Reforming the EJRA

DAVID PALFREYMAN

The University invented the EJRA back in 2011, and almost all colleges – perhaps with hindsight too slavishly or naively – copied its template into their ByLaws. By 2014 over 30 applications appear to have been lodged by academics wanting to stay on after 67, of which the majority were approved. It is reasonable to assume that successful applications were those recommended in pre-negotiations with departmental management.

In 2014 Professor Galligan appealed the refusal of his application, a process involving the University's internal 'Court of Appeal' and a distinguished senior judge, recently retired from the real Court of Appeal. First the judge had to decide whether, despite the University's resistence, Galligan should be allowed to question the entire EJRA concept: yes, he could, it was ruled (March, 2014). Then came the detailed challenge, and he won his appeal (September, 2014). The University would not release the judgement so that Galligan could merely summarize the findings in an article in *Oxford Magazine* (No.355, 0th Week, HT 2015).

The colleges in particular were put in a difficult position: the University did not inform them about the content of the judgement, even though they were meant to operate the same template. Another consequence was that for two years academics subsequently reaching retirement age were being dealt with under a questionable EJRA process in ignorance of the arguments delivered by the judge and under basically the original rules of procedure, but which were due to be considered by a Review Committee set to report in early 2017 with a view to reform. The meeting of Congregation on the EJRA last Trinity Term (in which it was unsuccessfully proposed that the EJRA process be suspended pending the review, which itself might be brought forward) was fatally undermined due to the fact that access to the appeal documentation was still denied to members of Congregation, the supreme legislative body of the University. In July a second EJRA appeal appears to have taken place and it is believed that a second judge has ruled that the earlier judgement should be released. Meanwhile the legal costs to the University are mounting, and who knows what further legal challenges.

The 2014 judgement leaves the EJRA with precious little credibility, and calls it into question on a matter of principle. Its elaborate procedures have 'flaws' (one thinks of the potential for patronage in particular), and are likely to produce decisions about colleagues that are 'fundamentally unacceptable' and that could 'never amount to a potentially fair reason for dismissal' – and indeed may well amount to an 'inevitably unfair dismissal'. To be clear – the Equality Act 2010 makes it illegal for an employer to discriminate on age by having compulsory retirement unless an age (here 67) can be "objectively justified". Rejecting the request of academics to continue beyond 67 is a dismissal; they are being sacked – and for two years the University has continued to sack our colleagues despite having good cause to think that its EJRA probably is not objectively justified, as required by the Act. That kind of behaviour, I trust, would never occur in any Oxford college.

In her appeal ruling the judge declared, *inter alia*: that she 'cannot wholly accept the logic of the University's case for the EJRA'; that the University 'has tended to overplay [the] importance' of the alleged 'intergenerational fairness' purported justification; that the University's argument for 'succession planning' may well be a sound justification for an EJRA but not necessarily one of 67; that the justification on the basis of 'diversity' was 'very slight'; that the University really can't 'pray in aid' its problems with implementing 'performance management' since it had no evidence anyway that the performance of its academics declines with age; that Oxford's complex joint-appointment approach to academic staffing cannot be used for objective justification of the EJRA (and indeed, from what one picks up is happening elsewhere across the Univesity, there is anyway now good reason to think that the joint-appointment idea and ideal of the College-end of the job disappearing if the University-end is terminated, and *vice versa*, is no longer operational, and in fact has always been of doubtful legal status); that, even if an EJRA were conceptually credible, the selected age of 67 'seems low' given that it was 67 in the 1960s; and that, all in all, the University failed to give 'in-depth consideration of the principles' of the EJRA and was 'illogical' in parts of its thinking, which 'left much to be desired'.

In short, the learned judge concluded, in upholding Professor Galligan's appeal against dismissal, that the University of Oxford's EJRA can't be 'objectively justified' : this means by implication that the colleges' EJRAs must also be of dubious legality. And, moreover, that the flawed procedure used under the EJRA in extending employment beyond 67 for some and not others 'does not assist in the justification' and indeed may well 'undermine the whole purpose of having the EJRA' (even if it were credible in principle).

* * *

The wisdom of operating any form of EJRA becomes the fundamental question. As far as is known all English universities other than Oxford and Cambridge (like most companies and the civil service) operate what is in effect a retirement age by means of "performance management" procedures backed up by generous pay offs and "early retirement schemes". Oxford needs to operate as fair and as open a set of retirement procedures as possible and in this respect an EJRA is perhaps much to be preferred over the managerial box-ticking procedures used elsewhere. Indeed if performance management procedures were to be employed in Oxford the Act would require *all* staff members to be processed in this way at regular intervals!

A potentially fairer and more flexible form of EJRA can be envisaged. Each retirement case should be treated and negotiated on its own merits, carefully balancing the interests of the University against those of the individual, and the process conducted by a neutrally representative, University-wide panel. A flexible variety of types of

"honorary posts" might be created for staff wishing to continue with some of their activities and duties so that their original posts can be freed up for younger academics. Costs to the University can be minimal (especially in the humanities) and the University has much to gain from the possible continuation of teaching from the highly experienced "semi-retired" staff members. A further adjustment would be in the notional retirement age; if the threshold was raised, for example to 70 (as applies as a starting point for negotiation in some US universities), fewer people would appeal; 70 itself would need to be adjusted as life expectancy extends and it gets harder to achieve adequate pension provision.

It is to be hoped that the EJRA Review Committee will consider the widest possible set of options for Congregation to contemplate and will provide cogent justifications for all its recommendations.