



Welcome to the January 2011 edition of Fife Law News. This newsletter has been sent to you as a supporter of Fife Law Centre.

Ex-BBC presenter wins age discrimination claim

O'Reilly v BBC 2200423/2010 (ET)

This recent case has, not surprisingly, received considerable attention in the media and concerned former Countryfile presenter Miriam O'Reilly who, having worked for the show for 8 years, was then dropped from her role in 2008 at the age of 53.



At that time the show was being moved to a more primetime slot in a revamped format. Younger presenters in their 30s were brought in to present the updated show along with John Craven, an existing male presenter (then 68) who was kept on as a presenter.

Ms O'Reilly (the Claimant) brought a claim against the BBC alleging age and sex discrimination. The Employment Tribunal (ET) agreed with her claim of age discrimination and awarded her compensation for loss of earnings and injury to feelings as a result of this finding.

Regulation 3 of the Employment Equality (Age) Regulations 2006 prohibits direct and indirect age discrimination. Age discrimination is unusual in that it *can* be justified in certain situations (unlike other forms of discrimination) i.e. where the employer can demonstrate that there is a genuine occupational requirement. One potential example could be work of a physically demanding nature such as construction work where an employer may have good reason to set a maximum age for on-site workers.

However, in this case the ET found there was no such justification. Although the Countryfile show had been moved to a more primetime viewing slot there was nothing to establish that younger presenters were required to ensure primetime audience figures. The Tribunal considered that, had the Claimant been 10-15 years younger, more consideration would have been given to her remaining as a presenter on the show.

In considering the claim and arguments put forward by the Claimant regarding the comparative lack of older woman broadcasters at the BBC the Tribunal stated that “We do not doubt that older women have faced particular disadvantage within the broadcast media”.

The Tribunal did not, however, uphold her claim of sex discrimination on the grounds that they did not consider that a man of the same age with same skills and experience as Ms O’Reilly would have been retained on the show either. It concluded that “the decision that the Claimant should no longer be a presenter on Countryfile was an act of age discrimination alone”.

Following the judgement the BBC apologised to Ms O’Reilly and said that its intention was to issue new guidance on fair selection procedures within the organisation. This case will now have potential repercussions for all industries, not just the broadcasting field.

Delay in Raising Claim

There was some delay on the part of Ms O’Reilly in raising the claim and the Tribunal had to initially consider whether to allow the claim at all. Ms O’Reilly argued that this delay was due to the fact that she did not seek legal advice until she became resigned to the fact that her career at the BBC as a whole was at an end. The ET found that it was just and equitable to allow her claim given the considerable prejudice that would arise if it were not allowed to proceed. Although in this case the delayed claim was allowed it is always prudent for employees to seek legal advice at an early stage to ensure they are within the strict time limits generally imposed for Employment Tribunal claims.

To view the full judgment please click here [O'Reilly v BBC](#)

Default retirement age of 65 to be phased out



On a related note to age discrimination, the government recently announced that, as of 1 October 2011, employers will not be able to forcibly retire employees **solely** on the grounds that they have reached the age of 65. After 6th April 2011 employers will no longer be allowed to issue any notifications for compulsory retirement.

Exceptions will be allowed where an individual is no longer capable of doing their job and objective justification for forced retirement can be shown by the employer. However it is clear that employers will have to think carefully about what criteria and procedures they use in such situations.

Unmarried father's rights in children's hearing extended

Principal Reporter v K [2010] UKSC 56



This recent case put the spotlight on the rights of unmarried fathers to take part in Children's Hearings. The Supreme Court found that the current regime in Scotland was unfair and in breach of Article 8 of the European Convention of Human Rights (ECHR) i.e. right to respect for family and private life.

Up until fairly recently unmarried fathers in Scotland had no automatic parental rights and responsibilities and could only acquire such rights by entering into an agreement with the mother or by applying to the courts.

In 2006 the law was amended so that unmarried fathers who were registered as the father on a birth certificate *would* automatically be deemed to have parental rights and responsibilities for that child. However, the amendment is not retrospective and therefore does not apply to unmarried registered fathers whose children were born before 4 May 2006.

The child of the unmarried father in this case was born in 2002. The father, K, had separated from his daughter's mother but was registered on the child's birth certificate. He continued to have regular contact with his daughter after separating from her mother. However, following abuse allegations made by the mother against the father the matter was brought before a children's hearing.

Initially K was not entitled to attend the hearings as he was not considered to be a 'relevant person' in terms of s.93 of the Children (Scotland) Act 1995. Children's hearings are conducted in private and only 'relevant persons' are entitled to attend and receive information and notifications about such hearings.

Following an order from the Sheriff Court, K was allowed to attend some of the hearings but thereafter the Panel imposed an order that he was to have no further contact with his daughter. K appealed against this ruling.

The case eventually reached the Supreme Court which, in reaching its decision, looked to similar cases that had come before the European Court of Human Rights. The court considered that the case raised a fundamental question over fairness of the treatment of unmarried fathers in K's position.

The fact that K was not allowed to attend hearings where decisions were being made due to about his alleged conduct meant that he had no opportunity to defend his position and this clearly raised issues under Article 6 of the ECHR (right to a fair hearing).

The court considered the difference in treatment between the mother and the unmarried father in the case as "striking". It also considered that the difference in treatment under Scots law between unmarried registered fathers of children born before 4 May 2006 and those of children born after that date to be unfair and stated that "it is difficult to see why the exclusion of fathers registered before that date can possibly be justified".



The court ruled the Children (Scotland) Act 1995 was to be read in such a way to allow fathers who "appear to have **established family life** with the child **with which the decision of a children's hearing may interfere**" to be considered as "relevant persons" for the purposes of children's hearing cases.

While the court made clear that "mere biology was not enough", in this case it was apparent that K had established a family life with his daughter and that the decisions being made at the hearings would have a significant impact upon his relationship with her. He therefore ought to be considered a 'relevant person' in terms of the legislation and be able to take part in the decision making process when it came to matters concerning his child.

The court further stated that:

“a parent (or other person) whose family life with the child is at risk in the proceedings must be afforded a proper opportunity to take part in the decision making process. As currently constituted the children’s hearing system violated the article 8 rights of this father (and indeed of his child) and risks violating the rights of others in the same situation”.

It is clear from this statement that the granting of extended rights in such types of hearings is not to be limited to parents and therefore could include other family member such as grandparents or even other persons if the “established family life” factor can be shown.

For the full UK Supreme Court judgement please click below [Principal Reporter v K \[2010\] UKSC 56](#)

Employers to be extra careful in redundancy selection process

Pinewood Repro Ltd T/A County Print v Page UKEAT0028/10

The employee in this case, Page, was provisionally selected for redundancy along with 2 other colleagues in the same department. A consultation process ensued and the 3 employees were assessed and scored on a range of factors such as attendance, productivity, skills, experience, disciplinary record and flexibility.



Page was given a copy of his scorings and attended a consultation meeting at which he queried some of the scores he had been given. At the meeting he was then given a copy of the scores for the others in his pool. These showed that on some of the factors he had scored slightly lower than his colleagues but no explanation was provided to him as to how such scorings had been reached.

The employee was subsequently selected for redundancy. His appeal against the decision was refused by his employers and they responded by stating that they were satisfied the scoring had been ‘factual and correct’.

He then raised a claim for unfair dismissal on the grounds that he had not been properly consulted about the selection criteria applied and that such criteria had not been fairly applied.

The Employment Tribunal (ET) upheld his claim for unfair dismissal and found that the employer had failed to give any explanation for why he had been given lower scores than his colleagues on certain criteria.

The employer lodged an appeal against the initial judgement but the Employment Appeal Tribunal (EAT) agreed with the findings of the ET. The EAT said that adequate information had to be provided to employees in such consultation processes. This was to ensure that they were sufficiently equipped to be able to respond and challenge scores given to them in such redundancy exercises, especially where these concerned factors that could only be scored subjectively (e.g. flexibility) rather than objectively (e.g. attendance).

The employer tried to argue that Page would have been dismissed in any case but the EAT was not convinced that any evidence was presented to suggest this was the case and the fact that the 3 sets of scores were very close did not support this argument either.

The case highlights the importance of giving employees adequate information in such consultancy processes and the risks of using subjective selection criteria which may leave decisions open to challenge. Employers need to ensure that fair, open and robust procedures are followed to avoid potential further cases of this nature.

Given the current climate and numbers of people going through some form of consultation process it is clear that, from an employee's point of view, this case highlights how one should not be adverse to questioning and challenging selection criteria used by their employers where they feel they have not been given enough information about the process or feel that such criteria are being used in an unfair manner against them.

To view the case from the EAT's website click here [Pinewood Repro Ltd T/A County Print v Page UKEAR0028/10](#)
