1. This is an appeal by Professor Peter Edwards (PE) against the decision of the University not to permit him to remain in his role as Statutory Professor of Inorganic Chemistry. On 11 September 2014 set in motion a process under which the University sought to apply its EJRA Procedure reminding PE of his retirement date as being 30 September 2016 i.e.30 September before PE reached his 68th birthday, and stating that the policy of the University was to have a fixed retirement date for “academic and academic related staff” but if he wished to continue in employment and considered he had a case “such as to justify an exception to the general rule, [he] had the option to make a request to continue to work at the University”. Full details of the Procedure laid down by Council are reproduced in Appendix A.

2. The appeal was heard over three days (9-11 May 2017). The University was represented by of counsel. The appellant was represented by of counsel. The University called as witnesses: . PE gave evidence on his own behalf.

3. The Procedure appended, and putting it briefly for the present, involved an application to an EJRA panel being made on the applicant’s behalf by a head of division following consultation between all interested parties, the panel taking account where relevant of the considerations set out in Section VI, duly considering the views of the individual staff member, the division, department, college and NHS Trust where appropriate, and making a decision on the request for an extension.

4. Just before the process relating to PE was set in motion Dame Janet Smith had ruled in the Oxford Appeal Court in an appeal by Professor Denis Galligan (DG) on issues of principle unrelated to the particular circumstances of DG’s case. first that she did not think on the evidence before her that the policy of imposing retirement at 67 could be objectively justified and second that the extension procedure was “fundamentally unacceptable as a means of deciding whether someone should be dismissed... [saying
also] rejection of an application under this procedure could never amount to a potentially fair reason for dismissal."

5. The University or perhaps more accurately the Council of the University's approach to this ruling on issues of principle has in my view been extremely unsatisfactory. The Council have taken the view that the decision is not a precedent and is "confidential" and is one that they are free to ignore. In so far as it may be said that ultimately some notice was taken of certain aspects of the decision because changes were made to the EJRA policy, those changes took over a year to introduce and in the meanwhile the decision was simply treated as of no effect in relation to persons such as PE and others to whom the University simply applied the EJRA process condemned by Dame Janet.

6. Indeed, the Council have sought not to allow Dame Janet’s reasons to become known to any member of the University and in particular to persons to whom the policy condemned might apply. They have even objected to the reasons being included in the papers to be put before me or any other member of the Appeal Court. That was ultimately not even argued as a legitimate position before me and rightly so.

7. I make clear I am not saying the decision is a precedent binding on future Appeal Courts, nor am I saying that the University simply has to accept the decision, since the decision itself was designed to assist the University in considering how it should approach the question of justifying (if it could) imposing a retirement age. But if a tribunal is set up to consider serious issues relating to employment and other matters at an Institution such as the University and a fortiori if that tribunal (an Appeal Court) is composed of senior or retired senior lawyers it must surely have been contemplated (a) that any decision of one Appeal Court would be of relevance to future Appeal Courts; and (b) that the University would abide by the decision of an Appeal Court until circumstances changed. The reason for that is obvious; it is an important principle of fairness that there should be consistency between the ways in which individuals are dealt with under the same or similar circumstances. Although that does not mean that one Appeal Court must decide the same way as another; before disagreeing with the ruling of another, it ought to have regard to the importance of consistency and be required to give reasons for departure from the previous decision [see North Wiltshire District Council v Secretary of State for the Environment and others [1992] 3 PLR 113]. Furthermore, as it seems to me, until the decision has been reversed or until the policy has been changed, for the same reason the University should be treating the decision as applicable to persons in a similar position to DG, or at the very least it should be open with such persons revealing the decision and explaining the basis on which it would be argued that it was clearly wrong.
If the University accepted at least in part that modifications must be made in order to meet the criticisms in the judgment (as it ultimately did), or that they might be able to go through some process which might provide a basis for overturning the judgment, it could not be fair simply to continue to apply the condemned policy, but nor would it be fair to say the condemned policy was to be applied but then not apply it consistently with the way it had been applied previously.

8. Let me be clear at the outset what in my judgment should have happened both in the light of Dame Janet’s judgment and in the circumstances of PE’s case. First in my view one of the weaknesses in the University’s position in seeking to enforce a retirement age was that the matter had not been debated openly and voted on at Congregation. A vote in favour would not be a complete answer to a challenge but it would be a highly material factor particularly if the points for and against were put forward in a balanced fashion in the context of the change in the law. There is absolutely no reason that I can see why (a) a change in procedure meeting the criticisms of Dame Janet and (b) if a retirement age was to be objectively justified (and Dame Janet’s judgment seems to me to contemplate that some retirement age (she suggests 70) could be justified), the changes and the consideration of imposing a retirement age and indeed what that age should be could not have been brought speedily before Congregation before continuation with an EJRA policy was contemplated. That would have been the right thing to do and I stress not because a change in statutes was involved, which might require consideration by Congregation, but because a balanced debate and vote by Congregation 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. This is a point which evidence was not appreciating. It is also important to stress and I thus repeat that the fact that a policy may be adopted by the University in accordance with its statutes does not automatically mean that the policy is lawful and it is for that reason a decision by Congregation is simply a material factor albeit an important material factor. It would also be a material factor if the procedure for extending the EJRA was altered that members of Congregation supported the extension procedure varied as thought appropriate. If the matter had been taken speedily to Congregation that would have involved only a very limited suspension of the EJRA process.

9. Second if Council wanted further time to consider whether a retirement age could be justified, and what that age should be and/or if they wished further time to consider changes to the procedure, then in a case such as PE they should either have postponed consideration until a new policy was approved by Congregation, or simply extended his
employment while the EJRA was suspended. If they chose to continue with the old policy in the hope that they would actually be able to justify it before a different tribunal, they should have revealed to the person being subjected to the process the existence of her ruling and made clear how they would persuade an Appeal Court to come to a decision different from that of Dame Janet remembering that they would have to treat his case strictly on the basis of that policy and consistently with the way that policy had been followed up to the date of Dame Janet’s judgment unless they gave proper notice of some different approach. It would not be fair to introduce by a back door changes to the procedure which at that stage were not the published policy.

10. As the University chose to continue with the old policy it is convenient to summarise how that policy had been and was being operated. The position so far as extending time for statutory professors was concerned i.e. before the new process came into existence in September 2015 is conveniently set out in the statement of [redacted] for the University (Para 9):

   a. [PE] quotes two sets of figures in his appeal. The first is data sent him on 20 July 2016 (page 794 of the bundle), which confirms that between 2011 and 2015, 31 Statutory Professors or Statutory Professors-elect applied for an extension. 14 were given approval to remain in their Chairs for the period of their extension. 6 of the 14 who were allowed to stay in their Chairs were prospective applications (which have not been allowed since October 2015). ….

   b. It is right to note that a relatively high number of Chairs are permitted to stay on beyond the EJRA. A higher proportion of statutory professors make applications to stay on than other roles and they often have a stronger argument to stay in employment. This is for a variety of reasons, including the fact that they often have large and long-term grants which are of strategic and financial importance for their departments and/or divisions. The research associated with these grants is often well-advanced and would benefit from the continuity of retaining the statutory professor leading it. The grants in themselves will usually also create career opportunities for earlier career researchers. Statutory professors also tend to be suitable for inclusion in the University’s REF census; the income generated from each REF continues for seven years and thus can support early career posts and other important activities for all that time. In the University’s view, this can in some circumstances support a strong argument to allow for short term extensions to enable individuals to contribute to the University’s REF.
This, for example, accounts for a high proportion of those permitted to remain in post in 2013 and the consequentially higher number of retirements in 2014.

c. Of course, we note that there was a period in which a higher proportion of Statutory Professors were not only permitted to remain in employment, but were also allowed to remain in their Chair post-EJRA. Before the EJRA policy was amended in 2015, it would be fair to say that there was less clarity around the expectation that posts would be vacated than there is now. However, in my view it was always the intention that substantive posts would be vacated and this was not effectively managed in the early years of the EJRA. The 2015 EJRA policy has been much clearer on this point and, no doubt partly as a result of that clarity, far fewer Statutory Professors have been permitted to remain in their Chairs. It is very occasionally the case that remaining in the substantive post is permitted, but this is only where there is a particularly strong case for doing so, or no reason for requiring the post to be vacated (for example, because there is absolutely no prospect of that post being filled and therefore no prospect of the EJRA aims being fulfilled).

11. The position of PE was that he fitted the criterion set out in (b) above completely. What is more the facts of his situation were stark because not only was he involved in important projects continuing after his retirement age, the University could not advertise or fill his Statutory Chair until the year 2019 because they lacked suitable accommodation; the post indeed has still not been advertised.

12. His was an obvious case where, applying the 2011 procedure as it had been applied up until Dame Janet’s ruling, his post as statutory professor should have been extended.

13. The chronology of what occurred to bring about a decision that his post should not be extended was as follows:

   a. Dame Janet’s ruling was on 1 September 2014 and the letter starting the process written to PE was on 11 September 2014

   b. In early January 2015 DG wrote an article in the Oxford Magazine [page 483] in which he set out the key findings in the judgment of Dame Janet including her finding that a retirement age of 67 had not been objectively justified and that rejection of an application under the procedure “could never amount to a potentially fair reason for dismissal”. What he suggested was that it was “now time for Congregation, the Sovereign Parliament of the University, to take an
active role in considering how best to proceed. There is no better place to start than to insist that the administration accept the ruling, suspend immediately the EJRA, and jointly with Congregation plan for the future.

c. In the same issue SG also wrote an article in which he stated that her decision was not a precedent and was “binding only in relation to the appeal of the individual concerned”. He explained how the judgment was being considered by the Personnel Committee and how a working group was going to consider (i) whether the aims needed clarifying; (ii) whether changes were needed to the considerations (criteria) for extension to employment; and (iii) whether there should be other procedural changes relating to the process of considering a request for an extension. He said Council had endorsed this plan of action and ended by saying “The current policy remains in effect until such time as it may be changed.” [As I have already made plain in my view DG’s approach was the correct one for the University to adopt. For the University to continue with a policy condemned and which they were reviewing in order to assess whether it needed changing was in my view plainly wrong. But they chose to continue with the old policy and it is on the basis of their choice to do that that PE’s case attacking procedural unfairness needs to be judged].

d. On 16 Feb 2015 PE met and learnt that one part of the selection criteria to be applied to him is that “persons should bring in part/all of his/her salary” and PE protested first on the basis that if such was to be part of selection criteria it should be laid out formally but also questioning how it was right that there should be a distinction between a person who the day before EJRA would not be expected to bring in funds to cover their salary and a person after EJRA who would be. Was that not discrimination on the ground of age? [page 227]. The explanation PE received was that was not sure there were any MPLS guidelines and decisions were being made on developing case law; and what it was down to ultimately was whether it was in the interests of the department/division/University to extend the contract rather than appoint a new person to the position. Inevitably that is a judgment call but one that can be helped by a strong business case. [It is this University interest first approach that had been condemned by Dame Janet and the absence of guidelines is a significant point against the old policy being fair.] also commented that if the
University can justify an EJRA then it can justify treating people differently after retirement age as compared to before.

e. In March 2015 PE wrote an article in the Oxford Magazine making the points (i) that if covering salary was a criteria it should be made clear formally; (ii) that it was unfair that persons post-EJRA should be treated differently in that regard from those pre-EJRA; and (iii) he made a specific request in relation to incomers wishing for a contract to extend beyond age 70 as to whether they went through the EJRA process or whether that process was waived and he wanted to see “success rates” of such applicants as compared to incumbents.

f. He also had a meeting following the writing of that article at the end of March 2015 with evidence said confirmed the old procedure should apply and that is confirmed by internal documents such as and that is why PE was told that any application should be submitted through MPLS Division who would consult the department via before passing it on to the EJRA Panel [page 222]. [The procedure which became effective from 30 September 2015 allowed for an application direct to the ERJA Committee.]

g. PE made his application by letter to by letter dated 9 April 2015 applying to work in his present position as Statutory Chair in Inorganic Chemistry for the period 30 September 2016 to 30 September 2019. Reliance was placed on major aspects of his work such as KACST-attributed Oxford Centre of Excellence in Petrochemicals and the funding of and other colleagues.

h. The letter was copied to for the Chemistry Management Board (CMB). acknowledged and asked if the submissions were final or whether PE was waiting for comments from the CMB. It is unclear why asked that question when under the system PE was not to be sent the comments of the CMB until he requested the same. Also, warned that CMB were finding the position difficult – mixed views were being expressed “about the general principles around the application of the EJRA and the specifics of your case” [page 239]. [The truth is that for those who had to administer the 2011 system it was difficult, because they were being told to apply the old condemned system while changes to meet the criticisms were being considered].
i. There was some interchange between CMB and division in which [redacted] for CMB said how difficult CMB were finding it and in which clarification of the procedure was sought. [redacted] in that context explained how applications come to the division but the department’s view was sought “in relation to the given grounds for consideration as set out in the current EJRA policy. These grounds mainly reflect on intergenerational fairness and whether an extension in some way inhibits opportunities for others (including consideration of diversity issues). It has been the case that extensions have been agreed whereby the substantive post is still released…with the postholder transferring to a new, different contract for a fixed term and fixed purpose (often RS4 roles.) All cases in the division thus far have been transfers to RS4 with specific research activity (grant funded) attached to the job role.” [page 237]

j. At this stage [redacted] wrote on 14 April 2015 to [redacted] “There is a precedent for Chairs to carry on doing research past EJRA, but not as Chairs, simply as Emeritus Professors. I don’t see in Peter’s Case for extension a clear reason why he needs to carry on as Chair, but perhaps the rules of the scheme do not allow for a sideways move of this type.” [page 243]. [redacted] again indicates a lack of any clarity as to precisely what were the conditions on which anyone could obtain an extension under the old rules.]

k. On 15 April 2015 by which time PE must have seen the full judgment of Dame Janet he set out in a letter to [redacted] and members of the CMB by reference to passages of her judgment his objections to the EJRA policy ending with the quotation saying “I do not think that the policy of imposing retirement at 67 can be objectively justified…” [page 247]. [redacted] simply responds that his points are not matters for the CMB. [page 251]

l. On 16 April 2015 PE gave further information as to the work which he wished to continue saying in summary “This is all now coming to fruition but, quite simply, needs more time to fully maximise the advance; hence one of the major reasons for my application.” The PPS to that e-mail is also significant “Again, a further thought. If it does seem likely that we could not appoint my successor until 2018(?)/2019 (for all the reasons we discussed.. space, finance etc), then of course the issue of intergenerational fairness / refreshment etc simply would not arise during my proposed post EJRA period of 2016 to 2019.” [page 250] [It is difficult to see how if there were as there had been decisions to extend the
employs of statutory professors under the old procedure this factor did not make PE’s an *a fortiori* case.

**m.** PE then sought to get [redacted] to sign off a “collaborative EPSRC grant proposal”. [redacted] was consulted and [redacted] was told that although there may have been cases in the past where someone made an application and then made an extension request “divisions have been asked by EJRA panel to ensure that we avoid doing this in the future…” [page 255]. That response is passed to PE who perhaps unsurprisingly responded “I simply don’t understand how all of this tallies with the specific request – put to me … to show the grants that they are bringing to cover part/all of their salary in the application itself.” [page 257] Considerable correspondence ensued with PE making that point. The correspondence included a letter of 8 May to [redacted] making the same point. [redacted] wrote to [redacted] on 17 May “Can you please sort this out so that I can keep one step removed? I told Peter [redacted] that self-funding is not a ‘criterion’ under existing rules, though it clearly helps to reduce the damage to the aims of the EJRA and so has been taken into account as a factor supporting the granting of an extension. We must be clear we have not required it under the old rules…” [page 296]. [This is a very mixed message for those seeking to administer the policy – not a criterion but something that has been taken into account.] Unsurprisingly it seems funding remained a factor and [redacted] wrote to PE on 19 May in response to PE’s concern saying that “salary has to come from somewhere. The problem is that there is no obvious money available in Chemistry to pay for a post EJRA position…. Therefore, I suggest you talk with [redacted] and the CMB about how this contribution might add up to some role post retirement to allow you to address the needs of your research programmes in a sensible fashion. However, the space needs and other … priorities may prevent them providing support, even with the money you are bringing in.” [page 298] This response caused PE to counter with a letter dated 20 May to [redacted] [redacted] copied to [redacted] [page 306] protesting at the procedure being adopted.

**n.** In the meanwhile, the CMB had been completing their report to the MPLS Division on PE’s application for an extension. The final version is dated 13 May 2015. It did not support an extension of his statutory professorship. It considered PE’s application against the points in Paragraph 25 of the old University’s EJRA procedure. It recognised his merits as a “very distinguished scientist”. It recognised the projects with which he had been involved but said “While the
currently funded KOPRC programme is unlikely to continue without [PE’s] leadership, we believe there are others in the department who could lead collaborations on a different basis with KACST in the future, possibly on a more wide-ranging basis involving more members of the department. On the other hand, we can certainly see the merits of [PE] at least completing the period of the current KACST grant to 2018 as Principal Investigator. One way to achieve that might be to appoint [PE] as say “Director of KOPRC” for a two-year period to September 2018, on a fixed term contract possibly part time (although we have not discussed this with him).” [page 292] The report recognised that space would not be available for a new Inorganic Chair until a further building (Hans Krebs II) was opened but as to why PE should not remain in post at least for a period, it simply stated that the department “would like to be able to start laying the groundwork for the replacement appointment. It was on any view negative in its response to various questions in relation to PE’s application.

0. The report was not shown to PE at this stage

p. On 29 May 2015 produced a report on behalf of the division addressed to for the consideration of the panel. [page 311]. It was ultimately re-dated 9 June with some minor amendment [page 368] and
forwarded to [redacted] by [redacted] with PE’s application on 9 June 2015 [page 317]. Its essential recommendation was that an extension as statutory professor should not be granted but that consideration be given to extending PE’s employment in some other role and the letter accordingly concluded by saying “the Division understands that the case for extension must show that the advantage of extended employment is exceptional and sufficient to justify accepting any consequent detriment to the aims of the EJRA” and with the words “I write to confirm that the Division is not able to support [PE] and his application to work beyond EJRA as proposed. Subject to the view of the EJRA Panel, the Division and the Department would welcome exploring some form of extension of employment so that [PE]’s valued contribution in areas where he has the critical leadership, skill and commitment to deliver important objectives can be fully realised.”

q. Personnel Services decided that since PE’s was a contested case there should be a hearing before the panel and on 22 June 2015 [page 372] so informed [redacted] who was to chair the panel.

r. By this stage notice had been given that there would be changes in the EJRA procedure to come into effect later in 2015 and the changes were in fact published on 4 June 2015. No change was made to the EJRA of 67 but so far as the process for obtaining an extension was concerned there were changes to the procedure to take effect from October 2015 summarised by [redacted] in his written submissions as follows: -

i. First, under paragraph 7 [page 12], ‘it is expected that in all but very rare cases, those who hold permanent posts would need, as a minimum, to step out of their current posts into a newly-created, fixed-term post, on a grade appropriate to the duties to be delivered’.

ii. Secondly, under paragraph 8(ii) [page 13], ‘in all but very rare cases, the applicant will have secured grant or other funding to cover their full costs (i.e. including on-costs) while in employment beyond the EJRA’.

iii. Thirdly, under paragraph 17(iii) [page 14], the Head of Department would be expected to confirm ‘that any necessary space, resources and equipment that will be required by the individual will be available if employment continues’.
On 23 June 2015 PE was informed that his application was to be considered by the panel on 3 July and was also informed- “As you may be aware, the views of the Department of Chemistry and the MPLS Division on the details of your proposed extended employment differ from what has been requested by you....” and that as a result he was invited to the meeting in order to state “key points from the case”.[page 376]

He also asked to see documentation setting out the views of the CMB and the MPLS Division [page 375].

The documentation was provided but it seems that it was not originally thought that the CMB’s submission would be sent to the panel [see e-mail to at page 381]. [It is extraordinary that PE should have to ask for documents containing the points against his application, and extraordinary that it should have been contemplated he might not be supplied with the CMB’s submission]

PE did however have some chance to set out a response to the CMB submission and did so in some detail and under considerable pressure of time. PE sent a draft to for to consider. The CMB response was to say views differ and they did not feel it appropriate to comment further. They corrected one factual error in relation to space [see e-mail of 29 June 2015 page 405] and PE’s final response went to the EJRA Panel by a document dated 2 July [pages 414 to 419]

The panel met on 3 July. PE put in further written points including references to Dame Janet’s ruling and the unfairness of the process particularly relating to the requirement whereby an applicant is “apparently expected to bring in salary, plus other costs, … and yet EPSRC applications … cannot be legally submitted unless the applicant has an official contract…” [page 429]. PE’s notes of the hearing would indicate that the panel were not concerned with Dame Janet’s ruling but were of the view they were simply acting under the present rules. According to PE the panel did not seem to be considering whether he should remain in his position as statutory chair which evidence I accept in the light of
their ruling to which I will come. They seemed to understand the “catch 22” situation produced by making it a condition that salary should be covered but applications for grants could not be made.

x. The panel ruled by written ruling dated 15 July 2015 [page 440] finding first “The panel expects that academics will normally as a minimum condition of extension [my underlining] of employment beyond the EJRA, vacate their posts in order to reduce the impact on the Aims”. That language reflects the policy which was to come into effect only on 30 September 2015 but is consistent with PE’s evidence as to the consideration they gave to his case that he should remain as statutory professor. But they held second that “there had been no consultation about alternative ways forward …about [PE]’s desire for an extension of employment, prior to his applying for that extension.” The panel encouraged the parties “to discuss ways in which [PE] might continue his employment in a new, fixed term post (rather than full time in his existing post) in order to reduce the impact of the Aims.” They said nothing about salary having to be covered or who by, albeit it seems internally one at least of the panel thought PE was correct on his point and that the division were applying the new procedure before it had come into effect [see e-mail from [redacted] at page 436]

y. PE then held discussions with [redacted] during which PE was offered as summarised by [redacted] on 2 September 2015 [page 462] an extension of employment on the basis that (i) he transferred to an RS4 contract with primary focus on completing research externally funded under the KOPRC grant (this releases the statutory professorship for potential refilling ahead of the next REF); (ii) the new contract had a two-year duration; (iii) the department to fund salary using KOPRC funds; (iv) salary to be set at level which protects PE’s pension planning; and (v) likely to be part time subject to PE’s pension arrangements. [redacted]

z. PE however came up with what was described as a third option. This contemplated an earlier retirement from the chair but an extension to September 2019 of the RS4 appointment albeit that would be part time. This led to further discussions between the parties particularly relating to space that would be required by PE on into 2019. It also led to meetings being fixed with the EJRA Panel but then postponed. The discussions were not always easy as for example
a letter from PE dated 24 September 2015 [page 529] show but that letter preceded what PE described as a "highly effective meeting" with the panel on 25 September 2015 [page 534] after which it was hoped that and PE would be able to "sort something out based on our discussions"

aa. Still there were problems resolving matters basically relating to space and the difficulties in applying for grants until the EJRA aspect was resolved [see e.g. 8 November 2015 exchange on pages 581 and 582].

bb. The EJRA Panel requested “finalised submission” by 30 November 2015 [page 588] and on 10 November and PE reached a basis for agreement [page 589] and an agreed note was made on 13 November 2015 [page 593] and the content passed to the EJRA Panel by on 16 November 2015.

c. By letter of 26 November 2015 from the ERJA Panel “the request” to appoint PE beyond his retirement age on an RS1V grade, on a 0.8 FTE basis, from 1 Jan 2016 and thereafter for three years beyond his retirement date was approved by the panel. It stated that the new fixed term contract that is issued should specify 30 September 2019 becomes PE’s retirement date under the EJRA.” [page 618].

dd. It took a little time to draw up the formal contract and ultimately that came to PE in the form of an offer of an appointment which “together with the enclosed Statement of Terms and Conditions of Employment…set out the terms and conditions that govern your employment with the University.” [page 638] The terms offered had to be amended to take account of what was now proposed to PE’s retirement age [page 654] and once that amended version had been delivered PE’s position was that (i) he wanted to go through the contract with a lawyer; and (ii) he wanted to discuss things with his line manager [page 656].

e. was fully briefed for the meeting in relation to the whole history and a meeting took place on 28 January 2016. PE’s note of the meeting reflects some attempt to open up issues in relation to the EJRA, but he records “It was clear to me that would not support my earlier efforts to remain in my Statutory Chair in Inorganic Chemistry” [page 679].

ff. There was then a meeting of what is termed the EJRA Working Group on 9 February 2016 and although PE at that stage said he was not going to pull out, he said “major things emerged about how the university behaves in all of this that
led me to hold off signing”. He pointed out that the University have teams of people but that in relation to EJRA applicants it was “happen chance” – thus he said “I heard [yesterday] of Statutory Chairs having contracts until 70 and the like(!).” He wanted the opportunity to clear “all this up and discuss all this with a lawyer colleague”. [pages 689-690]

gg. In the result when PE checked, he was told that there “were a small handful of cases in the past where the EJRA Panel agreed to consider applications from incoming professors who were 60 and above at the time of appointment but this is no longer the case. Even in these cases I do not think it is right to say that the EJRA was waived. Rather, the panel agreed to consider the case at an earlier point in time, namely prior to appointment.” [see e-mail 12 February 2016, page 694].

hh. It seems to have been this discovery which made PE angry [page 698] and decided PE not to sign the contract. Considerable correspondence then ensued relating to PE’s concerns about the ERJA policy [see e.g. his detailed letter to of 1 April 2016 [page 732] and his e-mail to on 14 April 2016 [page 741]] none of which it is necessary to recite in any detail. It ultimately led to him moving a motion before Congregation on 17 May 2016 to suspend the EJRA [page 927] in these terms: -.

"Congregation resolves:

(1) That the EJRA be suspended forthwith pending the publication of the findings of the EJRA Review Committee to all members of the University.

(2) That the EJRA Review Committee now be afforced with at least five members representing and answerable to Congregation.

(3) That the afforced Committee report its findings to Congregation by 1 January 2017.

(4) That Council and all University committees promptly disclose to Congregation all legal advice taken regarding the EJRA.”

14. That motion was defeated by a narrow majority both at Congregation and then in a postal vote. The full details of Dame Janet’s judgment were not shown to members of Congregation and much reliance was placed by those opposing the motion on the fact that there had now been brought in new procedures to take account of that judgment. It cannot therefore be taken as an endorsement of the original procedure for extending the
period of employment policy, but it can be said that there was much debate about a
retirement age and Congregation narrowly seemed to approve of continuing with a policy
with a retirement age of 67.

15. Following defeat of the motion, PE was once again asked to sign the contract he had
been offered and indeed was told by by letter of 30 June 2016 that his employment
would come to an end on 30 September 2016 if he did not sign [page 772]. He ultimately
signed under protest and notified of his intention to appeal to which responded
that if he wanted to appeal he must do so by 9 August 2016. The University have
accepted that they would not take any point on the timing of PE’s notice of appeal and he
duly appealed challenging the lawfulness of the University’s imposition of a retirement
age and challenging the fairness of the procedure applied to him in seeking an
extension.

16. Pausing at this stage to take stock and concentrating for the present on the procedure
adopted without for the present considering fully whether an EJRA of 67 or otherwise
can be objectively justified, it is clear to me that PE was unfairly treated. My reasons are
as follows: -

a. It was wrong for the University to apply a policy which had been condemned by
Dame Janet without at the very least taking the matter to Congregation and
explaining how they could show that she was so wrong that other Appeal Courts
would not be likely to follow her decision. A fortiori it was wrong to do so when
the Personnel Committee were not of the view that the policy did not need
changing but were considering the making of changes to meet the criticisms in
that judgment;

b. Whether the above is right or wrong, if the University decided to continue to
follow the 2011 policy, they had to do so consistently with the way persons had
been treated up until then, albeit the criticisms of Dame Janet would be likely to
apply, unless they gave formal notice that persons were now to be treated
differently. Thus, as had happened if persons who were applying for posts could
gain exemption from the EJRA process so as to be confident that they could
work up until 70, incumbents who had projects to complete should also have
been entitled to extensions. That seems to have been the position before Dame
Janet’s judgment, but was not applied to PE.
c. It was unfair to apply the strictures present in the new procedure put there to meet the criticisms of Dame Janet, before they came into force. The panel’s conclusion that as a “minimum” a different role had to be identified was an example; the requirement that the role should be funded by grants was another, that unfairness being compounded by the difficulty in applying for grants before EJRA consent had been given. Although the panel may not itself have been guilty in applying these last, accepted that applicants in reality did not succeed without the support of their department (in this case through the CMB) or the division and both were applying those strictures.

d. The procedure under which an application could only be made through the division and in which the division took the view of the CMB and incorporated it into its report without the CMB’s report being shown to PE was unfair. It was further unfair that the procedure seems to have been such that the panel appears to have started from the point of view that the division and CMB’s views were to be accepted and it was for the applicant to establish otherwise. in evidence could not think of a situation in which any extension had been granted which had not be supported by the division and the department. The panel were not interested in exploring PE’s case that he wanted to continue in his role as statutory professor; nor was any consideration it seems given to the fact that in PE’s case the statutory professorship was not going to be filled in any event until 2018/9 and there could be very little reason why he should not continue for that period.

e. There seemed to be a lack of clarity as between the persons concerned (the CMB, the division and even the panel) as to precisely what was the correct approach to applying the 2011 principles in PE’s case, and in one sense that was not surprising because of Dame Janet’s judgment and the fact that a working party was considering and had made recommendations as to how the old policy should be changed to meet her criticisms. But if there was that lack of clarity it was difficult for PE to know what case he had to make.

f. The fact that a new statutory chair could not be put in place until a new building was available in 2019 and indeed the post has not yet been advertised, makes the decision not to allow an extension to PE until 2019 quite illogical.
g. It also seems to me that if, as the University were doing in relation to PE even before the new procedures came into force in September 2015, applying a rule that except in very rare cases to continue in employment applicants must move to a different post and only then if they secure funding, there must be a very clear case which establishes the need for the retirement age chosen. As I will discuss below certainly as regards PE the University had not established that it was so necessary to achieving their aims that the age should be as low as 67, so that the University were entitled to insist that a person such as PE was not entitled to continue in any employment at all unless he had arranged funding particularly when there were problems in making an application for funding before obtaining the extension.

17. The above therefore leads me to the conclusion that on any view PE’s appeal should be allowed and my present view subject to any further submissions there may be as to the appropriate relief, is that he should be reinstated to his statutory chair for the period he requested 30 September 2016 to 30 September 2019 and that there is no reason why during that period the University should not continue the process of recruiting a successor.

18. I should make clear that I do not understand it to be suggested that he in some way compromised his position by his meetings with [redacted] and the agreement which they reached in November 2015. That point is rightly not taken because in my view no final agreement was reached; it had to be put forward by [redacted] to the panel for approval and then was subject to a contract being drawn up and signed. I accept that PE at the time felt he had no choice but to do what he then was prepared to do but if as at November 2015 it had been signed by PE then a compromise might have been the answer to his complaints. I say only might because such agreement would have been made without him being told as he should have been of the way in which applicants for posts had been granted terms on which they could stay until they were 70 and that might have given him grounds to rescind. It was not ultimately signed until July 2016 but then under protest and thus forms no bar to his claim.

19. Considerable argument before me centred simply on the question whether the University could justify an EJRA and in particular an EJRA of 67. I have put that aspect second in my considerations because of the view I had formed as to the unfairness of the process and also because the matter is before Congregation and I am doubtful whether it would be right for me to try and reach any conclusion other than that which is strictly relevant to PE’s case. It is the new procedure and a retirement age of 68 moving to 70 which is
under consideration by Congregation neither strictly in issue before me, but some
collection of the points that arise is necessary in relation to PE’s case where a
retirement of age of 67 was sought to be imposed. There has been considerably more
evidence placed before me than was placed before Dame Janet relevant to the
imposition of a retirement age of 67. The situation is also different in that the comment I
have made in paragraph 16(g) above is relevant only to PE and those to whom the
University continued to apply the old policy. It is right therefore that I should consider the
question whether the University has justified the imposition in PE’s case of a retirement
age of 67 and it may be that my comments might assist if there are others in the pipeline
in that I am concerned as to the expense which has been incurred in fighting this case
not to mention the possibility that the University may once again seek to argue points
before other Judges in the Appeal Court. Already many hours have been spent by Dame
Janet, by Sir John Goldring, Sir Jeremy Sullivan and now myself in seeking to deal with
these cases. I can see no reason why this judgment needs to be considered confidential
and hopefully it will be made available to any persons who are in a similar position to PE
and made available to other Appeal Court Judges dealing with similar cases. Hopefully in
that way some of the further expense and time involved in dealing with these cases can
be avoided.

20. It is accepted that in insisting on PE signing the contract the University were
discriminating on the ground of age and that the relevant question is accordingly as
follows.

21. Can the University justify as at June 2016 on the evidence before me an EJRA and
in particular an EJRA of 67?

I can take the law conveniently from [skeleton [paragraphs 4 – 8, 10]].

a. Under section 39(2) of the Equality Act 2010 (‘the 2010 Act’):

‘An employer (A) must not discriminate against an employee of A's (B) –

(a) as to B’s terms of employment;

(b) in the way A affords B access, or by not affording B 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.’

22. The various forms of unlawful discrimination are set out in Part 2 of the 2010 Act. So far as is material, ‘direct discrimination’ is defined in section 13 as follows:

‘(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.

…’

23. As is evident, ‘age’ is a protected characteristic: see sections 4 and 5 of the 2010 Act.

24. These provisions are intended to implement Directive 2000/78/EC (‘the Directive’) and must therefore be read compatibly with it.

25. In order to justify less favourable treatment on grounds of age, the University must prove:

a. that it pursued a legitimate aim or aims, and

b. that the means chosen to pursue those aims were proportionate, which means that they must be both appropriate and necessary.

26. The leading case in this particular context is Seldon v Clarkson, Wright and Jakes [2012] ICR 716. At paragraph 50, Lady Hale held as follows:

‘…

(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).

…

(5) However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so…
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).

...'

27. However, it is not enough that the less favourable treatment pursues legitimate aims. In addition (paragraph 62):

‘...the means chosen have to be both appropriate and necessary[footnote text deleted]. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. 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.’

28. In dealing with the question whether a measure has to be justified not only in general but also in its application to the particular individual Lady Hale made the following observations.

64. The answer given in the Employment Appeal Tribunal [citation deleted] with which the Court of Appeal agreed [citation deleted] was

“Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, which is itself an important value.”

Thus, the Appeal Tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare.

65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the
context of inter-generational fairness, it must be relevant that, at an earlier stage in his life, a partner or employee may well have benefitted from a rule which obliged his seniors to retire at a particular age. Nor can it be entirely irrelevant that the rule was renegotiated comparatively recently between partners. It is true they did not then appreciate that the forthcoming Age Regulations would apply to them. But it is some indication that at the time they thought it was fair to have such a rule. Luxembourg has drawn a distinction between laws and regulations which are unilaterally imposed and collective agreements which are the product of bargaining between social partners on a presumably more equal basis….”

29. The above quotation is important for two purposes. First it does show that it is at least relevant the extent to which there has been a collective decision and second that even though a justified rule must normally be applied there could be rare circumstances where it would be right to consider its application to the individual. It is also however important that in Seldon no point arose as to any procedure for extending the date for retirement. Dame Janet’s judgment was concerned principally with the way the extension procedure had been operated making it difficult for the University to say there was a “rule” at all.

The position on collective decision

30. Before Dame Janet reliance was placed on the fact that in 2011 it would have been open to 20 persons to have brought the matter before Congregation and that thus it should be assumed that there was general consent. Dame Janet seems to have treated the possibility as fairly neutral albeit relevant. But since Dame Janet’s decision the position is very different. First PE moved the resolution before Congregation in May 2016 to suspend the EJRA because of Dame Janet’s judgment until further work had been done and a full review carried out as to whether there should be an EJRA and if so at what age. As I have said his resolution was narrowly defeated both on the floor and in a postal vote but that would give some indication that a majority were in favour of an EJRA and at age 67. As I have also said the full judgment of Dame Janet was not made available to members of Congregation and although it was not easy for members to know precisely what the new procedure had changed, the fact that there had been changes in the light of her judgment was a factor relied on in seeking to defeat the resolution. What is more a more detailed review as at five years instead of ten was the outcome.

31. More importantly following that debate considerable work has been done to analyse the effectiveness or otherwise of an EJRA in seeking to achieve legitimate aims and the Report of the EJRA Working Group starts at page 971 in the bundle. That report and its
recommendation that there should be an EJRA but of 68 and not 67 was carried on the
floor of Congregation during the week before the hearing of this appeal. Furthermore, an
amendment to raise the age to 70 was defeated but is now the subject of a postal vote.
There was a further motion to be moved to abolish the EJRA altogether during the week
after the hearing but although that must have happened before the writing of this
judgment, I have not been informed of the result, and it will in any event be likely to go to
a postal vote.

32. The degree of consultation was significant. The group ran three open meetings to which
University staff were invited and set up an inbox to receive feedback and suggestions
from anyone who wished to contribute their views. All comments have been read by the
group and can be viewed on the website in anonymised form. In addition, extensive
consultation has taken place with various bodies and persons including trade union and
168 members of staff who retired during 2012-2016 at ages 65 to 67. [pages 877-978]

33. The aims considered were those of the new policy as revised in 2015. The group agreed
that “it remains important and relevant for the University to create sufficient vacancies so
that: opportunities for career progression are provided; refreshment of the workforce is
sustained; succession planning is possible; diversity is enhanced; intergenerational
fairness is promoted; and, flexibility through turnover among the academic workforce is
facilitated. This will help to safeguard the University’s high standards in teaching,
research and professional services.” [page 979]. In my view, the aims were legitimate
and the group properly directed themselves that it must be satisfied not only that the
aims remain important and relevant, but also that the data demonstrates that that the
EJRA is making a substantial contribution to their achievement, and that the same effect
could not be achieved by other means. Further the group considered carefully whether
the EJRA was a proportionate means of achieving these aims and they considered each
aim in detail.

34. They rightly concluded that safeguarding the high standards (Aim 1) was actually an
overarching objective which relies on the other aims and was not an aim in itself.

35. In considering the other aims –two the group recommended should be withdrawn and
those that remained were in summary “inter-generational fairness” “refreshing the
academic, research and other professional workforce” “facilitating succession planning”
and “promoting diversity”. In relation to all four the key point which the group considered
important was the need to create vacancies. So far as the first two aims were concerned
vacancies simply provided opportunities for the next generation and the possibility of
people being appointed with different ideas; so far as planning was concerned it provided
a fixed point in time; as regards diversity the point was slightly more complex being that
younger generations were more diverse and/or recruitment was now better at preventing
discrimination against women and thus with more vacancies more women would get a
chance to be appointed.

36. In relation to all four aims the group concluded that the EJRA did contribute to achieving
vacancies and thus contributed to the above aims in relation to higher grade staff
(statutory professors, associate professors and RSIVs) where the evidence showed that
“retirement” was the most significant reason for vacating posts. Although retirement was
not as significant for academic research grade 8 to 10, the group concluded that the
appropriate course was to recommend that the EJRA should apply to all members of
Congregation and in the result, they recommended exclusion of grades below 8 and that
an EJRA should simply apply to all staff who are eligible for membership of
Congregation.

37. The group noted that the “revised procedure” allowing for exceptions ensures that the
impact of extensions upon aims is minimised by encouraging those who apply to stay in
employment to vacate posts and to cover their own costs, in order that their substantive
posts can be refilled. Their view was that “the exceptions procedure provides balance
between the needs of individuals approaching retirement and of the Aims of the policy
(see further discussion on the need for fairness for older employees in section 5,
concerning the age at which the EJRA is set)” [see page 982].

38. The point made in parenthesis is important because it indicates and this is not a criticism
that in essence what the group is considering before it gets to section 5 is the justification
and necessity for having some retirement age--as long as there is a point at which a
person has to retire a vacancy will be created by that retirement and for planning
purposes as long as one knows what date that will be planning is provided for. The
question is in balancing the achievement of the aims (which includes the rights and
expectations of the younger generation) against the legitimate expectations and rights of
the older generation: where should that date be fixed and is it necessary to have an
EJRA at all in order to reach that position.

39. Just to add a little flesh to the above summary, the evidence from [summarised some
of the statistics and what the University say they show. [said in [witness
statement [paragraph 13]
a. In my view, one of the most telling statistics we have gathered relates to the reason for staff leaving. At Statutory Professor level, the proportion of posts vacated by reason of retirement during the last three years for which data is available is 58.3%, 33.3% and 79.2% (for 2012/13, 2013/14 and 2014/15 respectively); the total number of Statutory Professor departures over those three years was 45, an average of 15 per year. The Appeal Court may be interested to know that this sort of level is replicated across the other two most senior academic grades (RSIV and Associate Professors), where the equivalent figures for RSIVs are 33.3%, 56.3% and 30.8% and for Associate Professors are 51.1%, 42.1% and 54.5%. Whilst it does fluctuate from year to year, the proportion at all these levels, but particularly Statutory Professor, remains very significant. This is a clear indicator that retirement is a key driver in the creation of vacancies at the University. 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. For example, if the average length of appointment at Statutory Professor level was to increase from 16 to 19 years (based on the average age at appointment of 51.6 years) through Statutory Professors electing to remain in post for an additional three years on average, there would be an ongoing 16% reduction in the creation of vacancies. I consider this to be very significant given how key retirement is to creating vacancies in this grade. I think that this is an entirely plausible possibility; at Annexe C of the Review Group report (at page 1009 of the bundle), 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 been granted an extended 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.

b. We have also analysed the statistics in closer detail to be clear on the exact age at which individuals actually retire, to better understand the impact of having a retirement age. There are noticeable 'spikes' in the numbers of individuals leaving at ages 65 and 67, with the remainder dispersed in much smaller
numbers, mostly at ages 60-64 and inevitably a small number post-67. We have been able to do this analysis for periods both before and after the implementation of the EJRA, although I would observe that the ages of 65 and 67 are significant in both periods. Prior to implementation of the EJRA there were two retirement dates in operation – the normal University retirement age of 65 and a ‘legacy’ retirement date of 67. After the implementation of the EJRA, it has remained the case that both 65 and 67 (67 being the EJRA) have remained significant dates when high proportions of staff exit (although this is likely to change in the future with rising pension ages). 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 and therefore there will be a sizeable population of University staff whose retirement planning has likely been focussed on that age. Given the different factors in play affecting retirements pre and post EJRA (i.e. the different compulsory retirement ages), it is not at all straightforward to carry out a meaningful “like for like” comparison. However, 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. I set out below a table summarising the pre and post-EJRA retirement ages for the EJRA population:

<table>
<thead>
<tr>
<th>Age of retiree</th>
<th>Pre-EJRA (2006-2011)</th>
<th>Post-EJRA (2012-2016)</th>
</tr>
</thead>
<tbody>
<tr>
<td>60-64</td>
<td>27%</td>
<td>32.2%</td>
</tr>
<tr>
<td>65</td>
<td>27.6%</td>
<td>20.3%</td>
</tr>
<tr>
<td>66</td>
<td>7.2%</td>
<td>8.6%</td>
</tr>
<tr>
<td>67</td>
<td>32.8%</td>
<td>25.0%</td>
</tr>
<tr>
<td>68+</td>
<td>5.5%</td>
<td>13.6%</td>
</tr>
</tbody>
</table>

c. Further on this point, it may also be of assistance to the Appeal Court to understand the average levels of turnover within the University and, in particular, at the Statutory Professor level. In the period prior to the EJRA (2006-2011), the average turnover across the population impacted by the EJRA was 15.6%,
increasingly slightly to 15.8% after the EJRA was introduced. The equivalent figures for the Statutory Professor grade were an average turnover of 6.4% prior to the EJRA and 6.2% in the years since its introduction. I recognise that turnover is a delicate balance, as of course we want to encourage stability and loyalty amongst staff. However, it is also important – for all the reasons set out in the EJRA’s aims – to seek a healthy volume of vacancies to enable those aims to be advanced. Taken together with the high proportion of Statutory Professors for whom retirement is the reason for leaving, one can see that turnover would drop to very low levels indeed within this grade without the EJRA.

d. Finally, it would be worth observing the potential impact of the University’s pension provision. All those subject to the EJRA at Oxford are eligible for membership of the Universities Superannuation Scheme (USS) and most take it up. It remains a very valuable benefit, but USS has undergone significant change in recent years and it is likely that there will be further changes in the coming years. Those who are nearing retirement will only be impacted by the changes to a very limited extent, but those changes will no doubt have an increasing effect on retirement patterns in the coming years. As it stands, and certainly up until the point at which the EJRA will next see a substantive review (2021), it is the University’s understanding that there is only a limited financial impact on statutory professor retirees from being required to retire at the EJRA. The pension provision in place for those retiring in the next few years remains a particularly strong benefit. This is in marked contrast to mid-career and early-career employees, for whom the revisions to the pension scheme will have a more substantial impact. Benefits from 1 April 2016 are accrued on a CARE (Career Average Revalued Earnings) rather than final salary basis, up to a limit of £55,000 per annum, with a defined contribution scheme for earnings above that cap. This means that those who are further from retirement will have more years of accrual on a CARE basis (and for statutory professors, who earn above the threshold of £55,000, a defined contribution basis); this is less generous and will result in a smaller pension than the one from which those due to retire soon will benefit.

40. Thus, the EJRA Working Group recommended the continuation of an EJRA.
What about age?

41. The group set out the feedback they had received to “Continuing 67”; “moving to 30 September before 69th birthday” and “moving to 30 September before 71st birthday as soon as practicable”. They ultimately recommend moving up one year to 30th September before 69th birthday. They expressed the following views in so recommending [page 994]:

“The Group took the view that having decided that the EJRA was supporting the Aims …and thus should be retained, they should take care to ensure that it was set at an age which would continue to contribute to their achievement. Although the move to 70 would reduce the number of employees who were prevented by the EJRA from working as long as they wished and thus reduce the discriminatory impact upon older employees, it was decided that three-year hiatus in the University’s achievement of the Aims, as well as an ongoing reduction in the rate of progress towards them, was an unacceptable outcome. Primarily for this reason the Group decided against an immediate move to 70”

42. That paragraph could be said to be looking at the matter very much from the University’s point of view but it is followed further down by this paragraph:

“Despite its reluctance to see any delay in the achievement of some of the Aims, the Group wished to ensure that the age set was proportional and necessary to achieve the Aims. Given the presumption that age discrimination is unlawful, it decided that these arguments carried sufficient strength to necessitate an increase in the age of the EJRA by one year to 30 September before the 69th birthday. The Group believed that the EJRA will better achieve its Aims at this age because it will continue to ensure sustained turnover in support of the Aims, while better supporting older employees.”

43. The group also referred to the fact there would be a further review in five years’ time and recommended that provided the ten-year data confirmed the trend the EJRA be increased by a further year.

44. The group also considered the “exceptions process” and in particular they gave “Careful consideration ..to whether it was necessary to retain the expectation that, except for those in exceptional circumstances, individuals self-fund any extension...” [page 997] Their concern related to members of the Humanities Division where funding was less readily available but they recommended continuation of that criterion across the board.
45. On 6 February 2017 Council received the group’s report and agreed to publish it and to consult on its recommendations. Council considered the report for a second time on 13 March and the feedback from the consultation. The responses demonstrated a diverse range of views and “Council fully acknowledges that coming to a decision on the future of the EJRA is a difficult one for the University”. Council recommended to Congregation the adoption of all the recommendations of the EJRA Working Group.

46. Congregation met during the week before the hearing before me. I was informed that resolutions were moved to amend the retirement age but they were defeated and that Congregation voted to adopt the recommendations of the group but a postal vote is still to take place in relation to changing the age to 70 as soon as practicable. I was also informed that a resolution would come before Congregation in the reasonably near future proposing the abolition of any EJRA.

47. In a very skilful cross examination and in powerful submissions suggested that the impact of having an EJRA as opposed simply to allowing persons to retire was very slight. His analysis of the data in the EJRA Working Group’s Report suggested that at best an EJRA only had a minimum impact on the creation of vacancies for statutory professors -at most two a year difference. He also had powerful points to make as to whether it was necessary to have an EJRA in order for the University to achieve its aims. But his most powerful attack was as to whether anything established the necessity for a retirement age of 67 which was being applied to PE.

48. In relation to whether a retirement age can be justified at all, it seems to me that where work has been done and reported on with consideration of the points that were made before me, and where there has been a full opportunity to place before Congregation the arguments which were placed before me and where members have had all the opportunity to make the points that made for the University and has made for PE, the view of Congregation is an important factor in considering whether the University can objectively justify an EJRA. It may not be determinative but particularly in the light of the fact that Dame Janet seems to me to have taken the view that some EJRA would be objectively justifiable, it seems to me unlikely that an Appeal Court would take the view that some EJRA is not objectively justifiable if a clear majority of Congregation supported the view there should be one. It would thus be wrong to consider that question further without the evidence of the view Congregation has taken.
49. The question as to what is a justifiable age and whether for example 70 is the appropriate age is at present the subject of a postal vote and again strictly the issue whether if that vote did not support 70, an age of 30th September before the 69th birthday is the appropriate age is not an issue before me but, albeit not determinative, Congregation’s support for that age would be highly material.

50. What however seems to me to be clear is that it would not be fair to construe the vote on PE’s motion to suspend the EJRA as proper support for a retirement age of 67, particularly as Dame Janet’s judgment and the exceptions procedure was not fully before Congregation. Furthermore, as I have already said, if the University is going to allow continuation of employment in some different capacity in some cases but only on condition that the employee self-funds that continuation with the consequent difficulties of obtaining that self-funding, the onus on establishing that the retirement age chosen, as low as it was, was really necessary must be high. After a detailed review the Report of the EJRA Working Group was unable to justify 67, and in my view the University have not established the necessity for such a retirement age and the University accordingly discriminated against PE on the grounds of age by seeking to impose on him a retirement age of 67.

Conclusion

51. PE’s appeal must be allowed. My present view is to recommend that he should be reinstated as statutory professor until 30 September 2019 but am prepared to receive in writing submissions on relief before reaching any final conclusion. The Appeal Court has no power to order costs to be paid but I also express the hope that in the circumstances of this case the University might feel it was appropriate to pay PE’s costs of the appeal including the costs of contesting the preliminary issue on jurisdiction.

The Rt Hon Sir Mark Waller