

NOVA SCOTIA COURT OF APPEAL

Citation: *Li v. Jean*, 2012 NSCA 63

Date: 20120607

Docket: CA 370944

Registry: Halifax

Between:

Hui Li

Appellant

v.

Kong On Jean, the Attorney General of Nova Scotia
and the Labour Standards Tribunal

Respondents

Judge: The Honourable Justice Duncan R. Beveridge

Motion Heard: May 30, 2012, in Halifax, Nova Scotia, in Telechambers

Held: Motion to require the respondent Labour Standards Tribunal to provide the transcript of the hearing is dismissed without costs

Counsel: Appellant, in person
Level Y.Y. Chan, for the respondent, Kong On Jean
Siobhan M. Ryan, for the respondent, Labour Standards Tribunal
Edward A. Gores, Q.C., for the Attorney General of Nova Scotia (not participating)

Decision:

[1] After a 7-day hearing, Ms. Li's claim against her former employer was dismissed by the Labour Standards Tribunal ("Tribunal"). She launched an appeal to this Court and now seeks an order requiring the Tribunal to provide a transcript of the hearing. Ms. Li says she has no money to pay for such a transcript.

[2] Because Ms. Li now lives in Richmond, Virginia, I heard her motion by way of telephone Chambers on May 30, 2012. For the following reasons, her motion is denied.

BACKGROUND

[3] Ms. Li was employed as a housekeeper for Kong On Jean in 2006.

[4] In December 2006, the appellant presented a claim to the respondent Kong On Jean seeking payment for hours of employment of 12 hours a day, 7 days a week, for the entire year. By her calculation, she had worked 3,509 hours. She sought payment at the minimum wage rate of \$7.40 per hour. She claimed she spent these hours doing laundry, cooking, dishes, cleaning and childcare and working in the respondent's restaurant. Mr. Jean denied that the appellant worked more than four hours per day and had been amply compensated by free room and board for her and her family and other payments.

[5] Initially, the director of labour standards dismissed Ms. Li's complaint. She appealed to the Tribunal. The Tribunal heard evidence and submissions on September 21, 22 and November 24 and 25, 2010; and on September 6, 7 and 8, 2011. The appellant was self represented in the proceedings before the Tribunal and remains so. She had the assistance of her husband, Dr. Zhijun Qiu. Due to her limited fluency in English, the appellant testified through an interpreter (Chinese Mandarin being her mother tongue). Mr. Jean also testified using an interpreter (Chinese Cantonese).

[6] The Tribunal found that there was an employment relationship between the appellant and the respondent Jean from January to June 2006 but that her duties would not exceed 24 hours in a 7-day week. In exchange, she, her husband and her son received free room and board and Mr. Jean gave her gratuities from time to time as an expression of thanks. The Tribunal also found that after the appellant's

husband left in June 2006, there was no employment arrangement whatsoever. The appellant did stay at the Jean residence until December 2006, in order for her to complete her citizenship test, and she did do some housekeeping and childcare as needed, but on a gratuitous basis.

[7] The appellant filed her notice of appeal on December 5, 2011. In it she sets out the following grounds of appeal:

1. During hearing process, the Labour Court was against law, leading to error decision.
2. During hearing, it is not just and fair, leading to discrimination at respects of sex, race and language for me.

[8] The respondents Kong On Jean and the Labour Standards Tribunal gave notice of their intention to participate in the appeal. The Attorney General of Nova Scotia declined.

[9] Ms. Li was duly notified by the Registrar of this Court by letter dated December 19, 2011 of the need for the appellant to make a motion to set the time and date for the hearing of the appeal and for directions within 25 days after the filing of her notice of appeal. She was also advised with respect to the requirements of filing a certificate of readiness in support of her motion for directions. The requirements for a certificate of readiness are set out in Rule 90.26 of the *Nova Scotia Civil Procedure Rules*. It provides:

90.26 (1) Except as provided in Rule 90.26(4), an appellant must file a certificate of readiness in Form 90.26 in support of the motion for directions no less than four days before the day the motion is to be heard.

(2) By the certificate of readiness, the appellant or the appellant's counsel must certify all of the following:

- (a) the court appealed from has issued a formal order;
- (b) the appellant has a paper copy of the written decision under appeal,
- (c) the appellant has ordered copies of the audio recordings from the appropriate court;

- (d) the appellant has ordered the transcription of the audio recordings from a certified court reporter;
- (e) the appellant has been informed by the certified court reporter that the transcription will be completed by a specified date;
- (f) the appellant will be able to file the appeal book by a specified date.

(3) If no written decision is filed with the registrar, the appellant or the appellant's counsel must undertake to send a copy of the transcribed oral decision to the judge or tribunal appealed from as soon as it is received from the court reporter.

(4) An appellant who is unable to comply with Rule 90.26(1) must file an affidavit in support of the motion for directions, explaining the omission.

[10] Her motion for date and directions was heard on February 22, 2012 by way of telechambers. She had filed a certificate of readiness on February 15, 2012. The certificate was not complete. The only information provided in it was that she did have a paper copy of the written decision under appeal.

[11] The parties appeared before Fichaud J.A. on February 22, 2012. The appellant spoke through her husband, Dr. Qiu. Ms. Ryan, counsel on behalf of the Tribunal, undertook to send the record of the hearing to the appellant. This would include the notice of hearing, the complaint, any rulings or orders made in the course of the proceedings of the Tribunal, any written submissions received by the Tribunal and the decision and reasons therefore, and the CD containing a recording of the oral evidence heard by the Tribunal. Ms. Ryan advised that if the Tribunal was to prepare the transcript, the fee would be approximately \$8,000.

[12] The appellant expressed a desire to retain a lawyer to assist her in her appeal. She also expressed concern over the cost of the transcript. The motion for date and directions was adjourned to April 11, 2012.

[13] Hamilton J.A. presided in telephone Chambers on April 11, 2012. Ms. Li, again with the assistance of her husband, Dr. Qiu, advised that she would not be hiring a lawyer due to the cost. She had filed a letter with the Court on March 30,

2012 advising that she had contacted transcription companies. The lowest fee she could obtain to transcribe the CD was \$6,000 and it would take two months to prepare the transcript. She wrote “I know that the transcript is very critical”. She raised the issue as to whether or not there was any other way.

[14] The appellant had also filed a notice of motion dated April 5, 2012, requesting that the “Judge at the Court of Appeal to use the method to solve this problem”. The problem identified being she did not have enough money to prepare the transcript. These documents had not been served on the respondents. All motions were adjourned to May 16, 2012.

[15] On May 8, 2012, the appellant filed a notice of motion. It said:

Hui Li, [*plaintiff*] in this proceeding, moves for an order. Because she does not have enough money to do transcription from the CD of hearing at the Labour Tribunal, she asks the Judge at the Court of Appeal to use the method to solve this problem. The transcript should be provided by the Labor Tribunal.

She filed her affidavit, affirmed April 23, 2012. It says:

1. I am Hui Li, an appellant.
2. Making the transcript from the CD of hearing at the Labor Tribunal is very expensive and takes more than \$6000. I worked for Mr. Kong-on Jean for one year and only got about \$2900. During the past three hearing at Labor Tribunal, I spent lots of money on travelling to Halifax and document preparation. Therefore, I do not have money to make the transcript.
3. I ask that the other methods will be used.

[16] Originally, the motion was to be heard May 16, 2012. The hearing of the motion was adjourned at the request of Ms. Li. She was again assisted by her husband, Dr. Zhijun Qiu. The reason for the adjournment was that they had been unable to access their email account to review the submissions of the respondents’, and the hard copies sent to the appellant by registered mail and courier had not been received.

[17] I heard the appellant's motion on May 30, 2012 by way of telephone Chambers. Ms. Li was assisted by both her husband, Dr. Qiu, and her son who is a university student.

[18] The appellant's submissions on May 30, 2012 were that she does not have the money to pay for the preparation of the transcript. She has no job. She says that the cases referred to by the respondents are different than hers. The differences that she relies on is that her case is related to a labour dispute; she was self represented before the Tribunal; she was a woman; and that fairness required the Tribunal to prepare the transcript. She expanded her fairness justification. She claimed that the interpreter did not properly interpret her answers into English and from the English to Chinese. She complained about the quality of translation before the Tribunal but that the Tribunal refused to do anything about it. Hence, it is the Tribunal's fault that she needs to appeal.

[19] Ms. Ryan, on behalf of the respondent Tribunal, and Mr. Chan on behalf of the respondent Jean, made similar submissions. They say that the appellant has not in fact provided any actual evidence to substantiate her claimed inability to pay for the transcript. They point out that her husband is employed as a post doctorate fellow and that there is no specific financial information. They also say there is no legal authority in the rules or case law that would support the making of the requested order. I agree with these submissions.

[20] I recognize the appellant is self represented. The only evidence tendered in support of her motion is her affidavit affirmed on April 23, 2012. It is set out earlier in its entirety. With respect to her financial situation, she says "during the past three hearing at Labor Tribunal, I spent lots of money on travelling to Halifax and document preparation. Therefore, I do not have money to make the transcript."

[21] Even if I was to accept the appellant's unsworn statements as to her financial situation, I would decline to make the order requested. There are two reasons. First, her unsworn submissions do not provide the necessary detail for me to be satisfied that she does not have access to resources to pay for the transcript. For example, in the letter she filed with this Court on March 30, 2012, she wrote "I know that the transcript is very critical. Are there any other ways to substitute the transcript from the CD? In order to get fairness, we tried my best to prepare \$3000 for the lawyer fee. We contacted lots of lawyers in Halifax. However, actual

lawyer fee will reach about \$10000-15000. We will have very difficulty in getting so much money.” As can be seen, she doesn’t say that it is impossible to raise such funds, just that it would be very difficult.

[22] The second, and more fundamental problem, is that the appellant has been unable to identify any authority for me to make an order requiring the respondent Tribunal to pay for the preparation of the transcript. The *Judicature Act*, R.S.N.S. 1989, c. 240, bestows on the judges of the Court of Appeal broad rule-making powers regarding appeals. Rule 90.29 of the *Nova Scotia Civil Procedure Rules* provides as follows:

90.29 (1) An appellant who appeals from a decision or order of a court or judge must request a copy of the audio recording of the proceeding from the prothonotary or clerk of the court appealed from, and pay the prescribed fee to the prothonotary or clerk.

(2) The prothonotary or clerk, on receipt of the prescribed fee from the appellant, must provide the appellant with an audio recording of the entire hearing of the proceedings, including evidence, the oral submissions and all oral rulings and decisions.

(3) An appellant who appeals from a decision or order of a tribunal must request a copy of the entire record of the proceedings before the tribunal and pay the prescribed fee for the copy to the tribunal.

(4) The tribunal or other person or body that holds the record must, on receipt of the request and the prescribed fee from the appellant, provide the appellant with a copy of the entire record of the proceedings, including all rulings and decisions.

(5) The appellant must cause a transcript of the proceeding to be prepared by a certified court reporter, unless legislation provides otherwise or a judge permits otherwise.

[23] Rule 90.29(5) clearly requires an appellant to cause a transcript of the proceeding under appeal to be prepared by a certified court reporter. There are two exceptions. Legislation or a court order. There are no legislative provisions that apply. I may excuse compliance, but I see no authority to direct another party to an appeal, or any other person, to prepare a transcript or pay for the preparation of a transcript.

[24] In my opinion, the discretion set out in Rule 90.29(5) must be read in conjunction with Rule 90.30(4) and (5). Rule 90.30 sets out in detail the requirements for the preparation and filing of appeal books and transcripts. The Rule does permit variance with the requirements of 90.30. Of import is 90.30(4) and (5). These provide:

90.30 (4) Parties to an appeal may make an agreement to avoid the expense or delay of reproducing material unnecessary for the appeal by abridging all or part of the transcript of evidence or of any other material otherwise required to be included in the appeal book, or substituting an agreed statement of facts instead of a transcript or exhibit.

(5) A party may make a motion to a judge of the Court of Appeal for an order abridging a requirement for the form or content of the appeal book.

[25] These provisions recognize that parties need not slavishly follow the detailed requirements set out in Rule 90.30 where the parties, or a judge is satisfied, that the issues on appeal can be fully argued and considered without reproduction of the complete record from the court or tribunal below. This is what occurred in *LeBrun (c.o.b. LeBrun Construction) v. Woodward*, 2001 NSCA 9. Ms. LeBrun appealed from a decision by a judge of the Nova Scotia Supreme Court, in Chambers. The Registrar of this Court brought a motion to dismiss the appeal as the appeal book, including transcript, had not been filed. Ms. LeBrun claimed she had no money to pay for the preparation of these documents and sought an order that the Nova Scotia Department of Justice pay for the preparation of the transcript. Cromwell J.A., as he then was, dismissed the application, but declined the Registrar's motion to dismiss on the basis that a transcript of the proceedings was not necessary as there was no oral testimony given before the Chambers judge.

[26] Here, the appellant has expressly acknowledged that a transcript of the proceedings is critical to her appeal. During her submissions of May 30, 2012, she did not resile from this position. In fact, her submissions reinforced the importance of the transcript. She argued the proceedings were flawed by the incomplete or inaccurate translation carried out from Chinese (Mandarin) to English; and from English to Chinese (Mandarin). A transcript of the English version heard by the Tribunal would be necessary, supplemented by other evidence, to advance and for this court to consider arguments as to the inaccuracy or incompleteness of the translation.

[27] This is not the first time that appellate courts have been asked to provide relief to individuals who are unwilling or unable to fund the cost of preparation of transcripts. I can find no authorities that have acceded to this request. (See, for example, *G.B.R. v. Hollett*, [1995] N.S.J. No. 545 (C.A.); *Ayangma v. French School Board*, 2009 PECA 10; *Pavlis v. HSBC Bank Canada*, 2009 BCCA 309; *Ocean v. Economical Mutual Insurance Co.*, 2011 NSCA 106; and most recently *R. v. Cummings*, 2012 NSCA 52.)

[28] The motion to require the respondent Labour Standards Tribunal to provide the transcript is dismissed. The respondents did not request costs. None will be ordered.

Beveridge, J.A.