Neutral Citation No: [2018 NIQB 39] ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **HOR10623** ***Delivered:*** **23/04/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2015 No. 15397

BETWEEN:

FELIX AGNEW

Plaintiff;

-and-

UNIVERSITY OF ULSTER

Defendant.

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HORNER J

A. INTRODUCTION

[1] This court was asked to decide a preliminary issue, namely whether the plaintiff's causes of action in contract and tort are time barred by operation of the Limitation (Northern Ireland) Order 1989 ('the 1989 Order') and in particular:

(i) Is the plaintiff's claim in contract statute barred pursuant to Article 4 of the 1989 Order?

(ii) Is the plaintiff's claim in negligence (including for negligent misstatement) statute barred pursuant to Article 6 of the 1989 Order?

[2] I am grateful to counsel for the quality of their written and oral arguments and submissions. Their industry and ingenuity does them both credit.

B. FACTS

[3] The salient facts are as follows:

(i) The plaintiff was appointed to the position of Faculty Administrative Officer at the Coleraine Campus of the defendant from 15 October 1984.

(ii) By April 1994 all six Faculty Administrative Officers, including the plaintiff, applied to the defendant for a regrading of their position to ALCS5 as part of the annual review process. The plaintiff's regrading application was made contemporaneously with those of other Faculty Administrative Officers employed by the defendant.

(iii) In or about September 1994 the defendant's Department of Human Resources wrote to the plaintiff in the following terms:

> "… In relation to job duties the senior management team have decided quite properly, to assess and review faculty administrative post requirements bearing in mind recent changes and developments posed by new structures. It would be inappropriate for me to provide you with a job description at this stage which might prove inaccurate, but I can advise you that the duties expected from 1 October 1994 will be substantially similar to those you currently undertake. <u>It is important that a thorough review of faculty administrative duties is completed quickly and in this matter I will write again as soon as possible</u>." [Emphasis added]

(iv) In October 1994 the defendant's Staff Progress Committee issued a memorandum in respect of the plaintiff's application. It stated:

> "Being aware of the necessity for a review to be undertaken of faculty administrative work, which is currently underway, the Committee felt your case and other similar candidates would be better considered following the review to which I have referred. The Staff Progress Committee will consider the grading of faculty administrative staff in due course and any regradings from the process **will be backdated to 1 October 1994**." (Emphasis added)

(v) This assurance was repeated on 4 August 1995.

(vi) The plaintiff ceased employment with the defendant on 30 June 2003 and thereafter has been in receipt of pension payments.

(vii) On 1 August 2006 pursuant to the National Framework Agreement, job evaluation was introduced to all universities, including the defendant, and the plaintiff's former post (as Head of Faculty Administration) was benchmarked and job evaluated under the agreed Job Evaluation Scheme at the new Grade 9 under the single column salary scale which equated to the old ALCS5. The defendant did not retrospectively apply the regrading to the plaintiff's previous employment in that post. The regrading review, inclusive of appeals, was completed no later than August 2010. (It is agreed that by August 2008 the plaintiff would have been entitled to issue proceedings as a consequence of the failure to carry out regrading.)

(viii) The plaintiff said that he had no actual knowledge of what had happened and in particular that he had not received a retrospective upgrading, until 16 October 2010 when he was informed of this by a former colleague.

(ix) On 6 August 2012 the plaintiff's former solicitors issued a writ of summons on his behalf. The action was struck out on the basis that the writ of summons had not been validly served within 12 months of being issued.

(x) On 13 February 2015 the plaintiff's current solicitors issued a writ of summons in respect of the instant action.

C. RELEVANT LEGISLATIVE PROVISIONS

[4] Article 4 of the 1989 Order states:

> "Subject to Articles 5, 7 and 9, the following actions may not be brought after the expiration of six years from the date on which the cause of action accrued—
>
> (a) An action founded on simple contract …"

[5] Article 6 of the 1989 Order provides:

> "(1) Subject to paragraph (2) and to Articles 7 and 9 and 11 to 13, an action founded on tort may not be brought after the expiration of six years from the date on which the cause of action accrued."

D. THE ONUS OF PROOF

[6] There was some debate about which party bore the onus of proof in a case such as this, namely whether a claim of a plaintiff was statute barred. First principles would suggest that as the defendant has to prove that a cause of action is statute barred, that it is the defendant who should bear the burden of proof. However, Chitty on Contracts (32nd Edition) at 28-062 states:

> "In principle it might be expected that the defendant, having pleaded the statute, would bear the burden of proving that the claimant's cause of action accrued outside the limitation period and was in consequence statute barred. However, there is weighty authority for the view that the burden of proof is on the claimant to show that his cause of action accrued within the statutory period (eg see *Haward v Fawcetts* [2006] UKHL 9 at [106], per Lord Mance).
>
> In *Cartledge v E Jopling and Sons Limited* [1962] 1 KB 189 the Court of Appeal so held. But in the House of Lords (1963 A.C. 758 at 784) Lord Pearce placed a gloss on the proposition when he stated that, although the initial onus was on the claimant, once he had satisfied that onus, the burden passed to the defendant to show that the apparent accrual of cause of action was misleading and that in reality the cause of action accrued at an earlier date. […] In *London Congregational Union Inc v Harriss and Harriss* [1988] 1 All ER 15 at 30 Ralph Gibson LJ stated that the claimant must show, on the balance of probabilities, that the cause of action accrued, ie came into existence, on a day within the period of limitation. Only then would the onus shift to the defendant. The burden of proof may less often be of significance in contractual actions and actions in tort, but may still be of importance in certain cases."

[7] I accept that this is a correct statement of the law as it presently stands. But for reasons which will become clear the answer as to whether the plaintiff's claims are statute barred does not depend on who bears the onus of proof. The judgment of this court would be the same, regardless of whether the burden of proof was borne by the plaintiff or by the defendant.

E. DISCUSSION

[8] It is clear that the "review, regrade and refund" was completed by August 2008. The plaintiff acquired actual knowledge of the fact that he had not received a retrospective regrading (and as a consequence a refund) on or about August 2010. Accordingly it is common case that the court is concerned only with primary limitation periods in contract or tort, that is 6 years, given that the plaintiff's date of knowledge was in August 2010 and although proceedings were initially issued in 2012, these proceedings were not served and a further set of proceedings was issued in 2015 well outside the 3 year period from the "date of knowledge" of the plaintiff.

[9] The plaintiff argues that the duty owed to him by the defendant was a continuing one both in contract and tort, namely to backdate his pay once the review was held. Accordingly, the causes of action continue to accrue due and are not statute barred. The defendant denies there was any continuing obligation to review, regrade or repay. If there was, this terminated when the plaintiff's contract of employment ended in 2003. Consequently, any claim whether made in contract or in negligence is statute barred.

[10] There was much debate about whether the courts should follow the decision of Oliver J in *Midland Bank Trust Co Limited v Hett Stubbs and Kemp* [1979] (Ch) 384 or whether the court should be guided by *Bell v Peter Browne and Co* [1990] 3 All ER 124, a decision of the Court of Appeal in England.

[11] In *Midland Bank* Oliver J concluded that the solicitor's duty to register an option in respect of land was a continuing one binding upon him until effective registration became impossible. In *Bell* the Court of Appeal determined that the failure of solicitors acting for a husband to protect his one sixth share in the proceeds of sale of the matrimonial home by, for example, registering a caution, was not a continuing breach and that the cause of action accrued in 1978 when the husband transferred the former matrimonial home to his wife.

[12] Of course, there can be a continuing obligation to do something under a contract, such as for example, a repairing obligation under a lease. For example there can be a duty under a lease to keep the premises in "good and tenantable repair". This is a continuing obligation placed upon the tenant throughout the lease to keep the premises in a certain state. But when the lease terminates or expires, time begins to run against the landlord for the purposes of the 1989 Order.

[13] In *Bell* Nicholls LJ said:

> "[A] remediable breach is just as much a breach of contract when it occurs as an irremediable breach, although the practical consequences are likely to be less

> serious if the breach comes to light in time to take remedial action. Were the law otherwise, in any of these instances, the effect would be to frustrate the purpose of the statutes of limitation, for it would mean that breaches of contract would never become statute-barred unless the innocent party chose to accept the defaulting party's conduct as repudiation or, perhaps, performance ceased to be possible."

[14] I am satisfied that the line of authority this court should follow is that of the Court of Appeal in *Bell* especially given the subsequent decisions of the Court of Appeal in *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310 which decided that there was "no principled distinction" between the *Midland Bank* and *Bell* cases and that they were obliged to follow *Bell*. Further the Privy Council in *Maharaj v Johnson* [2105] EWCA Civ 1310 also preferred *Bell* when it held that the defendant's solicitors were under no continuing duty in contract after completion of the transaction in which they had been retained. In *Nouri v Marvi* [2011] PNLR 7, Patten LJ giving the judgment of the Court of Appeal in England stated at para [38]:

> "There are no special facts as suggested that solicitors assumed a continuing duty to Mr Nouri which survived the completion of the transaction."

While I am not bound by any English Court of Appeal or Privy Council decision, they are persuasive precedents that I should follow unless there is good reason not to do so; see *Beaufort Developments Limited v Gilbert-Ashe NI Ltd and ors* [1997] NI 42 and *Willers v Joyce and another* [2016] UKSC 44 .

[15] There was some debate about the nature of the variation of the contract of employment. I do not think it matters whether or not the variation was a unilateral one, a bilateral one or a multilateral one. I am satisfied that for the purposes of this preliminary issue there was a variation of the plaintiff's contract of employment.

[16] Further, Mr Fletcher relied heavily on the authority of *Attrill v Dreisdner Kleiner* [2013] EWCA Civ 394. This was a case where a bank had power to vary the plaintiff's contract of employment unilaterally. In that case the bank announced a creation of a guaranteed minimum bonus pool for 2008. The issues in this case related to the effect of introducing a term into a pre-existing contractual relationship, which the Court of Appeal in England found gave rise to a strong presumption that it was intended to be legally binding. It held that there had been an effective contractual amendment to the plaintiff's contract of employment.

[17] Elias LJ giving the judgment of the Court of Appeal considered obiter that even if he was wrong about there being a unilateral contractual amendment of Mr Attrill's contract of employment,

> "… there was in any event a binding contractual promise resulting from the terms of the promise and the circumstances on which it was made."

Again for reasons which will become clear I do not think that it matters whether there was a variation of the plaintiff's contract of employment or a separate contract/promise entered into between the plaintiff and the defendant as employee and employer.

[18] It is essential to consider the nature of the variation (or purported independent promise). In my view the obligation on the defendant is three-fold:

(i) To review **quickly**;

(ii) To then carry out a regrading exercise; and

(iii) To then refund depending on what back pay is due following that regrading exercise.

This is not a continuing obligation. There was a breach when the defendant failed to carry out the review **quickly**. Without it being necessary to determine the time scale envisioned by quickly, it cannot be gainsaid that the breach had occurred many years before August 2006. The regrade and refund (if appropriate) were to follow on from that review.

[19] Even if the requirement "to regrade and review" can be looked on as a separate obligation, which I do not consider is the proper approach, the failure to backdate and refund arose in August 2008 and, proceedings were only issued in February 2015 well outside any 6 year window.

[19] Henderson J in giving his judgment in the *Capita* case is surely correct when he said:

> "[49] Those breaches remain unremedied, but an unremedied breach of contract is just that: a breach of contract which has not been remedied. In the normal way, it is impossible to construct a continuing contractual obligation, in the sense of one which gives rise to a fresh breach on a daily basis, from the mere failure to perform the original obligation in due time. This remains the case, as Nicholls LJ explained in *Bell v Peter Browne & Co* [1990] 2 QB 495, even if the party in breach is asked to make good his default but fails to do so. As Nicholls LJ said, at page 501A:

> **'His failure to make good his existing breach of contract on request would not have constituted a further breach of contract: it would not have set a new six year limitation period running. Once again, the position would have been simply that the solicitor remained in breach.'**

> [50] Conceptually, there is of course, a class of contractual duties which do give rise to a continuing obligation to perform them which arises afresh from day to day. Examples are given by Nicholl LJ in the *Bell* case, at page 501D-E (repairing clauses and lease) and by Nixon J in *Larking v Great Western (Nepean) Gravel Limited* [1940] 64 CLR 221 at 236. To quote Dickson J, a duty of this nature is one **to maintain a state or condition of affairs**." (Emphasis added)

There was an unremedied breach here. A failure, as promised, to carry out a review promptly and then to regrade and refund what was due consequent upon that review. This was not a duty to maintain a state or condition of affairs. It was to carry out an agreed course of action. That failure had occurred more than 6 years before the plaintiff issued these present proceedings. Consequently, proceedings issued in February 2015 are statute barred. It makes no difference whether the cause of action is contract or tort.

[20] If I am wrong in my analysis and there was a continuing obligation (or obligations) to review, regrade or refund then that obligation (or those obligations) arose either as a result of the variation of the plaintiff's contract of employment or as an independent contract **between an employee and employer**. However, that relationship came to an end in 2003 when the plaintiff's employment with the defendant concluded. Any obligation under that contract of employment (or independent contract to review, regrade and refund) necessarily ended at the same time as the plaintiff's employment. As the Law of Limitation at (A) [172] states:

> "Nicholls LJ emphasised that this approach applied to the **normal** case in which a contract provides for something to be done and the defaulting party fails to perform that obligation at the time when it is due under the contract in which case there is a single breach of contract. He distinguished this from those **exceptional** cases where the true construction of the contract was that the obligation in question was of a continuing nature and on each day when it is not performed a new breach occurs. He gave

> as an example of the latter the usual repairing obligation to be found in the tenancy agreement which was hardly promising when it came to reconciling the decision in *Bell* with that in *Midland Bank*. This he said **may** be distinguished on the grounds that the solicitors in *Midland* never treated themselves as *functus officio* in relation to the option and continue to deal with the client upon the subject of the option while in *Bell* the solicitor had no contact with the client from shortly after the breach."

[21] There is nothing exceptional about the present case or the facts that give rise to the dispute. It is clear that when the plaintiff left his employment in 2003 the defendant became "*functus officio*". Any obligation to review or regrade or refund in respect of the plaintiff's employment terminated on that date.

[22] In the circumstances I have no hesitation in reaching the following conclusions:

(i) The obligation to "review, regrade and repay" was not a continuing one and any cause of action whether in contract or tort had accrued in excess of 6 years before these proceedings were instituted in 2015; and

(ii) Even if there was a continuing obligation under a variation of the contract of employment or under an independent contract concluded between the defendant and the plaintiff, it came to an end when the plaintiff's contract of employment was terminated in 2003 and any cause of action whether in contract or in tort accrued on that date.

CONCLUSION

[23] In the circumstances and for the reasons which I have set out the answer to the questions raised as preliminary issues are as follows:

(i) The plaintiff's claim in contract is statute barred pursuant to Article 4 of the 1989 Order.

(ii) The plaintiff's claim in negligence (including any claim for negligent misstatement) is statute barred pursuant to Article 6 of the 1989 Order.

I will hear the parties on the issues of costs when they have had an opportunity to digest the contents of this judgment.