Docket No.: CA 166475
Date: 20010111

NOVA SCOTIA COURT OF APPEAL

[Cite as: Ofume v. Nova Scotia (Education), 2001 NSCA 4]

BETWEEN:

PHILLIP OFUME

Appellant/Applicant

- and -

NOVA SCOTIA DEPARTMENT OF EDUCATION - AFRICAN CANADIAN SERVICE DIVISION

Respondent

DECISION

Counsel:	The applicant in person Dale Darling, for the respondent, Nova Scotia Department of Education William H. Kydd, Q.C., appearing for the Nova Scotia Labour Standards Tribunal
Application Heard:	January 4th, 2001
Decision Delivered:	January 11th, 2001

BEFORE THE HONOURABLE JUSTICE FLINN
IN CHAMBERS

FLINN, J.A. (In Chambers):

[1] This is a most unusual situation arising out of an application to set this appeal down for hearing. Important parts of the transcript from the hearing before the Tribunal, which hearing is the subject of this appeal, are not available.

[2] I will review the circumstances of this matter to date, my unsuccessful attempts to have the parties agree to a process to resolve the dilemma, the options which are available to me as a Chambers judge, and my decision as to how the matter should proceed from here.

[3] The Labour Standards Tribunal of Nova Scotia dismissed a complaint which the appellant, Mr. Ofume, had filed against his former employer, the Nova Scotia Department of Education - African Canadian Service Division (the respondent). On October 5th, 2000 the appellant filed a notice of appeal with this court appealing that dismissal.

[4] The grounds of appeal set out in his notice of appeal are as follows:

1. That from the beginning to the end of the proceeding, the Tribunal exhibited overt or open support for the Respondent and summarily biased and failed to give the Appellant the opportunity to freedom of expression and be allowed to put forward his argument.

2. The Tribunal ignored and set aside over 98% of the grounds of Appeal brought by the Appellant before the Tribunal especially that Section(s) 81 (a) and (b); 21; 15; and 16 were breached by the Respondent and the Director of Labour Standards Code. From the decision of the Director of Labour Standards to the Labour Standards Tribunal the above listed Section(s) were selected by the Appellant as grounds of Appeal and the same brought before the Tribunal.

3. To destroy the Appellant case or argument before the Tribunal, the Tribunal imported foreign or strange Section(s) of the Labour Standards Code into the Appellant case. These Section(s) that were deliberately imported by the Tribunal into the Appeal of the Appellant and the same which were not mentioned on the Appellant Appeal before the Tribunal are Section(s) 30(Employee Protection); 34(Vacation Pay); 37(Holidays with pay); 79 & 80 (Protection of pay); and 72(Termination of Employment). The Appellant shall rely on the Application which he had brought before the Labour Standards Tribunal.

4. The Appellant was issued a fake identification card by the Respondent to gain access to the large Department of Education work premises and to identify himself outside the Department of Education. The Respondent failed to give the Appellant a formal letter of employment and a letter indicating the terms and conditions of his employment. To allow the Respondent’s dictatorship, repression, and anarchy to succeed, the Tribunal clouded the meaning of “identification card” and offer favorable definition in support of the mischief of the Respondent. Section(s) 15 and 16 relate to the principal pleading of the Appellant because they form the major cause of action which is an Order requested by the Appellant challenging the duties and responsibilities of the Director of the Labour Standards during the employment of the Appellant with the Respondent.

5. The Appellant was not allowed by the Tribunal to issue subpoenas to over 85% of the Appellant witnesses when the need for the

witnesses arose due to a large list of documents(over 126 pages) submitted by the Counsel for the Respondent from the “back door” about two minutes before the commencement of the proceeding. The proceeding started on May 23, 2000. Prior to the date of this proceeding on May 16, 2000 the Counsel for the Respondent submitted few documents and deliberately failed to submit this important and major book. To frustrate the Appellant case and create a comfortable thoroughfare for this victimization to succeed, the Tribunal sanctioned the issuance of these subpoenas to the key witnesses which were listed by the Appellant. The Tribunal ignored the Nova Scotia Civil Procedure Rule 31.27 which was sited (sic) by the Appellant in support of the continuity of subpoena through out a given proceeding. The Tribunal forced the Appellant to continue his argument without these witnesses. There was no suggestion made by the Tribunal to adjourn the proceeding to July 06, 2000.

6. The language and expression used by the Tribunal in sections 1 to 11 of the decision dated on August 23, 2000 are sufficient proof backing the amount of support offered the Respondent to enable its case succeed. In supporting the Respondent, the Tribunal has made the entire world believe that employers in Nova Scotia and/or Canada could issue fake identification card to their employees and even hire staff without issuing them a formal letter of employment and a letter indicating the terms and conditions of their employment.

7. The Tribunal tried to police, dictate and sanction what question the Appellant should ask the Respondent. The Respondent frequently turns round to request the permission of the Tribunal to answer the question originating from the Appellant. Over 90% of the questions which the Appellant asked the Respondent were disapproved by the Tribunal and the Counsel for the Respondent.

8. The Tribunal allowed and recorded exhibits from the Counsel for the Respondent and from time to time rejected the same from the Appellant.

9. The Duty of the Tribunal is against or counter productive to Section 26 (1) (a) and (2) (a) and (b) of the Labour Standards Code if weighed side by side with paragraph(s) 4 and 9 of the decision of the Tribunal. The Tribunal failed to exercise its duty.

10. The Tribunal failed to use majority of the pleading of the Appellant and non of the witness to hand down the decision dated on August 23, 2000. The Tribunal inherited all the position of the Respondent and adopted it variously to condition the final decision.

[5] The relief which the appellant requests of this court are set out in his notice of appeal as follows:

> AND that the Appellant will ask the decision appealed be dismissed or canceled as follows:
>
> > (a) That the Application and argument of the Appellant were used by the Tribunal considering the wrong reference and importation of foreign or strange Section(s) of the Labour Standards Code into the Appellant case. Section(s) 30(Employee Protection); 34(Vacation Pay); 37(Holidays with pay); 79 & 80(Protection of pay); and 72(Termination of Employment) which were used to dismiss the Appellant Appeal before the Tribunal are contrary to the section(s) brought before the Tribunal by the Appellant.
> >
> > (b) The Tribunal ignored the Nova Scotia Civil Procedure Rule 31.27 to dismiss the Appeal of the Appellant. “Witnesses are mothers of good case adventure and prospecting”.
> >
> > (c) Failure of the Duty of the Tribunal according to Section 26 (1) (a) and (2) (a) and (b) of the Labour Standards Code with reference to paragraph(s) 4 and 9 of the decision of the Tribunal especially the oral demand for the soft compensation of the sum of $5000.00 as part of what the Appellant has suffered through this harsh treatment.
> >
> > (d) The Tribunal failed to give the Appellant the freedom and opportunity to present his case or argument.
>
> AND that the Appellant will also ask for the following:

> (a) The Appellant demands for the sum of $125,000 as part of what he has suffered as a result of the extreme subjugation and unofficial or illegal work environment and condition which he was subjected to by the Respondent.
>
> (b) The decision of the Director of Labour Standards and the Tribunal be dismissed accordingly.

[6] The matter first came before me, in Chambers, on November 23rd, 2000, on an application to set the matter down for hearing. Mr. Ofume is not represented by counsel.

[7] The matter was adjourned because Mr. Ofume had not filed a certificate respecting the preparation of the appeal book. That document was eventually filed on December 12th, 2000.

[8] There was also an indication, from counsel for the respondent, that the Tribunal had not been served with the notice of appeal, pursuant to **Civil Procedure Rule** 62.03(3). I had some concerns as to whether such service was required, because the **Labour Standards Code**, R.S.N.S. 1989 c. 246, prescribes how an appeal should be brought from a decision of the Tribunal, and there is no provision in the Statute for serving the

Tribunal with the notice of appeal. It is not necessary for me to decide that issue, because the Tribunal was served and appeared before me, through counsel, on December 21st, 2000.

[9] Counsel for the respondent also made reference to the fact that the notice of appeal was filed late. The decision and order of the Tribunal is dated August 23rd, 2000. The notice of appeal should have been filed within 30 days. The notice of appeal was actually filed on October 5th, 2000, 13 days late. Counsel for the respondent did not press this issue. I indicated that if the matter was pursued I would grant an extension of the time requirement, given the circumstance that Mr. Ofume was not represented by counsel, and that no prejudice by the delay (less than two weeks) was apparent, or alleged.

[10] With these preliminary matters out of the way the parties appeared before me, again, on December 21s, 2000 for the purpose of setting the appeal down for hearing. Mr. Ofume was unrepresented. The respondent appeared through counsel, as did the Tribunal.

[11] Counsel for the Tribunal advised me, at the commencement of the application, that a transcript of the hearing before the Tribunal would be incomplete, because the recording system malfunctioned. It had been indicated to counsel that, probably, all of Mr. Ofume's case (his own testimony and that of his witnesses) was not available. The evidence of other witnesses for the respondent was available, as were closing submissions before the Tribunal.

[12] As a result of this information, I adjourned the matter to January 4th, 2001. I wished to have more detail as to exactly what parts of the hearing before the Tribunal would not be available in a transcript, and I also wished submissions from the parties as to how the matter should proceed from here.

[13] On the day before the parties were to reconvene before me, counsel for the Tribunal filed an affidavit with the court which I had an opportunity to review on January 3rd, 2001. The affidavit was deposed to by the executive officer of the Nova Scotia Labour Standards Tribunal, Mr. Brian Condran. The relevant depositions in the affidavit are as follows:

> 2. That the hearing resulting in the Order made by the Nova Scotia Labour Standards Tribunal which is the subject of this Appeal took place on May 23 and June 26, 2000.
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> 3. The hearing on May 23 was tape recorded and tapes 1, 2, and 3 were made during the evidence and cross-examination of the Appellant Phillip Ofume, and of Levi Ezuriki, who were witnesses called by Dr. Ofume. After tape 3 was completed it was discovered that tapes 1, 2, and 3 were blank. A different tape recording machine was then substituted and tapes 4, 5, and 6 were successfully made of the direct and cross-examination of John Crawford and Dr. Kakembo, who were witnesses called by the Department of Education. The hearing on May 23 then concluded and resumed for argument and submissions on June 26. Successful recordings were made of the proceedings on June 26.
>
> 4. As a result the Labour Standards Tribunal is unable to provide a transcript of the evidence of Phillip Ofume or Levi Ezuriki.

[14] There is no indication in the affidavit, nor have I been advised, as to why the Tribunal continued with the hearing, having discovered that the first three tapes were blank, and why the Tribunal did not start over again under those circumstances.

[15] When the parties appeared before me on January 4th, 2001, I was concerned as to how, in these circumstances, I could set this appeal down for hearing. Given the nature of Mr. Ofume's grounds of appeal, the fact that all of his evidence, and that of his witness, would not be available for

review is a most unsatisfactory situation.

[16] It seemed to me (and I so advised the parties) that the logical course was for the parties to agree to a rehearing of Mr. Ofume's complaint before the Nova Scotia Labour Standard's Tribunal. I have no authority, as a Chambers judge, to order such a rehearing. However I did indicate to the parties that if they were prepared to consent to an order sending the matter back to the Tribunal for a rehearing, that I would convene a three member panel of the court and have that order issued. Further, it seemed to me that a rehearing would be a logical conclusion of the court of appeal, even if Mr. Ofume was successful on his appeal.

[17] Counsel for the Tribunal indicated that the Tribunal was prepared to reconvene and conduct a rehearing into Mr. Ofume's complaint. Counsel for the respondent indicated, as well, that the respondent department would consent to a rehearing. Mr. Ofume refused to agree to such a rehearing.

[18] I spent some time attempting to explain to Mr. Ofume the dilemma

with which I was presented, and I was uncertain as to whether he fully comprehended the implications of his not agreeing to having the matter reheard. I told Mr. Ofume that I would give him some time if he wished to consider the matter further. I suggested to him that he consult with a lawyer with respect to the present situation, and that if he needed time to do that I would adjourn the matter to another day. Mr. Ofume indicated, quite clearly, to me that he would not change his mind and that there was no point in adjourning the matter any further. I asked Mr. Ofume if he had any suggestions as to how we proceed from here, and he indicated that the matter was in my hands.

[19] The options which are open to me to deal with this matter, as a Chambers judge sitting alone, are few.

[20] Firstly, I could refuse to set the appeal down for hearing because of the missing trial transcript. If I do that, nothing happens, and the matter would languish in the Registrar's office until an application was made to dismiss the appeal for failure to perfect. This is not a satisfactory option.

[21] Secondly, I could order that each of the parties (including the Tribunal) produce (with the assistance of notes or otherwise) a summary of the evidence which the Tribunal heard and which was not recorded. After allowing a reasonable time for the preparation of these summaries, and depending upon the level of agreement contained in those summaries, the appeal could be set down for hearing, by the Chambers judge, using the summaries instead of a transcript of that evidence for which a transcript is not available. My concern with this option is that I may be optimistic in thinking that some level of unanimity can be reached from these summaries. If that is not successful, the Chambers judge, at that time, is in no better position than I am in now to deal with the matter.

[22] Thirdly, I could refer the application to set the appeal down for hearing to a panel of the court pursuant to **Civil Procedure Rule**

62.31.(8)(d) which provides as follows:

> 62.31.
> (8) A Judge may order that

> (d) the application be referred to the Court for hearing and disposition.

[23] In my view, under all of the circumstances, the third option is the most appropriate way of dealing with this unusual matter.

[24] I will, therefore, order that the appellant's application to set this appeal down for hearing be referred to a panel of this court. The application will heard at the Court of Appeal on Tuesday, March 27, 2001 at 2:00 p.m. in the afternoon. Any prior written submissions which the parties may wish to make on this application will be filed with the Registrar on or before February 27, 2001. While the Tribunal is not a party to this appeal, their participation on the hearing of this application may, under the unusual circumstances of this case, be helpful to the court in dealing with this application.

Flinn, J.A.