IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 00977

BETWEEN	**WILTON WILLIAMS**	**CLAIMANT/RESPONDENT**
AND	**AJAS LIMITED**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Seyon T. Hanson and Shamar Hanson instructed by Seyon T. Hanson & company for the applicant/defendant

Miss Rachael S. Dibbs for the respondent/claimant

10 July 2019, 12 and 22 May 2020

Civil procedure - Application to strike out claim – No reasonable ground for bringing the claim – Civil Procedure Rules, 2002, rule 26.3(1)

Civil procedure - Application for summary judgment - Civil Procedure Rules, 2002, rule 15.2

SIMMONS J

[1] This is an application by the defendant company ("AJAS") to strike out the claim and for summary judgment to be entered in its favour. The application is supported by the affidavit of Edward Christopher Bond sworn to on 10 September 2018.

[2] The grounds on which AJAS is seeking the orders are as follows:

(i) That the claimant's claim as set out in his claim form and particulars of claim both filed in this Honourable Court on March 8, 2018 and which arises from his position being made redundant by the defendant was filed in excess of six months from the relevant date when he was made redundant and when the cause of action arose, and the said claim is in contravention of the limitation period as set out in section 10 of the **Employment (Termination and Redundancy Payments) Act** ("the **Act**") which limits the period within which the claimant may commence proceedings;

(ii) That the claimant's claim is in respect of outstanding sums which arise from his position being made redundant on April 18, 2014 by way of letter dated January 24, 2014, and the claimant failed to make a claim within the six-month period either by notice in writing to the defendant, or by commencing proceedings under the **Act** within the said six-month period from the date of redundancy, and has filed his claim outside of the limitation period in violation of section 10 of the **Act**;

(iii) That the defendant has a complete defence in law to the claim;

(iv) That the defendant denies being liable to the claimant at all, and maintains that he was paid all sums due to him upon the redundancy in accordance with the provisions of the **Act**;

(v) That the claimant has no reasonable prospect of succeeding in his claim;

(vi) That judicial time would be saved by the grant of an order striking out the claimant's claim form and particulars of claim, and granting summary judgment.

Background

[3] The claimant/respondent ("Mr Williams") was a maintenance supervisor who had been employed to AJAS since 1979. AJAS is a limited liability company which

provides passenger and cargo handling services to various airlines entering and leaving Jamaica through its two international airports. In June 2013 AJAS' shares were acquired by Caricom Airlines Services (Holdings) Limited.

[4] On 8 January 2014 Mr Williams was given notice that he would be made redundant as of 18 April that year. He was paid redundancy payments for ninety-five (95) weeks.

[5] On 8 March 2018 he filed a claim for damages for breach of contract. His complaint is that he ought to have been paid additional sums as his contract of employment stipulated that redundancy payments after the ninth year of employment were to be calculated at four weeks per year and not the statutory rate of three weeks per year. He also alleged that he was not paid amounts due as salary increases for the years 2011, 2012 and 2013 ("the retroactive salary").

[6] AJAS in its defence stated that Mr Williams' employment was terminated by reason of redundancy in accordance with the terms of the **Act**. It also denied that he was made redundant based on terms not contained in his contract of employment and asserted that Mr Williams received all the benefits and payments to which he was entitled.

[7] Where the actual redundancy is concerned, AJAS indicated that there is nothing in Mr Williams contract of employment which would have prevented him being made redundant. AJAS also denied the existence of any contractual term which would have entitled Mr Williams to be paid four weeks per year of service.

[8] With respect to the claim for retroactive salary, the defence states that Mr Williams was not entitled to those payments prior to his redundancy as those sums were not due and payable at that time.

[9] AJAS also stated that Mr Williams failed to make his claim within six months of the date of his redundancy and as such, it is statute barred by virtue of section 10 of the **Act.**

The applicant's/defendant's submissions

[10] Counsel for AJAS, Mr Shamar Hanson submitted that the claim ought to be struck out as it is statute barred by virtue of section 10 of the **Act**. He stated that the action should have been brought within six months of 14 April 2014 which was the relevant date. Reference was made to ***Construction Developers Association Limited v Urban Development Corporation***, (unreported), Supreme Court, Jamaica, Claim Nos. 2008 HCV 2213 and 2008 HCV 2214, judgment delivered 23 March 2010 in which E. Brown J (Ag.) (as he then was), in his consideration of whether the case before him involved claims which were statute barred, referred to ***Wilkinson v Verity*** (1871) LR 6 CP 206 and ***Reeves v Batcher*** (1891) 2 Q.B. 509. Brown J made specific reference to the judgment of Willis J in ***Wilkinson*** where he said:

> *"It is a general rule that where there has once been a complete cause of action arising out of contract or tort, the statute [of Limitations] begins to run and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded."*[1]

The learned Judge also referred to the following passage in the judgment of Lindley, L.J. in ***Reeves***:

> *"The cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."*[2]

[11] Mr Hanson stated that based on the affidavit of Mr Bond no claim was made by Mr Williams within the six month period stipulated by the **Act**. It was submitted that based on rule 26.3 of the **Civil Procedure Rules, 2002** (**CPR**) the claim should be

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[2] Page 10

struck out as no reasonable ground for bringing it has been disclosed. In this regard he referred to the defence (paragraph 14) and ***Construction Developers Association Limited v Urban Development Corporation*** in which E. Brown J stated:

> *"A patently statute barred claim is doomed to fail unless there is indication that the defence will not be pleaded. Otherwise, the claimant will be left with an unenforceable cause of action…*
>
> *Although the court is notoriously slow to exercise its power to strike out a statement of case, where the pleaded defence allege the claims to be statute barred, in the absence of a reply averring an exception to the operation of the statute, the court, in giving effect to the overriding objective of the CPR, will be constrained to strike out the statement of case".*[3]

[12] Reference was also made to ***Pommells and another v Kerr and another*** [2015] JMCC COMM 26 in which Sykes J (as he then was) stated:

> *"…It is by affidavit evidence that the case and counter case for summary judgment is put before the court. Rule 15.4 clearly contemplates that a claimant may apply for summary judgment before the defence had been filed and if this is so in relation to the initial statement of case then clearly the same process of reasoning must apply to any amended statement of case. The court therefore concludes that the filing of the amended statement of case did not require any new defence to be filed before the summary judgment application can be dealt with. Any response to the summary judgment application must be by way of affidavit evidence".*[4]

[13] Where the application for summary judgment is concerned, it was submitted that the order ought to be granted as the claim has no realistic prospect of success. Counsel also reminded the court that although rule 15.5(2) of the **CPR** requires the filing of an affidavit by a respondent who wishes to rely on evidence. Mr Williams

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[3] Page 15
[4] Paragraph 23

has not done so. Reference was made to ***ASE Metals NV v Exclusive Holiday of Elegance Limited*** [2013] JMCA Civ 37 in which Brooks JA stated:

> *"[14] The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that that the respondent's case has no real prospect of success. In* ***ED & F Man Liquid Products Ltd v Patel and Another*** *[2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:*
>
> > *'...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success...'*
>
> *[15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of ED & F Man). The defendant must show that he has "a 'realistic' as opposed to a 'fanciful' prospect of success".*

[14] It was also submitted that AJAS has discharged its burden of proof that the claim was brought outside of the limitation period and there has been no averment in Mr Williams' pleadings to refute that assertion. Mr Williams failed to dispute the amount paid within the statutory period. Reference was made to ***Richards v Trafalgar Travel Ltd.*** [2012] JMSC Civ 61 in which Edwards J (as she then was) stated that the relevant date for the purpose of section 10 of the **Act**, was the date of dismissal.[5]

[15] In the circumstances, the claim should either be struck out or summary judgment entered in favour of AJAS.

The respondent's/claimant's submissions

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[5] Paragraphs [11] – [12]

[16] Counsel for Mr Williams, Miss Dibbs submitted that section 10 of the **Act** does not apply as the claim is not concerned with whether he is entitled to a redundancy payment. That section deals with instances in which there is a dispute as to entitlement. The claim is for an enhanced redundancy payment which is permitted under regulation 11 (now 12 (1)) of the **Employment (Termination and Redundancy Payments) Regulations** (the **Regulations**). In such circumstances, the **Limitation of Actions Act** applies as the claim would be for breach of contract to which a six year limitation period is applicable. The claim is for the difference between what was paid to Mr Williams and the amount to which he was entitled by contract. A triable issue exists as to whether that is so and as such, it was inappropriate to strike out the claim. Reference was made to ***Lloyd Haughton and Henry Haughton (Executors of the estate of Alexander Haughton, deceased) v Yvonne Haughton*** [Consolidated claims] (unreported), Supreme Court, Jamaica, Claim Nos. 2001/E 476 and 2003/E 1445 judgment delivered 8 April 2005 in which Sykes J (as he then was), stated:

> *"…The striking out of a case is the nuclear weapon in the court's arsenal. If exercised, that power excludes the litigant from the judicial process. That is why it is not, usually, the first and primary response of the court whenever there is non-compliance with the order of the court. However, there may well be cases that striking out is the most appropriate remedy."*[6]

[17] The issue of whether the claim for the retroactive salary falls within the ambit of section 10 of the **Act** cannot be determined at this stage and ought to be dealt with at the trial. It was also submitted that the claim has a realistic prospect of success.

[18] Counsel submitted that the cases relied on by AJAS can be distinguished. It was submitted that no affidavit was required to be filed by Mr Williams as the application is based on submissions in law. In any event based on ***Sagicor Bank Jamaica Limited v Taylor-Wright*** [2018] UKPC 12, the court when considering an

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[6] Paragraph 51

application for summary judgment is to be primarily guided by the parties' statements of case.

Discussion

[19] The issues which arise in this claim are:

(i) Whether the claim for the additional redundancy payment is statute barred?

(ii) Whether the claimant is entitled to the retroactive salary?

Principles relating to the application to strike out the claim

[20] Rule 26.3 (1) of the **CPR** sets out the circumstances in which the court may strike out a litigant's statement of case. The rule states:

> *"(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) .....*
>
> *(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;..."*

[21] In addition to the above, the court also has an inherent jurisdiction to strike out pleadings which are shown to be an abuse of its process.

[22] The United Kingdom has a similar provision which is to be found in paragraph 3.4 (2) of **Civil Procedure**, 2016, Volume 1 (the **White Book**) The explanatory notes which accompany that provision state that striking out may be appropriate where the *"…particulars of claim disclose no reasonable grounds for bringing the claim:*

those claims which set out no facts indicating what the claim is about; those claims which are incoherent and make no sense; and those claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant…". They include particulars of claim *"which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides…".*

[23] A claim or defence may also be struck out as not being a valid claim or defence as a matter of law. It is also inappropriate to strike out a statement of case if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence. The learned authors also state that *"an application to strike out should not be granted unless the court is certain that the claim is bound to fail…".*

[24] This principle was accepted by McDonald-Bishop J (as she then was) in ***Dotting v Clifford & The Spanish Town Funeral Home Ltd*****,** (unreported) Supreme Court, Jamaica, Claim No. 2006HCV0338, judgment delivered 19 March 2007. The learned Judge stated as follows:

> *"In considering this application to strike out,* ***I am mindful that such a course is only appropriate in plain and obvious cases.*** *The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substance or where it is clear that the statement of case is contradicted by all the documents or other material on which it is based (****Three Rivers District Council v Bank of England (No. 3)*** *[2003] 2 A.C., 1)****.*** *It may also be said, on the guidance of the relevant authorities, that in determining the issue as to whether the claim should be struck out one may seek to ascertain, among other things, whether the claimant's pleadings have given sufficient notice to the defendant of the case she wishes to present and whether the facts pleaded are capable of satisfying the requirements of the tort alleged. The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be essentially, the same as that in granting*

> *summary judgment, that is: the claim against the defendant is one that is not fit for trial at all?"*[7]
>
> [My emphasis]

[25] The court's power to strike out a party's statement of case assists the court in its mandate to effectively manage cases by allowing for the summary disposal of issues which do not require full investigation at trial. However, unlike applications for summary judgment, the court in its consideration of such applications is mainly concerned with the adequacy of the statements of case, with whether they disclose reasonable grounds for bringing or defending the action. Consideration may however be given to the factual allegations.

[26] The power to strike out a party's statement of case is a discretionary one which has serious consequences for the party whose case has been excluded by such an order. It is therefore, only to be exercised in exceptional circumstances.

[27] In ***Coghlan v Chief Constable of Cheshire Police*** [2018] EWHC 34 (QB) Edward Pepperall QC (sitting as a Deputy High Court Judge) stated:

> *"95. While applications to strike out under r.3.4(2)(a) and for summary judgment have in common the core assertion that the other party cannot succeed on its pleaded case, there is of course a difference in approach.* ***Whereas the focus of the enquiry under r.3.4 is upon the pleading, Part 24 requires analysis of the evidence.*** *That said, the court should be wary of any invitation to weigh competing evidence and make findings upon the papers. Summary judgment is only to be given in clear cases."*
>
> [My emphasis]

[28] In ***Coghlan v Chief Constable of Greater Manchester Police*** [2018] EWHC 1784, Yip J stated:

> *"68. In* ***James-Bowen & Others v Commissioner of Police for the Metropolis*** *[2016] EWCA Civ 1217, the Court of Appeal noted*

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[7] Paragraph 10

that defendants seeking to challenge claims at an early stage will frequently seek to rely on both provisions but that it is important to appreciate that they provide different grounds of relief. ***An application under r.3.4(2)(a) is concerned with striking out defective statements of case. It requires the court to examine the statements of case to decide whether the allegations, if established, are capable as a matter of law of supporting the claim****. Part 24 is concerned with the prospects of success, in relation to which Moore-Bick LJ said:*

> ***'****It proceeds primarily on the assumption that the statement of case is not defective as a matter of law, but that the pleaded case has no real prospect of being made good at trial. Inevitably the two overlap when the pleaded case is said to be bad in law, because a case which is bad in law has no prospect of success, but in principle it is desirable not to confuse the different procedures.'*

69. ***In relation to an application to strike out under r.3.4(2)(a), it should be assumed that the claimant will be able to establish the facts pleaded in the Particulars of Claim*** *(see* ***TBS v Metropolitan Police Commissioner*** *[2017] EWHC 3094 (QB) at [7]).*

70. An application for summary judgment may succeed where a strike out application would not but the court should be satisfied that all substantial facts relevant to alleged cause of action are before the court and that there is no real prospect of oral evidence affecting the court's assessment of the facts (see ***S v Gloucestershire County Council*** *[2001] Fam 313).*

71. The court will not strike a claim out or give summary judgment lightly. A claim is only to be struck out if it is clear and obvious that the claim, as pleaded, cannot succeed. I bear in mind what Judge LJ said in ***Swain v Hillman*** *[2001] 1 All ER 91:*

> ***'****To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step.'"*

[My emphasis]

[29] In ***TBS v Metropolitan Police Commissioner*** [2017] EWHC 3094 (QB), Nicol J outlined the principles in the following terms:

*"**The principles to be applied on a strike out application***

7. There was no significant difference between the parties as to these principles which I can summarise as follows:

> *i) I must assume that the Claimant will be able to establish the facts pleaded in the Particulars of Claim – see for instance **X v Bedfordshire County Council** [1988] 2 AC 633 at 740H. Sometimes a strike out application is combined with an application for summary judgment. For the latter purposes the Court has to decide whether the Claimant has a reasonable prospect of making out his or her factual assertions. That is not this case.*
>
> *ii) A claim should only be struck out if it is certain to fail; **Barrett v Enfield LBC** [2001] 2 AC 550, 557 and **Richards v Hughes** [2004] PNLR 35.*
>
> *iii) In an area of law which is developing, it is not normally appropriate to strike out a claim. It is better that such development should take place on the basis of 'actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out.'* Ibid.
>
> *iv) In what may be regarded as an example of the previous principles, the Court should be slow to strike out a claim in negligence at an early stage on the basis that the claimant has no prospect of demonstrating that it would be fair, just and reasonable to impose a duty of care unless the position is very clear. Such a question of legal policy is generally better decided at trial – **James-Bowen v Commissioner of Police for the Metropolis** [2016] EWCA Civ 1217 at [34]. (I was told that the Supreme Court has granted permission to appeal in that case, but, for the time being at least, the Court of Appeal's decision stands).*
>
> *v) However, 'if the court is satisfied that the case as pleaded cannot succeed on established rules of law, even if developed in accordance with principle, it must say so and relieve the parties from the expense and inconvenience of being required to deal with a claim that cannot succeed.' **James-Bowen v Metropolitan Police Commissioner** (above) at [14]."*

[30] Mr Williams has pleaded the existence of a contract of employment which it is alleged, takes the matter outside of the ambit of the **Act.** In addition, there is a claim for retroactive salary. AJAS has denied the existence of any such contractual provision and has stated that Mr Williams is not entitled to the retroactive salary.

Principles relating to the application for summary judgment

[31] Alternatively, AJAS has sought an order for summary judgment on the basis that the claim has no realistic prospect of success.

[32] Part 15.2 of the **CPR** outlines the circumstances in which the court may grant an order for summary judgment. The rule states:

> *"**Grounds for summary judgment***
>
> *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 or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue…"*

[33] This rules allows the court to actively manage cases by disposing of issues that have no real prospect of success. In ***Sagicor v Taylor-Wright*** (supra) it was described as *"a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial*."[8] Where such an application is made, if the respondent shows that its claim or defence has some prospect of success the matter ought properly to proceed to trial. Lord Briggs who delivered the decision of the Board stated:

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[8] Paragraph 16

> *"16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.*
>
> *17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."*

[34] The test which is to be applied in order to determine whether there is a real prospect of success was examined in ***Swain v Hillman*** [2001] 1 All ER 91. In this case Lord Woolf MR said:

> *"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*[9]

[35] The meaning of the term "real prospect of success" was considered in ***International Finance Corporation v Utexafrica Sprl*** [2001] All ER (D) 101 (May) which dealt with the setting aside of a default judgment. In that case, the Court concluded that in order to satisfy the test, a case should be more than merely

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[9]Page 92

arguable. However, this does not require a party to convince the Court that its case must succeed.

[36] In ***Gordon Stewart, Andrew Reid and Bay Roc Limited v. Merrick (Herman) Samuels*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 2/2005, judgment delivered 18 November 2005, where P. Harrison J.A. stated as follows:

> *"The prime test being 'no real prospect of success' requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a 'real prospect' and not a 'fanciful one'… The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning."* [10]

[37] The burden of proof rests on the applicant for summary judgment. In ***ED & F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472, Potter LJ in his examination of the difference between application for summary judgment (rule 24.2) and one to set aside a judgment (rule 13.3 (1)) said:

> *"9. In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside..."*

[38] However, where credible evidence has been adduced in support of the application, the respondent in order to rebut that assertion, has the evidential burden of proving that it has a real prospect of success. The court must however be careful in its consideration of the evidence so as not to embark upon a mini trial. Where facts are in dispute, it is the trial Judge who is tasked with their resolution. In ***Royal***

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[10] Page 6

Brompton Hospital National Health Service Trust v Hammond and others [2001] EWCA Civ 550 Aldous LJ said that *"… summary disposal, it does not contemplate a preliminary trial adopting the standard of proof applicable to a trial"*. [11]

[39] As was pointed by the Board in ***Sagicor v Taylor-Wright***, part 15.5 of the **CPR** makes provision for the filing of evidence where a party intends to rely on that evidence. Mr Williams has not presented any evidence of the contract or the practice on which he relies. I have also noted that no reply has been filed by Mr Williams nor has any affidavit in response been filed in respect of the present application. Miss Dibbs stated that it was unnecessary as the issue for determination was a point of law. I disagree. Although the dispute in respect of the claim for the difference in the redundancy payment is dependent on an interpretation of section 10(1)(c) of the **Act**, the facts on which Mr Williams relies ought to be stated in evidence. There is also the claim for retroactive salary. No evidence has been adduced to support the contention that the claim has a real prospect of success. However, based on the pleadings it is clear that further enquiry is needed to settle the issue of his entitlement to the retroactive payments.

Is the claim statute barred?

[40] The resolution of this issue is dependent on whether the claim for the additional amount or shortfall in the redundancy payment arises solely under contract or is governed by the **Act**. Section 5 (1) of the **Act** which falls under the heading "Redundancy Payments" states:

> *"Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve*

[11] Paragraph 23

> *months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed".*

[41] Regulation 8(1) of the **Regulations** prescribes the method by which redundancy payments are to be calculated. It states:

> *"Subject to paragraph (2) the amount of the redundancy payment to which an employee other than an employee engaged in seasonal employment is entitled in respect of any period ending with the relevant date, during which the employee has been continuously employed, shall be –*
>
> *(a) In respect of a period not exceeding ten years of employment, the sum arrived at by multiplying two weeks' pay by the number of years;*
>
> *(b) In respect of a period of more than ten years of employment –*
>
> *(i) for the first ten years reckoned, the sum arrived at by multiplying two weeks' pay by that number of years; and*
>
> *(ii) for the years remaining, the sum arrived at by multiplying three weeks' pay by the number of such remaining years".*

[42] The claimant's case is that the above provision is inapplicable to this case by virtue of regulation 12 (1)) of the **Regulations** which states:

> *"Nothing in these Regulations shall be construed as preventing any employee from being paid more than the amount which he is entitled to receive under these Regulations as redundancy payment or as remuneration during a period of notice".*

[43] The above regulation allows parties to contract out of the statutory requirements for the computation of redundancy payments. It does not in my view take the issue of the adequacy of the redundancy payment made to Mr Williams, outside of the ambit of section 10. The provision applies to redundancy payments enhanced or otherwise.

[44] There is no dispute that Mr Williams was employed from 1979 to 18 April 2014. The latter date is the effective date. The dispute surrounds the calculation of his redundancy payment. Mr Williams would without more, have been required to file a claim to determine the amount payable within the six months of the effective date, 18 April 2014. The claim was filed just shy of four years after the effective date. I felt it necessary to mention that fact, because although it may be argued that the letter dated 8 January 2014 (the redundancy letter) which was sent to Mr Williams erroneously gave him until 31 January 2014 to point out any discrepancies, he delayed taking any action until 8 March 2018.

[45] Section 10 (1) (c) of the **Act** speaks to the determination of the right to a payment as well as the determination of the amount of such payment. Miss Dibbs argued that the words *"shall not be entitled"* in that section mean that it is only applicable where the entitlement to a redundancy payment is in issue and that is not the issue in this case. I disagree with that limited interpretation. Those words to my mind also apply where the amount and not the entitlement *per se,* to the payment is in issue. The fact that Mr Williams has claimed an additional amount in effect means that he is claiming an entitlement to a redundancy payment in that amount. This appears to fall squarely within the provisions of section 10 of the **Act**.

Resolution

[46] Where a defendant alleges that the claim against him is statute barred, he has the option of pleading the defence of limitation (as was done in this case) or applying to strike out the claim on the basis that it is frivolous, vexatious and an abuse of the process of the court. The claim cannot be struck out on the basis that there is no cause of action. The defendant can also apply for summary judgment on the basis that the claim has no reasonable prospect of success.

[47] In keeping with the approach adopted in ***Coghlan v Chief Constable of Greater Manchester Police*** (supra), assuming the facts pleaded in the claim are true, I am unable to agree with Mr Hanson that there is no reasonable ground for bringing the claim. I am of the view that counsel might have been on better ground if he had argued that the claim could have been struck out as being an abuse of the process of the court but that was not argued.

[48] Where the application for summary judgment is concerned, I agree with the defendant, that the claim for the additional redundancy payment has no real prospect of success; it is statute barred. Bearing in mind that the court is empowered to give summary judgment on a particular issue, I find that there still remains a triable issue in respect of Mr Williams' entitlement to the retroactive salary.

Order

(1) The application to strike out the claim is refused.

(2) Summary judgment is entered in favour of the defendant in respect of the claim for the enhanced redundancy payment.

(3) Costs of the application are awarded to the defendant/applicant to be agreed or taxed.

(4) In accordance with rule 15.6(3) of the **CPR** case management orders will be made.