



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

CAUSE NO.: G0081 OF 2023

BETWEEN:

ISLAND POOLS LTD

Applicant

AND:

(1) THE SUMMARY COURT OF THE CAYMAN ISLANDS

(2) THE DIRECTOR OF LABOUR

Respondents

STERLING SECURITY SOLUTIONS LTD

Intervener

Before: The Hon. Justice Marlene Carter

Parties: Mr. Nicholas Dixey of Nelsons, Attorneys for the Applicant
Mrs. Marilyn Brandt, Deputy Solicitor General for the Respondents
Mr. Richard Parrish of Broadhurst LLC for the Intervener

Heard: 4 March 2024

Decision: 12 September 2024

HEADNOTE

Judicial Review – Section 78 of the Criminal Procedure Code (2021 Revision)

“competent complainant” – Labour Act, Sections 54, 71-73

JUDGMENT

Background

1. The Applicant appeared before the Summary Court to answer two charges under the Labour Act (2021 Revision) (hereinafter “**the Act**”): (i) Failing to Pay Holiday Pay, contrary to section 16 and (ii) Failure to Pay Wages, contrary to section 31 (1) as read with sections 28, 29 and 30 of the Act.
2. Before the Chief Magistrate, the Applicant raised a preliminary objection, submitting that the Summary Court had no jurisdiction to try the case by operation of the six-month time bar under section 78 of the Criminal Procedure Code (2021 Revision) (the “**CPC**”). The Chief Magistrate ruled that the Summary Court did have jurisdiction to try the Applicant. The Applicant applied and was granted leave to apply for Judicial Review of the Magistrate’s decision on 6 June 2023.
3. In his Ruling of 26 January 2023 (“**the Ruling**”), the Chief Magistrate referred to the following facts:

“Relevant Facts

The charges were laid on 10 May 2022, over two years after the last offence was allegedly committed in April 2020, and five and a half years after the first in November 2016.

All of the substantive evidence against the Defendant in this case comes from a single source -the witness Garth St Patrick Mcleish, a previous employee of the Defendant. He is, on any view, “the victim” here -the individual who it is alleged was underpaid in 2016 and 2020 by the Defendant.

Mr Mcleish made a complaint to the Department of Labour and Pensions (“the DLP”) on 10 November 2021. One of the roles of the DLP is to enforce the provisions of the Act, and it has investigative powers.

Mr Mcleish confirms that he had attended to make the complaint on 10 November 2021 because he had been asking to be paid, but the Defendant had refused. Mr Mcleish delivered further documentary evidence to the DLP on 25 November 2021, 26 November 2021, 6 December 2021 and 13

December 2021 in support of his complaint, such as pay slips and time logs.”

4. At issue before the Chief Magistrate were the following questions:

“(i) Was Mr. McLeish "a competent complainant" within the meaning of s 78 of the CPC?

(ii) If so, when did evidence sufficient to justify proceedings come to his actual or constructive knowledge?”

Magistrate’s decision and reasoning

5. The Chief Magistrate acknowledged that there were no binding authorities upon which he could rely to resolve the issues outlined above. He referred to authorities cited by counsel for the Applicant, advanced as being able to assist in construing the legislative intent behind section 78. The cases referred to were: *R v Scunthorpe Justices, Ex parte M, Ex parte G*¹ and *Regina v Newcastle upon Tyne Justices, ex parte John Bryce (Contractors)*²
6. The Chief Magistrate noted that the English legislation referred to in those cases was not in identical terms to section 78 of the CPC and distinguished those cases in that regard. He also noted that in the Cayman Islands, magistrates have significantly greater sentencing powers and deal with very serious offences, while in the UK, there was a more limited jurisdiction, custodial sentences being limited to twelve (12) months. The Chief Magistrate drew a further distinction between these UK authorities and the position in The Cayman Islands. He referred to Practice Direction 5/2025, stating that the rapid disposal of cases is not the sole concern of the Summary Court, where *“dealing with cases efficiently and expeditiously is but one of the many considerations that must be addressed by a court to ensure that a case is dealt with justly.”* As such, the Chief Magistrate concluded that *“...in the Cayman Islands expedition is not the only consideration when dealing with summary offences.”*

¹ [1998] EWHC 228 (Admin)

² [1976] 2 All ER 611 at page 614A

7. The Chief Magistrate referred to the case of *Eldemire*³ and noted that although the comments of Sanderson J. in that case seemed to suggest that section 78 is an absolute time bar where expedition of summary matters is the only consideration, *“Eldemire must be read as confirming that section 78 of the CPC is not simply a time bar, there is an added element – the requirement of ‘evidence sufficient to justify proceedings’.”*⁴
8. The Chief Magistrate determined that while it was not in dispute that the Applicant was a complainant in that he had made a complaint that the Defendant had failed to pay his wages, he was still not a **competent complainant** within the meaning of section 78 of the CPC.
9. The Chief Magistrate stated that the term competent complainant must not be examined in isolation:

“Firstly, it is inextricably bound to the preceding words of section 78 - “evidence sufficient to justify proceedings” coming to the competent complainant's knowledge. Secondly, this is a prosecution brought pursuant to specific legislation - the Labour Act - and that legislation must inform the court's interpretation.”

10. The Chief Magistrate dismissed any suggestion that the section 78 time bar should be analogous to that of section 54 of the Act, which compelled a complaint of unfair dismissal by an employee to be filed within ninety (90) days of the date of dismissal. He stated as follows:

“Admittedly, this section imposes an absolute time bar; however, again, there is an important distinction that is determinative on this point. The filing of a complaint of unfair dismissal pursuant to section 54 is a civil proceeding, not a criminal prosecution. In respect of the former, the dispute is between individuals whereas, in respect of the latter, a prosecution is brought in the name of the King on behalf of the public where, upon a finding of guilt, a defendant faces punishment with a view to, among other things, protecting the public from unscrupulous

³ [2000] CILR 97

⁴ See page 6, lines 1-2 of Ruling

employers. Consequently, the fact that there is a time bar for the former does not assist in resolving the issue before the court.”

11. The Chief Magistrate noted, with approval, the decision of Chapple J. (Actg.) in *Wayne Carlos Myles v R*⁵, in which the phrase “*evidence sufficient to justify proceedings coming to the actual or constructive knowledge of a competent complainant*” had been considered and where the Learned Judge had approved the statement that “*knowledge ... involves an opportunity for those with appropriate skills to consider whether there is information sufficient to justify a prosecution.*”⁶
12. The Chief Magistrate insisted that the Court must examine the legislative context when interpreting “*generic legislation*” such as section 78 of the CPC. He referred to sections 71-73 of the Act. Section 71 charges the Director with securing the due administration and enforcement of the Act, section 72 with the proper observance of the Act whether or not a complaint has been filed with the Director, and section 73(2) states specifically:

“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.”

13. The Chief Magistrate concluded:

“In the end, bearing in mind the wording of section 78 of the CPC including the phrase ‘evidence sufficient to justify proceedings’ and recognizing that this is a prosecution brought pursuant to specific legislation, the Labour Act, it is clear to me that the Director of Labour is the “competent complainant” in Labour Act prosecutions, not Mr Mcleish. The Director has ‘the appropriate skills to consider whether there is sufficient information to justify a prosecution’.”

⁵ SCA 4-6/2020

⁶ Referring to Pill LJ’s statement in *Letherbarrow v Warwickshire County Council* [2015] EWHC 4820

The Grounds upon which Judicial Review is sought

14. The Grounds for review of the decision in the Ruling were as follows:

“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 section 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 outset- 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.”*

Applicant’s Submissions

15. Upon the hearing of the Originating Summons, counsel for the Applicant adopted the submissions previously advanced before the Chief Magistrate as well as those filed in support of the application for leave for Judicial Review. Counsel, very helpfully, expanded on those submissions.

Ground 1 - The competent complainant – did the Chief Magistrate err in finding that only the Director of Labour is capable of being a competent complainant?

16. Section 5 of the Criminal Procedure Code (2021 Revision) states:

“Mode of trial of particular offences

5. (1) For the purpose of determining the mode of trial before a court, offences shall be classified into three categories —

Category A- offences triable upon indictment and not otherwise;

Category B- offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons charged if there be more than one), may be tried summarily; and

Category C- offences triable summarily and not otherwise.

(2) Where any law creating an offence fails to prescribe the mode of trial, the mode of trial shall be as prescribed in Schedule 1.

(3) Notwithstanding any other law but subject to section 190, the offences set forth in Schedule 1 shall fall into the categories therein prescribed.”

17. Section 78 of the Criminal Procedure Code specifies the time within which Category C offences should be brought before a court. Section 78 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.”

18. Counsel for the Applicant submitted that Section 78 was framed by the provisions of s. 5 of the CPC. As such, the Court must be cognizant of the mischief at which the time bar for the institution of proceedings was aimed. He submitted that the aim of the section was to *“ensure that summary offences are charged and tried quickly when an individual aggrieved complainant, or the enforcement agencies are in possession of the evidence to support the laying of a charge.”*

19. Counsel referred to an authority in England and Wales, where a similar section on the issue of the time bar in section 127 of the Magistrates Court Act (1980) was considered. In *R v Newcastle Upon Tyne Justices, ex parte John Bryce (Contractors) Ltd*, May J. stated:

“In my view the six months’ limitation provision in the 1952 Act is to ensure that summary offences are charged and tried as soon as reasonably possible after their alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by the magistrates’ courts throughout the country of the summary offences brought before them to be tried.

...

The purpose of the six-month time limit imposed by section 127 of the 1980 Act is to ensure that summary offences are charged and tried as soon as reasonably practicable after their alleged commission.”

20. Counsel submitted that section 78 is a jurisdictional provision and a time bar, which seeks to ensure prompt disposal of summary offences once the offences come to light. Counsel emphasized that the Applicant recognized the distinction between time that ran from the date of commission of an alleged offence and time that ran from the date upon which the offence came to light. He submitted that the Applicant’s position was as follows:

“16. It was submitted by the Applicant that the nuance here under section 78 of the CPC is that if, when the offence was allegedly committed, an 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. The section also recognises that in many cases there may not be an identifiable individual victim, such as in cases involving drugs, immigration offences or regulatory offences, and in those sorts of cases, the competent complainants will often be limited to the police or other enforcement agency or regulator, and the prosecution authority.”

21. Counsel submitted that the Chief Magistrate appeared to adopt a different approach in identifying the purpose behind section 78 of the CPC from that identified by the Applicant - to deal with Category C offences promptly. Counsel argued that the Chief Magistrate’s reasoning, wherein he noted the need for a case to be dealt with efficiently and expeditiously, as only one of the many considerations to be addressed by a Court to ensure that a case is dealt with justly, was to ignore the fact that section 78 concerns jurisdiction and should therefore not be subject to *“any balance of discretion based upon procedural guidelines and on what a particular magistrate considers to be a fair outcome.”*

22. Counsel cautioned:

“20. In applying a purpose-based approach to construction of the section generally, the Court should be wary of adopting an interpretation which would undermine the purpose behind the time bar, that is that Category C offences should be prosecuted promptly.”

23. The Applicant submits that the Chief Magistrate failed to properly address what was one of the Applicant’s primary points regarding section 78, the issue of whether there could be more than one competent complainant. The Applicant further submits that:

“22. ... the legislation expressly does not contemplate that there will always be only one competent complainant- if so, it would have used the words “The competent complainant” as opposed to “A competent complainant”. Accordingly, time runs from when sufficient evidence to charge came to the knowledge of the first competent complainant in time, which is often (but not always) a private citizen. To the extent that the Summary Court has acknowledged at all that there can be more than one complainant, the Summary Court has chosen to view this through the prism of finding that only those charged with enforcing the law or regulatory compliance can be competent complainants.”

24. It is the Applicant’s position that the wording of section 78 was deliberate and was meant to include private citizens consistent with the aim of the swift disposal of summary-only offences. Counsel referred to the case of *Morgans v DPP*⁷, a case concerned with section 11(2) of the Computer Misuse Act 1990 (repealed) and a provision which is in similar terms to section 78 of the CPC.

25. In *Morgans*, Kennedy LJ stated:

“Section 11(2) is an exception to the normal rule that summary offences should be prosecuted within six months. As an exception in favour of the prosecution it should be strictly construed. The draftsman could have provided that proceedings for an offence under subsection (1) ‘may be brought within a period of six months from the date on which the

⁷ [1999] 1 WLR 968

prosecution forms the opinion that there is sufficient evidence to warrant proceedings' but he did not do so.”⁸

26. Counsel urged the Court to note that although the Court in *Morgans* was concerned with “*knowledge*”, the important takeaway here is that section 78 of the CPC, like section 11(2) of the Computer Misuse Act, should be strictly construed.
27. Counsel submitted that this Court should consider that if the legislators had intended to limit the definition to enforcement agencies rather than aggrieved individual complainants, this would have been entirely open to them. In this case, the Court should find that the interpretation of “*a competent complainant*” should be construed strictly, especially in relation to a provision relating to criminal procedure.

Ground 2 - Did the Chief Magistrate err in finding that Mr. McLeish was not a competent complainant

28. Counsel for the Applicant submitted that the Court should find Mr. McLeish is a competent complainant because:

“i) He is of the age of majority and is not suffering from any mental disability that would require him to have a litigation friend or guardian;

ii) He is competent to take and defend court proceedings in his own name and give evidence in court. Indeed, he could be compelled to give evidence; and

iii) In respect of the charges that have been laid, he would certainly have been entitled and competent in law to conduct a private prosecution pursuant to section 12 and 13 of the CPC.”

29. Specifically addressing the Act, Counsel noted that the Act refers to “*complainants*” to describe aggrieved employees throughout the legislation. Counsel argued that the Chief Magistrate had fallen into error when he sought to make a distinction between complaints under the Act as being civil in nature and those under section 78 as being criminal in nature to explain why a complainant

⁸ At page 983

was competent under section 78 but not able, under the Act, to sustain a section 54 complaint.⁹

30. In referring to matters before the Summary Court in which the issue of the competent complainant had previously been ventilated, Counsel referred the Court to *R v Front Door Cayman Ltd*¹⁰ and *R v Island Builders Company Ltd*¹¹, cases in which the Summary Court had come to a similar conclusion to that of the Chief Magistrate that the competent complainant vis a vis the Act, could only be the Department of Labour and Pensions (hereinafter the “DLP”). Counsel noted in this regard that while it is correct that the DLP is well placed to assess whether there are grounds for believing that an offence has been committed, Mr. McLeish was also perfectly entitled and competent in law to bring a private prosecution.

31. Counsel submits:

*“41. All that section 78 of the CPC is requiring is for the aggrieved employee to **make the report in good time**, so that charges can be laid by the appropriate authorities within six months. The real problem here is that the magistrates’ interpretation allows, as in the Applicant’s case, a potentially aggrieved employee to sit and wait for five years to report, perhaps using that time and the threat of prosecution as a hatchet to try and negotiate a settlement, and yet when the employee finally decides to report many years later, the prosecution would still be in time. This consequence plainly offends against the clear purpose and intent of section 78 of the CPC.”*

⁹ Section 54 of the Labour Act (2021 Revision): “(1) Should any questions arise as to whether an employee has been unfairly dismissed, the employee may seek a resolution of the question by filing a complaint of unfair dismissal with the Director. (2) A complaint under subsection (1) must be filed within ninety days of the date of dismissal.

(3) Should the complaint involve a group of employees under similar circumstances they may file a joint complaint.

(4) Should there be filed at or about the same time a number of complaints raising the same or substantially similar issues, the Director may direct that they be consolidated into a single proceeding.”

¹⁰ (SC 03767 of 2014)

¹¹ (SC 01940/14 & 2137/14) 27 April 2015

32. Counsel invited the Court to also consider other Acts with Penal provisions. He submitted that, where it was sought to restrict the category of complainant, the competency of a complainant, the particular legislation would do so expressly. In this regard, the Court was directed to the Securities Investment Business Act (2020 Revision), and it was submitted as follows:

“43. ... Proceedings with respect to offences under section 24 or 25¹² may only be instituted by the Director of Public Prosecutions.

If the Labour Act was intended by the legislature to confine the meaning of competent complainants in respect of offences under section 78 of the CPC to the inspectors and enforcement officers of the DLP, and to the DPP (and thereby disqualify private citizens from that definition), the legislature could, and would, have expressly done so- as it has done in the case of the specific offences under Securities Investment Business Act.”

33. Referring to the Chief Magistrate’s assertion in the Ruling that an aggrieved defendant could find comfort in being able to make an abuse of process argument to address any concerns about inordinate delay that may arise from a complaint being made sometime after the event, Counsel submitted as follows: *“It is trite that if the reason for delay between the commission of an offence and the laying of a charge is attributable to the victim not promptly reporting the matter to the police, then an abuse application will fail as the delay would be unrelated to any conduct on the part of the Crown.”* Such an application, he contended, could easily be defended by the prosecution on that basis.

34. Counsel urged the Court to note that:

“52. The interpretation and approach of the Summary Court would defeat the purpose of the section 78 time bar, and would allow Summary Court proceedings involving complainants of full majority suffering from no disability being brought many years (as in this case) after the alleged period of offending.

¹² False or misleading market or insider dealing

53. If the legislature had wished to restrict the meaning of “competent complainant” in respect of Labour Act offences to the officers of the DLP and the DPP, or otherwise extend the period within which charges for those offences could be laid, it could, and would, have done so- as is demonstrable by provisions in other statutes. It is open to the legislature to make this minor amendment to the Labour Act at any time.”

The Respondent’s Submissions

35. The Deputy Solicitor General submitted that the Chief Magistrate was correct to hold that a proper interpretation of “*competent complainant*”, as it relates to offences under the Act, must be the Department of Labour and Pensions. The Respondents accept that the Applicant is a complainant but insist that he is not the “*competent complainant*” under the CPC.

36. The Respondents argue that the definition of a complaint under the Act is distinct from that found in the CPC because both sections 46 [severance pay] and 54 [unfair dismissal] of the Act do not create criminal offences under the Act, but rather, matters to be dealt with by the Labour Tribunal. Counsel, therefore, urged the Court to take care not to liken the definition of complaint under the Act to that under the CPC. Counsel submitted that no issue of 'competence' arises in relation to complaints made to the Director of the DLP under sections 46 and 54 of the Act.

37. Counsel noted the distinction made by the Chief Magistrate in his Ruling:

“15. ... The filing of a complaint of unfair dismissal pursuant to section 54 is a civil proceeding, not a criminal prosecution. In respect of the former, the dispute is between individuals whereas in respect of the latter, a prosecution is brought in the name of the King on behalf of the public where, upon a finding of guilt, a defendant faces punishment with a view to, among other things, protecting the public from unscrupulous employers: Consequently, the fact that there is a time bar for the former does not assist in resolving the issue before the court.”

38. Counsel for the Respondents submitted that the Chief Magistrate was cognizant that the term ‘complainant’ should not be examined in isolation as the Act must

inform the Court's interpretation. She referred the Court to the following section of the Chief Magistrate's Ruling:

"17. ... The term "competent complainant" must not be examined in isolation. Firstly, it is inextricably bound to the preceding words of section 78 - "evidence sufficient to justify proceedings" coming to the competent complainant's knowledge. Secondly, this is a prosecution brought pursuant to specific legislation - the Labour Act - and that legislation must inform the court's interpretation."

39. Following this line of reasoning, Counsel for the Respondents submitted that given *"the quasi-civil nature"* of the offences under the Immigration (Transition) Act; The Customs and Border Control Act; the National Pensions Act; and the Labour Act, the *"competent complainant"* to determine whether there is *"evidence sufficient to justify proceedings"*, in relation to such offences, must be the appropriate authority created by the Legislature which is thereby vested with the duty to administer the law and its regulations.

40. The relevant provisions in the legislation referred to above are as follows:

(i) Section 7 of the Immigration (Transition) Act (2022 Revision) states:

'7 (1) In addition to the powers and duties conferred upon the Director of WORC by or under any other law, the Director of WORC is responsible for –

(a) the management, supervision and control of WORC;

(b) the administration and implementation of this Act'

(ii) Sections 79 and 80 of the National Pensions Act (2024 Revision) states:

'79. (1) There is established the office of the Superintendent of Pensions.

(2) The Superintendent is the chief administrative officer of the Board and shall exercise the powers and perform the duties that are vested in or imposed upon the Superintendent by this Law and the regulations.

80. The Board shall-

(a) administer this Law and the regulations;

(iii) Section 5 of the Customs and Border Control Act (2024 Revision) states:

'In addition to the duties conferred upon the Director by or under any other law, the Director is responsible for –

(a) the management, supervision and control of Customs and Border Control;

(b) the administration and implementation of this Act;'

(iv) Section 71 and 72 of the Labour Act (2021) Revision states:

'71. (1) There is established a Department of Human Resources, comprising the Director of Labour, the Deputy Director and such labour inspectors and other staff as may be necessary for the due administration and enforcement of this Act.

72. Whether or not a complaint has been filed the Director shall be charged with securing the proper observance of this Act."

41. Counsel for the Respondents argued that it is because of "*the inherent nuances of such offences*", they being "quasi-civil" in nature, there is a requirement for an individual or entity with the requisite expertise and experience to determine what would amount to evidence sufficient to justify proceedings and whether there is such evidence to justify a criminal prosecution¹³.
42. Counsel for the Respondents acknowledged that in determining who is a competent complainant, considerations such as those noted by the Applicant were relevant; the "*competent complainant*" should be of the age of majority and not suffering from any mental disability that would require him to have a Litigation Friend or guardian for instance. However, Counsel submitted that such matters add nothing to the findings of the Chief Magistrate at page eleven (11) of the Ruling that it is the Director who has "*the appropriate skills to consider whether there is sufficient information to justify a prosecution*".

¹³ Letherbarrow v Warwickshire Country Council [2015] EWHC 4820 [1/1/10]

43. The Respondents submit that a person's entitlement to bring a private prosecution under section 14 of the CPC cannot be an appropriate consideration for the Court in determining whether a complainant is competent under section 78. Rather, this determination has to be done on a case-by-case basis based primarily on the nature of the offence charged, as what would amount to *"evidence sufficient to justify proceedings"* [as per section 78 of the CPC] should be specifically considered in relation to that specific offence.
44. In conclusion, the Respondents submitted:

"37. A 'competent complainant' is an individual or entity with the requisite expertise and/or experience to make a proper assessment about whether there exists sufficient evidence to justify proceedings, that is, that the actions or omissions that are the subject of the complaint would likely amount to a criminal offence.

38. Though the former employee, Mr. Garth St. Patrick Mcleish, would have been aggrieved by the omissions he alleged against the Applicant, he lacks the requisite expertise and/or experience to make a proper assessment about whether there exists sufficient evidence to justify proceedings, that is, that the actions or omissions that are the subject of the complaint would likely amount to a criminal offence."

The Intervener's Submissions

45. The Intervener is a company engaged in the business of providing uniformed security services including security consulting, investigations, confidential documents services and other specialized security services in the Cayman Islands.
46. Following an audit conducted by the DLP, the Intervener is before the Summary Court on charges of Failing to Make Payment of Overtime Wages in respect of twenty-one (21) of its employees. The Intervener's position is that regardless of the Court's determination:

"(a) Should it be the case that the relevant employee is determined to be the "competent complainant", then it is submitted that the six-month time

period began when the relevant employee first worked overtime and was not paid additional wages for that overtime; and/or

b) Should the DLP be found to be the “competent complainant”, then it is submitted that the relevant time period began on 3 November 2023, the date upon which Sterling provided all necessary information demonstrating a breach of the Act, or in any event, on 1 December 2023, the date at which the DLP confirmed to Sterling that it had knowledge of Sterling’s breach of the Act.”¹⁴

47. The Intervener submits that the Applicant’s position is correct, that in the context of a charge brought pursuant to the Act, the “*competent complainant*” under section 78 of the CPC can only be the aggrieved employee in circumstances where said employee is found by the Court to be “*competent*”. It adopts the Applicant’s position that the interpretation and approach currently adopted by the Summary Court defeats the purpose of the six-month time bar, by allowing complaints to be brought by the DLP many years after the alleged period of offending.
48. The Intervener posits that there is a supplemental question that must also be determined by this Court if it agrees with the interpretation of the Chief Magistrate that the “*competent complainant*” may only be the DLP. This further question is when, in such a case, will it be considered “*that evidence sufficient to justify proceedings have come to [the] DLP’s constructive knowledge. This is especially the case with respect to charges brought pursuant to section 26 of the Act, namely a failure to pay overtime.*”
49. The Intervener’s position is indeed different to the case originally before the Court. Even though this question was not specifically addressed in the original hearing before the Chief Magistrate, the Intervener seeks guidance from this Court because the DLP continues to issue proceedings for a Failure to Pay Overtime in circumstances where they may have had prior knowledge of a breach by an employer not within six (6) months of such breach being known to the DLP but rather, within six (6) months of an actual employee complaint.

¹⁴ See *Cansell 1*, paragraph 8

50. Specifically, the Intervener takes issue with the constructive knowledge to be imputed to the DLP. The Intervener set out this issue as follows:

“13. ... it remains unclear as to when the DLP will be considered by the Court to have constructive knowledge to justify proceedings in circumstances where, for example, it is provided information that an employee has worked overtime and not been paid, but may not have any further information or an actual complaint from that particular employee as at that date, or where it is put on notice by an employer of a general failure to register its employee’s overtime waivers, but does not have further information in respect of any specific employee. This is especially relevant where it is understood that the DLP has a record of whether any overtime agreements in respect of employees have been approved and registered.”

51. On this question, the Intervener submitted that the correct interpretation of the section to be adopted by this Court is that which was formulated by the Learned Magistrate in ***Regina v Island Builders Ltd***, namely, where it was stated:

“I find that time starts to run from when the Department has evidence sufficient to justify proceedings. It is accepted that evidence does not mean the criminal standard of proof beyond a reasonable doubt, but rather amounts to knowledge, actual or constructive, of an offence....I do not believe that it means that an audit must be concluded in each and every case. It will in some cases, but in others the knowledge will come to the attention of the Department from an employee or employer...so long as the Department was given information of a breach, then they must act quickly to enforce the law.”¹⁵

Court’s Considerations

52. In essence, the Applicant’s contention on this application for judicial review is that the Summary Court has erred in its interpretation and approach regarding the purpose of the Section 78 time bar. The two offences with which the Applicant is charged before the Summary Court are offences that can only be tried summarily.

¹⁵ See page 20 of that Judgment

- In taking the approach that it has regarding the interpretation of the time bar, the Applicant's position is that the Summary Court has fallen into error when it sought to marry that interpretation with the specific provisions under the Act regarding who is a competent complainant under that Act such that its conclusions on the issue of the time within which the competent complainant must institute proceedings for Category C offences, such as those for which the Applicant is charged, are erroneous.
53. The determination of this application for judicial review, rests on the interpretation of the phrase from Section 78 of the Criminal Procedure Code, when "*evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant*".
54. The Respondents have conceded that the statute's language is such that it is open to an interpretation which accords with more than one complainant. A complaint is an allegation that some person has committed an offence. The Applicant is a valid complainant under the Act. There is no concession regarding the competent complainant.
55. There has been judicial consideration of who is the competent complainant in the context of the Act in a series of cases before the Summary Court. Counsel for the Applicant has argued that the Summary Court has, for assorted reasons, been incorrect in its interpretation of the term *competent complainant*, placing undue reliance on factors that should not affect such interpretation. Counsel referred to what he termed "*dangerous reasoning*" on the part of the Chief Magistrate in referring to the Criminal Procedure Rules, 2019, Practice Direction 5/2015 and the fact of the greater sentencing powers in the Cayman Islands for summary offences, to distinguish this approach to the interpretation of the purpose of Category C offences, from that of cited UK authorities.¹⁶
56. In *Regina v Front Door Cayman Ltd*¹⁷, Magistrate McFarlane was faced with the issue of whether the charges laid against the Defendant were statute barred because

¹⁶ The Chief Magistrate's reasoning noted at paragraph 6 herein.

¹⁷ SC03767/2014/PM/JYGM

they were not laid within the relevant 6-month time limit imposed by Section 78 of the CPC.

57. The Learned Magistrate stated at paragraphs 10 – 12:

“[10] A competent complainant is an individual (usually a police or other law enforcement officer from an independent investigative authority) with the requisite expertise and experience to make a proper assessment about whether there is sufficient evidence to justify proceedings, much like the prison officer in R v Eldemire (where an inmate of Her Majesty's Prison Northward was found in possession of 67 packets of vegetable matter resembling ganja). The Court took the view that the prison officer was the competent complainant because. time began to run on the date the officer discovered the drugs.¹⁸

[11] In the case of Labour Law infractions, the competent complainant can be none other than inspectors or other agents of the Department of Labour and Pensions, because they alone are charged with enforcement of the Labour Law, and are therefore in the best position to determine whether there are reasonable and probable grounds for believing that a potential defendant has offence.¹⁹

[12] In any event, Mr Hoffman maintains that on either analysis (whether the competent complainant is the employee in question or the Department of Labour and Pensions) the charges are in his submission statute barred.”

58. In **Regina v Islands Builders**²⁰, Magistrate Hernandez [as she then was], was also faced with an application to dismiss because, it was submitted, the charges against the defendant were statute barred. At issue was the question of who was the competent complainant, given that the determination of this issue would directly impact the date from which to measure when there was sufficient evidence coming to the attention of such complainant to justify proceedings.

¹⁸ R v Eldemire [2000 CILR 97] at page 101, lines 13 -15.

¹⁹ See dicta of Sanderson J in R v Eldemire at page 101, lines 26 - 27.

²⁰ 01940 of 2014/Actg. Mag. Hernandez

59. The Magistrate set out the issue thus:

“9. Counsel for the defendant has submitted that the competent complainant is the employee, who would have known from the receipt of his pay slip that he was not being paid overtime, and accordingly, from that date of knowledge, time starts to run. Accordingly, to come in 2014 to lay charges which arose from facts within the knowledge of the employee from 2012 and 2013 is outside of the period to lay charges within the Summary Court.”

60. The Court found that the competent complainant for the purposes of the Act is the DLP.

61. I note that, in each of these cases, the Court emphasized that the nature of matters triable summarily made it incumbent on the Department of Labour and Pensions to act quickly and efficiently in laying charges once it has evidence sufficient to commence proceedings. Each Magistrate also emphasized that there was a distinction to be drawn between the standard required for the commencement of proceedings and the standard of evidence sufficient to secure a conviction.

62. In *Wayne Carlos Myles v Regina*²¹, Chapple J. (Actg.) concluded that the Learned Magistrate in the Summary Court had properly directed herself regarding constructive knowledge and her conclusion that a *“court has to consider what knowledge [the prosecution] might reasonably have been expected to acquire”*. Chapple J (Actg.) noted that *“knowledge ... involves an opportunity for those with appropriate skills to consider whether there is sufficient information to justify a prosecution.”*²²

63. The Learned Judge went on to state that *“A degree of pragmatism and realism has to be applied to the question of what knowledge a prosecutor might reasonably be expected to acquire.”*²³

²¹ SCA# 4-6 /2020

²² Pill LJ in *Letherbarrow v Warwickshire County Council* [2015] EWHC 4820

²³ While the subsequent Court of Appeal judgment in this matter did not deal with this issue in any substance, the Court of Appeal finding that submissions on constructive knowledge did not involve a point of law alone and therefore not falling within Section 29 (1) of the Court of Appeal Act (2011

64. The Applicant argues that it is only if an aggrieved complainant is not competent for reasons such as age or disability that the appropriate enforcement agency [in the case of offences under the Act, the Director of Labour and Pensions] could step in and, in that instance, time would run from the time that that agency has sufficient evidence in its possession to charge for the offence.²⁴
65. The fact that the CPC refers to a *competent complainant* does not restrict the designation of a specific authority or agency as the competent complainant under the Act. This is separate to the issue of such competent authority being compliant with the strictures imposed regarding the time for bringing a prosecution for a Category C offence under Section 78.
66. The Applicant argues that the Act does not specifically say that an aggrieved individual cannot bring a prosecution. However, the phrase which precedes *competent complainant* in the Code qualifies that individual for the purposes of bringing criminal proceedings. In essence, Section 78 could be read as stating “*evidence sufficient to justify [criminal] proceedings*”. The section contemplates an assessment to determine if the evidence which may form the complaint is sufficient to justify such proceedings. This is the plain and obvious purpose of the phrase. On the Applicant’s submission, this is an assessment which can be made by an aggrieved individual. Counsel does not argue that such an assessment is unnecessary. It is unclear, however, how an aggrieved individual, such as the Complainant in this case against the Applicant, would be in a position to determine the exact nature and strength of the evidence necessary to justify criminal proceedings.
67. There must be an authority which makes such an assessment to ensure consistency and certainty in approach to such assessment. Under the Act, in respect of criminal prosecutions, that authority is the Director of Labour and Pensions. As quoted by

Revision), the CA did note that if they did have jurisdiction to consider this ground of appeal that they would have upheld the decision of both the Magistrate and Chapple J. on the facts.

²⁴ Counsel also referred to cases in which there may not be an identifiable individual victim as obtained in cases involving drugs, immigration and regulatory offences where the police or other enforcement agency or regulator, as the case may be, would assume the role of competent complainant.

the Chief Magistrate in the Ruling, the provisions of ss. 71-73 of the Act are relevant to determine the authority assigned that role.

68. One could well imagine a scenario, were it otherwise, where every person who felt himself aggrieved by an employer's actions, charged with the assessment of whether there was evidence sufficient to justify criminal proceedings, could proceed to institute such proceedings. There would be an influx of charges against employers. The need for an independent assessment of the evidence, whether such evidence could reach the threshold of being sufficient to justify criminal proceedings, is essential to protect not only employees but also employers from frivolous charges being brought against them.
69. The Applicant argues that an interpretation which places such an assessment with the DLP could allow *"a potentially aggrieved employee to sit and wait for five years to report, perhaps using that time and the threat of prosecution as a hatchet to try and negotiate a settlement and yet when the employee finally decides to report many years later, the prosecution would still be in time."* However, the consequences for an employer could be worse if the potentially aggrieved employee were to institute charges against the employer without oversight.
70. The Chief Magistrate did not err in finding that only the Director of Labour is capable of being a competent complainant in prosecutions under the Act as read with Section 78 of the CPC. While there is no express provision of such in the Act, the factors considered by the Chief Magistrate were relevant, and there was a sufficient basis on which he concluded that the Director of Labour is the competent complainant.
71. The Summary Court did not err in finding that Mr. McLeish was not a competent complainant. The issue is whether he was a competent complainant under the Act. Mr. McLeish is a complainant within the meaning of the CPC, but the Summary Court was correct to draw a distinction between Mr. McLeish as a complainant and Mr. McLeish as a competent complainant under the Act.
72. On the facts of this case, the charges against the Applicant have not been laid outside the time limited for same under the relevant sections of the Act.

73. It appears to this Court that while the submissions on this application revolve around the competent complainant, the time that may lapse between the commission of an alleged offence and the lawful institution of proceedings under the Act by the DLP is the fundamental concern of the Applicant and indeed of the Intervener. This Court has found that the Chief Magistrate did not err in ruling that the DLP is the competent complainant for the purposes of the Act. However, it may well be that the Applicant and other persons concerned may wish to suggest an amendment to the Act which would expressly state a time from the alleged offending within which it must be reported to the DLP, barring which the DLP would be time barred from commencing an investigation and or instituting proceedings.
74. Regarding the submissions of the Intervener, I note paragraphs 20 and 25 of the decision in *Regina v Front Door Cayman Ltd*:

“[20] ... it seems to me that in circumstances where the Department of Labour and Pensions is in possession of evidence that overtime has not been paid to a non-managerial employee and there is no evidence that a Labour Tribunal (part of the Department of Labour and Pensions) has approved and registered a section 26 agreement to contract out of overtime pay, this will in most cases be evidence sufficient to justify the commencement of proceedings. This is not to say that this is evidence which will satisfy the half time test,²⁵ or will necessarily result in a conviction, but as noted by Sanderson J in R v Eldemire, it is always open to the prosecution to obtain additional evidence to support its case.²⁶”

...

[25] The Department of Labour and Pensions should ensure that immediate efforts are made to ensure that charges in summary only matters are laid without delay once it has formed a view that there are reasonable and probable grounds for believing that a potential defendant has committed an offence. Moreover, the Department of Labour and Pensions should also ensure that its Inspectors understand the distinction

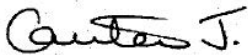
²⁵ Section 70 of the Criminal Procedure Code (2013 Revision).

²⁶ See R v Eldemire at page 101, lines 15 - 19.

to be drawn between evidence which is sufficient to justify the commencement of proceedings, as opposed to evidence which is sufficient to found a conviction.”

75. This statement from the Magistrate adequately addresses the issue of when it will be found “*that evidence sufficient to justify proceedings have come to [the] DLP’s constructive knowledge. ... especially the case with respect to charges brought pursuant to section 26 of the Act, namely a failure to pay overtime.*” This Court cannot improve on the Learned Magistrate’s enunciation of the relevant matters to be considered in such a scenario.
76. Ever mindful that each case must turn on its own facts, I agree with the Intervener’s submission that once the DLP is provided with information of a breach of the Act by either an employee or employer or has reasonable grounds to believe a breach has occurred, this may amount to constructive knowledge sufficient to justify proceedings and that in those circumstances there may be no need to wait for an individual complaint from an affected employee.
77. Regarding the DLP’s obligation to investigate once a breach has come to the Department’s attention, an investigation could also proceed upon learning of an employer’s general failure to register and approve overtime waivers on behalf of its employees. It will remain within the DLP’s remit whether the investigation reveals sufficient information to justify the commencement of proceedings. This Court is loath to say definitively that in every case the limitation period should run from the time such information was received by the DLP. The myriad facts and circumstances of individual cases weigh against such an approach. However, it may, in many cases, be sufficient.
78. The DLP must be cognizant of its authority in these matters and also of its obligations to act fairly towards employees and employers. In order to do so and in order that employers, if they are alleged to have committed offences against the Act, are in a position to defend these, if so warranted, the DLP must be able to distinguish between what the Magistrate described as “*the distinction to be drawn between evidence which is sufficient to justify the commencement of proceedings, as opposed to evidence which is sufficient to found a conviction.*”

79. Counsel for the Applicant stressed, in his submissions to this Court, that the interpretation and application of the provisions in the Act regarding the time for the institution of proceedings were being applied in a manner which served to undermine the purpose behind the time bar and the agreed intent of Section 78 of the CPC, so as to render its provision nugatory. The DLP, in its approach to these matters, must ensure that there is greater confidence in the Department in its role as the competent complainant for the purpose of instituting criminal proceedings under the Act.
80. For the reasons outlined above, both Grounds of Review fail. There is no order as to costs.



The Hon. Justice Marlene I. Carter
Judge of the Grand Court