

A job candidate rejected because she did not have recent paid work experience after taking time out to look after her children has been awarded compensation by an Employment Tribunal in Northern Ireland (*Crilly v Ballymagroarty Hazelbank Community Partnership*). This decision is by no means groundbreaking in principle, but it shows just how easily and inadvertently employers can get caught out when drawing up short-listing criteria.

Ms Crilly applied for a job at the Ballymagroarty Hazelbank Community Partnership (BHCP) in October 2010. She was rejected at the short-listing stage because she did not meet one of the criteria for the post, namely 2 years' relevant paid experience gained within the last 5 years. Ms Crilly was unable to fulfil this requirement because she had taken a 6 year break from paid work to bring up her children. She had however done extensive high-level unpaid work in the voluntary sector during this period. When her application was rejected without even an interview, Ms Crilly brought a claim of indirect sex discrimination, arguing that BHCP's requirement for candidates to have relevant experience within the last 5 years placed women at a particular disadvantage (as they were more likely than men to have taken a career break) and could not be justified. BHCP defended itself by stating that the requirement to have recent relevant experience was justified because it needed to have someone in the post who could perform with minimal supervision from the start and without the need to undergo extensive in-post training.

The Tribunal upheld Ms Crilly's claim. It accepted that the requirement to have relevant experience within the last 5 years placed women at a particular disadvantage compared with men, bearing in mind recent statistics from the Northern Ireland Labour Force Survey which showed that the vast proportion (90.6%) of people who take extended periods out of the workplace are women who do so due to childcare responsibilities. Ms Crilly had also clearly suffered a disadvantage because she had been rejected at the short-listing stage. The burden therefore was on BHCP to show that the requirement to have 2 years' experience within the last 5 years was justified, i.e. that it was "a proportionate means of achieving a legitimate aim".

Case law makes it clear that in order for an aim to be legitimate it has to correspond with a "real need" on the part of the employer. In this case the Tribunal said that whilst BHCP's argument that it needed to have someone in post who could perform with minimal supervision and without the need for extensive training could **potentially** constitute a legitimate aim, it was not persuaded that the means employed to achieve this aim were appropriate and necessary. It did not therefore satisfy the test of objective justification. BHCP's argument that it needed a candidate who could "hit the ground running" was holed below the waterline when it conceded in evidence that the requirement of 2 years' experience could have been met at any time during the preceding 5-year period, i.e. up to 3 full years before even starting the job.

Furthermore, the two successful candidates had actually undergone a 2-month induction period, something Ms Crilly claimed (and BHCP could not deny) could equally have been used to bring her up to speed with recent developments in the area.

The Tribunal also accepted Ms Crilly's argument that there should have been flexibility on the requirement to have gained experience within the last 5 years, so as to enable people such as her (who could demonstrate extensive recent **unpaid** experience of potentially at least equal relevance) a chance to be tested at interview.

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This case does not establish any new legal principles, but it is a good example of how easily employers can trip up when advertising for posts – BHCP probably never gave a second thought to the possibility that its short-listing criteria could indirectly discriminate against women. After all, the number of people seeking employment after taking off 3 years out of the last 5 must in absolute terms surely be negligible. The decision highlights that employers should be careful when advertising for roles and should not set criteria which could disadvantage particular groups, unless they are very confident these can be justified. To gain that degree of confidence means stress-testing every single component of your proposed selection criteria. Ask yourself – why do we need 2 years' experience? Would not 18 months be ok if they were more recent? Why does it have to be paid? What does that bring to us that voluntary work does not? Why is the cut-off 5 years backwards rather than 4 or 6? The Tribunal is unlikely to second-guess a considered and demonstrable rationale for a particular criterion but will have much more room for manoeuvre if there is a vacuum in the employer's supporting thought processes.

Other examples of short-listing criteria that could fall foul of the discrimination legislation unless they can be objectively justified include: (a) a requirement to have a certain number of years' experience which could indirectly discriminate against younger workers; (b) a requirement to have continuous experience which could equally indirectly discriminate against women who have taken time out due to childcare commitments; or (c) a requirement to have a UK-based qualification which may indirectly discriminate because of race when equivalent qualifications obtained abroad would also meet the requirements of the job.

Further Information

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