NOVA SCOTIA COURT OF APPEAL
Citation: *Li v. Jean*, 2013 NSCA 135

Date: 20131127
Docket: CA 370944
Registry: Halifax

Between:

Hui Li

Appellant

v.

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

Respondents

Judges:	Beveridge, Bryson and Scanlan, JJ.A.
Appeal Heard:	November 18, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Scanlan, J.A.; Beveridge and Bryson, JJ.A. concurring
Counsel:	Appellant in person Level Y.Y. Chan and Cameron Foster (Articled Clerk), for the respondent Kong On Jean Siobhan M. Ryan, for the respondent Labour Standards Tribunal Respondent Attorney General of Nova Scotia not participating

Reasons for judgment:

Background

[1] The appellant, Ms. Hui Li, resided in the home of the respondent, Mr. Kong On Jean, from January to November 2006. For the seven years since then, the appellant has been attempting to recover $20,637.45 she says the respondent owes her in wages for domestic services she allegedly provided during that 11 month period. There were various arrangements throughout the relevant time. Ms. Li, sometimes with her son and husband, would occupy one or two rooms in the respondent's home. One aspect of the arrangement was that the appellant provided various domestic services for Mr. Jean and his family throughout the period. There was no written agreement or even an express oral agreement that clearly defined her daily tasks. At the end of the period, the appellant claimed she was not paid for all the work she did. The parties disagree as to the amount of time Ms. Li expended in providing domestic services to the Jean family.

[2] Ms. Li alleged she provided domestic services totalling 3509.25 hours and claimed $20,637.45 in unpaid wages, calculated based on the minimum wage rate of $7.40 per hour. Mr. Jean denies the appellant worked in excess of 20 hours per week performing requested services. He asserts that all compensation to which the appellant is entitled has either been paid through direct payments or by way of setoffs for rent and food.

[3] The matter was referred to the Director of Labour Standards who rejected the claim for additional compensation. That decision was appealed to the Labour Standards Tribunal (the Tribunal)(decision reported at 2011 NSLST 36). After a seven day hearing, the Tribunal rejected the appeal. The appellant now appeals the decision of the Tribunal. For the reasons set out below I would dismiss the appeal.

[4] The Notice of Appeal sets out two 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.

[5] The grounds of appeal were perhaps more thoroughly flushed out in the "Pleading" attached to the Notice of Appeal. In essence, the appellant alleges the Tribunal erred in findings of fact and the Tribunal misapprehended the evidence. In addition, the appellant submits there were errors in translation resulting in the Tribunal not actually receiving the evidence as given by her and by other witnesses. The appellant also suggests that she misunderstood the directions and comments of the Tribunal because of the deficiencies in the translation. The appellant asserts that she speaks Mandarin but not English. There was a translator at the tribunal hearing who translated between English, Mandarin and Cantonese.

Motions to Admit Fresh Evidence

[6] The appellant filed two motions in support of her appeal. In the first motion, she asked the Court to receive fresh evidence consisting of 320 pages of written material. Through those materials, the appellant recites numerous alleged errors in translation. I understand this material to have been created by the appellant's husband, based on his review and interpretation of the CD recordings from the Tribunal hearing. The second motion involves an assertion by the appellant that the CD recording as provided by the Tribunal is incomplete. The appellant wishes to introduce what she describes as fresh evidence, which includes what she describes as "key evidence" absent from the CD recordings as produced.

[7] In *Thies v. Thies* (1992), 110 N.S.R. (2d) 177, Justice Freeman discussed the procedure to be followed when dealing with a motion to admit fresh evidence. I summarize by noting he suggests such motions be heard and judgment reserved pending the hearing of the appeal. This allows the Court to consider the question of fresh evidence against the background of the case and the other evidence. If the evidence could not reasonably have affected the results, the motion is dismissed and the Court proceeds to disposition of the appeal. If however the evidence is of such nature and effect that, taken with other evidence, it would be conclusive of the issues in the case, the Court would dispose of the matter there. If the evidence is not decisive in nature, but could affect the result, the Court could admit the

proffered evidence and direct a new trial, assuming all the other criteria related to admission of fresh evidence have been met.

[8] A failure of, or gross deficiency in translation has the potential to deprive a litigant of the right to a trial of issues on the merits but as pointed out in *Fu v Canada (Minister of Citizenship and Immigration)* 2011 FC 155 at para. 10, if the errors are not material to the ultimate findings the court should not intervene. In *R v Tran* [1994]2 SCR 951, the Supreme Court referenced the fact that interpretations may not be perfect. At para. 60 of the decision the court noted that interpretation is an inherently human endeavor and it would not be sensible to require a standard of perfection. In this appeal, the 320 pages of materials which challenge the quality of the translation were prepared by the appellant's husband, Dr. Qui. The appellant provided this Court with his affidavit setting out his education and experience. There are several problems related to the materials created by the appellant's husband, Dr. Qiu. The rules related to expert witnesses, in this case, an expert in translation, have not been adhered to. Even if he were an expert in translation, the appellant's husband, Dr. Qiu, is not an appropriate expert witness. He obviously has a personal relationship with one of the parties. In addition, at least indirectly, he stands to gain from the outcome. Those factors are sufficient reason to refuse admission of the 320 pages of materials as produced by the appellant's husband. Absent the evidence of Dr. Qiu, there is no evidence of deficiencies in the translation. The motion to admit the materials as fresh evidence is denied.

[9] The second motion of the appellant relates to a CD recording of the proceedings which the appellant now suggests is incomplete. In this regard, the Tribunal takes the position that there are no missing parts. Whether a part of the recordings is missing or not does not alter the fact the Tribunal heard all the evidence as it was presented. The CD recording was produced following the hearing. The issue of whether part of the recording is now missing cannot be said to have impacted the decision of the Tribunal. The motion to adduce new evidence as to what may have been included in any missing parts of the record is therefore dismissed.

Analysis of the Grounds of Appeal

[10] I now turn to the merits of the appeal. The appellant asserts that the Tribunal erred in findings of fact or misapprehended the evidence leading to an erroneous conclusion.

Standard of Review

[11] Section 20 of the **Labour Standards Code** R.S.N.S. 1989, c. 246, as amended, deems orders of the Tribunal to be final or binding except in accordance with subsection 20(2) which permits appeals on a question of law or jurisdiction.

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada established two standards of review: correctness and reasonableness. This Court has set out the standard of review in appeals involving the Labour Standards Tribunal in *New Scotland Soccer Academy v. Nova Scotia Labour Standards Tribunal*, 2012 NSCA 40. The standard as noted in that case was one of correctness where the issue raised was a question of law. In some cases there are questions of mixed law and fact. When that occurs, the Court has applied a reasonableness standard. For example in *Sobeys Group Inc. v. Coleman*, 2005 NSCA 142, the court applied a reasonableness standard in circumstances where it is practically impossible to separate the legal issues from the factual findings. In *Coleman* the issue of mixed law and fact involved a question of whether an employer "reasonably" could conclude that the employee had abandoned his claim for reinstatement.

[13] In the present case the appellant challenges the Tribunal's findings of fact. Findings of fact are accorded the deferential standard of reasonableness. I again refer to section 20(2) of the *Act* which permits appeals only on questions of law or jurisdiction. In *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, the Supreme Court of Canada made it clear that unreasonable errors of fact constitute errors of law:

> An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts. (at 494)

[14] At para. 169 of its decision the Tribunal found that "…the time expended by the Complainant (in providing domestic services) would be approximately 20 hours per week, which is less than 24 hours per week…" Based on that determination the Tribunal held the Complainant was exempt from the *Minimum Wage Order* of the *Labour Standards Code*. (see para. 169 of the Tribunal decision). At para . 178 of the Tribunal decision, it references the *General Labour Standards Code Regulations, Section 2(1) (b)* which is set out in part:

> 2(1) Persons who are employed in a private home by the householder to provide domestic service
>
> > (b) for no more than 24 hours within a period beginning on a Sunday and ending on the following Saturday, or during such other seven day period which is the customary pay period of the employer
>
> are exempted from the application of the *Code*.

[15] The Tribunal correctly noted that the appellant had the burden of proving the facts supporting her claim on a balance of probabilities. The Tribunal determined as a fact that the appellant had not worked more than 20 hours per week. She therefore did not meet the threshold of hours to be entitled to minimum wage compensation.

[16] In addition, the Tribunal determined that the appellant did not work as many hours as she had claimed over the entire period . At para. 177, the Tribunal determined that for the period between June 2006 and December 2006, there was no employment relationship whatsoever. The Tribunal found instead that the relationship for that period was one of free room and board in return for some housekeeping and limited on-going child care to be provided by the appellant for Mr. Jean's children.

[17] There is ample evidence to support the Tribunal's findings. The Tribunal is tasked with the responsibility of weighing the evidence and assessing credibility of witnesses. The present case is not one which suggests the presence of egregious factual errors. Absent such errors, it is not for this Court to intervene and reweigh the evidence. The decision makes it clear the Tribunal accepted the evidence of the respondent and his witnesses over that of the appellant and her witnesses.

[18] The appeal is dismissed.

[19] The most common approach of this Court in Labour Standards Tribunal appeals is to award no costs. There is nothing about the present case which justifies a departure from that approach. The parties will each bear their own costs.

Scanlan, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.