Reports of the Exchequer Court of Canada v.11 1905-1908

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1908

April 14.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

ROBERTS v. THE SHIP "*TARTAR.*"

Shipping—Master's wages—Custom of port as to discharge of master without notice—Set-off.

It is not the custom of the port of Vancouver that masters of tug-boats and small coasting vessels may, on the one hand, be discharged without notice, and, on the other hand, leave their employer's service in the same manner, in either case receiving their wages up to the date of the termination of the service.

2. An item of set-off asserted by the owners against the master's claim for wages, consisting of an amount of $30.75 charged for the fare and board of a friend of the master who had been taken with him on one of his trips on the owner's tug-boat, was not allowed because it was a general practice in the port of Vancouver to allow the masters such a privilege.

ACTION by a master for wages and for damages for wrongful dismissal.

The facts appear in the reasons for judgment.

The case was tried in Vancouver before Mr. Justice Martin, Local Judge for the British Columbia Admiralty District, on 1st April, 1908.

A. C. Brydon Jack for plaintiff;

R. L. Reid, K.C., for ship.

MARTIN, L. J. now (April 14th, 1908,) delivered judgment.

This action raises a question of importance to mariners of the port of Vancouver, viz.:—Is it the custom of that port that masters of tug-boats and small coasting vessels may on the one hand be discharged without notice, and, on the other, leave their employer's service in the same manner, in either case receiving their wages up the date of the termination of the service?

The owners of the defendant tug-boat adduced evidence to support the custom and the plaintiff brought forward

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witnesses to the contrary, with the result that I am satisfied said alleged custom does not exist. It is of so unusual a nature that I should have expected evidence to satisfy me beyond reasonable doubt that it was the "settled and established practice of the port," as was said in *Postlethwaite* v. *Freeland* (1), but even the defendants' evidence hardly went that length. But in any event I could not hold such a custom to be reasonable, the objections to it being so many and so obvious; to give one example only, it would be an extraordinary state of affairs, and one contrary not only to the interests of master and owner but of the travelling public, if a master on a trip from, say, Vancouver to Van Anda, thence to Nanaimo, and back to Vancouver, could, in effect, desert his ship at Van Anda without any notice, leave his passengers and his owners in the lurch, and yet get paid for such a manifest breach of all marine traditional obligations and standards. A Court of Admiralty can hardly be expected to sanction anything of that sort.

If the defendants were not justified in dismissing the plaintiff in pursuance of the said custom, which I find they were not, then after a careful consideration of all the evidence I have come to the conclusion that there was no other ground for his dismissal. The question very largely depends upon the state of the weather when the tug had the boom in tow, and though the master of the *Schelt* was called by the defendant to disprove the plaintiff's statement on that head, he admitted he was unable to do so.

Such being the case, the plaintiff is entitled to the sum of $116.35, being the amount of wages actually due up to his discharge on the 15th of January, and I award him the further sum of $100 damages, *i.e.* one month's salary for wrongful dismissal.

(1) [1880] 5 A. C. 599 at p. 616.

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Reasons for Judgment.

Mr. Jack rightly contended that it has been the practice of this court to make an allowance of a month's wages to mariners engaged on a monthly basis who have been wrongfully dismissed, provided they showed due diligence, as the plaintiff did here, to obtain similar employment elsewhere after dismissal but were, as here, unsuccessful in the effort.

Turning then to the set-off. The first item, for merchandise, has been abandoned, and the second one, for washing, the owners have not established. The third does not found any claim against the plaintiff. It is true that he, as master, increased the mate's wages on the pay-sheet sent to the owners, but they were not misled by it, and if they chose to pay the additional amount, which there was no legal obligation to do, they cannot recover the sum from the plaintiff.

The two last items in the set-off amount to $30.75 and are sought to be deducted from the plaintiff's wages because the owners objected to his taking a friend with him on the tug on one of her trips, and so they charged the fare up against him, $9, together with his friend's board for twenty-eight days at 75c., $21.75. But I do not think it would be just to allow this, deduction in view of the fact that one of the defendants own witnesses admitted that owners in general did not object to captains of tug-boats taking their friends on such trips, even for a longer period than twenty-eight days, and that it would not be customary to object to the captain extending in this way the courtesy of his vessel, so to speak, to a friend who no doubt would reciprocate. Such being the fact it would, I think, have been better, in case the owner's herein objected to such a recognised practice, if they had definitely informed their master of that fact beforehand, otherwise it would not be fair to him to seek to make him liable.

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Reasons for Judgment.

The result is that judgment will be entered in favour of the plaintiff for $116.35 wages and $100 damages, total $216.35.

As to the costs Mr. Reid asks that they should not be awarded to the plaintiff because the amount was relatively small, under fifty pounds (1), and the action might have been brought in the County Court. It is true that the amount is not large, but as is frequently the case with actions regarding seamen's wages, questions of principle are herein involved, (as a recent example of which in this court see *Cable* v. *Socotra* (2)), and the two questions of custom which have arisen are of general importance to mariners on this coast, and merit the consideration of a court of superior jurisdiction. But further, as was urged by plaintiff's counsel, this court affords a special remedy for the recovery of wages, by the seizure of the vessel, which is not open to other courts, and its practice affords the means for a very desirable prompt determination of the claim. I see no good reason to depart from general rule No. 132, that the costs should follow the event. No question of accounts, properly so called, arises here, as was the case in the *Fleur de Lis* (3), it is a simple claim for so much wages for so many days, as fully within the defendants' knowledge as the plaintiff's, and damages for wrongful dismissal.

Judgment accordingly.

Solicitor for plaintiff: *A. C. Brydon Jack.*

Solicitors for ship: *Bowser, Reid and Wallbridge.*

(1) Howell's Admiralty Practice, 63.

(2) 11 Ex. C. R. 301.

(3) [1896] L. R. 1 Ad. & Ecc. 49.