University of Oxford Appeal Court: Appeal by Professor John Pitcher

Ruling on jurisdiction

Introduction

1. Professor Pitcher is a full-time Associate Professor in conjunction with St. John's College, Oxford. His retirement date, in accordance with the University's "Employer Justified Retirement Age policy (EJRA)," is 30th September 2016. He has sought an extension of four years. A panel appointed by the Personnel Committee considered Professor Pitcher's request. It refused it. He now appeals the panel's decision to the Appeal Court. He submits that as part of the appeal, I have the jurisdiction to consider the lawfulness of the University's EJRA policy. In support of that submission, he relies, in broad terms, on the reasoning of Dame Janet Smith, who, in the case of Professor Denis Galligan, found the Appeal Court's jurisdiction was sufficiently wide for it to consider and rule upon the policy. She found it to be discriminatory on the grounds of age. The University does not accept the Appeal Court has jurisdiction to consider the policy. It submits Dame Janet was not right in that regard; that I am not bound by her decision (which was not appealed).

2. While consistency of approach by this Appeal Court is of course highly desirable, and Dame Janet's decision strongly persuasive, I am not, it seems to me, bound by it. No-one has contended to the contrary. I shall therefore consider the question of jurisdiction afresh.

The University's policy on retirement

3. The Equality Act 2010 came into force on 1st October 2011. It required that dismissal on the ground of retirement based on age had objectively to be justified. In response, the University promulgated its policy on retirement. It did so under University Council Regulations 3 (sic), to which I shall come. Until then, in broad terms, 65 had been the retirement age. I am told that Congregation, the University's ultimate legislative body, has approved the EJRA in principle. Moreover, in 2016 it voted in favour of it. That was in response to a resolution that the EJRA should be suspended.

4. I quote from the policy document:

> "Council has agreed to maintain a retirement age for…academic…staff…primarily to support the University's mission to sustain excellence in teaching, research and administration and to maintain

and develop its historical position as a world class university. (See the Aim of the EJRA)…"

5. The retirement age maintained was 67. The document continued:

"…The EJRA will operate for an initial period of ten years from 1 October 2011. The application and outcomes of the EJRA and its procedures will be reported annually to the Personnel Committee and will be subject to an interim review after five years…

…There is a procedure for considering all requests to work beyond [67]…"

6. The "Aim of EJRA" was described in the following terms:

" The EJRA is considered to provide a proportionate means of

- safeguarding the high standards of the University…
- promoting inter-generational fairness and maintaining opportunities for career progression…
- facilitating succession planning by maintaining predictable retirement dates…
- promoting equality and diversity…
- facilitating flexibility through turnover…
- minimising the impact of staff morale…to manage the expected cuts in public funding….
- ….avoiding invidious performance management and redundancy procedures…"

7. A "Procedure for considering requests to work beyond the…EJRA" was promulgated. In broad terms, it envisaged a request for an extension, ultimately to be considered by a panel. Paragraph 9 of the procedure states:

"All requests to continue working beyond EJRA will be considered by a panel appointed by the Personnel Committee. The panel will assess each request on its own merits *in the context of the aims of the EJRA* [my emphasis] and in the light of any exceptional personal circumstances."

8. The panel's constitution is prescribed. By paragraph 12 of the procedure:

"The panel will consider the request *in the light of the aims of the EJRA* [my emphasis], taking into account where relevant the considerations, set out in

> Section VI…having duly considered the views of the individual staff member, the division, department, college and NHS trust as appropriate…
> 13. Where all 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* [my emphasis]…
> 15. The panel will decide on the request for an extension of employment including the length of time of any such extension. The decision of the panel shall have effect in respect of employment by the University, and the division/department shall act accordingly. In the case of joint appointments, the college will make its decision according to its own regulations and procedures."

9. Professor Pitcher has a joint appointment.

10. Section VI, under the heading "Consideration of requests to work beyond the EJRA" states:

> "It is the policy of the University that academic….staff will have a fixed retirement date in order to support the aim of the EJRA…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* [my emphasis]. The panel will weigh the advantages of extended employment…against the opportunities arising from creating a vacancy or part-vacancy."

11. It is quite plain from the wording above that the jurisdiction of the panel was not intended to extend to consideration of the EJRA policy. On the contrary, the panel is in terms enjoined to consider the case before it in the context of the policy. As I set out in more detail below, it is Mr Islam-Choudhury's submission on behalf of Professor Pitcher, that in the light of Dame Janet's conclusion that the policy was discriminatory, the panel was obliged to consider it.

An appeal from the panel's decision

12. Paragraph 17 of the procedure document, under the heading, "Communicating the decision" states:

> "Where the request to continue working beyond the EJRA is rejected, the individual will be notified in writing of the right of appeal."

13. Section V of the document deals with the appeal. Paragraph 19 provides that the formalities set out in paragraphs 41-2 of Statute XII should apply. Paragraph 20 states that:

> "An appeal may be made against refusal of a request…
>
> 21. The letter of appeal should set out clearly the grounds for appeal.
>
> 22. The appeal will be heard in accordance with the provisions of Statute XII, Part H.

The relevant University Statutes and Regulations

14. In order to understand whether the Appeal Court may consider the legality of the EJRA, it is necessary to consider the relevant University Statutes and Regulations. For, as Ms Prince on behalf of the University submits, the Appeal Court is a creature of University Statute.

The Statutes

15. By Statute 1, section 1, the University is a civil corporation under common law. By Statute IV, Congregation is the ultimate legislative body of the University. Statute IV, paragraphs 2(1) and 2(2) state that:

> "(1) Any resolution passed 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…[Statute VI (sections 1-20), Statute XII and Statute XV] shall not take effect without the approval of Her Majesty in Council."

Statute VI

16. Statute VI concerns Council. Council lies next in line in the governance structure. Paragraphs 1 to 3 deal with Council's "Functions and Powers." By paragraph 1:

> "Council shall be responsible, under the statutes, for the advancement of the University's objects…[and] its administration…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….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…"

17. By paragraph 15:

> "Council shall have the power to make regulations not inconsistent with the statutes."

Statute XI

18. Statute XI is entitled "University Discipline." However, paragraph 7 provides, among other things, for an Appeal Court. Paragraph 17(1) sets out the constitution of the Appeal Court. By paragraph 18(1);

> "The function of the Appeal Court shall be to hear and determine, in accordance with the procedure set out in regulations made under section 20 [of Statute XI]:
> (a) appeals from the Visitatorial Board;
> (b) all other appeals made under Part H of Statute XII…
> (d) other appeals which are designated to be made to the Appeal Court in regulations made by Council.
> (2) In relation to all other appeals made under Part H of Statute XII the Appeal Court shall have the powers laid down in that Part.
> (3)(a) In relation to all other appeals the Appeal Court shall have full power to determine any question of law and of fact, and, in exceptional cases only, to hear evidence.
> (b) The Court may quash or confirm the decision appealed against, or make any order in substitution for it which the tribunal whose order is being appealed could have made."

23. There is disagreement between the University and Professor Pitcher as to the provision under which his case comes to the Appeal Court. The University submits that the appeal comes under section 18(1)(d). For it is an appeal "designated to be made to the Appeal Court in regulations made by Council;" that is to say, paragraph 17 of the EJRA procedure document (see paragraph 12 above). Professor Pitcher submits it comes under section 18(1)(b), as one of "all other appeals made under Part H of Statute XII."

24. Section 20(1) provides that further rules relating to the Student Disciplinary Panel, the Student Appeal Panel and the Appeal Court "in relation to matters

covered by [Statute XI] shall be set out by Council by regulation." By section 20(2), any such rules have to comply with the principles of natural justice.

25. I observe that section 18(3)(b) is on the face of it clear. In proceedings to which section 18 applies, the Appeal Court may not make an order wider than could the tribunal from which the appeal emanates.

Statute XIV

26. I shall take Statute XIV next. It is entitled "Employment of Academic…Staff by the University." By section 1 no University official or employee:

> "…shall have authority, except with the express consent of Council and subject to sections 2-5 of this statute:
> …(3) to dismiss…academic related staff in circumstances other than those which fall within the provisions of Parts B-E of Statute XII…"

27. By sections 3 and 15:

> "3. Any dismissal shall have complied with the appropriate procedures for the dismissal of the member of staff concerned…
> 15. Every employee of the University who is subject to the jurisdiction of the Visitatorial Board under the provisions of Statute XII…shall retire not later than the date applicable to that employee as laid down by Council by regulation."

Statute XII

28. I remind myself that paragraph 20 of the "Procedure for considering requests to work beyond the…EJRA" states that the appeal will be heard in accordance with the provisions of Statute XII, Part H.

29. Statute XII is entitled "Academic Staff and the Visitatorial Board." It is "a Queen-in-Council statute." In other words, it cannot be amended or added to without the approval of Her Majesty (see paragraph 15 above). Statute XII was passed in 1988. At that time dismissals by reason of retirement could not give rise to claims for unfair dismissal.

30. Part A is entitled "Construction, Application and Interpretation." It provides:

"1. This statute and any decree or regulation made under this statute shall be construed in every case to give effect to the following guiding principles, that is to say:

…(3) to apply the principles of justice and fairness.

2. No provision in Part B [redundancy], Part D [discipline], Part E [incapacity on medical grounds], or Part G [removal of the Vice-Chancellor] shall enable any member of staff to be dismissed unless the reason for the dismissal may in the circumstances (including the size and administrative resources of the University) reasonably be treated as a sufficient reason for dismissal."

31. Section 2 reflects what is now the wording of section 98(4) of the Employment Rights Act 1996, which provides that:

"…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends of whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee…"

32. Section 4(1) of Statute XII states:

"In this statute 'dismiss' and 'dismissal' mean dismissal of a member of the academic staff and…include remove, or as the case may be, removal from office…"

33. There is no doubt Professor Pitcher was dismissed.

34. Section 5 sets out the meaning of a "good cause" to justify dismissal of the member of the academic staff. It does not include dismissal on the grounds of retirement.

35. Section 7(1) states that:

"In any case of conflict, the provisions of this statute shall prevail over those of any other statutes and over those of the regulations, and the provisions of any regulation made under this statute shall prevail over those of any other regulation…"

36. Part C deals with the constitution and responsibilities of the Visitatorial Board.

37. Part F deals with "Grievance Procedures." Professor Pitcher has in part advanced his appeal on the basis of a grievance, namely that the EJRA is discriminatory. By section 31(4):

> "If the Vice-Chancellor is satisfied that the subject matter of the grievance could properly be considered with (or form the whole or any part of):
> ….(c) an appeal under Part H,
> he or she shall defer action upon it under this Part until the relevant complaint, determination or appeal has been heard or the time for instituting it has passed…"

38. Part H, section 39 and following, deals with appeals.

> "39. This part establishes procedures for hearing and determining appeals by members of the academic staff who are dismissed or under notice of dismissal or who are otherwise disciplined.
> 40.(1) …Part [H] applies:
> (a) to any appeal against a decision of Council…to dismiss in the exercise of its powers under Part B [for redundancy];
> (b) to any appeal arising in any proceedings…under Part D [misconduct];
> (c) to any appeal against dismissal otherwise than in pursuance of Part B [redundancy], D [misconduct], E [medical grounds] or G [removal of the Vice-Chancellor];….
> (2) No appeal shall however lie against:
> (a) a decision of Congregation under section 10(2) [redundancy]…
> 43.(1) Where an appeal is instituted under…Part [H], it shall be heard and determined by the Appeal Court constituted under Statute XI…
> 44(1) The procedure to be followed in respect of the…determination of appeals shall be set out in regulations made under this section…
> (3) The Appeal Court may allow or dismiss an appeal in whole or in part and, without prejudice to the foregoing, may:
> (a) remit and an appeal from a decision…[in respect of redundancy] (or any issue arising in the course of such an appeal) to Council as the appropriate body for further consideration…; or
> (b) remit an appeal…[in respect of misconduct] for rehearing or reconsideration…
> (c) remit an appeal…[in respect of medical grounds] for further consideration…

(d) remit an appeal by the Vice-Chancellor…for rehearing or reconsideration
(e) substitute any lesser or alternative penalty [for misconduct]…that would have been open…on the original charges…"

39. As I have said, there was no question in 1988 of Statute XII applying to dismissals by reason of retirement. It was only the Equality Act 2010 that prohibited dismissal on the ground of retirement unless objectively justified. There is a dispute between the University and Professor Pitcher as to whether its introduction increased the scope of Statute XII so as to encompass dismissal by reason of retirement.

40. Statute XVII concerns "Resolution of Disputes over the Interpretation or Application of Statutes and Regulations." By section 1:

"If a dispute over the interpretation or application of any of these statutes or any regulation arises in the course of proceedings taken under Statute XI [or] Statute XII …it shall be decided, subject to any right of appeal, by the person or tribunal before whom the proceedings are taking place."

The Regulations

Council Regulations 3 of 2004

41. These obviously originally pre-dated the EJRA. They were subsequently amended to reflect the EJRA. By regulations 2 and 7:

"2. Terms and conditions of employment for all staff shall be as determined from time to time by the Personnel Committee, having regard to the University's Equal Opportunities Policy and Race Equality Policy…
7(1) Every employee of the University specified in section 15 of Statute XIV [paragraph 26 above] shall normally retire from employment not later than the 30 September immediately preceding his or her 68th birthday…
(3) Council may make arrangements to provide for the continued employment in special cases of a person who wishes to remain in the employment of the University and whose services for the University it desires to retain."

42. As I have indicated, the University's EJRA policy was promulgated under Council Regulations 3.

Council Regulations 5 of 2006

43. These are the "Regulations for Appeals to the Appeal Court." By regulation 1.1, they are said to apply:

> "…to the conduct of all appeals to the Appeal Court as mentioned in section 18(1) of Statute XI." (See paragraphs 18-25 above)

44. By paragraph 3.1(1):

> "The powers of the [Appeal] Court in respect of appeals made against decisions of the Visitatorial Board and other appeals arising under Part H of Statute XII are specified in section 40 of that statute.
> (2) In these appeals the Court may make any of the orders mentioned in section 44(3) of that statute." (See paragraph 30 above)

The statutory background

45. I next turn to the general law of England and Wales. It of course applies to the University as it does to any employer. As I have said, the Equality Act 2010 requires that dismissal on the ground of retirement based on age has objectively to be justified. There is no dispute but that that was the basis of Professor Pitcher's dismissal.

46. My attention has been drawn to the ACAS Code of Practice on disciplinary and grievance procedures. Mr Islam-Choudhury has particularly drawn my attention to the possibility of an award being increased by up to 25% if an Employment Tribunal feels an employer has unreasonably failed to follow the ACAS statutory Code of Practice on discipline and grievance. I have seen and read the Guidance for Employers on "Working without the default retirement age." Much of that Guidance does not deal with the application of EJRA at all. As to EJRA it states, among other things:

> "…The justification of a set retirement age will be particularly important in the event that such a policy is challenged in an employment tribunal…
> …The test of objective justification is not an easy one to pass…
> …Employers should also follow a fair procedure in retiring people at the compulsory retirement age…"

The relevant facts for present purposes

The panel's decision

47. On 4 June 2014 Professor West, the head of the Humanities Division wrote to Professor Pitcher, "to remind him" that his date of retirement "will be 30 September 2016." She set out the option of requesting to continue to work. She stated that "if you do not successfully request an extension…your employment…will terminate on 30 September 2016."

48. The panel considered Professor Pitcher's case on 26 January 2016. It promulgated its decision on 3 March 2016. As to its jurisdiction to consider the lawfulness of the EJRA policy in the light of Dame Janet's decision, it stated:

> "The panel considered the substance of your case in accordance with the Considerations set out in section VI of the EJRA procedures in place… and in the context of the Aims. It noted the concerns you expressed about the lawfulness of the EJRA policy and procedure, in the light of [Dame Janet Smith's]…Appeal Court decision from which you quoted, but did not consider that addressing these points lay within its remit, which was to consider your application in the context of the procedure…"

Professor Pitcher's grounds of appeal

49. The grounds of appeal submit that the EJRA "is discriminatory on the grounds of age." The appeal panel "fell into a fatal error by stating that the validity of the EJRA was outside of (sic) its remit;" that by seeking to implement the EJRA policy in the face of Dame Janet's finding was discriminatory. The University was in breach of its own governance rules. The grounds further submit that the refusal of the panel to consider age discrimination was itself an act of age discrimination.

Professor Pitcher's argument

50. I have carefully considered all of Mr Islam-Choudhury's submissions on behalf of Professor Pitcher. I shall try and encapsulate some of them in my own words.

51. The legislative framework, which now incorporates protection against dismissal on the ground of age, is of great importance and applies to the University. The burden on the University to avoid discrimination on the grounds of age is heavy. The Appeal Court should interpret the Statutes of the University in such a way as to give effect to the legislative framework.

52. As Dame Janet Smith said, there is every advantage in this Appeal Court, rather than an Employment Tribunal dealing with the case.

53. This appeal falls within Statute XI, paragraph 18(1)(b). It is an "other appeal" made under Part H of Statute XII. It is an appeal against dismissal "otherwise" than under the specific grounds set out in section 40(1)(c). That provides a stand-alone basis of appeal irrespective of Regulation 3 and the EJRA policy guidance. That being so, all the provisions of Statute XII come into play. Section 1(3) requires the Appeal Court to apply the principles of justice and fairness. Justice and fairness, when read against the statutory framework, require that the University provide an effective mechanism to challenge a possible discriminatory and unlawful policy. Section 2 in terms reflects the statutory background. Section 44(3) provides the court with an unfettered discretion to determine the appeal on any basis. Section 7(1) provides that in the case of conflict, the provisions of Statute XII override the regulations. The policy made under Regulation 3, paragraph 7 must be read subject to the requirements of Statute XII.

54. Moreover, Statute XVII provides the Appeal Court with the jurisdiction to interpret the correct scope of the appeal.

55. In short, therefore, Professor Pitcher's dismissal was on the basis of an unlawful and discriminatory policy (as Dame Janet Smith has found); he has an unfettered right to appeal; I have unfettered jurisdiction to hear the appeal; the University Statutes should be interpreted in the light of the general statutory background; there is everything to be said for the Appeal Court dealing with this matter as opposed to an Employment Tribunal (not least from Professor Pitcher's point of view and the avoidance on the part of the University of a possible penalty). Ultimately, it would be unreasonable and unfair for Professor Pitcher not to be able to challenge the lawfulness of the EJRA policy when another Court of Appeal has found to the contrary; that I should not depart from Dame Janet Smith's decision without good reason.

My conclusion

56. I am of course very conscious of Dame Janet Smith's decision in Professor Galligan's case. I have anxiously considered it. I am conscious that if at all possible, consistency is important. However, in the final analysis the Appeal

Court is an internal appeal mechanism within the University akin to such a mechanism in a private company. Precedent does not apply. I have to make my own decision. For reasons which I shall set out, that decision is that the Appeal Court does not have the jurisdiction to consider the legality of the EJRA policy. My reasons for so concluding are set out below.

57. First, the Appeal Court is a creature of the University's legislation. It can have no jurisdiction wider than that which the legislation provides. While it is an independent body in the sense that it takes those decisions it is entitled to take independently, it is not a body wholly independent of the University. It is part of an internal University appeal structure in those areas its legislation provides for. Its powers have to be considered in that context.

58. Second, I am told Congregation has approved the EJRA in principle. It has recently confirmed it. Irrespective of that, Council properly reached a decision in respect of the policy. The University ultimately legislated for it under Regulation 3. In doing so, it provided for an aggrieved employee to appeal. It would be surprising, possibly perverse (as Ms Prince suggested), if the University's legislation provided the Appeal Court with the power to review the merits of a University policy incorporated into University legislation in such an appeal. There is nothing in any part of the University's legislation which provides the Appeal Court with such a power of review.

59. Third, I agree with Ms Prince that the appeal in terms comes within section 18(1)(d) of Statute XI (see paragraph 18 above). It is an appeal "designated to be made to the Appeal Court in regulations made by Council." Consequently, it is not an "other appeal" within paragraph 18(1)(b). Paragraph 18(1)(b) does not therefore provide the basis of an appeal under Part H of Statute XII.

60. Fourth, section V of the EJRA procedure document deals with appeals (see paragraph 13 above). Paragraph 22 states that "the appeal will be heard in accordance with the provisions of Statute XII, Part H." It also provides that the formalities set out in paragraphs 41-2 of Statute XII will apply. That, as it seems to me, does no more than adopt the procedure set out in Part H. It does not mean that an appeal which is outside the scope of Statute XII comes within it.

61. Fifth, I do not think that Statute XII can be 'read up' in the way submitted by Mr Islam-Choudhury, whether or not an appeal lies under paragraph 18(1)(b) of Statute XII. Statute XII was passed in 1988. It plainly could not then have been intended to apply to retirement dismissals. Retirement was and is in terms dealt with by Statute XIV, section 15 (see paragraphs 26 and 27 above). It does not seem to me that the change in the statutory background means that the scope of Statute XII must now be read in such a way as to give rise to an appeal on the grounds of retirement, whether or not on the basis of a stand-alone appeal. The Statute has not been amended. Such a reading would have substantial and surprising implications. It would mean, that, unlike in cases of redundancy, the Appeal Court could decide in each case before it whether the EJRA policy was objectively justified. It would be adjudicating upon and possibly effectively defeating the policy on which the University had (rightly or wrongly) decided and upon which, as happened at least in the present case, the panel decided the case. Moreover, section 5 of Statute XII (paragraph 34 above) requires that dismissal may only be for defined "good cause[s]." They do not include retirement. A 'reading up' of the Statute would require the addition of dismissal on the basis of retirement as such a cause.

62. In my view Statute XII encompasses dismissals on the ground of retirement only in the narrow terms provided for by the EJRA provisions on appeal in the way I have described. There is no conflict between Statute XII and Regulation 3.

63. Sixth, the wording of paragraph 21 of the EJRA appeal procedure suggests the appeal is limited to the refusal of the request, not the lawfulness of the policy. The powers of the panel are in terms circumscribed. It did not have the power to consider the lawfulness of the EJRA policy. That is so in spite of Dame Janet's decision.

64. It is, as it seems to me, axiomatic, that in the absence of an express provision to the contrary, an Appeal Court cannot consider and dispose of a case on a basis expressly forbidden to the tribunal at first instance. Mr Islam-Choudhury has not drawn my attention to any such case. There is no such provision here. Moreover, although not determinative of the issue, section 18(3)(b) (paragraphs 18 and 25 above) makes clear that in any appeal under section 18, the appeal body can only make an order which the tribunal below could make. That hardly suggests the appeal body is intended to have a wider jurisdiction than the tribunal below.

65. In short, it is my view that the panel could not consider the EJRA policy. The Appeal Court is similarly constrained.

66. Seventh, while I understand why there is considerable attraction in the Appeal Court, as opposed to an Employment Tribunal, deciding the issue of the lawfulness of the EJRA, if it is not open to the Court to do so, it cannot.

A final observation

67. In the final analysis, it seems to me the University legislation contemplates what is a coherent process. First the University decides its policy. Second, the panel considers in the individual case whether the policy is being properly applied. Third, the Appeal Court decides whether the panel was correct. The Appeal Court is the ultimate arbiter of the correct application of the policy. It is not the ultimate arbiter of the correctness of the policy in the first place.

John Goldring
14 September 2016