

SUMMARY

## **2011/22 Replacement of 51 year-old TV presenter was age discrimination (UK)**

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### **Summary**

A 51-year-old female TV presenter suffered unjustified age discrimination when she was replaced by younger presenters. Whilst the employer's wish to appeal to younger viewers was a legitimate aim, the dropping of an older presenter in order to pander to their assumed prejudices was not a proportionate means of achieving that aim.

### **Facts**

Miriam O'Reilly, aged 51, was an award-winning television presenter employed by the British Broadcasting Corporation (BBC) on its Countryfile programme about rural affairs and farming. She also contributed to the BBC radio show Costing the Earth and the Countryfile printed magazine.

The BBC decided to move Countryfile from its daytime slot on Sunday to a primetime evening slot. Ms O'Reilly was informed that she would no longer be required to appear on the show as they wanted to attract a significantly larger audience by "refreshing" the existing presenter line-up. Three other female presenters aged between 42 and 44 and one 43-year-old male presenter were also told they would not be moving forward to the primetime show. The new line-up included several presenters, both male and female, aged between 26 and 38. One presenter (a 68-year-old man), who had presented on the show since it began over 20 years

earlier, was kept on.

Ms O'Reilly complained to the production team and her colleagues and various news articles appeared in the press speculating about the "ageist" decision to drop her from the programme. She subsequently brought a claim of direct age and sex discrimination against the BBC. In addition, she complained that she had been victimised for raising those allegations. She asserted that, following her complaints, she was only offered one Costing the Earth programme (on the "environmental cost of ageing") and the possibility of one other. She was also no longer asked to contribute to articles in the Countryfile magazine.

### **The Employment Tribunal's Decision**

One of Ms O'Reilly's submissions before the Employment Tribunal was that she had been subjected to a joint combination of age and sex discrimination. The BBC pointed to the fact that the Equality Act 2010 included a specific provision not yet implemented outlawing "combined" or "dual" discrimination on the basis of two protected characteristics (section 14). Since that measure was not yet in force, the BBC argued that combined discrimination could not be unlawful under current anti-discrimination legislation. The Employment Tribunal found that this reasoning was flawed, stating that a woman's sex or age need not be the "sole or principal reason" for the detrimental treatment in question. It was possible to claim discrimination on both grounds under existing law if they significantly influenced the reason for the treatment.

A central element of the BBC's defence was that its decision was based on criteria that the presenters for the new slot required: a profile that would make them familiar to peak-time audiences; an ability to present shows in an "immersive manner"; and knowledge of rural affairs. However, the Tribunal found that there was no record of candidates having been assessed against those criteria. Rather, the key witnesses for the BBC had "offered the complacent explanation that this is just the way things are done in the media world". On the evidence, the Tribunal refused to accept that the criteria were devised and adopted as the BBC suggested.

In relation to age discrimination, in the absence of defined and consistently applied selection criteria, the Tribunal found that BBC's decision to appoint the new presenters was influenced by their age. The age profile of the primetime presenting group had been reduced significantly and, although the long-standing presenter aged 68 had been retained, he was a well-known figure which made his position unique. The evidence suggested that the BBC was essentially looking for younger, more diverse talent to replace the existing presenters and thereby refresh and rejuvenate the programme. Their "comparative youth" had been a significant factor,

whereas Ms O'Reilly's age had been key factor in the decision not to consider her. Accordingly, she had been subjected to direct age discrimination.

That was, however, not the end of the matter because direct age discrimination can potentially be objectively justified in the UK (unlike direct discrimination on other protected grounds). The Employment Tribunal therefore considered the BBC's alternative argument that their actions had been justified by the aim of appealing to a wider audience, including younger viewers. Although accepting this was a legitimate aim, the Tribunal found there was no evidence to suggest that choosing younger presenters was required to appeal to such an audience. In any case, it would not be proportionate to pass over older presenters simply because of the assumed prejudice of younger viewers. The BBC's objective justification therefore failed.

With regard to sex discrimination, the Employment Tribunal rejected the contention that the claimant's gender had been a significant factor, either alone or in combination with age. The outcome would have been no different had Ms O'Reilly been a man of the same age with the same skill set, because the "element of comparative youth" would still have been missing. The Tribunal noted that certain sexist comments to Ms O'Reilly by colleagues were not made by those with responsibility for the decision as to whether or not she was to be kept on for the primetime Countryfile show. That decision was not due to her sex but on the basis of her age alone.

Finally, in relation to Ms O'Reilly's complaints of victimisation, the Tribunal found that the decision no longer to involve her in the Countryfile magazine had resulted directly from annoyance surrounding her allegations of discrimination. Moreover, offering Ms O'Reilly the Costing the Earth programme on ageing was a deliberate act of the BBC that made her feel she could not present, resulting in her stepping down as a presenter on the programme. Both these incidents amounted to unlawful victimisation.

Normally, a remedies hearing would have followed, in which Ms O'Reilly would have sought a declaration by the Tribunal, damages for loss of earnings and for injury to feelings, as well as "recommendations" by the Tribunal requiring the BBC to conduct age quality audits and take steps to address identified underrepresentation of this group. However, Ms O'Reilly withdrew her case before the remedies hearing, which seems to indicate that the dispute was settled. The BBC's Director-General announced that the BBC accepted the Tribunal's judgement and publically apologised to Ms O'Reilly.

## **Commentary**

Although only a first-instance judgement, this ruling has sent shock waves through broadcasting and media circles. It is significant as being the first Tribunal decision to address the apparent disadvantage faced by older presenters in the industry (particularly women, it must be said, despite the Tribunal's rejection of the allegation of sex discrimination on the facts).

Following O'Reilly, broadcasters, and particularly those making casting decisions, need to ensure they can show that their processes are transparent and legally compliant. The optimum is to draw up specific and relevant criteria and apply them scrupulously and fairly in choosing between candidates. At a minimum, managers should ensure they can present a coherent and reasoned selection process to support the decisions they reach. Until now, it appears to have been common practice to make such decisions on a "creative" and far less structured basis. The BBC executives in O'Reilly fell at this hurdle as the "objective" criteria on which their decisions were allegedly based were not initially identified but developed gradually through the course of the proceedings.

An additional consideration for broadcasters is whether age itself can ever be a valid consideration to include in the decision-making process where, for example, broadcasters are seeking to engage with a particular age group. Even though this was recognised as a legitimate aim in O'Reilly, the decision shows how difficult justification on this basis may be – particularly as there are few statistics available to support the assumption that viewers are more likely to engage with presenters closer to their own age.

One potential objective justification which was not argued in O'Reilly is "intergenerational fairness" – the sharing out of job opportunities between the generations. In appropriate cases this argument could be more successful, in an industry where the positions are few and older "stars" with network experience and a strong audience profile are likely directly to reduce the number of opportunities for younger workers.

**Note 1:** If the other presenters had brought their claim within the three month time limit, I think that they would have had a good chance of claiming direct age discrimination. The male presenter (who later returned to Countryfile) and two of the female presenters were told that they would not be moving to the evening show. In the absence of consistently applied selection criteria and considering their ages, a tribunal would have been likely to conclude that age was a significant factor in the reason for their "less favourable" treatment. The other female presenter was told that she would no longer be used owing to the extent of her involvement following her relocation to South Africa. Although it would be for the tribunal to

decide the real reason for the treatment, she was approximately the same age as the other presenters and so could have also argued that she had been subject to age discrimination on the evidence.

**Note 2:** In March 2011, the UK Government announced that the above-mentioned provisions in the Equality Act 2010 covering “combined discrimination” will not be brought into force as part of its drive to reduce the amount of red tape faced by businesses.

### **Comments from other jurisdictions**

*Germany (Martin Reufels):*

1. This is a very interesting ruling that will certainly have an effect on broadcasting and media operations in the European Union. According to section 10 of the German General Equal Treatment Act, different treatment based on age may be justified if the reasons for the different treatment meet the threshold of a proportionality test. The aim of the different treatment must be legitimate, and the means of achieving it must be proportionate. As a result, it could well be the case that TV-stations take age into account as a factor when determining who should act as a presenter for a given show, in particular where the audience for that show is predominantly within a certain age range. For example, there cannot be much doubt that a broadcaster should be free to impose a general age limit on presenters for a children’s TV-show where the concept of the show is that it should be presented by teenagers. However, every show must be based on a specific and clearly outlined concept.
2. In addition, the courts will need to be aware that broadcasters enjoy special protection, in that they benefit from the freedom of press and freedom of expression, and are therefore entitled to retain a certain liberty and discretion in writing their material. A tendency to severely restrict the way in which broadcasters operate would obstruct the flexibility and variety of the programming.

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**Creator:** Employment Appeal Tribunal

**Verdict at:** 2011-01-10

**Case number:** ET 2200423/2010