

Jackie Lane, 'Woodcock v Cumbria Primary Care Trust: The Objective Justification Test for Age Discrimination' (2013) 76 MLR 134
Mary Syngé *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) (2012) 75(4) MLR 606–654

Example 1

Woodcock v Cumbria Primary Care Trust: The Objective Justification Test for Age Discrimination

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This note discusses the limits to the defence of objective justification when applied to direct age discrimination, specifically with regard to situations where the employer attempts to rely on cost-saving as a legitimate aim. **The author examines** the jurisprudence of the Court of Justice of the European Union (formerly the European Court of Justice, ECJ) on which this case relies, **and considers whether** the defence has been interpreted too widely, opening up the possibility of cost-saving as a defence to discrimination on the grounds of this particular protected characteristic.

The note concludes that, while cost-saving cannot be the sole justification for less favourable treatment by employers, **it may nevertheless** form part of an overall legitimate aim when coupled with additional factors.

INTRODUCTION

The case of *Woodcock v Cumbria Primary Care Trust* is an appeal brought by Mr Woodcock on the grounds that he suffered direct discrimination by way of less favourable treatment on the grounds of his age, and that the action of his employer, Cumbria Primary Care Trust (PCT), was unjustified; he questions, in particular, whether **the need to save money can ever be a legitimate aim in justifying age discrimination**.

This objective justification defence, now contained within the Equality Act 2010,¹ has been extensively examined in the courts, both in the UK and in the ECJ.

It was famously challenged in the Age Concern case² for being incompatible with the parent EC Directive 2000/78 (the Directive) which, under Article 6(1), appeared to permit only specific examples of defences to direct age discrimination, namely 'legitimate employment policy, labour market and vocational training objectives'³.

However, the UK consultation papers on age discrimination, *Coming of Age*⁴ and its predecessor, *Age Matters*,⁵ seem to suggest that there are a number of potential legitimate aims such as health, welfare and safety concerns and the particular training requirements of the job in question, the key factor being that they should correspond to a real need on the part of the employer, *including* considerations of cost. In *Woodcock* it was argued for the appellant that cost saving was the sole aim of the Trust in the way it acted towards their employee and that this was not a legitimate aim; it is arguable that where cost-saving is the *only* aim of the alleged discriminatory treatment, that it cannot and should not be considered to be a *legitimate* aim.

¹ Equality Act 2010, s 13(2).

² *R (on the application of Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] All ER (EC) 619 (the Age Concern case).

³ Article 6 provides: Justification of differences of treatment on grounds of age Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

⁴ *Coming of Age* at <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file16397.pdf> para 4.1.16 and 4.1.17 (last visited 27 April 2012).

⁵ *Age Matters* at <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file24331.pdf> para 3.15 (last visited 27 April 2012).

Example 2

Independent Schools Council v Charity Commission for England and Wales [2011] UKUT 421 (TCC)

Mary Syngé*

This note provides a critical analysis of the Upper Tribunal's decision and questions its proposed application and legal justification. The author suggests that the Upper Tribunal has introduced a third sense of public benefit and that this relies upon a circular rationale which is informed by policy rather than law.

INTRODUCTION

On 14 October 2011, the Upper Tribunal (Tax and Chancery) (the Tribunal) published its decision in judicial review proceedings brought by the Independent Schools Council (ISC).¹ These proceedings challenged guidance, published by the Charity Commission (the Commission), concerning the public benefit requirement under the Charities Act 2006 (the Act²). The parties had not agreed upon whether, and if so to what extent, **fee-charging schools were legally required to extend opportunities to people unable to afford their fees.**

The ISC claimed victory and was assured of some relief, but the Commission also celebrated the Tribunal's confirmation of its interpretation of the law on the 'key issues'.³ **Did the decision really achieve a win-win result and was this its purpose?**

The public benefit requirement

In order to be a charity, an institution must be established exclusively for certain purposes which are 'for the public benefit'.⁴ 'Public benefit' has the meaning attributed to it in case law⁵ and is not to be presumed.⁶ In published guidance for charity trustees, in which it sought to explain the public benefit requirement, the Commission included two principles which the ISC claimed were erroneous in law.⁷ Principle 2b stated that 'where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted . . . by ability to pay any fees charged'.⁸ Principle 2c added that 'people in poverty must not be excluded from the opportunity to benefit'.

The proceedings

The ISC sought judicial review and an order to quash parts of the guidance. The Attorney-General also submitted a Reference, seeking clarification as to whether the public benefit requirement was met in a series of hypothetical scenarios.⁹ Both applications were heard by the Tribunal in May 2011. Mr Justice Warren sat with Judge Alison McKenna, originally President of the Charity Tribunal,¹⁰ and Judge Elizabeth Ovey.

¹ *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC); the decision is dated 13 October 2011. References to paragraphs are to this decision, unless otherwise stated.

² References to section numbers are to sections of the Act, unless otherwise stated.

³ http://www.charitycommission.gov.uk/RSS/News/pr_upper_tribunal.aspx (last visited 21 December 2011).

⁴ section 2(1); the purposes must be within the list of charitable purposes in section 2(2) which, as the Tribunal notes, reflects the accepted heads of charity prior to the Act.

⁵ section 3(3).

⁶ section 3(2).

⁷ The guidance considered in these proceedings is found in three publications: *Charities and Public Benefit – the Charity Commission's General Guidance on Public Benefit* (January 2008); *Public Benefit and Fee-Charging* (December 2008) and *The Advancement of Education for the Public Benefit* (December 2008). The *Emerging Findings* report, following the Commission's public benefit assessments of existing charities, including five independent schools, appears to lie outside the scope of the proceedings at [27].

⁸ Principle 2b also disallows unreasonable restrictions based on geographical and other criteria, but the decision is limited to that part of principle 2b regarding fees.

⁹ In a reference submitted pursuant to the Charities Act 1993, section 2A(4)(b) as amended.

¹⁰ The Charity Tribunal was abolished and its functions transferred to the First-tier and Upper Tribunals pursuant to SI 2009/1834; Judge McKenna was previously employed as an in-house legal adviser to the Commission (1997–2002), although, as a partner at Wilsons (solicitors), she also represented

The Tribunal ruled that a duty to extend benefits to those unable to afford fees did exist, but that the nature and extent of those benefits was a matter for the trustees' discretion, and not for the Commission. Consequently, it declared principles 2b¹¹ and, 'at least as explained in the Guidance', 2c to be 'wrong'¹² and ordered the parties to agree what relief should be afforded to the ISC.¹³ No agreement having been reached, the Tribunal released a further decision, on 2 December 2011, in which it identified those parts of the guidance which should be quashed, unless withdrawn by the Commission. These were all references to principle 2b¹⁴ and those parts which sought to explain principle 2c (but not the principle itself).¹⁵

¹¹ In relation to fees only.

¹² at [235].

¹³ at [236].

¹⁴ In relation to fees only.

¹⁵ The decision of 2 December 2011 is available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/independent-schools-charity-commission-02122011.pdf> (last visited 25 April 2012). The Commission subsequently withdrew the relevant guidance (including the whole of the specific guidance, *Public Benefit and Fee-charging*), on 21 December 2011. The impact on the general guidance presumably means that the first decision can no longer be limited solely to educational charities, as was intended (at [15]).