[2026] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2023CV00264

BETWEEN	**SELENA MOHAMMED WILSON**	**APPELLANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Kwame Gordon and Miss Tamoy Campbell instructed by Samuda & Johnson for the appellant

Ms Tashell Powell, Dwayne Houston, and Kemar Setal instructed by the Director of Public Prosecutions

3, 4 November 2025 and 27 March 2026

Judicial review – Application for leave – Arguable ground – Power of the Director of Public Prosecutions to institute or consent to criminal proceedings – Industrial Disputes Tribunal proceedings – The Labour Relations and Industrial Disputes Act, section 12(9) – The Interpretation Act, section 49(2) – The Constitution, section 94 – Civil Procedure Rules 2002, Part 56

F WILLIAMS JA

[1] I have read in draft the judgment of my learned sister, Shelly-Williams JA (Ag), and I agree with her reasoning and conclusion. I only wish to add a few words generally, and, in particular, with respect to the Director of Public Prosecutions' ('DPP's') finding that there was insufficient evidence on the basis of which there could be a prosecution of any officer of the Jamaica Urban Transit Company ('the JUTC'). The DPP's exact words were

that there was: "no indication that any officer of the JUTC would be criminally responsible to the satisfactory standard required".

[2] The learned judge accepted this as accurate, as she found at paras. [36], [37] and [40] of her judgment. Contrary to her finding, however, there was ample evidence (albeit inferential, rather than direct) to support such a prosecution. Section 49(2) of the Interpretation Act permits, in the making of a decision as to whether or not to prosecute an officer of a limited liability company, the taking into account of whether the officer: "… consented to, or connived at, or did not exercise all such reasonable diligence as he ought in the circumstances to have exercised to prevent the offence, having regard to the nature of his functions in that capacity and to all the circumstances" (emphasis added).

[3] The Industrial Disputes Tribunal's (IDT's) written awards (in particular the first one) were among the documents provided by the Jamaica Constabulary Force ('JCF') to the Office of the DPP ('ODPP'). The award contains a summary of the evidence given by the appellant before the tribunal, in which the appellant spoke to the circumstances of her employment and termination. Among the circumstances are the fact that, as deputy managing director for operations, the appellant had only the managing director above her in the hierarchy of the company and that it was the managing director himself who indicated to the appellant that he would have been terminating her services, and actually did so (see, for example, page 8 of the first award handed down on 5 August 2021). If the written award is accurate (and there has been no challenge to its accuracy), then that amounts to unchallenged evidence. The letter of dismissal was signed by him as the only person superior to her in the organisation (see pages 3 and 4 of the said award).

[4] Additionally, at both hearings before the IDT, the JUTC was represented by its industrial relations manager and by both in-house and external attorneys-at-law. In a matter involving the termination of an officer as highly placed as the deputy managing director, with whose approval, for example, would external counsel have been retained, given instructions, and (assuming that they did not act gratis) paid? The inference to be

drawn from these and other primary facts is clearly that it was the managing director who must have authorised all of those things, or someone equally highly placed.

[5] With respect to the charging of the company itself, although the DPP's permission is not necessary for the charge to be brought, it is not uncommon, especially in matters that are not run-of-the-mill (and charges under the Labour Relations and Industrial Disputes Act are not brought in Jamaican courts every day), for the DPP's ruling to be sought. Where such a ruling is given, in whatever terms it is couched, it would be unwise for someone who could otherwise bring a private prosecution to proceed to prosecute. In the words of the Board at para. 33 of **Commissioner of Police and Another v Steadroy C O Benjamin** [2014] UKPC 8: "The police would be wise to tread with care before deciding to reject a request by the Director not to institute proceedings". In the result, the DPP's ruling in relation to the charging of the JUTC itself effectively amounted to a proscription on prosecution, which the JCF would have been most reluctant to try to go against or circumvent.

FOSTER-PUSEY JA (DISSENTING)

[6] Regrettably, I do not agree with my brother and sister regarding their decision in this matter. I largely adopt my learned sister's outline of the background to this case. The only exception is that I would not use the phrase that the managing director of the Jamaica Urban Transit Company Limited (at the relevant time) "personally fired" the appellant (see para. [49]).

[7] I agree with the decisions made by Tie Powell J and Wolfe Reece J (the learned judge whose decision is on appeal), who both refused leave to apply for judicial review in the matter. My brief reasons are outlined below.

[8] As my learned sister has indicated, in an appeal of this nature, this court is not reviewing an exercise of discretion but is instead considering whether the learned judge erred in concluding that there was no arguable ground for judicial review with a realistic prospect of success.

[9] I agree with the appellant's summary of the issues argued before us. These were:

a. Whether the learned judge below erred when she refused leave to apply for judicial review to challenge the DPP's decision not to prosecute the JUTC; and
b. Whether the learned judge below erred when she refused leave to apply for judicial review to challenge the DPP's decision not to prosecute the managing director/an officer of the JUTC.

[10] Before commenting on the issues, it is useful to have the text of the DPP's letter at the forefront of the discussion. It read:

> "In response to your letter dated September 16, 2022, the learned Director of Public Prosecutions (DPP) will not direct that any Officer of the JUTC be charged under s.12(9) of the **Labour Relations and Industrial Dispute** [sic] **Act**.
>
> The DPP has the power to direct that criminal charges be laid against any director, general manager, secretary or other similar officer of the JUTC that held such capacity when the award was made to Mrs Mohammed-Wilson and more specifically when the alleged breach of the order occurred. However, to exercise this power the DPP must first be satisfied that at the time of the alleged breach, the Officer committed the breach personally, consented to the breach being committed, connived at or did not exercise reasonable diligence to ensure that such breach did not occur.
>
> **Having perused the documents submitted hereto, there is nothing to suggest to the satisfactory standard required that any Officer of the JUTC is criminally responsible.**
>
> The intent of the complainant is to recover the full sums owed to her by the JUTC. **Hence, criminal prosecution of the company may not be the best avenue to plod.** If the company is indeed found criminally liable and guilty of the offence, and subsequently fined, these fines are due to the Crown and will be of no benefit to the complainant.

> Further, the Civil Jurisdiction of the court is better suited to grant reprieve in matters where conflicting issues of compensation, statutory deductions and fulsome awards are being contested.
>
> It is advised that the complainant seek redress in the civil court." (Emphasis supplied)

[11] I will first make a comment on the second issue. The learned judge, at para. [36] of her judgment, referred to the DPP's ruling that, having reviewed the documentation provided to her office, there was "no indication that any officer of the JUTC would be criminally responsible to the satisfactory standard required". The learned judge commented at para. [36]:

> "This Court concurs with the view that the DPP when seeking to determine whether to initiate a prosecution is at liberty to make an assessment of the evidence, look at public interest issues and whether initiating such proceeding serves the interest of justice."

[12] In continuing to consider the issue, the learned judge noted that although the appellant submitted that the DPP erred in her interpretation of corporate responsibility, it was clear from the DPP's letter that she was aware of the principles of corporate responsibility. The learned judge commented that it was clear the DPP was assessing what the Crown would have to prove to establish a viable prosecution. At para. [37] the learned judge further stated:

> "…I am of the view that Mr Gordon's submission that the decision of the DPP was illegal, erred on a point of law or fact is not supported by the evidence of [sic] before the Court. Further the nature of the power of the DPP to decide whether to prosecute or not prosecute given under Section 94(3) of the Constitution is discretionary, therefore it is within her power to assess the evidence and decide if there is enough evidence to initiate a prosecution and more so a viable prosecution. In doing so and coming to the conclusion that the evidence did not meet the satisfactory standard required to initiate a prosecution, and in the absence of further evidence, the DPP's reasons did not amount to illegality under

> section 12(9) LRIDA or the law generally. I find that the DPP did not exceed the scope of her power derived from the legislative provisions."

[13] I see no error of law or fact in the learned judge's analysis. The DPP's letter reflected that she was fully aware of the principles of corporate criminal responsibility and that an officer can be found criminally responsible for the company's acts or omissions. There is no error of law in the letter.

[14] The appellant's only challenge is based on a disagreement with the conclusion the DPP reached after considering the relevant law and evaluating the facts or material presented to her office. It has not been shown that the DPP incorrectly considered or failed to consider any particular facts.

[15] Additionally, nothing prevents the JCF from providing further statements and materials to demonstrate to the DPP that she can successfully pursue charges against any specific officer in the JUTC, given their roles and responsibilities in ensuring the JUTC complies with the IDT's order. I, therefore, do not agree with Mr Gordon's submission that no reasonable DPP could have decided that it was not appropriate, on the material before her, to direct that any officer of the JUTC be charged.

[16] I agree with the learned judge's comments, at para. [40] of her judgment, that judicial review does not focus on whether the court would have reached a different conclusion, but rather on whether it is arguable with a realistic prospect of success that the DPP acted illegally, irrationally, or with procedural impropriety under the broad principles of judicial review.

[17] On the other issue relating to the prosecution of the JUTC itself, I agree that, in law, the JCF does not require the DPP's permission to charge the company.

[18] The learned judge opined that the DPP's statements in the letter did not reflect any error on a point of law or fact but constituted "the DPP's interpretation and opinion

of how the law should be applied to the [appellant's] case to obtain a just outcome". I agree.

[19] Before this court, there was extensive discussion about whether the DPP directed that the JUTC should not be charged. In my view, it is not arguable with a realistic prospect of success that the DPP issued such a directive. I agree with the DPP's counsel that the points made in the letter were "*obiter dictum*" since no ruling or directive is required by the DPP before the JCF can charge the JUTC. The wording of the letter supports this conclusion. Given these circumstances, it would not be appropriate to grant leave to apply for an order of *certiorari* to quash this *obiter dictum* by the DPP. Nor would it be necessary to issue an order of *mandamus* for her to reconsider any decision related to prosecuting the JUTC. The JCF is free to proceed with charging the JUTC if it deems fit.

Conclusion

[20] I, therefore, believe that the appellant has not established that the learned judge erred in her reasons and ruling. Furthermore, in my view, the appellant has not established arguable grounds for review with a realistic prospect of success.

[21] In short, the DPP does not need to rule on or direct a prosecution of the JUTC itself. She did not order that no prosecution take place.

[22] In addition, it is highly unlikely that the appellant will be able to successfully argue that the DPP's decision not to direct that any officer of the JUTC be charged was illegal, irrational, or wrong in law. This is bearing in mind her explanation that, on the material before her, she was not satisfied that she could establish, to a satisfactory standard, criminal responsibility on the part of any JUTC officer.

SHELLY-WILLIAMS JA (AG)

Introduction

[23] This matter involves an appeal against the decision of Wolfe-Reece J ('the learned judge') reflected in the written judgment dated 2 November 2023, with neutral citation [2023] JMSC Civ 210. In the said judgment, the following orders were made:

> "(1) An Order pursuant to Part 56.6(2) of the Civil Procedure Rules, 2002 (CPR) extending time within which to apply for Judicial Review, if this Honourable Court deems that such an Order is necessary in the circumstances, is refused.
>
> (2) Leave to apply for judicial review of the decision of the Respondent contained in letter of the 6th of October 2021 to not prosecute the Jamaica Urban Transit Company Limited (JUTC) for breaching Section 12(9) of the Labour Relations and Industrial Disputes Act is refused.
>
> (3) Leave to apply for an Order of certiorari to quash the decision of the Respondent to not prosecute the JUTC is refused.
>
> (4) Leave to apply for an Order of mandamus directing the Respondent to either reconsider her decision according to law or to initiate a prosecution against the JUTC pursuant to section 12(9) of the Labour Relations and Industrial Disputes Act is refused.
>
> (5) No order as to costs."

Background

<u>The Industrial Dispute Tribunal's proceedings</u>

[24] Mrs Selena Mohammed Wilson ('the appellant') was originally employed by the Jamaica Urban Transit Company Ltd ('the JUTC') as manager, service planning. The appellant applied for and was appointed deputy managing director of operations on 1 May 2018. At the time of her separation from the JUTC, she was also the deputy

managing director of operations, reporting directly to the managing director. In April 2019, the managing director of the JUTC terminated her employment contract, and the appellant subsequently filed a complaint with the Industrial Disputes Tribunal ('IDT'). The IDT awarded $11,600,000.00 (award dated 5 August 2021) to the appellant as compensation for unjustifiable dismissal from her employment. After the ruling, the appellant agreed with the JUTC to have the award paid in three instalments. The appellant averred that JUTC failed to pay the third portion in full and deducted $2,224,409.71. JUTC explained that the deductions were made for tax purposes.

[25] The IDT's assistance was sought to clarify JUTC's payment obligations, given the parties' differing opinions on the matter. It ruled that the appellant should have been paid the full amount of the award. This was communicated to the parties on 11 April 2022. Despite this clarification, JUTC failed to pay the appellant the outstanding amount of the award. Consequently, the appellant sought the police's assistance, and the police thereafter brought the matter to the respondent's attention.

[26] The Office of the Director of Public Prosecutions ('the ODPP') issued a letter on 6 October 2022 stating: -

> "In response to your letter dated September 16, 2022, the learned Director of Public Prosecutions (DPP) will not direct that any Officer of the JUTC be charged under s.12(9) of the **Labour Relations and Industrial Dispute [sic] Act**.
>
> The DPP has the power to direct that criminal charges be laid against any director, general manager, secretary or other similar officer of the JUTC that held such capacity when the award was made to Mrs Mohammed-Wilson and more specifically when the alleged breach of the order occurred.
>
> However, to exercise this power the DPP must first be satisfied that at the time of the alleged breach, the Officer committed the breach personally, consented to the breach being committed, connived at or did not exercise reasonable diligence to ensure that such breach did not occur.

> Having perused the documents submitted hereto, there is nothing to suggest to the satisfactory standard required that any Officer of the JUTC is criminally responsible.
>
> The intent of the complainant is to recover the full sums owed to her by the JUTC. Hence, criminal prosecution of the company may not be the best avenue to plod. If the company is indeed found criminally liable and guilty of the offence, and subsequently fined, these fines are due to the Crown and will be of no benefit to the complainant.
>
> Further, the Civil Jurisdiction of the court is better suited to grant reprieve in matters where conflicting issues of compensation, statutory deductions and fulsome awards are being contested.
>
> It is advised that the complainant seek redress in the civil court."

[27] A legal officer of the Jamaica Constabulary Force ('JCF') sent a letter to the ODPP on 18 October 2022, requesting that the office revisit its position in this matter. A letter was also sent to the ODPP by the appellant's counsel, requesting reconsideration of the 6 October 2022 decision. Although personnel within the ODPP indicated that they would respond to the request, no further response was received.

Supreme Court's proceedings

[28] Considering the respondent's decision, the appellant, through her attorney-at-law, sought leave to apply for judicial review in the Supreme Court. Tie-Powell J refused leave to apply for judicial review. The appellant then renewed the application for leave, but it was again refused when the matter came before the learned judge. Having reviewed the letter from the DPP, the learned judge in paras. 39 and 40 of her decision stated that: -

> "39. I am of the view that these statements do not constitute evidence of any error on a point of law or fact, or any improper or incorrect consideration that was made by the DPP. Rather, these statements constitute the DPP's

> interpretation and opinion of how the law should be applied to the Applicant's case to obtain a just outcome.
>
> 40. It is also noted that pursuant to Section 49 of the Interpretation Act, the direction of the DPP is required to charge a person who at the time of the commission of the offence was a Director, General manager, secretary or similar officer of that body or was purporting to act in any such capacity be liable to prosecution as if he has personally committed the offence. It is evident that the DPP made a specific determination on being able to prove to the satisfaction of the Court that any officer of the JUTC consented to, connived at or did not exercise all reasonable diligence as he ought to in the circumstances to prevent the offence.
>
> It has been emphasized and reemphasized by the Courts in this jurisdiction that judicial review is not concerned with the question of whether the Court would have come to a different conclusion or decided the matter differently than the DPP based on the evidence, but whether within the purview of the DPP, she acted illegal, [sic] irrationally or with procedural impropriety, as outlined in **Council of Civil of [sic] Service Unions v Minister for the Civil Service** [1985] AC 374. The fact that based on the DPP's assessment of the evidence she concluded that there was no material to substantiate that any officer of the JUTC would be criminally liable to the required standard is not evidence that the DPP acted *ultra vires* the LRIDA or otherwise illegally or irrationally. The Applicant has therefore failed to demonstrate on a balance of probabilities that she has an arguable ground of a real prospect of success in the claim for judicial review."

[29] The orders sought were on the same terms as those made in para. [3] above, except that the words "is refused" were absent and the costs order requested was "[a]n order for cost [sic] to be costs in the claim".

This court's proceedings

[30] The appellant, appealed to this court, seeking to have the decision of the learned judge set aside and to obtain leave to review the DPP's decision. Leave to appeal was

granted on 29 January 2024. The grounds of appeal, as reflected in the notice and grounds of appeal, relate to paras. 37 and 39-40 of the learned judge's written decision. The learned judge found, as per these paragraphs, that (a) the respondent did not exceed her powers as adumbrated in legislative provisions, (b) there was no improper consideration or error of law on the respondent's part in her view that a civil remedy was more appropriate, and (c) the appellant failed to demonstrate that she had an arguable ground with a realistic prospect of success in her judicial review matter.

[31] The appellant filed the following grounds of appeal, namely:

1) "The learned Judge below sitting in Open Court having ruled that the Applicant had proven that the application was not subject to the discretionary bar of delay and that that there was no alternative remedy available which would result in a bar to the application refused the application seeking leave to apply for Judicial Review and in so doing failed to properly exercise her discretion.

2) The learned [j]udge below sitting in Open Court erred in law in making the finding contained in paragraph 40 of her written reasons that the Applicant had failed to demonstrate on a balance of probabilities that she has an arguable ground of a real prospect of success in the claim for judicial review.

3) The learned [j]udge below sitting in Open Court erred in law in that she failed to properly construe section 49 (2) of the *Interpretation Act* and in so doing found that the Respondent had properly exercised her discretion to not prosecute the JUTC.

4) The learned [j]udge below erred in law in concluding in paragraph 37 of her written reasons that it is clear that the Respondent is aware of the principles of corporate criminal responsibility and in so doing upheld the Respondent's decision to not prosecute the JUTC in circumstances where these principles support the prosecution of a director, general manager, secretary or other similar officer of the JUTC.

5) The learned [j]udge below erred in law when she found in paragraph 39 of her written reasons that statements made by the Respondent in her decisions letter of the 6th of October, 2022 namely that the criminal prosecution of the JUTC "may not be the best avenue to plod" given the intent of the Application and that the Applicant should pursue remedies in the civil jurisdiction of the court, did not constitute an error on a point of law or fact, or any improper or inconsideration [sic]? on the part of the Respondent.

6) The learned [j]udge below erred in law in that she failed to distinguish between the discretion of the Respondent to determine the sufficiency of evidence to initiate prosecution and whether the principles of corporate criminal responsibility and/or section 49 of the *Interpretation Act* provided the Respondent with sufficient grounds to establish a *prima facie* case against a director, general manager secretary or other similar officer of the JUTC given the irrefutable evidence of the JUTC's refusal to comply with two awards of the IDT.

7) The learned [j]udge below erred in law in that that she failed to properly construe section 12 (9) of the *Labour Relations and Industrial Disputes Act* and/or section 49 (2) of the *Interpretation Act* and in so doing failed to consider whether the prosecution of the JUTC was a legal option capable of being pursued independent of whether there was sufficient evidence to initiate prosecution against a director, general manager, secretary or other similar officer of the JUTC.

8) The learned [j]udge below erred in law in that she failed to consider whether the Respondent's decision to not prosecute the JUTC was irrational or erroneous in law in the face of the irrefutable evidence that it had refused to comply with two awards of the IDT." (Emphasis as in the original)

[32] During submissions, the eight grounds were summarised and argued under two main headings, which were:

i. whether the learned judge below erred when she refused leave to apply for judicial review to challenge the respondent's decision not to prosecute officers of JUTC (grounds 4,6,7 and 8); and

ii. whether the learned judge below erred when she refused leave to apply for judicial review to challenge the respondent's decision not to prosecute JUTC (grounds 1, 3 and 7).

Analysis

Are the decisions of the Office of the Director of Public Prosecutions subject to judicial review?

[33] In addressing these issues, a preliminary question that arises is whether the DPP's decisions are subject to review. The DPP is an office conferred/created by the Constitution of Jamaica. The DPP's powers are enshrined in section 94 of the Constitution, which states, *inter alia*, that:

> "(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do-
>
> a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
>
> b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
>
> c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
>
> (4) The powers of the Director of Public Prosecutions under subsection (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions."

[34] Counsel for the appellant argued that it is well settled that the respondent's decisions are subject to judicial review on the grounds of illegality, irrationality, and procedural impropriety. The respondent conceded that its decisions are subject to judicial review and relied on the authority of **Jeewan Mohit v The DPP of Mauritius** [2006] UKPC 20.

[35] The simple answer to whether the DPP's decisions (whether taken directly by her or through personnel within her office, further to section 94(4) of the Constitution) are subject to judicial review is yes. This issue has been adjudicated and settled in cases before the Privy Council and this court. In the case of **Jeewan Mohit v The Director of Public Prosecutions of Mauritius**, the Privy Council, referenced (among others) the case of **Lagesse v Director of Public Prosecutions** [1990] MR 194, and relied on pages 200-201 in that decision to conclude, at para. 13 of its judgment, that: -

> "With the concluding paragraph of this passage the Board again, respectfully, agrees: where proceedings initiated by the DPP are before the courts, they must ensure that the proceedings are fair and that a defendant enjoys the protection of the law even if that involves interference with the DPP's discretion as prosecutor. But the Board is not persuaded by the court's reasons for holding that the DPP's decisions to file a nolle prosequi or not to prosecute are not amenable to judicial review. The complainant may, as in this case, have no remedy against any suspected tortfeasor. The alternative course of resort to private prosecution is not an available option where it is a private prosecution which the DPP has intervened to stop. Recognition of a right to challenge the DPP's decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP's decision are made out, it involves the courts in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner."

[36] The Board went on to conclude, at para. 20 of the decision, that:

> "Thus the Board should approach the present issue on the assumption that the powers conferred on the DPP by section 72(3) of the Constitution are subject to judicial review, whatever the standard of review may be, unless there is some

> compelling reason to infer that such an assumption is excluded…"

[37] The option to review the DPP's decision has been adopted and applied in several cases in the Supreme Court, including **Nerine Small v The Director of Public Prosecutions** [2013] JMSC Full 1 and **Millicent Forbes v The Director of Public Prosecutions** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 03617, judgment delivered 9 April 2010. This position has been adopted and applied in several cases in this jurisdiction, including this court's decision in **Leonie Marshall v The Director of Public Prosecutions**, (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 39/2003, judgment delivered 18 March 2005.

Whether the learned judge below erred when she refused leave to apply for judicial review to challenge the respondent's decision not to prosecute officers of JUTC (Grounds 4,6,7 and 8).

Appellant's submission

[38] Relying on cases such as **Sharma v Brown-Antoine and Others** [2006] UKPC 57 and **R (on application of N) v Mental Health Review Tribunal (Northern Region)** [2005] EWCA Civ 1605 at para. 62, along with the analysis provided by Professor Eddy Ventose on pages 8 and 9 regarding leave to apply for judicial review in Commonwealth Caribbean Administrative Law, the appellant argued that the lower court should have granted leave for judicial review. Counsel for the appellant submitted that the granting of leave for judicial review depends on the applicant showing that the matter has an arguable ground with a realistic prospect of success and is not subject to any discretionary bar, such as delay or an alternative remedy. Furthermore, the more serious the allegations, the stronger the evidence required to prove them on the balance of probabilities.

[39] Counsel for the appellant submitted, relying on the case of **R v Director of Public Prosecutions, Ex Parte Manning and Another** [2001] QB 330, that a court reviewing a DPP's decision not to prosecute would usually be guided by how the matter would

resolve at trial. It was further argued that a court ought to use its power sparingly and should grant leave to challenge such a decision only where it is found to be "bad in law". However, this burden is not so heavy as to prevent citizens from obtaining redress through judicial review.

[40] The appellant argued that it is "inescapable" that the managing director of JUTC should be the company's officer who is accountable for JUTC's non-payment of the IDT's award in full. This is so, the appellant argues, because the person holding that office would be the "directing mind" of the company. The case law authorities of **Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd** [1915] AC 705 and **H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd** [1957] 1 QB 159, in conjunction with section 49(2) of the Interpretation Act, were cited to bolster this argument.

[41] Counsel for the appellant acknowledged that, under section 49(2) and (3) of the Interpretation Act, the consent of the DPP is required before charging an officer of the JUTC. In subsequent written submissions, it was also argued that proof of negligent conduct by an officer of the JUTC is sufficient to establish the offence under section 49(2) of the Labour Relations and Industrial Disputes Act ('LRIDA'), because a lack of reasonable diligence amounts to the same. Further support was found in the case of **R v Chargot Ltd (t/a Contract Services)** [2009] 1 WLR 1 at page 15, para. 33, for the meaning of "consent, connivance or neglect" in which the case of **Attorney General's Reference (No 1 of 1995)** [1996] 1 WLR 970 was referred to and applied.

[42] The appellant argued that, at the very least, a *prima facie* case was established further to section 12(9)(a) of the LRIDA and thus the respondent ought to have exercised the powers bestowed on her under section 94 of the Constitution of Jamaica to prosecute.

Respondent's submissions

[43] The respondent argued that the documents before the representative of the ODPP contained no evidence that Mr. Paul Abrahams, as the managing director of JUTC, was the directing mind of the company. It was further argued that merely being the directing

mind is not sufficient to prove the criminal liability of a company's officer. It must also be proven that the specific person consented, connived, or failed to exercise reasonable diligence that he should have exercised to prevent the failure to pay the IDT's award. Counsel submitted that there was no evidence before the respondent to show such an omission or commission on the part of Mr. Abrahams to have caused him to be personally prosecuted under section 12(9) of the LRIDA. Further, there was insufficient evidence to establish criminal liability of any of the company's officers.

Analysis

[44] The standard for leave to apply for judicial review has been well established in several cases from our court and the Privy Council. In the well-quoted case of **Sharma v Brown-Antoine**, the Chief Justice of Trinidad and Tobago sought to challenge a decision to prosecute him, arguing that it was unfair and/or an abuse of the court's process. The Privy Council, in that decision, sets out the threshold an applicant must meet to be granted leave to apply for judicial review (at page 7), which is:

> "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: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. 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. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability: '… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.'"

[45] This test was further explained in the case of **Attorney General of Trinidad and Tobago v Ayers-Caesar** [2019] UKPC 44, where Lord Sales, writing for the majority of the Board, opined at para. 2 that:

> "2. The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether [the applicant for judicial review] has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in Sharma v Brown-Antoine [2006] UKPC 57; [2007] 1 WLR 780, para 14. Wider questions of the public interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage."

[46] Lord Sales also indicated that the primary purpose of an application for leave was to filter and exclude unarguable cases.

[47] In the recent decision of **National Bank of Anguilla (Private Banking and Trust) Ltd (in Administration) and another (Appellants) v Chief Minister of Anguilla and others (Respondents) (Anguilla)** [2025] UKPC 14 ('**National Bank of Anguilla v Chief Minister of Anguilla**'), Lord Reed, writing for the Board, defined the approach to be adopted by the appellate court in reviewing the discretion exercised by the judge of the lower court with respect to judicial review applications. He stated in para. 84 of the judgment that:

> "84. Deciding whether there is an arguable ground for judicial review is not an exercise of discretion. Accordingly, when the judge in the present proceedings refused leave to apply for judicial review on the ground that there was no arguable ground for judicial review with a realistic prospect of success…, he was not exercising a discretion. It follows that, on the appeal against his decision, the Court of Appeal was not reviewing an exercise of discretion. It should not, therefore, have confined itself to the limited grounds on which the exercise of discretion might be reviewed on appeal, but should have considered whether the judge had erred in

> concluding that there was no arguable ground for judicial review. If it concluded that he had, it should then have re-considered the matter for itself. In approaching the appeal as a review of the exercise of discretion, the Court of Appeal accordingly erred in law. It is therefore necessary for the Board to consider the question anew."

[48] In the case of **Council of Civil Service Unions v Minister for the Civil Service** [1985] 1 AC 374, Lord Diplock stated that:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'."

[49] In this case, counsel for the appellant contended that they have an arguable case with a reasonable prospect of success and that leave to apply for judicial review should have been granted to review the ODPP's decision not to prosecute. The uncontested allegations relating to the proposed criminal case are that: -

a. IDT awarded $11,600,000.00 to the appellant.

b. JUTC indicated that the sum of $2,224,409.71 was to be withheld for tax purposes.

c. IDT made a second ruling that JUTC should not have withheld the outstanding sum of $2,224,409.71, which should have been paid to the appellant.

d. There was no appeal from IDT's decision, so the decision stands.

e. The outstanding sum has not been paid to the appellant.

f. The managing director of JUTC personally fired the applicant.

g. JUTC was represented at both IDT hearings by the industrial relations manager of JUTC, attorney at law Mr Mathew Royal, and legal officer Miss Kimberley Dobson.

[50] Counsel for the JCF, after reviewing the relevant statements and documents, believed that charges should be initiated and referred the case to the ODDP for a decision. The ODPP responded with a letter from a Deputy Director of Public Prosecution, stating that no JUTC officer would face charges. A second section of that letter, which pertains to JUTC, has prompted debate over whether it was an obiter dictum or part of the ODPP's ruling.

[51] I will first address whether leave should have been granted to review the ODPP's decision not to charge the JUTC officers. The JUTC is a corporation that is defined by Section 3 of the Interpretation Act as a person. Section 3 of the Interpretation Act states that a person: -

> "includes any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons;"

[52] Sections 49(2) and (3) of the said Interpretation Act provide that members of a corporation may be charged; however, the ODPP must give consent prior to a charge being laid. Sections 49(2) and (3) state that: -

> "(2) Where an offence under any Act passed after the 1st April, 1968, has been committed by a body corporate the liability of whose members is limited, then notwithstanding and without prejudice to the liability of that body, any person who at the time of such commission was a director, general manager, secretary or other similar officer of that body or was purporting to act in any such capacity shall, subject to subsection (3) be liable to be prosecuted as if he had

> personally committed that offence and shall, if on such prosecution it is proved to the satisfaction of the court that he consented to, or connived at, or did not exercise all such reasonable diligence as he ought in the circumstances to have exercised to prevent the offence, having regard to the nature of his functions in that capacity and to all the circumstances, be liable to the like conviction and punishment as if he had personally been guilty of that offence.
>
> (3) A person shall not be charged under subsection (2) except upon the direction of the Director of Public Prosecutions."

One issue that must be addressed is the intent that is associated with this offence as it concerns officers of a corporation.

[53] Assistance as to corporate intent can be garnered from the House of Lords case of **R v Chargot Limited (t/a Contract Services) and others**, which concerned a worker who had died from an accident at a worksite. The worker had been driving a truck that tipped over, and he was buried under the spoil. The company, as well as its director and general manager, was charged with a breach of health and safety at work. One issue raised on appeal was that the trial judge failed to give guidance to the jury regarding the words "neglect, connivance, or consent". Lord Hoffman, writing on behalf of the Lords of Appeal, stated in paras. 32 to 34 that:

> "The prosecution of a director, manager, secretary or other similar officer under section 37 requires it first to be established that a body corporate of which he is an officer has committed an offence under one of the other provisions in that Part of the Act. Where the offence that is alleged against it is a breach of section 2(1) or section 3(1) the considerations mentioned above will, of course, all apply. So he can say in his defence that there was no breach of that provision by the body corporate or, if there was, that it was not reasonably practicable for the body corporate to avoid it. It is only when it is proved that an offence under one of those provisions has been committed that the question can arise as to whether the breach was something for which the officer too can be held criminally responsible. Then there are some additional facts and circumstances that must be established. The offence which section 37 creates is not an absolute offence. The

officer commits an offence under this section only if the body corporate committed it with his consent or connivance or its commission was attributable to any neglect on his part. These are things relating to his state of mind that must be proved against him.

33. Here too the circumstances will vary from case to case. So no fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer's state of mind was such as to amount to consent, connivance or neglect. In some cases, as where the officer's place of activity was remote from the work place or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence of which fair notice may have to be given. In others, where the officer was in day to day contact with what was done there, very little more may be needed. In *Wotherspoon v HM Advocate* 1978 JC 74, 78 Lord Justice General Emslie said the section is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of the offence by a body corporate, and that the functions of the office which he holds will be a highly relevant consideration. In *R v P Ltd* [2008] ICR 96 Latham LJ endorsed the Lord Justice General's observation that the question, in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate safety procedures were in place. I would too. The fact that the penalties that may be imposed for a breach of this section have been increased does not require any alteration in this test. On the contrary, it emphasises the importance that is attached, in the public interest, to the performance of the duty that section 37 imposes on the officer.

34. In *Attorney-General's Reference (No 1 of 1995)* [1996] 1 WLR 970 the questions were directed to the effect of section 96(1) of the Banking Act 1987 which is in identical terms to section 37 of the 1974 Act. Lord Taylor of Gosforth CJ said at p 980 that where 'consent' is alleged against him, a defendant has to be proved to know the material facts which constitute the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts. I agree, although I would add that consent can be established by

> inference as well as by proof of an express agreement. The state of mind that the words 'connivance' and 'neglect' contemplate is one that may also be established by inference. The offences that are created by sections 2(1) and 3(1) are directed to the result that must be achieved by the body corporate. Where it is shown that the body corporate failed to achieve or prevent the result that those sections contemplate, it will be a relatively short step for the inference to be drawn that there was connivance or neglect on his part if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference."

[54] The JCF, as prescribed by the Interpretation Act, was duty-bound to refer the file to the ODPP for its consent prior to charging the director, general manager, secretary, or other similar officer of JUTC ('the officers'). The decision not to charge any of the officers was made clear in the ODPP's letter dated 6 October 2023, which stated that:

> "Having perused the documents submitted hereto, there is nothing to suggest to the satisfactory standard required that any Officer of the JUTC is criminally responsible."

[55] The offence that is being alleged is a breach of section 12(9) of the LRIDA, which states that:

> "Any person who fails to comply with any order or requirement of the Tribunal made pursuant to subsection (5), or with any other decision or any award of the Tribunal, shall be guilty of an offence and-
>
> a) in the case of an employer to whom that order, requirement, decision or award relates, shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five hundred thousand dollars, and in the case of a continuing offence to a further fine not exceeding twenty thousand dollars for each day on which the offence continues after conviction;
>
> b) in the case of any other person to whom that order, requirement, decision or award relates, shall be liable

> on summary conviction before a Resident Magistrate to a fine not exceeding fifty thousand dollars, and in the case of a continuing offence to a further fine not exceeding two thousand dollars for each day on which the offence continues after conviction."

[56] Counsel for the respondent argued that all communications regarding JUTC and its decision before the court did not indicate that the managing director of JUTC could be held criminally liable. In this case, the allegations and evidence given by the appellant during the IDT hearings indicate that the managing director had personally terminated the appellant's contract. JUTC then participated in and was represented at both IDT hearings, among others, by JUTC's industrial relations manager. The second ruling of the IDT specifically addressed the issue and found that no funds should have been withheld from the appellant. I find, adopting the dicta in **R v Chargot**, that, based on the available evidence, it was open to the DPP to interpret the actions of the officers of the JUTC as falling within the ambit of section 12(9) of the LRIDA.

[57] The termination occurred in circumstances in which the managing director was the only employee of the company superior to the appellant, and with his unchallenged declaration to her that he was going to terminate her employment (see page 8 of the transcript from the hearing at the IDT) enough facts were before the DPP, from which inferences could be reasonably drawn as to whether anyone: "consented to, connived at, or did not exercise reasonable diligence as he ought in the circumstances to have exercised to prevent the offence, having regard to the nature of his functions in that capacity and to all the circumstances" (section 49(2) of the Interpretation Act). The use of the phrase "having regard to …all the circumstances" indicates that it would be open to any court that might review the matter to have regard to the facts and all the reasonable inferences that might be drawn in the matter.

[58] I find that the learned judge erred in law in making the finding, in para. 40 of her written reasons, that the appellant had failed to demonstrate, on a balance of probabilities, that she had an arguable ground with a real prospect of success in the claim

for judicial review. I find that the appellant does have an arguable case with a realistic prospect of success, and I, therefore, find that leave should have been granted to review the DPP's decision. The appeal should, therefore, be allowed on the grounds, which gave rise to this issue.

Whether the learned judge below erred when she refused leave to apply for judicial review to challenge the respondent's decision not to prosecute JUTC (grounds 1,3 and 7)

[59] There is the issue of whether the ODPP delivered a ruling on whether JUTC should be charged. Counsel for the appellant argued that, even if insufficient evidence exists to prosecute an officer of JUTC, sufficient evidence exists (based on the undisputed failure to pay the IDT award in full) to prosecute JUTC as of right.

[60] Regarding the charges against JUTC, counsel for the respondent's position was that the request for guidance from the JCF was limited to officers within JUTC, not the company itself. Further, the correspondence from the JCF made it clear that the JCF recognised an offence had been committed and was at liberty to prosecute without direction from the ODPP. It was further argued that the legislation did not require the ODPP's direction to facilitate prosecution. Reliance was placed on case law, including **R v Commissioner of Police of the Metropolis ex parte Blackburn** [1968] 2 QB 118 and **Commissioner of Police and Another v Steadroy C O Benjamin** [2014] UKPC 8, (**'Steadroy Benjamin'**), at para. 27, for the position that the commissioner of police has sole responsibility to determine whether to prosecute, and no "Minister of the Crown" could tell him to do otherwise. This is so unless statutory provisions expressly require the ODPP's prior approval.

Analysis

[61] The fact that generally, the JCF can bring charges against anyone at any time, without reference to the ODPP, is not in issue. That was clearly established in the case of **R v Commissioner of Police of the Metropolis ex parte Blackburn**, where Lord Denning, at page 136A of his judgment, stated that:

> "I hold it to be the duty of the Commissioner of Police of the Metropolis… to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so…. He is answerable to the law and to the law alone."

[62] This dictum was approved in the case of **Steadroy Benjamin**, where Lord Wilson, delivering the opinion of the Board, stated at para. 27 of the judgment , that: -

> "Is it indeed absurd for the power to discontinue not to be matched by a power to prevent? The Director exercises his power to discontinue by taking a formal, publicly visible, step in the proceedings which can (with whatever degree of difficulty: *Leonie Marshall v Director of Public Prosecutions* [2007] UKPC 4) be challenged by judicial review. An instruction by the Director to the police not to institute proceedings would also in theory be susceptible to judicial review but would often lack the public visibility which would alert potential applicants to the possibility of challenge." (Italics as in the original)

[63] Unlike section 49 of the Interpretation Act, which requires the consent of the DPP before officers of a corporation can be charged, the JCF requires no such consent to charge the JUTC. The issue arose out of a section of the letter dated 6 October 2023 from the ODPP. The disputed section of the letter states: -

> "The intent of the complainant is to receive the full sums owed to her by the JUTC. Hence, criminal prosecution of the company may not be the best avenue to plod. If the company is indeed found criminally liable and guilty of the offence, and subsequently fined, these fines are due to the Crown and will be of no benefit to the complainant.

> Furthermore, the Civil Jurisdiction of the court is better suited to grant reprieve in matters where conflicting issues of compensation, statutory deductions and fulsome awards are being contested."

[64] Counsel for the respondent argued that these paragraphs are *obiter dictum* and, as such, cannot be viewed as a directive to the JCF not to charge the JUTC. Counsel for the appellant argues that this, in fact, amounted to a decision not to charge.

[65] Section 94 of the Constitution gives the ODPP the power to commence, intervene in, and discontinue prosecutions. The latter two powers are exclusive to the ODPP. Indeed, the ODPP ordinarily has no power to prohibit a prosecution, as **Steadroy Benjamin** noted. Nevertheless, the police may consider it imprudent to launch a prosecution where the ODPP has expressed a proscription. I find that the wording of the letter of 6 October 2023 was a directive given not to charge the JUTC. The letter also outlined the proper course of action for the potential complainant, which did not include criminal charges. This position was maintained at the leave hearing before the lower court, when the same Deputy Director of Public Prosecutions appeared and submitted that charges should not be laid against the officers of JUTC, nor against the JUTC itself. It is also apparent that the JCF's legal officer was unsure how to proceed, as she wrote further correspondence to the ODPP, which went unanswered. Merely indicating that, despite this perceived decision, the JCF can proceed to charge is disingenuous.

[66] I find that it could reasonably be interpreted by the JCF as a decision/directive not to prosecute the JUTC. I find that the learned judge erred in law, in para. 39 of her decision, when, in reference to the section of the letter concerning whether JUTC should be held criminally liable, she stated:

> "Rather, these statements constitute the DPP's interpretation and opinion of how the law should be applied to the Applicant's case to obtain a just outcome."

[67] I find that the appellant has an arguable case with a realistic prospect of success, and as such, leave should be granted on the grounds embodied in this second issue.

Alternative remedies

[68] The next issue is whether the appellant had alternative remedies to the application for judicial review. The appellant asserts that section 12(9) of the LRIDA was breached. Rule 56.3(d) of The Supreme Court of Jamaica Civil Procedure Rules (2002) ('CPR') dictates that, when applying for leave to file a judicial review, the applicant must indicate

> "whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued."

[69] The respondent expressed the view in the letter dated 6 October 2023, that the civil jurisdiction is a better avenue for the appellant to pursue her claim. The respondent maintained this position in her submissions to the learned judge in the application for leave for judicial review. The appellant's submission is that there is no alternative to filing charges in this matter. The appellant's counsel argues that the fact that she had the option to file a civil claim is not an alternative remedy to the respondent's decision not to charge.

Analysis

[70] I find that the IDT's decision regarding payment of the outstanding sum was clear. The JUTC did not apply to review the IDT's decision. The IDT has no power to enforce its own orders and decisions. Parliament considered the IDT's decisions so important that it attached criminal sanctions for noncompliance. Once allegations are made that a decision has been breached, it is the court's role to decide whether they are made out. Whether the appellant has the option to file a claim to recover the sum is a separate issue. It is like an individual driving recklessly and hitting a pedestrian on the road. The driver can be charged with dangerous or reckless driving. That would not preclude the pedestrian from seeking damages for the injuries he suffered in the accident.

The criminal sanction is important for enforcing the rules of the road and as a deterrent to others who may want to breach them. The civil action is merely compensatory. The learned judge correctly evaluated the evidence and the law presented in the application before her and found. at para. 46 of her decision, that no alternative remedy existed**.**

Conclusion

[71] I conclude that the ODPP's decision is subject to judicial review. I find that the appellant has an arguable ground with a realistic prospect of success for judicial review of the ODPP's decision not to grant consent for officers of the JUTC to be the subject of criminal charges. Leave for judicial review should have been granted. I also find that the ODPP issued what reasonably amounted to a directive to the JCF that the JUTC should not be charged, and that decision is subject to judicial review. Therefore, I am of the view that we should allow the appeal and grant leave to pursue judicial review.

F WILLIAMS JA

ORDER

By majority (Foster-Pusey JA dissenting)

a. The appeal is allowed.

b. The order made by Wolfe-Reece J, in judgment dated 2 November 2023, refusing leave to apply for judicial review, is set aside.

c. Leave to apply for judicial review is granted.

d. Leave is granted on condition that the appellant file a claim for judicial review within 14 days of the date of this order.

e. There shall be no order as to costs in the court below.

f. The costs of the appeal are awarded to the appellant to be agreed or taxed, unless, within 14 days of the date of this order, the party seeking

a different order as to costs files and serves written submissions for a different costs order to be made. Any responding party is to file and serve written submissions within 14 days of service on them of the submissions of the party seeking costs. Consequently, the court will consider the issue of costs on paper.