



[2023] JMSC Civ 163

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV02668

BETWEEN JOYCELYN STEADMAN CLAIMANT

AND QUEST SECURITY COMPANY LIMITED DEFENDANT

IN CHAMBERS

VIDEO CONFERENCE

Civil Procedure – Notice of Application for Court Orders to Strike Out Claim – Abuse of Process – Summary Judgment – Contra Proferentem Rule – Constructive Trust – Ambiguity – Limitation of Actions Act, s. 34 and 46 – Civil Procedure Rules, 1.1, 3.12, 15. 5(2), 15.5(5) and 26.3.

Mr. Cedric Brown appeared for the Claimant

Mrs. Kaysian Kennedy-Sherman instructed by Townsend, Whyte & Porter appeared for the Defendant

Heard: 29th June, 11th July and 18th September 2023

MASTER CARNEGIE (AG)

BACKGROUND

[1] The Defendant, Quest Security Company Limited, is a limited liability company duly incorporated under the laws of Jamaica having its registered office at 26 Roosevelt Avenue, Kingston 6. The Claimant, Miss Joycelyn Steadman, is a former sub-contractor of the Defendant in the capacity of a security guard.

[2] Both statement of case filed on behalf of the Claimant and the Defendant suggests that the employment relationship between the parties which commenced in 2004, was terminated by the Defendant in December 2015.

The Claim

[3] The substantive matter began by way of the Fixed Date Claim Form filed on May 31st, 2021, and reflects in the Particulars of Claim that the Claimant claims from the Defendant –

- (i) A declaratory judgment by the court that the Defendant, Quest Security Company Limited, is in breach of the contract of employment it entered into with the Claimant, Joycelyn Steadman in the year 2004, and in contravention of relevant laws that regulate an employer and employee relationship.
- (ii) An order by the Court that the Defendant, Quest Security Company Limited, pay over to the Claimant, Joycelyn Steadman, an aggregate sum of money plus interest reflecting a deduction of One Thousand Five Hundred Dollars (\$1,500.00) which was deducted from the Claimant's wages every fortnight, from the year 2004 to December of the year 2015, for the provision of uniforms which were never delivered to the Claimant.
- (iii) An order that the Defendant, Quest Security Company Limited, pay over with interest the full amount that the Claimant should have received as laundry allowance during the relevant period of her employment.
- (iv) An order that the Defendant, Quest Security Company Limited, pay over to the Claimant, Joycelyn Steadman, all outstanding amounts earned with interest as overtime payment arising from the hours she worked beyond the standard weekly forty (40) hours set by law.
- (v) An order that the Defendant, Quest Security Company Limited, pay damages to the Claimant, Joycelyn Steadman, for the contravention of her rights under the Minimum Wages (Industrial Security Guards) Order, 1982.
- (vi) That the cost of this Claim be paid by the Defendant.

The Defence

[4] The Defence, filed December 20th, 2021, disputes the Claim and states that the Claimant was an independent contractor at the material time with the Defendant

for the provision of security services. Further, the Defendant admitted that One Thousand Five Hundred Dollars (\$1,500.00) was deducted from the Claimant's fortnightly salary and indicated that the proper uniform was made available to the Claimant at all material times she was contracted for service.

[5] The Defendant further pleaded that it rents uniforms to all its security guards at a monthly cost of Three Thousand Dollars (\$3,000.00). The Defendant indicated that it is a contractual requirement that all security guards be properly clad in uniform when they are invited to work at the various locations for which the Claimant is contracted to provide security services.

[6] The Defence filed reflects the following denials:

- (i) that the Claimant was provided with only two (2) pairs of pants and two (2) shirts over the period;
- (ii) that, up to the time of bringing this Claim, the Claimant had not been paid for the One Hundred and Thirty-Four (134) hours she worked during that period at the Ministry of Education located at 2-4 National Heroes Circle, Kingston;
- (iii) that the Claimant was never paid any laundry allowance even though she was entitled to be paid the same; and
- (iv) that overtime was not paid during the Claimant's employment from 2004 to December 2015, even though she was made to work many times over and beyond the standard weekly forty (40) hours set by the law.

[7] The Defendant pleaded that there are no monies owed to the Claimant and that the Claimant is put to strict proof of same. Further, any claim by the Claimant would be subject to the provisions of the Limitations Act of Jamaica.

Notice of Application for Court Orders to Strike Out Claim and Enter Summary Judgment

[8] The Defendant has sought the following orders by way of the Notice of Application for Court Orders filed March 14th, 2023 –

1. That the Claimant's Claim Form and Particulars of Claim and/or Affidavit be struck out;
2. That Summary Judgment be entered in favour of the Defendant;
3. Such Further and/or other relief as this Honourable Court deems just;
4. Costs to the Defendant to be agreed or taxed.

[9] The grounds on which the Orders are sought in respect of the Notice of Application for Court Orders filed March 14th, 2023, are –

1. The Claimant filed her Fixed Date Claim Form on May 31, 2021, for breach of contract allegedly arising out of a contract of employment spanning 2004 to 2015.
2. Any claim for breach between 2004 and 2015, is in contravention of the limitation period set forth in the Limitation Act at section 46 which limits the period in which the Claimant may commence proceedings to six (6) years from the date of breach of contract.
3. That the instant proceedings were commenced outside the required limitation period and as such should be struck out pursuant to CPR Rule 26.3(1)(b) of the CPR for an abuse of process.
4. That the Defendant has a complete Defence in law to the Claim.
5. The Claimant's right to bring the cause of action has been extinguished.
6. The Claimant has no reasonable prospect of succeeding in her claim or any such part thereof brought for breach of contract well outside the limitation period of six (6) years.
7. That prejudice to the Defendant is great as the Claim has been brought for breach of contract well outside the limitation period of six (6) years.
8. Summary judgment is appropriate when there is no genuine dispute as to any material fact, the Claimant has no real prospect of success, and the Defendant is entitled to judgment as a matter of law.
9. That judicial time would be saved by the grant of an order for summary judgment and striking out of the Claimant's Claim Form and Particulars of Claim.

[10] Consequently, the Defendant has asked the court to consider whether the Claimant's Claim is statute barred pursuant to the provisions of section 46 of the Limitations Act.

Notice of Application to Amend Particulars of Claim Pursuant to Civil Procedure Rules 20.4 and 20.6

[11] On the 11th day of July 2023, the Parties were permitted to have discussions re the Notice of Application to Amend the Particulars of Claim, filed February 15th, 2023, given the procedural implications of same. Consequent to such discussions, the Parties returned on July 29th, 2023 when, at the request of the Claimant, the Notice of Application to Amend Particulars of Claim pursuant to Civil Procedure Rules 20.4 and 20.6 was withdrawn. The Attorney-at-Law for the Defendant and Claimant's attorney concurred that said the Notice of Application was not properly before the court, and in any case, was in relation to a procedural point as to jurisdiction.

SUBMISSIONS ON THE NOTICE OF APPLICATION TO STRIKE OUT CLAIM AND ENTER SUMMARY JUDGEMENT

The Defendant's Submissions

[12] Counsel for the Defendant submitted that summary judgment should be entered, as the Claim brought by the Claimant is statute barred and as such provides a complete defence in law. In this regard, the Claim shows no reasonable prospect of success and is therefore an abuse of process.

[13] Counsel relied on the Affidavit of Mr. Joseph Dibbs, Managing Director of the Defendant, which was filed on 22nd March 2023. Reference was also made to paragraphs four (4) to fourteen (14) of the Affidavit in support of the Claim.

Limitation Period

[14] The Affidavit in support reflects that the Claim was served on the Defendant in 2022, between six (6) and seventeen (17) years after the periods in which the breaches are being claimed, outside the statutory limitation period. Counsel relied on the authority of **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2010] JMCA Civ 7 ("**Brown & Brown v JNBS**") where the Court of Appeal indicated that the court has no power to extend a limitation period. In furtherance of this authority, counsel submitted that where the limitation period of six (6) years has expired, the Claimant's claim is hopeless with no chance of succeeding once the Defendant raises same in their Defence.

[15] Counsel also relied on the case of **International Assets Service Limited v Edgar Watson** [2014] JMCA Civ 42, where Dukharan JA indicated in paragraph 15 –

"If Brooks J was correct that the six-year limitation period was applicable, rule 26.3(b) and/or (c) of the Civil Procedure Rules (CPR) 2002, provides that the court can strike out a claim or statement of case which is an abuse of process or where it discloses no reasonable grounds for bringing, or, defending a claim. Under the Act, a matter that is statute barred will have no prospect of success at trial and is, therefore, an abuse of process."

[16] Counsel submitted that on realizing the absence of a prospect of success and futility in the Claim, the Claimant attempts to pivot from the documented Claim of a breach of contract to a claim for breach of trust, which also has no prospect of success according to Section 46 of both the Limitations Act and the Trustee Act.

[17] It was Counsel's submission that the learned legislators contemplated that a litigant may seek to avoid the six (6) year period to bring contract claims by attempting to set up a trust claim. This door, counsel submits, has been firmly closed by both the Limitation of Actions and Trustee Act, as any such claim must be brought within the time within which the same would be recoverable if there were no such trusts.

[18] Counsel added that the time frame to bring a claim commences from the point when the facts exist establishing all the essential elements of the cause of action.

Subsequently, Counsel indicates that the Claimant has failed to bring her claim within the period permitted by law.

- [19] In support of the aforesaid submissions, Counsel relies on **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24, paragraph 39, where P. Williams JA highlighted the correct approach to be taken when calculating the limitation period by reciting **Blackstone's Civil Practice**, 2012, paragraph 10.13 which states—

"The rules on accrual fix the date from which time begins to run for limitation purposes. Lindley LJ in Reeves v Butcher [1891] 2 QB 509 said: 'it has always been held that the statute runs from the earliest time at which an action would be brought.' In Read v Brown (1888) 22 QBD 128 Lord Esher MR defined cause of action as encompassing every fact which it would be necessary for the [claimant] to prove, if traversed, to support his right to the judgment of the court. In other words, time runs from the point when facts exist establishing all the essential elements of the cause of action."

- [20] It was the submission of Counsel that the Claimant has not denied the expiration of the limitation period in her affidavit nor has the Claimant established a real prospect of success.

Prejudice

- [21] Counsel contends that the Defendant would be greatly prejudiced, as it is no longer in possession of any document which could assist its Defence, as more than six (6) years have elapsed from the date of any alleged contract with the Claimant. Further, the prejudice to the Defendant is great due to the passage of time as any evidence of falsity of allegations of the Claimant would no longer be required to be kept nor in the possession of the Defendant for the years 2004 through 2015 inclusive.

Claimant was Re-imbursed

- [22] Counsel submitted that the Orders sought in the Fixed Date Claim Form, filed May 31st, 2021, are irrelevant as the Claimant was reimbursed with interest. Further, the court should look at what the Claimant claims as the work relationship between the

Parties ended in December 2015. In consideration of their submissions, counsel concluded that the Defendant is entitled to judgment as a matter of law.

The Claimant's Submissions

[23] Counsel for the Claimant relied on paragraphs 4 through 13 of the Affidavit of Miss Jocelyn Steadman in Response to the Notice of Application for Court Order to Strike Out Claim filed April 17, 2023.

[24] The Claimant avers that in 2016, she first became aware of the need to take action after her contract of employment was terminated and the realization that the uniforms up to that time were not forthcoming and would become useless.

[25] The Claimant averred in her affidavit that in 2016, the Defendant requested time to sort out her matters of returning the deductions, and which she stated six (6) months was a reasonable time.

[26] The Claimant opposes the application at bar on the basis that she was made to believe that during her eleven (11) years of employment, the monies deducted would have been towards specific purposes which she did not benefit from.

[27] Counsel submitted that there is the creation of a constructive trust against which section 46 of the Limitation of Actions Act has no effect. Counsel relied on the contra proferentem rule to support his submissions opposing the application at bar. Counsel further submitted that public policy requires that a message be sent to the Defendant and similar companies. Submissions in respect of each ground are summarized accordingly.

Constructive Trust

[28] Counsel submitted that by virtue of the acknowledgment by the Defendant of a working relationship with the Claimant, in the circumstances a constructive trust was created. Further, the Defendant admitted that they deducted One Thousand Five Hundred Dollars (\$1,500.00) fortnightly amounting to approximately Thirty-

Nine Thousand Dollars (\$39,000.00) annually, from the year 2004 to the end of December 2015, when her employment was terminated.

- [29]** It was counsel's submission also that the Affidavit reflects that during these eleven (11) years of employment, the Claimant only collected one (1) pair of uniforms. Counsel's further submission was that the Defendant cannot equitably keep the monies deducted and therefore cannot rely on section 46 of the Limitation of Actions Act, because this would be unjust enrichment.
- [30]** The sum of One Thousand Five Hundred (\$1,500.00) was deducted fortnightly for the purpose of providing uniforms and this was the common understanding between the Parties. Therefore, Counsel submitted that the Defendant is a constructive trustee in equity in the circumstances and that since the uniforms were never provided, the money deducted is to be held by the Defendant in a constructive trust.
- [31]** Counsel submitted that the social and economic position of the Claimant was impacted by the contributions made as the funds deducted came from her salary and were not used for the purpose for which it was collected. Subsequently, by virtue of these deductions, the Claimant's purchasing power, savings capacity and investment possibilities were all negatively impacted as she had less funds to undertake these activities and had to sweep the streets to make up her pay.
- [32]** Counsel's final submission on this ground was that the Claimant's contributions every fortnight between 2004 and 2015, are not funds that the Defendant can equitably keep as holding on to same gives rise to unjust enrichment of the Defendant. The Defendant is a trustee in equity of the said deductions and in the surrounding circumstances ought to be ordered by the Court, exercising its equitable jurisdiction, to pay over the contributions collected along with interest to the Claimant, as the equitable beneficiary.

Estoppel

[33] Counsel submitted that in the circumstances it would be clearly inequitable for the Defendant to renege on its promise and claim its strict legal rights under section 46 of the Limitation of Actions Act, in order to keep the contributions made. The court in exercising its equitable jurisdiction must stop the Defendant from relying on section 46 of the Limitation of Actions Act, in the context of the Defendant reneging on its promise to provide uniforms. In support of this point, Counsel relies on **Crabb v Arun DC** [1976] 1 Ch 179 and **Ajayi (t/a Colony Carrier Co.) v RT Briscoe** [1964] 1 WLR 1326.

[34] In the case of **Crabb v Arun DC** (supra), Lord Denning discussed equitable estoppel in a claim to a right of access over land to a public highway. In that case, Lord Denning MR said this at page 871:

“...If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights... even though that promise may be unenforceable in point of law for want of consideration or want of writing... and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise... Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights... knowing or intending that the other will act on that belief... and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied...”

[35] In **Ajayi (t/a Colony Carrier Co.) v RT Briscoe** (supra), the Privy Council discussed promissory estoppel and established that the burden of proving promissory estoppel is on the party who seeks to rely on it. Further, that a party to a contract could resile from their representation if they give reasonable notice to the other party/parties that they want to rely on their legal rights again, so long as this reasonably allows the other party/parties to resume their original position.

Contra Proferentem Rule

[36] The submission on behalf of the Claimant was that the contra proferentem rule states broadly that where there is doubt about the meaning of a clause within a contract, the words should be construed against the person who put them forward.

- [37]** Counsel referenced Clause 1.8 of the Contract of Employment as stated in the Affidavit of the Claimant. Counsel quoted from said clause and contract. Counsel submitted that the clause in question must be an exclusion or indemnity clause and that it is ambiguous. Further, in order for a party to rely on this rule, Counsel submitted that the party against whom the rule is invoked must be the maker of the contract, the author of the ambiguous clause or the party who seeks to benefit from the ambiguity.
- [38]** The submission was that the parties to the contract must be of different bargaining power, one stronger and the other weaker. Further, the contract must be one of those standardized contracts which Counsel submitted the Claimant had no part in negotiating and no input regarding the provisions and how it is worded.
- [39]** Counsel submitted further that the application of the contra proferentem rule stands to satisfy the objective of preventing big companies from taking advantage of parties with weaker and limited bargaining power. On this point Counsel made the following arguments:
- (i) By leaving the month or the year open and vague and ambiguous as to when the uniforms are to be supplied to the guards, Quest Security Company Limited attempts to exclude itself from being sued for the performance of such an obligation within the context of a specific year as it does not say the month or year within which the uniforms are to be supplied. The issue of performance arising from the clause can therefore be subjected to the guards' period of employment and not just a particular month or year during his or her employment.
 - (ii) Quest Security Company Limited, the Defendant, is the maker of the contract, and the author of this ambiguous clause within the contract.
 - (iii) The ambiguity is intended to favour the Defendant, Quest Security Company, the maker of the contract.

- (iv) Quest Security Company Limited and the Claimant have different bargaining powers. Quest Security Company Limited is a big, sophisticated security company staffed by qualified personnel.
- (v) The Contract appears to be drafted by a lawyer who inserted this ambiguous clause.
- (vi) The contract is one of those standardized employment contracts that the Claimant had no part in negotiating and no input regarding the provisions and how it is worded.
- (vii) The facts and surrounding circumstances of the case meets the objective of the application of the contra proferentem rule in preventing big companies and corporations from taking advantage of weaker members of society, such as unjustly enriching themselves at the cost of powerless employees.

[40] Counsel further emphasized that the maker of the contract, the Defendant, inserted in its contract an ambiguous clause with regard to specific performance. Further, there was ambiguity as to when the uniforms were to be delivered to the guards. Counsel's submission was that the Defendant seeks to avoid liability arising from specific performance of its obligation to supply uniforms to its guards within any particular year. The Claimant, as Counsel submitted, kept paying with the expectation of getting her money back if the delivery of the uniforms was not eventually forthcoming.

[41] Counsel closed his submissions on this point by arguing that the Claim is not statute barred since time could not begin to run until sometime in the year 2016 when employment was terminated. Further, the Defendant asked for time to sort things out and was given six (6) months into the year 2016 to do so, which was considered reasonable.

Application of the Law to Shape Public Policy

[42] Counsel's final submission was that a message should be sent to these security companies operating in Jamaica, which for a long time are alleged to maintain poor labour practices in areas of wages and fringe benefits, hours of work, poor working conditions, misuse of worker's deductions and general exploitation of their workers.

ISSUES

[43] In light of the above submissions made, the issues to be considered by the Court are –

1. Whether the Defendant can avail itself of the complete defence of statute of limitation.
2. Whether the Claimant's statement of case discloses no reasonable grounds for bringing or defending the claim and should be struck out as an abuse of the process of the court

LAW AND ANALYSIS

[44] The starting point for consideration is CPR 15.2 and 26.3 which states –

“---15.2 The Court may give summary judgment on the claim or on a particular issue if it considers that –

- (a) The claimant has no real prospect of succeeding on the claim on the issue; or*
- (b) The defendant has no real prospect of successfully defending the claim or the issue.---*”

“Sanctions – Striking out Statement of Case

26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

- (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
- (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
- (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
- (d) that statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.---*” (emphasis mine)

Whether the Defendant can avail itself of the complete defence under the Limitation Act.

- [45] Consideration must be given to the substantive Claim in its entirety in coming to a determination as to the cause of action and whether the Defendant can avail themselves of a complete defence under section 46 of the Limitation of Actions Act.
- [46] In the Application at bar, Counsel for the Claimant raised several principles of law which he states rebuts the presumption that the cause of action is statute barred. In the submissions opposing the application, Counsel for the Claimant indicates that the Claimant is claiming that she is entitled to the monies owed to her. The further submission was that the non-payment of those sums amounted to a constructive trust which estops the Defendant from relying on section 46 of the Limitation of Actions Act. I am guided by the statement of case of the Claimant.

Cause of Action

- [47] The case law provides that a different approach is required for making a determination as to whether the Claim is statute barred by examining the causes of action (see **Attorney General v Arlene Martin** (supra) at para 59). On examining the Claimant's statement of cases, it is clear that the cause of action has not been set out clearly. I am not constrained in examining same to determine the causes of action – the Claim is for:
- (a) failure to provide the uniforms as stipulated in the contract;
 - (b) pay for laundry allowance;
 - (c) overtime pay; and
 - (d) failure to act in accordance with relevant sections of the Minimum Wage (Industrial Security Guards) Order 1982.

As set out, the Claim is for sums spanning the employment relationship between the Parties, from 2004 to 2015 inclusive.

[48] Therefore, at the risk of repetition, the extent of the Claimant's statement of case, is one for:

- (a) breach of contract and therefore, the reimbursement with interest of all monies deducted fortnightly from the Claimant's remuneration between the year 2004 to December of the year 2015 for uniform allowance;
- (b) the payment of the amounts outstanding as remuneration with interest arising from the one hundred and thirty-four (134) hours that the Claimant worked during the month of December 2015;
- (c) the payment of the full amount that the Claimant should have received as laundry allowance with interest thereon; and
- (d) overtime payment arising from the hours the Claimant worked beyond the standard weekly forty (40) hours set by law.

[49] Counsel for the Claimant exhibited an employment contract dated the 13th day of May 2013, which shows the Claimant as the only signatory to the employment contract. There was no date showing when the contract was signed by the Claimant nor the presence of a signature for a witness. However, by virtue of the submissions made on behalf of both parties, the period of the employment relationship is not in dispute.

[50] Having not had the benefit of the previous contracts including the first contract between the parties in 2004, any determination of the application at bar would be in the context of the contract dated the 13th day of May 2013 as an indicator of what the terms of the employment relationship were from the 13th of May 2013 to the date of termination December 2015.

[51] The subject clause of the Claim is found in the exhibited contract dated the 13th day of May 2013, at clause 1.8 and reflects –

“ ...

1.8 The Subcontractor shall receive uniforms from the Contractor solely for the purposes of identification and security of the Contractor and their clients as follows:

- 2 Pants
- 3 Shirts

- 1 Cap
- 2 Patches
- 1 Tie

which he hereby undertakes to keep and care. The Subcontractor shall agree to make a reasonable payment for uniforms and equipment. The Subcontractor shall further agree that he shall pay the replacement cost of any clothing lost or damaged not in the course of carrying out his duties under the contract...

Breach of Contract

[52] I would agree with counsel for the Defendant that the Statement of Case does reflect a claim for breach of contract it did not identify what is the breach of contract and when it occurred. However, having regard to the submissions made on behalf of the Parties, it is gleaned that such period spanned 2004 to 2015 inclusive for the period for the sums being claimed.

[53] The submissions on behalf of the Defendant are that the Claim was served between six (6) and seventeen (17) years, after the periods in which the breaches are being claimed, which is outside the statutory period. Counsel stated that this would mean the Claim is statute barred. I note, however, in examining the statement of case that there was a period for the claim of payment of overtime pay that is being claimed for the contract period starting July 30th 2015 and October 31st 2015.

[54] The point of reference and the only evidence of the terms of the contract which governed the employment relationship between the Parties is the exhibited contract exhibited which bears the date 13th day of May 2013. The Claimant averred she was unable to provide any other contract and the Defendant indicated they were not in possession of same. Clause 1.1 of the contract dated 13th day of May reflects –

“1.1 This Agreement shall commence on the 13th May 2013 and be valid for three (3) months. This Agreement is renewable on a quarterly basis, at the Contractor’s discretion, as signed to by the Subcontractor. The Contractor may terminate the use of the Subcontractor’s services at any time without obligation except for payment due for services prior to date of termination. Nothing herein provided should be prevent the Contract from renewing this contract upon satisfactory completion of the contract term.”

[55] The May 2013 contract exhibited reflects in the signatory a quarterly renewal period reflected as starting at 31st January 20..., 30th April 20..., 30th July 20... 31st October 20... The quarterly renewal period would have started October 31st October 2015, prior to the December 2015 termination of the employment relationship. Therefore, the Claim as filed would not be statute barred for the period after the Claim was filed up to December 2021.

[56] Consideration is given to the submissions made on behalf of the Claimant with respect to the principles of constructive trusts, the contra proferentem rule and ambiguity in the words of the contract. Having considered the submissions made in respect of same, regard has to be given to the nature of the contract and in the context of the statement of case.

[57] The learned F. Williams J (Ag) (as he then was) in **International Assets Services Limited v Arnold Foote** (supra) held that in actions for simple contract, the limitation period is six (6) years. This was affirmed by the Court of Appeal in the recent decision of **Silvera Adjudah v The Attorney General of Jamaica** [2022] JMCA App 24. F. Williams J(Ag) relied on **Halsbury's Laws of England** Volume 9 in the said case quoted the definition of simple contracts –

“Simple contracts include all contracts which are not contracts of records or contracts made by deed. Simple contracts may be expressed or implied, or partly expressed or partly implied.”

[58] F. Williams J (Ag) also discussed the point at which the cause of action arises in cases involving a breach of simple contract for the purposes of the Limitation of Actions Act. He quoted from **Halsbury's Laws of England** Volume 28 paragraph 668 –

“When the cause of action arises. In an action for breach of contract the cause of action is the breach. Accordingly, such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of action brought...”

[59] Further, F. Williams J (Ag) opined that a simple contract should be differentiated from a special contract, he noted at page 8 of his judgment –

*“By contrast, contracts by deed are known as “specialties” -vide **R v Williams** [1942] A.C. 541, 555, per Viscount Maugham:-*

“The word “specialty” is sometimes used to denote any contract under seal, but it is more often used in the sense of meaning a specialty debt, that is, an obligation under seal securing a debt, or a debt due from the Crown or under statute.”

[60] By virtue of the definition and distinction between simple contracts and specialty contracts as espoused by the learned Williams J (Ag), it is determined that the contract in question without more is a simple contract, notwithstanding, Counsel on behalf of the Claimant submissions acknowledgment that the contract in question was a standard one.

[61] I must reflect sections 34 and 46 of the Limitation of Actions Act as referenced by Counsel for the Defendant –

“34. No action suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by any express trust, or to recovery any arrears of rent or interest in respect of sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time which the same would be recoverable if there was not such any trust.

46. In actions of debt or upon the case grounded in simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence in any of courts of this Island, of a new and continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James I Cap. 16, which has been recognized and is now esteemed, used accepted and received as one of the Statutes of this Island, or to deprive any party to the benefits thereof unless such acknowledgement or promise shall be made or contained by or in some writing, to be charged by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise; and where there shall be two or more joint contractor, executor or administrators of any contractor, nor such joint contractor, executor or administrator shall loose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them:

Provided always, that nothing herein contained shall alter, take away or lessen the effect of any payment of any interest made by any person whatsoever:

Provided also that in actions to be commenced against two or more such joint contactors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by the United Kingdom Statute aforesaid as to one or more of such joint contractors or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants

against whom he shall recover and for the other defend or defendants against the plaintiff.

- [62] The case law has settled that section 46 of the Limitation of Actions Act is applied in the context of the UK (see: **Vanetta Neil v Janice Halstead** [2019] JMSC Civ. 68 where Rattray J held the limitation period for claims of this nature is six (6) years; and **International Assets Services Limited v Arnold Foote** (supra) F. Williams J (Ag) opined that a cause of action must be brought within six (6) years).
- [63] Counsel for the Claimant in his submissions, sought to invoke equitable principles to suggest that the Defendant cannot rely on the statute of Limitations. An examination of the law in this area has demonstrated that even for equitable claims there is a limitation bar. For the Claimant to invoke such principles in submissions in opposition to the Notice of Application at bar, reliance on same, would mean it should be discernable on the statement of case. This is not the case.
- [64] The learned authors in **Equity and the Law of Trusts**, 10th Edition at page 67, provides that a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property to assert his own beneficial interest in the property and deny the beneficial interest of another party.
- [65] It must be stated that the cases relied on by Counsel for the Claimant are in relation to claims in respect of property. Further, it bears repeating that same is not gleaned on the Claimant's statement of case.
- [66] **Cheshire, Fifoot and Fumston's Law of Contract**, 17th Edition provides that the contra proferentem rule applies if there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity should be resolved against the party who inserted it and seeks to rely on it.

[67] However, by virtue of the classification of the type of contract, any breach alleged arises on the date it arose. In this regard, further reliance is placed on **Cheshire, Fifoot and Fumston's Law of Contract** (supra) page 804 reflects –

“The expression ‘cause of action’ means the factual situation stated by the plaintiff which, if substantiated, entitles him to a remedy against the defendant. If, when analysed, it discloses a breach of contract, it accrues when that breach occurs, from which moment time begins to run against the plaintiff. The fact that actual damage is not suffered by him until some date later than the breach does not extend the time within which he must sue.”

[68] In the case of **Marjorie Knight v Lancelot Hume** [2017] JMSC Civ. 51, Evan Brown J (as he then was) explains inter-alia the equitable claims versus legal rights and the rationale for the limitation period. He held –

“... there are specific statutory limitation periods that apply to certain types of equitable claim. For example, “claims brought by a beneficiary or by a trustee on behalf of a beneficiary or by a trustee on behalf of a beneficiary to recover trust property or any breach of trust must all be brought within six years from the time when the cause of action first accrued.”

[69] The learned judge continued at paragraph 35 of the judgment to say that –

“Critical to the operation of the limitation period is when the right to bring an “action or suit” first accrued. In other words, the pivotal consideration is when time starts to run against the person making the claim. Central to the understanding of the limitation law is the appreciation that there must be a trigger to set time in motion against the claimant. Practically, people are not moved to assert (or protect) their rights in the absence of a threat to those rights.”

[70] He further held that –

“Likewise, an unenforceable legal right is treated as unenforceable in equity. This is treated as unenforceable in equity. This is achieved in one or two way or both ways. Firstly, the relevant statutory provision may expressly or by necessary implication apply to all material remedies, wherever available at law or in equity. Secondly even if the provision is concerned exclusively with the protection of a legal right “it would be unconscionable to allow it to be circumvented by resort to other courts.”

[71] Though on different facts, the principle elucidated in **Sherrie Grant v Charles McLaughlin and Collin Smith** [2019] JMCA Civ 4 addressed the issue that the claim was based in equity and therefore the limitation of actions did not affect it. In that case the submission was made that statutory limitations existed under the statute of limitations for *inter-alia* unjust enrichment as they were grounded in equity and were triable issues.

[72] The learned Morrison JA (as he then was) held that equitable claims and breach of contract are subject to the six-year limitation for which there would be no postponement of the limitation. Morrison JA held further that time would begin to run for the purposes of the Limitation of Actions Act. The point of distinction between the application at bar and this case is the uncertainty in determining the point at which the breach of contract occurred.

[73] Submissions made on behalf of the Claimant was that she discovered that the monies and the uniforms would not be forthcoming on her termination in 2015. This would have been well out of time for claims ground in breach of contract. In this regard, further reliance is placed on the learned Morrison JA who continued in **Sherrie Grant v Charles McLaughlin and Collin Smith** (supra) at paragraph [58] to say –

*“The relevant principles concerning the commencement time for limitation purposes were conveniently set out in **Medical and Immunodiagnostic Laboratory Limited v Dorett O’Meally Johnson** [2010] JMCA Civ 42. K Harrison JA made the following points in paragraphs [5] through [8]:*

- (a) the general rule in contract is that the cause of action accrues when the breach occurs and not when the damage is suffered;*
- (b) there the contract is for the sale of goods the buyer’s right of action for breach of an implied or expressed warranty relating to goods accrues when the goods are delivered and not when the defect is discovered or damage ensues;*
- (c) the general rule in tort is that the cause of action arises when the damage is suffered and not when the act or omission complained of occurs.”*

[74] By virtue of the authorities, the Claimant would not succeed in so far as the Claim is statute barred. Therefore, having regard to when the Claim was filed, the statute of limitations would not have expired in respect of the Claim for the renewal period for July 2015 and October 2015. Further, the Defendant, though denying that there are outstanding amounts to be paid to the Claimant, has not provided any evidence in support of whether the sum or any part thereof was settled.

[75] Having regard to the Fixed Date Claim Form filed in the substantive claim, I agree with the Defendant that the issue of the contra proferentem rule, constructive trust or ambiguity do not arise in the statement of case for the Claimant. The submissions made on behalf of the Claimant would not have assisted her.

However, I do not agree that the Defendant can avail itself of a complete defence of limitation at this interlocutory stage, so far as the substantive claim is concerned.

Whether the Defendant Statement of Case should be struck out for disclosing no reasonable grounds for bringing or Defending the Claim

[76] The striking out of a claim is a severe measure and the power to do so must be exercised with extreme caution and should only be taken in plain and obvious cases (see: **S&T Distributors Ltd. et al v CIBC Jamaica Ltd. et al** (unreported) Court of Appeal of Jamaica, SCCA No. 112/2004, delivered July 31, 2007).

[77] In making a determination as to whether the Claim as filed should be struck out, I am not required, at this interlocutory stage, to embark upon a mini- trial, but to have due regard to the statements of case (see: **Victor Rodriques v Bryon Mitchell Mitchell** [2022] JMSC Civ. 49 which applied the principle espoused in **Williams & Humbert Ltd. v W&H Trademarks (Jersey) Ltd. and Others** (1986) 1 All ER 129).

[78] **Blackstone's Civil Procedure 2022**, reflects at page 621 -

"A cause of action that is unknown to the law will be struck out... A statement of case ought also to be struck out if the facts set out do not constitute a cause of action or defence alleged..."

[79] The learned Brown JA in **Adjudah Silvera v The Attorney General of Jamaica** (supra) reiterated the words of Dukharan JA in the case of **International Assets Services Limited v Edgar Watson** (supra), at paragraph 51, the relevant portion of which is reflected below –

"...a matter that is statute barred will have no chance of success at trial and is therefore an abuse of process."

Brown JA continued at paragraph 52 of the judgment, this time reiterating the words of the learned P. Williams JA in **The Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24, where she stated –

“Although the defence that a limitation period has expired is a procedural defence, it is one that usually has to be raised as such and be resolved at trial. However, it is permissible for the defendant to apply to have the claim or the relevant parts of it struck out as being an abuse of process.”

[80] I take this to mean that notwithstanding a defence of limitation being raised, the Defendant is permitted to apply to have the claim, or relevant parts of it, struck out as being an abuse of process.

[81] **Blackstone’s Civil Procedure** (supra) indicates at page 623 –

“A claim issued after the expiry of limitation may be struck out as an abuse of process (alternatively, the limitation point may be determined as a preliminary issue, or at trial, or by way of an application for a direction under the LA 1980, s 33) but cannot be struck out on the ground of there being no reasonable cause of action. The reason is that limitation is a procedural defence, so does not prevent there being a cause of action.”

[82] Given the above, I do not agree with Counsel for the Defendant that there is no reasonable cause of action. My reason for this conclusion is further supplemented by the reason that the defence of limitation being raised there are matters that remain triable issues in respect of contract periods of July 2015 and October 2015.

[83] However, those parts of the Claim should be struck out in so far as it involves matters in respect of contract periods prior to when the Claim was filed in May 2015. As such, there is a cause of action in respect of matters that are within the six-year limitation period prior of the claim being filed May 31st 2015.

CERTIFICATE OF TRUTH

[84] CPR 3.12 and 3.13 reflects –

Statements of case - certificate of truth

3.12 (1) *Every statement of case must be verified by a certificate of truth.*

(2) *The general rule is that the certificate of truth must be signed by the lay party personally.*

(3) *Where it is impracticable for the lay party personally to sign the certificate required by paragraph (1) it may be given by that person’s attorney-at-law.*

(4) *A certificate of truth given by the attorney-at-law must also certify*

- (a) the reasons why it is impractical for the lay party to give the certificate; and
- (b) that the certificate is given on the lay party's instructions.

(5) Where a statement of case is changed under Part 20 the amended statement of case must be verified by a certificate of truth.

(6) Information given under Part 34 (whether voluntarily or following an order of the court) must be verified by a certificate of truth.

(7) A certificate of truth by a lay party personally must be in the following form - "I [name] certify that I believe that the facts stated in this [name document] are true."

(8) A certificate given by the attorney-at-law for a party must be in the following form - "I [name of the individual attorney-at-law giving the certificate] certify that –

(a) the [claimant or as the case may be] states that he believes that the facts stated in this [name document] are true; and

(b) this certificate is given on the [claimant's or as the case may be] instructions. The [claimant or as the case may be] cannot give the certificate because [state reason]."

Failure to give certificate of truth

3.13 (1) The court may strike out any statement of case which has not been verified by a certificate of truth.

(2) Any party may apply for an order under paragraph (1).

[85] Failure to include a certificate of truth does not invalidate any step unless the court so orders, as it is a procedural step which is not fatal (see: CPR 26.9 (2); **Shakira Dixon (by her next friend Norinne Bennett) v Donald Jackson** (unreported), Court of Appeal of Jamaica, SCCA No. 120/2005 (delivered on January 19, 2006); and **James Wyllie & Ors v David West & Ors** (unreported), Court of Appeal of Jamaica, SCCA No. 120/2007 (delivered on August 13, 2008)).

[86] I have perused the Fixed Date Claim Form; it is not observed that the certificate of truth is absent. In any case, the case law has settled the issue that failure to include a procedural step is not fatal.

PREJUDICE

[87] In the United Kingdom, Regulation 59(8) of their National Minimum Wage Regulations, 2015 prescribes that employers must retain employment records for

a minimum period of six (6) years after the end of the last pay reference period for the one that the record covers. I note however that Jamaica does not have such a provision in their Minimum Wage Regulations.

[88] Section 21(1) of the Jamaican General Consumption Tax Regulations (“GCT Regulations”), however, provides that registered taxpayers are required to keep at their principal place of business all such books of accounts, records and documents in relation to their taxable activity for a period of not less than six (6) years after the last taxable period which they relate. These include, as gleaned from section 21(2) of the GCT Regulations, records of income and expenditure and bank statements whereby payroll records would be included since payroll is considered as an expenditure of a business or company.

[89] The Claimant having filed her Claim has no control over the policy of the Defendant for keeping records beyond six (6) years. However, having regard to the fact that the Claim in totality is not statute barred as at the date filed, the Defendant cannot rely on prejudice in not being in possession of any record in respect of the Claimant, for the Claim to be struck out.

PUBLIC POLICY

[90] The judicial arm hears and determines matters brought before it for determination as to the legality, interpretation or constitutionality of any law; or judicial review of any action by a public body. The role of the judiciary is to hear and determine matters by reviewing evidence and making a determination based on law and facts. It is by such process that there may be implications for public policy.

[91] At this interlocutory stage, the duty of the court is to further the overriding objective by dealing with cases justly (see: CPR 1.1(1)). Further, CPR 1.2 provides –

“The Court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules.”

Therefore, in these circumstances, public policy is not a determinative factor as to whether the Claim as filed should be struck out as an abuse of process and summary judgment entered for disclosing no reasonable cause of action.

CONCLUSION

[92] Having regard to the fact that the Defendant cannot, at this stage, rely on the defence of limitation and having regard to the triable issues that are within the six-year limitation period, I make the following orders therefore –

1. The Order for Summary Judgment is refused.
2. The Claim is struck out so far as the limitation period is still applicable in respect of the substantive claim filed within six (6) years of any contract period starting July 30th 2015 and October 31st 2015.
3. The Fixed Date Claim Form is amended in paragraph i. by deleting the words “between the year 2004” and substitute the words “from July 30th 2015” and in the Particulars of Claim – delete from paragraphs 2, 4 and 5, the words “from the year 2004” and substitute therefore the words “from July 2015”
4. The Attorney at law for Claimant is to file and served an amended Claim Form on or before October 31st 2023.
5. The attorney for the Defendant is permitted file and serve amended Defence on or before November 23rd 2023.
6. Costs to the Defendant to be taxed or agreed.
7. Case management conference is set for December 6th, 2023 at 10:00 am for half an hour.
8. Defendant’s attorney at law to prepare, file, and serve orders herein.