. It had to confine itself to the procedure. The claimant confirmed that he wished his application to be considered under the old 2011 policy and not under the revised 2015 procedure.
159. He raised a concern arising out of a paragraph in Professor Perry's letter dated 3 August 2015, in which it stated:

“It did not seem to us that we could make a persuasive case that your retirement according to schedule would constitute a loss of ‘unusually distinguished scholarship’ in a way that would ‘be unacceptable to the collegiate University’. These bars are deliberately set extremely high and the expectation is that most of us – including the extremely distinguished – are not going to clear them.”

160. We quite understand the claimant's concern about the statement as it would suggest that only a few applicants for extension of their employment would be successful. He asked Professor Small whether there had been an understanding at the meeting at which his application was considered, that only a few would be able to carry on working beyond retirement. Professor Small's response was that the second sentence of the quote was "an informal gloss on the sentence before". She thought that Professor Perry's concern had been to draw a distinction between the claimant's undoubted excellence and the decision under the criteria.
161. At the conclusion of the meeting Dr Goss said that the claimant would receive a copy of the minutes of the meeting before the Panel's decision was finalised which would be within two weeks. (850-854)
162. We set out herein verbatim the statement read out by the claimant:

"Statement read to the University EJRA Panel 22 January 2016

1. This panel is appointed and operates under the Employer Justified Retirement Age (EJRA) Rules of the University. As such, acting as what may be considered to be a tribunal, the Panel has a duty to act in accordance with those rules, take note of any guidance that may be available to guide it and to reach a fair decision in accordance with the rules and law.
2. Prior to the Equality Act 2010 (The Act) the normal retirement age of Oxford University appointment was 65. The Act made age-linked retirement unlawful unless it could be objectively justified. *The presumption and policy is that people will continue working: to make them redundant has to be justified by the organisation; the employed person does not have to justify their employment.*
3. In response the University introduced in 2011 the Employer Justified Retirement Age (EJRA) which prescribes a retirement age of the September following a person's 67th birthday, and that a person may remain in post only demanding criteria are satisfied.
4. Professor Denis Galligan, Professor of Socio-legal studies and a Professorial Fellow of Wolfson College, became subject to the EJRA age-linked retirement. It was decided that he did not meet the criteria to remain and therefore had to leave his position in the September (2014) following his 67th birthday.
5. In precis, Professor Galligan appealed under the Statutes of the University, and the appeal was heard in June 2014 before Dame Janet Smith (The Judge), formerly a Judge in the High Court and Court of Appeal for over 23 years.
6. After a four day hearing, involving evidence by members and officers of the University, extensive written and oral argument with the University represented by senior Counsel, the Judge in a 75 page decision found comprehensively against the University.
7. I specifically draw the Panel's attention to the following conclusions by the Judge that must be relevant in its considerations of my position.

- a) That the policy of imposing retirement age at 67 cannot be justified.
 - b) That the EJRA policy and the rejection of an application under this procedure can never amount to a potentially fair reason for dismissal.
 - c) That asking an applicant to appeal using the EJRA procedure put the employee to the well-nigh impossible task of convincing the panel of the advantage to the university of allowing an extension and accordingly such procedure was unfair. That is, the procedure we are engaged in today.
8. Further, I specifically draw attention of the panel to the Judge's conclusions in respect of the aims and objectives set out under the EJRA:
- a) That, in respect of the aim of *intergenerational fairness and refreshing academic workforce*, the Judge did not consider that this was an important aim and had been exaggerated by the University which had tended to overplay its importance. Rather than refreshing the academic workforce, the EJRA merely allowed the University to pick and choose who wants to keep and who it wanted to get rid of. In particular the Judge took the view that the aim of intergenerational fairness was not a valid consideration when seeking to impose compulsory retirement on statutory professors. This is equally true in my case since both the English Faculty Board and the Divisional Board, in respect of my university lectureship, have commended my research and teaching, and the university has acknowledged it with a recent Distinction title.
 - b) *Succession planning*: In this respect the policy of forced retirement at 67 cannot be objectively justified.
 - c) *Equality and diversity* were important that operating the EJRA can only have a marginal effect and the importance of the EJRA in this respect was very slight indeed.
 - d) Concluding, the Judge baldly stated that requiring an established employee to demonstrate that he or she is indispensable or be dismissed is an inevitable unfair dismissal.

All the above statements are drawn from the decision of the Judge, and I believe will not be challenged factually by any person here.

It is therefore obvious that in law I am entitled to remain in my position in accordance with the Equality Act 2010. Further it is not for me to justify my remaining in post. On the contrary the university has to justify its position to ask me to retire. Its grounds have to be valid in law: it can be clearly demonstrated that on careful examination are not.

To cite the Judge again; the policy of imposing retirement at 67 cannot be objectively justified and the EJRA policy and the rejection of an application under this procedure can never be a fair reason for dismissal.

The University has not put forward any grounds to dismiss me other than I am about to reach the age of 67, and this is insufficient in law."

163. It is clear from the above that the claimant's concern was on the legality of the EJRA procedure. We accept, however, that his application did focus on his work. (855-856)
164. Following Dr Goss' letter to the claimant on 9 February 2016, inviting him to decide whether he wished his application to be considered under the old 2011 or new 2015 policy, the claimant responded on 15 February 2016 repeating that he wished the application to be considered under the old procedure. (994-995, 1008-1009)
165. The Panel's decision was communicated to him by Dr Goss in his letter dated 3 March 2016. In it he stated that the Panel disregarded the paragraph in Professor Perry's letter to the claimant to which the claimant had raised concern. He stated that the Panel decided that as Professor Perry could not clarify the meaning of the sentence, it would be disregarded. It was decided that the lawfulness of the EJRA was beyond its remit. Dr Goss then wrote in respect of the claimant's substantive application for an extension:

"The [Panel] first considered whether your contribution would be unusually hard to replace, given your particular skill set and the employment market (*paragraph a*) of the Considerations. In your application, you outlined your research plans for the coming years, which you predict will result in a top-rated REF submission in 2019/20, and your anticipated contribution in terms of teaching as Shakespearian and, more specifically', specialising in commentary and positioning in terms of genre.

In research terms, the panel noted that you have plans for a number of published volumes and other projects, such as a film and invited lecturers at the V & A, which would be of value to the University and to scholarship more widely. However, given the confidence expressed by the Division that a replacement appointment "of a high quality" (Submission from the Humanities Division, p.2) would be possible, and since such a replacement might reasonably be expected to have a distinguished and innovative research programme of their own, the Panel did not consider that an argument had been made that your contribution in this regard would be unusually hard to replace.

In terms of teaching, the Panel noted that you state that 'The English Faculty at Oxford is not particularly short of Shakespearians at present' (your document quotes 'Application from Professor John Pitcher', p5). This accord with the Division's comment that there are 16 Associate Professors working in the early modern field in their faculty at present (Submission, p.2). In light of this, the panel considered that high quality teaching on Shakespeare could not be characterised as unusually hard to replace in the context of the current and anticipating staffing profile of the English Faculty.

The panel did not consider that an argument had been made that there was a demonstrable need, for a defined period to retain your expertise to complete a specific project (*paragraph a*) of the Considerations.

The panel then considered the likely impact of extending your employment compared with the opportunity arising from a vacancy or opportunities for career development and succession planning, in the context of recent and expected

turnover (*paragraph b*) of the Considerations. It was considered to be key that your post is the only anticipated vacancy at Associate Professor level in the English Faculty until 2020, and that financial considerations mean that no new posts can be created (Divisional submission, p.2). In this context, the Panel considered that the opportunities for career progression and refreshment arising from a vacancy would be invaluable to the Faculty.

The Panel then addressed the opportunities arising from extended employment compared to those arising from a vacancy in terms of the academic and business needs of the Faculty and Division (*paragraph c*) of the Considerations. No need has been identified by the Faculty to develop a new field of research or to meet other specific research aims (*paragraph c(i)*) of the Considerations. You expressed confidence that you would be able to contribute a top-rated submission for the facilities REF return in 2020 (p.2 of your application), but the Panel considered it likely that a “high quality” replacement would be able to do likewise. As outlined above, your contribution to teaching and a broader intellectual development of students, while valuable, would not be unduly difficult to replace, albeit by someone with a specialism in a different area than yours (*paragraph c(ii)*) of the Considerations. The Panel noted your contributions to administration (p.1 of your application; *paragraph C(iii)*) of the Considerations but took the view that your replacement might be expected to make a comparable contribution over time.

The Panel noted anyone employed to replace you would receive a salary on the same scale as you. Although that person might be appointed at a lower point on the scale and might not be in receipt of the allowance that accompanies professorial title, this would not have a significant ongoing impact on Faculty costs. As a result, the financial impact anticipated as a result of your contribution in employment or retirement was not considered to be a decisive factor (*paragraph d*) of the Considerations.

The Panel noted that you have not put forward any arguments relating to diversity. The Division had noted that the limited nature of turnover in the Faculty meant that your post would provide the only opportunity to improve diversity through recruitment in the next few years.

With respect to Consideration g, regarding joint appointments and the protection of the shared educational interests of the College and University, I, as Chair, informed the Panel that I have been in contact with the Chair of the College’s EJRA Panel and that we would work together to ensure that the joint post is protected, whatever the outcome of the deliberations of the two panels.

The Panel took the view that you did not put forward any relevant personal circumstances that would properly justify exceptional treatment (*paragraph i*) of the Considerations.

In light of their deliberations, the Panel decided that an exception to the general rule that the academic and academic-related staff should retire at their EJRA could not be justified in this case.

If you consider that you have grounds to appeal this decision, you may submit an appeal in writing to the Registrar within 28 days of receipt of this letter in accordance with Statute XII, Part H. Your letter to the Registrar should set out clearly the grounds of your appeal”. (1026-1028)

166. In our view the Panel considered the relevant matters in assessing the application for an extension and gave reasons for its decision. It also noted that although the claimant did not consider diversity in his application, it was, however, considered by it.

The claimant's appeal

167. In the claimant's letter dated 30 March 2016, addressed to Dr Goss, he stated his intention to appeal the decision of the Panel. Attached to his letter were his grounds of appeal. There were two main grounds, namely that the EJRA was discriminatory on grounds of age, and that the findings of the EJRA Panel were flawed without evidential support. He elaborated on each. He stated that in the six-staged process under which the academic employee was required to present and apply for permission to work beyond the retirement date by essentially presenting a business case that he or she should be retained, there were no objective criteria by which it was judged. In relation to age discrimination, he relied on the internal Court of Appeal decision in Galligan that "Safeguarding high standards University and College did not meet social policy aims and could not be justified". Intergenerational fairness and the need to refresh the academic workforce, although he accepted that intergenerational fairness was a valid social policy aim, it was not proportionate and could not be supported by evidence. There was no expectation that more junior academics would be promoted from within the College or University.

168. With regard to "Succession planning", he accepted that this was a valid social policy aim but that it was not proportionate and could not be supported by evidence and could be applied equally to any age. Therefore, it could not be justified.

169. In relation to "Diversity", as a ground of justification, the University and the College did not consider any evidence in support of this ground. What was being sought was justification of discrimination on the grounds of age in order to promote equality and diversity and other protected characteristics. It was not a valid social policy aim and was not proportionate.

170. In relation to "Minimising the impact on staff morale by using a predictable retirement age", the claimant wrote that he understood it to be a euphemism for "avoiding performance management". As the College and the University do not have any performance management processes, there was no effective performance management for those below the age of 67, consequently, it would be discriminatory to impose some form of performance management after that age. There was no evidence that performance over the age of 67 years was demonstrably worse than below that age. This was an arbitrary ground and not proportionate.

171. In relation to "The distinctive collegial process through which the University is governed", this was specific to the University and the College and did not meet the test of being a social policy aim for the purposes of justifying direct age discrimination.

172. He then dealt with what he claimed were the flawed findings of the EJRA Panel. He submitted that the test applied in the submissions of the Chair of the English Faculty departed from the University's stated EJRA considerations. It was wrong to ignore his submissions on the point and that demonstrated a flawed approach by the Faculty.
173. In relation to his projected publications for REF, he was confident that they would be top-rated and that the rejection of his submission that his contribution would be unusually hard to replace, was flawed. The decision was not based on evidence but on supposition. He further stated that his teaching had been described by the Faculty Chair as "brilliant", notwithstanding that the Panel found that a suitable replacement would be available but that was without assessing fully whether his experience and expertise in teaching could be replaced on a like-for-like basis.
174. In his final paragraph under the heading "Resolution", he wrote:
- "I have found the whole process, and the uncertainty that it has brought, to be extremely distressing, particularly by having to persuade esteemed colleagues of the worth that I provide to the College and University, when no issues about my performance have been raised before. Although I do not accept that the EJRA is a valid and lawful process, my preferred outcome would be for the College and University to accept and allow my formal "application to continue in post" dated 2 December 2015." (1046-1050)
175. Sir John Goldring, a retired Court of Appeal judge, was appointed to hear the claimant's appeal.
176. Prior to the appeal hearing, the claimant again asked the University to release the Galligan decision. He eventually obtained a copy in August 2016 following Sir Jeremy Sullivan's, a retired High Court judge, decision in the case of Professor Anthony Watts, on 6 July 2016, that the Galligan decision should be disclosed to Professor Watts. According to the claimant, Professor Watts was either reinstated or re-engaged by the University and did not pursue his appeal. (1263, 1816)
177. On 6 September 2016, the University's Appeal Court heard submissions on the legality of the EJRA policy and on 14 September 2016, Sir John Goldring decided that the Court did not have the authority to consider whether the EJRA was discriminatory. The same would apply to the EJRA Panel. He concluded that the Appeal Court is an internal appeal mechanism within the University akin to a private company. "... decision is that the Appeal Court does not have jurisdiction to consider the legality of the EJRA policy". (1393-1407)
178. The claimant having taken Sir John Goldring's ruling into account, decided on or around 10 October 2016, to withdraw his remaining grounds of appeal and did not continue with the appeal process.
179. He also submitted a formal grievance alleging age discrimination under Part F Statute XII of the University's Statutes and agreed to stay those proceedings pending the outcome of his Employment Tribunal case. (1513)

180. Another issue raised by him during this tribunal hearing was the role of Dr Goss who gave evidence during the Galligan appeal but who did not consider, in relation to hearing the claimant's extension application, that it was a sufficient reason to step down as Chair of the EJRA Panel. He denied that he lacked impartiality. At the time the claimant was unaware that Dr Goss had given evidence during the Galligan appeal and Dr Goss did not see it as his duty to disclose that fact to him.
181. The Galligan decision was considered by the University as being confidential and that Dame Janet Smith did not have the authority to decide on the issue of the lawfulness of the EJRA policy. The University, however, acknowledged that her decision was not challenged in the High Court as being ultra vires.
182. Dr Goss also denied that once the Faculty of English and the Humanities Division were of the view that they would not support the claimant's application for an extension, the outcome before the EJRA Panel was a foregone conclusion. It was the Panel's decision on the application based on the information before it, including evidence from the claimant.
183. He further stated that American universities have considerable sums of money to give to academics to persuade them to leave their posts. Universities in the United Kingdom, including Oxford University, do not have the funds to do the same.
184. Emeritus Professor status is determined by the University's Statutes. We accepted Professor Goss's evidence that a professor who retires over the age of 60 years is entitled to have the title of Emeritus Professor. This was confirmed by Ms Thonemann who gave to the claimant the information relevant to claiming that title. We also find that the claimant, as a retired professor, can engage in research work; retain membership of the English Faculty; use the well-resourced Bodleian Library; and can apply for research grants.

The University's review

185. In July 2015, the University's Council established a working group to undertake a five-year review of the EJRA. The Review Group consulted with staff at the University; the Divisional Boards; Heads of Department; representatives of the Oxford branch of the UCU, the UCU Early Career Network and the Oxford Research Staff Society. An in-box was set up to receive feedback and suggestions. Given that the Review Group was concerned with a small population of people who retire each year, it was difficult to draw firm conclusions. It considered a vast amount of data and reported in January 2017. In its report to Council in January 2018, it stated in relation to those who retired at 67 years, that in 2011-2012 it was 16; 2012-2013, 7; 2013-2014, 31; 2014-2015, 55; 2015-2016, 41; and 2016-2017 it was 32. (2631-2636)

186. At Statutory Professor level the proportion of posts vacated by reason of retirement during the period 2012-2013, 2013-2014 and 2014-2015 respectively, was 58.3%, 33.3% and 79.2%. The total number of Statutory Professor departures over those three years was 45, an average of 15 per year. Statutory Professors is the title the University gives for its professorships. An Associate Professor is not a Statutory Professor. This information was replicated across the two other most senior academic and research grades RSIV and Associate Professor where the equivalent figures for RSIVs were 33.3%, 53.3%, and 30.8% and for Associate Professors; 51.1%, 42.1% and 54.5%.
187. This shows that retirement is a key driver in the creation of vacancies at senior academic grades at the University.
188. The Review Group noted that 26% of retired staff stated that they would have continued to work in the absence of an EJRA for an average of three years. This suggests that if there was no EJRA then the turnover would be significantly lower.
189. In relation to gender diversity, the data gathered in relation to Statutory Professors showed that there had been a steady improvement in the proportion of women in that population between 2012 and 2016, increasing from 11.6% to 14.8%. Since the introduction of the EJRA, the average turnover was 6.2%. Following a project to improve the search and selection procedures, 37.5% of new appointments to Statutory Professor grade in the period 2012 to 2016, were women. In this current year, according to the evidence of Ms Thonemann, more than half the Statutory Professor posts offered have been to women and the proportion of women in each grade has continued to improve by around 1% each year.
190. The data held by the University in relation to ethnicity and disability was less reliable than the data on gender. This is largely due to the need for individuals to self-report on ethnicity and disability. A sizeable proportion chose not to do so. At present the number of “unknowns” for both BME, and disabled employees outnumber the declared numbers in both those categories. (2448-2535)
191. The claimant in cross-examination accepted that in relation to diversity at least, it is likely to take 20 years before there could be significant change.

St John's College

192. The College is a registered charity and, like other colleges, is governed by statutes. It is legally constructed in an Act of Parliament. The sovereign body of the College is the Governing Body. It is able to enact by-laws and governs the College's activities. It consists mainly of permanent academic staff and since 2010, it has delegated its powers over remuneration to a Remuneration Committee made up of external members. The President is elected by the members of the Governing Body and has limited powers beyond being the Chair of the Governing Body.

193. There are several College Officerships usually held by Official Fellows or Professorial Fellows which are simultaneously held with their substantive posts. The Officerships do not form part of a contract of employment and appointments are made by the Governing Body with a recommendation by the President each year. In practice, some Officerships are usually held for one year at a time, others for three or six, and others for much longer. The Officerships are used to assign certain responsibilities within the College.
194. The Governing Body meets three or four times during each of the three terms of the academic year and mainly operates through committees with recommendations being decided by the Governing Body.
195. Currently the Governing Body has 57 members, including the President. There are 39 Official Fellows who have teaching and welfare duties towards undergraduates of the College, and all but 2 have joint appointments with the University.
196. Most Official Fellows hold a joint appointment with the University. A joint post is typically advertised jointly. The University and the College then separately offer a contract of employment and these contracts cross refer and usually tie the halves together so that the holder cannot give up his one half.
197. Three main College posts are President, Principal Bursar and Senior Tutor. The President and Principal Bursar are often full-time roles although the current holders do some academic activity at the same time. Informally, the three Officers make up the management team of the College.
198. The Committees reporting to the Governing Body are the Statutes Committee, General Purposes Committee, Educational Policy Committee and the EJRA Panel.
199. The College is part of the Conference of Colleges.
200. As we have stated earlier, the government's proposal to abolish the DRA by 1 October 2011, led the University to engage in the government's consultation exercise on its proposal. Through the Conference of Colleges, it advocated to all the constituent colleges, the importance of taking a common position on the EJRA in relation to joint appointments which applied to many academic posts.
201. At a meeting of the Governing Body on 9 March 2011, Professor Mark Freedland, a well-respected academic in employment law, explained to those present, the situation regarding the EJRA as part of the consultation process in light of the government's proposal to abolish the DRA. It was recorded in the minutes that "In the ensuing discussion there was majority support for the EJRA proposal".
202. In the unconfirmed minutes of the meeting of the Conference of Colleges, held on 30 June 2011, the Chairman reminded Conference that there had been extensive consultation and discussion on the broader issue of

introducing an EJRA across the collegiate university. Those in attendance were asked to take a binding vote on the introduction of an EJRA in relation to the College side of joint appointments. Some concerns were raised, in particular, finance.

203. The minutes record, "The Conference agrees that colleges should introduce an EJRA of 67 for academics on joint appointments, in parallel with the University." 32 were in favour, 5 against. Accordingly, the motion was duly passed. (343-353, 360, 363)
204. The claimant was a member of the Governing Body. He was on sabbatical leave during the academic year 2010 and returned in September 2011. In October 2011, he was unwell having suffered a subdural haematoma and went on sick leave in the year 2011-2012. He candidly admitted in evidence before us, that he had not been quite attentive to the discussions at the Governing Body meetings on the proposal to introduce an EJRA. It was not until 2012-2013 when he became convinced that an EJRA was "a bad thing".
205. In an email exchange on 4 March 2011, he thanked Professor Mark Freedland for the conversation they had on the proposed new legislation on retirement as he found it to have been of great use as the legislative changes were of concern to him as he approached retirement. (341)
206. The College's General Purposes Committee met on 22 June 2011 and agreed that the President be empowered to vote at the Conference of Colleges' meeting in favour of the University's proposals for an EJRA of 67 years for members of academic staff. (347-349)
207. On 20 June 2011, the Governing Body also agreed with the position adopted by the General Purposes Committee that the President vote in favour of an EJRA at the Conference of Colleges. (350-353)
208. At the meeting of the Governing Body, held on 11 January 2012, By-law XL1 was passed which meant that the EJRA would be adopted by the College. It would operate for an initial period of 10 years from 1 October 2011 and a report would be given to the Governing Body on an annual basis on its effectiveness. There would also be an interim review after 5 years. The aims of the EJRA were the same as that of the University's and applied to all academic staff employed by the College including the holders of joint academic appointments with the University. The retirement date would be 30 September preceding the employee's 68th birthday.
209. In relation to the considerations of a request to work beyond the EJRA, they were the same as those of the University's except that they referred to the College and are in By-law XL1. The aims and considerations are as follows:-

"2. Aims of the EJRA

The EJRA and its associated procedures are considered to provide a proportionate means of:

- safeguarding the high standards of the college in teaching and research:-
- promoting inter-generational fairness and maintaining opportunities for career progression for those at particular stages of a career, given the importance of having available opportunities for progression across the generations, in order, in particular, to refresh the academic and research workforce within the college and to enable them to maintain the collegiate university's position on the international stage;
- facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate University's joint appointment system, given the long lead times for making academic appointments, particularly in a university of Oxford's international standing;
- 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;
- minimising the impact on staff morale by using a predictable retirement date to manage the need to make efficiencies by retiring staff at the EJRA; and
- in the context of the distinctive collegial processes through which the college 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 needs of the college have changed...

4. Consideration of requests to work beyond the ERJA

All requests to continue working beyond the EJRA will be considered in the context of the aims of the college in maintaining the EJRA as set out in section 2 above. Applications will be approved only where, having taken account of the considerations set out below, the Governing Body, having received advice from a college panel is convinced that any detriment to the furtherance of aims of the EJRA is offset by a balance of advantage arising from an extension of employment. The relevance of each consideration will depend on the post in question. The college panel and subsequently the Governing Body as decision-maker 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 creating a vacancy or part-vacancy, including the intention of recruiting someone else, using the vacancy for a different purpose, or leaving the post vacant for a period (whichever may apply).

- Is the individual, if extended in employment, expected to make a significant contribution to the college, for example through distinguished scholarship, and would the loss of this contribution be unacceptable to the college and collegiate University?
- Would the employee's contribution be very hard to replace given his or her particular skills set and/or the employment market? For example, does the

college 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 needs of the college over the proposed period (for example, where there is a desire to develop a new field of research or a new course)?
- What is the likely impact of continued employment compared with the opportunity arising from a vacancy on the quality of work of the college, for example on its ability to respond to student needs, to meet research aims?
- How would any financial commitments or benefits which would accrue from a 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 college?
- 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?
- Are there relevant circumstances that would properly justify exceptional treatment? (273G-273N)

210. In a letter dated 12 December 2012, sent by Professor Ian Sobey, Senior Tutor of the College, to the claimant and to other academic staff, he wrote that the decision taken by the Governing Body was to introduce an EJRA. All existing academic staff who had a normal retirement date of 30 September immediately preceding their 66th birthday, were deemed from 1 October 2011, to have a retirement date of 30 September preceding their 68th birthday which would be the EJRA date. Further, all vested rights specified by Statute would continue to apply under the EJRA provisions. The claimant was informed that his retirement date was deemed to be on 30 September 2016. (369)

211. In 2002 the claimant instigated and designed the practical aspects of the first Alumni office in the College. He proposed there should be a new role of Fellow for Alumni to be engaged in personal contacts between Fellows, former students and reunions. A Director of Development was appointed following the creation of the Development Office in 2007, specialising in the raising of funds for the College. In 2012 the Governing Body conducted a

review of the Development Office and found that it was significantly underperforming by way of raising funds. On 26 March 2012, the then President, Sir Michael Scholar, wrote to the claimant inviting him to assume the role for Fellow for Alumni to persuade the Governing Body of the need to take development and alumni activities more seriously as he would bring a “boost to the post”. (367-368)

212. The General Purposes Committee at its meeting held on 4 July 2014, recommended that the claimant be offered an enhanced role to support the College’s development and Alumni relations activities from 1 October 2014. (404)
213. On 11 July 2014, the Governing Body agreed to appoint him to the role of the College’s Founders Fellow for two years up to 31 August 2016, which could be renewed for a further two years and a further two years subject to the College’s EJRA processes and satisfactory evaluation of performance. This would take the claimant up to 2020, if successful. It was in addition to his Official Fellow role.
214. The job advertisement for the post of Supernumerary Teaching Fellowship from 1 October 2015 to 30 September 2020, stated that the post was intended “to provide cover for Professor John Pitcher, who has recently become Founders Fellow, a role that involves working with the President and others to oversee and direct the College’s strategy in the areas of development and alumni relations.”
215. On 1 October 2015, the College appointed a Supernumerary Teaching Fellow in English for a five-year fixed term to 30 September 2010.
216. In accordance with the College’s EJRA policy, on 15 October 2015, the claimant was reminded by Professor Maggie Snowling, President of the College, that his retirement date was 30 September 2016 immediately preceding his 68th birthday. Amongst other things, she stated that he had the option of making a request to continue to work at the College beyond his retirement date and if it was his intention to do so, his application should be addressed to the Senior Tutor. The written request would be submitted for consideration to a panel consisting of five members of the Governing Body but not the President or Senior Tutor. As the usual deadline for written submissions was 18 months prior to the retirement date, Professor Snowling was prepared to extend it to allow the claimant’s submissions by 16 November 2015. As his appointment was a joint appointment with the University, the Chair of the panel would liaise with the Chair of the University panel. The expectation, Professor Snowling stated, was that a recommendation would emerge from a period of informal consultation between the College and the University. The claimant’s request would be considered in the light of the aims of the College’s EJRA policy and of the considerations set out in the procedure. She encouraged him to start exploring options if he intended to apply to extend his employment beyond the retirement date. Options to include considerable flexibility in the continuation or variation of contracts to accommodate changes in role or hours. Should he elect not to apply for an extension or retire early, his employment would terminate on 30 September 2016. (592-593)

217. Professor Allen Grafen, Senior Tutor, acknowledged in evidence that the claimant ought to have been informed 15 months prior to 30 September 2016, namely by June 2015, of his retirement date and be given the options as set out in Professor Snowling's letter. It was at his instigation that Professor Snowling sent the letter to the claimant. Procedures would be governed by the College's Byelaw XL1. (273G-273N)
218. The claimant replied to Professor Snowling's letter on 17 October 2015, in which he referred to his application for an extension under the University's EJRA policy, made in June 2015. He stated that he would be seeing his solicitor before responding. He asked for clarification on his Founders Fellow role from 2015 to 2020 and why he needed to make a written submission to the College prior to 16 November. (606)
219. Professor Grafen met with him on 22 October 2015. We find that it was an opportunity for the claimant to outline his views. He said to Professor Grafen that he should be kept on in the College's employment as Founders Fellow on his full College and University salary but to be paid by the College. As Professor Grafen predicted that the claimant would make such a proposal he, prior to the meeting, discussed the matter with Professor Snowling who told him that she was not convinced that it was necessary for the College to continue the role of Founders Fellow. Professor Andrew Parker, Principal Bursar of the College, expressed to Professor Grafen his doubts that the Founders Fellow role was large enough on its own to justify full-time employment. It was with this information in mind that Professor Grafen responded to the claimant's proposal saying to the claimant that he thought it was unlikely the Governing Body would agree to it or that it would pass the Remuneration Committee, the members of which are independent of the College. This was because the claimant was effectively asking for full-time pay for a College Officership role which did not involve a major time commitment.
220. On 27 October 2015, he emailed Professor Grafen with his draft application and invited him to look over it to see whether anything needed to be amended. He stated that his solicitor was going through the draft and that once Professor Grafen submitted his response he would revise the draft and forward a copy to him. (619-631)
221. Professor Grafen noted from the first draft that the claimant had stated that he believed he had already secured the Governing Body's agreement to remain as Founders Fellow based on the decision on 11 July 2014 that the role be renewed after two years. It was clear to Professor Grafen that there were a number of conditions attached when considering extending the Founders Fellow role, namely the University's approval of the claimant's request to work beyond the EJRA and the College's own EJRA procedure, as well as a satisfactory evaluation of his performance in the role. By October 2015, the claimant was already aware that the University's Faculty of English had prepared a report or submission that was not supportive of his application under the EJRA.

222. The claimant then forwarded on 28 October 2015, the final version of his application to Professor Grafen.
223. Professor Grafen met with him again on 3 November 2015 for two hours and took notes. He made it clear that he felt unable to support the claimant's request and reiterated that he believed that it would not have the support of the Governing Body or at the Remuneration Committee. They then discussed other possibilities. He suggested that the claimant could apply to continue in employment as Official Fellow and Tutor in English. Another possibility was to continue as Founders Fellow while holding an Emeritus Research Fellowship. The claimant rejected both options and saw the second as resulting in a significant reduction in remuneration. His preferred option was for the College to pay him to take up the Founders Fellow role combined with continuing research.
224. In Professor Grafen's notes he recorded that the claimant had made it clear to him that he would create "bad publicity for the College" because, in his words, "I know where the bodies are buried". This statement, in Professor Grafen's view, was an explicit threat by the claimant to exploit what he saw was the vulnerability of the College in the aftermath of the recent resignation of the Director of Development. The claimant invited Professor Grafen to tell Professor Snowling that he would not be able to continue some of his work as Founders Fellow if his request was contested. (649-650)
225. There then followed further correspondence between the claimant and Professor Grafen on the options discussed and on an extension of time within which the claimant had to submit his formal application. The formal application was emailed by him to Professor Grafen on 3 December 2015. In his covering email he stated that amendments to the application may be required should the College decide not to extend his employment. He asked that Professor Grafen send him a copy of his submissions to the members of the Governing Body's EJRA Panel. (692)
226. In his application, the claimant stated that he wanted to continue in post as an Official Fellow from 2016-2020 and in his current role as Founders Fellow together with existing research duties. He quoted the College By-laws in relation to the EJRA procedure, namely Byelaw XL1, that the College's application procedure would run in parallel with those of the University's, but that did not happen. He asserted that there had been a mismatch in the timings of the two procedures which had a bearing on his College application. He gave a brief account of the history behind his application to the University and dealt with his application to the College. He wrote:
- “ (ii) On the College side, the issue of my application for College ERA was fully in front of GB [Governing Body] at its meeting 11 July 2014, where under item 5, a proposal in five items was approved regarding my new role, including recasting my existing College Office into a new job (subsequently called Founders Fellow); teaching remission for me; the appointment of a five year supernumerary teaching fellow from October

2015 to do my teaching; and the nature of the Fellowship post 2016 ‘to be agreed after further discussion’. Item 2 specifies that

“After August 2016 the role could be renewed for a further two years and then a further (and final) two years, subject (for each two year period) both to the University’s Panel’s approval of Professor Pitcher’s request to work beyond the EJRA and also to the College’s own EJRA procedure (as detailed in the By-laws) and the satisfactory evaluation of his performance in the role.””

227. He stated that the College’s EJRA informal procedures did not begin until mid-October 2015 and he had two informal meetings with Professor Grafen. The delay had nothing to do with him, that is, the claimant and that while arrangements to convene the EJRA University Panel were being put in place, the College had not even begun the formal EJRA procedure. He went on to state that having regard to the mismatch in timing, in order to protect his position, he may add to his application by way of an amendment following the University’s EJRA procedure.
228. He then dealt with the options which were rejected and his proposal during his discussions with Professor Grafen on 22 October and 3 November 2015. He stated that he declined the option of retiring from College Fellowship and applying for an Emeritus Research Fellowship “ERF” from Michaelmas Term in 2016, or to retire and apply for an ERF and continue to hold the College Office of Founders Fellow alongside the ERF. He declined the first option because his University EJRA was extant at the time. In relation to the second option, he declined in part because he understood that the Governing Body had decided not to permit an ERF to hold a Founders Fellow role. He was also of the view that the time taken in performing his role as Founders Fellow, had been seriously underestimated. We have noted that the role attracted a stipend of £10,952 and was not a permanent position.
229. In relation to earnings, he wrote that if he retired and applied for an Emeritus Research Fellowship as well as carrying out the College Office Founders Fellow role, even if the Governing Body agreed to it, he would still be doing the job of Founders Fellow as an ERF for a total of £13,000 which was around 20% of salary for 2014-2016. He asserted that he was well qualified to carry out the role of Founders Fellow as he had done since 2014 with “considerable success”. He suggested that his total stipend for the period of extension should include the Common University Fund portion on the grounds that a similar arrangement was made for a Fellow for a stipulated period beyond his specified retirement age, namely Dr Tony Boyce, Principal Bursar, 2006-2010. Further, that he should continue as an Official Fellow until 2020 as there was also a precedent which he referred to.
230. He then referred to the Faculty of English and Humanities Division’s views on his University EJRA application, in that they did not support it. He suggested that the College consider, as a possibility, allowing a fixed term extension of his employment as an Official Fellow and member of the Governing Body to complete the Founders Fellow project 2016-2020 with a

total financial package as in 2014-2016, including the CUF portion. This would avoid any legal claims against the University in relation to the EJRA policy.

231. He then dealt with a checklist of the duties of the Founders Fellow against his work from September 2014 to December 2015 and his work as Founders Fellow against the College's considerations of requests to work beyond the EJRA. He wrote:

“Is the individual, if extended in employment, expected to make a significant contribution to the college, for example through distinguished scholarship, and would the loss of this contribution be unacceptable to the college and the collegiate University?”

Although the English Faculty Board response praises my ‘distinguished scholarship’, the chief case for my continuing beyond the EJRA in College would be to complete a fully considered plan of D&AR activity as Founder’s Fellow – which I have shown is of crucial significance over the next five years.

Would the employee’s contribution be very hard to replace given his or her particular skills set and/or the employment market? For example, does the college 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?”

I submit that I have a particular skill set that it would be very difficult if not impossible to replace. For the role to be effective, the Founder’s Fellow must be a Fellow and member of GB with considerable personal familiarity with a large number of alumni and donors. I have taught more than 300 undergraduates and graduates, and known about the same number through my ten-year period as Senior Tutor and Tutor for Graduates. I have been using this skill set and familiarity to begin various fundraising initiatives – leading towards the scholarship campaign that is my ultimate aim. This sits alongside a funding drive for the Library from major prospects, and will need a period of four years to bring to maturity.

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

The academic needs of the College include the provision of a new Library and Study space, and the follow on of restored tutorial rooms in Canterbury Quad. A key duty of my period as Founder’s Fellow has been and will continue to be to raise significant sums of money for the completion of this work, in collaboration with the Director of D&AR, the President and Fellows.

What is the likely impact of continued employment compared with the opportunity arising from a vacancy on the quality of the work of the college, for example on its ability to respond to student needs, to meet research aims?”

My chief personal aim in 2016-20 is to help to create a large alumni-funded source of money to pay for students who would not be able to be at St John’s without this assistance (this plan has been seen by various College committees). The provision of the new Library and restored tutorial rooms, mentioned above,

is directly connected to this aim – outstanding facilities and assistance for disadvantaged students (undergraduates and one year taught graduate students).

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

I have raised and will continue to raise significant funds – large sums in comparison with my being an Official Fellow with the stipend and privileges of 2014-16 as Founder’s Fellow. I have already raised £1m from one donor (in two parts: 2013 and 2015), which is a level of benefaction that hadn’t been reached in St John’s for five years prior to my work. I have used the skills and familiarity with alumni I mention above to discuss with them ideas for legacy giving, alumni fund giving, and to solicit successfully smaller but considerable donations.

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?

As I explain above, I have succession planning in the teaching of English in St John’s fully in mind, including an aim to raise alumni funds to pay for an official Fellowship in English (see further below).

What is the likely impact on the promotion of diversity?

The promotion of social and ethnic diversity is the key objective of the College scholarship campaign I have been planning to raise from alumni benefactions (I am wholly committed to this for personal reasons as well as principle: I came to Oxford from disadvantaged circumstances).

Is the duration of the proposed extension of employment appropriate in terms of the benefits expected to the college?

The four years envisaged 2016-2020 is the duration accepted by GB in July 2014 as the time needed to reorder and redirect D&AR and raise major funds – which I have begun and plan to do in the future.

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?

The teaching of early modern English and Shakespeare is secure within College until 2019, assuming the fixed term Supernumerary Teaching Fellow stays in post until then (this is the temporary teaching model that has been used for several subjects over the past decade in St John’s). The English Faculty will certainly wish to continue a joint appointment, but as I say above, it is not clear at what point the Humanities Division would be able to fund its side of the post (comparisons with other Humanities subjects in St John’s come to mind). I might add that recent experience of the English Faculty’s refilling joint appointments is that in practice there is usually an interval of three or four years after the retirement of a CUF (e.g. the 2015 replacement at Corpus, following a retirement in 2011).

Are there relevant circumstances that would properly justify exceptional treatment?

I believe there are good non-exceptional reasons for this fixed term extension. I will complete my own large-scale academic projects (along with new smaller ones), and complete the refashioning of D&AR, alongside the Director, to bring them to a level of success that other Oxford colleges reached several years back.” (693-706)

232. On 1 December 2015, the College appointed a full-time Director of Development and Alumni Relations, Ms Amber Bielby, who is expected to continue in post until 2020.
233. It was Professor Grafen’s view that he could not support the claimant’s application to remain as an Official Fellow to complete the Founders Fellow project. He stated that there were a number of reasons why he came to this conclusion. Firstly, the apparent diminution in the importance to the College in having someone in a Founders Fellow role. Secondly, the financial implications for the College. Thirdly, being asked to consider committing to the College Officership for a period of four years. Finally, the fact that he had not received any positive views in support of the claimant’s tenure in the role of Founders Fellow. The College wanted to be free to appoint to a new Official Fellowship, jointly with the University. He said in evidence that the claimant’s Founders Fellow work was needed when the previous Director of Development and Alumni Relations left the College but that need had diminished significantly as a new Director with a professional background, was in place from 1 December 2015. It seemed clear to him that Ms Bielby would be taking over much of the work done by the claimant in his capacity as Founders Fellow. Although the claimant did not make any references in his application to how much time he had been spending on Founders Fellow work, in Professor Grafen’s view it was likely to have been a day a week.
234. An alternative course, considered by Professor Grafen, was for the claimant to have taken up an Emeritus Professorship role which most retiring academics do and, subject to the Governing Body’s approval, could have held a Founders Fellow Officership while doing so. However, the claimant was not in favour of such an option.
235. Professor Ian Sobey, was Acting Principal Bursar at the time until he retired in September 2016, when it was resumed by Professor Andrew Parker, Official Fellow and Tutor in Physiology, after returning from one-year sabbatical in October 2016. Together they prepared a note for the EJRA Panel on the claimant’s application from a financial perspective.
236. On 16 December 2015, Professor Grafen set out his note of the College’s position in response to the claimant’s application. He stated that the indicators were that the University may not grant the application for an extension but it may be granted on appeal. If it was granted by the University, he would recommend that the claimant be given the opportunity to make a late change to his application to the College “basing it on the usual

academic grounds”. Professor Grafen was in no doubt that the claimant was applying to be Founders Fellow under the EJRA with the College bearing the full cost equivalent to his College and University posts. He considered the matters under Byelaw XL1, Part 1, Section 4. It was his view that the application fell outside the EJRA policy and considerations as the claimant was applying for the Founders Fellow role to be a full-time position and not a teaching post. It would leave the College in a difficult situation should it decide that it did not want to continue the role of Founders Fellow because of a review of his performance or because someone else was preferred in that role. It was in Professor Grafen’s view, an expensive and wasteful position to adopt. With regard to the Supernumerary Teaching Fellow, there was no indication that the incumbent had any intention of leaving the post early. The claimant had not indicated to Professor Grafen the time commitment required in the Founders Fellow role and this was considered a weakness in the application. Further, the claimant wanted to continue as Founders Fellow with no teaching commitment.

237. Professor Grafen expressed concern about the governance issues which may arise if the claimant’s application was granted which would, in effect, lead the College to convert a stipendiary College Officership, not one he regarded as major, into a fully salaried position without a “demonstrable business need for the same”. This was at a point when the holder was due to retire. He believed that the Remuneration Committee would regard a large increase in payment as inappropriate and, possibly, illegal. As it was part of the claimant’s application to continue his research activity, Professor Grafen was of the view that this could be done on an Emeritus basis.
238. There was some delay, Professor Grafen acknowledged, in addressing the application but this was due to the fact that it was outside the By-law as the claimant was trying to continue in a College Officer role rather than in a teaching role. Such College Officerships were usually decided a few months prior to the relevant academic year. He referred to the suggested option, namely for the College to consider offering the claimant the Founders Fellow role to hold in conjunction with an Emeritus status as part of the usual College Officership process other than as part of the EJRA process.
239. In relation to the EJRA “considerations”, Professor Grafen noted that no case had been made by the claimant regarding the loss of distinguished scholarship; academic needs were irrelevant given the nature of the application; the sixth consideration relating to the opportunity arising from a vacancy was irrelevant because the claimant’s application meant that whether he retired or his application was granted, the College would be free to appoint a Tutorial Fellow in English. (713-722)
240. In Professor Sobey’s note for the EJRA Panel, he highlighted the level of support given to the claimant in addition to his remission from teaching duties, such as the creation in 2011 of an Officership of Editor of TW Magazine, one of the College’s magazines. The appointment of the claimant as a Consultant in January 2015 on a one-year contract was to

support him in editing the TW Magazine as well as the development of Alumni duties. Sabbatical leave in 2010-2011, was granted on the understanding that he would retire in 2016 and be able to publish books on Samuel Daniel. (737-741)

241. We have seen a copy of the email the claimant sent to Professor Sobey, who was then Senior Tutor, dated 12 November 2009, in which he stated his intention to retire in 2016. (326-327)
242. It was Professor Sobey's and Professor Parker's view that the level of support being requested of the College for the claimant to continue working beyond the EJRA, in the event that the University refused to grant his request, could not be justified. He considered four scenarios each setting out the financial position in different situations. The first scenario was the status quo on the basis that both the University and the College employments would continue. The revised position was £79,435 per year. In the second scenario being what the claimant was seeking, which was for the College to bear the costs of both the College and University employments, the total would be £111,131 per year. In relation to the third scenario, the cost of the claimant continuing as an Official Fellow in College without the cost of University employment and without the Founders Fellow costs, although he was not seeking this option, was £65,001 per year.
243. The fourth was the cost in not granting the claimant's request to work beyond the EJRA. In that case, if the College decided to continue with the Founders Fellow role in the form envisaged by the claimant, then paying an existing colleague a stipend similar to that paid to the claimant, and also granting that person a similar teaching remission, potentially a six-hour stipendiary lecturer, would cost about £35,399 per year.
244. It was noted by both Professor Sobey and Professor Parker that the difference between the cost of implementing the claimant's request and not doing so was in the region of around £80,000 per annum.
245. These were the revised figures presented by Professor Sobey. (787-789)
246. On 15 January 2016, the claimant lodged a grievance against the College and the University in which he alleged that he had been discriminated against because of age by the application of the EJRA. (782-784)

The College EJRA Panel meetings

247. On 18 December 2015, Professor Snowling emailed the College EJRA Panel members to inform them they were empowered under the By-law to consider the claimant's extension of employment with the College beyond the EJRA. She advised them of the need to liaise with the University's EJRA Panel which was expected to meet on 11 and 29 January 2016. Their bundle of documents in preparation for the panel meeting was available from her office. She stated that the claimant would also receive a copy as well as the Senior Tutor and Acting Principal Bursar. (724)

248. The other panel members were Professor Paul Craig, Professor Kate Nation; Professor Jaideep Pandit; and Professor Alastair Wright.
249. Professor Batty contacted Dr Goss, Chair of the University EJRA Panel, to inform him that the College EJRA would be meeting to consider the claimant's application under its EJRA policy. This was in accordance with the College's By-law XL1, step 4. We were told by Professor Batty that there was no discussion on the substance of the claimant's case although there were four or five discussions by telephone. (867)
250. On 6 January 2016, Professor Batty reported to the Panel his discussions with Dr Goss. The panel members agreed that they would provide a report to the Governing Body.
251. The Panel decided to interview: Professor Snowling in her role as President, in relation, principally, to the Founders Fellow role; Professor Grafen as Senior Tutor, on the claimant's application; Professor Sobey, at the time Acting Principal Bursar, on the financial issues as well as on the claimant, all on 19 January 2016; Professor Parker as Principal Bursar on the Founders Fellow role and how it might develop in light of the appointment of Ms Bielby as the Director of Development and Alumni Relations, on 21 January; and the claimant on 22 January.
252. The claimant wrote to Professor Stephen Goss requesting a copy of the University's Appeal Court decision in the case of Galligan and had forwarded to Professor Batty, a copy of that correspondence. He invited the President of the College to request a copy of the decision and to have the lawfulness of the EJRA considered by the Governing Body. Professor Batty wrote to Professor Snowling stating that he did not intend to comment on the Galligan case and noted that the Governing Body had already agreed with the recommendation of the General Purposes Committee that there should be no change to the College's EJRA. (811)
253. At the meeting of the Governing Body on 17 February 2016, the position taken by Professor Snowling was that the Galligan decision was confidential. (1012-1017)
254. We now refer to the notes of the Panel's meetings with the above individuals. In relation to Professor Snowling, she was asked whether in her opinion should the office of Founders Fellow be a major College office like that of the Principal Bursar? She replied that the decision to appoint a Founders Fellow in 2014 was based on the belief that the Development and Alumni Office was failing. She stated that she felt that after the new appointment, the role of Founders Fellow would also be reviewed. She thought that the College could go forward with the Founders Fellow as an Emeritus Fellow. After two years and after having had a discussion with Ms Bielby, Professor Snowling said that fundraising was a skilled profession and the College needed a full-time professional fundraiser.
255. When asked whether there was a need for a full-time Founders Fellow now that there was a Director of Development and Alumni Relations in post, she

replied that although the Founders Fellow was important, it was “not so much now as over the past two years.”

256. When asked what would the new Director of Development and Alumni Relations do and how would it would affect the role of Founders Fellow, she replied that in the interim, a major role for the Founders Fellow was in strategic matters and in merging and leading the Development and Alumni Relations team. As Ms Bielby now led the team and the Founders Fellow worked alongside her, with the President and the Development Board to develop strategy for consideration by the Governing Body, the Founders Fellow had no line management responsibilities other than for the fixed term Communications Officer. She said that the Founders Fellow role had not been reviewed as part of the list of College Officerships. The view was that the College needed more than one Founders Fellow, to reflect different subject areas.
257. When asked whether she thought the claimant was particularly suited for the role of Founders Fellow for the period 2016-2020 or would a shorter period be more appropriate, she replied saying that he was asked to take on a large job. He was full of ideas and was very energetic but was not always willing to listen. This could be problematic in connection with donor relations. He found it hard when his ideas were not accepted. She was against the idea of the post of Founders Fellow qualifying as an Official Fellowship as it was not associated with teaching and research. She thought it would be desirable, but not essential, for the Founders Fellow to have an academic background. She stated that the minutes of the Governing Body, held in July 2014, did not give the claimant the right to expect to continue in his role as Founders Fellow. He should not have implied to the English Faculty that the College had renewed him until 2020.
258. She was asked, should the College continue to try to justify the EJRA, she responded by saying:
- “That depends upon what the University decides. At the moment, I believe the process is legally valid. I believe Professor Pitcher is arguing to be a College Officer, not to continue teaching.”
259. When asked whether other members of the Fellowship were able to take on the role as Founders Fellow, she replied that the claimant’s skills could be replaced.
260. The Panel then asked to see a copy of the job description for the post of Director of Development and Alumni Relations. (554a-554f)
261. Professor Sobey was then questioned. He was against the idea of the office of Founders Fellow being a major College office like that of the Principal Bursar. As Ms Bielby was in post, the College should consider whether it needed the post of Founders Fellow at all. He said that it was not inconceivable that the Founders Fellow could be a supernumerary Fellow, not on the Governing Body, as that would be a break with past practice because College Officerships have in the past been restricted to

members of the Governing Body. The Director of Development and Alumni Relations was responsible for the day-to-day management of the Development and Alumni Relations team. The role of Founders Fellow was now reduced. Ms Bielby was managing the office and the staff. He acknowledged that the Founders Fellow would have to be involved in deciding strategy along with the Director of Development and Alumni Relations in consultation with the President and the Governing Body.

262. When asked whether the claimant was particularly suited for the role of Founders Fellow for the period 2016-2020 or could a shorter period be more appropriate, Professor Sobey said that he would vote against it. He voted against it in 2014 as he felt it was a mistake. He did not see the claimant as a good listener and that was not a good quality in a Founders Fellow. He was enthusiastic but Professor Sobey was not sure he followed through.
263. When asked whether the minutes of the meeting of the Governing Body held in July 2014, gave the claimant the right to expect to continue in the role of Founders Fellow, Professor Sobey replied that from his memory, the minutes were written in two parts because of disquiet expressed. The continuation was linked to the continuation of the University post and a review of the claimant's performance as Founders Fellow, "It is difficult to see how that could be seen as an unequivocal confirmation of his continuation."
264. He was asked whether the claimant could continue as Founders Fellow without being an Official Fellow, he said that might be a solution from the College's point of view as some aims as set out in the College's EJRA process were defensible. The issue of diversity was most likely to carry weight. The claimant was entitled to ask to change his working pattern but there was no requirement that the College pick up the University's share of his salary. His University contract from 1985 mentioned that the continuation of that post was contingent upon him having a teaching post in the College "but the ability to adjust working patterns could possibly override this.". If the College allowed the claimant to continue beyond the EJRA it would not set a formal precedent in law, though that may be the perception of others.
265. Professor Grafen was interviewed in his capacity as Senior Tutor. He could not answer the question whether in his opinion could the office of Founders Fellow be a major College office such as that of the Principal Bursar, as the claimant was not applying to continue in his post as an academic. In Professor Grafen's view, however, he would not regard the Founders Fellow to be a major College office and did not see the claimant continuing in the role of Founders Fellow as an Official Fellowship as he would not be fulfilling the duties of an Official Fellow. Professor Grafen did not think that the claimant would be of value as Founders Fellow if he was not teaching or doing research. He talked to other Fellows involved in the Alumni Office and they were also of the same view.
266. He was questioned about his written submission and was asked why he thought the claimant had the expectation in his application that he would continue as Founders Fellow until 2020, he responded by saying that the

claimant had a history of getting things out of the College. His research support had been extended on a number of occasions. He wanted to stay on as Founders Fellow. The Governing Body's July 2014 minutes were carefully worded to say that the Founders Fellow post was conditional upon the University and the College EJRA processes; a review of his performance as Founders Fellow; and it was recorded in the minutes that the post "may" be renewed. The claimant's application must be considered on its merits from the College's point of view.

267. He could not comment on the research element of the claimant's application as he was not an expert in the subject but noted the response from the Faculty. He was of the view that an Emeritus Research Fellowship would enable the claimant to continue with his research into his retirement. The College employed Official Fellows to teach and do research. The claimant did not make a strong case to remain as an Official Fellow. The application was not straightforward as no academic case had been made by him, therefore, it should be considered as a business case. He was doing a good job as Founders Fellow. The delay in addressing his application was that he was applying to continue in a completely new post. He could only continue as Founders Fellow after a performance review.
268. In Professor Parker's interview he said that he did not see the post of Founders Fellow being a full-time responsibility. He agreed with the other Professors that the appointment of the Director of Development and Alumni Relations had taken over much of the responsibilities the claimant had undertaken. In relation to the claimant's suitability for the role of Founders Fellow for the period 2016 to 2020 or a possible shorter period, Professor Parker responded by saying that the claimant had been very helpful and he was in support of some of the claimant's views. When the matter was discussed at the Governing Body, a contingency was built in with regard to the decision of the University. He stated that he had a conversation with the claimant and advised him that his best opportunity would be to have a clear break at the end of his Official Fellowship then a move to some kind of post-retirement job in development. It was his view, that is Professor Parker's view, that College Officerships rotate and the College may, therefore, wish to do this with the post of Founders Fellow. He, like the others interviewed, said that in the minutes of the Governing Body contingencies were built into the role of Founders Fellow.
269. In relation to the College continuing to justify the EJRA, Professor Parker said the College should be careful to move closely with the University especially with joint appointments where the termination of one brings about the termination of the other. If the University insisted on terminating its side of the claimant's appointment, the College would have to issue a new contract if it wished to retain the claimant as an Official Fellow. Professor Parker was of the view that the College should continue with an EJRA but there were problems, particularly in relation to pension, as it may affect an individual's need to continue to work. His view was that an application under the EJRA process should be based on the continuation of the core duties of the existing post. (875-883)

270. On 21 January 2016, the claimant emailed Professor Batty attaching a submission for the panel to consider along with an extract from the Oxford Magazine as well as a paper he presented to the Governing Body on 20 January 2016. His application to the Panel was to adjourn the meeting with him the following day, 22 January, as he believed that the College's EJRA was discriminatory as found by Dame Janet Smith in the Galligan case. He also referred to the article in the Oxford Magazine by Professor Galligan and the response to it by the Pro Vice Chancellor, Dr Goss who gave a contrary opinion. Professor Galligan was of the view that imposing a retirement at 67 years could not be objectively justified. The claimant stated that the decision of the Governing Body on 20 January was to request the University to formally obtain a copy of the decision of the Galligan case. He wrote:

“16 I submit to the Panel that they cannot make an objective, reasonable and informed decision upon the EJRA criteria and my application without having the benefit of considering a 75 page decision by a senior High Court Judge. Particularly when she arrived at her decision after hearing four days of evidence and legal argument. Such a detailed decision would be of great guidance and assistance to the Panel in reaching a reasonably informed and correct in law decision.”

271. He requested that the EJRA Panel should adjourn the hearing of his application pending the disclosure to the Governing Body of the Galligan decision. He also invited the EJRA Panel to request from the University, a copy of the decision in order to be better informed. (819-828)

272. At the meeting of the EJRA Panel on 22 January 2016, at which the claimant attended, Professor Batty informed him that it was not the Panel's intention to make a decision immediately after the meeting as the members may wish to consult with others as part of the process and may want to speak to him on other occasions. He was told that the Panel would have to coordinate with the University. The claimant said that he was due to meet with the University on Tuesday 26 January 2016 and reiterated his views that he was of the opinion that the EJRA procedure was unlawful. He clarified that he could not do teaching as well as the Founders Fellow role. He was asked:

“4 Notwithstanding the legalities of the EJRA, your application mentions that you wish to continue in your substantive, core role. What do you consider this to be?

I consider this to be as in the description of the College Officership, which is more than being the Fellow for Alumni. I believe that donors want to be approached by academics and that a Senior Fellow is the best way of effecting this. I don't say I am the only person who can do this but I don't think anybody currently on the Governing Body could do it either. I think the post of Founders Fellow is a temporary role.”

273. He said that his core role was that of Founders Fellow but engaging in academic research. There then followed the following questions and answers:

“6 Do you see this as being the case until 2020?

During the transitional period there was the need to plan fundraising. The Director of Development and Alumni for the first time was now responsible for both development and Alumni. I see my role now and going forward to 2020 as being the Founders Fellow, with the proviso that I would be willing to “muck in” if necessary, for example if there were no Supernumerary Teaching Fellow in English.

7 So would you say teaching is a supplementary role?

I cannot do teaching, administration (as the Founders Fellow) and research.

8 So being the Founders Fellow is your core role, with the others additional roles?

I hope I would be paid as an Official Fellow to do the job as Founders Fellow and to do the research.”

274. He was also asked:

“17 Do you think the Founders Fellow should have the status of an Official Fellow even if the individual would not normally be doing the duties of an Official Fellow, notwithstanding the situation regarding housing on retirement?

A Fellowship, yes, but the title is not crucial. My original request was linked to the situation regarding housing. The Fellow for Alumni did not need to be an Official Fellow. It is likely that the Founders Fellow would be an Official Fellow due to links with Alumni.” (883-887)

275. The Panel agreed to analyse the role of Official Fellow against the EJRA considerations and request a copy of the Global Philanthropic Report commissioned by the College. This was in relation to the alumni activities of the claimant. This was received by Professor Batty on or around 30 January 2016 who read parts of it and noted that Global Philanthropic thought that the Director of Development and Alumni Relations would replace the role of Founders Fellow. (834-837)

276. The EJRA Panel met on 5 February 2016 at which Professor Batty informed the members that he had a discussion with Dr Goss on 28 January 2016, who informed him that the University had not reached a decision on the claimant’s application but was minded to turn it down. The Panel agreed that it would be difficult to reach a decision in the absence of the University’s decision on the claimant’s application. (980-981)

277. The Panel met again on 12 February 2016. During the meeting Professor Batty said that a copy of the Galligan decision was placed anonymously in his pigeon hole. Professor Sobey confirmed that he had sought counsel’s advice on the Panel’s decision and on the EJRA policy. It was agreed that counsel’s advice should be circulated to the Panel members but not to the

claimant. The Panel also noted that it was constrained by the existing By-law and could not change the existing EJRA of 67 years. The members agreed to read counsel's advice before their next meeting. (999-1000)

278. There was a further meeting on 19 February when it was agreed that information should be collated in relation to all academics by age and gender from 2011 to 2016; details of those leaving the Governing Body and their replacements by age and gender since 2001 including reasons for leaving; and details of the length of service and the age of current members of the Governing Body compared with 2011.
279. The Panel members were made aware that the English Faculty and Humanities Division did not support the claimant's application and that it was likely that the University would turn it down. (1018-1020)
280. Professor Batty said in evidence before us that the information sought and subsequently provided, confirmed that only two Official Fellows had retired since the introduction of the EJRA; that females were a minority amongst the Official Fellows; and that no female Official Fellow would reach the EJRA within the next 10 years while 10 male Official Fellows would reach the EJRA. The Panel were not able to obtain information regarding race as it was not collected by the College office.
281. The EJRA Panel members met on 27 February for three and a half hours and they discussed the draft report presented by Ms Eileen Marston, Academic Administrator, to the Governing Body. It was agreed that the claimant be told only by the Panel and not by anyone else, the outcome of his application. The Galligan decision received by Professor Batty, it was decided, should be sent to the University. (1022)
282. On 1 April 2016, Professor Batty emailed the claimant the decision of the College's EJRA Panel. He wrote:

"Dear John,

I write as Chair of the panel appointed by St John's College to consider your application to continue in post beyond the College's EJRA.

We have completed our report to the Governing Body and I attach a copy. I am making the report available to the President who will arrange for the Governing Body to take the decision on your application.

The recommendation of the Panel is that your application is not supported. The reasons for this recommendation can be summarised as follows:

1. The aims of the EJRA remain proportionate aims for the College to pursue.
2. The Panel concluded after careful consideration that your application does not meet the detailed criteria set out in By-law XL1.
3. Your University post will not be continuing and you will not hold a Tutorial Fellowship.

4. In our opinion the Governing Body is unlikely to want to have a post of Founders Fellow of the type that you envisage for the period 2016 to 2020.
5. The cost to the College of continuing your appointment would be very considerable.
6. In accordance with the Colleges By-law I shall inform the Head of the Humanities Division and the Chair of the English Faculty Board of the recommendation. I will defer this until I know that you are aware of the recommendation.

With regards,

Charles Batty” (1100)

283. The EJRA Panel’s detailed reasons were in a report and annexes. It considered By-lawXL1 and found against the claimant. (1080-1093)

Review of case against EJRA considerations:

13. The panel reviewed Professor Pitcher’s request against the aims of the EJRA and the substantive criteria set out in the By-law, which are listed below, considering both his duties as an Official Fell and, separately, as Founder’s Fellow.

14. *Is the individual, if extended in employment, expected to make a significant contribution to the college, for example through distinguished scholarship, and would the loss of this contribution be unacceptable to the college and collegiate University?*

Official Fellowship: The panel considers that it is reasonable to accept the judgment of the Faculty of English and the Humanities Division on this criterion. Both agree that Professor Pitcher is a highly respected scholar of early Modern English; there is no question as to his academic distinction. In considering Professor Pitcher’s application, the Humanities Division noted the expectation in the University’s EJRA Procedures that given the high standards of scholarship and research prevalent in the University, distinguished scholarship does not, in itself, constitute an exceptional contribution such that its loss should be deemed unacceptable to the University. The panel shares the view of the Humanities Division that the loss of Professor Pitcher’s contribution falls within the normal consequences of retirement, nothing that an Emeritus Research Fellowship would enable Professor Pitcher to continue his research into his retirement.

No case is made in Professor Pitcher’s application to the College for distinguished scholarship whose loss would be unacceptable to the College. Professor Pitcher confirms in his application that the principal case for his continuing beyond the EJRA would be to complete a fully-considered plan of Development and Alumni Relations activity as Founder’s Fellow.

Founder’s Fellow: In the light of the views expressed by those who were consulted by the Panel (see par 01), and nothing that the future role of Founder’s Fellow is likely to be much diminished following the appointment of the Director of Development and Alumni Relations, the panel is of the view that the loss of

Professor Pitcher's contribution as Founder's Fellow is not unacceptable. The substance of this issue is addressed in para 15.

15. *Would the employee's contribution be very hard to replace given his or her particular skills set and/or the employment market? For example, does the college 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?*

Official Fellowship: The panel again notes the judgment of the Faculty of English and of the Humanities Division that the early modern period is flourishing, and that Professor Pitcher's contribution to teaching and research would not be unduly difficult to replace. The Humanities Division EJRA panel took the view that in the current employment market, the Faculty would be able to make a new appointment of a high quality. The College can therefore reasonably share the University's optimism in this regard.

The panel notes that in 2015, the College was successful in recruiting to a Supernumerary Teaching Fellowship in English Literature 1550-1760, receiving 65 applications for the post (41 female, 24 male).

Founder's Fellow: It is the view of the College Officers who met the panel that Professor Pitcher has been very energetic in the role of Founder's Fellow, playing a significant role particularly during the two-year transitional period from 2014-16. With the exception of Professor Pitcher himself, they believe that the demands of the role have been substantially reduced following the appointment of a Director of Development and alumni Relations.

It should also be noted that this view is supported by Global Philanthropic's report to the College. The report notes the view of a number of alumni that the President is the major figure in fundraising in the College and recommends that the College's future fundraising initiatives are focussed on the President and the Director of Development and Alumni Relations.

Having taken the comments of those consulted (see par 10) into consideration, the panel's view is that, like all other college offices (with the exception of the Principal Bursar), the role of the Founder's Fellow going forward will be (at most) supplementary to the core duties of a Fellow and it will not carry exceptional status. It is also possible that in the short to medium term the role will be so diminished that no formal position of Founder's Fellow will be needed, given the role now undertaken by the Director of Development and Alumni Relations and the potential that the President may take on a greater alumni relations role. In any event, even if the Founder's Fellow were to remain (as a supplementary role), there are a number of experienced members of the Governing Body able to fulfil the future role of Founder's Fell and therefore Professor Pitcher's contribution would not be difficult to replace.

16. *How would continued employment, compared with the opportunity arising from a vacancy, fit with the future academic needs of the college over the proposed period (for example, where there is a desire to develop a new field of research or a new counsel)?*

Official Fellowship: Professor Pitcher's request is to continue as Founder's Fellow with none of the duties customarily associated with an Official Fellowship, except for continuation of his own research. As noted in para 14, Professor Pitcher would be able to continue his personal research as an Emeritus

Research Fellow and his substantive tutorial duties (teaching, pastoral, and admissions) are currently being undertaken by a Supernumerary Teaching Fellow in English. Consideration of the academic needs of the College is therefore not relevant to his request for continued employment.

Founder's Fellow: There is a synergy between the future academic needs of the College and its development policy as agreed by the Governing Body. The Founder's Fellow has a role to play in promoting connections between the Fellowship, the academic strategy of the College, and alumni. However, the view of those the panel has spoken to (other than Professor Pitcher) is that there is no need for Professor Pitcher to continue as Founder's Fellow as there are other members of the Governing Body able to fulfil this role, more particularly given that, as stated above, the role of the Founder's Fellow will diminish with the appointment of the Director of Development and Alumni Relations.

17. *What is the likely impact of continued employment compared with the opportunity arising from a vacancy of the quality of work of the college, for example on its ability to respond to student needs, to meet research aims?*

Official Fellowship: The impact on teaching would be non-existent or at most minimal, given that Professor Pitcher is not seeking to continue in his Tutorial role and is currently bought-out of his teaching duties as an Official Fellow. Unless the current Supernumerary Teaching Fellow resigns early, the college will not have a tutorial vacancy until 2019. There would be no particular impact on the college's research aims.

The college currently has three Official Fellows in English and in the event of a vacancy it would normally seek to appoint a replacement in the appropriate subject period. The panel is not aware of any plans to change the size and shape of teaching provision in English. See also para 18.

Founder's Fellow: This question is not entirely apposite as in this case the alternative to granting the request is unlikely to be the appointment of somebody else to be Founder's Fellow with a role similar to the one that Professor Pitcher wishes to have. We take into account the work now being undertaken by the Director of Development and Alumni Relations and also the potential that the President may play a larger role in this area. The likely alternative would be the appointment of an existing Fellow (or more than one) to be Founder's Fellow with a limited role supplementary to the core duties of an Official Fellow. Such a post could be held by a number of other individuals, not solely Professor Pitcher. As indicated in para 15, it is possible that in the short to medium term there will be no need for a formal Founder's Fellow.

We note that the reference to student needs might also refer to the College's ability to raise funds for scholarships and bursaries. This might require the College to have the post of Founder's Fellow in some form, but this does not mean that the post has to be held by Professor Pitcher. If the Founder's Fellow has only a small role funds would be released that could be used for other purposes.

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

In relation to this criterion we need to consider the Official Fellowship and the office of Founder's Fellow together.

If Professor Pitcher's employment were to be continued as he has requested, the cost to the College (at current rates) would be c£111,131 per year (see annexe C for detailed costings).

If Professor Pitcher were to retire and another Fellow is appointed as Founder's Fellow, the cost to the College would depend on the remuneration and buy-out arrangements put in place at the time. If we assume that the current salary of the Founder's Fellow is maintained and that the new Founder's Fellow is given a 6-hour teaching buyout, the cost of the College would be c£35,399 per year.

The panel feels that in the light of a vacancy, the cost of any future arrangement with regard to the stipend of the Founder's Fellow is likely to be significantly lower than £35,399 per year.

The College's Remuneration Committee, in its minutes of 8 February 2016, states that "the great majority of colleges relied on a professional Development & Alumni team without an academic being directly involved, and that the two other colleges with academic officers directly involved with Development and Alumni matters paid stipends of £2,410 and £3,781 (St John's stipend is £10,952)."

The panel also feels that a 6-hour buy-out would be exceptionally large for a College Office other than Principal Bursar.

Professor Pitcher's request involves him continuing with his research activity. The panel notes that research can still be pursued during retirement, and that under the College's scheme for Emeritus Research Fellows, Professor Pitcher's research could continue to be supported at a much-reduced cost to the College than if he were to continue in employment as an Official Fellow.

In relation to benefits, the question here appears to be about maximising development income net of costs. During his meeting with the panel, Professor Pitcher made it clear that he would expect the College to pay all three components of his currently salary; his university salary; his College salary, and the Founders Fellow component of his salary. The panel is of the view that Professor Pitcher can have no reasonable grounds for expecting the College to pay the University portion of his salary in these circumstances.

The panel concludes that if the role of Founder's Fellow remains a required role by the College, the skills are available amongst other members of the Governing Body such that a new Founder's Fellow (or a number of Fellows sharing aspects of the role), supported by the professional fundraising skills and knowledge of the Director of Development and Alumni Relations, would be successful in this role at a cost to the College significantly below the remuneration expected by Professor Pitcher.

19. *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?*

Official Fellowship: The impact of continued employment during the period 2016-19 compared with the opportunity arising from a vacancy would be negligible, given that Professor Pitcher's teaching duties are currently covered by

a Supernumerary Teaching Fellow until 30 September 2019. Following normal practice, the panel expect the College will wish to discuss the future of the joint appointment with the University in advance of 30th September 2019.

A vacancy caused by Professor Pitcher's retirement may create an opportunity to refill the resulting Tutorial Fellowship in English by bringing forward the date of a new appointment. Following Professor Pitcher's retirement from his University post, the English Faculty and Humanities Division may wish to replace him before 2019. It is not clear at what point there will be funds available for that, but there is a possibility that they will seek to make an earlier appointment. The college has in the past agreed to appoint to Titular posts so as to secure the future of a joint appointment.

Another possibility is that the current Supernumerary Teaching Fellow may resign before 2019 (most of the college's Supernumerary Teaching Fellows have resigned early in order to take up permanent posts). In that event the College might approach the University with a view to filling the joint post as soon as possible.

If no new appointment has been made by 2019, the College will need to make alternative arrangements for 1st October 2019 – 30th September 2020, when the current Supernumerary Teaching Fellow is due to take a paid sabbatical year.

Founder's Fellow: If Professor Pitcher were to retire, another individual or individuals would probably be appointed to the role of Founder's Fellow, thus providing them with an opportunity to develop their careers.

20. *What is the likely impact on the promotion of diversity?*

Official Fellowship: Although in the longer-term retirement would have the effect of promoting diversity, in this instance, because Professor Pitcher's tutorial duties are already covered, there will be little or no immediate impact unless (i) the Supernumerary Teaching Fellow in English resigns and/or (ii) a proleptic appointment to the Official Fellowship in English is made (see para 19)

Professor Pitcher's retirement would have the effect of slightly increasing the proportionate diversity of the Governing Body.

The College Office provided information about the ages and genders of members of the Governing Body, and those who had left the Governing Body in the last 10 years. The college does not have information about other characteristics.

The Governing Body currently has 39 male and 16 (29%) female members. In 2011 there were 43 male and 10(19%) female members. In the last 10 years, there have been 21 retirements and 10 resignations from the Governing Body (28 male, 3 female), and 33 new elections (20 male, 13 female). There are currently 14 males and 12 females in fixed-term academic posts (Supernumerary Teaching Fellows, Junior Research Fellows), all appointed since 2011.

It should be noted that the college's EJRA applies almost exclusively to Official Fellows, but the University's EJRA applies to almost all members of the Governing Body. Only two official Fellows have retired (both at age 67) since the introduction of the EJRA on 1st October 2011. No female Official Fellow is due to retire in the next 10 years (and only two in the next 20 years), but 11 male Official Fellows are due to retire in the next 10 years (at age 67). This indicates

that applying an EJRA is likely to assist considerably in changing the gender balance over the next 10 years, but the change would be delayed if the EJRA is not applied.

The college does not have comprehensive ethnic monitoring data for members of the Governing Body. Nevertheless, based on its combined knowledge and experience across what is a relatively small pool of 44 colleagues the Panel recognised that it has a low percentage of members with a BME background. The Panel concludes that application of the EJRA may assist in increasing the representation of BME members in the Governing Body.

Founders Fellow: If Professor Pitcher were to retire it would provide the College with the opportunity to increase diversity in development and alumni relations. For example, the appointment of a number of Founder's Fellows of different ages, genders and ethnic backgrounds, and at different stages of their careers would provide an opportunity to better reflect the increasingly diverse backgrounds of the College's alumni.

21. *Is the duration of the proposed extension of employment appropriate in terms of the benefits expected to the college?*

Official Fellowship and Founder's Fellow: The panel does not consider that the duration of the proposed extended employment is appropriate in terms of the benefits expected to the College.

22. *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?*

Official Fellowship: It is unclear whether in the event the College approves Professor Pitcher's application, the College would not lose its association with the University side of the joint appointment. See para 19.

Founder's Fellow: This consideration is not applicable to the post of Founder's Fellow.

23. *Are there relevant circumstances that would properly justify exceptional treatment?*

Official Fellowship: The panel has considered this issue and has concluded that there are no relevant circumstances to justify exceptional treatment. It further notes that no representatives have been made on this point by Professor Pitcher.

Founder's Fellow: Professor Pitcher argues that the Governing Body has already taken a decision to continue him as Founder's Fellow until 2020, and further believes that he has a reasonable expectation that this decision will be maintained.

Professor Pitcher's case is based on his interpretation of the minutes of the Governing Body meeting held on 11th July 2014 (annexed at B).

In the light of the above, the panel asked Professor Pitcher why he regards the minute of the meeting as giving him the right to expect to continue in the role of

Founder's Fellow. Professor Pitcher said he believed the post could not be held in conjunction with a retirement fellowship or Emeritus Research Fellowship. He believed it was the intention of the minute that he should continue in the role of Founder's Fellow, as an Official Fellow.

The panel notes that the 2014 minute is carefully worded to be conditional on the outcomes of the University and College EJRA processes, and on a review of his performance as Founder's Fellow. In addition, the minute states that the College officership "could" be renewed. It is difficult to see how that could be seen as an unequivocal confirmation that Professor Pitcher "should" continue.

The panel has considered whether on an objective reading of the minutes relied upon by Professor Pitcher he had a reasonable expectation of an extension to his employment and whether that would amount to a circumstance justifying exceptional treatment. The panel were unanimous in their view that Professor Pitcher has no such reasonable expectation.

Additional observations

24. In reaching the recommendation described below the panel has taken the view that it was obliged to consider Professor Pitcher's application according to the terms of the existing bye-law.

25. The panel notes that the decision to adopt a College EJRA was taken collectively by the Governing Body at a meeting on 12th January 2012.

26. The panel chair received on 12th February 2016 an unsolicited copy of the judgment in the case concerning the EJRA that had gone to the University's Appeal Court in 2014. This was left anonymously by hand in the chair's College pigeon hole, in an unmarked envelope. Knowing this to be confidential unless disclosure is agreed by both parties involved, the panel chose not to read this, and the Chairman did not introduce any aspect of that report into discussion, which is therefore not part of the evidence considered by the Panel. The copy of the report has been passed to the University.

Conclusion

27. The panel has given careful, considered thought to Professor Pitcher's request in the context of the aims of the EJRA as set out in By-Law XLI. The panel returned to the aims set out in the EJRA (at paragraph 2 of the By-law):

"The EJRA and its associated procedures are considered to provide a proportionate means of:

- Safeguarding the high standards of the college in teaching and research:-
- Promoting inter-generational fairness and maintaining opportunities for career progression for those at particular stages of career, given the importance of having available opportunities for progression across the generations, in order, in particular, to refresh the academic and research workforce within the college and to enable them to maintain the collegiate university's position on the international stage;

- Facilitating succession planning by maintaining predictable retirement dates, especially in relation to collegiate University's joint appointment system, given the long lead times for making academic appointments, particularly in a university of Oxford's international standing;
- 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;
- Minimising the impact on staff moral by using a predictable retirement date to manage the need to make efficiencies on retiring staff at the EJRA; and
- In the context of the distinctive collegial processes through which the college is governed, avoiding invidious performance management at the end of a long career, where the performance of the individual and/or the academic needs of the college have changed."

28. The panel is of the view that those aims remain proportionate aims for the College to pursue.

29. Having considered the ten areas for consideration set out in the EJRA process (section 4, By-Law) and the overarching aims and proportionality, the panel concludes that the detriment to the furtherance of the aims of the EJRA would not be offset by a balance of advantage arising from an extension of employment.

30. The panel notes that Professor Pitcher's request is unusual in that it does not follow the expected pattern of a request to work beyond the EJRA, which would be in the form of an application to continue to carry out some or all of the duties of the substantive post. His application is to continue in post as an Official Fell of the College but in a separate role, without fulfilling what the panel considers to be his core duties as an Official Fellow.

31. The panel understood that it was permitted to consider continued employment on an altered basis to that currently held, including but not limited to a different post, or part of a post, or different terms and conditions. The panel suggested to Professor Pitcher that he might retire as an Official Fellow and take on post-retirement employment, but he did not appear to wish to continue in anything other than a full-time role.

32. Professor Pitcher has claimed a number of precedents in support of his application. The panel has considered cases of the type that he has described, and concluded that they are not analogous or precedential in this case. (1082-1089)

284. At the meeting of the Governing Body on 20 April 2016, the Panel's recommendations were approved. The claimant's application was not supported. He was informed of the Governing Body's decision by Professor Snowling in her letter dated 20 April 2016 and was advised of his right of appeal in accordance with the College's statutes and procedures. (1112-1114)

285. On 29 April 2016, the claimant wrote to Professor Snowling stating his intention to appeal the Governing Body's decision. (1117)

286. He presented his detailed grounds of appeal on 17 May 2016, challenging the Panel's report and maintaining his position that the EJRA was discriminatory on grounds of age. (1145-1152)

The claimant's appeal - jurisdiction

287. Ms Jane McNeill, Queens Counsel, was appointed to hear the claimant's appeal in accordance with the College's procedure. The hearing was on 24 June 2016, at which Ms Motraghi, counsel for the College, attended. Mr Michael Purcell, counsel, represented the claimant. Ms McNeill considered the first ground of the claimant's appeal, namely that EJRA was discriminatory on grounds of age and had to determine whether the College's internal appeal process allow for a determination on whether the EJRA policy and the extension provisions were unlawfully discriminatory because of age? After hearing submissions on the point, she decided on 14 July 2016, having considered the relevant By-laws, that she did not have jurisdiction to determine the issue of the legality of the College's EJRA and gave her decision. (1224-1226, 1301-1316)

288. The full appeal hearing was scheduled to take place later on in the year, but following Ms McNeill's ruling, it was abandoned by the claimant.

289. We have already referred to the Galligan decision which was published on 1 September 2014. Its impact reverberated throughout the University, the Colleges and beyond. Concerns were raised as to the legitimacy of the EJRA policy and the extension provisions.

290. The claimant retired on 30 September 2016.

291. He formally withdrew his appeal on 10 October 2016. (1513)

292. The claimant's application was the first to involve a joint appointment.

293. In Professor Grafen's evidence, he told the Tribunal that joint appointments are an important feature and each employer has its own EJRA rules and procedure. A central element of both is the possibility of communication between the College and the University to consider the implications of any decision for the future of the joint post. The joint postholder has two EJRA processes to take part in, if he or she wishes to continue in both halves of the employment. Retaining one half is a possibility under the EJRA, subject to the agreement of all parties. Professor Grafen then went on to say, and we adopt paragraph 12 of his evidence, the following:

"The College's EJRA process closely mirrored that of the University, this reflects the crucial importance to the College of the joint appointment arrangements and thus having a joined up EJRA process with the University. Single employee positions are considerably less attractive than joint appointments in as far as the most able academics who might consider working in Oxford are concerned. The attraction of the University is of course the opportunity to work in a research-intensive environment with some of the world's leading academics; the attraction of the College is the opportunity to work in the close-knit academic community

with all the social privileges that entails as well, of course, as the well-established tutorial system that is the hallmark of Oxford. From the perspective of the University and the College, it is highly desirable to have the same person delivering both lectures and College tutorials. The importance of joint appointments is of great significance in the deliberations of an application for extension beyond the EJRA.”

College’s review of the EJRA

294. In 2016 the College set up an EJRA Review Panel at which Ms McNeill QC was a member though not as a legal adviser. It met on 11 May 2017 to consider the statistical data and agreed that retaining the EJRA was certain to increase the number of female Official Fellows. Intergenerational fairness was also agreed to be a key legitimate aim of the EJRA. They also agreed to avoid performance management as it was not considered to be a good aim. An interim report was prepared on 8 June 2017. (1698-1705)
295. In September 2017, the College carried out an EJRA survey, the results of which suggested strong support, 84%, in favour of maintaining an EJRA at the same age as the University to encourage intergenerational fairness.
296. In a final report produced in October 2017, it recommended discarding the aim of “avoiding invidious performance management”. Some recommendations were made regarding minor changes to the procedure and were approved by the Governing Body on 7 March 2018.
297. A revised By-law was finally implemented in March 2018.
298. We have referred to some statistical evidence which showed that between the ages 65 and 67 years the principal reason for leaving the College was retirement (1695).
299. In a letter dated 6 July 2016, Professor Sobey, Acting Principal Bursar, wrote to the claimant to inform him that as a retired Fellow living in College property, he was required to pay “50% of the fair rent” which would be assessed. It follows from this that the claimant was not required to leave his College accommodation upon retirement. (1254)
300. The principal pension scheme for academic and academic-related staff is the Universities Superannuation Scheme “USS”. From the age of 65 years all eligible USS pension members can, if they so decide, take their full pension and retire from the University or if they continue to work, they can take their pension later. (369)
301. The claimant said in evidence and we do find as fact, that retirement by the College gives him full social and dining rights; in practice he would be given a room if he wanted to engage in research; he can be put forward for an Emeritus Professorship; he benefits from a final salary under the USS pension scheme as he was employed prior to 2011; and he can apply for a temporary College Officership.

Professor Peter Edwards

302. Professor Edwards, a Statutory Professor of Inorganic Chemistry, was the subject of a notice of retirement in September 2014. He was not supported in his application that his substantive post be extended. Instead he was offered another role on a 0.8 FTE for 3 years. He signed under protest as he became aware of Dame Janet Smith's decision.
303. He proposed a motion before Congregation which was published in the Oxford University Gazette Supplement, to suspend EJRA pending the publication of the findings of the EJRA Review Committee to all members of the University and that Congregation should have overall control of the EJRA process. It was debated in Congregation on 17 May 2016 and was defeated by 149 votes against with 141 in favour. A postal ballot duly resulted in the further 865 votes against the motion with 741 in favour. Although not a resounding victory, the EJRA policy and the extension provisions were, therefore, endorsed by the University population.
304. In May 2017, Congregation had a further opportunity to debate the EJRA. On 27 April 2017, a legislative proposal to implement the recommendations of the EJRA Group and its five-year interim review was published in the Gazette, together with two amendments proposed by members of the Congregation. They both concerned amending the retirement age to either 69 or 70.
305. On 2 May 2017, Congregation debated the proposed amendments and the legislative proposal on the EJRA. At the end of the debate a vote was taken on the amendments and they were defeated. A further vote was then taken on the legislative proposal, which was voted in favour by 104, 19 against. The legislative proposal implementing the recommendation of the five-year review was approved.
306. There was a further debate in Congregation in response to a 20-member motion put forward by members of the Congregation on 17 May 2017 that the EJRA for the University should be abolished. After a vote it was defeated.
307. The claimant was one of the speakers at Congregation who spoke in favour of suspending the EJRA but it was not approved. (2418-2433, 2540-2544, 2545-2556, 2560-2571)
308. Professor Edwards, appealed against the decision challenging the lawfulness of the University's EJRA policy and extension provisions. His appeal was heard by Sir Mark Waller, retired Court of Appeal judge in May 2017 with the decision promulgated on or around 16 June 2017. He allowed the appeal taking the view that the EJRA process had been "condemned" by Dame Janet Smith and it was wrong for the Council to continue to apply it, particularly in Professor Edwards' case. He was critical of the University in dismissing the decision of Dame Janet Smith as not binding and confidential. He stated that the decision though not binding on another Appeal Court, was nonetheless important in terms of achieving

consistency. He also concluded that there should have been a motion before Congregation on whether there should be an EJRA as it would have involved “a balanced debate” and “would be a material factor in considering whether a retirement age at 67 or any age could be objectively justified by virtue of the support it had from Congregation.” It was unfair to have applied the “strictures present” in the new 2015 policy. Following Dame Janet Smith’s decision, Council had time to consider its implications and should have disclosed to Professor Edwards and to Congregation the decision as Congregation had not had the opportunity of debating an EJRA during the consultation exercise in 2011.

309. It would be fair to say that Sir Mark Waller took the view that Professor Edwards had been treated unfairly in many respects. He allowed the appeal and expressed his view that the professor be reinstated to his statutory chair from 30 September 2016 to 30 September 2019.

310. He acknowledged that considerable work had been done by the 5 year Review Working Group since Dame Janet Smith’s decision. It recommended and Congregation approved, an EJRA of 68 years in or around May 2017. He found that the Review Group consulted extensively and recommended four aims be kept. He agreed that safeguarding high standards is an “overarching” aim. He accepted that “retirement is a key driver in the creation of vacancies at the University”, a view taken by the Review Group.

311. Of note, Sir Mark Waller wrote:

“Naturally, we acknowledge that removing the EJRA would not result in retirements ceasing altogether. However, it would be reasonable to conclude that a significant proportion of staff would elect to remain in post beyond the EJRA if they were easily able to do so, and such elections would substantially impact upon the creation of vacancies.at Annex C of the Review Group report, it is noted that 25% of respondents to a survey of retired staff stated that they would have continued to work in the absence of an EJRA, for an average of three years. Naturally, this figure of 25% is in addition to those who have actually applied for and had been granted a period of employment. It is also logical to predict that, without an EJRA, that sizeable group leaving by reason of retirement at 67 would become largely unpredictable in terms of leaving date and this has an impact on succession planning for the University as well as career planning and progression for individual staff members. Clearly the EJRA impacts on those leaving at 67, and we believe that 65 remains a significant age as this is still (currently) the normal pension age for the University staff whose retirement planning is likely to be focussed on that age. ...it is clear that maintaining a retirement age has enabled the University to continue generating vacancies with a view to achieving the EJRA aims. It is my view that the levels of those leaving at 67 post-EJRA demonstrate that the EJRA is a factor in generating vacancies at that point and there would not necessarily be the same ‘spike’ in the absence of the EJRA.” (1710-1739)

312. We were told that Professor Edwards, by agreement with the University, was allowed to continue to work for the duration of his extension.

313. Sir Mark Waller seemed to have accepted why the Review Group recommended the continuation of an EJRA.

314. In relation to pension provisions, he wrote that “it remains a valuable benefit” for those who were due to retire in the next few years but the Universities Superannuation Scheme changed from 1 April 2016, to Career Average Revalued Earnings, less beneficial than final salary.
315. It useful to note that the Review Group’s report came after the Galligan decision and Sir Mark Waller was in a position to analyse the evidence obtained five years after the introduction of the EJRA and over 2.5 years after Galligan.
316. Having heard the evidence and having read the Review Group’s report we agree with Sir Mark Waller’s findings set out above.

Submissions

317. The tribunal heard submissions from Mr Islam-Choudhury, counsel on behalf of the claimant; from Mr Mr S Jones, Queens Counsel, on behalf of the First Respondent, the University; and from Ms Motraghi, counsel on behalf of the Second Respondent, the College. They produced very detailed written submissions and referred to a number of authorities. Together they produced a bundle of relevant authorities.
318. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, as amended. We have, however, in our conclusions, referred to some of their submissions in our consideration of the issues.

The law

319. There is little dispute between the parties as to the applicable law. They have jointly produced a bundle of authorities. We have adopted most of Ms Motraghi’s submissions on the law in respect of direct age discrimination.
320. Section 13 of the Equality Act 2010 defines direct discrimination as follows:

“13. Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.”

321. Section 39(2) provides:

“An employer (A) must not discriminate against an employee of A’s (B) –

(a) -----

(b) in the way A affords B access, or by not affording access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service,

(c) by dismissing B,

(d) by subjecting B to any other detriment.”

322. A special feature of direct age discrimination is that it can be justified.

323. Section 123(1) is on time limits. Complaints must be brought within three months from the “act which the complaint relates” (a), or “such other period as the employment tribunal thinks just and equitable”, (b).

“(3) conduct extending over a period is to be treated as done at the end of the period.”

324. In the case of Haque v Luton Borough Council [2018] UKEAT/0180-17-1204, the EAT held that the extension of time provisions in section 2017B should be applied sequentially.

325. The time limit is extended by virtue of the provisions in section 140B.

326. In Barclays Bank plc v Kapur and Others [1991] ICR 208, House of Lords. Their Lordships held that where an employer operates a discriminatory regime, rule, practice or principle, then it will amount to an act extending over a period. This has been modified and the tribunal can also look at the substance of the complaints to determine whether they can be said to be part of a continuing act, Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 and Aziz v FDA [2010] EWCA Civ 304. Time limits are applied strictly, Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434. A tribunal in exercising its discretion whether to extend time on just and equitable grounds, may have regard to the checklist in section 33 Limitation Act 1980. Factors which may be considered are: the prejudice each party may suffer as a result of the decision; the length of and reason for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has co-operated with any requests for information; the promptness of the claimant’s actions once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the facts giving rise to the cause of action, London Borough of Southwark v Afolabi [2003] IRLR 220 Court of Appeal.

The European perspective

327. In relation to the European perspective, Article 6 of the Framework Directive:

“Notwithstanding article 2(2), member states may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and

vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

“Such differences of treatment may include, among others— (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.”

328. The lawfulness of limiting a working age has been considered in the European context in the following cases.
329. In Petersen v Berufungsausschuss für Zahn für den Bezirk Westfalen-Lippe [2010] IRLR 254 the European Court of Justice considered a German law which set a maximum working age of 68 for dentists in its health service. The Court held that, provided there was an excessive number of panel dentists or a latent risk of such a situation occurring, Article 6(1) of the Framework Directive permitted using a maximum age as an appropriate and necessary means of achieving the aim of sharing employment opportunities.
330. In the Bulgarian case of Georgiev v Tehnicheski Universitet – Sofia, Filial Povdic (C-250/09; C-268/09), the ECJ concluded that Bulgarian legislation which prevented university professors from working beyond the age of 68, was capable of being appropriate and necessary for allocating posts between the generations and ensuring quality of teaching. While it was for the national court to determine whether those aims were genuinely being pursued in a proportionate way, the Court considered 68 to be a reasonable cut-off point, given that it was longer than state retirement age and the age at which a state pension became available. The claimant in that case did not challenge the adequacy of the pension. It was noted that professors were able to pursue their careers for a relatively long period after state retirement age.
331. The encouragement of recruitment in higher education by offering professorships to younger people may constitute a social or employment policy aim, (paragraph 45).
332. The ECJ concluded that compulsory retirement was permitted where it pursued a legitimate aim linked to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations and that it makes it possible to achieve that aim by appropriate and necessary means, (paragraph 68).
333. In Fuchs and another v Land Hessen [2011] IRLR 1043, the ECJ considered whether German legislation on the compulsory retirement of civil servants at 65 could be justified under Article 6(1). It upheld the

legitimate policy aims of establishing an age structure that balances young and older civil servants, in order to encourage the recruitment and promotion of young people, to improve personnel management and therefore prevent possible disputes concerning fitness to work, while at the same time seeking to provide a high quality service. The court recognised that a “mix of different generations” could contribute to the quality of the service by, among other things, promoting the exchange of experience. Although these policy aims were of benefit to the employer, they also had a sufficient “public interest” element to enable the German authorities to rely on them when seeking to justify a potentially discriminatory law. The court also ruled that, while budgetary considerations could be taken into account along with other factors, cost saving was not itself a legitimate policy aim.

334. As to whether the retirement laws were "appropriate and necessary" to achieve that aim, the ECJ gave guidance indicating that they did not appear "unreasonable" and that older workers would not be unduly prejudiced on retirement if they were entitled to a reasonable level of pension. Member states have a "margin of discretion" when implementing EU measures into national law, and the ECJ left the ultimate decision on justification up to the national court.
335. In Hörnfeldt v Posten Meddelande AB [2012] IRLR 785, the ECJ upheld a Swedish compulsory retirement age of 67 years, finding Sweden's legitimate aims for the policy were similar to those of Germany in Fuchs. However, in Hörnfeldt, the ECJ placed less importance on the issue of individual pension entitlement at the compulsory retirement age. Mr Hörnfeldt's complaint that he had inadequate pension provision at age 67 because he had worked part-time did not sway the court in his favour. It found that one reason for the compulsory retirement age of 67 was to give Swedish employees a greater opportunity to build up an adequate pension entitlement before retirement, but it was not necessary for the compulsory retirement age to take into account pension entitlement on retirement.
336. In Prigge and others v Deutsche Lufthansa AG [2011] IRLR 1052 (ECJ), the ECJ held that a compulsory retirement age of 60 for Lufthansa airline pilots, contained in a collective agreement recognised by German law, was contrary to the Framework Directive. The retirement age could not be objectively justified under Article 6(1) because, the ECJ concluded, air safety does not constitute a legitimate aim for the purposes of that article. In order to justify direct age discrimination, the legitimate aims must be social policy objectives, such as those related to employment policy, the labour market, or vocational training.
337. The retirement age of 60 was also out of step with German and international laws on air safety, which fixed an upper age limit of 65 for airline pilots. For this reason, an age limit of 60 in the collective agreement was not "proportionate" and therefore could not amount to a GOR under Article 4(1), neither was it lawful under Article 2(5), as it was not "necessary" for the protection of public security or health.

United Kingdom domestic law

338. A small number of domestic cases have considered mandatory retirement ages. Most important among them is Seldon v Clarkson Wright & Jakes [2012] ICR 716 (Supreme Court). The Claimant, a partner in a firm of solicitors was required to retire before he reached 65 in accordance with a term in the partnership agreement, included with the object of retaining the firm's younger associates with the opportunity to become partners, facilitating long term workforce planning and limiting the need to expel partners by way of performance management thereby preserving the congenial culture of the firm. The Claimant contended this amounted to direct age discrimination.
339. The Employment Tribunal found that although the Claimant had been treated less favourably on the ground of his age, the aims of the requirement to retire at 65 were legitimate and the requirement was a proportionate means of achieving those aims. The Claimant appealed including to the Supreme Court, where the Tribunal's decision was upheld save that the matter was remitted to the Tribunal to determine whether the age of 65 could be lawfully and properly chosen rather than some other less discriminatory age.
340. At the Supreme Court, Baroness Hale provided the leading judgment and gave the following summary, paragraph 50:

“What messages, then, can we take from the European case law?”

- (1) All the references to the European Court discussed above have concerned national laws or provisions in collective agreements authorised by national laws. They have not concerned provisions in individual contracts of employment or partnership, as this case does. However, *Bartsch* [2009] All ER (EC) 113 did concern the rules of a particular employers' pension fund; and *Prigge* ... concerned a collective agreement governing the employees of a single employer, Deutsche Lufthansa.
- (2) If it is sought to justify direct age discrimination under article 6(1), the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is “distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness” (*Age Concern* [2009] ICR 1080 and *Fuchs* [2012] ICR 93).
- (3) It would appear from that, as Advocate General Bot pointed out in *Kçükdeveci* [2011] 2 CMLR 703, that flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives.
- (4) A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims: (i) promoting access to employment for younger people (*Palacios de la Villa*, *Hütter* and *Kçükdeveci*); (ii) the efficient planning of the departure and recruitment of staff (*Fuchs*); (iii) sharing out employment opportunities fairly between the

generations (Petersen, Rosenblatt and Fuchs); (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (Georgiev and Fuchs); (v) rewarding experience (Hütter and Hennigs); (vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (Ingeniørforeningen i Danmark); (vii) facilitating the participation of older workers in the workforce (Fuchs; see also *Mangold v Helm (Case C-144/04) [2006] All ER (EC) 383*); (viii) avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job, which may be humiliating for the employee concerned (Rosenblatt); or (ix) avoiding disputes about the employee's fitness for work over a certain age (Fuchs).

- (5) However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding experience or protecting long service (Hütter, Küçükdeveci and Ingeniørforeningen i Danmark)
- (6) The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen (Fuchs).
- (7) The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued (Age Concern).”

341. Baroness Hale further explained at para 55-57:

“55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) they are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it.

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

57. The second kind may be summed up as *dignity*. This has been variously put as avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and as avoiding the need for costly and divisive disputes about capacity or underperformance. Either way, it is much more controversial. As Age UK argue, the philosophy underlying all the anti-discrimination laws is the dignity of each individual, the right to be treated equally irrespective of either irrational prejudice or stereotypical assumptions which may be true of some but not of others. The assumptions underlying these objectives look suspiciously like stereotyping.

Concerns about capacity, it is argued, are better dealt with, as they were in *Wolf v Stadt Frankfurt am Main* (Case C-229/08) [2010] All ER (EC) 939 and *Prigge v Deutsche Lufthansa AG* (Case C-447/09) [2011] IRLR 1052, under article 4(1), which enables them to be related to the particular requirements of the job in question. (Emphasis in original)

342. The means chosen have to be both appropriate and necessary. The “means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.”, paragraph 62.
343. Finally, Baroness Hale considered whether the measure had to be justified not only in general but also in its specific application to a particular individual, paragraph 63.
344. The case returned to the Tribunal to determine whether the age of 65 could be lawfully and properly chosen rather than some other less discriminatory age. The Tribunal concluded that the selection of the age of 65 was appropriate and reasonably necessary to achieve each of those aims and was an age that none of the partners had expressed any disagreement with and that had been upheld in a number of cases. This decision was appealed.
345. In Seldon (No 2) [2014] ICR 1275, Langstaff J, President of the Employment Appeal Tribunal (EAT), explained that the task for the Tribunal was to determine where the balance lay between the discriminatory effect of a particular age and its success in achieving the aims held to be legitimate; that the balance would not necessarily show that a particular point could be identified as any more or less appropriate than another point, and, accordingly, the fact that a different age, within very much the same range but slightly later, might have been identified did not mean that the Tribunal had erred in law.
346. The Tribunal had recorded that the age of 65 had been in the partnership deed for as long as could be remembered and the clause had been retained in the most recent partnership deed without discussion. No partner had expressed disagreement with that age and the partners were in an equal bargaining position when they consented to that rule. The Tribunal had also considered a number of other factors including but not limited to state pension age and that the ECJ had in a number of different cases upheld the retirement age of 65.
347. The Tribunal had recognised that the lower the age of retirement the more harm to the partners required to retire and the higher the age of retirement the more harm to associates who may leave; and that the age needed to reflect that the Respondent needed to be able to plan for its future.
348. Langstaff J accepted that the fact that a different date within very much the same age range but which was slightly later could have been identified does not mean there was an error of law, paragraph 26. He explained that the judgments of the appeal courts had been that it was appropriate to meet

the legitimate aims of this employer that there should be an age for retirement and yet:

“if it were to be said that a day later than a given age would discriminate less, as it would if the interests of the retiree were to be considered, it would therefore be wrong in law not to take a day later as the date: and if a day later still, the same would apply – but then as a matter of principle it would seem that no date could be chosen lawfully because any date would be capable of being rendered unlawful by the argument that a slightly later date would serve just as well.”
(para 26)

349. In Air Products plc v Cockram [2018] IRLR 755, employees who were members of the employer’s Long-Term Incentive Plan “LTIP” lose their unvested awards upon termination of employment. However, employees won or after a customary retirement age, were permitted to retain their awards. On 6 April 2010, the pension provisions changed by legislation and entitlement to a pension became available when the person reaches 55 years of age. The employer raised its customary retirement age from 50 to 55 years because it wanted to achieve fairness between the generations and to treat employees consistently; it believed that permitting a group of employees who had a protected pension age of 50 years to benefit from the retirement exception from that age would be unfair to the predominantly younger employees who were in the defined contribution scheme with a retirement age of 55; and it also believed that a retirement age of 50 years for all in the Incentive Plan was too low to achieve the retention aims of the LTIP. The claimant resigned at the age of 50 years and lost his unvested LTIP awards. He claimed age discrimination asserting that the benefits should apply to him at 50 and that there was no evidence that the changes led to the retention of younger staff.
350. The legitimate aim advanced by the employer was to strike a balance between encouraging retention up to the age of 55 and providing some incentive to retire in order to create opportunities for younger employees.
351. In delivering the leading judgment, Bean LJ held with reference to the issue of lack of evidence that the aims were being achieved, in paragraphs 30 and 31, the following:

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

31. Mr Laddie suggested that the company should have been in a position to place before the tribunal evidence of whether the customary retirement age clause in the LTIP had in fact led to a high retention rate; if they failed to do so the tribunal the tribunal should have inferred from that omission that there was no evidence that the provision did in fact encourage retention. I do not consider that the employment tribunal should have required or expected the employers to adduce such evidence. It would be impossible to do so very soon after such a provision was introduced; and even at a later date the causative effect of a

provision in the LTIP about customary retirement age would be difficult to isolate: employees in their early 50s make choices about whether to remain in the same employment, move jobs or take voluntary retirement for a whole variety of reasons.”

352. Guidance on applying justifiable direct discrimination because of age is given in the Employment and Human Rights Commission’s Code of Practice on Employment (2011), paragraphs 3.36 to 3.41. It refers to objective justification and was issued before the Seldon judgment in the Supreme Court and has now to be read in light of that judgment.

353. As regards unfair dismissal, section 98(1) Employment Rights Act 1996 “ERA”, provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show what was the reason or the principal reason for dismissing the employee. Dismissal for “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held” is a potentially fair reason, s.98(1)(b).

354. Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

“Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

- (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

355. The range of reasonable responses test applies to the substantive decision to dismiss as well as procedural matters, Shreshtha v Genesis Housing Association Ltd [2015] IRLR 399.

Conclusion

Direct age discrimination against the University

356. The questions we have to ask are:

- i. Were the aims legitimate?
- ii. Were they in fact being pursued?
- iii. Are they legitimate in the particular circumstances of the employee?
- iv. Are the means adopted appropriate and necessary?

Safeguarding the high standards of the University in teaching, research and professional services.

357. This is not an aim the University seeks to rely on. Its position is that it is an overarching objective. However, contrary to Mr Islam-Choudhury's contention that it is not a valid social policy aim because it is specific to the University and does not have wider social import, we disagree and refer to the Fuchs case in which it was held that the provision of a high quality justice service is a legitimate aim. This is understandable as society benefits from having such a service and it engenders trust in the judiciary.

358. Of more relevance is the case of Georgiev. In that case Bulgarian law prevented university professors from working beyond 68 years. The European Court of Justice held that compulsory retirement was permitted where it pursues a legitimate aim linked to employment and labour market policy, such as the delivery of high quality teaching and research at universities. The retirement age was 5 years longer than the state pension age.

359. In this case, the University being world renowned, needs to attract and maintain high quality candidates both to study and in teaching, in so doing, it has to safeguard high standards in teaching, research and in professional services. We conclude that this is a social policy aim, therefore, a valid legitimate aim under section 13 Equality Act.

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

360. The claimant conceded that promoting intergenerational fairness is capable of being a legitimate aim but argues that it is not proportionate. This aim is still being pursued by the University as it is focussed on providing opportunities for younger academics and academic-related staff. We say at this stage in order to avoid repetition, that all of the aims relied upon by the University are still being pursued. They are legitimate in the claimant's circumstances because he was of an age that triggered the provisions of the EJRA. The real issue is proportionality.

361. Mr Islam-Choudhury submitted that no evidence had been led by the University in the period 2011-2015, of large numbers of junior academic staff employed by the University being promoted to Associate Professor roles. Recruitment, he says, takes place in an international marketplace limiting the opportunities for those employed to be promoted to such positions.

362. He referred to the Personnel Committee's report dated 16 January 2018, in which it was noted, he submitted, the detrimental impact on intergenerational fairness. Table 6 showed that there has been a 26.7% increase in employees older than 67 years and a decrease in those under

39 years. This was because the University's EJRA at 67 years, gave many a 2 year increase allowing them to remain at work longer increasing the older age profile. In addition, in the first 4 years following its introduction, many who applied for an extension have been successful. There was no two year corresponding increase for the claimant. The statistical data does not support the University's case that the EJRA promotes inter-generational fairness and maintains opportunities for career progression. (2631-2636)

363. Our view is that the above legitimate aim requires vacancies to become available. Like the claimant and his generation, in order to progress, they had to apply for more senior vacant positions freed up by the retirement of senior academics. Compulsory retirement is one way the University achieves this. It is about the younger generation both outside and inside the University being given the opportunities for career progression.
364. The University's EJRA seeks "to balance the wishes of the individual approaching the EJRA with the needs of the collegiate University (including the legitimate career aspirations for other staff) by facilitating the timely discussion of options with a view to identifying possible future arrangements which are acceptable to all parties, and by providing a clear decision-making and appeal process which allows account to be taken of all relevant considerations." (1985)
365. The above extract is taken from the results of consultation on the EJRA presented by the Personnel Committee in 2011. It is clear from this that the University and the College were aware, prior to implementation, of the need to engage in a balancing exercise when considering the issue of the extension provisions.
366. In creating vacancies through the EJRA, the University recognised the impact on the older generation. To mitigate its effect and in order to achieve a sense of balance, it has set in place regular 5 and 10 year reviews of its policy. It decided to extend the EJRA age to 68 years from 30 September 2015 and to 69 years from 30 September 2022. Where someone who is approaching retirement wishes to remain in service, he or she can ask for an extension beyond the EJRA. In 2012-13, of the 93 academic staff who were eligible to work beyond the EJRA, 55 (59.14%) applied for an extension. In the year 2014-15, still within the old 2011 EJRA, 54 were eligible and 49 (90.74%) applied.
367. The balancing exercise to be followed requires the prospective retiree to demonstrate that their particular contribution would be hard to replace. If this is satisfied, their services will be retained thereby closing off a potential avenue for promotion and refreshment.
368. We bear in mind that the Review Group's findings reveal that only a small proportion of posts is vacated each year through retirement and as such it is difficult to reach any firm conclusions. During the years 2012-13, 2013-14 and 2014-15, at Associate Professor level, 51.1%, 42.1% and 54.5% were vacated by retirement.
369. The Review Group found that 26% of retired staff stated that they would have continued for an average of 3 years had it not been for the EJRA.

This mean that if there was no EJRA the number of those retiring would be much lower.

370. In the statistics referred to by Mr Islam Choudhury in the report by the Personnel Committee on 16 January 2018, there had been a decrease in those under the age of 39 years and an increase in those over the age of 67 years. The increase, we find, was due to the extension of the retirement age and this delayed the retirement of the older members of staff. Eventually, they will retire, for whatever reason, creating vacancies for the younger members of staff to fill. It is, in our view, still early days before we see any significant changes under this legitimate aim. The University is endeavouring to change decades and possibly centuries old traditions and practices by providing opportunities for the younger generation, not necessarily limited to those in this country but internationally. As the University competes in the global market, it has to create opportunities to advance by way of career progression.
371. Retirement remains the key driver in the creation of University vacancies at senior academic grades.
372. In considering the claimant's application the University took into account the considerations under its policy and concluded that the exception to the general rule that academic and academic related staff should retire at their EJRA, could not be justified.
373. We have concluded that the extension provisions in the EJRA provide a proportionate means of achieving the above legitimate aims as they are both necessary and appropriate.

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 International standing.

374. This is a legitimate aim as accepted by the claimant and it follows on from the Seldon judgment. Mr Islam-Choudhury, however, submitted, that the steps taken to achieve that aim were neither necessary nor appropriate. The University did not provide evidence to show that new appointments were made on a regular basis to commence shortly after 30 September 2016. No evidence was led to show that junior academic staff in the period 2011-2015, were promoted to Associate Professor roles. Had such evidence been adduced by the University it would have demonstrated certainty in succession planning. The evidence given before the Tribunal demonstrated the exact opposite. The EJRA under which the claimant applied for an extension shows a high succession rate in 2011-2012, 2012-2013 and 2013-2014. The majority of applicants were successful in applying for an extension.
375. Mr Islam-Choudhury, further submitted that, in the claimant's case, the University would only have planned after 30 September 2016, by initiating a recruitment process for the vacancy created by the claimant's departure.

Professor Wickham did not give evidence as to when recruitment for the vacancy commenced and when it was filled. Alternatives to forced retirement by the EJRA were available to the University, such as an agreed or negotiated departure which would have met the same aim in a proportionate way. The University, therefore, has not proved that the application of the aim with the EJRA was either appropriate or necessary. The EJRA did not facilitate succession planning.

376. Mr Jones disagreed. He submitted that the creation of a vacancy allows the University to engage in succession planning as the EJRA provides a definitive date when the employee would leave through retirement. Even the extension procedure provides the opportunity of filling the vacancy should the application be unsuccessful. The extension procedure, submitted by Mr Jones, enhances the proportionate nature of the EJRA policy but does not require termination at all costs and in all circumstances.
377. He further submitted that in the report of the EJRA Working Group, in January 2017, the conclusion was that the EJRA policy plays an important role in enabling the University to plan for succession and to manage staff as well as staffing budgets in the Divisions, particularly academic posts, where a recruitment process can take up to two years. It was particularly important in the context of the focus on budgets and headcount. (2460)
378. Our conclusion is that the EJRA policy including the extension provisions, allows for succession planning. The prospective retiree is told over a year in advance of the expected date when they are due to retire. They can either agree to retire on the given date or apply for an extension. If they accept retirement, it allows the University to engage in succession planning. If, however, they apply for an extension, after exhausting the procedure, including the appeal stage and if unsuccessful, the University could still engage in succession planning. The notice given by the University allows it sufficient time to complete the extension process, including appeal. Younger academics may not be inclined to leave if they are aware of a potential vacancy through the EJRA.
379. In the claimant's case, he was notified of his retirement on 4 June 2014 and was informed of the outcome of his application for an extension on 3 March 2016. He later abandoned his appeal on 10 October 2016. Although he still has an extant grievance, the two years would allow the University to engage in discussing what should happen to the vacancy created by his departure.
380. The University's EJRA extension provisions are both necessary and appropriate in achieving this legitimate aim of succession planning.

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.

381. Mr Islam-Choudhury, accepted that this is a legitimate aim but takes issue with the EJRA as being a proportionate means of achieving it. He, however, accepted that Associate Professors are, in the main, male. At the

University there is no reliable data on BAME academics and those with a disability. He referred to the University's January 2017 five year review, noting that 51.1% of vacancies were created through retirement in 2012-13; 42.1% in 2013-2014; and 54.5% in 2014-15. Half of the vacancies created during that period were for reasons other than retirement. Mr Islam-Choudhury submitted that this undermines the "perception", Dr Goss expressed in evidence that many would wish to continue to retire, justifying the EJRA.

382. Mr Islam-Choudhury further submitted that the University's witnesses conceded that even though a vacancy has been created, it did not mean that a woman or a BAME or disabled candidate would be successful in being appointed. The rate of improvement in the gender balance of Associated Professors "is low totalling 1.2% an increase from 26.6% to 27.8%". (2462).
383. Further, the report records feedback from the Divisions that the existence of the EJRA may actually be a disincentive to others who may wish to apply for a vacant post. Mr Islam-Choudhury submitted that this is likely to have an adverse impact on potential female candidates, those with a disability or from a BAME background. In addition, Ms Thonemann's evidence was that there was no female applicant in the last year, October 2017 – October 2018 who applied for an extension.
384. Having regard to the above matters he submitted that the EJRA has not been proven by the University to be either appropriate or necessary in achieving this legitimate aim.
385. Mr Jones, on the other hand, took a completely different view. He emphasised that the starting point is that creation of a vacancy. This enables the University to engage in creating a more equal and diverse workforce. The evidence that retirements are important for the creation of senior level vacancies, is compelling. Decisions on retirement have complex causes as a causal influence of the policy may not always be easy to identify. In addition, it is still too early to demonstrate the impact. Gender diversity is only one aspect of this legitimate aim. The University has set itself a number of specific equality objectives in the equality overview 2012-2013, such as, increase the proportion of women in senior roles; improve the recruitment and retention of the BAME staff; increase the percentage of UK under-graduates at Oxford from disadvantaged, socio-economic backgrounds; increase the percentage of UK undergraduate students at Oxford from neighbourhoods from low participation in higher education; and meet or exceed the benchmark on participation by disabled students. These objectives complement the EJRA and it would be unrealistic to expect an immediate impact on equality and diversity.
386. We agree with Mr Jones's submissions. What the University's Equality Impact Assessment revealed was that in 2010, men made up 85.2% of academic staff aged 60-64 and 90.2% of those aged 65 and older. Diversity was greater amongst younger staff. 67.4% of academics in the age group, 30-39 were male. Racial diversity was also higher amongst

younger staff. A positive impact was expected in relation to promoting equality and diversity. According to Ms Thonemann, in her evidence, there has been a material improvement. The EJRA Working Group's conclusion was that the policy was contributing to improvements in gender diversity. The EJRA creates vacancies and those recruited to those vacancies are more diverse than those who retire.

387. The University was seeking, in 2011, to make available opportunities for women, younger academic staff, those of a different race, and those with disabilities. For too long senior positions have been held by those who did not reflect these groups.
388. As to proportionality of this legitimate aim, progress in this area is likely to be slow having regard to the extension of the retirement age by 2 years from 65 to 67 years. By the date of the decision on the claimant's extension application, the EJRA policy had been in place for nearly 5 years. Statistical evidence of significant changes in this area of equality and diversity is unlikely to be realised. The exceptions policy resulted in high retention of those making applications. This extended the tenure of the more senior staff who are the least diverse as they were mainly white and male. In 2015 the University revised the policy to enable it to create more vacancies to facilitate this aim. The retirement age also increased to 68 years following the Working Group's recommendation. We agree that this will further delay improvements of equality and diversity.
389. We have come to the conclusion that, on balance, the EJRA's extension provisions are a necessary and appropriate means of achieving this legitimate aim.

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.

390. Mr Islam-Choudhury, conceded that this is capable of being an legitimate aim. The issue is one of proportionality. He submitted that the claimant gave an account of how humiliated he felt having to go through the EJRA process. Ms Thonemann conceded in cross-examination that the process was "difficult" for employees and "people have said that it is uncomfortable". She wrote to Dr Goss on 16 October 2015 stating "I don't expect that "C" withdraw the case either, but I like to explain (the process) and give them to (sic) option to withdraw with dignity". The January 2017 report noted the feedback that "a lot of effort – centrally and in departments – is being put into operating a policy which appears to be make little difference to how many people retire at EJRA" and "cases which are turned down or go to appeal cause a great deal of bad feeling in the departments". "Since October 2015, no member of Humanities had applied for extended employment. It is likely that individuals were being discouraged from applying by this criterion or finding it difficult to put together an application that would satisfy."
391. Mr Islam-Choudhury submitted that these statements demonstrate that in Humanities, at least, the EJRA is in fact demoralising to staff.

392. In relation to the January 2017 report, he said that it records feedback from all Divisions, “We must ensure that all procedures do not make people feel pushed out or otherwise undervalued at this stage of their careers”.
393. He submitted that given the statistical evidence that about 50% of Associate Professors from 2012-2015, left for reasons other than retirement, a more appropriate way of maintaining staff morale is to have an agreed or negotiated retirement, as opposed to forced retirement. The University has not proved that the application of the aim through the EJRA was either appropriate or necessary.
394. Mr Jones submitted that this legitimate aim has in mind the flexibility to hold open vacancies to allow some latitude in the allocation of scarce resources, including helping to avoid redundancies. Achieving this aim is linked to the creation of vacancies but with the possibility of keeping them open rather than filling them. Retired employees may not be immediately replaced because resources which otherwise would have been allocated to their posts, may be spent on another, reducing the risk of needing to make cuts.
395. We find that the application for EJRA policy and procedure is likely to cause those affected a considerable amount of anxiety and concern about their future having spent many years working at the University and establishing a reputation in their chosen field. What is clear is that the University is not immune from the effects of funding cuts. Rather than, for example, embark on a redundancy exercise, which would give rise to considerable apprehension among the affected staff, the funds freed up by the vacancy, could be used in ways which may secure their employments thereby enhancing staff morale. There is no dispute that the claimant was treated less favourably because of age, in that he had reached the retirement age under the EJRA. He also suffered a detriment as his employment was terminated. We, however, have come to the conclusion that the EJRA is a proportionate means of achieving the legitimate aims.
396. Mr Jones is not relying on the “distinctive collegial processes through which the University is governed, avoiding invidious performance management”, as a separate legitimate aim.
397. The comparators are Associated Professors, all of whom hold posts jointly with the University and the College, aged under 65 years as at 30 September 2016 and to whom the EJRA rule, that academics shall normally retire from employment not later than the 30 September immediately preceding his or her 68th birthday, was not applied.

Further alleged discriminatory acts

398. The claimant, in his further particulars of claim dated 12 May 2015, contends that there were additional acts of direct discrimination because of age, as set out in paragraph 9.12 above in the agreed list of issues. (52-53)
399. He alleges that: he was sent notice of retirement by Professor West dated 4 June 2014, paragraph 5a; he was told he had to submit his extension application by end of June 2015 or his employment would terminate on 30

September 2016, paragraph 5b; he was told on 28 October by Professor West that his application for an extension had to be against the published criteria, paragraph 5c; he applied to extend his employment to September 2020, paragraph 5d; Professor Perry informed him by letter dated 3 August 2015, that the Faculty of English would not be supporting his application, paragraph 5f; by letter dated 5 October 2015, Professor Perry informed Professor Wickham, Head of Humanities, of the Faculty's decision, paragraph 5g; in October 2015, the Humanities Division did not support his application, paragraph 5h; he contends that any representations made by the College to the University which are found to be discriminatory because of age, tainted the University's process with unlawful discrimination, paragraph 5k; before the EJRA Panel on 26 January 2016, he read the statement alleging that the EJRA process was discriminatory because of age and that his forced retirement would be discriminatory and unfair, paragraph 5m; and by letter dated 3 March 2016, he was told of the EJRA Panel's decision not to extend his employment to September 2020, that the lawfulness of the EJRA lay outside the EJRA Panel's remit, and not having regard to the Galligan decision, paragraph 5n.

400. We accept that when compared with Associate Professors under the age of 65 years, they would not have been subjected to the same or similar process as the EJRA would not have applied to them. The procedure followed was in line with the EJRA process and the extension provisions which we have found were justified. It was not clear to us why the EJRA Panel in stating that the lawfulness of the EJRA was outside of its remit and in not following the Galligan decision, were acts of direct age discrimination. The decision had nothing to do with age or the claimant's age, but to do with its genuine and honestly held belief that its role was to apply the policy and that the University believed that the Galligan decision was wrong.
401. The other acts relied upon are in line with the University application of the EJRA which we have found is justifiable age discrimination.
402. We have come to the conclusion that these aspects of the claimant's direct age discrimination as set out in paragraph 9.12, are not well-founded.

Proportionality

403. On the issue of proportionality, we have to balance the discriminatory effects of the measure and whether there were steps which could have been taken to mitigate the effects on the claimant?
404. In arriving at our conclusions above, we have taken into account that the legitimate aims relied upon by the University are the product of case law as set out by Lady Hale in Seldon. They were also accepted as legitimate by Sir Mark Waller in Edwards. The age of 67 was arrived at following consultation with staff, union and other groups within the University. Alternatives to and EJRA were considered, such as a financial inducements scheme, performance management, and a negotiated departure, but were held to be either expensive or unviable. The University did not have the funds to pay those it wished to retire. Staff were not in favour of

performance management at such a late stage in a senior academic's life. A negotiated departure scheme would not guarantee an agreed departure date and as such, would affect succession planning.

405. We accept that Congregation did not have the opportunity to debate on the introduction of an EJRA but if there was any significant objection it was open to 20 members to put down a motion.
406. A retirement age of 65 years, now 68, is not fixed because the review process allows for changes to be made. It is likely that retirement at 70 will come into effect in 2020. The review process adds to proportionality. We know there will be the 10-year review in 2021 with possible changes to follow. The extension provisions also add to proportionality, though the 2015 policy is stricter than the 2011 one. It was held in Fuchs that a retirement age of 65 with the possibility of an extension, was considered proportionate as it helped to achieve the legitimate aim of encouraging recruitment and promotion of younger people. The EJRA and the extension provisions create vacancies allowing the University to move toward realising the legitimate aims. This was also recognised by Sir Mark Waller in Edwards. The extension provisions mitigate the effects of the EJRA policy by providing those 67 years the opportunity of applying to extend their employment.
407. What about the application of the EJRA and the extension provisions on the claimant? We accept that by virtue of his age he became subject to the EJRA. He elected to be considered under the 2011 policy and discussed options to avoid retirement. He was aware of what was required in order to persuade the Faculty and the Division to support his application. He also had the right and exercised it, to argue his case before the EJRA Panel. We accept that he was unsuccessful, but he had the right to his USS pension at 65 years. His benefits pre-dates April 2016 when career average pension was introduced. Being retired does not mean that he is divorced from university academic life. He is entitled to acquire the title of Emeritus Professor and be allowed to use the University's facilities to do research work. He can also apply for research funds to carry out his work.
408. We have taken all of the above when considering the issue of proportionality and have come to the conclusion that the EJRA and extension provisions are both appropriate and necessary.

The claim of unfair dismissal claim against the University

409. As regards unfair dismissal, section 98 (1)(b) Employment Rights Act 1996, states that a potentially fair reason for dismissal is, "some other substantial reason of a kind, such as to justify the dismissal of employee holding he position which the employee held".
410. Mr Islam-Choudhury submitted that the reason for his dismissal was that the claimant had been unsuccessful in his application for an extension of his employment under the extension provisions of the University's EJRA

and referred to the view taken by Dame Janet Smith in the Galligan decision as supporting this contention.

411. Mr Jones submitted that the claimant was dismissed for some other substantial reason, namely retirement.
412. We conclude that the reason for the claimant's dismissal was some other substantial reason, that being that he did not meet the requirements for an extension of his employment. Consequently, the decision was taken that his employment be terminated. The extension provision is an integral part of the EJRA policy which is based on retirement.
413. The analogy given by Mr Jones in relation to redundancy, is apt in this case. He posits the question, if an employee who is in a redundancy situation is unsuccessful in his or her application for alternative employment, is the reason for dismissal the fact that they were unsuccessful in their application or redundancy? He submitted that the reason would be redundancy. We agree with this submission and do conclude that the claimant's dismissal was for some other substantial reason, that being retirement.
414. Mr Islam-Choudhury further submitted that the claimant's dismissal was procedurally unfair because achieving a successful outcome in his application for an extension of employment, was unreasonably difficult. He quoted paragraph 23 of the EJRA policy which states that applications will only be approved "where the panel is satisfied that an extension creates sufficient clear advantage to the University.....". Further, paragraph 24 states "distinguished scholarship does not in itself, necessary constitute an exceptional contribution".
415. He then referred to what he submitted were the subjective elements in the policy, such as "clear advantage to the University"; would the employee's "contribution" be "unusually hard" to replace. He further submitted that the "likely impact" and "opportunity" gives no guidance on how these are to be measured. "Future academic and business needs" makes it difficult for applicants to know what is required when formulating their application. "Exception contribution" and "unusually distinguished scholarship" and "unacceptable" loss to the University, provides no guidance on what is meant by the use of such language.
416. He submitted, that consistent with the approach taken by Dame Janet Smith, the extension provisions allow the University to "cherry pick" who it would like to keep.
417. The University has provided no clear evidence in support of the Faculty of English and Humanities Division's decision not to support the claimant's application and that is because of the subjective nature of the test. This is made more acute by the fact that no one had received any guidance or training on the application of the EJRA.
418. He referred to the evidence given by Professor Wickham whom he described as a "poor witness". Contrary to what he, Professor Wickham,

wrote in his witness statement, he did not attend the EJRA panel hearing on 29 January 2016. He further stated that he took calls from colleagues to discuss the claimant's application but conceded in evidence that it was Ms Catherine McKiernan, Administrator, who took the calls. Further, he took no action when he knew that the claimant was challenging the EJRA policy as being discriminatory, describing it as the claimant's opinion. Professor Wickham's report and the views of the Faculty and Division were described by Mr Islam-Choudhury as subjective opinion.

419. He further submitted that no reasonable employer would have proceeded with the claimant's application once it had received "the damning decision of Dame Janet Smith in Galligan which found that the EJRA in general principle was unlawful and discriminatory".
420. In response, Mr Jones submitted that the claimant's challenges to the extension provisions amounted to an attack on the justification of the policy and was not a matter of procedure. In order to achieve its aims, the University requires a policy of compulsory retirement and it is appropriate that any extension to that policy should apply only in genuinely exceptional circumstances. The policy sets out a number of factors applicable to the claimant. He, that is Mr Jones, listed those factors with reference to page 104 of the bundle. He submitted that the suggestion that the standard is set impossibly high is difficult to reconcile given the very high success rate of applications. (113)
421. In relation to the University EJRA panel applying a subjective test to the question whether the claimant's performance was exceptional, Mr Jones submitted that it is not a matter of procedure. The test is not whether the claimant's performance was exceptional but on an objective assessment set against a set of criteria whether the employment was to be extended was ultimately and inevitably a matter for the University.
422. Rejecting the claimant's submissions without alleged sufficient evidential support, is not a matter of procedure according to Mr Jones. The EJRA panel approached the issue in good faith and was satisfied that a sufficient case had not been made to retain the claimant in employment. That was a matter within their discretion given the material before them, in particular, the Divisional submission which was unchallenged in substance and the claimant's own submission. The decision not to extend was one which was open to a reasonable employer to take.
423. As regards the EJRA Panel unreasonably refused to consider the Galligan decision, this required the panel members to have concluded that the policy was discriminatory but the panel is a creature of the policy. Such an approach to its role was unrealistic. The panel, according to Mr Jones, was obliged to apply the procedure pursuant to which it had been created. It was not for the panel to decide whether it should exist. The University was reasonably entitled to take the view that Dame Janet Smith had exceeded her authority. It is clear that on the issue jurisdiction, senior and experienced judges have differed.

424. In relation to Dr Goss's involvement on the panel, there was no evidence that his assessment of the criteria was in some way tainted or partial. The material before the panel was largely uncontested and provided more than adequate grounds for the decision.
425. We have come to the conclusion that in relation to the claimant's assertion that the threshold was unusually high or unreasonably difficult to meet, we do not agree with this submission. The EJRA Panel had to be satisfied whether to retain the claimant would be an advantage to the University's aims and objectives. That the proportion of successful applicants was low, we would agree with Mr Islam-Choudhury. However, during the first 3 years following its implementation, a significantly high percentage of applications was successful. The University has resolved to provide training on the application of the policy and on the extension provisions.
426. In relation to those statements referred to by Mr Islam-Choudhury as indicative of the subjective assessment of the extension provisions, the claimant did not request clarification on how they were to be applied in his case. His application was detailed and covered the matters the EJRA Panel had to consider. At the panel hearing he focussed on the Galligan decision and read out a statement contending that the policy was age discriminatory and unlawful.
427. There was no evidence before us that the University had engaged in "cherry picking" applicants and there was no suggestion that those who were successful had not benefited the University. Even the claimant acknowledged that the University was not short of Shakespearean scholars. It had to decide in relation to set criteria. The Faculty and Division were best placed to determine the value of an applicant's contribution to the University and whether he should be retained. It had not been suggested that they were influenced by any ulterior motives or prejudices towards the claimant. Quite the contrary, his particular expertise was acknowledged but they had to have regard to the considerations as set out in the EJRA policy.
428. The fact that Dame Janet Smith concluded in the Galligan case, that the EJRA policy could not be justified and was unlawful, was not a decision that was binding on the University as its genuinely and honestly held view was that Dame Janet Smith had exceeded her authority. There was, therefore, no need to abort EJRA process in the claimant's case, nor was Dr Goss required to step down from his position of chair of the EJRA Panel because he was called to give evidence before Dame Janet Smith.
429. The claimant was not denied an appeal but withdrew from the appeal process following the ruling on jurisdiction by Sir John Goldring who decided the Appeal Court did not have the authority to consider whether the EJRA was discriminatory. (1393 – 1407)
430. We, therefore, have concluded that that claimant's dismissal was not procedurally unfair.

431. As regards the claimant's submission that his dismissal was substantively unfair, he relies on the decision to dismiss being based on an alleged flawed and discriminatory EJRA, therefore, unlawful direct age discrimination. Mr Islam-Choudhury submitted that the principal reason for the claimant's dismissal was that it was deemed that his continued employment did not provide a "clear advantage to the university" and because of "retirement". Further, an assessment of the claimant's application for an extension of employment with the EJRA policy, was based on subjective opinions and not objective facts.
432. We have considered all of the above in our conclusions under the issue of proportionality. We concluded that the EJRA policy is not discriminatory because of age as the University has established justification for the discriminatory treatment. We have also concluded that the claimant was not dismissed because he was unsuccessful in his application but on grounds of retirement being for some other substantial reason.
433. He was given the opportunity of persuading the EJRA Panel that he should be retained in employment. His application was genuinely considered taking into account the views of the Faculty of English and Humanities Division. He was questioned by the panel members. He asserted that the policy was unlawful but this was considered as an issue beyond the panel's remit. He was unsuccessful and was informed of the outcome in writing. He exercised his right of appeal but did not pursue it to an appeal hearing.
434. We do not put ourselves in place of the reasonable employer. Applying the judgment in the case of Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 776, the University's decision not to extend his employment came within the range of reasonable responses. Accordingly, we have come to the conclusion that the claimant's dismissal is not substantively unfair.
435. Having regard to our conclusions, the claimant's claims against the University, of direct age discrimination and unfair dismissal, are not well-founded and are dismissed.

Retirement at 67 years

436. Mr Islam-Choudhury submitted that there is no justification in choosing 67 years for retirement under the EJRA policy and no statistical evidence had been led to why that age had been chosen.
437. We bear in mind the Personnel Committee's report dated 20 May 2011, on maintaining an EJRA. The University stated that there was a discussion on linking the EJRA to the state pension age of 65 at the time. The Continuing Education Board suggested an age greater than the pension age. Age 67 had been chosen as it was after the current normal retirement age in existence at the time and reflected increase in longevity. It was, therefore, suggested that the EJRA be set at 67 years on 30 September immediately preceding the staff member's 68th birthday (1942).

438. In consultation on the EJRA of 67 years as being the right age, 59% of UCU members who responded to the survey supported it. Some were in favour of 65 years but this would have the disadvantage of bringing retirement 2 years earlier than the age under discussion. 67 years represented a sensible balance. Even the claimant at one point, submitted a retirement age 70 years.
439. In Seldon (No.2) if the age range falls within a reasonable range, 67-70 years, it could be considered as appropriate and necessary to have a retirement age of 67 years. The same will apply to the position adopted by the College which we have considered later in this judgment.
440. The selection of age 67 years for retirement, we have concluded is a proportionate means of achieving all the aims relied upon by the University. We also bear in mind that it has increased to 68 years.

Direct age discrimination against the College

441. Mr Islam-Choudhury accepted that the legitimate aims of the College's EJRA are materially identical to those of the University's and referred to his submissions in relation to the University's EJRA except that the College argues "in the context of the distinctive collegiate processes through which the College 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 needs of the College have changed." We will rely on our conclusions above in relation to the College's legitimate aims. We bear in mind that the College will no longer seek to rely on this aim.
442. Lady Hale in Seldon recognised avoiding invidious performance management as a legitimate aim. The College did not wish to invoke performance management on those who are at the senior end of their academic careers. This protects their dignity as recognised in Fuchs.
443. The comparators are Official Fellows, all of whom hold posts jointly with the College and University, aged under 65 years as at 30 September 2016 and to whom the EJRA rule that academics shall normally retire from employment not later than the 30 September immediately preceding his or her 68th birthday, was not applied.
444. We accept that subjecting the claimant to the EJRA procedure was less favourable treatment as the comparators were not required to go through that process as they would be under the retirement age of 67 years.
445. Mr Islam-Choudhury submitted that there was no consultation prior to the introduction of the College's EJRA because what the College wanted, above all, was alignment with the University's EJRA. It had provided no reason why retirement at 67 years was both appropriate and necessary, therefore, it has not proved that it could be justified.
446. He referred to the decision taken by the College on 11 January 2012, to remove the upper age limit for the role of President, which had been 70

years. Appointments to the role would not exceed 10 years which would mean, he submitted, that the College could appoint someone as President well into their 70s, undermining the rationale to impose a retirement age of 67 years.

447. We have already found that the post of President is one of the official positions in the College and is not a joint appointment with the University. It is separate and distinct from the claimant's circumstances. (366a)
448. Mr Islam-Choudhury referred to the lack of statistical data provided by the College and considered the claimant's evidence in relation to the statistics he provided. He stated that from 1980-2012, 44 Official Fellows have left the College, 18 retired at their retirement date. (1864). He submitted this reflected the University's statistics that about 50% of vacancies are created by retirement. This is also true of those at Associate Professor grade.
449. The College did not consider other alternative means of achieving any of the legitimate aims, such as agreement, in place of forced retirement.
450. The College also had no evidence as to why retirement at 67 years of age as opposed to any other age, was appropriate and necessary. 67 years was chosen to enable the College to continue its alignment with the University. If the University had chosen an age of 70 years, it was likely that the College would have done the same. The College, therefore, has not proved that a retirement age of 67 years was independently justified.
451. Ms Motraghi submitted on behalf of the College, that there was no point reinventing the wheel. Many posts are joint appointments with the University and funding from the College is 60% and from the University it is 40%. The University included the Colleges in the consultation exercise. The Colleges are members of the Congregation. The EJRA was proposed and agreed to with limited objections. The Governing Body of the College has no secretariat and limited resources. It made sense to have a combined approach on the issue of retirement following the government's proposal to abolish the DRA by October 2011.
452. She submitted that Professor Grafen told us that each employer has its own EJRA rules and procedure in relation to joint appointments. There has to be effective communication between the College and the University when considering the implications of any decision for the future of a joint post. Most academics would prefer a joint appointment as it allows them to work in the University's intensive research environment with world leading academics, lecturing as well as engaging in tutorials at College. It is desirable to have the same person delivering lectures as well as tutorials. This, therefore, necessitates the alignment of both EJRA's.
453. The College engaged, quite independently of the University, in consultation before finally agreeing the EJRA policy and the extension provisions.
454. We have come to the conclusion that from a practical point of view, it makes sense, particularly in relation to joint appointments, that there should

be correlation in the EJRA between the University and the College. They are jointly funded 60% by the College and 40% by the University.

455. In relation to consultation, the now retired and eminent employment expert, Professor Mark Freedland, the College's former Senior Law Tutor, was on the University's EJRA Working Group. The College is a member of the Conference of Colleges. This body was consulted on the introduction of an EJRA. A working group convened to consider the effects of the abolition of the default retirement age and the possibility of an EJRA. Advice was given by Robin Allen QC, who was counsel on the Seldon case that went to the Supreme Court. Consultation across the collegiate university showed widespread support for the introduction of an EJRA of 67 years. Conference of Colleges agreed that a common approach to the application of the EJRA be taken to strengthen the joint appointments system. The proposed extension procedure would allow for College flexibility in individual cases.
456. During Hilary Term in 2011, the Personnel Committee conducted consultation on a proposal to maintain an EJRA of 67 years for academic and academic-related staff. There was broad support for it. The vast majority of colleges were in favour of maintaining an EJRA for joint appointments and college-only academic staff. Oxford UCU also supported the proposal.
457. Alternatives to an EJRA, such as, offering financial incentives to encourage retirement as in the United States, or increasing the opportunities for promotion, were unaffordable and not an appropriate use of public funds.
458. There were discussions on an EJRA by the College's standing committees, the Governing Body, the General Purposes Committee, and the Statutes Committee, in 2011, before its implementation.
459. The notes of meetings record the outcomes rather than the detailed nature of the discussions.
460. We bear in mind that we are dealing with academics who are independent minded and quite capable of expressing themselves. Indeed, it is difficult to imagine a more independently minded collective of individuals. They are an unlikely group of people to be browbeaten into adopting a particular point of view or a particular position on an issue. This was clearly demonstrated following the disclosure of the Galligan decision, when considerable steps were taken to either halt or suspend the EJRA. The claimant was actively involved in the movement.
461. Although both the University and the College seem to prefer an EJRA, this was because the alternatives were considered as unaffordable or unworkable. A scheme which allows an academic to discuss and agree his or her date of departure does not provide a fixed date and is dependent on there being an agreement. Redundancy was not an option favoured by many. Staff did not support performance management as a likely

approach. If there was a viable alternative to an EJRA, we are satisfied it would have been discussed and approved.

462. Considerable time and effort went into consultation with opportunities being given to staff to state their views.

Selecting 67 years

463. Although Mr Islam-Choudhury submitted that a retirement age of 70 years would have been less discriminatory on the claimant and on those who are subjected to the EJRA, in Seldon (No.2), the EAT had to consider whether the employment tribunal's judgment that the retirement age of 65 years was appropriate and necessary in order to achieve the legitimate aims. Langstaff J, President, held dismissing the appeal, that the tribunal was entitled to conclude that 65 years "was an appropriate age" and "The issue for the employment tribunal is to determine where the balance lies: the balance between the discriminatory effect of choosing a particular age and its success in achieving the aim held to be legitimate. That balance, like any balance, may not necessarily show that a particular point can be identified as any more or less appropriate than another particular point."
464. Langstaff J further held that identifying a different but slightly later age within the same range does not demonstrate an error of law.
465. The European Court of Justice upheld a retirement age of 65 years, such as in Fuchs and Georgiev.
466. We agree with Ms Motraghi's submissions on the proportionality of the retirement age of 67 years. The College, like other colleges, has to maintain consistency with the University in relation to the retirement age because many academic posts are joint appointments. It would cause difficulties in relation to succession planning if one half of the joint appointment becomes vacant at an earlier date than the other.
467. The College's Governing Body of which the claimant was a member, overwhelmingly supported the EJRA of 67 years knowing that the measure would affect them in due course.
468. The state pension age is currently 65 years applicable to both men and women. From October 2020, this will rise to 66 years. It follows from this that the prospective retiree will not be subjected to the EJRA until 2 years after they are entitled to receive their state pension.
469. For many academics the contractual pension age increased from 65 to 67 years.
470. Those who commenced employment prior to 2011, such as the claimant, could retire at 65 years and claim a pension.
471. Academics have more time to pay into the state and USS pension schemes in order to make reasonable provisions in retirement.

472. On 7 March 2018, the College's EJRA has increased by one year to 68 years. The EJRA has built in flexibility to take into account the views of staff in relation to whether the retirement age should increase.
473. Taking into account the above matters, the age of 67 years is both necessary and appropriate.
474. The claimant also claims that he had been discriminated because of age as set out in paragraph 9.1.2 in the list of issues. He relies on matters pleaded in paragraph 6 of his further particulars of claim dated 12 May 2017. They are, like the University: notice of retirement dated 12 December 2012 from Dr Sobey, paragraph 6a; Professor Snowling informing him on or about 15 October 2015, that should he wish to work beyond the retirement date he would need to make an application under the EJRA, paragraph 6g; in November 2015, he was informed by Professor Grafen that the Founders Fellow terms did not apply, his employment was subject to the EJRA and he had two options, namely retire from his substantive post and apply for an Emeritus Research Fellowship, or retire from his substantive post and continue to hold the position of Founders Fellow along with an ERF, paragraph 6i; the claimant, facing the prospect of being forcibly retired in September 2016, decided to apply for an extension, paragraph 6j; the claimant applied on or around 2 December 2015, paragraph 6l; in Professor Grafen's report dated 16 December 2015, he stated that the outcome of the College application was conditional upon the outcome of the University application and was, therefore, tainted with discrimination, paragraph 6m; Professor Grafen's representations about funding on the basis that the Founders Fellow role would cease before 2020, were flawed and amounted to an act of direct age discrimination, paragraph 6n; any representations made by the University to the College which are found to be discriminatory because of age also tainted the College process with unlawful discrimination, paragraph 6q; the College EJRA Panel, in January 2016, refused to consider whether its process was discriminatory and waited for the outcome of the University's application before informing the claimant of its decision in order to align itself with the University, paragraph 6r; Professor Snowling in evaluating the claimant's performance in the role of Founders Fellow on 10 March 2016, did so because of the claimant's age and was an act of direct age discrimination that cannot be justified, paragraph 6t; reliance on the University's refusal to extend the claimant's employment, tainted the College's decision with unlawful discrimination, paragraph 6u; the EJRA Panel's recommendation to the Governing Body in March 2016, that the claimant's application be refused, was an unjustifiable act of direct age discrimination, paragraph 6v; and the Governing Body's decision on 20 April 2016, not to extend the claimant's employment was an unjustifiable act of direct age discrimination, paragraph 6w. (52-57)
475. In relation to paragraph 6a above, the letter sent by Professor Sobey was a generic letter to the claimant and his colleagues informing them of the contractual changes following the implementation of the EJRA and the extension provisions. The claimant was directed to the College's website for further information. The claimant was formally notified of his retirement

date by Professor Snowling on 15 October 2015. Although this was not in accordance with the policy in terms of the length of notice, being 18 months, the claimant was given additional time to 16 November 2015 to apply for an extension.

476. We have come to the conclusion that notifying the claimant on 15 October 2015 was an oversight on the part of the College and was not an act of direct age discrimination.
477. As regards paragraph 6g, the College was advising the claimant on the extension provisions which we have found was proportionate and justified age discrimination.
478. In paragraph 6i, the claimant alleged that the College reneged on the agreement that he had allegedly been appointed as Founders Fellow until 2020. He stated that he was offered two options and that his treatment amounted to direct age discrimination. We found that the Founders Fellow post would only continue if both the University and the College approved his extension request and there was a satisfactory evaluation of his performance. The College did not renege in any way as those were the terms approved by the Governing Body on 11 July 2014. It was not his substantive post and the evidence was that there was not enough work for it to be considered a full-time position.
479. Paragraphs 6j and 6l are not acts of direct age discrimination as the claimant was following the College's EJRA extension provisions.
480. In relation to paragraph 6m, Professor Grafen stated in his report dated 16 December 2015, that it was possible that the University may approve the claimant's application and, if so, the claimant would have to amend his College application on academic grounds, meaning that he had to change from a bespoke Founders Fellow role which did not require him to engage teaching, to an academic and teaching role. The difficulty for the College was the claimant had based his application, in large part, on continuing in his Founders Fellow role. It was bespoke as it was not academic unlike his substantive role in the College as Tutor in English.
481. As regards paragraph 6n, the College's genuinely held belief was that there was not enough work for the claimant to engage in as Founders Fellow because of the role of the Director of Development and Alumni Relations. If anything, he would have only been required to carry out that role one day a week and it was highly likely that it may cease to exist by 2020.
482. In relation to paragraph 6q, we have concluded that the University had not discriminated against the claimant because of age.
483. The refusal to consider whether the EJRA was discriminatory because of age was a decision it was entitled to make. The College was not bound by the decision of the University Appeal Panel. The EJRA Panel is part of the College's internal mechanism and not a court. The College was waiting for the outcome of the University process as the policy requires it to. There is a

slight illogicality in the claimant's arguments. On the one hand he argues that the College aligned itself to the University, and on the other hand, it should have distanced itself from the University's decision not to follow Galligan. The College, in our view, considered the claimant's bespoke application and in doing so, it was not influenced by the University's decisions. We also bear in mind that if the claimant's University application was granted, Professor Grafen was prepared to allow him to amend his application to take into account academic matters. We do take into account that the EJRA Panel did also consider the application in relation to the claimant's substantive Official Fellow role. Our findings of fact do not support the claimant's assertions in paragraph 6r.

484. The claimant's allegation in paragraph 6t is that Professor Snowling's decision in her letter dated 10 March 2016, to evaluate him in the Founders Fellow role, was an act of direct age discrimination. We do not agree. Professor Snowling stated that the evaluation was in line with the decision of the Governing Body on 11 July 2014 and was not her initiative. It is clear from the EJRA Panel's decision that the claimant was made aware that the College did not see the Founders Fellow role as adding value to its work.
485. In relation to paragraph 6u, we conclude that the College did not rely on the outcome of the University's decision when it considered the claimant's application as it took into account matters pertinent to the claimant's work as an Official Fellow and as Founders Fellow. Both positions were not under the direct control of the University. In addition, we have found that the treatment of the claimant by the University could be justified.
486. As regards paragraph 6v, the decision of the EJRA Panel to recommend to the Governing Body in March 2016, that the claimant's application be refused as an unjustifiable act of age discrimination, we have already concluded that the EJRA policy and extension provisions are proportionate. There was no finding that in recommending to the Governing Body that the application be refused, that it was based on age or on the claimant's age. The EJRA Panel took into account those the matters under the extension provisions it was required to do.
487. There was no finding that the Governing Body's decision to refuse the claimant's application was based on his age but having regard to the EJRA Panel's decision, paragraph 6w. The basis of the claimant's application was based on his Founders Fellow although the College considered his Official Fellow role in refusing to extend his employment.

Unfair dismissal claim against the College

488. In relation to the claimant's unfair dismissal claim against the College, we have already concluded that the reason for his dismissal was some other substantial reason, namely retirement.
489. In relation to procedural unfairness, Mr Islam-Choudhury repeated the alleged subjective aspects of the EJRA extension provisions set out in the College's By-law. He referred to such matters as "that the detriment to the

furtherance of the aims of the EJRA would not be offset by a balance of advantage arising from an extension of employment”; “significant contribution to the College”; what makes loss of claimant’s contribution as “unacceptable to the College”; and would the employee’s “contribution” be “unusually hard” to replace. (273i)

490. In addition, how was the claimant or an applicant expected to know “future academic needs” and there is no guidance on “likely impact” and “opportunity” in the 4th and 6th bullet points. (273i)
491. He repeated what Dame Janet Smith said that the extension provisions allow the College to “cherry pick” who it wants to retain. It was neither a reasonable nor a fair way of deciding whether someone’s employment should be terminated. No one had received guidance or training on the application of the EJRA, in particular Professor Batty, who chaired the EJRA Panel and who did not ask Professor Sobey for financial information on how much money the claimant had raised in the 18 months as Founders Fellow. He did not refer to the Director’s job description in which it is stated that the postholder had to work alongside, not instead of, the Founders Fellow. Professor Batty discussed the substance of the claimant’s application with Mr Goss on 28 January 2016. (554a – 554f)
492. Mr Islam-Choudhury further submitted that the College should have suspended the process in light of the Galligan decision. The claimant raised a grievance on 15 January 2016, alleging that the EJRA policy was discriminatory. In interviews, the President and Professor Parker, expressed opinions to the effect that the lawfulness of the EJRA was far from certain. This should have led, according to Mr Islam-Choudhury, to Professor Batty, staying the EJRA process.
493. He further submitted that Professor Batty was at the General Purposes Committee meeting on 3 February 2016 along with the President and Professor Grafen. The committee resolved to set up an EJRA review panel with a wide remit to look at the validity of the EJRA. This was only two weeks after the claimant had raised a grievance about its legality and just a week after he had complained to the EJRA Panel that the EJRA policy was discriminatory. Mr Islam-Choudhury submitted that no reasonable employer, having resolved to conduct a substantive review of the EJRA, would have continued to apply it to the claimant in face of his objections. Even the legal advice obtained by the panel suggested that the lawfulness of the EJRA process was unclear and, therefore, should have been suspended.
494. He also submitted that the College chose not to call Ms Jane McNeill QC, to challenge her decision at the appeal stage that she had no jurisdiction to consider the lawfulness of the College’s EJRA. Accordingly, the claimant was denied the opportunity of pursuing an appeal. The appeal panel had the power to determine the lawfulness of By-law XL1 whether it is discriminatory or not.
495. Taking all these points into account, Mr Islam-Choudhury submitted that the claimant’s dismissal was procedurally unfair.

496. In relation to substantive unfairness, he relies on the alleged flawed and discriminatory EJRA and that the principal reason for the claimant's dismissal was that he was unsuccessful in his application for an extension and not because of retirement.
497. Ms Motraghi submitted that the College's EJRA By-law is justified as a proportionate means of achieving a legitimate aim. It required a policy of compulsory retirement. An exception is made to the normal process as part and parcel of that By-law. The panel had to take into account, in reaching its decision, the considerations as set out. It was envisaged that some applicants would receive an extension where the balance of advantage lay in their favour and some would not satisfy the requirements. It did not mean that the College was engaged in "cherry picking" or doing so in a manner that was unlawful. The decision was ultimately that of the College through the ERJA Panel and the decision of the Governing Body. This did not make the tests subjective.
498. Ms Motraghi referred to the re-amended particulars of claim, and came to the contrary conclusion, namely that claimant's dismissal was not procedurally unfair.
499. In relation to substantive unfairness, she submitted that the College's EJRA policy is objectively justified, therefore, the claimant's claim that his dismissal was substantively unfair is without merit. Even the extension provisions can be justified. The reason for the claimant's dismissal, Ms Motraghi submitted, was some other substantial reason, that being retirement. A fair procedure was followed and the claimant did not continue with his appeal.
500. In relation to the Galligan case, this was not a decision of the College and it was not appropriate for the College to abdicate its decision making role to follow a decision made in another case by another institution. The appropriateness or otherwise of considering the lawfulness of the College's EJRA and extension provisions were for Ms Jane McNeill QC to hear and determine, who was properly appointed to chair the appeal process. She concluded that it was not her function to rule on the issue of the lawfulness of the College's EJRA policy. Accordingly, the claimant was neither procedurally nor substantively unfairly dismissed.
501. For essentially the same reasons we have given in respect of the unfair dismissal claim against the University, we rely on them here as against the College. We have come to the conclusion that the claimant was not unfairly dismissed, either procedurally or substantively by the College.

The issue of evidence

502. The EJRA's of both respondents have been in operation for seven years. By the date of their decision not to extend the claimant's employment, the EJRA had been in force for nearly five years. To expect real and significant change during that time, in our view, would be unrealistic. The under

representation of women, BAME, and those with disabilities, just to name a few groups with protected characteristics, has been the result of past practices going back many decades. Change will take time. An example is the 2 years extension of retirement date from 65 to 67 which meant that there was unlikely to be a large number of people retiring during the five years leading up to the decision on the claimant's application.

503. In relation to gender diversity, in 2010, 85.2% of academic staff aged between 60-64 were men and of the academic staff older than 64, 90.2% were also men. To achieve an acceptable proportion in relation to gender diversity, will take time. (1996)
504. The extension provisions in the initial three years resulted in a substantial number of applicants, mainly men, being successful. This had the effect of extending their employment. It meant that vacancies which would have been used to achieve the legitimate aims, were delayed until their eventual retirement.
505. The EJRA age has been raised to 68 years with the effect of delaying process of diversifying the work force.
506. Even with the EJRA in place the turnover is low.
507. In the case of Cockram, employment tribunals must be slow to look for evidence that the necessary and appropriate means are achieving the legitimate aims where the recently implemented scheme or policy had not had time to take effect. This is very much the position in this case. Achieving the legitimate aims by the EJRA and the extension provisions will take time. The University and the College want their academic and academic-related staff to be more reflective of society as a whole taking into account demographic changes over the years.
508. In this case, it was never stated that the aims would be quickly fulfilled once the EJRA policies were in force. The University Working Party recognised that the EJRA would take time to demonstrate achievement of the aims and even then, it would not be a straightforward exercise to pinpoint the causal effects from the statistics. (2461)
509. It is, however, important that the University and the College review whether the aims are still relevant and whether their EJRA policies are substantially contributing to their achievement.

Out of time

510. We heard little in the way of submissions on the out of time issue with regard to direct age discrimination. We have come to the conclusion that all of the acts relied upon by the claimant were integral to the respondents' EJRA policies and extension procedures leading to his eventual termination of employment on 30 September 2016. They form "conduct extending over a period" and are in time, section 123(3)(a) Equality Act 2010.

511. The provisional remedy hearing listed for 27-28 June 2019, is vacated.

Employment Judge Bedeau

Date: ...16 May 2019.....

Sent to the parties on: ...16 May 2019..

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For the Tribunal Office