

## Employment Alert No 184: Tribunal finds that Miriam O'Reilly was discriminated against by BBC on grounds of her age

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### Background

The case of *Miriam O'Reilly v BBC & Anr* is a case of (primarily) direct age discrimination which has made headlines because of its high profile parties, TV presenter Miriam O'Reilly and the BBC. But, in giving its Judgment in the case, the Tribunal also made some comments about dismissal practices that will interest employers.

By way of reminder, an employee (including a freelance worker) is subject to direct age discrimination if, on the grounds of his age, he is treated less favourably than others and the treatment in question cannot be shown to be "a proportionate means of achieving a legitimate aim". Direct age discrimination can be justified, whereas other forms of direct discrimination cannot. That was the position under the Employment Equality (Age) Regulations 2006, which applied to this case, and remains the same in the Equality Act 2010.

### Facts

Ms O'Reilly was a presenter on the BBC's Countryfile. The programme was set to move from Sunday mornings to air at primetime on Sunday evening. As a result, the BBC wanted to "refresh" the programme in pursuit of which aim Ms O'Reilly was released. She claimed age discrimination (and sex discrimination which scarcely featured in the case).

The BBC's principal case was that: (i) Ms O'Reilly had not been let go because of her age but, rather, because the BBC had wanted a presenter with more primetime TV experience who would be recognisable to the show's new primetime audience. Ms O'Reilly's experience, apart from Countryfile, was mainly in radio; (ii) it had applied criteria to the presenters to decide who should go; and (iii) the decision to let Ms O'Reilly go had been made by Andrew Thorman, Head of Rural Affairs. The BBC had not disclosed any documentary evidence relating to the process which led to the decision that Ms O'Reilly should go.

During the 12 day Tribunal hearing, the oral evidence departed from this principal case. For example, Mr Thorman said that: (i) he had not made the dismissal decision but rather it had been made by Jay Hunt, Controller of BBC1 at the relevant time (which Ms Hunt denied); (ii) no criteria had been applied; and (iii) he had, in fact, understood that the exercise was to try to attract younger viewers to Countryfile and that having younger presenters would assist that aim.

## Decision

Given the evidence that came out during the Tribunal hearing, it is perhaps unsurprising that the Tribunal found that:

- the truth of the position was that the BBC had been looking for younger talent to replace Ms O'Reilly (and others) in order to refresh and rejuvenate Countryfile. Mr Thorman and Ms Hunt had not been straightforward about the real basis for their decision to release Ms O'Reilly;
- age discrimination had not been justified. The BBC had failed to establish that having younger presenters was required to appeal to a younger viewing audience.

However, comments made to Ms O'Reilly by junior members of staff about her need for botox, and similar, were not relevant to the issues before the Tribunal, as those individuals had had no input into the decision to dismiss her.

The Tribunal also made the following comment about the lack of documentary evidence produced by the BBC: "We bear in mind that the lack of documentation and failure to apply a formal procedure does not, of itself, evidence discrimination... However, that failure makes it much more difficult for the Respondent to explain the decisions and to state with clarity the grounds upon which the decisions were taken."

## What does this mean for employers?

While this case does not change the law as we know it, it does serve as a useful reminder to employers seeking to defend any Tribunal claim, but particularly one of discrimination, of the importance of:

- establishing, through a detailed analysis of the facts, whether your case before the Tribunal hearing will hold up to close scrutiny; and
- not being solely reliant on witness statement evidence to make your case. Tribunals prefer to see documents which support what has been said in witness statements and oral evidence. Their absence is not automatically fatal to a case, but it makes the employer's battle an uphill one.

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