[2013] JMSC FULL 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2013/HCV00626

CORAM: THE HON. MR. JUSTICE H. MARSH
THE HON. MS. JUSTICE C. MCDONALD
THE HON. MR. JUSTICE D. BATTS

BETWEEN	**NERINE SMALL**	**APPLICANT**
A N D	**THE DIRECTOR OF PUBLIC PRODECUTIONS**	**RESPONDENT**

Renewed Application for Permission to Apply for Judicial Review - Whether Director of Public Prosecution's decision not to prosecute ultra vires - Circumstances in which permission to review will be granted - Labour Relations and Industrial Disputes Act - Enforcement of Order of the Industrial Disputes Tribunal.

Mrs. Georgia Gibson-Henlin instructed by Henlin Gibson Henlin, Attorney-at-Law for the Applicant.

Ms. Tracy Ann Johnson and Mrs. Andrea Swaby, Attorneys-at-Law for the Respondent.

Ms. Carlene Larmond for the Attorney General.

HEARD: 1st, 2nd and 29th, July, 2013

MARSH, J.

I have read the judgment and reasons in draft of Batts, J. and save to say that I concur, have nothing to add.

MCDONALD, J.

I also have been afforded the opportunity to read the judgment in draft of Batts, J. I agree with his reasons and conclusion.

BATTS, J.

[1] The Applicant, Nerine Small had her application for permission to apply for Judicial Review refused by the Honourable Mr. Justice Donald McIntosh a Judge of the Supreme Court. She has renewed that application before the Full Court of the Supreme Court pursuant to Order 56.5 (1) of the Civil Procedure Rules.

[2] The renewed application is supported by three affidavits of Nerine Small dated 5th February, 2013, 3rd June, 2013 and 8th February, 2013. The Respondent has filed and relies on two affidavits of Andrea Swaby sworn to on the 11th February, 2013 and 1st July, 2013. The material facts and circumstances of the application are not in dispute and may be shortly stated.

[3] The applicant was employed to Caribbean Airlines Ltd., as Vice-President Legal Affairs and Corporate Secretary. Her employment was terminated and she alleged the termination was wrongful. The applicant's complaint was eventually heard by the Industrial Dispute Tribunal which after a hearing made an award in her favour. The award is dated the 31st July, 2012 and concludes with the following words:

> **"Caribbean Airline Limited, having conceded its case by its expressed inability to adduce evidence to justify its decision to dismiss the worker have left the Tribunal with the simple task of determining what is a**

just fair and reasonable Award taking into consideration all the relevant facts in this matter.

In doing this Tribunal is guided by the judgment of the Lords of the Judicial Committee of the Privy Council Appeal No. 69 of 2003 in Jamaica Flour Mills v. Industrial Disputes Tribunal and National Workers Union, where Lord Scotty (sic) Foscote at paragraph 24 made the following pronouncement on the matter of re-instatement:

> **".....their Lordships would observe, however that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the code……"**

Accordingly, as a result of the unjustified dismissal of Nerine Small, the Tribunal awards as follows:

THE AWARD

> **That Miss Nerine Small be reinstated in her job effective July 1, 2011 with the payment of full normal wages."**

[4] Miss Small's Attorneys thereafter wrote to the airline's attorneys requesting implementation of the award. The airline's attorneys wrote back indicating that they would not be appealing the Industrial Disputes Tribunal's award and intended to 'fully' comply. They advised in that letter, which is dated 13th August, 2012 that:

> **"CAL intends to make the post of Vice President Legal Services redundant and this will take effect later this week. Accordingly, Miss Small will receive her full salary, for the month of August 2012 together with pay in lieu of notice in respect of the redundancy exercise on or before Friday 17th August, 2012."**

The letter dated 13th August, 2012 was signed by Anna Gracie of the firm Rattray Patterson Rattray which represented Caribbean Airlines Limited.

[5] Two letters dated the 15th August, 2012 addressed to Miss Nerine Small were sent to the office of her attorneys. These letters were signed by Miss Charmaine Heslop-DaCosta, Vice President Human Resources of Caribbean Airlines. The letters read as follows:

> **"August 15, 2012**
>
> **Ms. Nerine Small**
> **6 Fort George Road**
> **Stony Hill**
> **St. Andrew**
> **JAMAICA**
>
> **Dear Ms. Small**
>
> **In accordance with the decision of the Industrial disputes Tribunal on July 31, 2012 for the reinstatement of your employment to Caribbean Airlines Limited, we**

have requested of the Norman Manley International Airport ('NMIA') to issue you with a permanent Restricted Access Pass (RAP) which will be processed according to NMIA's security screening procedures. In the interim, arrangements have been put in place for NMIA to issue you with a Temporary/Visitor's Pass to facilitate access to the Hangar offices.

On NMIA's issuance of the Temporary/Visitor's Pass, you will be accompanied by a company representative to your offices as contained in the NMIA security procedures. When exiting the compound, you will be required to surrender the Temporary/Visitor's Pass to the security personnel on duty.

Yours truly
CARIBBEAN AIRLINES LIMITED

Charmaine Heslop-DaCosta (Mrs.)
Vice President, Human Resources

August 15, 2012

Ms. Nerine Small
6 Fort George Road
Stony Hill
St. Andrew
JAMAICA

Dear Ms. Small:

We write to advise that Caribbean Airlines (CAL) has reorganized the manner in which it delivers legal services within its organization. One effect of that reorganization is that it has outsourced many of the functions previously carried out by the Vice President Legal and Corporate Secretary. Additionally, it has created the post of General Counsel.

As a result of the foregoing your position as Vice President and Corporate Secretary will be declared redundant and your employment terminated with effect from August 15, 2012.

You will be paid up to August 15, 2012 when your employment will be terminated. You will also be paid in lieu of your notice entitlement as well as for any outstanding vacation leave due to you. Your employment commenced in October 2010. Accordingly, you are not entitled to redundancy within the provisions of the Employment (Termination and Redundancy Payments) Act.

However, upon receipt of these payments you will not be required to report for duty over the period August 1, 2012 to August 15, 2012 when you are paid and when your termination takes effect, unless you are specifically required to do so.

Please see hereunder a detail of the compensation to which you are entitled in respect of this termination:

	JAD	USD
Total Net Salary for July 1, 2011 to July 31, 2012	1,319,959.37	110,357,98
Total net payments inclusive of the following: Salary for August 1, 2012 to August 15, 2012 Vacation for 20 days Payment in lieu of notice for 3 months	378,472.58	37,148.58

You will observe that normal wages, notice pay and pay for untaken earned vacation leave are subject to normal statutory and other payroll deductions. (See statement attached and four cheques enclosed).

You are required to return all company property, including, if applicable, but not limited to, files, identification cards.

We take this opportunity to thank you for your service to the Company and wish for you success in your future endeavours.

Yours truly,
CARIBBEAN AIRLINES LIMITED

Charmaine Heslop-DaCosta (Mrs.)
Vice President, Human Resources

Enclosures:"

[6] The applicant was not able to resume her position, sit at a desk or even return to the offices of Caribbean Airlines Ltd. In effect it appears she was reinstated and made redundant simultaneously. Her attorneys by letter dated 26th September, 2012 protested what they allege was the failure of Caribbean Airlines Ltd. to implement the order of the Industrial Disputes Tribunal. After an exchange of letters in which Caribbean Airline's attorneys mentioned they had "reinstated and then terminated her employment by way of redundancy," the applicant laid an information Number 26007/2012 before the Corporate Area Resident Magistrate's Court on the 16th October 2012. Caribbean Airlines Ltd. was charged with breach of an order of the Industrial Disputes Tribunal pursuant to Section 12(9) (a) of the Labour Relations and Industrial Disputes Act.

[7] By letter dated the 9th October, 2012 Caribbean Airlines Ltd. through its attorneys wrote to the Minister of Labour and Social Security seeking the Minister's:

> **"Intervention to ensure that this matter may be resolved."**

That letter in its second paragraph defined the "matter" to be resolved in the following way:

> **"A dispute exists between our client and Miss Nerine Small arising from an Award of the Industrial Disputes Tribunal handed down on 31st July, 2012 and a decision taken by our client contained in letter dated 15th August, 2012 to make the position of Vice President, Legal Affairs and Corporate Secretary redundant."**

[8] Having received no response or acknowledgement the attorneys for Caribbean Airlines Ltd. wrote another letter to the Minister dated 14th December, 2012 by way of follow up. Neither of these letters were copied to the applicant or her attorneys.

[9] On the 9th January, 2013 the Ministry of Labour and Social Security wrote the following to the applicant's attorney:

> **"This Ministry has been informed by the Attorneys representing Caribbean Airlines Limited that a dispute exists between your client Miss Nerine Small and the Airline arising from an Award of the Industrial Disputes Tribunal made on July 31, 2012, and the subsequent decision of the Airline to make the position of Vice-President Legal Affairs and Corporate Secretary redundant.**
>
> **Your comments on the matter would be greatly appreciated as well as tentative dates and times convenient to you to attend a meeting at this Ministry in an effort to resolve this issue."**

[10] The applicant's attorneys responded the following day. That letter concluded with the following paragraph:

> **"In the circumstances the only dispute that our client now has with Caribbean Airlines is its failure to comply with the order of the Industrial Disputes Tribunal. This is being adjudicated on in the Resident Magistrate's Court. It will shortly be sued on in the civil courts for the unpaid wages consequent thereon.**
>
> **For these reasons we are unable to advise our client to participate in any further proceedings at the Ministry since the proceedings have moved on since having been first reported to the Minister on the 16th day of September, 2011. Caribbean Airlines needs to comply with the order of the Industrial Disputes Tribunal.**

Please be advised accordingly."

[11] By letter dated the 4th January, 2013 Mr. Walter Scott, Q.C., writing on behalf of Caribbean Airlines Ltd. penned a letter to the Director of Public Prosecutions. That letter invited the learned director to exercise her powers under Section 94(3) of the Constitution and to discontinue what the writer described as:

> **"this present charade of a private prosecution, which in essence amounts to an abuse of the process of the Criminal Courts."**

That letter it should also be noted was not copied to the applicant or her legal representatives.

[12] The learned Director of Public Prosecutions thereafter wrote the first of two letters of decision about which the applicant complains. The first letter is dated the 30th January, 2013 and is addressed to the applicant's legal representative and reads as follows:

> **"January 30, 2013**
>
> **Mrs. Georgia Gibson-Henlin**
> **Attorneys-at-Law**
> **Henlin Gibson Henlin**
> **Suites 3 & 4**
> **24 Cargill Avenue**
> **Kingston 10**
>
> **Dear Madame,**
>
> **Re: Regina v. Caribbean Airlines Limited Information No. 26007/2012**
>
> **We refer to the matter at caption, and letter dated 04 January 2013, a copy of which is attached for your perusal. Attorneys for Caribbean Airlines asked the Office of the Director of Public Prosecutions to review the matter at caption and to exercise our powers under section 94(3) of the Constitution in discontinuing the private prosecution brought by your client Ms. Nerine Small.**
>
> **It is apparent that there is a dispute which has arisen concerning the award of the Industrial Disputes Tribunal**

handed down on 31 July 2012. We have noted that the Attorneys acting for Caribbean Airlines Limited wrote to the Honourable Mr. Derrick Kellier, MP, Minister of Labour and Social Security on the 09 October 2012 and also on the 14 December 2012 seeking his immediate intervention to ensure that the dispute arising from the award of the Industrial Disputes Tribunal is resolved quickly.

We have attached the relevant letters for ease of reference.

We have considered the effect of these letters in light of the private prosecution commenced by Ms. Small and are guided by section 12(10) of the Labour Relations and Industrial Disputes Act which reads,

'If any question arises as to the interpretation of any award of the tribunal the Minister or any employer or Trade Union, or worker to whom the award relates may apply to the Chairman of the Tribunal for a decision on such question, and the division of the tribunal by which such award was made shall decide the matter and give its decision to the Minister and to the employer and trade union to whom the award relates, and to the worker (if any) who applied for the decision to be made. Any person who applies for a decision to be made under this subsection and any employer or trade union to whom the award in respect of which the application made relates shall be entitled to be heard by the tribunal before its decision is given."

We are also guided by the reasoning of the Privy Council in the matter of Jamaica Flour Mills Limited vs. The Industrial Disputes Tribunal and Anor. (2005) UKPC 16, 69 of 2003, and in particular the judgement of Lord Scott where he states at paragraph 24:

'Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be reinstated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy,

this time properly fulfilling his obligations of communication and consultation under the Code……'

The matter having been referred to the Tribunal prior to the instigation of private criminal proceedings, we believe it is a better course that the matter be ventilated before the Tribunal and or the Minister before criminal proceedings are contemplated. The private prosecution appears to be somewhat premature considering that Caribbean Airlines has actively sought the intervention of the Minister of Labour. In light of this, it is my view that the private prosecution could be deemed an abuse of the process of the criminal courts.

Consequently, a Nolle prosequi will be entered in this matter, conditional on the determination of proceedings under the Labour Relations and Industrial Disputes Act.

We are aware that the matter is to be mentioned on the 07 February 2013. The Conditional Nolle Prosequi will be entered on that date. Depending on what occurs after the matter is ventilated in that forum, the issue of commencement of criminal proceedings may be revisited.

Please accept my best wishes for 2013.

Yours faithfully,

PAULA V. LLEWELLYN, Q.C.,
THE DIRECTOR OF PUBLIC PROSECUTIONS

cc. Mr. Walter Scott Q.C.,
Attorney-at-Law."

[13] The applicant's attorneys responded to the letter dated 30th January, 2013. That letter set forth the applicants side of the story and stated in the (2nd and 3rd paragraphs):

"We observe that your decisions must be based on matters that you have considered. We are sure you will agree that such considerations must be reasonable and subject to due process and fairness. Your decision was arrived at without reference to Miss Small or her

legal representatives. In the circumstances our instructions are to apply for judicial review of your decision.

Our client's concern is that an attempt is being made to have one agency of government thwart compliance with the decision of another agency of government authorized by law. We know that you judiciously guard the independence of your office. We consider that what has occurred here is more likely to be viewed as an abuse of process than our client's adherence to the procedure laid down in the Labour Relations and Industrial Disputes Act (the Act) to protect her legitimate interests."

[14] The appeal left the learned Director of Public Prosecutions unmoved. Her response came by letter dated 1st February, 2013, the second decision in issue. That letter read,

"February 1, 2013

Mrs. Georgia Gibson-Henlin
Henlin Gibson Henlin
Attorneys-at-Law
Suite 3 & 4
24 Cargill Avenue
Kingston 10

Dear Mrs. Gibson-Henlin,

Re: Nerine Small vs. Caribbean Airlines Limited - Information No. 26007/2012

I am in receipt of yours of the 31st ultimo. It is observed that the issue joined between both parties concerning the re-instatement of Ms. Nerine Small is unresolved and both parties have indeed written to the Honourable Minister of Labour following the award of the Industrial Disputes Tribunal.

I trust that the documents you have attached to your letter to us consists of the extent of the material you wish the Office of the Director of Public Prosecutions (ODPP) to consider before making a final decision in this matter at this time.

Having considered the several attachments to your letter, there is no document which satisfies me that the Minister of Labour has responded to your letter of the 10th January, 2013. Secondly there is no document which was attached by Counsel representing Caribbean Airlines which satisfied us that the Honourable Minister of Labour had responded to Queens Counsel Mr. Walter Scott's letters dated the 09 October 2012 and the 14th December 2012.

Reference is made in your letter dated 10th January 2013 of your receipt of a letter dated 09 January 2013 from the said Minister of Labour. It appears that yours of the 10th January was in response to such letter. Perhaps it was due to an oversight on your part that the letter dated 09 January 2013 from the Honourable Minister was not attached along with your several enclosures. I would respectfully ask that this letter be disclosed as it may further assist us in making a final determination at this time.

Moreover, this letter ought to be disclosed to the defense as the prosecution is duty bound to disclose all material which is relevant to the facts in issue.

I have the highest regard for your intellectual prowess which is why I know that you will forward same to my office at the earliest opportunity. You understand that I would wish to make a final determination in fairness to both parties.

You have stated in email dated October 18, 2012 to a Mr. Smith and I quote, 'the Ministry has no further role in this matter' and that you are moving to enforce the order under section 12 (9) of the Labour Relations and Industrial Disputes Act. It is unfortunate that you have not considered section 12 (10) of the Act in question which enables Caribbean Airlines to seek the intervention of the Tribunal to assist where questions have arisen concerning the interpretation of its award.

I consider that Mr. Scott's letters to the Honourable Minister of Labour dated the 09th October 2012 and the 14th December 2012 constitute an act of seeking the further intervention of the Minister and by extension, the Tribunal in the matter. It would seem to me that if Mr. Scott Q.C., has sought the intervention of the Industrial Disputes Tribunal, to prosecute before their intervention has been made, is premature and could be considered by the Court to be an abuse of it s process.

One can only infer that it is for this very reason that Caribbean Airlines Limited has sought to move the DPP to utilize my powers under section 93 of the Constitution to discontinue the prosecution at this time. If this issue is raised and the Court enquires, this could be deemed an abuse of the process of the Court.

THE ISSUE

Should this matter proceed to trial the following issue will arise;

1. **Whether the Caribbean airlines failed to comply with the award of the Tribunal?**

On 15 August 2012, Caribbean Airlines wrote to your client, advising that Ms. Nerine Small's post will be declared redundant. The tribunal itself in coming to their determination of an appropriate award for Ms. Small averted (sic) to the Privy Council decision of *Jamaica Flour Mills Limited vs. the Industrial Disputes Tribunal and Anor (2005) UKPC 16, 69 of 2003* and the Judgment of Lord Scott. We cited the relevant portion in our letter to you. The reasoning of His Lordship is unambiguous. Reinstatement does not REQUIRE that the employee is placed at the same desk or machine or be given the same work. It reads, 'if moreover, in a particular case, there really is no suitable job into which the employee can be reinstated, THE EMPLOYER CAN IMMEDIATELY EMBARK UPON THE PROCESS OF DISMISSING THE EMPLOYEE ON THE GROUND OF REDUNDANCY……..'

Caribbean Airlines has expressly stated in their letter dated 15 August 2012 addressed to Ms. Small that, 'CAL has reorganized the manner in which it delivers legal services within the organization….it has outsourced many of the functions previously carried out by the Vice

President Legal and Corporate Secretary….As a result of the foregoing your position as Vice President Legal and Corporate Secretary will be declared redundant and your employment terminated with effect August 15, 2012….”

The issue is whether the crown can prove beyond a reasonable doubt that their actions constituted a failure to comply with the award of the tribunal. The common law clearly contemplates that in given circumstances redundancy may be appropriate in the exercise of reinstating an employee who had been unjustly dismissed. The burden of proof in criminal law is proof beyond a reasonable doubt. The prosecution will be hard pressed to prove that Caribbean Airlines failed to comply with the award of the Tribunal.

I have considered whether it is best to refrain from exercising the powers under section 94 of the Constitution. However the common law position as outlined in the Privy Council decision abovementioned urges me in the interest of justice to intervene in this matter.

THE DECISION TO PROSECUTE www.dpp.gov.jm

The decision to prosecute brings with it a grave responsibility to balance the scales of justice.

Our prosecutor’s protocol mandates the utmost regard for fairness. The case of *Boucher v. The Queen (1954) 110 CC* 263, 270, is quite instructive, it reads “…the role of the Prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

In the present case we have considered whether there is sufficient evidence that is substantial and reliable which suggest that a criminal offence known to law has been committed by Caribbean Airlines. Is there a reasonable prospect of a conviction should proceedings be instituted?

I have concluded that it would be seen by the Court as oppressive and unfair to prosecute Caribbean airlines at

this time as they have sought the intervention of the Honourable Minister which is provided for by law to assist in resolving the impasse that has arisen subsequent to the award of the Industrial Tribunal.

BASIS OF NOLLE PROSEQUI

I stand ready to take account of any change in circumstances that occurs as the case develops hence my entering a Conditional Nolle prosequi in the matter. The nolle prosequi is entered solely so that the proceedings against the accused on a charge of Breach of the Labour Relations and Industrial Disputes Act may commence de novo on the determination or conclusion of proceedings under the Labour Relations and Industrial Disputes Act.

Ms. Small has not yet exhausted the machinery of the Labour Relations and Industrial Disputes Act and with the greatest of respect to Counsel; the giving of an award is not the extent of the powers of the Tribunal and the Honourable Minister under Labour Relations and Industrial Disputes Act. We recommend that the parties continue to seek the intervention of the Honourable Minister as has been done by Queen's Counsel Mr. Scott to assist in the resolution of the critical issue in this case. The issue remains;

'whether the actions of Caribbean Airlines in declaring Ms. Small's post redundant and paying her in lieu of notice considered to be bona fide execution of the award of the Tribunal to reinstate Ms. Small?'

It is in the best interest of your client that the process under the Labour Relations and Industrial Disputes Act be totally exhausted before the extreme action in terms of prosecution, which cannot be sustained, is taken. I urge you in the best interest of your client to reconsider. I would appeal to you to come to some consensus with Mr. Scott QC in respect of the way forward.

In light of the high regard I have for both Counsel in this matter, I am prepared to stay the entry of the Nolle prosequi for another date to be agreed in order to facilitate further discussions between yourself and Mr. Scott QC. I look forward to notification from you and Mr.

Scott QC in terms of the next date the matter will be fixed for mention.

Please accept my best wishes.

Paula V. Llewellyn Q.C.
Director of Public Prosecutions

Cc: Mr. Walter Scott Q.C.,

[15] The applicant thereafter instituted these proceedings seeking permission to commence an application for Judicial Review of the decision of the Director of Public Prosecutions to discontinue the private prosecution which the applicant had earlier commenced.

[16] The jurisdiction of this court to grant permission to commence Judicial Review is found in Order 56.5(1). Although a single judge earlier refused permission the rules allow for a further application before this court. We, be it noted, are not therefore sitting as a court of appeal from the decision of McIntosh , J. rather we are hearing a renewed application. This does not mean that this court will not have regard to and pay due deference to the decision and reasons of the Honourable Mr. Justice Donald McIntosh when coming to our own decision.

[17] On an application such as this I bear in mind that the applicant has a duty to demonstrate that a decision capable of review has been made; and that the application for judicial review has a real prospect of success that is, it is not a fanciful application. It is sometimes said that the applicant must disclose an "arguable case" for Judicial Review. ***Christopher Coke v. Ministry of Justice and Director of Public Prosecutions 2010 HCV 0259*** unreported Judgment of McCalla, C.J. 9 June 2010, applying ***Sharma v. Brown-Antoine [2006] WIR 379 at 387; [2007] 1 WLR 780 at 787*** a decision of the Judicial Committee in which the court stated,

> **"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* **exparte Hughes (1992) 5 Admin. LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edition, 200 4) 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."

[18] Both the Applicant and Respondent's Counsel made oral and written submissions. I acknowledge their Industry and am grateful for their assistance.

[19] The Respondent, Director of Public Prosecutions, argued strenuously for the refusal of permission to apply for Judicial Review. They first argued that there is no decision capable of review because the conditional nolle prosequi has not been entered. The letters of which complaint is made only evidence an intention to do so. They see support for this submission in the judgment of the Honourable Mr. Justice Donald McIntosh where in refusing permission he stated,

"[5] Section 56.2 (2)(c) give any person who has been adversely affected by the decision which is the subject of the application to apply for Judicial Review (sic). This court is of the view that the Director of Public Prosecutions has not made a decision that adversely affects the Applicant. There is an intimation that the Director of Public Prosecutions may exercise her Constitutional rights under Section 94 (3)(c) of the Constitution of Jamaica.

[6] This application is for the specific purpose of preventing the Director of Public Prosecutions from exercising her Constitutional Rights. The

right the Director of Public Prosecutions exercises would be within her discretion.

[7] The courts cannot and should not interfere with the exercise of her powers (under the Constitution). If however the exercise of her powers are considered improper and/or unlawful, that could be subject to Judicial Review.

[8] To date there is no application for leave to seek Judicial Review because there has been no exercise of the Constitutional Powers of the Director of Public Prosecutions affecting the applicant."

[20] The Respondent and the learned Judge have with respect confused the making of a decision with its implementation. The letters in question both clearly articulate the decision to issue a conditional nolle prosequi and the reasons therefor. The decisions are capable of being reviewed judicially. Furthermore it is too late in the day to question the power of this court to review preemptively. This power was made clear by the Judicial Committee which, on an appeal from Bahamas, acknowledged the power to grant relief prior to the passage of legislation, which if passed would have been unconstitutional see ***Bahamas District of Methodist Churches in the Caribbean v. Symonette*** (2000) 5 LRC 196. Similarly therefore I hold Prohibition will lie to prevent the intended action of the Director of Public Prosecutions if such intended action will be *ultra vires* unconstitutional or otherwise unlawful. Finally on this point I observe that what Section 94 of the Constitution confers on the Director of Public Prosecutions is a power not a right. She has a duty to exercise that power lawfully.

[21] The Respondent also resists the grant of permission on the ground that there is no arguable case or that the claim for judicial review will fail. It is urged upon us that the Constitutional power given to the Director of Public Prosecutions by Sections 93 (3)(c) contain, "special discretionary powers." The Respondent submits that consistently with

the independence of her office, these powers should be unfettered and exercised without interference.

[22] The Respondents concede (somewhat paradoxically) in paragraph 28 of their written submissions that the exercise of discretion by the Director of Public Prosecutions may be subject to judicial review. They submit further that the court seldom interferes with the exercise of a discretion to discontinue proceedings. Reliance is placed on the decisions of ***Matalulu v. DPP*** [2003] 4 LRC 712 pages 735-736 and ***R. v. DPP ex parte Manning*** [2001] QB 330 at 349 paragraph 41.

[23] I do not agree that the power of the Respondent is unfettered. The office of the Director of Public Prosecutions and the exercise of her power is governed by law. It is the duty of this court to uphold the law, and we do this in relation to the Director by way of Judicial Review. The basic principles applicable to a decision of the Director of Public Prosecutions do not differ from that applicable in other contexts. That is the Director must act within the power granted to her, she must act for reasons which are relevant, she must not act based upon a mistake of law and she must act rationally. In other words she must act within jurisdiction as it has come to be understood since the decision of the House of Lords in **CCSU v. Minister for Civil Service** [1985] 1 AC 374. These grounds being conveniently categorized as: (1) illegality (2) irrationality and (3) Procedural impropriety. It has always been recognized that the decision maker who is given a discretion, provided she acts within her jurisdiction, is entitled to be right or to be wrong in its exercise. It is no part of the duty of a court of judicial review to substitute its opinion as to the way that discretion ought to be exercised.

[24] It is because of the specialist nature of the office of the Director of Public Prosecutions that courts have repeatedly emphasised this latter principle. In other words the Director when deciding whether or not to prosecute or whether to discontinue a prosecution is entitled to take into account a number of factors including, her own view of the evidence, the public interest in having the matter litigated or not, as well as the interests of justice. By its very nature it will be a rare case indeed when the exercise of her discretion is overturned. See ***Mohit v. DPP*** [2006] UK PC 20, ***Leonie Marshall v.***

DPP PCA No. 2 of 2006, **Sonatan Dharma Maharabha v. DPP** Claim CV 2013-02358 unreported judgment of Mr. Justice V. Kokaram (Trinidad & Tobago) and **Millicent Forbes v. DPP** 2009 HCV 03617 a decision of Brooks, J.

[25] To say that a power of review will be sparingly exercised is not to say that it never will be. It goes without saying that each case must be decided on its particular facts. In the case at bar there are certain features which may take it out of the ordinary. These are:

(a) The decision to conditional nolle prosequi was taken in relation to a private prosecution in what can be considered a private matter, having its roots in an employer employee dispute.

(b) The decision not to prosecute was taken on an entirely false premise, or at any rate it is arguable that the premise on which the Director proceeded was wrong in law and fact. This is because in both letters of decision the Director stated that the parties were in a "dispute" and that as the matter had been referred to the Minister the parties should attend before the Minister to attempt a resolution. In fact, and the applicant argues this point very convincingly, the dispute having been resolved the Minister has no remaining statutory role. The Industrial Disputes Tribunal had given its decision. That decision can either be challenged by application to the courts; or, interpreted by application to the Chairman of the Industrial Disputes Tribunal. If neither of these options are adopted then the decision is to be implemented. The consequence, and the only consequence specified in the legislation, of a failure to

> implement the Tribunal's decision is prosecution before the Resident Magistrate's Court. Neither the Minister nor Caribbean Airlines have applied to challenge or clarify the decision. This is not surprising as the Order of the Industrial Disputes Tribunal is clear. It is therefore certainly arguable that the learned Director of Public Prosecutions has made an error of Law which goes to jurisdiction. The Director's decision as we have seen is premised on the Minister having some continuing role and on the belief that there remains between the Applicant and Caribbean Airlines a dispute within the meaning of the Labour Relations and Industrial Disputes Act. Both assumptions arguably are patently false.

[26] The third feature of this case which takes it out of the ordinary, is that this is a review of a decision not to prosecute. The judges in the Supreme Court of Fiji (Matalulu cited above), made seemingly contradictory statements in this regard. They stated at page 19 of their judgment,

> **"Where the DPP decides to discontinue a prosecution on the basis of a mistaken view of the law then, by definition, there is no court proceeding within which that view can be tested and it may be a stronger case for review can be made. In *R v. DPP* exp. Icebeline [2000] 3 LRC 377 at 420 Lord Steyn stated, as a general principle, that in the case of a decision not to prosecute judicial review is available. His Lordship cited *R. v. DPP* exp. C [1995] 1 Cr. App. R. 136 observing that 'in such a case there is no other remedy.'**

The court on the other hand also stated at page 19,

> **"Again an error of law which informs a decision not to continue with a prosecution is not an error which goes to the scope of the DPP's power or vitiates the proper exercise of the DPPs discretion. Decisions to initiate or not to initiate or to discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The DPP is empowered to make such judgments even though they may be wrong on the law or mistaken on the facts."**

Matalulu's case has been referred to with approval by the Judicial Committee of the Privy Council in ***Mohit v. DPP*** (above) and ***Sharmar v. Brown-Antoine*** P.C. Appeal #75 of 2006. In ***Leonie Marshall v. DPP*** (above) the court cited ***Mohit, Matalulu*** and **R. v. *DPP exparte Manning*** (above). Their Lordships approved the passage at paragraph 23 of Lord Bingham CJ' judgment in ***R v. DPP exparte Manning*** (above paragraph. 22) which ended with the following words:

> **"The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decisions will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant if brought would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against**

> **the defendant and of the likely defences. It will often be impossible to stigmatize a judgment on such matters as wrong even if one disagrees with it. <u>So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective, remedy would be denied</u>." (Emphasis added)**

[27] It follows from this that the court recognizes the possibility of review of a decision not to prosecute on the basis of an error of law. Secondly the court also recognizes that the standard for review in a case involving a decision not to prosecute ought not to be set too high. The apparent contradictory statements in Matalulu should now be better understood. The court when speaking of no review for errors of law was referring to errors in relation to the case to be prosecuted, that is, the elements of the crime and the merits of the case. This is not necessarily inconsistent with the view endorsed by the Judicial Committee of the Privy Council that a decision not to prosecute is reviewable because in case of an error of law the subject has absolutely no other recourse.

[28] This being the law therefore, it is manifest that on the facts of this case there is an eminently arguable case that the decision of the learned Director of Public Prosecutions not to prosecute ought to be set aside. In her second letter of decision (quoted in paragraph 14 above) the Director of Public Prosecutions proceeded to analyze the prospects for a successful prosecution of Caribbean Airlines. Her conclusion on this question is as follows:

> **"In the present case we have considered whether there is sufficient evidence that is substantial and reliable which suggest that a criminal offence known to law has**

> **been committed by Caribbean Airlines. Is there a reasonable prospect of a conviction should proceedings be instituted?**
>
> **I have concluded that it would be seen by the court as oppressive and unfair to prosecute Caribbean Airlines at this time as they have sought the intervention of the Honourable Minister which is provided for by law to assist in resolving the impasse that has arisen subsequent to the award of the Industrial Tribunal."**

[29] These words suggest that the Director asked herself the wrong question and considered material that was irrelevant and erroneous in law. The question is not how a court would view a prosecution but whether or not there was evidence capable in law of proving beyond a reasonable doubt that Caribbean Airlines Ltd. failed to comply with the Order of the Industrial Disputes Tribunal. The Minister had no statutory role when it came to compliance with the Order and hence the DPP's reference to the intended accused seeking the Minister's intervention is irrelevant. It is certainly arguable that an appeal to the Minister cannot be a defence to the charge of failing to comply with the Order of the Industrial Disputes Tribunal.

[30] The learned Director of Public Prosecutions, in that letter of decision dated 1 February 2013, also stated,

> **"The issue is whether the Crown can prove beyond reasonable doubt that their actions constituted a failure to comply with the award of the tribunal. The common law clearly contemplates that in given circumstances redundancy may be appropriate in the exercise of reinstating an employee who had been unjustly dismissed. The burden of proof in criminal law is proof beyond reasonable doubt. The prosecution will be hard pressed to prove that Caribbean Airlines failed to comply with the award of the Tribunal."**

[31] It is again eminently arguable that the learned Director of Public Prosecutions erred in law when she said that "redundancy may be appropriate in the exercise of reinstating an employee" because neither the Judicial Committee of the Privy Council nor the Industrial Disputes Tribunal said any such thing. The Learned Director failed to appreciate that the court in the Jamaica Flour Mills case (to which she refers in her letter see Paragraph 14 above), merely indicated that reinstatement was possible even when a position had already been made redundant. This is so because once reinstated the employer could then immediately embark on the "process" of redundancy. That process as their Lordships recognized, involves notice to the employee and then consultation on matters such as (a) The necessity for redundancy (b) Alternative employment options within the company and (c) The amount of compensation payable. The process is guided by the Industrial Relations Code and by case law and practice which has developed around it. This was made clear by the Jamaican Court of Appeal whose decision was upheld and its analysis adopted by the Judicial Committee of the Privy Council, in the **Jamaica Flour Mills** case . In the Court of Appeal Harrison JA having quoted relevant sections of the Code said:

> **"The substance and tone of paragraph 11 [of the Code] is a direct reference to the course of conduct expected of management towards its employees, whenever a situation of redundancy arises, as contemplated by section 5 of the Employment (Termination and Redundancy Payments) Act (the "ETRPA"). That conduct is anticipated as a pre-requisite prior to any dismissal by the employee.**
>
> **Consequently, it is incorrect to state that, in the circumstances of this case, the Code was irrelevant to the issues before the Industrial Disputes Tribunal. Paragraph 11 of the Code is intimately concerned with the fact of redundancies and dismissals. The Industrial Disputes Tribunal therefore acted properly in considering the provisions of the Code in its**

determination of the propriety of the dismissals by reason of redundancy."

Jamaica Flour Mlls Ltd. v. The Industrial Disputes Tribunal and the National Workers Union SCCA No. 7/2002 unreported decision 11th June 2003.

[32] Against that background, the acceptance by the learned Director of Public Prosecutions that a letter making the applicant redundant at the same moment it informs of reinstatement could amount to compliance with the Order of the Industrial Disputes Tribunal, is arguably wrong in law and irrational and hence liable to be set aside. Moreso where the redundancy contemplated is futuristic, that is the position to which the applicant was ordered reinstated had not yet been phased out. In this regard see the terms of the letter from Caribbean Airlines dated 15 August, 2012 to the applicant.

[33] It is therefore the view of this court that the application for judicial review has a real prospect of success. It is arguable that the learned Director of Public Prosecutions made errors of law which went to jurisdiction or that she considered irrelevant matters and acted irrationally in the Wednesbury sense. Her decision arguably was one that no reasonable Director of Public Prosecutions could or would have made. The applicant therefore should be afforded the opportunity to challenge the decision of the learned Director of Public Prosecutions.

[34] I am somewhat fortified in the view I take of this matter by the opinion submitted to this court by the Attorney General's Department. The Attorney General was served pursuant to the Order of the Honourable Mr. Justice E. Brown dated 3 April, 2013. The Attorney General's submission concludes:

"In all the circumstances, I submit that there appears to be a claim that ought properly to proceed for a full and substantive determination by way of Judicial Review, as the claim at this stage appears to pass the threshold

test of an arguable case with a realistic prospect of success."

[35] For all the reasons stated in this judgment we therefore make the following Orders:

(a) That the applicant Nerine Small be granted permission to apply for Judicial Review by way of:

i) Certiorari to quash the decision of the Respondent contained in letters dated 30 January 2013 and/or 1st February 2013 to enter a conditional nolle prosequi in respect of pending criminal proceedings in Regina v. Caribbean Airlines Ltd. Information No. 260007/2012 in the Corporate Area Resident Magistrate's Court.

ii) Prohibition to prevent the Respondent from carrying out her decision dated 30 January 2013 and/or 1st February 2013 to enter a conditional nolle prosequi as aforesaid.

iii) Prohibition to prevent the Respondent directing the applicant to meet with Caribbean Airlines Ltd. as a condition precedent to exercising her discretion to continue criminal proceedings in Regina v. Caribbean Airlines Ltd. Information No. 26007/2012 in the Corporate Area Resident Magistrate's Court.

(b) That the Respondents' decision contained in letters dated January 30 2013 and 1st February 2013 be stayed pending the determination of the application for Judicial Review.

(c) That the Criminal Proceedings in Regina v. Caribbean Airlines Ltd. Information No. 260007/2012 in the Corporate Area Resident Magistrate's Court be stayed pending the determination of the application for Judicial Review.

(d) Costs of this application to the applicant to be taxed if not agreed.