

# Headline

news from **Head  Office**

January 2011

## BBC loses Age Discrimination case

**Former Countryfile presenter Miriam O'Reilly successful in Age Discrimination claim against BBC after being dropped when show moved to new primetime slot.**

O'Reilly, 53, took the BBC to an employment tribunal claiming she was unfairly dropped from the show following its move from a Sunday morning to a peak-time Sunday evening slot in April 2009.

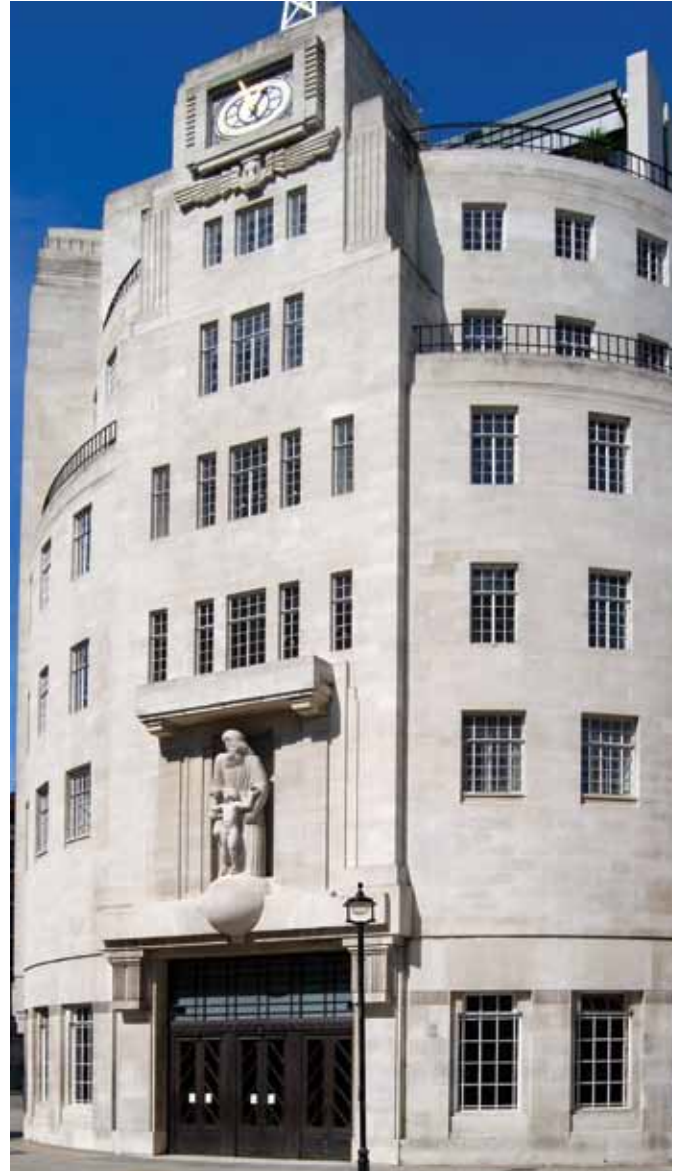
She was one of four female presenters, all in their 40s or 50s, who were also dropped from the long running show and claimed she had been a victim of age and sex discrimination.

The Tribunal heard how O'Reilly had endured such comments as "be careful with those wrinkles when high definition comes in" some 8 months before being dropped and was told the reason why she would no longer be working on the show was because it was being "refreshed".

As a result, the Tribunal's final decision was to uphold the presenter's claims of age discrimination and victimisation, but not sex discrimination. In its judgment they commented that the discrimination "was not justified" and that she had been "dismissed almost entirely out of hand". They criticised the BBC for the "lack of documentation" about the decision making process that led to O'Reilly's replacement on the show and although that in itself is not evidence of discrimination it "makes it much more difficult for the respondent [the BBC] to explain the decisions and state with clarity the grounds upon which the decisions were taken."

Consequently O'Reilly will now receive damages from the BBC to compensate her for the treatment she has received. In reaction to her win O'Reilly remarked "words cannot describe how happy I feel. It's historic and it's going to have huge implications for all broadcasters."

Not only will this judgment have implications for all broadcasters, with the BBC having already issued an apology to O'Reilly advising they will be providing additional training to senior editorial executives and issuing new guidance on the fair selection of presenters, but the verdict is a major embarrassment for BBC1's former controller Jay Hunt who has just started her new job as Chief Creative Officer of Channel 4 and whose evidence was paramount to the corporation's defence.



In the aftermath of this landmark case the job now of dealing with the issues identified, that so clearly need to be addressed by the whole industry, and raising the topic of fair representation of people of all ages across the broadcasting industry is in the hands of Chair of the Cultural Diversity Network Mark Thompson.

**Human Resources • Health and Safety**  
supporting your business piece by piece

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# Introduction to Head Office

## Head Office provides an innovative and effective way to ensure that your business complies with the legislative requirements of both Human Resources and Health & Safety.

Keeping up with the ever changing legislations and pressures faced managing a team of staff is very expensive, particularly with the use of ad hoc employment lawyers and HR / health and safety consultants.

Head Office aims to reduce these expenditures through a monthly subscription which provides an insurance policy against the costs of an employee taking you to an employment tribunal and any award payouts. On a day to day basis, Head Office supports the business by providing updated guidance on new legislation and case law, a dedicated helpline staffed by HR legal experts and a contract / letter template builder which can be used both as a support mechanism for an existing HR team or as a part of an owner managed business where there is no dedicated HR resource.

Key benefits can include:

- **A safety net with our exclusive insurance policy that covers the costs of getting to tribunal and any award up to £250,000**
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As part of the offer Head Office will provide an initial review of your current position with the aim of recommending the most appropriate solution for your needs.

Call us now on 0845 217 8650 to speak to one of our expert advisers.

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## Abolition of the Retirement Age

When the default retirement age was introduced in 2006, the Government had already committed to reviewing it in 2011. This review was brought forward to 2010, largely "to reflect the change in economic circumstances since it was introduced".

As a result from the 1st October 2011, the default retirement age will be abolished allowing those who want to work past 65 to do so. Therefore any dismissals on the basis of retirement taking place on or after the 1st October 2011 will have to be justified as fair under the Employment Rights Act 1996 and as free from any form of discrimination under the Equality Act 2010.

This change will be subject to some transitional provisions. The last date for issuing a notice of dismissal for retirement under the current statutory retirement procedure will therefore be the 5th April 2011 with the last effective date of termination for such dismissals being the 30th September 2011. The short notice provisions, which currently enable an employer to give less notice than six months of intended retirement, will be abolished from the 6th April 2011.

Employers will no longer be able to regard 65 as the "safe" age at which to retire employees but will instead have to show objective justification for dismissing at this or indeed any set age for retirement. Whether employers actually keep fixed retirement ages or decide when to retire people on a case-by case basis, they will have justify the decision to retire. This will entail identifying a legitimate aim being pursued and showing that the means used to pursue it are proportionate.

In terms of workforce planning, there will no longer be an obviously legitimate point at which to have a discussion with older workers about their future plans and when they might cease to work in the business. There will be fears that initiating any such discussion may be perceived as discriminatory in itself.

Possible consequences of this are that an employer may resort to a clumsy and inappropriate "without prejudice" discussion which is not in fact protected by the without prejudice cloak. Younger employees may feel disgruntled about what they perceive to be a "bottleneck" if succession planning is not addressed, so it is not just claims from older employees that employers have to consider. In those cases where there are performance problems with older workers, perhaps connected to declining health or ability, employers may keep them on but avoid invoking capability

procedures for the sake of their "dignity". This would not only prejudice the fairness of any subsequent dismissals but could lead to discrimination claims under the Equality Act 2010.

ACAS has produced guidance which provides examples of good and bad practice when conducting workplace discussions about an employee's future plans and recommends the following:

- Such discussions could be built into the appraisal system and should be conducted at least annually.
- Avoid asking questions which could be seen to be discriminatory, such as "why don't you retire to avoid an undignified sacking?" or by indicating that the employee is blocking younger workers from progressing.
- Ask open questions about the employee's future plans for the short, medium and long term.

Since retirement will no longer be a statutory reason for dismissal and the fairness of retirement dismissals will no longer be governed by statutory provision, employers will be bound by the current law relating to unfair dismissal. Effectively they will have to show that the dismissal of an older worker for one of the five potentially fair reasons and that a fair procedure was followed. The reason in these circumstances might typically be "some other substantial reason" (as indicated by the government in its response) or "capability".

The ACAS guidance says surprisingly little about how to effect a fair dismissal in circumstances where the employee is retiring. It seems to equate having an objective justification for a fixed retirement age (referred to as "Employer Justified Retirement Age") with having a potentially fair reason for dismissal. On the procedural side, the ACAS guidance simply indicates that "employers should also follow a fair procedure in retiring people at the compulsory retirement age.

Overall it seems employers have two options: abandon fixed retirement ages altogether or else retain a fixed retirement age.

If fixed retirement ages are to be retained, the employer will need to be able to justify the retirement age, whether it is company-wide or used for particular positions. If fixed retirement ages are abandoned, the employer will still need to justify the decision to retire a particular employee on a case-by-case basis. Arguably, an employer that has a fixed retirement age is more exposed to immediate challenge than an employer which abandons a fixed retirement age and approaches the matter on a case-by-case basis.

If you have any queries relating to any of the articles in this magazine, please contact our legal advisors on 0845 217 8650



# Can I require an employee to repay their training costs?



**A clause in a contract of employment which seeks repayment of training costs if the employee leaves before a certain date is likely to be deemed a restraint of trade and unenforceable for being a penalty clause, unless it reflects a genuine pre-estimate of the employer's losses.**

This issue was first addressed in the case of *Strathclyde Regional Council v Neil* [1984] IRLR 11 where a social worker had signed a contract requiring her to stay in employment with the Council for a period of 2 years after completing a particular training course. If she was to leave before the end of the 2 years the contract stipulated that she would be required to repay some of the costs associated with her attendance on the course.

She did in fact leave the Council before the end of the 2 years and the Council issued proceedings against her for the repayment of the costs as per the contract.

Both the Court at first instance and Court of Appeal found that the clause was a reasonable restriction and could not be considered an unlawful restraint of trade. The Court also considered that since the longer the employee stayed with the Council the less they would have to repay, it could not be considered a penalty either and was in reality a genuine pre estimate of the Council's loss.

Each case will turn on its own individual facts but where a repayment clause is used it is important for the employer to check the following:

- The repayment period does not amount to indirect discrimination, in particular on grounds of sex, age or disability. This is because it is debatable that female, older or disabled workers are often less able than others to remain in continuous employment for prolonged periods of time.
- Therefore, avoid making the repayment period too long.
- Have the employee sign a deduction consent form or include a deduction from earnings clause in the employment contract. Given such a clause is drafted correctly; it will enable the employer to deduct any outstanding repayments from salary (for example, during a notice period or from pay in lieu of notice). In the absence of such a clause, recovery of "wasted" training costs may be tantamount to an unlawful deduction of wages.

This point is also governed by the Employment Rights Act 1996 which stipulates that any deduction from an employee's wages is considered unlawful unless:

- The deduction is required or authorised by statute or a provision in the employee's contract; or
- The employee has given their prior written consent to the deduction.

Given this, although there remains uncertainty concerning this issue as the *Strathclyde* case was heard over two decades ago and the Court may well take a different view in today's climate, an employer would be best placed to, at the very least, ensure an employee consents to the deduction in writing or by a provision in their contract and any repayment clause does in fact reflect the employer's actual loss.

# Clegg reveals plan for couples to share Maternity leave

**The Deputy Prime Minister outlines plan to modernise the current "Edwardian" parental leave system.**

Fathers may be allowed to take up 10 months' paid paternity leave under plans being announced by the Government recently. Mr Clegg speaking at the launch of a think tank report which warns that overwork, stress and inflexible hours are undermining parents' confidence in raising children. He referred to 'Alarm Clock Britain', maintaining it is fundamental that reforms to parental leave not only help the rich but also ordinary working families.

The Government would like couples to be able to take leave in a number of chunks rather than a single block, or parents taking time off together rather than one after the other.

Mr Clegg has said "too many parents feel trapped by the current rigid rules." The current rules, which only allow men two weeks paternity leave, "patronise women and marginalise men."

It seems the coalition Government is going ahead with measures drawn up by Labour which will also allow fathers to take any remaining unpaid maternity leave if mothers go back to work early, up to a maximum of six months.

These changes are due to take effect in April this year but it is expected that Mr Clegg will confirm that he and the Prime Minister David Cameron want to introduce additional reforms in 2015 that will further "transform the opportunities for fathers to take time off to care for their children".



# Have you ever thought about secondments and sabbaticals?

## What is a secondment?

A secondment is when an employee moves to work in a different area of a business on a temporary basis or goes "on loan" to an external organisation. The length of a secondment can range from a few weeks to a year or more.

Secondments can provide positive career development opportunities by adding to the portfolio of skills and expertise of employees. They are also a means of enhancing the skills based of the organisation or creating partnerships between companies. They can expose employees to opportunities that may not be available to them in their current organisation, enabling organisation to develop their talent whilst retaining talent, preventing those key employees leaving to fulfil their career aspirations. This can reduce recruitment and training costs associated with replacing those who leave the organisation.

For secondments to external organisations, the employee's salary would continue to be paid by the employer and re-charged to the organisation the employee will be seconded to. If you are considering seconding employees to external organisations it is important to agree the terms of the secondment, such as; the length of the secondment, place and hours of work, how performance will be assessed, the notice required to terminate the secondment by either party and what will happen to the employee upon their return.

## What is a sabbatical?

a sabbatical is a period of absence, which is either paid, part-paid or unpaid for the purpose of study, travel, rest or spending time with their family. Sabbaticals provide an opportunity for employees to take a break from work, which they may not necessarily do because they are concerned about finding a job upon their return.

Companies can benefit from employees returning from a sabbatical more renewed, energised and enthusiastic about their jobs. Like secondments, it can also enable companies to retain key staff, who would otherwise resign to take a period of absence, and then potentially gain employment elsewhere upon their return.

Sabbaticals can also assist organisations seeking short-term cost savings. For example offering voluntary unpaid or part-paid sabbaticals can offer an alternative to short-time working, temporary lay-offs or even redundancies.

If you are thinking of introducing sabbaticals or secondments, please don't hesitate to contact Head Office, we can advise you on the terms of such agreements to ensure they run smoothly for both the company and employee benefit in the short and long term.

# Brink's Global Services Inc and ors v Igrox Ltd and anor, Court of Appeal, 2010 EWCA Civ 1207.

## Employer liable for employee's theft.

Under common law an employer is vicariously liable for the tortious acts committed by their employees, if such acts or omissions are committed in the course of employment.

In this recent case the Court of Appeal considered whether the same applied where the employee had stolen silver bars from a shipping container he was supposed to be fumigating.

Brink's Global Services Inc (BGS Inc) provides a worldwide service for the carriage of goods. Igrox Limited (I Ltd) provides fumigation services, including the fumigation of goods packed in containers for carriage abroad.

In May 2007 BGS Inc was contracted to carry 627 silver bars from a bank in London to India. The silver was collected and taken to the container terminal, where it was placed in the secure fumigation compound.

I Ltd was then contracted to carry out the fumigation and instructed two of its employees, B and R, to do so. However instead of carrying out the fumigation as they were supposed to they were recorded by CCTV inspecting and resealing the container, without fumigating, and then R returned a little later and stole 15 bars of silver.

BGS Inc discovered the theft on the 14th May and R was convicted of the theft. The silver, however, was never recovered.

BGS Inc compensated the owners of the silver and sought to recover their outlay from I Ltd on the basis that they were vicariously liable for R's actions. The High Court concluded that R's actions were inextricably linked with what he was authorised to do in the performance of his duties and were so closely connected with the

employment that it was fair and just to hold I Ltd liable.

The judge therefore held that R committed the theft in the course of his employment and that I Ltd was consequently vicariously liable for the loss of the silver.

I Ltd appealed to the Court of Appeal on the basis that the High Court judge's findings were flawed because he had failed to take account of B's witness evidence. Namely that it was his decision not to fumigate the container because they did not have the necessary chemicals and therefore R had not made previous preparations to steal the silver. The Court of Appeal accepted the judge had overlooked this evidence and went on to review the authorities relating to vicarious liability for guidance on whether R had committed the offence during the course of his employment or whether it was just that his employment had merely provided him with the opportunity.

The Court concluded that there was a sufficiently close connection between R's theft of the silver and the purpose of his employment to make it fair and just that I Ltd should be held vicariously liable for his actions.

I Ltd was, in a wide sense, responsible for the container's contents during the fumigation process, a responsibility it had delegated to B and R and which they were employed to fulfil.

Theft by an employee from the very container which he is instructed to fumigate was, in the Court's opinion, a risk reasonably incidental to the purpose for which R was employed.

Accordingly the Court dismissed the Appeal, upholding the High Court's decision at first instance.

## Free Seminar on Working with the social network

### Bristol:

Tuesday, 1st March 2011,  
8.30 am to 10.30 am

Future Inns, Cabot Circus, Bristol, BS1 3EW

### Cardiff:

Wednesday 9th March 2011,  
8.30 am to 10.30 am

Future Inns, Cardiff Bay, CF10 4JY



- This seminar will provide you with advice and ideas of how to work with the social network sites
- How to avoid the pitfalls of social media in your business
- Best practice tips
- Dealing with disciplinary issues and your employees resulting from social networking
- Employment Law update – including
  - Additional paternity leave
  - Retirement
  - Agency workers

### Speakers

Austin Walters, Triplefishy  
Bethan Southcombe, Head Office  
Helen Mckeand, Head Office

**RSVP:** [jules.molyneux@askheadoffice.co.uk](mailto:jules.molyneux@askheadoffice.co.uk)  
**02920 38 5808**

## Royal Wedding Public Holiday update

**Prime Minister David Cameron welcomed the announcement of the date for the marriage of Prince William and Ms Middleton and it has been agreed by the Cabinet that Friday April 29, 2011 will be marked by a Bank Holiday.**

### So what does this mean for employers?

There are currently 8 annual Bank holidays in the UK which comprise the following:

- 1 January – New Years Day (or next working day)
- The Friday before Easter Sunday – Good Friday
- The day after Easter Sunday – Easter Monday
- First Monday in May – May Day Bank Holiday
- Last Monday in May – Spring Bank Holiday
- Last Monday in August – Summer Bank Holiday
- 25 December – Christmas Day
- 26 December – Boxing Day

Over the last few years employers have seen statutory leave entitlement increase from 20 (4 weeks) to 28 days (5.6 weeks) for full time employees. The thinking behind this increase was in part to bring an end to employers requiring that employees had to count public holidays against their then 4 week annual leave entitlement.

Of course, for this year, 2011, we now have the benefit of an extra Bank holiday – that being Friday 29 April.

With the increase to 9 days for the Royal Wedding many employers have been left pondering whether they must provide this day off as a matter of law.

### So what is the situation?

Well, despite the increase to take account of the 8 days, 9 in the case of 2011, there is still no right to time off, whether paid or not, on any public holiday.

Whether an employee is required to work on a public holiday is a matter for their contract, or in many cases, simply the employer's preference. In many industries, such as retail, travel or emergency services, working on a public holiday is obviously a commercial or operational necessity.

Where employers allow employees to take leave on public holidays, this may count against statutory leave, however, notwithstanding this many employers still give paid leave on public holidays in addition to the statutory leave.

Given an employee does not have the right to the 29th April off work, just as is the case with any other Bank holiday, an employer's options are as follows:

- Require an employee to take the day off and deduct the day from their statutory leave.
- Allow an employee the day off as paid leave in addition to their statutory leave.
- Require an employee to work the day and provide a day off in lieu.
- Apply your normal practices that apply to any other public holiday, for example in industries such as retail an employer may allow an employee to take the day off out of their annual leave if they so wish or alternatively work the day, as the business will probably be trading as any other day.

It is crucial that any decision made by the employer reflects their employee's contracts of employment or the business' ordinary working practices and part time employees should not be discriminated against - any benefit offered to full time employees should also be offered to part time employees on a pro rata basis.

On the subject of Public Holidays – A Private Members' Bill calling for an additional Bank holiday has been introduced in the House of Commons. The Bill would designate St David's Day (Wales) and St George's Day (England) or their nearest working days as annual public holidays, with effect from 2012, increasing the annual public holidays from 8 to 9.....watch this space!



# Ways to make your workplace happier!!



**With the Festive Season and the associated celebrations being a distant memory everyone is trying to beat the January blues....so with this in mind we have put together a few tips on trying to make your workplace a happier one.**

1. Recruit people with the right attitude or talents to fit your workplace - it is a lot easier to teach the essentials for a job, however, personalities and attitudes are a lot harder to change. Poor attitudes and behaviour can spread like wild fire the workplace and have a negative impact on productivity, employee morale and customer / client service.
2. Never over promise – promises that fail to materialise leave a sour taste in peoples' mouths. Maintain employees and clients expectations through realistic delivery and results.
3. Your line managers are your role models \* - 96.8% of "The Sunday Times 100 Best Companies to work for " have a culture of fairness and cite their Line Mangers as being exceptional role models within the companies promoting the values and behaviours the company wishes to instil.
4. Employee feedback – record it, review it and act on it. This can be done by reviewing appraisals, probation review meetings, staff surveys or starting a suggestion scheme. These tools can provide invaluable insight into what is going on throughout the organisation, bringing things to your attention that you never knew existed.
5. Encourage employees to go the EXTRA MILE – train and encourage your employees to think constantly about how they can improve their performance and how that contributes to the business.
6. Ask your employees how they think your service or product can be improved. Often those doing the job can identify "better ways of doing things" than management. Ask them what causes them problems or wastes their time, not only will this help to save your business money, but hopefully make employees feel more involved through their contributions.
7. Don't forget the small things.....a cheerful "Good Morning", a smile, a thank you and praise cost nothing, but they can make a BIG difference to how people feel and how they will interact for the rest of the day, and that can be infectious!!!

**\*Sunday Times 100 Best Companies to Work for and CIPD "Harnessing the power of employee communication" 2010**

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