

E.R.

RESTRICTED - MANAGEMENT

XCB
Meeting to be
arranged in week
commencing 30 January
to discuss the way
ahead.

cc: Secretary
Mr Dillon
Members of ASEOM
Mr McCartney
Mr Jardine
Mr Smith
Dr Mallon
Mr Trelford

FROM: D C GOWDY

DATE: 22 DECEMBER 1994

TO: PRINCIPAL ESTABLISHMENT OFFICERS

McCAUSLAND ISSUES

1. The purpose of this minute and accompanying papers is to consider the possible NICS response (both in policy and practical terms) to the Fair Employment Tribunal (FET) ruling in the case of McCausland v Dungannon District Council. The complexity and importance of the issues involved militate against superficial or brief treatment and hence the accompanying material is necessarily on the lengthy side. Aside from informing NICS decisions the material has been prepared with an eye to a possible brief to Counsel in the event of a challenge.

Background

2. As you will be aware, in the McCausland case the FET decided that the use of an internal trawl within the Local Government Service amounted to indirect discrimination against the complainant (Mr McCausland) who was prevented from applying for the post by reason of his not being a member of staff of the LGS. The effect of the McCausland decision means that where the operation of internal promotion procedures in the NICS gives rise to disproportionate impact against any one of the four equal opportunity groups (men, women, Catholic or Protestant) there is a risk of challenge under fair employment or sex discrimination law.

Issues for the NICS

3. The most obvious question for the NICS is whether current NICS arrangements are likely to result in disproportionate impact and hence be vulnerable to challenge and, if so, what should we do about it? In turn this poses the questions as to whether we need to change our procedures to make them more acceptable or whether there is any

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difference between Service-wide competitions and Departmental competitions.

4. In addressing these issues we obviously need to take account of a number of considerations. One is the emphasis to be placed on our equal opportunity policy objectives for the NICS. Broadly put, these are to be seen to be in the vanguard of good equality opportunity practice and to work towards a position where men and women, Catholics and Protestants are fairly represented in all areas and levels of NICS work. At the same time we must be able to deliver our business objectives in a cost-effective and efficient way. Moreover, we must also have regard to the implications of our actions on staff morale. The decisions we take on the McCausland issue must seek to strike the right balance between these different considerations.

Disproportionate Impact in NICS Competitions

5. So far, the application of the formula used by the Court of Appeal in the McCausland case to individual NICS competitions or in respect of a range of potential Service-wide or Departmental scenarios confirms that in the generality of cases significant disproportionate impact is likely to occur in respect of one or other of the four equal opportunity categories. On the statistics available, Service-wide competition and Departmental promotion board are both vulnerable to challenge from non-civil servants denied the opportunity to compete (an external challenge). Statistically, promotion boards in Departments could also be challenged by a civil servant in another Department excluded from the competition (an internal challenge). (See Paper I for figurework). Identifying relevant comparators in applying the McCausland test is a problem but nit-picking on this issue is unlikely to commend itself to a Tribunal nor, so far as we can judge, is likely to materially alter the broad conclusions on disproportionate impact.

Justification

6. Given our public statements that the NICS is a committed equal opportunity employer, we will be expected to take the necessary steps to avoid disproportionate impact; the only exceptions will be where it is demonstrably the case that such an effect has to be accepted if the requirements of a post are properly to be fulfilled. The legal test in these circumstances is quite rigorous and requires the employer to show that there is a real need for imposition of the requirement giving rise to the alleged discrimination, that need being sufficient to outweigh its discriminatory effect.

7. The raft of justification arguments available in respect of competitions which are vulnerable to challenge by non-civil servants (these can be Service-wide or Departmental competitions) are described in Paper II. The justification arguments in respect of Departmental competitions where the challenge is from a civil servant in another Department, or in respect of a grade requirement, are set out in Paper III.

The External Challenge to Service-Wide and Departmental Competitions

8. Whilst the position on Service-wide competitions is better than that for Departmental boards the case in favour of Service-wide internal promotion is not without its problems. Some of the arguments are not exclusive to the NICS (as compared to other public sector bodies) and there are several counter-arguments in favour of open competition for all NICS posts (wider choice, potentially better equal opportunity balance) as set out in paragraphs 37-45 of Paper II.
9. A critical issue in this context is the extent to which the Service is willing to argue for continued use of internal promotion at the lower and middle levels in order to deliver a predictable pool of Roman Catholic and female candidates for the more senior posts in the face of apparent disproportionate impact against men and Protestants at the lower levels. (See Table 1 of Paper I). Increased female and Roman Catholic representation at the senior levels is a significant political issue. A decision to go out, or to remain internal when filling posts in the feeder groups to the more senior levels, will be seen from one perspective (mainly that of men and Protestants) as a test of Government's even-handedness and from the other (mainly women and Roman Catholics) as a test of the Government's determination to tackle historical imbalances in a purposeful way. In essence delivering improved Roman Catholic and female representation at the senior level is unlikely to be achieved by a policy of external competition applied down through the grades. Insofar as this is viewed as a pivotal factor in remaining internal, early discussion with the FEC (and EOC) on the issue will be vital.
10. At best, therefore, the available justification arguments point to a respectable (but not cast iron) case for the continued use of internal promotion on a Service-wide basis. What weight a Tribunal will attach to them is a matter of speculation and the arguments will in every case be assessed against the extent of disproportionate impact and the merits of a particular complainant: the circumstances of individual cases can introduce particular quirks which may be difficult to answer. We need to

recognise that cases could be lost with consequent damage to the Service's reputation and credibility. A number of such losses could erode the Service's arguments in favour of continued internal promotion generally. That said, the arguments in Paper II appear sufficient in the abstract to justify continued use of internal promotion on a Service-wide basis.

The Internal Challenge to Departmental and Grade Requirements

11. So far as an internal challenge is concerned, the justification arguments available are not particularly compelling and are further complicated in the case of a Departmental eligibility requirement by the Service's persistent lack of success in tackling Departmental imbalances as between Protestants and Roman Catholics. The rigorous use of grade requirements as an eligibility criterion is also increasingly open to question (Paper III).
12. Paper III, which addresses the internal challenge, puts forward two main proposals for change: (1) that the NICS should move to a central promotion system in which all Departments participate fully; and (2) that grade should no longer be used as the exclusive eligibility criteria. Eligibility criteria should instead be based on specific job-related competencies which would allow any officer who has the necessary skills and experience but who is below the traditionally eligible grade to compete. Paper III also recommends that a comprehensive review of promotion procedures should be carried out which would include promotability assessments and reporting.
13. These changes are important not only to minimise the risk of an internal challenge but also to support the justification case for the continued use of internal procedures against the potential for challenge from outside. If in the event of a challenge from outside the NICS we are to assert that the internal system delivers the best most efficient workforce then we must be confident that within the organisation there are not procedures which will unnecessarily limit its ability to have the best possible candidates appointed.

Possible Operational Arrangements

14. In the event that the Service decides that it wishes to retain internal promotion (either Departmentally or Service-wide) consideration must also be given to how best this might be pursued in the light of the justification arguments available. A number of options are discussed at paras 46-56 of Paper II. The most convenient, and more strategic, option is at paragraph 47 et seq. This is an arrangement under which there would be a presumption in

favour of internal promotion up to and including Grade 7 level in the General Service group but that proposals to fill posts at Grade 6 and above should be subject to case by case consideration taking account of the composition of the internal and potential external fields, the Service's wider equal opportunity objectives and the other management considerations applying to filling senior posts as set out in the Memorandum on the Future Proposals for the Management of the NICS. The same arrangement would apply in principle to other occupational groups. This arrangement has been in place since mid-1994 on an interim basis and is consistent with the broad enterprise-related justification arguments set out in paragraphs 17-36 of Paper II. It is also consistent with the Service's publicly stated commitment to accelerated progress towards improved Roman Catholic and female representation at the senior grades.

15. If this approach is not regarded as acceptable the only viable alternative to wholesale open competition appears to be case by case consideration of each proposed competition. This would provide a check for potential disproportionate impact with a decision to stay in or go out being taken in the light of the available justification arguments. The principal drawback with this approach is that it would be cumbersome to operate and would involve a more ad hoc approach to equality of opportunity than hitherto.
16. Despite the evident conflict with delegation policy, and an increase in costs (at least in the short term) the equal opportunity considerations overwhelmingly favour a move to Service-wide promotions. Such a move would increase choice, facilitate the development of career anchors and help equalise increasingly scarce promotion opportunities. Detailed arrangements would need further work.

Next Steps

17. Subject to Departmental views on the way ahead we envisage an early paper to PCC (based largely on this note) followed by discussion with TUS, FEC and EOC. To date there has been little or no discussion of these issues with any of these interests.

Conclusions

18. There are difficult decisions to be made and a discussion will be necessary in finalising advice to PCC. CPG's current assessment is that the weight of argument favours a move to a Service-wide, corporate approach to promotion as set out in paragraph 13, with an easement in grade eligibility requirements as envisaged in paragraph 11.

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19. Departments are asked to note the raft of work in the attached papers and to consider, for the purposes of advising PCC:
- (a) whether internal promotion should continue:
 - (i) Service-wide; and
 - (ii) Departmentally;
 - (b) If so, whether it should proceed on the basis of the arrangements at (i) paragraph 13 or (ii) paragraph 14. 2/14/18
 - (c) whether there should be an easement in the grade eligibility requirements as proposed in paragraph 11. Amur III
20. I appreciate that it will take some time for Departments to digest this volume of material and I would propose to allow a month for consideration and to convene a meeting in week commencing 30 January to discuss the way ahead. }

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