

MS

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Ms M O'Reilly

(1) British Broadcasting Corporation
(2) Bristol Magazines Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 4-19 November 2010

EMPLOYMENT JUDGE: Mr J Tayler

MEMBERS: Lady A Sedley
Mr J Carroll

Appearances

For the Claimant: Ms H Williams, Queen's Counsel
For the Respondent: Mr J Galbraith-Martin, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- (i) The First Respondent subjected the Claimant to direct age discrimination and age victimisation.
- (ii) The Second Respondent subjected the Claimant to age victimisation.


EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

10 January 2011

JUDGMENT SENT TO THE PARTIES ON

11 January 2011

AND ENTERED IN THE REGISTER


FOR SECRETARY OF THE TRIBUNALS

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REASONS OF THE EMPLOYMENT TRIBUNAL

Introduction

1. By a Claim Form received by the Employment Tribunal on 25 January 2010 the Claimant brought complaints of direct age discrimination, age victimisation, direct sex discrimination and sex victimisation against the First Respondent.
2. A Case Management Discussion was held on 12 April 2010. I granted permission for the Claimant to amend her claim against the First Respondent to include indirect age and indirect sex discrimination.
3. Subsequently, the parties agreed that any claim related to Countryfile Magazine should lie against the Second Respondent. On 3 November 2010 Employment Judge Lewzey ordered, by consent, that the Second Respondent be joined to the claim.
4. A finalised version of the list of issues was agreed between the parties, shortly before the hearing, which is attached as Annex 1.
5. At the outset of the hearing we granted permission for an amendment of the Response so that it be treated as made on behalf of both the first and second Respondents to deal with the allegation that the Claimant was not given any further work for Countryfile Magazine.

Evidence

6. The Claimant gave evidence to us from a primary witness statement and a supplementary witness statement. On her behalf she called Charlotte Smith, a former presenter on Countryfile and various BBC radio programs.
7. On behalf of the Respondent we heard from:
 - 7.1. Mohit Bakaya – Commissioning Editor, Specialist Factual, Radio 4
 - 7.2. Andrew Thorman – Head of Rural Affairs (Audio, Music and Factual) and Head of Audio and Music Production (Birmingham)
 - 7.3. Jay Hunt – Controller of BBC1 at the material times
 - 7.4. Liam Keelan – Controller, BBC Daytime
 - 7.5. Teresa Bogan – Series Producer – at the relevant time Series Producer for Countryfile
 - 7.6. Lucy Lunt – Senior Producer for Audio and Music Factual
 - 7.7. Amanda Queiroz – Production Executive for BBC Audio and Music Division
 - 7.8. Maggie Ayre – Producer for Radio 4, Audio and Music Division
 - 7.9. Stephen Peacock – Executive Producer for Audio and Music (Factual), Birmingham
 - 7.10. David Ross – Editor, Radio Current Affairs, Manchester
 - 7.11. Cavan Scott – Editor of Countryfile Magazine at the relevant time
 - 7.12. Mark Damazer – Formerly Controller of Radio 4 and Radio 7
8. The witnesses gave their evidence from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.
9. We were provided with an agreed bundle of documents, to which a number of additional documents were added by consent during the course of the hearing. References to page numbers in this Judgment are to the page numbers in the agreed bundle. In addition, we were provided with four DVDs which included extracts from the daytime and evening versions of Countryfile.

10. In this Judgment we start by setting out our primary findings of fact and then give our analysis of the law. When considering the application of the law to the facts we reach conclusions on certain disputed factual issues and draw inferences from our primary findings of fact where we consider it appropriate.

Findings of Fact

11. The Claimant commenced work for the BBC in 1982.
12. In 1989 the BBC began the broadcast of the television rural affairs magazine programme, Countryfile. It covers rural and farming issues; including journalistic and more light-hearted segments.
13. One of the original presenters was John Craven; who was well known for his role on the children's television news programme, Newsround.
14. In 1998 or 1999 Charlotte Smith started working on Countryfile.
15. In 2000 the Claimant started working on the early morning specialist farming programme on Radio 4, Farming Today.
16. In 2001 the Claimant, Ben Fogle and Adam Henson started working on Countryfile.
17. In 2004 the BBC broadcast an edition of Countryfile, presented by the Claimant, investigating over-fishing off the coast of West Africa. It won the Foreign Press Award, Royal Television Society Award and British Environment Media Award.
18. On 1 April 2004 the Claimant started working on the Radio 4 environmental documentary series, Costing the Earth. Initially, she presented one or two programmes in each six episode series.
19. On 7 March 2005 Mr Thorman sent an e-mail to the Claimant congratulating her on her programme titled Birds of a Feather, stating(p122):

"A big thank you for all your hard work, dedication and commitment which gave us a very strong UK exclusive angle on this running story. I heard and saw much of the coverage which was in no small part down to you."
20. This indicates the high regard in which the Claimant was held by Mr Thorman at the time.
21. In or about January or February 2006 Ms Ayre started working as Series Producer for Costing the Earth. The Claimant was presenting approximate three episodes per series.

22. On 20 June 2006 the Claimant presented her first episode of File on 4 on the subject of "Farmers". File on 4 is a highly prestigious radio documentary series. The team spend approximately one month investigating the stories.
23. On 24 March 2006 the editor of the Radio 4 early afternoon series Woman's Hour, Gill Burridge, sent an e-mail to Mr Thorman asking about the possible availability of the Claimant to cover for Jenni Murray; asking (p125):

"Would she take on board the broad range of subjects and tone we are looking for? Any advice gratefully received."
24. Mr Thorman responded:

"She'd be great".
25. On 5 July 2006 Mr Thorman wrote to Mr Peacock in relation to the "Milk bung" story; asking (p126):

"I can see if we can get a bit of extra dosh out of AQ to let Miriam loose",
26. This was a reference to the Claimant, and is further indication of the Mr Thorman's good opinion of her.
27. In August 2006 there were exchanges of e-mails between Mr Thorman and Mr Ross about the availability of the Claimant to present a further episode of File on 4, raising the concern that it would interfere with her work on Farming Today. The Claimant subsequently left Farming Today and concentrated her efforts on Countryfile.
28. In 2006 Juliette Morris started working for Countryfile.
29. On 12 October 2006 the Claimant was asked to present Woman's Hour for a number of weeks.
30. On 4 December 2006 Mr Thorman sent an e-mail to Chris Impey, who was then the Producer of Farming Today, asking (p129):

"How about entering Miriam for the Speech Broadcaster of the Year in this year's Sony's? She presents Farming Today This Week, Costing the Earth, Woman's Hour, File on Four and Pick of the Week ...

Could you have a look at the category and pull together an entry"

31. Mr Impey replied:
- "Will do. Some good CTE progs, the great File on Four, tenacious on FTTW and showing her versatility and warmth on Woman's Hour"
32. The Sony Awards are the most prestigious awards in Radio. The proposal to enter the Claimant as Speech Broadcaster of the Year showed that Mr Thorman thought very highly her.
33. From 2007 onward Ms Ayre had some concerns about the Claimant's availability and enthusiasm for Costing the Earth. The Claimant was unhappy with the time commitment and the relatively low fee that she received for the programme. However, having discussed the matter with the Claimant, Ms Ayre wrote to Mr Thorman on 14 June 2007 in the following terms (p263):
- "Just chatted to Miriam about CTE over the summer. She's wholly committed and also willing to do an extra programme to account for Tom's absence plus possibly using another presenter. I'd be happy with that option"
34. However, in August 2007 there was an occasion when the Claimant was unable to present an edition of Costing the Earth that she had been scheduled to do; as a result of which Ms Smith covered. Ms Ayre wrote to Mr Thorman on 13 August 2007 stating (p264):
- "I am not sure if Steve has mentioned to you – that we have had to use Charlotte Smith on one of the programmes to replace Miriam who was uncertain about availability. Charlotte is working with Anne-Marie on the flooding programme"
35. Mr Thorman replied (p264):
- "Hi, yes he did. I think we may have to revisit the question of presenters once this series is done and dusted. I am aware of how much of a headache this has been for you"
36. In the summer of 2007 there was some friction between Ms Ayre and the Claimant as to her availability for Costing the Earth. However, later in the summer a meeting took place between the Claimant, Ms Ayre and Mr Peacock at which it was agreed that the Claimant would reduce her commitment to two Costing the Earth programmes per series. The Claimant did this with the intention of ensuring that her engagements would not clash.
37. In October 2007 Countryfile Magazine was launched.

38. In November 2007 an episode of Countryfile was presented by the Claimant which included a feature on the endangered Bluefin Tuna. This episode was runner up for the Foreign Press Award.
39. In November 2007 the Claimant commenced writing for Countryfile Magazine; producing a series on Green Heroes that ran for approximately a year.
40. On 11 March 2008 Ms Ayre sent an e-mail to Mr Thorman asking if he had spoken to the Claimant about her availability/willingness to do the next series of Costing the Earth. Mr Thorman replied (p265):

"I had a long chat with her post wind. She was very receptive (and supportive of you) and up for doing more so feel free to ask. I just hope she took on board everything I said. I am sure she will I'd say 60/40 split with Tom.. But if she can't or isn't available or not interested then at least we have asked and I would be happy for Tom to do as many as poss."
41. This indicates that there was some continuing concern about the Claimant's commitment to Costing the Earth, but that she was to remain as one of the main presenters.
42. In the spring of 2008 a decision was taken to increase the number of episodes of Costing the Earth from 6 to 8 per series, with effect from April 2009.
43. In May 2008 Ms Hunt returned to the BBC, after a short period working for Channel 5, in the role of Controller of BBC1.
44. In the summer of 2008 Mr Thorman and Ms Hunt had a number of telephone conversations, and a meeting in London, during which they considered the possibility of moving Countryfile from its daytime slot on Sunday to an early evening slot on Sunday, during primetime. The viewing figures for Countryfile were extremely good and it was hoped that it might move successfully to a primetime slot and attract a substantially larger audience. The key factual issues in this case turn on when, by whom and on what grounds the decision was taken as to who would be the presenters of the new peak time programme.
45. In outline, it is the Respondents' contention that a set of criteria were devised and then applied to the existing presenters, as a result of which the Claimant and a number of her colleagues did not "move forward" to the new primetime programme. The Respondent contends that the principal criterion was that the presenter must have network experience so as to make him or her familiar to a primetime audience. It is the Claimant's case that no such criteria were applied and that decisions were taken on an impressionistic basis. We shall return in our analysis to when, by whom, and on what basis the decision was taken.
46. In deciding to move Countryfile from a daytime to evening slot, a decision was also taken that the daytime slot should be filled by a new programme that would

include archive footage from Countryfile, linked together by new pieces. This was eventually called Country Tracks.

47. On 4 September 2008 Costing the Earth won the IVCA Clarion Award for best Radio Environment Programme; as a result of which Mr Thorman sent an e-mail setting out his congratulations (p267):

“Congratulations to Costing the Earth and especially Maggie Ayre, Tom Heap and Miriam O’Reilly but also to the team support they received for chalking up yet another top environmental award”
48. On 26 September 2008 Helen Foulkes, Executive Producer, Daytime and Factual Formats, sent a proposal for the replacement programme for the daytime slot for Countryfile that was then called Countryfile Tracks. She referred to the fact that Mr Keelan the Controller of BBC1 daytime, liked the proposal. She suggested presenters including Ben Fogle, Tom Heap and Ellie Harrison.
49. On 9 October 2008 the BBC expenses policy was amended, which clarified that the channel would not pay for Christmas gifts or champagne under any circumstances. This explains why the Claimant was not thereafter sent such gifts by Mr Thorman (p191C-E and p138A).
50. On the same day, Tom Heap, who was now the primary presenter for Costing the Earth, sent an e-mail to Ms Ayre suggesting a programme on Biomass Heating (p267A-B + p281).
51. In October 2008 Mr Bakaya commissioned a File on 4 programme, that was to be presented by the Claimant, called Trading on HIV.
52. On 20 October 2008 Helen Foulkes sent an e-mail to Mr Thorman raising the question of presenters for the replacement programme for the daytime slot previously filled by Countryfile. The programme was now called Country Tracks. She suggested that Mr Fogle was likely to be the main presenter and that Adam Henson might be used as an occasional substitute. It is clear that by early November 2008 a decision had been taken to replace a number of the presenters of Countryfile.
53. On 7 November 2008 Mr Thorman sent an e-mail to Teresa Bogan, under the subject heading Countryfile presenters, stating(p140):

“Here is a shortlist of possibles I have been able to pull together. Let me know what you think. I must respond by Monday pm Any others?”
54. The e-mail set out a number of possible presenters. Mr Thorman did not suggest that the proposed presenters had been picked by the application of any particular criteria. Ms Bogan, in her oral evidence, stated that she had not been

told that specific criteria had been applied. Ms Bogan responded that day stating (p140):

"Can I get back to you on Monday morning? I know some of them but not all – and I am on my own today. I can probably think of a few others but need to do a bit of research"

55. Ms Bogan returned to the subject in an e-mail to Mr Thorman on 10 November 2008, in which she stated (p140A):

"Here are some thoughts on some additional ethnic talent.

Re: the list you sent over to me – I am familiar with some of them but not all so I'd need to order up some of their stuff to get a proper feel (several of the internet show reels aren't working at the moment). Do you want me to do that or would I be wasting my time (ie is Jay just gonna pick someone)????"

56. It is clear that Ms Bogan had either been told, or had inferred from the ethnic origins of the possible presenters on the list put forward by Mr Thorman, that they were seeking new presenters who were of an ethnic minority. It is also clear that she did not know of some of the names that had been put forward by Mr Thorman and was not familiar with their work as a result of any primetime profile that they might already have. In her e-mail she does not make reference to any criteria that she had applied in making her proposals. She was under the impression that Ms Hunt would play a significant role in choosing the new presenters.
57. On 13 November 2008 Mr Thorman sent an e-mail to Michaela Strachan, who was an occasional presenter on Countryfile, informing her of changes to the presenter line up. Ms Strachan, whose date of birth is 7 April 1966, was at that time 42. In the e-mail Mr Thorman said (p145):

"Hi Michaela,

I was hoping to see you in person to let you know that some pretty major changes are being considered by the controller of BBC One – Jay Hunt – for Countryfile.

Nothing has been agreed yet but if it goes ahead then it will have an impact on our relationship. You have had a long and very productive relationship with us and, although I would like to consider continuing to use you, there may be fewer opportunities – if any – going forward.

Jay is keen to build a more regular team of faces who would become much more associated with the brand than you have been able to be.

At this stage nothing is being made public – for the simply reason that nothing has been signed off by Jay. If it does happen it won't be until April next year."

58. It is clear that Mr Thorman was placing emphasis on the extent of the involvement of Ms Hunt in selecting presenters for Countryfile. Ms Strachan was only an occasional presenter for Countryfile, by this time having moved to live in South Africa, and was only available to present the programme on visits to the United Kingdom. She spent the majority of her time presenting wildlife programmes in South Africa.
59. On the same day, or thereabout, Mr Thorman informed Ben Fogle, another presenter on Countryfile, that he would not be used in the future, but that he would have the opportunity to present Country Tracks. Mr Fogle's date of birth is 3 November 1973; he was 35 at this time.
60. On 13 November 2008 Mr Thorman sent an e-mail to Ms Hunt updating her on the conversation with Mr Fogle, stating (p141):

"I have – after several attempts – managed to speak to Ben Fogle. I had already agreed and discussed what I was going to say with his agent Hilary.

I told him that we were having to build a much more regular team to front the proposition and that, while we loved him to bits, this hadn't been his preferred option to date. However here was an opportunity to become the face of the new daytime show. It would require less of a commitment but would provide much more exposure than he was currently getting or committing to with Countryfile.

Hilary then rang to say he felt devastated but she also told me that I couldn't have said anything else and was perfectly understanding.

Moving on – I have said much the same to Michaela Strachan (tho only by e-mail as she's been in SA) and have kept JC fully in the loop. He says there's a lot for him to consider. He does get it though.

I am seeing Katie Knapman next week along with Sanjida"

61. In both the e-mail about the conversation with Mr Fogle and that sent to Ms Strachan, Mr Thorman referred to building a much more regular team, rather than the application of criterion which required network experience that would make the presenters familiar to a primetime audience.
62. Katie Knapman was under consideration as a new presenter for Countryfile. She subsequently joined the show. Ms Knapman had experience presenting the Holiday Programme and Tomorrow's World, but had been living in Hong Kong

for the previous three years bringing up her children and did not have current network exposure that would make her familiar to a primetime audience. Ms Knapman was born on 22 October 1972, she was 36.

63. The reference to Sanjida was to Dr Sanjida O'Connell who was considered for Countryfile, but not chosen. Ms Hunt responded (p141):
- "Thanks for this. I am very grateful to you for handling it so well"
64. To which Mr Thorman replied (p141):
- "I still think they'll winge to you!
- Re Elle – not sure – but definitely worth a closer look. Also Emma Masingale (from the same stable, so to speak) less TV experience tho. I'll do some digging.
- Julia B keeps texting me but her sister (her agent) wants silly money. Will get there if she is genuinely keen.
65. The reference to Ellie was to Ellie Harrison who had some experience as a contributor to the One Show but did not have the level of network exposure that would make her familiar to a primetime audience. Her date of birth was 17 November 1977; she was 30.
66. The reference to Julia B was to Julia Bradbury who had extensive primetime, experience having presented Watchdog, Wainwright's Walks and a number of other network programmes. Her date of birth was 24 July 1970, she was 38. Subsequently, she was to become one of the two main presenters for evening Countryfile.
67. On 14 November 2008 Mr Thorman had a conversation with the Claimant in which he informed her that she was no longer going to be one of the presenters of Countryfile. The Claimant was born on 19 February 1957; she was 51 at that date.
68. In the ET3 Response the matter is dealt with at paragraph 14 as follows (p23):
- "It is acknowledged that in November 2008 Mr Thorman informed the Claimant that Countryfile was moving to a primetime viewing slot in the broadcast schedule. The announcement was not made to the Claimant alone but to all of the Countryfile production team and its presenters and reporters. All of the Countryfile presenters were told that the programme would be losing some of its best known and well loved faces."

69. It was not suggested that the Claimant was informed that particular criteria had been applied to her.
70. Mr Thorman, in his witness statement, deals with the matter differently. At paragraph 46 he states:

"In November 2008 I explained individually to each of the Countryfile team members (including Miriam) that the programme was moving to a new primetime slot. Miriam knew that I had been championing this for a while and it did not come as a surprise to her. I explained to her that the programme was moving and that I was sorry to say that she would not be moving along with the show, as the channel wanted us to use presenters who had more experience of presenting on network television shows and who had bigger profiles."

71. This requirement for experience at presenting on network television shows and for big profiles is not one referred to in the ET3 Response or in the contemporaneous e-mail exchanges.
72. The Claimant, by contrast, says this of the conversation, at paragraph 35 of her witness statement:

"Andrew Thorman did not explain why I was not going to be working on the new show, except to say that the Network wanted to 'refresh' the presenter line-up. I asked who else was being dropped, and he said we would be losing some familiar and well loved faces, but he would not give me the names."

73. Two aspects of the account are similar. The Claimant refers to the use of the word Network and Mr Thorman to the word Channel. We consider that this is a reference to Ms Hunt as controller of BBC1. Both the accounts refer to the loss of familiar and well loved faces. We prefer the account of the Claimant and accept that reference was made to refreshing the presenter line up, rather than to a requirement for presenters who had experience of presenting on network television shows and had bigger profiles. That fits with the lack of any reference to the criteria in the contemporaneous documents.
74. That day, the Claimant and Ms Bogan exchanged e-mails about her removal from Countryfile. The Claimant stated (p142):

"I saw Andrew before I left this morning and he told me about the changes to CF. I just wanted to say because it will be difficult in a busy office, how much I have enjoyed working on the prog. I am sure CF will continue to be loved – it is a great show."

75. Ms Bogan responded (p142):
- “I’m really, really, really sorry. I can assure you with my hand on my heart, it was nothing to do with me. I know and appreciate just how much you have given to Countryfile and I don’t know how we will manage without you (and I am serious about that). I’m really sad about it all. I can’t call you now for various reasons but if you want to talk about it please call me whenever it suits you.”
76. Ms Bogan’s wish to distance herself from the decision is notable; as is her expression of the high regard in which she held the Claimant.
77. On the same day, Charlotte Smith was informed that she would not be moving to the evening show. Ms Smith was born in 1964, she was 44. In addition Juliette Morris was informed that she would not continue as a presenter. Her date of birth was 26 April 1965; she was 43. Tom Heap was also informed that he was not to remain on Countryfile as one of the major presenters; although he did return at a later date. His date of birth was 6 January 1965; he was 43.
78. On 14 November 2008 Ms Strachan exchanged e-mails with Mr Thorman stating how sad she was that she would be not to be involved in the programme any more. Mr Thorman responded (p144):
- “As I say, it has been terrific working with you all these years and I guess there was always going to be a time when the channel would want to make changes”
79. On 14 November 2008 Mr Bogan sent an e-mail to Mr Thorman with some details about Ms Harrison (p141A).
80. On 17 November 2008 the Claimant flew to Kenya to make a film on the Bush Meat Trade for the Born Free Foundation. She was provided with recording equipment by Mr Peacock and Ms Ayre to obtain material that might be used subsequently in a Costing the Earth programme.
81. On 19 November 2008 (p143A) Dr O’Connell’s agent sent Mr Thorman a copy of her profile, noting that they had met the day before. Dr O’Connell did not have a significant network profile that would have made her familiar to prime time audiences. She was born in 1970; she was 38.
82. On or about 19 November 2008 the Claimant learned that Charlotte Smith, Juliette Morris and Michaela Strachan were not going to continue presenting the Countryfile when it moved to primetime. The Claimant felt that this was an example of older women being removed from television and felt that she and her colleagues were being subject to age and sex discrimination. She made this view known amongst her colleagues in the production team of Countryfile.

83. On 26 November 2008, Mr Thorman sent an e-mail to Mr Scott, the Editor of Countryfile Magazine, stating (p146):

"It has been confirmed that the show is moving in April – but the budget hasn't been signed off and so no new talent has been contracted yet!

Sadly it does mean that we will be saying au revoir if not goodbye to some familiar faces. Michaela Strachan. Juliette Morris. Charlotte Smith and Miriam O'Reilly. Ben has been offered the job as presenter of the new proposed replacement show at 11.00 which has a working title "Country Tracks". For information about this show please liaise with Executive Producer – Helen Foulkes.

Adam and JC will remain with Countryfile to be joined by a number of new faces, all of whom have been contacted but not, as I say, contracted! No problem talking to JC – he is in the picture.

I'd rather you didn't mention or discuss the position with other individuals who may feel rather sensitive. However, if they mention it to you, then obviously that's fine."

84. The reference to JC was to John Craven. His date of birth is 16 August 1940; he was 68 at the time. The reference to Adam was to Adam Henson who was a presenter who had joined Countryfile after a talent search seeking a farmer for the programme. In the agreed cast list he is stated to be in his early to mid 40s.
85. Mr Thorman did not suggest that new presenters were picked for their network profile or familiarity to primetime audiences.
86. On 27 November 2008 (p148) Mr Thorman sent an e-mail to Ms Hunt (p148) as follows:
- "Hi – glad to say we have done the deal with Julia.
- Telegraph Sat?"
87. The reference to Julia was to Julia Bradbury, who had been contracted to be one of the main presenters for the evening Countryfile. The reference to the Telegraph was to the fact that Ms Hunt was to be interviewed for a major article in the Telegraph that Saturday dealing with a number of changes she was to introduce in her role as controller of BBC1.
88. On 28 November 2008 Ms Hunt sent an e-mail to Mr Thorman in response, stating (p147):

"This is great. Just wanted to make sure we have the comms around this right before it breaks in the paper. Telegraph will say that the show will be fronted by Julia and Matt, but John will still be involved. There will be a new diverse team of other presenters alongside them."

89. Ms Hunt went on to ask a number of questions that were answered, by insertion into the text, by Mr Thorman, who made reference to Tom Heap being a useful backstop and stated:

"We are still to conclude negotiations with Jules Hudson, James Wong and Katie Knapman, all of whom are keen to be involved."

90. It is notable that in Ms Hunt's e-mail that she makes reference to a "new diverse team" when referring to those other than the two main presenters; who were to be Julia Bradbury and Matt Baker. There is no reference to the new team having particular network experience or primetime familiarity.
91. Matt Baker who was to be the main presenter alongside Julia Bradbury had a significant network profile, particularly from Blue Peter. Mr Baker was born on 23 December 1977; he was 30 at the time.
92. The principal experience of one of the new team members, Jules Hudson, was on the BBC2 programme Escape to the Country, which had on three occasions been broadcast in primetime. It was thought by Mr Thorman and Ms Hunt that he had additional primetime experience on Time Team, Battlefields, The Iron Duke and Rebels and Redcoats. This was an error resulting from a profile produced by his agents which lead them to believe he presented the programmes whereas, in fact, he had been involved in the production team. Mr Hudson was born on 9 January 1970; he was 38 at the time. James Wong is an Ethnobotanist, who was shortly to make a programme for BBC2 called Grow Your Own Drugs. In the agreed cast list his date of birth is given as 1982; he was 26, or thereabouts, at the time.
93. On 28 November 2008 Mr Thorman was informed that Richard Evans would join the series as a "co-exec". This was to assist in updating the visual image of the programme as it moved to its primetime slot.
94. On 28 November 2008 an article appeared in the on-line version of the Guardian (p149) stating:
- "The BBC is to move Sunday morning rural affairs show Countryfile to a peak-time slot but without any of its current roster of middle-aged female presenters, sparking accusations of ageism."
95. This on-line article was not subsequently repeated in the print version of the Guardian.

96. Towards the end of November, or early part of December, the Claimant informed Ms Bogan that she would not be returning to work on Countryfile after Christmas.
97. On 8 December 2008 an article appeared in The Mirror suggesting the Countryfile decision was ageist (p151). An article appeared in the Telegraph on 9 December 2008 again alleging ageism (p152). At about this time, the Claimant was informed by Louise Pyne, a colleague who had formerly worked on Countryfile, that Dawn Mears, a film editor on Countryfile, had said that while she was working in an editing suite Mr Thorman had commented on one of the press articles and suggested it was the Claimant who had leaked the information to the press. Initially, the Claimant thought that this conversation had happened at the end of November, and resulted from the Guardian article. However, during her evidence she recalled that she had been told that a copy of a newspaper had been open in the editing suite. As the Guardian article had not been published in the paper, but only online, she accepted that it could not have been the Guardian article, and must have been one of the articles that was published in December.
98. Mr Thorman denied that he had ever suggested that the Claimant was responsible for the leak. Mr Thorman suggested that the stories that had been published alleging ageism were of little concern to him. We do not accept that is the case. We do not find his evidence credible in this regard. The movement of Countryfile from its morning slot to an evening primetime slot was a matter of major significance for BBC1 generally and, in particular, for Mr Thorman, for whom it would be the first primetime programme that he was responsible for.
99. Ms Hunt told us, on a number of occasions, how significant she considered this move; and how determined she was that it should be a success. What is more, diversity is an issue of great importance within the BBC. We find it incredible, in the circumstances of such a significant move, that Mr Thorman would have been so unconcerned about allegations that the move was ageist. This causes us to doubt his evidence in this regard. We prefer the evidence of the Claimant, even though it comes as second hand hearsay, that such a discussion did take place and Mr Thorman did suggest that he believed the Claimant was responsible for the leaks. Were the allegation made up it would be unlikely to involve such a tortuous route in which the information came to the Claimant, involving two individuals who could have been challenged or brought forward as witnesses by the BBC to contradict her story. In addition, this chimes with the evidence of Ms Bogan who told us that there was a general belief in the office that the Claimant had been responsible for leaking the stories.
100. The Claimant telephoned Mr Thorman to tell him that she was not the source of the leaks. She contends that he said words to the effect that as she was leaving the show after Christmas what was he to think. Mr Thorman denied this. We prefer the evidence of the Claimant, which fits with our view of what had been said in the editing suite. The Claimant also alleges that, in this conversation, Mr Thorman said words to the effect "one day someone will tell me I am too old to do this job and shuffle me off to retirement" (Claimant paragraph 66). Mr

Thorman denies that he said this, although he accepts that in some later conversation he said words to the effect that, because he had been responsible for the programme for many years, and because BBC1 was looking at a different line up of presenters, it would not surprise him if the channel also wanted different involvement at his level (Mr Thorman paragraph 50). While we do not think it is likely, in the light of his concern about the articles that had been published alleging ageism, that he would have spoken of being moved because he was too old, we think that it is likely that there was mention of him being moved because of his long involvement with the programme, which the Claimant interpreted as inferring a link with his age. During the discussion the Claimant stated that she was prepared to return to Countryfile after Christmas.

101. On 8 December 2008 Ms Strachan sent an e-mail to Mr Thorman stating under the subject heading "we are too old!! (p161):

"Hi Andrew, well I guess its been made public!! Got an e-mail from a friend today saying it had been in the press, googled it and all I found was a Daily Mirror cutting saying that the Countryfile girls had been dumped for Julia Bradbury and it was seen as an ageist thing!! I am not even much older than Julia Bradbury! Did Jay need to make it quite so brutal? Surely she could have just said that Countryfile was going to go prime time with new presenters not name us all and say we are being dumped. Oh it's a cruel harsh world! Hope to see you in the new year, I'll try and do some more Countryfiles before the changes come into place and we are pushed aside for younger models!!"

102. Although Ms Strachan's tone was jocular Mr Thorman cannot but have been concerned as to her real reaction; and that of others. Mr Thorman responded on 9 December stating (p161):

"Jay was interviewed by the Telegraph in which she mentioned (briefly) Countryfile move. She didn't name anyone in the current team and didn't talk about any reasons other than the fact that the show was doing very well, but someone then briefed the media Guardian about the ageist thing which was neither accurate nor helpful. They pulled their story."

103. Ms Strachan responded that day, stating (p161):

"Well I'll bring my zimmer next time I come to Birmingham!! Actually the whole thing made me chuckle!"

104. On 10 December 2008 articles appeared in The Mail and People alleging ageism in respect of the Countryfile decision (pp154-156 and 157). On 11 December 2008 an article appeared in The Times under the heading "No Country for Old Women" referring to the Countryfile decision (pp191F-G). That day Mr Thorman and Ms Foulkes exchanged e-mails about presenters for Country Tracks noting that Ben Fogle had been agreed and suggesting that Ellie Harrison might be a possibility (p158).

105. On 12 December, shortly after their conversation, Mr Thorman sent an e-mail to the Claimant, as follows(p160):
- “A brief line to thank you for your understanding and to apologise for the fallout from this as a result of some pretty lousy reporting. As I have told the team, I would be happy to use you post-April if and when the opportunity arises. You have been a loyal and committed member of the team and I hope we will continue to enjoy a professional relationship built up over many years”
106. This was the first time that any suggestion had been made that the Claimant might be used in future episodes of Countryfile; as we shall return to in our analysis. The same day Mr Thorman sent e-mails to Ms Smith and Ms Strachan raising the possibility of further work on Countryfile should the opportunity arise. In these e-mails, as in the previous conversations in which they had been informed that they would not be continuing with Countryfile, it was not stated that the reason for the discontinuance was their lack of network experience that would make them familiar to primetime audiences.
107. On 12 December Juliette Morris sent an e-mail to Ms Bogan seeking to make it clear that it was not her who had spoken to the journalists. In response Ms Bogan replied(p163):
- “There has been a bit of a kerfuffle which was probably inevitable given the Selina Scott thing. We didn't for one moment think that you were behind any of it. Andrew seems quite relaxed about it all and is of the view that any publicity is good publicity”
108. We do not accept that Mr Thorman was so relaxed, but consider that he was involved in the “kerfuffle” that had arisen.
109. In around December 2008 the Claimant was informed that she would be presenting two of the six Costing the Earth programmes for the next series; they were subsequently broadcast on 26 January 2009 and 9 February 2009 (p281).
110. On 18 December 2008 Ms Foulkes sent an e-mail to Gerald Melling with new details of the proposed Country Tracks programme, suggesting that Ellie Harrison would join as a presenter along with Ben Fogle.
111. At the beginning of January 2009 the Claimant had conversations with Mr Peacock about the possibility of a Costing the Earth programme using her material on Bush Meat, perhaps linked to a section based in the UK.
112. On 10 January 2009 the Claimant returned to work on Countryfile. On 14 January 2009 her mother died, limiting her availability for work in that period.

113. On 16 January 2009 Mr Thorman exchanged e-mails with Mr Scott of the Countryfile Magazine. Mr Scott forwarded an e-mail from a reader (p174):

"I'd like to say that I'm disgusted at the way the BBC has treated Miriam, Juliette and Charlotte in passing them over in favour of Julia Bradbury to present the TV programme, just because she is younger and perceived to be more glamorous. She isn't even a graduate or a qualified journalist – just a TV personality"

114. In forwarding the e-mail Mr Scott commented:

"Just so you know, I've been getting quite a few of these. Obviously I am not printing any, unless you would like a right of reply in the mag"

115. Mr Thorman responded that day, stating (p174):

"Hi Cav. I think we should talk about it first because it isn't black and white and nor is it a true reflection of what we are doing. If its an age thing then Julia and John are hardly spring chickens and if its about personalities then that is subjective and all programmes need to refresh their output and that includes the faces on the screen"

116. It is notable that Mr Thorman does not say that the change is about the network experience and resultant primetime familiarity of the presenters. It is also notable that Mr Thorman uses the term refreshing the faces on screen, which chimes with the way in which the Claimant recalls him explaining the change in the line up to her. In addition, it is notable that Julia Bradbury and John Craven are both referred to as not being spring chickens; when Mr Craven was 68 and Ms Bradbury was 38; which is notable for the disparity in age between them and for the fact that Mr Henson, who is in his early to mid 40s, is not referred to.

117. On 16 January 2009 Ms Foulkes sent an e-mail to Mr Thorman stating that Ms Harrison had agreed to be a presenter on Country Tracks.

118. In January or February 2009 the Claimant was informed by Mr Peacock that the Bush Meat programme would not be pursued. He raised concerns about the fact that her trip to South Africa for the Born Free Foundation had been financed by Landrover Jaguar which could cause a compliance issue with BBC Funding Criteria.

119. In February 2009 a meeting was held in Birmingham to prepare for the new evening Countryfile for which an editorial synopsis was set out, stating (p174G):

"When it came to rethinking the programme we thought it should [be] evolution and not revolution.

We have avoided anything too radical because we didn't want to throw the baby out with the bathwater and alienate people, particularly bearing in mind the audience research which we had just before Christmas which suggested we are doing a pretty good job. ...

That said there are areas of the programme that we feel do need a tweak to make Countryfile sit comfortably in its new slot.

1. The new presenters and the way we use our presenters will do a lot to freshen up the brand. We're keen to immerse them in their stories so there'll be lots of opportunity for them to get stuck in – traditionally they have been bystanders, slightly set back from the action”

120. There was reference to increasing the pace of the programme, moving away from traditional links and improving the production value of the programme to make it look a bit glossier.
121. It had been decided that Mr Craven would have a separate section called Countryfile Investigation which would be the principal slot for journalism. It was also agreed that Mr Henson would have a separate segment filmed on his farm; called Adam's Farm.
122. On 12 February 2009 the Trading on HIV programme for Radio 4 was delayed due to the absence of a producer who could assist the Claimant (p175).
123. On 20 February 2009 the Telegraph published an article about Julia Bradbury, referring to the Countryfile decision.
124. On 26 February 2009 Mr Thorman was sent publicity plans for the new show (P178). A campaign objective was stated to be to counter any potential negative coverage around the replacement of some of the presenters. The audience to be target was referred to as the BBC1 Heartland and family audience. Under the heading Risk Assessment it was stated:

“The BBC may be accused of ageism because Michaela Strachan, Juliette Morris, Charlotte Smith and Miriam O'Reilly (all of whom are middle-aged) are not returning to the show once it moves to the new teatime slot.

The BBC may be accused of sexism since the original line up of presenters. John Craven and Adam Henson are the only ones remaining on. This might get subsumed into the more general argument about ageism and sexism at the BBC (e.g the Moira Stewart story) and in the media in general (e.g. the Selina Scott story).

The show's former presenters may speak out negatively about the re-launch if they feel disgruntled about being replaced.

The BBC may be accused of pandering to younger audiences because the two new presenters (Julia Bradbury and Matt Baker) are young, attractive sorts.

We may face questions about the credentials of the new presenters, which could lead to accusations of "dumbing down" ...

What is your plan to minimise these risks?

I will prepare comprehensive Q&As to counter any suggestion that ageism/sexism plays any part in the new presenter line-up.

To counter any suggestion of ageism, I will position John Craven as a central figure in the new series. I will make it clear that we are not getting rid of old presenters to make the way for younger ones.

I will set up interviews with the new presenters that will establish them in a credible light by emphasising their relevant experience and their passion for rural affairs. This should counter any suggestion that Julia and Matt were chosen simply because they are young and attractive."

125. The document shows that the BBC appreciated the type of criticism that might be focused against it. It clearly was a matter of substantial concern; and one that Mr Thorman was informed of.
126. On 6 March 2009 the BBC issued a press release stating that Countryfile was moving to Sunday evening.
127. On 6 March 2009 Lynne Jones, Assistant Editor, Investigations Unit and Radio current Affairs, Manchester sent an e-mail to the Claimant stating (p325):
- "I heard that you may be reducing your commitment to Countryfile, and wondered if this might be an opportunity for us here at radio current affairs?? Do get in touch with me or David Ross if you are interested in doing File on 4, or specials. RCA is also launching a new R4 strand "The Report" next month, and building up a family of reporters for that."
128. The Claimant responded on 7 March 2009 (p325):
- "I would absolutely love to. I am seeing the Countryfile decision as freedom to get back to what I am best at".
129. She went on to suggest the possibility of a documentary based on the power play between Continuity and Real IRA. This reflects the particular interest that the Claimant had in journalism.

130. On 7 March 2009 the Claimant sent an e-mail to Ms Lunt in the following terms (p185C):

"I just want to thank you for your kind words the other day – it meant a lot. And they do say when one door closes another opens. I have been asked by Radio 4 Current Affairs to join their investigations unit. They said the CF decision was an opportunity for them ...

Thank you again, and sorry for blubbing like an idiot."

131. There had been a conversation between the Claimant and Ms Lunt. The Claimant had stated her views that the decision to drop her as a presenter from Countryfile was ageist and sexist. Ms Lunt had become annoyed on her behalf and had spoken with Mr Thorman. In her evidence Ms Lunt suggested that she was entirely satisfied by Mr Thorman that the decision was not ageist or sexist. We do not feel that this fits credibly with her response to the Claimant, on 10 March 2009, in which she stated (p185C):

"Miriam, I am really thrilled for you – and for the network, I am just delighted that they have had the sense to put you in such a perfect role, marvellous news.

And please ... what are old friends for? Old in both senses, I am acutely aware that at some stage, possibly sooner than I think, my face will not fit and I will be sent to Radio Training!"

132. That shows that Ms Lunt had not been entirely satisfied with Mr Thorman's explanation.
133. On 11 March 2009 there was a brief telephone conversation between the Claimant and Ms Ayre in which the Claimant was informed that the run of Costing the Earth was going to be extended from six to eight programmes. It was suggested that she was to be offered a programme then called the Environmental Cost of Aging, and possibly one other programme. The conversation ended shortly as the Claimant's mobile phone cut out.
134. A further conversation took place on 12 March 2009 during which the Claimant suggested that she should be considered for 4 out of the 8 episodes. It was again suggested that she should present the Environmental Cost of Aging programme. The Claimant explained that she was extremely unhappy at this suggestion; particularly in the light of the publicity that had arisen as a result of her removal from Countryfile, and her suggestion that it was ageist. She asked whether it might be possible for the episode to be swapped so that she could present on a different subject. Ms Ayre said that she would refer the matter to Mr Peacock. Ms Ayre had a conversation with Mr Peacock and then called the Claimant. She said that it would not be possible for the episodes to be swapped and that the only programme being offered to the Claimant was that on the Environmental Cost of Aging, although there was the possibility that there might

be one other. The Claimant's suggestion that she might present four out of the eight programmes was declined.

135. There is a dispute between Ms Ayre and the Claimant as to what was then said. The Claimant contends that she said that she did not want to do the Environmental Cost of Aging programme; but that was the limit of her decision. Ms Ayre contends that the Claimant stated that she no longer wanted to work on Costing the Earth. There are various e-mail exchanges to which we will shortly refer that lead us to conclude that the Claimant did, in fact, state that she no longer wished to present for Costing the Earth.
136. After that conversation, there was an e-mail exchange between Ms Ayre and Martin Poyntz-Roberts (p269-271). It appears that they had a brief discussion in which Ms Ayre had told Mr Poyntz-Roberts that the Claimant would not be continuing with Costing the Earth; after which, at 13.54, Ms Ayre sent an e-mail to Mr Poyntz-Roberts stating:
- "I'll tell you full details when I see you, which I think might not be till Thursday ..."
137. At 16.05 Ms Ayre sent an e-mail to Mr Thorman stating(p268):
- "Miriam no longer wants to do CTE. She confirmed this morning ..."
138. That is consistent with the Claimant having stated that she wished to cease presenting for Costing the Earth; rather than merely that she was not prepared to present the Environmental Cost of Aging programme.
139. Mr Poyntz-Roberts responded to Ms Ayre at 16.11:
- "Ok cool! That will give me something to look forward to rather than my farming shift! I don't imagine it was a fun conversation ..."
140. Ms Ayre responded at 16.14:
- "No, it wasn't, but the original call yesterday wound me up far more than it should have, and partly as a result I managed to fall out with husband and both my kids last night when I went home still stressed. Should know better by now ..."
141. It is notable that the initial brief conversation of 11 March 2009 was said to have been so stressful as to cause this falling out. We shall return to the significance of this in our analysis. Mr Poyntz-Roberts replied:

"Hmmm. I know what you mean ... Deep breaths followed by even deeper glasses of wine! How did Andrew take it? Did she create a scene?"

142. Ms Ayre responded at 16.23:

"No, just bent my ear and blames AT as some kind of arch plotter against her. He doesn't yet know ... not in today"

143. Mr Poyntz-Roberts responded at 16.40:

"As for Miriam – as we have been here before, is she going to change her mind? I think we all sing from the same hymn sheet don't we tho"

144. This suggests that there had been ongoing friction about Costing the Earth and that Mr Poyntz-Roberts was glad that an opportunity had come to make a break. Ms Ayre responded at 16.42:

"Plan to talk to AT on Monday re: presenters – for clarification. Even if there's a change of mind, it makes it much harder to come back now having made the definitive break that was always lacking in the past"

145. Ms Ayre was also happy to take the opportunity for a break in the Claimant's involvement in Costing the Earth.

146. On 23 March 2009 there were e-mail exchanges between Claire Hargreaves, the Deputy Editor of Countryfile Magazine, and the Claimant about the possibility of her writing reviews, or other articles, for Countryfile Magazine. At 16.04 Ms Hargreaves sent an e-mail to the Claimant asking how she was and offering her the possibility of a book review. The Claimant responded at 17.39 stating (p290):

"Hello Claire, I'm fine considering. Thanks for the offer, but I don't know how you would bill me in the magazine. I am no longer doing Costing the Earth either. After five years on CTE I was only offered one programme (there was a possibility of two) from the new extended eight part series and that was called 'green grannies' – OAPs and the environment. Considering all of the horrible headlines from CF about 'old ladies put out to pasture' I thought it was a joke – sadly not. It's not the type of image I want for myself, so I had to say no. I am very pleased the series is so successful that they wanted to give it more air time though."

147. This email is consistent with the Claimant having decided to cease all involvement with Costing the Earth rather than having only turned down the Environmental Cost of Aging programme. However, that arose from the fact that Mr Peacock and Ms Ayre were insistent that she present a programme that she felt was inappropriate, and only offered the possibility of one other.

148. Ms Hargreaves responded at 09.16 on 24 March (p290):
- "I am very sorry to hear about the CTE thing. Don't worry about the billing – we'd say you are a (first rate) BBC broadcaster and journalist, and that you presented CF for years. We'd love you to carry on doing reviews and features for us on the mag, if you are up for that. Cav is keen to speak to you about other features and will be in touch shortly"
149. The Claimant responded at 10.17 stating that she had been asked to join the Current Affairs unit in Manchester. Ms Hargreaves responded at 10.40 stating that it appeared to be a good opportunity and (p289):
- "I do hope we can keep in touch and that we can link in with any investigations you are doing up in Manchester. It's still BBC."
150. The Claimant appeared on her last Countryfile programme on 29 March 2009.
151. In April 2009 the Claimant was asked to present Pick of the Week in Manchester.
152. On 2 April 2009 the Claimant provided Claire Hargreaves with the book review for Countryfile Magazine.
153. On 3 April 2009 an interview with Julia Bradbury was published in the Telegraph referring to the Countryside decision.
154. On 5 April 2009 Countryfile moved to its new slots at 7.00pm on Sunday. In the new slot the main presenters were Julia Bradbury and Matt Baker. John Craven presented the John Craven Investigates slot; Adam Henson presented Adam's Farm. There were three subsidiary presenters, Katie Knapman, James Wong and Jules Hudson.
155. The production values of the programme increased and there was a more immersive nature of presentation in which the presenters played a greater role in the activities they were reporting on than had previously been the case. There was less general journalistic content; with the more serious journalism being limited to the slot presented by Mr Craven. The look of the programme was updated with faster edits and the use of more popular music. The general nature of the programme remained the same, in that it was based in one area of the country each week, about which a number of features were presented. The programme has performed well in its new slot with viewing figures increasing to the region of 7million.
156. On 16 April a further article was published in the Telegraph about Julia Bradbury, again referring to the Countryfile decision.

157. On 17 April 2009 the Claimant met with David Ross to discuss work for File on 4. Mr Ross was keen that the Claimant should carry out more work for File on 4; he anticipated that she might become one of the regular presenters. This would involve her engaging in "in depth investigations" into stories of major concern.
158. On 28 April 2009 Mr Scott asked the Claimant whether she would be interested in producing a feature on the future of the National Parks for Countryfile Magazine (p286).
159. At the beginning of May 2009 Mr Thorman appeared on the television programme Points of View to defend the change in presenters of Countryfile.
160. On 7 May 2009 the Claimant telephoned Jolyon Jenkins, Senior Producer Audio and Music, proposing a programme for the It's My Story slot on Radio 4. The story was based on what the Claimant's father had told her about abuse he had suffered as an alter boy growing up in Ireland in the 1940s. It was proposed as a personal piece that might be dramatic and revelatory. The proposal was put by Mr Jenkins to Mr Bakaya (p373).
161. On 10 May 2009 the Claimant sent an e-mail to Mr Scott stating that she could write the feature on National Parks that week (p286). Mr Scott did not respond to the Claimant as he usually did. The Claimant sent a second e-mail to Mr Scott on 11 May 2009 to which he again did not reply, as a result of which, she left a telephone message for him. He did not respond to the message. This was out of character; the Claimant having previously found him to be polite and punctual in his return of her communications.
162. On May 2009 Tom Heap presented a feature for Costing the Earth about environmental issues and the older population, now broadcast under the title "Grey is the New Green".
163. On 12 May 2009 the Claimant sent an e-mail to Claire Hargreaves noting that Mr Scott had failed to respond to her message, stating(p287):

"Hi Claire, I replied to a message from Cav about National Parks – is he off this week as I haven't heard from him – or perhaps he replied to my BBC e-mail?"
164. Again, the Claimant received no response to this e-mail, which was out of character for Ms Hargreaves; and inconsistent with the previous positive messages Ms Hargreaves had sent about the continued involvement of the Claimant with Countryfile Magazine.
165. On 18 May 2009 the Claimant sent an e-mail to Ms Bogan, after a visit to the Birmingham offices, saying how nice it had been to see everyone (p190A). Ms Bogan responded suggesting a catch up when she next visited the Birmingham offices.

166. On 20 May 2009 Catholic Church published a report into Child Abuse in Irish Catholic Institutions.
167. On 21 May 2009 Mr Thorman and Mr Evans exchanged e-mails about possible stand-in presenters for Countryfile (p190C-D). The Claimant's name was not mentioned.
168. On 23 May 2009 the Claimant presented the Trading on HIV programme for Radio 4.
169. On 26 May 2009 the Claimant sent an e-mail to Amanda Queiroz asking whether she might hotdesk while at the Birmingham office undertaking work for File on 4. Ms Queiroz agreed. On 1 June 2009 the Claimant commenced work on File on 4, working in Birmingham. Mr Thorman avoided contact with her. Their working relationship had become extremely difficult.
170. In early June 2009 Mr Thorman and Mr Evans exchanged further e-mails about possible stand-in presenters for Countryfile (p190E-H); again the Claimant was not mentioned.
171. In the early part of June the Claimant and Ms Queiroz had a conversation about Laser Eye Surgery. They remained on good terms. At about that time there was a conversation between the Claimant and a number of other members of staff. We accept that she raised the suggestion that members of staff in Manchester were being paid more than those in Birmingham. This illustrated her annoyance with Mr Thorman.
172. On 11 June 2009 Mr Thorman and Mr Evans exchanged e-mails about possible female presenters for Countryfile, and the possibility of using "celebrities". Again, the Claimant was not suggested.
173. On 19 June 2009 Mr Bakaya sent an e-mail enquiring whether the Claimant would be able to make the It's My Story piece quickly. This was because he considered that were the story to be produced it should be done so that it could be linked with the publication of the report by the Catholic Church in Ireland. He was interested in the programme being made, but only if it could be done quickly (p377). Between 23 June and 24 June 2009 there were further exchanges in which Mr Bakaya expressed his concern about the topicality of the programme. Mr Jenkins sent an e-mail to the Claimant asking if she could make the programme by the end of the year; to which she responded that she could (p382). On 26 June 2009 there were further e-mail exchanges relating to Mr Jenkins availability in October 2009 to produce the programme. Subsequently, Mr Bakaya decided that as Mr Jenkins could not be available until October that would be too great a delay and, therefore, that he would not support the making of the programme.

174. On 30 June 2009 the Claimant had further a discussion with Mr Ross about her interest in presenting other programmes for File on 4. Her programme, the Real Cost of No Win No Fee, was broadcast on 30 June 2009.
175. On 7 July 2009 Ms Hunt addressed a meeting of the Audience Council of England in Birmingham. She made a number of comments about BBC programmes, including Countryfile. We shall return to these in our analysis.
176. On 9 July 2009 a draft rota for File on 4 identified the Claimant for two possible programmes in the next series (p328).
177. That day an article appeared in the Telegraph referring to the removal of Arleen Phillips from Strictly Come Dancing and to the decision on presenters for Countryfile.
178. On 14 July 2009 Mr Jenkins sent an e-mail to the Claimant informing her that her proposal for It's My Story had been rejected. He stated he had not been informed why (p392). There is a pro-forma form giving a reason for the rejection of the programme (p399) which stated:

"Thanks for an interesting offer. However, in a competitive round, there were other ideas that we preferred"

179. We accept Mr Bakaya's evidence that this is a computer generated form, completed from a dropdown menu, with standard reasons for rejection, which are often given little consideration. We accept that the real reason for his decision not to pursue the programme was his feeling that if Mr Jenkins was not available until October the programme would lose its topicality.
180. On 14 July 2009 the Claimant had conversations with John Byrne, a Radio 4 producer based in Bristol, about possible programmes. One of the ideas the Claimant had was about the emotional cost to the inhabitants of Wootton Bassett of the role they had started to play in lining the streets when hearses passed through taking bodies that had been repatriated from Afghanistan, through RAF Lyneham, to the mortuary at the John Radcliffe Hospital. E-mails were exchanged between Ms O'Reilly and Mr Byrne on July 15. The Claimant stated (p401):

"Hi John, thanks for yesterday. I forgot to mention when I was on the phone that there is a programme, I think, in Wootton Bassett. It seems this village has taken on the mantle of grief for the country. Someone is probably already making, or writing, something about the impact on the people there. It's very poignant to see them turning out time after time to line the streets as all those coffins go by – and as Brown himself has warned there is going to be a lot more over the Summer. I know the commissioning round is over – but it might be worth mentioning it. If it's too late for you I will speak to David Ross, but I wanted to mention it to you first."

181. Mr Byrne responded saying that the programme would have to be fast tracked and stating:

"By the way, if it gets bought then mysteriously pulled, that really would be suspicious!"
182. There was some concern amongst colleagues of the Claimant about the possible repercussions of the allegations that had been made in the press of ageism and sexism in respect of the decision to remove her from Countryfile. Mr Byrne's e-mail planted a suspicion in the Claimant's mind that made her particularly sensitive to the treatment of her programme about Wootton Bassett.
183. On 21 July 2009 Ms Bogan sent an e-mail raising concerns about Countryfile presenter availability and suggesting there was an urgent need for another female presenter. There were exchanges of e-mails suggesting the possibility of various celebrities (pp19TI(i)-(iii)). The Claimant's name was not mentioned.
184. On 5 August 2009 Mr Ross revised the rota for File on 4 and proposed a pre-series meeting (p329-330).
185. On 8 August 2009 Ms Bogan sent an e-mail to Mr Thorman suggesting Jackie Brambles as a potential presenter for Countryfile, referring to her as being pretty and bright. When challenged on this in cross-examination, Ms Bogan stated that television is a visual medium and accepted that "people on tele look good" and went on to concede that "there are a lot of attractive women on TV".
186. On 10 August 2009 the Claimant sent an e-mail to Ms Queiroz about hot desking at Birmingham in September for her next slot working on File on 4. Ms Queiroz failed to respond to that e-mail. We accept that was an oversight.
187. On 28 August 2009 an article in the Guardian referred to a poll by Age Concern and raised the Countryfile decision.
188. On 22 August 2009 the Claimant sent a further e-mail to Ms Queiroz about "hot desking". Again Ms Queiroz failed to respond, but we accept that that was an oversight.
189. On 27 August 2009 Mr Ross sent an e-mail to the Claimant about her suggestion for a programme about the Catholic Church, suggesting that he was not sure that it would be right for File on 4, unless there was some significant new revelation.
190. On 2 September the Claimant commenced working on an episode of File on 4 working from the Birmingham office. There continued to be an atmosphere in the office arising out of the break down in her relationship with Mr Thorman.

191. On 4 September 2009 the Claimant sent an e-mail to Mr Ross proposing the Wootton Bassett programme and a programme on the Catholic Church.
192. Between 4-7 September 2009, Ms Bogan, Mr Thorman and Mr Evans exchanged e-mails about the possibility of using various celebrity presenters for Countryfile. The Claimant was not mentioned as a possibility.
193. On 24 September 2009 Mr Ross sent an e-mail suggesting that the run of File on 4 would be extended by two programmes (p339).
194. On 25 September 2009 an article appeared in the Daily Mail on female newsreaders over 50, again referring to the Countryfile decision.
195. On 29 September 2009 a File on 4 programme on Care Concerns, presented by the Claimant, was broadcast. This programme dealt with the care of psychiatric patients that had been released into the community. Mr Ross was aware that there had been some difficulties in making the programme, particularly as the producer had been concerned that the Claimant was not sufficiently on top of the statistical material, which had led to interviews being halted and restarted; and a concern that the Claimant had been over aggressive in her interview technique.
196. On 1 October 2009 the Claimant sent an e-mail to Mr Ross noting that she had received a text from Dr Zigmond of the Royal College of Psychiatrists complimenting her on the programme. Mr Ross responded (p339A):

"That's good – thanks Miriam, hope you've recovered. Nothing yet from DOH".
197. This was reference to the fact that it was expected that there would be a complaint from the Department of Health about the programme. Subsequently, a complaint was received. Mr Ross responded defending the Claimant but had misgivings about her role in the making of the programme.
198. On 8 October 2009 the Claimant sent an e-mail to Mr Lewis forwarding her earlier proposal for a programme on Wootton Bassett (p402). On 9 October 2009 Mr Lewis sent an e-mail stating that Mr Ross had agreed to fund the Claimant to conduct research on Wootton Bassett (p403). It is clear that both Mr Bakaya and Mr Ross thought that the Claimant's idea was good. Although the matter had been subject to very considerable exposure in the media, they felt that she was introducing a new angle by looking in-depth into the effect that the events were having on the community within Wootton Bassett.
199. On 14 October 2009 the Claimant sent an e-mail to Mr Lewis with a summary of the research she had undertaken for the Wootton Bassett programme (p405).

200. That day Mr Thorman sent an e-mail to Ms Hunt with a list of possible presenters for Countryfile (p190K). The Claimant was not mentioned.
201. Between 16-19 October 2009 the Claimant sent various e-mails to Mr Lewis with further information about her proposals for the programme on Wootton Bassett, to which Mr Lewis responded positively.
202. On 19 October 2009 Mr Ross circulated a further proposed rota for File on 4 which now included the Claimant presenting only one programme. We accept that the earlier versions had been drafts and that there now were more detailed proposals, although the 8 December 2009 programme remained "TBC".
203. On 21 October 2009 Mr Ross sent an e-mail to Mr Bakaya attaching various commissioning proposals, including Wootton Bassett with the Claimant as presenter. On 22 October 2009 Mr Ross met with Mr Bakaya to discuss commissioning ideas, including Wootton Bassett. Both remained very positive.
204. That day an article appeared in the Telegraph referring to a survey carried out by SAGA and making reference to the Countryfile decision.
205. On 26 October 2009 Mr Ross sent an e-mail to Mr Bakaya asking for his advice on how to proceed with the Wootton Bassett programme.
206. In the week commencing 26 October 2009 Mr Bakaya met with Mark Damazer during which he discussed various programmes for possible commissioning, including Wootton Bassett. Mr Bakaya did not make specific reference to the Claimant who he had not "clocked" was associated with the programme. Mr Bakaya was very positive about the programme. Mr Damazer, then the Controller of Radio 4, took a different view. His opinion was that the subject had been "all over the media" and that it was "becoming tired". He decided that the programme should not be made. Although he generally agreed with Mr Bakaya's commissioning recommendations, he had the final say at Radio 4 and, on a not infrequent basis, would turn down programmes that his commissioning editors were keen to make, even when significant preparatory work had been undertaken.
207. On 27 October 2009 the Telegraph published an interview with Sandy Toksvig in which she referred to the Countryfile decision.
208. On 27 October 2009 Mr Lewis sent an e-mail to the Claimant informing her that they were awaiting a date from Mr Bakaya, and that she would need to be ready to jump in relation to the Wootton Bassett story (p419).
209. On 29 October 2009 Mr Lewis and Mr Ross exchanged e-mails in relation to the Wootton Bassett proposal discussing the Claimant's research.

210. On 30 October 2009 Mr Bakaya sent an e-mail to Mr Ross informing him of Mr Damazer's decision under the heading "Aargh!" (p427):
- "I am really sorry about this, but Mark is not convinced by wootton bassett. Says he feels its been everywhere. This kind of thing inevitably happens from time to time. But I should've checked before I gave you the green light. Can we talk?"
211. It is clear that Mr Bakaya was embarrassed that he had been so positive about the programme only to have to inform Mr Ross that it had been turned down. Unfortunately, there was, thereafter, a delay in informing the Claimant, who remained of the belief that the programme would shortly go ahead.
212. On 30 October 2009 the Telegraph published a further article about Radio 4 listeners and referred to the Countryfile decision.
213. On 3 November 2009 Mr Thorman sent Mr Evans a list of possible presenters for Countryfile (p190K-N). The Claimant's name did not appear.
214. On 4 November 2009 the Claimant sent an e-mail to Mr Lewis stating that she had received information that a number of servicemen were due to be repatriated through Wootton Bassett.
215. On 5 November 2009 Mr Evans sent an e-mail to Mr Thorman authorising a sum of £8,000 to be used for a trawl for an unknown female Countryfile presenter (p191A).
216. On 6 November 2009 the Claimant sent an e-mail to Mr Lewis informing him that she had been told that the date for repatriation to Wootton Bassett was 10 November 2009. Subsequently, she spoke with him by telephone and was informed that her proposal had been rejected. The Claimant felt that this was an extremely heavy blow. She had made detailed arrangements for the programme. She had made a number of contacts with people in Wootton Bassett. She was mindful of the fact that it had been suggested to her that should the programme suddenly be pulled she should be suspicious. She felt that this indicated that her career with the BBC was at an end. She decided that she should speak to a lawyer. Up until this time she had hoped that, despite her concerns that her removal from Countryfile constituted age and sex discrimination, she could maintain a career with the BBC. She was extremely reluctant to consider proceedings against the BBC while she felt that that possibility remained.
217. On 9 November 2009 Mr Heap covered for Mr Craven on Countryfile while he was on Jury Service.
218. At an editors meeting on 16 December 2009 Mr Lewis again raised the possibility of a programme on Wootton Bassett. Although he was aware that Mr

Damazzer had said no, there was an empty slot and he was hopeful that he might be able to revive interest in the programme.

219. The Claimant submitted a claim to the Employment Tribunal on 25 January 2010.
220. On 3 February 2010 the Claimant and Mr Jenkins exchanged e-mails about the *My Story* decision. The Claimant stated that she had never been told why the story was pulled, Mr Jenkins replied (p397):

"No, neither was I. It was quite mysterious. One moment they wanted it, urgently; the next they didn't want it at all. It could be sinister or it could be quite innocent – Radio 4 commissioning often seems to lack logic"

The Law

221. The Employment Equality (Age) Regulations 2006 ("the Age Regulations") render unlawful certain forms of age discrimination. They apply in the context of applicants and employees pursuant to Regulation 7. The parties accepted that the definition of employee is wide enough to include "freelance" workers such as the Claimant. Direct and indirect age discrimination is rendered unlawful by Regulation 3:

3 Discrimination on grounds of age

(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if--

- (a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
- (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but--
- (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
- (ii) which puts B at that disadvantage,

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

222. Direct age discrimination is unique in the discrimination strands, in that it is capable of justification.

223. Age victimisation is precluded by Regulation 4 as follows:

4 Discrimination by way of victimisation

(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has--

(c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or

(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations,

or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

224. Discrimination on grounds of gender is rendered unlawful, in certain circumstances, by the Sex Discrimination Act 1975 ("SDA"). Discrimination against applicants and employees is precluded by Section 6. Again, the wide definition of employee is accepted to include "freelancers" such as the Claimant. Direct and indirect sex discrimination is precluded by Section 1:

Direct and indirect discrimination against women

(2) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if--

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man but--

(i) which puts or would put women at a particular disadvantage when compared with men,

(ii) which puts her at that disadvantage, and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

225. Discrimination by victimisation is precluded by Section 4 SDA.

4 Discrimination by way of victimisation

(1) A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has--

- (c) otherwise done anything under or by reference to this Act ... in relation to the discriminator or any other person, or
- (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act ...

or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.

226. Section 5 sets out provisions as to interpretation and as to the nature of comparators.
227. The primary claims brought by the Claimant are ones of direct discrimination. If direct discrimination was made out the Claimant indicated that the indirect discrimination claims would not be pursued.
228. The approach that we should adopt to direct discrimination was largely agreed between the parties. As the Claimant pointed out, the Employment Appeal Tribunal in the **Law Society v Bahi** [2003] IRLR 640, made this simple point, at paragraph 91:
- “It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error”.
229. The provisions that we are dealing are to combat discrimination. In that context it is important to note that it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer’s procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.
230. In **Amnesty International v Ahmed** [2009] ICR 1450 the Employment Appeal Tribunal drew a distinction between cases in which a decision is taken on explicitly, or inherently, discriminatory grounds, so that the putative discrimination can be found in the criterion themselves; and other cases where it is necessary for the Tribunal to consider what was in the mind of the alleged discriminator. It was held at paragraph 34, of the latter type of case:

“In other cases of which **Nagarajan** is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation i.e. by the mental process (whether conscious or unconscious) which lead the putative discriminator to do the act. Establishing what these processes were is not always an easy enquiry, but tribunals are

trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such cases, however, it is important to bear in mind that the subject of the enquiry is the ground of, or reason for, the putative discriminator's action."

231. In **Bahl** the EAT at, paragraph 99, reminded Tribunals:

"The fundamental question is why the alleged discriminator acted as he did".

232. This reasoning follows the judgment of Lord Nicholls in **Chief Constable of the West Yorkshire Police v Khan** [2001] ICR 1065, at paragraph 29, where he stated:

"Contrary to the views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of that happening. Sometimes the court may look for the "operative cause", or the "effective cause". Sometimes it may apply a "but for" approach. For the reasons I sought to explain in **Nagarajan v London Regional Transport** [1999] ICR 877, 884-885, a causation exercise of this type is not required either by Section 1(1)(a) or Section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.

233. In **Shamoon v Chief Constable of the RUC** [2003] IRLR 285 Lord Nicholls noted that it is not essential to consider the less favourable treatment issue prior to the reason why. It was noted that Employment Tribunals may be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. If it was on prescribed grounds there will usually be no difficulty in deciding whether the treatment afforded to the Claimant was less favourable than was, or would have been, afforded to others.

234. It is also important to note that the Claimant's sex or age need not be the sole, or even principal, reason for the treatment, as long as it has significantly influenced the reason for the treatment: see **Nagarajan v London Regional Transport** [1999] IRLR 572.

235. It has long been accepted that it is rare to find overt evidence supporting a claim of discrimination. The tribunal is generally tasked with considering what inferences it would be appropriate for it to draw from the primary findings of fact

it makes. This was recognised by the Court of Appeal in **King v The Great Britain China Centre** [1991] IRLR 513 CA. Subsequently, a statutory reversal of the burden of proof was provided for in Section 63A SDA and Regulation 30 of the Age Regulations where the Claimant has established facts from which the tribunal could conclude, in the absence of an adequate explanation, that discrimination has occurred.

236. The burden of proof provisions were considered by the Court of Appeal in **Igen v Wong** [2005] IRLR 258, in which guidance was given as to the stages to be considered by a Tribunal. However, we would note that they provide a mechanism that may be applied in determining whether discrimination is made out. However, in many cases, it will be possible to determine cases without recourse to the burden of proof; but deciding the matter on the balance of probabilities on a consideration of the totality of the evidence. This potentially avoids the disputes that may arise as to what evidence is relevant to the first stage of the analysis, in establishing facts from which discrimination could be established, from those that determine whether the Respondent has established to the Tribunal's full satisfaction that discrimination did not occur.
237. As explained above, in large part, these principles were agreed and propounded by both parties. They were in agreement that we should focus on the reason why question; that we should analyse the evidence and draw what inferences we felt were appropriate from the primary facts.
238. Where the parties' representatives parted company was on the question of whether the law currently precludes combined discrimination. Specific provisions are made to prohibit dual discrimination in the Equality Act 2010, which are not currently in force. Mr Galbraith-Martin argued that, in the absence of those provisions having come into force, it must be assumed that such discrimination is not currently unlawful. He drew support from the guidance notes to the Equality Act. However, we would note that those have no particular statutory force.
239. He also relies on the decision in **Bahl** in which the Tribunal did not feel able to draw an inference of sex discrimination or race discrimination, but did feel able to conclude that the Claimant would not have been treated as she was had she been a white man. This reasoning was found to be impermissible by the Employment Appeal Tribunal and, subsequently, the Court of Appeal.
240. To analyse this matter we put a number of questions to Counsel. The parties accepted that there is a distinction to be drawn between the questions of whether particular conduct is unlawful; the evidence that may be relied upon to prove such unlawful conduct; and the analysis of that evidence that is required to establish whether discrimination is made out.
241. The simple way to test whether conduct is, in principle, unlawful, is to consider the application of express criteria, which do not require any inference to be drawn as to the reason for treatment that results from their application.

242. Counsel accepted that were a criterion applied that those over 40 may not apply for a job; this would constitute direct age discrimination. It was also accepted that a criterion that women may not apply for a position would be direct sex discrimination.
243. It was accepted by Mr Galbraith-Martin that if both criteria were applied; so that women, and people over 40, cannot apply for a position; this would be both direct age and direct sex discrimination. He accepted that is the case as all women and all people over 40 would be excluded.
244. However, Mr Galbraith-Martin contends that were there a criterion that women over 40 may not apply for a job, this would not be unlawful, because it would be combined discrimination. His reasoning is that not all women are precluded from applying, and not all persons over 40 are precluded from applying. Women under 40 can apply; and men over 40 can apply.
245. When analysed in this way, the result seems surprising. When this was put to Mr Galbraith-Martin, he contended that the operation of the law does, on occasions, give rise to surprising results. Be that as it may, we consider that the analysis is flawed. It is flawed for this reason – the prescribed reason need not be the sole reason, or even the principal reason, why a person suffers detrimental treatment. Part of the reason that a woman over 40 is precluded from applying for the job, in the above example, is the fact that she is a woman. Another part of the reason is that she is over 40. Both of them are significant elements of the reason that she suffers the detriment. In such circumstances, we consider it is clear that the woman is subject to both sex and age discrimination.
246. The way that this can be fitted with the comparative exercise set out in the legislation is that a woman over 40 can compare her treatment to a man over 40; by which exercise the sex discrimination element of the treatment is established. Similarly, the woman over 40 can compare her treatment to another person under 40, thereby establishing the age discrimination element.
247. Mr Galbraith-Martin urged on us at the outset that these are statutes that are concerned with rooting out discrimination. It would be extremely surprising should that fail because the discrimination is combined.
248. The position is more difficult when dealing with claims in which it is necessary to determine the reason why treatment was afforded which was not based on the application of criteria that were expressly, or inherently, discriminatory. This raises real difficulties in the analysis of evidence, that we consider, on a proper analysis, was where the EAT and Court of Appeal considered that the tribunal fell into error in **Bahl**. The error was not as to the possibility of there being combined discrimination, which was not expressly considered in the case; but of analysis of the evidence which requires a conclusion that age and/or sex were significant factors in the decision that was made before liability can be established. It is not sufficient to conclude that the evidence does not support a

finding of either sex or age discrimination, but that it must be one or the other, or both.

249. It is of significance there are four possible forms of unlawful discrimination where both age and gender may be factors in a decision. The decision might be based on age alone; it might be based on sex alone; it might be based on both age and sex; or it could be based on age and sex in combination. The importance of identifying these four possibilities is so that we can properly analyse the evidence to decide which, if any, of them it is. That requires a more subtle analysis than merely concluding that age and gender may be factors. We have to decide whether age or sex is a factor in the decision singly, whether both are factors, or whether they are factors in combination. We need to have that in mind to analyse the primary facts and draw inferences from them.
250. When dealing with complaints of victimisation we are also considering the reason for the treatment. Was it doing the protected act? namely, for the purpose of this claim, complaining of treatment that would amount to a breach of the relevant anti-discrimination provisions?
251. The time limits for claims of sex and age discrimination are three months. In certain circumstances treatment may constitute a continuing act. There may be a continuing state of affairs under which decisions are taken from time to time: see **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96.
252. Where a complaint is out of time it may, nonetheless, be considered where the Tribunal decides that it is just and equitable to do so. Factors for consideration in that exercise were considered in **BBC v Keeble** [1997] IRLR 336, para 8, as follows:

The EAT remitted the case for rehearing, directing that the issue of whether it was just and equitable to extend time should be decided on the basis of the circumstances of each individual case after hearing evidence. The EAT also advised that the industrial tribunal should adopt as a checklist the factors mentioned in s.33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, *inter alia*, to

- (a) the length of and reasons for the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay
- (c) the extent to which the party sued had cooperated with any requests for information;
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

The decision of the EAT was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in s.33 was erroneous."

253. The relevant factors were put rather more broadly by the Court of Appeal in **Robertson v Bexley Community Centre** [2003] in which it was held that the tribunal has a wide discretion in determining whether it is just and equitable to extend time and is entitled to consider anything that it considers relevant. However, the Court of Appeal reminded tribunals that time limits are exercised strictly in Employment Tribunals and that extension of time is the exception rather than the rule.

Further factual determinations, analysis and application of the law to determine the issues

254. The central question in this case is why the decision was taken that the Claimant would no longer be a presenter of Countryfile. That necessarily involved us considering by whom the decision was taken, when the decision was taken and on what basis. One might have expected that the when and by whom questions would be easy to answer. That was not the case. In his statement Mr Thorman stated at paragraph 20:

"I should explain here that Jay and I did not specifically discuss Miriam. However, in deciding which presenters to use, I had to consider the specific criteria that Jay had emphasised"

255. This places him as the decision maker; making the decision on the basis of criteria set by Ms Hunt. However, despite suggesting there had been no discussion about the Claimant, in his oral evidence he said that Ms Hunt had felt that the Claimant was more of a radio presenter. When asked how he knew this if there had been no discussion, he shifted his position and gradually, during the course of his evidence, became more adamant that the decision had, in fact, been taken by Ms Hunt. His final position was that it was a determination made in a "one sentence conversation"; him asking, after a discussion about the main presenters, "what about the others?" and being told "they're radio, no".
256. Ms Hunt denied that she made the decision. Her position was that she and Mr Thorman agreed criteria which she left him to apply.
257. The concept of the application of criteria is one that gradually developed in the course of the proceedings. In the response to the questionnaire it was stated (p674):

It was considered that the future success of Countryfile on a Sunday evening would require the programme to reach out to its likely new

audience, a broadening of the programme's content while also maintaining its integrity and the use of a presentation team which was credible in terms of its knowledge of issues affecting rural life, as had been the case for the Sunday morning programme. The new broadcast time also provided an opportunity to broaden the mix of presenters from that previously engaged for the Sunday morning programme.

The Complainant was not engaged as part of the new presenting team because other than her previous experience on Countryfile on a Sunday morning, most of her experience had been on radio rather than television. For this reason it was felt that she would not be sufficiently well known to the likely BBC 1 audience on a Sunday evening.

258. At this stage there was no direct reference to the devising and application of specific criteria to all of the existing presenters.
259. In the Response to the Claim Form the matter was pleaded at paragraph 15, as follows (p23):

"Changes to the presenting team were motivated by legitimate commissioning factors which were applied to all members of the Countryfile presenting team without reference to age and/or sex."

260. At that stage the legitimate commissioning factors were not elaborated. They were set out in Additional Information, as six factors:

(i) Each presenter needed to have a demonstrable network television profile which meant that they would be more familiar to a primetime television audience;

(ii) Each presenter needed to have a track record as a television presenter rather than solely as a reporter (as they needed to be engaging and compelling story tellers);

(iii) Each presenter needed to have an affinity with and/or relevance to the audience for the programme. The Respondent was looking for presenters with some actual or perceived (by the audience) affiliation, knowledge, experience, interest or empathy with the countryside and/or rural issues (this was felt to be more important for the two main presenters of the show than the other members of the team);

(iv) A wish to create a balanced and diverse presenting team;

(v) Presenters who were able to confirm availability; and

(vi) A wish for John Craven to still be able to highlight and report on rural issues within the programme (only applied to John Craven)."

261. Mr Thorman dealt with criteria at paragraph 17 of his witness statement, suggesting that three were applied, as they required individuals who were:
- (i) experienced as television presenters, rather than reporters, who would be engaging and compelling story tellers;
 - (ii) presenters who had a strong audience profile meaning that they would be well known to audiences at that time of day; and
 - (iii) presenters who, where possible, had a connection to the countryside or rural issues. This was more important for two main presenters of the show than the other members of the team.
262. He went on to state there was a need to reflect the diversity of the audience. His version of the criteria were set out rather differently to those in the Additional Information, although, under cross-examination, he stated that the criteria in the Additional Information were those that were applied.
263. Ms Hunt, when cross-examined, was adamant that criteria had been set. She suggested that they only appeared complex when set out in legal pleadings; they had been straightforward; namely, that the presenters required network profile that would make them familiar to peak-time audiences, an ability to present shows in an immersive manner and a knowledge of rural affairs.
264. There is no documentation, whatsoever, of this decision making process. There are no exchanges of e-mails, no record of the criteria and no record of any of the telephone discussions or meetings. There is no record of the assessment of the presenters against the criteria. Both Ms Hunt and Mr Thorman offered the complacent explanation that this is just the way things are done in the media world. There was also reference to "creative conversations" which were stated to be "highly subjective".
265. We bear in mind that the lack of documentation and failure to apply a formal procedure does not, of itself, evidence discrimination. The role of the Tribunal is not to punish the BBC for the way in which it makes such decisions and for its failure to adopt any formal procedures. 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.
266. On consideration of the totality of the evidence we do not accept that criteria were devised and adopted as suggested by the Respondent. Although there were general discussions about preferred characteristics of presenters, and a wish to include some who were better known, there was no establishment of explicit criteria that Mr Thorman was required to apply. There is no reference to such criterion in his subsequent correspondence. He did not tell Ms Bogan that he had applied such criteria. He did not tell those who were "not going forward with the programme" that he had applied such criteria. He told the Claimant that the presenting line up was to be "refreshed".

267. Mr Galbraith-Martin placed emphasis, in his oral submissions, on the argument that if Mr Thorman was right, and that the only discussion that had taken place about the Claimant was a reference to her experience being in radio, this was shorthand for her lacking primetime experience and, though lacking in formal procedure, this was a decision that evinced no discrimination.
268. What we have to do is look with care at the surrounding evidence and form our best view of how these decisions were taken. We consider that the relevant decisions were taken during the conversations between Mr Thorman and Ms Hunt, by telephone and at a meeting in London in Summer 2008. It was quickly established that Mr Craven would be remain on Countryfile. He had been established with the programme since its inception and was an extremely well known presenter. Subject to his agreement, he was certain to remain as one of the new team. Mr Henson was to remain as he has a farm that would allow a section of the programme to be based on his farm. It was also decided that there should be two principal presenters who must have a high profile in primetime television; these slots were subsequently filled by Julia Bradbury and Matt Baker.
269. The Claimant accepted in her oral evidence that she did not seek to compare herself with those individuals. Her comparison was with what one might call, hopefully not pejoratively, the second tier presenters; who would not present on every programme, but would be faces of Countryfile. Ms Strachan was in a unique position as her lack of availability meant that she was not a realistic prospect to remain with the program and to be one of its faces. Mr Fogle was proposed to move to Country Tracks. Mr Heap was not to remain as a regular presenter, but to be used occasionally, possibly filling in for Mr Craven.
270. The Claimant, Ms Smith and Ms Morris were dismissed almost entirely out of hand. While we accept that Ms Hunt may have referred to them being "in radio" we do not accept that constitutes, by itself, the decision. To an extent the lack of consideration given to them largely resulted in the decision; if you were not one of those who would be "moving forward" you would be "dropped".
271. Ms Hunt and Mr Thorman gave the Claimant, Ms Smith and Ms Morris little consideration. Mr Thorman, who knew them well, did nothing to argue for their retention. However, Ms Hunt's suggestion that they were not mentioned at all is inconsistent with her e-mails that show that she was aware that they were to be dropped. She was unable to tell us when or how that information had been imparted to her.
272. Mr Thorman gained the clear understanding in those conversations that the Claimant, Ms Smith and Ms Morris would not be "moving forward". He also came away with the impression that at least some of the new faces would need to be "diverse", which he took to mean from an ethnic minority. He also understood that the presenters needed to be refreshed, from which he understood it should be rejuvenated. He was particularly looking for younger presenters from ethnic minorities. The emphasis on those from an ethnic

minority is reflected in Ms Bogan response to Mr Thorman's initial list in which she referred to the "ethnic talent".

273. This, we consider, is the key to the approach that was taken. The BBC wishes to establish diversity in its presenters. It feels that its presenters should reflect the audiences to which they broadcast. This is a commendable aim. However, the law requires, save in very limited circumstances, equality of opportunity. There are two main ways of seeking to achieve diversity. Diversity may be established, or approached, without breaching the requirements of equality of opportunity, by applying clear and defined criteria equally to a pool of candidates and picking candidates solely on the basis of merit. If that is done properly, in groups that are large enough for statistically relevant analysis, the individuals appointed should reflect the diversity of the pool of appropriately qualified candidates, as skills are spread throughout it. The fact that there may be under-representation of particular groups within the pool of appropriately qualified candidates can currently only be addressed by limited lawful positive action, and often arises from complex socio-economic factors, particularly historic discrimination, that the employer often is not in a position to address.
274. When looking at small groups the equal application of criteria, even to a genuinely diverse pool of candidates, does not necessarily result in choice of representatives of all groups, or prevent the apparent over representation of a particular group, in those eventually selected. A statistical analysis to establish whether real equality of opportunity is being achieved has to be over larger numbers to identify any particular failings.
275. While there are many who feel that the approach of equality of opportunity has failed to establish diversity in many organisations there is currently only limited scope for positive action, although section 159 of the Equality Act, which is not currently in force, would increase that scope. The philosophical, political and legal debates about the correct approach to equality and diversity are not for us. Our role is to apply the law as it currently stands.
276. An alternative method of seeking to establish diversity is by filling particular slots with people chosen to represent particular groups so that there is, at least, a degree of diversity, but without equality of opportunity. We have concluded that this was the approach that was adopted in this case. That is clear from the fact that Ms Bogan referred to "ethnic talent", and to the fact, at a later stage, a trawl was made for "female" presenters. One of the risks of this slot filling approach is that it may not only involve unlawful positive discrimination; but may disadvantage particular groups who are not, on a particular occasion, considered to be important in creating apparent diversity.
277. Mr Thorman, when questioned on this matter, considered that it was legitimate to pick presenters with characteristics of those sections of the population that he was seeking to attract to the programme. Indeed, he went on to accept that part of the exercise that he understood he and Ms Hunt were undertaking was to try and attract younger viewers to Countryfile. It follows that his understanding was that the youth of presenters was a relevant factor.

278. Ms Hunt was adamant that this was not the case. The minutes of a meeting of the Audience Council for England were produced partway through Ms Hunt's evidence. She had to be recalled to deal with it. She made a number of points about the general viewership of BBC1. She referred, when considering how BBC1 could remain the premier TV Chanel in Britain (p191U), to:
- "Part of that mission was to make BBC One feel contemporary and connected to the widest audience, and given that the average age of the BBC One viewer was 52, this needed to be addressed for the longer term".
279. She referred later to the issue of building younger audiences and a strategy to engage younger people through entertainment. She said this would not be a case of BBC1 "dumbing down" but rather communicating to younger viewers. She referred to her wish to establish diverse production and presentation teams. She noted:
- "The habit was to have three or four men of a certain age who were authority figures, so there was a need to look at presenters as with Watchdog, and to bring back older women as with Anne Robinson"
280. This was a matter that she returned to in detail in her evidence, stating that she appreciated that there is under-representation of older women within the BBC, particularly as authority figures. She believes that steps should be taken to address this by appointment of presenters, such as Anne Robinson, to particular roles.
281. She referred in the speech to the judging panel for Strictly Come Dancing, and the fact that she had to act in the best interest of the show to ensure that the brand was rejuvenated to stay fresh.
282. The following is recorded in the minutes of the meeting:
- "A member raised the issue of keeping the heartland audience of older viewers, reflecting that we are in an aging society and particularly an aging female society. Jay was mindful of the heartland audience and proud to have content such as Antiques Road Show on the channel but there was a danger of over catering to those audiences; she was taking gentle steps to bring in younger audiences as well"
283. In a more detailed note of the meeting (p191AA) it was recorded that Ms Hunt had referred to the average BBC1 viewer being 52 and need to tackle younger audiences. The following was recorded in respect of Countryfile:
- "Countryfile – now has black reporter.
- Asian journo, John C stays as need older male.

Need to be drastic – the channel has to connect with all our audience.

Need to have genuine understanding of country issues.

Otherwise in danger of not looking like the country we live in”

284. Later on it was recorded:

“But in next few months some things announced which may look mean, but she needs to achieve ‘social engineering’ to re-gear the channel”

285. The term social engineering underlines the approach that was taken; namely, finding presenters to reflect particular aspects of diversity to fit specific slots. She later referred to:

“brands need rejuvenating to stay fresh”.

286. When asked about the risk of losing the heartland audience, Ms Hunt was recorded saying that the demographic of Countryfile is older (p191FF):

“If doing in a zealot way we would drop C/File as it doesn't attract younger audience.”

287. Reference was then made to Antiques Road Show and it was stated:

“Mindful need to get them on board. Proud to have this content on the channel but in danger of over catering to that audience so taking steps to make gentle changes to bring in younger audiences”

288. Mr Hunt suggested that this was a general reference to programmes on BBC1 and that it would be “insane” to try and attract a young audience to Countryfile, which is the epitome of a programme made for its “heartland” audience. While we accept that there was no prospect of a major shift in the age profile of the audience for Countryfile, we consider that Ms Hunt was referring to making gentle changes to bring some younger viewers to BBC1 programmes generally, including Countryfile.

289. We conclude that Mr Thorman came away from his discussions and meeting with Ms Hunt with the clear understanding that he was to look for new ethnically diverse younger talent to replace the Claimant, Ms Smith and Ms Morris as second tier presenters, which would refresh and rejuvenate the programme.

290. Both representatives stressed that we should use comparators as a way to test our findings, rather than as the central basis of analysis. It might be argued that the retention of Mr Craven suggested that age was not a factor. However, as set out above, we consider his position was quite different to that of the other

presenters. The general age profile of the programme became considerably younger when the new presenters were appointed, particularly for the second tier group for which the Claimant might have been considered. The new second tier presenters did not have the substantial network profile that might attract primetime audiences that was suggested to be the principal criteria. We consider that a significant factor in their choice was their comparative youth; and in the decision not to consider the Claimant, her age. We contrast the treatment of the Claimant (51), Charlotte Smith (44) and Juliette Morris (43) with the new second tier presenters Jules Hudson (38), Katie Knapman (36) and James Wong (26). If the Claimant had been 10 to 15 years younger she would have been given proper consideration to remain as a presenter of Countryfile.

291. The discrimination was not justified. The wish to appeal to a primetime audience, including younger viewers, is a legitimate aim. However, we do not accept that it has been established that choosing younger presenters is required to appeal to such an audience. It is not a means of achieving that aim. Even if it was a means of achieving that aim, it would not be proportionate to do away with older presenters simply to pander the assumed prejudice of some younger viewers.
292. We have considered with care whether another factor was gender; both gender and age; or a combination of gender and age. The Claimant put the matter principally on the combination. She relies on the fact that, as Mr Hunt accepted, there is an under-representation of older women in the BBC. There are areas, particular news broadcast, in which this issue has been to the fore, in that it has been pointed out that women newscasters have generally been removed at a much younger age than their male counterparts. In such a case it would be the combination of age and gender that is alleged to give rise to the treatment. We do not doubt that older women have faced particular disadvantage within the broadcast media.
293. There are a number of incidents that the Claimant referred to in her witness statement to support the suggestion that her gender in combination with her age was a factor, although we note that they did not appear in the closing submissions put forward on her behalf.
294. The Claimant gave evidence that a colleague, at a relatively junior level, at some stage prior to the consideration of the re-positioning of Countryfile had said that she would need to watch out for her wrinkles when high definition television came in. We do not accept that this individual was doing any more than making a comment of the concerns that many had about high definition television. More importantly, she was not involved in the decision that the Claimant would leave Countryfile.
295. The Claimant stated that on another occasion she was offered the use of a can of spray hair dye. Again, this was by a junior colleague who had no involvement in the decision as to presenters.

296. The Claimant also stated that, when talking to Ms Pyne about her concerns about a future in the media, she suggested "its time for botox". Again this was from a relatively junior colleague, who was a friend of the Claimant, and reflected a concern that television presenters have about aging. However, Ms Pyne was not involved in the decisions that were taken about the presenters for Countryfile.
297. Ms Smith referred to a conversation with another colleague in which it had been suggested that she might not pass the prime time test of being young and pretty enough. Again this was another junior colleague who was not involved in the decision.
298. What these comments reflect is that there is a general concern as to the disadvantages that are suffered by older women in the media as a result of combined discrimination. While these comments give an insight into the particular problems that older women feel they face in television generally, we have to analyse this particular decision.
299. We do accept that Ms Hunt has genuine concerns about the lack of older women in television, particularly in authority roles. If John Craven had been female she might have been Ms Hunt's ideal person for the "elder statesman role" on Countryfile. However, that does not preclude the inclusion of youth as a factor for the second tier presenters in an attempt to attract some younger viewers and to rejuvenate the show.
300. While we conclude that age was a factor in the final choice of presenters, we do not accept that this particular decision involved combined age and sex discrimination or sex discrimination in addition to age discrimination. In the end, we test this by asking ourselves whether the Claimant would have been retained had she been a man, of the same age, with the same skill set, being considered for one of the second tier presenter roles. We do not consider she would as the element of comparative youth required for the second tier presenters would have been missing. That is why we conclude that the decision that the Claimant should no longer be a presenter on Countryfile was an act of age discrimination alone.
301. Mr Thorman was extremely troubled by the allegations of discrimination made by Claimant. We first considered the position in respect of Countryfile Magazine. In the immediate aftermath of the Claimant leaving Countryfile, Ms Hargreaves was very keen that the Claimant should continue to be involved. She was offered and accepted a role to write a book review. Mr Scott also appeared, initially, to be interested in retaining her. He suggested that she should write an article on the future of the National Parks. However, thereafter he failed to respond to the Claimant's e-mails, her voicemail or the e-mail sent to Ms Hargreaves. This was quite out of character with the way in which he had treated the Claimant previously. During cross examination he repeatedly said words to the effect that "I am sorry, it was wrong of me I was overworked". But he could not provide any persuasive explanation as to why there were so many failures to respond. One or two might result from overwork. However, we did not

find it credible that he would have failed to respond at all without some underlying reason. In the response to the questionnaire it was suggested that as he had decided that the article was not to be commissioned he did not respond to the Claimant. That does not fit with the polite treatment that the Claimant had received from Mr Scott in the past. More fundamentally, having suggested that the Claimant write a feature on the future of the National Parks over the next 50 years, he changed his mind. He was not able to give a plausible explanation why he did so. He suggested that he decided that the Magazine's readers might not be interested in the subject. We find this implausible. The readers of Countryfile Magazine, or any other magazine about the natural world, would surely be very interested in what the future holds for Britain's National Parks. In addition, neither Mr Scott nor Ms Hargreaves ever contacted the Claimant again to suggest any alternative articles.

302. In the circumstances we conclude that Mr Scott must have been told, or inferred, that he was no longer to use the Claimant. We conclude that this must have come directly, or indirectly, from Mr Thorman, and resulted from his annoyance as to the allegations that the Claimant was making. We find that the decision not to use the Claimant on Countryfile Magazine any further was an act of victimisation.
303. In relation to Costing the Earth, we consider that the decision to offer the Claimant the programme on the Environment Cost of Aging was deliberate. We do not accept that there had been a failure to anticipate that this might be antagonising in circumstances in which she was complaining of age and sex discrimination. This is corroborated by the fact that Ms Ayer suggested that she was so stressed after the initial brief conversation on 11 March 2009, when she only had a chance to raise the title of the programme before the Claimant's phone cut out, that she had a falling out with her husband and children. This suggests that merely raising the subject was stressful for Ms Ayer.
304. While Mr Galbraith-Martin is correct in his submission that a form of quasi-constructive dismissal is not specifically relied upon by the Claimant, what is relied upon is the fact she was only offered the Environmental Cost of Aging and not offered any further Costing the Earth programmes; there was only the possibility of one other. We note the e-mail exchanges between Ms Ayre and Mr Poyntz-Roberts and what can only be described as mildly disguised elation that the Claimant was no longer to take part in the programme. While, in part, this may have arisen from previous problems with her availability, we consider that a decision must have been taken that the Claimant should only be offer a programme that she felt she could not present, with the possibility of one other, with had the result that she felt she could not continue presenting the programme. We consider that this came, either directly or indirectly, from Mr Thorman as a result of his annoyance at the allegations being made by the Claimant.
305. The decisions that the Claimant would be offered no further work on Countryfile was, in reality, final and there was no further consideration of the Claimant as an occasional presenter as had been suggested by Mr Thorman. Similarly, the

decisions that the Claimant would be offered no further work on Countryfile Magazine was final and there was no further consideration of the Claimant as a contributor. The decision that the Claimant should only be offered the Environmental Cost of Aging programme, with the possibility of another programme, was a final. These particular decisions were not part of any further continuing acts. Accordingly, the claims are out of time.

306. In respect on File on 4, we accept that the programme that the Claimant presented on psychiatric Care in the Community was subject to a complaint from Phil Hope in the Department of Health. While that was robustly defended, we accept Mr Ross's evidence that the producer of the programme had been concerned about the Claimant's understanding of the detailed statistics, had felt that interviews had broken down as a result and that the Claimant had been unnecessarily aggressive in them. The Claimant did not contact him further with new ideas for File on 4 programmes. We accept that it was a highly sought after slot and that if Mr Ross had any doubts about a presenter he would not approach them. We accept that this was the real reason why the Claimant was offered no further File on 4 programmes.
307. We accept that the Claimant's suggestion for Its My Story was eventually turned down by Mr Bakaya because he felt that it could not be produced sufficiently swiftly so as to link to the release of the report from the Catholic Church in Ireland. That was the real reason that the programme was not progressed, and did not constitute victimisation.
308. We also accept that Mr Damazer decided not to progress the Wootton Bassett programme because he believed that the subject had been exhaustively covered in the media and the story was becoming too old. That was the real reason for his decision and involved no victimisation to the Claimant.
309. However, it was that decision, in the light of the suggestion to the Claimant that should it be pulled from "on high" she should be suspicious, that lead her to conclude that her career at the BBC was at an end. Up to that point she had genuinely hoped that she might continue with her career. She hoped that Mr Thorman's suggestion that she might present on Countryfile in the future was genuine. She hoped that she would have a role with the investigations unit in Manchester. She felt that to bring a claim of discrimination would have catastrophic consequences for her BBC career. It was not until she was told of the decision on Wootton Bassett that she decided she needed to seek advice.
310. In considering whether we should consider the complaints despite the fact that they are out of time we first considered the length of the delay. It was on a 14 November 2008 that Mr Thorman informed the Claimant that she would not be a presenter on the new primetime version of Countryfile, that decision having been made in the summer of 2008. It was on 12 March 2009 that the Claimant was informed that the only firm offer of a programme for Costing the Earth was the Environmental Cost of Ageing, with the possibility of one other programme, thereafter. The Claimant at that stage stated that she no longer wish to be involved with Costing the Earth. It was in the middle of May 2009 that it became

apparent to the Claimant that she was not going to hear from Mr Scott to be offered any further work on Countryfile Magazine. Accordingly, the delay is substantial.

311. We have next asked ourselves the reason for the delay. It was not until the Claimant was informed that the programme on Wootton Bassett was not to be made that she came to the conclusion that her career with the BBC was at an end. Up to that point she had genuinely hoped that she might continue with her career. She hoped that Mr Thorman's suggestion that she might present Countryfile in the future was genuine. She hoped that she would have a role with the Investigations Unit in Manchester. She felt that to bring a claim of discrimination would have catastrophic consequences for her BBC career. The reason for the delay was the Claimant's attempt to maintain a career with the BBC.
312. We have next considered the effect of the delay to the cogency of the evidence. Mr Galbraith-Martin suggested that the Respondent has faced difficulties by reason of the necessity of explaining decisions made some time ago, in circumstances in which they were not documented. As Ms Williams points out, the fact that they were not documented does not result from any delay; it is not a case in which documentation had been lost, it never existed. Unfortunately, we have come to the conclusion that the inconsistencies in the evidence given to us by Ms Hunt and Mr Thorman about the decision not to continue with the Claimant as a presenter on Countryfile arise, not as a result of their memories fading with time; both were insistent that they had clear recollections of the events; but because they were not straightforward as to the real basis for their decision.
313. The Claimant initially sought information from the Respondent by serving a Questionnaire on 17 December 2009. Her representatives sought to give the Respondent an opportunity to explain their position before commencing proceedings. They did so relatively swiftly after being instructed by the Claimant. The information provided by the Respondent did not set out the real basis for the decision that she should not continue as a presenter of Countryfile. To that extent of the Respondent did not cooperate with the request for information, although we accept it was not made until a substantial time after the decisions that we have found amounted to age discrimination or age victimisation.
314. The Claimant could have acted more promptly once she was aware of the facts that gave rise to the claim. However, she decided not to take legal advice until she felt forced to the conclusion that her career with the BBC was at an end. Once she made that decision she took prompt steps to obtain legal advice.
315. Any prejudice to the Respondent that might arise in permitting the claim to continue would result from the delay in commencement of proceedings. In certain circumstances, that could be substantial, arising out of the natural fading of witnesses' memories. However, as set out above, in this case we do not accept that that was the real reason that the Respondent was not able to adequately explain the basis of its decision. We consider that the prejudice to

the Claimant, were she not permitted to pursue her claim, would be substantial and outweighs that to the Respondent in permitting the claim to proceed.

316. In the circumstances, we considered it is just and equitable to extend time so as to determine the claims.



EMPLOYMENT JUDGE

REASONS SIGNED BY EMPLOYMENT JUDGE ON

10 January 2011

REASONS SENT TO THE PARTIES ON

10 January 2011

AND ENTERED IN THE REGISTER



FOR SECRETARY OF THE TRIBUNALS

ANEX 1

MIRIAM O'REILLY

Claimant

-and-

British Broadcasting Corporation

Respondent

LIST OF ISSUES

Time Limit

1. Whether the alleged acts of discrimination, to the extent that they occurred more than 3 months prior to the claim being lodged, constituted a continuing course of discrimination from the date of the claimant's removal from the Countryfile programme in November 2008 and ongoing in that the respondent continues to omit to offer her any work as presenter on the Countryfile programme, other programmes and the Countryfile magazine.
2. Whether, if the Tribunal finds there is no continuing discrimination, it is just and equitable to extend time.

Direct sex discrimination

3. Whether, on the ground of her sex, the respondent treated the claimant less favourably than it treated or would have treated a man either under s6(1) SDA [by refusing to offer her employment] or under s6(2) [dismissing her or subjecting her to a detriment] as follows:
 - a. Her removal from the Countryfile Programme and failure to give her alternative work; she relies on the following actual comparators, who were treated more favourably:
 - i. Jules Hudson (mid 30s),
 - ii. Tom Heap (about 45), who covers for John Craven,
 - iii. Ben Fogle (mid 30s),
 - iv. Matt Baker, (early 30s),
 - v. John Craven (69); sex,
 - vi. Adam Henson (mid 40s),
 - vii. James Wong (mid 30s), occasional presenter.

And, in the alternative, the claimant relies on hypothetical comparators.

The claimant reserves the right to add other comparators following disclosure of the names of presenters offered work on Countryfile from April 2009 to present.

- b. The respondent's decision to offer the claimant only one programme of Costing the Earth, this being on 'The Environmental Cost of Ageing' and failure to offer her any further work (20-23);
- c. The respondent's failure to offer the claimant work on 'File on Four (26-28);
- d. The respondent's refusal to accept the claimant's proposal for the programme 'My Story' (29-30);
- e. The respondent's refusal to accept the claimant's proposal for the programme on Wootton Bassett (31-35);

The claimant relies on hypothetical comparators.

The claimant reserves the right to name actual comparators following disclosure of the names of presenters offered work on Costing the Earth from April 2009 to present.

Direct age discrimination

4. Whether, on the ground of her age, the claimant was treated less favourably by the respondent than it treated or would have treated a person under the age of 45 years either under Regulation 7(1) [by refusing to offer her employment] or under Reg 7 (2) AR [dismissing her or subjecting her to a detriment] as follows:
 - a. Her removal from the Countryfile Programme and failure to give her alternative work; she relies on the following actual comparators:
 - i. Katie Knapman, (early 30s),
 - ii. Jules Hudson (mid 30s),
 - iii. Tom Heap (about 45), who covers for John Craven,
 - iv. Ben Fogle (mid 30s),
 - v. Matt Baker, (early 30s)
 - vi. Adam Henson (mid 40s),
 - vii. James Wong (mid 30s), occasional presenter,
 - viii. Julia Bradbury (late 30s).

And, in the alternative, the claimant relies on hypothetical comparators.

The claimant reserves the right to add other comparators following disclosure of the names of presenters offered work on Countryfile from April 2009 to present.

- b. The respondent's decision to offer the claimant only one programme of Costing the Earth, this being on 'The Environmental Cost of Ageing' and failure to offer her any further work (20-23);

- c. The respondent's failure to offer the claimant work on 'File on Four (26-28);
- d. The respondent's refusal to accept the claimant's proposal for the programme 'My Story' (29-30);
- e. The respondent's refusal to accept the claimant's proposal for the programme on Wootton Bassett (31-35).

The claimant relies on hypothetical comparators.

The claimant reserves the right to name actual comparators following disclosure of the names of presenters offered work on Costing the Earth from April 2009 to present.

Whether the respondent has shown that the discrimination was a proportionate means of achieving a legitimate aim.

Indirect age and sex discrimination

- 5. Whether the respondent indirectly discriminated against the claimant by applying to her a provision, criterion or practice (PCP) which he applied or would have applied equally to men and / or persons not of the same age group as B but:
 - a. Which puts or would put women and / or persons of the same age group as B at a particular disadvantage when compared with men and / or other persons, and
 - b. Which puts the claimant at that disadvantage,

And A cannot show the PCP to be a proportionate means of achieving a legitimate aim.

The 'PCP is that all TV presenters used in primetime slots should have a 'perceived' primetime audience appeal. This places actual and potential presenters who are over the age of 45 years (Age PCP) and / or female (Gender PCP) and / or over the age of 45 and female (Combined PCP) at a particular disadvantage. It put the claimant at that disadvantage since as a result of the application of the PCP she was removed as a presenter from Countryfile, and thereafter has not been selected to take part in the show or any other primetime TV programme.

Victimisation under SDA and Age Regulations

- 6. Whether the respondent treated the claimant less favourably than he treated or would have treated other persons in the same circumstances, and did so by reason that the respondent suspected that the claimant:
 - a. Had or intended to do anything under or by reference to the Sex Discrimination Act and/or Age Regulations;
 - b. Alleged that the respondent had committed an act which would amount to a contravention of the Sex Discrimination Act or Age Regulations

In relation to the following acts:

- i. The respondent's decision to offer the claimant only one programme of Costing the Earth, this being on 'The Environmental Cost of Ageing' and failure to offer her any further work (20-23);
- ii. The respondent's failure to offer the claimant work on 'File on Four (26-28);
- iii. The respondent's refusal to accept the claimant's proposal for the programme 'My Story' (29-30);
- iv. The respondent's refusal to accept the claimant's proposal for the programme on Wootton Bassett (31-35);
- v. The respondent's failure to consider the claimant properly or at all for the position of newsreader over 50;
- vi. The withdrawal of the claimant's email.

The claimant relies on hypothetical comparators.

Remedy

7. The compensation to which the claimant is entitled including:
 - a. Loss of earnings;
 - b. Injury to feelings;
 - c. Aggravated damages.
8. Whether the claimant is entitled to a recommendation.