

EJRA, what are the options?

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The history of discrimination and prejudice is littered with practices based on irrational fears and justified by specious arguments. Discrimination often persists simply because “it has always been this way”. The familiarity of the practice lends it a semblance of acceptability. The justifications have not been challenged and the practices continued because those in power could maintain the *status quo*. The discriminated group, even in an ostensibly democratic system, could not bring about change either because they lacked sufficient influence as a minority or because the majority did not care sufficiently about the injustice since it did not affect them directly. Discrimination on the basis of age was outlawed by the Equality Act in 2010. The law identified a set of characteristics that would be protected from being used as a basis for discrimination in employment e.g. race, gender, sexual orientation, and disability. Age is explicitly included as a “protected characteristic”, thus challenging the long-standing and “accepted” custom of compulsory retirement at a fixed age. The law, however, includes the proviso that an employer may discriminate on the basis of age if such discrimination can be justified in the pursuit of legitimate aims. This qualification was designed sensibly, and primarily, to enable an employer to enforce retirement if age rendered employees less able to perform the work or to contribute to achieving certain aims of the enterprise. Unfortunately such qualifications are often exploited as loopholes by those in power to maintain the *status quo* and to continue unlawful discriminatory practices based on false premises and weak arguments protected by abuse of power.

What, you may ask, has all this to do with options for the EJRA at Oxford? Precisely this, the lawfulness of the University’s EJRA (Employer Justified Retirement Age) is being questioned. At the first challenge to its legality in the University’s own Appeal Court, in the case of Galligan vs the University (2014), the judge, Dame Janet Smith, found the University’s EJRA procedure to be unlawful, not only in the specific case of the appellant but also in general.¹ The University has not respected the general judgment and concealed its findings from Congregation. It ignored important aspects such as respecting employees’ right to choose their retirement date, continued its age-discriminatory practice of enforced retirement and introduced further age-discrimination by requiring those wishing to extend employment past the EJRA

to supply their own salary and other costs. In response to the judgment it set up a Review Working Group (RWG) to determine the extent to which the policy is meeting its aims *and therefore can be justified in law*. As I have argued previously, the RWG will be unable to show that the EJRA is meeting its aims because its effect, if there is any, cannot be isolated from all the other factors that affect the achieving of the aims.² In addition, the use of an EJRA to meet two of the principal aims, safeguarding standards and maintaining Oxford’s position as a world-leading institution, is based on the demonstrably false premise that decline in academic performance is correlated with age.³ Furthermore there is a complete lack of objective relevant data to support this premise. As with the other aims Dame Janet Smith ruled that the University “... *must produce evidence and not rely on bare assertion*.”⁴ No evidence has been produced. The argument based on creating opportunities (for younger academics) is similar to that used to justify expelling women from the workforce after World War I and, in the USA after World War II, expelling black workers, especially black women, to make space for white men on the grounds that the posts were “needed” for returning servicemen.⁵

Finally, the only argument that could potentially be supported by data, the effect on diversity e.g. gender, founders on the objective fact that the gender balance in Oxford has not altered significantly since the introduction of the EJRA and remains fixed at the same level as other Universities which do not have mandatory retirement.⁶ In this context Dame Janet Smith pointed out that, “*Unless the diversity promoting benefits to be derived from introducing the EJRA are very significant it does not seem to me to be justifiable to introduce one form of discrimination to combat another.*”⁷

The justifying of discrimination using false premises, with no evidence, and specious arguments is typical of power groups seeking to maintain the *status quo*. Council and the Administration appear to be hoping that the RWG can deliver a report that allows it to retain the EJRA in some form or other. But what are the options? Whatever emerges from the review process any recommendation to Council must fall into one of the following categories;

- (a) *Retain the EJRA in its present form*
- (b) *Modify the current EJRA e.g. by changing the mandatory retirement age*
- (c) *Abandon the EJRA*

Option (a) is surely not viable. The pressure for change will only increase as the queue of active academics facing dismissal lengthens outside the Appeal Court and Employment Tribunals. The financial and reputational cost could become unsustainable, and the repeated expenditure on Appeal Court cases and legal fees could also raise concerns related to the University's charitable status. There is also the very real potential for negative effects on recruitment and retention of world-leading academics. As if these factors are not enough, the State Pension Age is set to rise to 68 creating an anomaly that would particularly hit women who had taken career breaks and so have less University Pension provision.⁸ Furthermore, even on present-day statistical information, Oxford academics dismissed at the EJRA would be forced to spend a sizeable proportion (approximately 30%) of their potential working life unemployed.⁹

The second option of modifying the EJRA faces the same difficulties as the current procedure viz. it would still be based on the false premise and there is no way of analysing the data to show that even a modified procedure could be a proportionate or effective way of achieving the aims. The RWG could, however, consider recommending to Council that the default retirement age (DRA) be either decreased or increased.

The first of these options, reducing the DRA, say to 65 or even lower, would be consistent with Council's "logic". After all, it argues that the current scheme increases diversity, maintains academic standards, etc. by dismissing older staff. If, however, the effect is not seen with an EJRA of 67, and it is not, moving to an even lower age would accelerate the removal of unproductive, white, male, academics and perhaps produce a measurable effect. There is, of course, no guarantee that incoming younger academics will be, on average, any more productive in the longer term than those they replace and it would take a long time to establish this effect from any data. Enforcing retirement at an even younger age, however, clearly moves in the opposite direction to that demanded by the increase in healthy and active life-expectancy, pension considerations and other demographic trends.¹⁰

The other option for a change would be to raise the DRA e.g. from 67 to 70. Council might be attracted to this idea as it would give the appearance of having listened to and accommodated the objectors' concerns. However, apart from the difficulties outlined above of demonstrating the effectiveness of the EJRA, there are at least two further problems with this option. Firstly, since the rate of voluntary retirements increases with age, for a variety of reasons, the number of those wishing to stay beyond 70 is bound to be an even smaller proportion of the workforce. It is worth noting for example that, in respect of improving gender balance, Dame Janet Smith's judgment records that, "*Dr Goss*

(representing the University) accepted, ... that the advantageous effect of having an EJRA (of 67) would be small."¹¹ At 70, the effect would be even smaller and therefore give even less justification for the policy. Secondly, an EJRA of 70 is still age discrimination. Raising the bar slightly is analogous in a racial context to abolishing discrimination based on skin colour but retaining it for *very* black people!

We are therefore left with option (c), abandoning the EJRA. This is not as radical a change as it might seem. After all, we would simply be joining with most employers and all the other UK universities, with the exception of Cambridge and St. Andrews, who seem to have managed perfectly well the transition to not having a DRA. We can easily imagine that all the other institutions would have very similar aims to Oxford's in terms of academic standards, refreshment, diversity, etc. Indeed the "justification" given by St Andrews is almost word-for-word identical to Oxford's, a similarity that is no doubt merely coincidental.¹² Nonetheless, all the other universities, having considered the options, have concluded that they could not lawfully impose an ageist policy of mandatory retirement. Together with the vast majority of employers in government and commerce they are honouring the spirit and letter of the law enshrined in the Equality Act by eschewing age discrimination.

There is, of course, the 'mouse in the room' in the form of performance management masquerading as an elephant. To be fair to Council and the Administration, it is clear that they introduced the EJRA specifically for this reason in response to Congregation's opposition to management procedures that might be used to threaten academic freedom. In this context the justification in terms of standards, refreshment, diversity, etc. begin to look like reasons 'invented' to disguise this underlying reason for introducing the EJRA. Performance management will be presented as the 'only alternative' to the EJRA as a means of getting rid of under-performing aged academics. One should always be suspicious of 'only alternative' arguments and there are a number of answers to such fear-mongering. To begin with, as Dame Janet noted in her examination of the process that led to the introduction of the EJRA, alternatives proposed at the time were not even considered.¹³

The issue is firstly one of management – how to deal with under-performing employees and, secondly, how to manage employees whose performance seems to be affected by advancing age. Here too, the University needs to consider the options. There are well-established procedures, also governed by Employment Law, for dismissal of workers who are found to be incompetent or incapable. It is surely not inconceivable that a group of intelligent people, in one of the best universities in the world, can devise a management process that deals with these problems whilst also building in

protection of academic freedom. Furthermore, the University already offers advice, in line with Government guidelines, on how to deal with staff members not subject to the EJRA and who are experiencing difficulties associated with their age.¹⁴ Is it really not possible to devise similar methods for academic staff? It is also worth noting that according to information gathered under a Freedom of Information request to nine other Russell Group universities, of the five which were able to respond to the relevant question, none reported any problems operating without a retirement age.¹⁵

Finally, can it really be considered good management to dismiss 9 productive workers in order to deal with 1 under-performing colleague? The University's data shows that over 90% of applications for extension beyond the EJRA, under the original regulations, were approved.¹⁶ This figure of 1 in 10 indicates the maximum extent of any under-performance problem. In fact, the "problem" is much smaller than this, since rejection under the original regulations did not necessarily imply underperformance. The 'elephant in the room' therefore is actually of more mouse-like proportions but its shadow is exaggerated by projecting irrational fears from false premises using flawed logic. We need to retain a proper sense of perspective and proportion. The University, however, took the option of revising the original regulations governing extension beyond the EJRA, to significantly reduce the success rate for extension applications and, in so doing, re-enforced the age-discrimination features of the policy.

The EJRA may have been a well-intentioned scheme to address a perceived problem but, as pointed out by our own Appeal Court, it has serious flaws and is unlawful. There are other and more effective ways to achieve the aims that are claimed to justify it. Therefore it cannot be right to persist in discriminating against some of our colleagues simply because of their age. Denying people the dignity and sense of self-worth that comes from their work, for reasons based on prejudice and ignorance, is an affront to decency. When issues can be dealt with by other means there can be no justification for unlawful discrimination.

Abandoning the EJRA has the following benefits: it avoids the high financial and reputational costs of a continuous series of Appeal Court hearings and Employment Tribunals; retains willing, active and successful academics with all their experience and grant-attracting capabilities; ensures the University remains competitive in attracting and retaining world-leading researchers; keeps the University in line with demographic trends; enables young and mid-career academics, especially women, to provide adequate pension provision; and, most of all, removes the moral stain of ageist discrimination.

In conclusion, it seems that the option that is both sensible and morally defensible is to abandon the EJRA.

¹ DJS, Dame Janet Smith in the Appeal Court case Galligan vs The University (2014). The full judgment may be viewed at http://www.oxfordejragroup.net/Content/local/Dame_Janet_Smith_Judgement.PDF

² P.Ewart, "Can the EJRA achieve its aims?" *Oxford Magazine*, No. 378, Eighth Week, Michaelmas Term, 2016; <https://www.ox.ac.uk/sites/files/oxford/Oxford%20Magazine%208th%20week%20Michaelmas%20term%202016%20-%20No%20378.pdf>

³ Quantifying the evolution of individual scientific impact, R. Sinatra et al. *Science*, Vol. 354, Issue 6312, DOI: 10.1126/science.aaf5239

⁴ DJS *op. cit.*, paragraph 6

⁵ See for example, http://www.nationalarchives.gov.uk/pathways/firstworldwar/document_packs/women.htm And for the US experience, K.T. Anderson "Last Hired, First Fired: Black Women Workers during World War II", *The Journal of American History*, Vol. 69, pp. 82-97, (1982), https://www.jstor.org/stable/1887753?seq=16#page_scan_tab_contents, I am grateful to Dr David Steinsaltz, Dept. of Statistics, Oxford, for drawing these instances to my attention.

⁶ [http://www.admin.ox.ac.uk/media/global/wwwadminoxacuk/localsite/equalityanddiversity/documents/psed/University_of_Oxford_Equality_Report_2014-15_Section_B_Staff_data_\[FINAL\].pdf](http://www.admin.ox.ac.uk/media/global/wwwadminoxacuk/localsite/equalityanddiversity/documents/psed/University_of_Oxford_Equality_Report_2014-15_Section_B_Staff_data_[FINAL].pdf)

⁷ DJS *op. cit.*, paragraph 50

⁸ The current State Pension Age for those currently in their 20's is 68 and could potentially rise to 70 within their working lives. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310231/spa-timetable.pdf

⁹ The 30% figure is based on the portion of adult life defined by first academic appointment at, say 25, retirement at 67 and average life-expectancy for men and women of 85. <https://www.gov.uk/government/news/life-expectancy-at-older-ages-is-the-highest-its-ever-been>

¹⁰ D.Steinsaltz, "Will 90 become the new 60?" <http://nautil.us/issue/36/aging/will-90-become-the-new-60>

¹¹ DJS *op. cit.*, paragraph 49

¹² <https://www.st-andrews.ac.uk/media/human-resources/new-policysection-documents/retirementprocess/Retirement%20Policy%20EJRA%20V2%20Feb%202016.pdf>, section 3.

¹³ DJS *op. cit.*, paragraph 32

¹⁴ <https://www.gov.uk/government/publications/employing-olderworkers-an-employer-s-guide-to-today-s-multi-generational-workforce>

¹⁵ Of this, admittedly random sample of universities, only some, having the recorded relevant information, were able to respond regarding the specific issue of management problems; Kings College London, University College London, London School of Economics, Glasgow and York.

¹⁶ https://www.ox.ac.uk/sites/files/oxford/field/field_document/Presentation%20for%20open%20meetings%20-%20for%20website.pdf (page 7)