

NOVA SCOTIA COURT OF APPEAL

Citation: *Li v. Jean*, 2012 NSCA 125

Date: 20121214

Docket: CA 370944

Registry: Halifax

Between:

Hui Li

Appellant

v.

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

Respondents

Judge: The Honourable Justice Peter M. S. Bryson

Motion Heard: December 12, 2012, in Halifax, Nova Scotia, In Chambers

Held: Appellant's motion is dismissed.

Counsel: Appellant, in person (through her son Stephen Li, acting as translator)
Level Chan, for the respondent, Kong On Jean
Siobhan Ryan, for the respondent, Labour Standards Tribunal
Edward A. Gores, Q.C., for the respondent, Attorney General of Nova Scotia, not participating

Decision:

Introduction:

[1] The appellant, Ms. Li, has brought a motion for production of the notes of the panel members of the Labour Standards Tribunal, whose decision she has appealed. Ms. Li brought a claim against her former employer, Kong On Jean. On May 6, 2008 the Director of Labour Standards dismissed the complaint. Ms. Li appealed to the Labour Standards Tribunal which consisted of a three-person panel. The Labour Standards Tribunal panel dismissed Ms. Li's appeal. On December 5, 2011, Ms. Li appealed from the Labour Standards Tribunal to the Nova Scotia Court of Appeal. In her grounds of appeal she alleges:

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.

[2] The Labour Standards Tribunal has been replaced by the Labour Board (S.N.S. 2010, c. 37, s. 19(2)(a)). But for consistency and continuity I will refer to the Tribunal in these reasons.

[3] Apparently Ms. Li has a limited knowledge of English and speaks Chinese Mandarin. Mr. Kong on Jean speaks Cantonese. During the course of the hearing before the Labour Standards Tribunal, Christina Chui was sworn as an interpreter to translate the language of each for the other and translate into the English language.

[4] The motion before me proceeded with Mr. Level Chan acting for Kong On Jean, Siobhan Ryan acting for the Labour Standards Tribunal and Ms. Li, self represented, with her son Stephen Li translating for her and then making submissions for her based on instructions he received from her. Mr. Stephen Li is 22, resides with his parents and attends university in the United States. His English is good.

[5] On Wednesday, December 12, 2012, Ms. Lee made a motion in telephone Chambers for an order requiring the "judge's notes" from the Labour Standards

Tribunal be produced for her. The motion was opposed by the Labour Standards Tribunal and Kong On Jean. I dismissed Ms. Li's motion and indicated I would provide written reasons. These are the reasons:

Procedural Note:

[6] It will be helpful to say something about procedure because there was some confusion on Ms. Li's part during the motion. A question arose about whether or not evidence – or at least additional evidence about alleged omissions in the transcript before the Labour Standards Tribunal – would be received by the “Court of Appeal”. I explained that a fresh evidence motion or a motion to correct the record would have to be placed before the Court of Appeal. This prompted Ms. Li to inquire “Was I not the Court of Appeal?” For Ms. Li's sake I can explain that a motion like this one in Chambers is heard by a single judge of the Court of Appeal. Chambers motions deal with procedural matters – such as scheduling of the filing of written arguments (factums), scheduling the appeal hearing itself, any extensions that might be granted, and the like. In contrast, the formal appeal itself, at which time the court will consider the merits of Ms. Li's appeal, will be heard by a panel of three judges. It is those judges who will decide such things as whether evidence she wants to bring before the court is actually “fresh evidence” or a “correction of the record” and, if so, whether the court will receive that evidence. That is why I told her that if she thought there were any errors or omissions in the transcript, she should bring those errors and omissions to the Court's attention in her factum and the court will decide whether or not it will consider this “fresh” or “different” evidence, because a single judge in Chambers would not decide such a question.

Background:

[7] This appeal has proceeded very slowly. After Ms. Li filed her appeal in December 2011, she was sent a standard letter from the Registrar of the Court of Appeal telling her that it was her responsibility to obtain a date for the hearing of the appeal and to obtain directions regarding it. She was told about how to make a notice of motion and was referred to the court website which has both the appropriate appeal Rule 90 and appropriate forms accessible on it.

[8] Ms. Li initially was not sure whether she was going to retain a lawyer or pay for a transcript. Her motion for directions of February 22, 2012 was adjourned in order to give her time to determine these things. She later made a motion to the court to require the Labour Standards Tribunal to provide her with a transcript of the hearing. That motion was dismissed with costs by Justice Duncan R. Beveridge (2012 NSCA 63).

[9] Ms. Li then wrote to the court complaining that there were errors and/or omissions in the CD recording of proceedings before the Labour Standards Tribunal. On July 17, 2012, the Deputy Registrar of the Court of Appeal wrote to Ms. Li and told her that it was her responsibility to contact the Labour Standards Tribunal and discuss what sections were missing. The Deputy Registrar suggested that any such sections should be “written down so the Tribunal may be able to discuss and possibly search for those particular sections.” The Deputy Registrar also cautioned Ms. Li that she needed to set appeal dates which were “time sensitive”. The Deputy Registrar wrote:

“...Once you have the transcript in hand, then if there are portions or sections missing, you can indicate the missing sections to the court in your appeal factum. It is your responsibility to have your CDs transcribed as soon as possible and at the same time it is very important to file your notice of motion for date and directions.

[10] On August 8, 2012, Ms. Li wrote to the Labour Standards Tribunal advising that the audio CD provided to her had some “critical testimony missing”. Ms. Li’s August 8th email did not tell the Board what sections of testimony were missing. On August 28, 2012, the Labour Standards Tribunal confirmed to Ms. Li that “...the Tribunal (Board) has reviewed the entire recording that was provided to you and is satisfied that all the testimony of witnesses at the hearing was recorded.”

[11] By email of October 21, 2012, Ms. Li repeated her allegation that the CD was inaccurate and/or incomplete. By email of October 26th, the Deputy Registrar reiterated to Ms. Li that she had already been told on July 17th that she could indicate what sections were missing to the court in her appeal factum and that it was her responsibility to transcribe the CDs and file them with the court. Ms. Li was reminded that the court ordered this be done on June 7, 2012. The Registrar of the Court of Appeal filed a motion to dismiss Ms. Li’s appeal because Ms. Li had not moved her appeal forward by obtaining a transcript. That motion was

heard on October 31st. At that time, Justice David P. S. Farrar ordered that Ms. Li file the appeal book (including the transcript) by December 13, 2012, failing which the appeal would be dismissed.

[12] It appears that after Justice Farrar's order, Ms. Li began looking for a transcription service. She made a motion on November 21st seeking an extension of time to file the appeal book. She also sought an order requiring the Tribunal to pay for "translating Chinese or Cantonese into English and English into Chinese, and to make a Chinese transcript". The evidence indicated that Ms. Li could have a transcript by the end of January. Accordingly, Ms. Li was given an extension. It was ordered that the appeal book be filed not later than February 8, 2013, failing which the appeal would stand dismissed. Ms. Li was reminded again that she could use her factum to bring to the court's attention any errors or omissions in the transcript. The Court of Appeal would consider whether or not to accept her corrections of any alleged errors or omissions when the full appeal is heard before a panel of three judges. Ms. Li was reminded of what she had been told by the Deputy Registrar on July 17th. Her motion for a translated transcript was dismissed.

Motion of December 12, 2012:

[13] Ms. Li brought a motion requesting the "judge's notes at the hearing of the Labour Tribunal". Ms. Li persists in saying that the CD is incorrect. Under questioning from me, Ms. Li said the errors and omissions in the CD had been so well concealed that reading the transcript would not show them. Under further questioning she alleged that these errors and omissions must have been deliberately made by the person recording the evidence. Ms. Li submitted that she needed the judges' notes to compare them with the CD to show the errors and omissions which she alleges.

[14] During her submissions on November 21st, Ms. Li said that there were errors and omissions in the translations. The translator did not always correctly translate a question or the answer. Accordingly, during the motion on December 12, I pointed out to Ms. Li that this kind of error or omission would not be recorded in the judges' notes because the judges do not speak Chinese Mandarin or Chinese Cantonese. Ms. Li said that there were other errors and omissions in English which she thought the judges' notes would disclose.

[15] Kong On Jean and the Labour Standards Tribunal oppose Ms. Li's motion.

[16] There is a practical and a legal problem with Ms. Li's motion. The practical problem is this: the notes of a judge or a panel member are almost never a word-for-word record of what occurs in court. Moreover, they are not intended to be that kind of record. They are notes made by a judge for his or her own personal use highlighting points which the judge may think are especially relevant and often containing editorial comments for future use by the judge. A Judge's notes are not a record of the court proceedings and are not intended to serve that purpose. The Nova Scotia Court of Appeal has addressed this issue in the past in *Yorke v. Board of Education of Northside-Victoria District* (1992), 112 N.S.R. (2d) 315, (N.S.C.A.). The court said:

[3] The apparent purpose in requiring notes to be delivered up as part of the record of the proceedings is the assumption that the notes are a record of the evidence taken in the absence of a certified transcript of the proceedings. In my opinion the notes of a Board member are not a proper record of the evidence as the notes are not a verbatim record of what a witness stated under oath and are therefore likely inaccurate and unreliable. Secondly, the notes may contain tentative observations of the Board member which the Board member may subsequently decide were not well founded. Therefore, the notes could be misleading. Thirdly, the notes of a Board member are personal notations of the member made during the hearing. In short, the notes are a personal and unreliable record of the evidence. As a general rule, handwritten notes would serve no useful purpose for a superior court when reviewing a Board decision. [Emphasis added]

[17] As well, counsel for the Labour Standards Tribunal refers us to s. 27 of the *Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 1, which says:

27 The record of a hearing before the Board under this Act must include

- (a) the notice of hearing;
- (b) the complaint;
- (c) any rulings or orders made in the course of the proceedings of the Board;
- (ca) all documentary evidence filed with the Board;

(d) any written submissions received by the Board; and

(e) the decision and the reasons therefor.

Clearly, the notes of the Tribunal are not part of the record.

[18] But more fundamentally, a judge's notes – including the Tribunal panel members' notes in this case – are privileged and cannot be disclosed.

[19] Section 11(1) of the *Labour Board Act*, S.N.S. 2010, c. 37, says:

11 (1) The Board and each member has the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*, including, but not so as to limit those powers, the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the Board considers necessary to the full investigation of any matter within its jurisdiction. [Emphasis added]

[20] The *Public Inquiries Act*, R.S.N.S. 1989, c. 372 provides in s. 5:

5 The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court. [Emphasis added]

[21] Judicial immunity is a powerful privilege, vital to the independence of the judiciary. It is virtually absolute. Judges cannot be compelled as witnesses with respect to anything pertaining to their office. That immunity should and does extend to notes taken in their judicial capacity: *R. v. Li*, [2008] O.J. No. 1077.

[22] Ms. Li has had a CD recording of the proceedings before the Labour Standards Tribunal since February 2012 and has not yet produced a transcript. She must do so. To repeat what she has been told before – Ms. Li can point out in her factum whatever errors or omissions she thinks are contained in the transcript. A full panel of three judges of the Court of Appeal will consider those submissions when the appeal hearing occurs. Ms. Li is reminded that unless her

appeal book is filed by February 8, 2013, her appeal will be automatically dismissed by virtue of the order of November 26, 2012.

[23] Ms. Li's motion to produce the judges' notes is dismissed.

Bryson, J.A.