Application by Professor Ross John Anderson for Review by the Commissary

This is an application by Prof Anderson for a Commissary Review of the decision dated 20th March 2023 by the Council of the University to terminate his employment ("sack" or "fire" him) on 30th September 2023, the month when he becomes 67 years old.

Prof Anderson is Prof of Security Engineering in the Department of Computer Science and Technology and a University Officer. He proceeds on his own behalf and other unidentified officers of the University who are or will be subject to the provisions to which his complaint and this application are directed, the University "Employer Justified Retirement Age" ("EJRA").

The University's wide-ranging response (despite self-description as a "preliminary" response) is that the Council did not terminate Prof Anderson's employment on 20th March this year or at all: even if it had purported to do so the Council would have lacked any such authority. The complaint therefore is flawed. Further, even if the effect of what was decided on 20th March was, contrary to the University's contention, indeed a termination of Prof Anderson's employment, the decision would not be susceptible to the Commissary review jurisdiction.

On the application of the University I decided to examine these issues immediately, and separately. If the University is right then, notwithstanding some further contentions by Prof Anderson, (which, with respect, I regard as makeweight) and possible amendments to add further grounds, out of time (which I reject) the Review jurisdiction would be unavailable.

The rival contentions serve to obfuscate the stark reality that, as things stand at this moment, Prof Anderson's employment will indeed be terminated on 30th September. That is what he is seeking to avoid.

At the heart of this complain, and the basis of the asserted termination of his employment, is the University's adoption in 2011 of 67 years as the justified retirement age (EJRA). A similar scheme was adopted by two other universities, Oxford University and St Andrews University. It continues in force. Prof Anderson argues that it should not, indeed that legitimate requests to review/reform it have for too long been avoided by the University. The public law process, an alternative remedy, would be too costly and protracted, certainly too late for Prof Anderson's situation. The Commissary should step in.

Before addressing the specific jurisdiction of the Commissary the starting point is that the University Statutes (whether of Cambridge University or any other institution) are subject to the laws promulgated by Act of Parliament, as and when interpreted by the Courts vested with jurisdiction to do so. The Equalities Act 2010, (title summarised for convenience), looms large over the EJRA scheme and indeed as we now know, the Oxford EJRA has been given the closest possible examination by the Full Employment Tribunal. In a reserved judgement, after examining earlier inconsistent decisions, the purported justification or at any rate, its asserted consistency with legitimate objectives notwithstanding the Equalities Act provisions directed against discrimination on the grounds of age, was rejected, in unequivocal language. (Field-Johnson and others v The Chancellor … of University of Oxford)

The scheme "is not a proportionate means of achieving legitimate aims". It "has a highly discriminatory effect, removing people from their jobs simply because they have obtained a particular age. The very small, "we go so far as to say trivial", way in which (it) contributes to Promoting Equality and Diversity does not justify the highly discriminatory effect… Consent or lack of objection from congregation does not make something that is otherwise unlawful lawful… The Respondent has not shown that (it) is a proportionate means of achieving a legitimate aim" I have taken this last long quotation from paragraph 195 of the judgement, but to appreciate its full significance it must be considered as whole.

Cambridge University asserts that its EJRA is different. Without purporting to have conducted a provision by provision analysis of the two schemes, but having studied numerous observations in the

various debates, but also without having invited specific argument on the issue, my preliminary thoughts are that it would be gratifying indeed the Cambridge scheme emerged more favourably from litigation than the Oxford scheme. At the end I return to the potential impact of this Tribunal judgement.

Existing employment law has further consequences. If, following analysis of the Cambridge scheme, the Tribunal decides that is was flawed, “highly discriminatory”, and “unlawful”, for Prof Anderson the appropriate remedy ought to be re-engagement or reinstatement. Quite apart from whether the potentially damaging gap between the September termination of his employment and its resuscitation, with its inevitable damage to the pattern of continuing achievement, the Tribunal would not, in reality, could not, make an effective such remedy. If the other were made, and the University disagreed and failed to reinstate or re-engage a further award of damages would follow, but specific performance of the contract of employment would not be made. McKenzie v The Chancellor … of the University of Cambridge (2019) E WCA Civ 1060 confirmed long-standing law.

Incidentally, I do not doubt the genuineness of Prof Anderson’s belief that the outcome of his particular litigation saddled the claimant with a cost order for £1 million: nevertheless if which I doubt the issue arises I should require a statement from the professor to that effect. My analysis of the problems with specific performance (that is, re-engagement or reinstatement) produces two further threads: first, if the University disregarded a reinstatement or re-engagement order, in the circumstances would that represent justice? Second, if a Tribunal could not insist on compliance the enforcement power in the Commissary would be significantly undermined.

Essential Timeline

I propose to summarise the most essential recent facts. Linked to the Equalities Act 2010, with its unequivocal principle that discrimination based on age is unlawful, in 2011 the Abatement of Default Retirement Age was replaced by the University’s EJRA. Its officers were contractually bound by it.

Between 2015 and 2016 a fresh five-year Review of EJRA was proposed, and since then it has remained in force. As a matter of employment contract Prof Anderson continues to be bound by it, and as I have already indicated, in accordance with the contractual provisions he is required to retire (therefore “sacked”) from 30 September. The review is now due to conclude its deliberations this autumn. Whatever the outcome, that is too late for Prof Anderson.

During 2023 there has been much focus on these issues. At a “Town Hall” meeting on 24 January, as a Topic of Concern, EJRA was discussed at the Council of the Regent House. In response to an application by Prof Anderson and others for the suspension of the EJRA, which commanded significant majority, not unanimous, support, among the contributors to the debate, the Council resolved that it would be “premature” to adopt the proposal before completion of the Review.

This Review would examine the operation of the EJRA “to determine whether it has been successful in meeting its aims”, the terms of the current Retirement Policy to establish whether they remain fit for purpose, and assess the rationale for the aims and implications of potentially “removing, retaining or revising existing EJRA”.

On 8 March, promulgated to the parties on 13 March, the reserved judgement addressing the Oxford EJRA emerged, and at Cambridge, more or less simultaneously, on 20 March, the Council meeting on which Prof Anderson bases his claim for wrongful termination of employment took place. The confirmed minutes also reveal that reference was made to Oxford University EJRA litigation and its outcome. The suggestion that there might be reputational damage unless the University suspended its EJRA appears to have been addressed on the basis that judgement would be binding only on Oxford University. Concern was also expressed that any suspension of the Cambridge EJRA might expose the University the risk of acting unfairly in relation to employees “nearing retirement age”. In essence, beyond the decision to review, a decision about EJRA was postponed.

This Application

However closely studied the available evidence, there is none which supports the contention that Prof Anderson's contract of employment at the University was or has been terminated. Indeed, it remains in force today.

It will terminate on 30 September under existing contractual arrangements and essential purpose of this application for the Commissary review is to achieve some postponement or delay ("moratorium") of the contractual terms provided by the University EJRA, thus avoiding the employment consequences which would otherwise follow on 30 September. Had the Council purported to terminate his employment on this occasion, it would have been exposed to criticism for misusing its own powers. What the present application involves is that the Commissary should unilaterally interfere with a contract of employment between the University and one of its officers at the behest one of the parties to the contract.

My present view is that ultimately the future of the University EJRA is the responsibility of the Regent House. For now it remains in force.

The Commissary jurisdiction over employment issues

In view of my decision on the termination of contract issue, I shall be brief.

In relation to employment issues the jurisdiction of the Commissary is significantly constrained by the University statutes themselves. Consistently with earlier legislation, the powers do not extend to "any decision by a University authority concerning the appointment of an individual or individuals to employment in the University, or concerning promotion in such employment (A IX 3 (c) )." Therefore the Commissary has no jurisdiction to address the merits (or otherwise) of an appointment. Although there is no express prohibition against a reference to the Commissary for a review of a decision to terminate employment, any such decision undoubtedly "concerns" the employment of that individual. The power to order specific performance of a contract of employment is not available. The Commissary is not exempt from the ordinary laws which prevent interference with contractual arrangements.

The Commissary is not formally entitled "the Visitor" to the University. However the jurisdiction is not widely dissimilar. The University statutes are consistent with current Education Act legislation on this issue. (See A (IX) 10) As they should be. And they also provide an internal, albeit complex, route to a remedy in the event of wrongful dismissal. Finally, despite Prof Anderson's reservations, there is a public law system for examining and deciding these cases before expert, specialist Tribunals.

Conclusion

The Commissary jurisdiction is not available to Prof Anderson, first, because he has not been wrongfully dismissed from his employment, which indeed continues in force as I write, and second, because of the constrains within the University statutes themselves, consistent with the ordinary public law principles, which limit the extent of that jurisdiction.

Further comments

Having reached my conclusions that the Commissary jurisdiction is not available to Prof Anderson, I immediately acknowledge that the formal responsibility of the Commissary is concluded.

Nevertheless I have studied these papers and, unusually, propose to add a footnote. The University has known since the end of March that Oxford University EJRA has been subject of a damning court decision. For my part, I very much hope that the University will already have sought independent legal advice about the potential impact of the decision on the Cambridge University EJRA. Postponement on the basis that the two schemes are different, without expert analysis, and on the basis that there is a full Review in progress working its way through to the next autumn, and possible implementation then or indeed in early 2024, fails to reflect what I regard the urgency of the situation. There is a prospect that the Cambridge EJRA may be regarded as discriminatory and unlawful, and if nothing else, the university authorities should be urgently seeking independent advice to ensure that it is not.

If it is, then immediate action is needed to remedy the potential consequences to the officers of the University who would be affected by any discriminatory age provisions. This would go beyond merely reputational damage: it would, unless the Cambridge EJRA were upheld, result in a case or cases of what would amount to wrongful dismissal. Beyond injustice to individuals the reputational damage would indeed be massive.

Igor Judge

Commissary

22.06.23