Two differently constituted tribunals reached different conclusions on the same compulsory retirement policy – but neither made an error of law

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***The Chancellor, Masters and Scholars of The University of Oxford v Professor Paul Ewart EA-2020-000128-RN* - EAT judgment of Mrs Justice Eady on 27 September 2021.**

Professor Pitcher had employments at Oxford University and St John's College and was compulsorily retired from both by operation of the Employer Justified Retirement Age ('EJRA') that the University and the College both operated, his application under the extension provisions having been refused. An ET dismissed his claims of direct discrimination and unfair dismissal, finding that the EJRAs were justified and the dismissals fair.

Professor Ewart also had employment at the University and the EJRA was also applied to him. Initially he obtained an extension but on his application for a further extension he was unsuccessful, and he also faced compulsory retirement. However, a differently constituted ET found that the University had not shown the EJRA to be justified and upheld his claims of direct age discrimination and unfair dismissal.

The University and the College relied on legitimate aims of inter-generational fairness, succession planning, and equality and diversity. The EJRA was said to facilitate other measures in achieving those aims by ensuring vacancy creation was not delayed and recruitment into senior academic roles might take place from a younger, more diverse cohort.

In Professor Pitcher's case, the ET acknowledged the limited evidence demonstrating impact, but considered this was because the EJRA was relatively new. It gave weight to survey evidence regarding those who would have continued in employment absent the EJRA and to the mitigating effects of the extension provisions, and found that the discriminatory impact

(also mitigated by post-retirement opportunities for senior academics) was justified. It also found that that Professor Pitcher was dismissed for a fair reason (the application of an EJRA that was not unlawfully discriminatory).

In Professor Ewart's case, a statistical analysis showed the rate of vacancies created by the EJRA was trivial (2-4%) and the (differently constituted) ET found the University had not produced sufficient evidence to show the EJRA could contribute to the realisation of the legitimate aim. It also found that the discriminatory impact was severe, and not significantly mitigated by the extension provisions. It held that the EJRA was not shown to be proportionate.

On the combined hearing of the appeals, the EAT dismissed both. The EAT held that although the ETs had reached different conclusions on proportionality, and that those conclusions related to the policy itself not its individual application, neither had erred in law.

Comment: These cases are a stark example of two differently constituted tribunals giving conflicting decisions on essentially the same issue, which hardly seems satisfactory. However, the conclusions of both ETs were open to them on the evidence, and the nature of the proportionality assessment means it is possible for different ETs to reach different conclusions when considering the same measure adopted by the same employer in respect of the same aims. The task of the EAT is not to strive to find a single answer, but to consider whether a particular decision was wrong in law.

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