



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

Cause No.: GC 81 of 2023

BETWEEN

ISLAND POOLS LTD

Applicant

AND

THE SUMMARY COURT OF THE CAYMAN ISLANDS

Respondent

ON THE PAPERS

Parties: Nelsons, Attorneys for the Applicant

Before: The Hon. Justice Marlene Carter (Actg.)

Application received: 13 May 2023

Written Ruling Delivered: 29 May 2023

HEADNOTE

Application for leave for judicial review – interlocutory decision of the Magistrate – whether alternative remedy available to the applicant

RULING

1. In considering whether to grant leave to apply for judicial review the court's role is to consider whether "*there is some arguable case or claim which is not obviously untenable, vexatious or frivolous*".¹

¹ Smith v Commissioner of Police [1980-83 CILR 126]

2. *“(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.”*²
3. An arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. *Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (ret’d) et. al.*³
4. The applicant is charged with two labour related offences before the Summary Court. These charges were laid in the Summary Court on the 10th of May 2022. The charges relate to periods between November 2016 and April 2020.
5. The charges were brought by the Department of Labour and Pensions (“DLP”) pursuant to Sections 16 and 31(1) of the Labour Act respectively.
6. The applicant seeks leave to apply for judicial review of a decision of the Chief Magistrate of the 26 January 2023, in which the Chief Magistrate ruled that the Summary Court had jurisdiction to try the charges. The Chief Magistrate concluded that the DLP was the competent complainant for the purposes of Section 78 of the Criminal Procedure Code and that being so the charges were laid in time. The Chief Magistrate was satisfied that the competent authority, having determined that there was evidence sufficient to justify bringing the proceedings against the applicant, did bring same within 6 months of receiving the complaint as required by Section 78.
7. The Labour Act at Section 73 states as follows:

“Powers of Director, Deputy Director and inspectors

- 73. (1) The Director, Deputy Director and any labour inspector shall, for the performance of their functions under this Act have power to —*
- (a) enter any workplace without previous notice at any time during the working hours of that particular workplace;*

² Sharma v Brown-Antione, [2006] UKPC 57

³ 2010 HCV 00474, (Unreported), per Mangatal J.

- (b) carry out any examination, test or inquiry which that person may consider necessary to satisfy themselves that this Act is being observed;
 - (c) question, alone or in the presence of witnesses, any employer or employee on any matters concerning the application of this Act; and
 - (d) require the production of any records or documents required to be maintained by this Act and to copy or make abstracts of any such records or documents.
- (2.) The Director, Deputy Director or any labour inspector may institute criminal proceedings for any offence under this Act, and may appear before the Summary Court to conduct the prosecution in respect of any such offence.”

8. The applicant challenges the decision of the Chief Magistrate on 2 grounds:

- “12. The Summary court erred as a matter of law in finding that only the Director of Labour is capable of being a “competent complainant” in prosecutions under the Labour Act for the purposes of sections 78 of the CPC. There is no express provision in the Labour Act, the CPC or elsewhere that provides that only the Labour Director may be a competent complainant for the purposes of Labour Act prosecutions, and there was no proper basis to find otherwise.
13. The Summary Court erred in finding that Mr McLeish was not a competent complainant for the purposes of section 78 of the CPC where it is undisputed that:
- a) Mr. McLeish is a “complainant” within the meaning of the CPC generally and was aggrieved.
 - b) Mr. McLeish is at the age of majority;
 - c) Mr. McLeish is not suffering any relevant disability;
 - d) Mr. McLeish is capable in law of bringing and defending proceedings, giving evidence, and himself bringing a private prosecution pursuant to the CPC for a Labour Act offence (even in circumstances where the Labour Director had refused to support such a charge);
 - e) Mr. McLeish was aware of the quantum of wages he had in fact been paid and was aggrieved from the out-set – no special skills were required; and
 - f) The totality of the evidence against the Applicant comes from Mr. McLeish and was in his possession from the outset. Accordingly, the sufficiency or otherwise of the evidence in support of the charges was not affected by any additional evidence garnered as a result of the DLP investigation, because there was no such additional evidence.

14. *In the circumstances of the charges laid in the Summary Court Proceedings, the six-month period under section 78 of the CPC ran from the date by which the applicant was obliged, pursuant to the Labour Act, to have paid Mr. McLeish those wages it is alleged were not paid. The charges were laid outside that period, and accordingly the Summary Court has no jurisdiction to try the case, and the Summary Court erred in finding otherwise.*”

9. Section 78 of the CPC states:

“Limitation of time for proceedings for summary offences

78. *Except where a longer time is specially allowed by law, no offence which is triable summarily shall be triable by a Summary Court unless the charge or complaint relating to it is laid within six months from the date on which evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant: Provided that if the circumstances giving rise to the complaint or charge occurred upon a vessel upon the high seas, then the court shall have jurisdiction in respect thereof if the complaint or charge was laid within six months after the arrival of the vessel at that vessel’s port of discharge in the Islands.*”

10. In essence, the applicant argues that the Chief Magistrate was, by his decision that the DLP was the only competent complainant under the Act, purporting thereby to act outside of the jurisdiction of the Summary Court as prescribed by Section 78.

11. The applicant concedes that the effect of Section 78 is that the time bar for the institution of proceedings does not run from the date of the alleged offence but instead from the date when the competent complainant has sufficient evidence for a charge to be laid.

12. However the applicant argues that this interpretation is “*nuanced*” to allow for a situation where: “*if, when the offence was allegedly committed, the aggrieved individual complainant was not “competent” for example if the complainant was a child or an adult under a disability, time would run instead from when “sufficient evidence to charge for the offence was in possession of the appropriate enforcement agency” or “in cases where there may not be an identifiable individual victim.*” In the instant case, the applicant submits, neither of those situations arise, the complaining employee is competent, and the laying of the charges was not therefore dependent on the DLP as a competent complainant.

13. The applicant argues the Chief Magistrate's reference to the remedy of abuse for delay is misconceived in this case where the interpretation of Section 78 is concerned with the jurisdiction of the Summary Court to hear the matter whereas an abuse for delay argument is one taken within the trial process. The appellant's argument is the decision against which leave is being sought is one against the jurisdiction to continue such proceedings.
14. It is always desirable for all challenges to take place in the criminal trial or on appeal. A criminal court has the power to restrain proceedings which are an abuse of process even where such abuse does not compromise the fairness of the trial itself.⁴
15. The Criminal Procedure Code 2021 states:

“PART IX - Appeals from Summary Court

Appeals from decisions of Summary Court

165(1) Save as hereafter in this Code provided, any person who is dissatisfied with any judgment, sentence or order of the Summary Court in any criminal cause or matter to which that person is a party may appeal to the Grand Court against such judgment, sentence or order either by motion on matters of law or fact (or both) or by way of case stated on a point of law only as hereafter provided:

Provided that in no case shall the complainant appeal from a decision dismissing a complaint except by way of a stated case on a point of law.”

16. The decision of the Chief Magistrate is not a “*judgment, sentence or order of the Summary Court*” and an appeal from the Summary Court is therefore not proper avenue for an aggrieved applicant as in this case.
17. ***In the Matter of an Appeal by Way of Case Stated, Highbury Poultry Farm Produce Ltd v Crown Prosecution Service; In the Matter of an Application for Judicial Review the Queen (Highbury Poultry Farm. Produce Ltd) v Telford Magistrates Court***⁵ – Mr. Justice Jay referred to an earlier decision in *Downes v RSPCA* [2018] 2 Cr. App. R. 3 which stated:

⁴ R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42

⁵ [2018] EWHC 3122 (Admin)

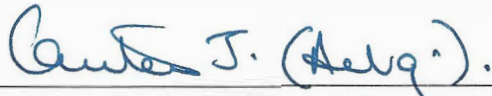
“..the issue before this Court (Holroyde LJ and Julian Knowles J) on an appeal by way of case stated was whether this was the appropriate avenue to pursue in a situation where the district judge had made a preliminary ruling to the effect that the charges were laid in time, and the magistrates’ court therefore had jurisdiction to consider them. After a thorough examination of the relevant jurisprudence, the Divisional Court drew a distinction between cases where jurisdiction was declined, and the decision was therefore “final”, and where it was not. As Julian Knowles J. explained at paragraph 23 of his judgment:

“It seems to me that the relevant principles to be drawn from these cases are as follows: (a) where a jurisdictional point is taken before the magistrates’ court, then if the court declines jurisdiction that decision can be challenged either by judicial review or by way of case stated (see Clerkenwell Metropolitan Stipendiary Magistrate, supra); (b) where such a point is taken and a court accepts that it has jurisdiction then there is nothing in Streames to suggest that the magistrates’ court has the power to state a case. The only remedy is for the aggrieved party to seek judicial review, and the magistrates in such an event should not adjourn unless there are particularly good reasons to do so. It will very usually be better to carry on and complete the case, allowing for all matters to be raised on appeal at the conclusion of the case in the normal way; and (c) in all other cases there is no power to state a case in relation to an interlocutory ruling. A magistrate should proceed to determine the case finally and then to state a case if appropriate to do so. In a “special case” (the words used in Streames) and if the defendant has obtained leave to seek judicial review, then the magistrates might consider adjourning.”

18. The avenue adopted by the applicant to seek leave for judicial review is the proper approach in this case where the magistrate, in what may be termed an interlocutory ruling, has concluded that the court has jurisdiction to proceed with the trial of the applicant. While, as noted elsewhere, “the trial process is well equipped to deal with the bulk of complaints which have in recent Divisional cases founded applications for a stay,”⁶ in this case, where the decision to assume jurisdiction to continue the trial is the issue which is being challenged, it is a matter which may be dealt with outside the trial process.
19. This court is not called upon here to determine the merits of the case. Leave may be refused if the challenge is wholly unmeritorious and plainly unarguable. I do not find that the application is *obviously untenable, vexatious or frivolous*. I am not here concerned with whether judicial review should or should not be granted, whether the applicant is ultimately entitled to the relief that he

⁶ Attorney-General’s Reference (No 1 of 1990) [1992] QB 630 at 642

seeks. I do find that there is an arguable case with a realistic prospect of success. Leave to apply for judicial review is granted on the grounds as set out in the application.



JUSTICE MARLENE I. CARTER (Actg.)
JUDGE OF THE GRAND COURT