

**20 December 2018**

**PRESS SUMMARY**

***The Lord Chancellor and Secretary of State for Justice and another v McCloud and Mostyn and others [2018] EWCA Civ 2844***

On appeal from UKEAT/0071/17/LA

***Sargeant v London Fire and Emergency Planning Authority and others [2018] EWCA Civ 2844***

On appeal from UKEAT/0116/17/LA and UKEAT/0137/17/LA

**The Court:** Longmore LJ, Sir Colin Rimer and Sir Patrick Elias.

**BACKGROUND TO THE APPEALS**

The claimants in McCloud are judges, each of whom had been members of the Judicial Pension Scheme (“**JPS**”). On 1 April 2015, a New Judicial Pension Scheme (“**NJPS**”) was introduced, membership of which is admitted to be substantially less attractive than membership of the JPS. The claims in McCloud concern not the reformed scheme itself, but rather the transitional provisions by which that scheme was introduced. Those provisions define judges’ entitlement to remain active members of the JPS by reference to their age. Existing members of the JPS who were born on or before 1<sup>st</sup> April 1957 have full protection and remain entitled to continuing active membership of the JPS; those born between 2<sup>nd</sup> April 1957 and 1<sup>st</sup> September 1960 are entitled to time-limited protection; and those born after 1<sup>st</sup> September 1960 are not entitled to any protection and are excluded from active membership of the JPS. The claimants, who are all entitled to limited or no protection, brought claims (i) alleging direct discrimination on grounds of age; (ii) for equal pay on the basis that the transitional provisions disproportionately adversely affect women; and (iii) alleging indirect sex and race discrimination. The respondents do not dispute that the transitional provisions discriminate on grounds of age, but argue that they are justified as a proportionate means of achieving a legitimate aim.

The claimants in Sargeant are English and Welsh firefighters, each of whom had been members of the Firefighters’ Pension Scheme 1992 (the “**1992 FPS**”) or an equivalent scheme. On 1 April 2015, new firefighters’ pension schemes were introduced in England and Wales (together, the “**2015 FPS**”). The terms of the 2015 FPS are admitted to be less favourable than those of the 1992 FPS. As with the claims in McCloud, the claims in Sargeant concern the transitional provisions by which the 2015 FPS was introduced. The structure of the transitional provisions, and the types of claim advanced, are essentially the same as in McCloud.

The Employment Tribunal (the “**ET**”) in McCloud held that the respondents had failed to identify a legitimate aim, or to demonstrate that the transitional provisions were a proportionate means of achieving any assumed legitimate aim. In contrast, the ET in

Sargeant held that the transitional provisions in issue in those claims did comprise a proportionate means of achieving legitimate aims.

The Employment Appeal Tribunal (“EAT”) in McCloud held that the ET had misdirected itself in concluding that no legitimate aim had been established by focusing on an absence of evidence to conclude that the aim of protecting older judges was irrational, in circumstances where that aim was not susceptible to evidential proof because it was informed by moral or political value judgments. The decision of the ET was nevertheless not to be disturbed because its analysis of proportionate means was unimpeachable. In particular, the ET had in its analysis of both aims and means accorded the respondents a sufficient ‘margin of discretion’. There was a tension between European authorities requiring that a wide margin of discretion be accorded by the court to the government’s identification of legitimate aims and proportionate means; and English authorities which encouraged judicial scrutiny of aims and means. However, those conflicting authorities had been reconciled by the Supreme Court in Seldon v Clarkson Wright & Jakes [2012] UKSC 16.

The EAT in Sargeant held that a margin of discretion was to be applied in relation to aims but not means. The ET had applied that margin correctly in its analysis of aims, but had erred by failing to scrutinise whether the means adopted was proportionate. The EAT therefore ordered that matter to be remitted to the ET.

## **JUDGMENT**

### *Age discrimination claims*

The Court of Appeal held that the age discrimination claims in both McCloud and Sargeant were made out. In the judges’ case the court upheld the ET’s conclusions on legitimate aims. As such, the issue of proportionate means did not fall to be considered [95]. The court nevertheless expressed its view that although the reasoning of the ET on proportionate means disclosed some errors, none of them vitiated the conclusion reached [96]-[99]. As for Sargeant, the court overturned the ET’s finding that the government parties had established legitimate aims [164], such that the issue of proportionate means did not fall to be considered [165].

The central issue of law concerned the margin of discretion to be applied. There was no tension between the European and domestic authorities on this issue [84]. The correct approach, and the approach consistent with both the domestic and the European authorities, was for the court to afford the government some margin of discretion in relation to both aims and means, but to determine for itself what the appropriate margin should be in each particular case; and then, applying that appropriate margin, to determine whether a particular aim is legitimate or a means proportionate [85]-[87]; [143]-[145]. The Court emphasised that once a court has established a social policy aim is capable of being a legitimate aim, it must further determine whether it is in fact legitimate in the particular circumstances of the case [86]; [151]. The ET in McCloud followed that approach [89]. The ET in Sargeant failed to follow that approach in relation to legitimacy of aims by proceeding straight from a finding that the claimed

aims were social policy aims, to the conclusion that they were also legitimate aims [152]-[155].

A further issue concerned whether supporting evidence was required to substantiate the legitimacy of the aims relied on by the government parties in both actions. The court held that the legitimacy of those aims could not be established without supporting evidence. It was not sufficient simply to assert a claimed belief that it ‘felt right’ to protect older firefighters or older judges, and then to characterise the decision to do so as a moral decision incapable of evidential substantiation [157]. The government needed to show how it had arrived at the conclusion that that aim ‘felt right’, which analysis would have to be supported by evidence [157]-[160]. So far as concerns Sergeant, the ET erred in finding that the aims relied upon were legitimate in the absence of any supporting evidence [163]. The EAT erred in finding the reasoning of the ET to be unimpeachable [164]. As for McCloud, the moral and political aims relied upon before the EAT were not argued as separate aims before the ET, such that the reliance the ET placed on a lack of evidence did not concern such aims [91]-[92].

#### *Equal pay and indirect race discrimination claims*

Given the success of the age discrimination claims, the equal pay and indirect race discrimination claims were “*of no real practical significance*” [166]. The court nevertheless stated its view, holding that the claims in McCloud were made out and, subject to one matter on which remission would have been required if the age discrimination claims had not been successful, also in Sergeant.

#### Note

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.