

APPEAL FROM NEW BRUNSWICK ADMIRALTY DISTRICT.

BETWEEN

THE SHIP "LADY EILEEN" } APPELLANT;
(Defendant).....1907
April 8.

AND

LEANDER JOSEPH POULIOT } RESPONDENT.
(Plaintiff).....*Shipping—Master's wages—Action for wrongful dismissal.*

On the 27th of January, 1905, the respondent entered into an agreement in writing with the appellants to proceed to Glasgow, Scotland, and take command of the steamer *Lady Eileen* and bring her to the port of Sydney, C.B. Thereafter he was, in the language of the agreement, "subject and obedient to the orders of the managers of said company to continue in command of the said steamship until the first day of January, A.D. 1906, or until such earlier time as may be ordered by the said managers." By another clause of the agreement it was provided that "notwithstanding anything herein contained it is the clear intention and meaning of these presents that for his services during the season of A.D. 1905, he, the said L. J. P. shall be paid at least the sum of \$1,050, irrespective of the length of the season, unless for neglect or breach of duty he be sooner dismissed, or the Company have a proper right of set-off against the same." The respondent brought the *Lady Eileen* to Canada, and the appellants placed her on the route between Campbellton, N.B., and Gaspé, P.Q., under the command of the respondent as master. A subsidy was obtained for carrying His Majesty's mails between the said ports twice a week, and the ship made her first regular trip on the 13th May, 1905. On the 29th June, the ship left Gaspé for Campbellton, reaching Dalhousie about 9 p.m. After landing his freight at that place, the respondent thought it was not safe to proceed to Campbellton on account of the darkness and certain obstacles then in the channel. His view of the danger of proceeding in the darkness was shared by the pilot. At about 10.30 o'clock he received the following telegram from the appellant's manager: "Leave Dalhousie at once. Do not lay in Dalhousie. See that you follow these orders." To which he replied: "Will leave Dalhousie daylight to-morrow, or whenever I think proper." The ship arrived at Campbellton early the

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next morning, but too late to deliver the mails to the morning train. The respondent was then immediately dismissed from their service by the appellants.

Held, affirming the judgment appealed from, that the respondent's disobedience of the order given to him was, under the circumstances of the case, justified, and that his dismissal was wrongful.

A PPEAL from a judgment of the Local Judge of the New Brunswick Admiralty District.

The facts of the case are stated in the reasons for judgment of the learned trial judge, which are as follows :

MCLEOD, L.J. : "The plaintiff in this case was for a time in 1905 master of the steamship *Lady Eileen* plying between Campbellton, N.B., and Gaspé, Quebec. He was dismissed by the owners, or by Mr. Franklin S. Blair on behalf of the owners, on the 30th of June, 1905, and it is for this dismissal that this action is brought.

"The agreement as to the hiring and the facts leading up to the dismissal may be shortly stated as follows :—

"The *Lady Eileen* is a steamer built for and owned by the Interprovincial Navigation Company, Limited, (hereinafter called the company), and was built for the purpose of running between Campbellton and Gaspé. After some negotiations the owners agreed to hire the plaintiff as master of the steamer and on the 27th of January, 1905, an agreement of hiring in writing was entered into between the company and the plaintiff. The agreement, which is in evidence, in the first place recited that the company proposed to establish a steamship line plying between Campbellton, in the Province of New Brunswick, and Gaspé, in the Province of Quebec, and for that purpose would at the opening of navigation in the (then) coming spring place on the route the steamship *Lady Eileen*, and also that at a duly constituted meeting of the directors of the said company held at the town of Campbellton, on Thursday, the 26th of January, (then) instant, that the said Leander Joseph Pouliot (the plain-

tiff) be constituted and appointed master of the said steamship, and that an agreement for that purpose be entered into upon the terms and conditions (then) following. The agreement then follows. It is not necessary here to set it out in full, but by it the plaintiff was appointed master of the *Lady Eileen* until the first day of January, A.D. 1906, or until such earlier time as might be ordered by the said managers. He was to report at the office of the company in Campbellton on the 1st of February, 1905, and then proceed to Glasgow, Scotland, and take command of the steamer and bring her to the port of Sydney, Cape Breton. The agreement then proceeds:

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“After which he will, subject and obedient to the “orders of the managers of the said company continue “in command of the said steamship until the first day of “January, A.D. 1906, or until such earlier time as may “be ordered by the said managers. And it is hereby “covenanted and agreed by the said company to and “with the said Leander Joseph Pouliot that it will com- “pensate and pay to the said Leander Joseph Pouliot “for his services for the period extending from the said “21st day of February, A.D. 1905, down to and includ- “ing the day of arrival of the said steamship at the said “port of Sydney a sum of money computed at the rate “of one hundred and twenty dollars and sixty-seven “cents per month for all the time aforesaid and in “addition thereto will reimburse and pay to the said “Leander Joseph Pouliot all ordinary and proper “expenses incurred by him in and about the said service “during the said period.”

“And it was further agreed that the salary of the plaintiff after the steamship arrived at Sydney and as long as he continued in the employ of the company should be one hundred and sixteen dollars and sixty-six

1907 cents a month and free board on the steamship while on duty.

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"There was a further provision that in the event of the company requiring the services of the plaintiff after the close of the navigation on the said route it should have the right to command and continue his services as master in other waters for a period of three months for the gross sum of one hundred and fifty dollars and free board, but nothing in this case turns on this clause of the agreement.

"The last clause of the agreement is as follows: "Notwithstanding anything herein contained it is the clear intention and meaning of these presents that for his services during the season of A.D. 1905, he, the said Joseph Leander Pouliot, shall be paid at least the sum of one thousand and fifty dollars irrespective of the length of the season, unless for neglect or breach of duty he be sooner dismissed or the company have a proper right of set off against the same."

"Owing to some delay in completing the work on the steamship the company notified the plaintiff not to report for orders until the 27th of February, on which day he reported at the company's office. On the 6th of March he was directed to proceed to Glasgow to take charge of the steamship. The instructions were in writing and are in evidence. I do not think, however, they effect the questions arising in this case. By the instructions, however, he was directed to bring the steamship to Sydney or whatever other port in Nova Scotia the ice would allow him to make.

"The plaintiff then proceeded to Glasgow and, when the steamship was ready, brought her to Louisburg, N.S., arriving there on the 28th of April, 1905. He reported to the company, and Mr. Blair, one of the managers, went there and met him. The steamship was then coaled and proceeded to Campbellton and

commenced running on the route between there and Gaspé, leaving Campbellton on her first trip on the 18th of May. The plaintiff continued as captain until the 30th of June, when he was dismissed by Mr. Blair, one of the managers, as he (Mr. Blair), alleges, for breach of duty, or rather for disobeying the orders, or rather an order of the company, the order itself having been given by Mr Blair. It is for this dismissal that this action is brought.

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"It appears that the steamer was subsidized by the Dominion Government to carry the mails between Campbellton and Gaspé. She made two trips a week, leaving Campbellton on Wednesday and Saturday mornings. When she left on Wednesday morning she was due to arrive at Campbellton on Thursday night or Friday morning, in time to deliver the mails at the train which passed there at about three o'clock in the morning. When she left on Saturday she got back, I should judge from the evidence, on Monday night.

"The steamer left Campbellton on Wednesday morning, the 28th of June, 1905, in charge of the plaintiff as master, on her usual trip to Gaspé, and on her return reached Dalhousie at about 9 o'clock, p.m., or perhaps a little after nine, on the night of the 28th. He discharged what cargo he had to discharge there and remained there until daylight. His reasons for doing so, he says, were that the night was very dark and he did not know the channel of the river very well, and he did not think it safe to venture further up the river until daylight. (Campbellton, I should say, is about twelve or thirteen miles farther up the river Restigouche from Dalhousie.) He also says that Peterson, who was his pilot, and who was appointed by the owners, was not a proper or safe pilot. From the evidence it appears that Peterson was appointed a special Branch Pilot, that is a commission was given him to act as pilot on the Restigouche River,

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and this it also appears was given him at the request of the managers of the *Lady Eileen*, some of whom were on the Pilot Commission, and it was given him so that he might act as pilot on the *Lady Eileen*. I gather from the evidence that he was not what could be called a good pilot, although he acted as pilot on this steamer, having been appointed for that purpose by the managers.

"The plaintiff says that after he had landed his freight at Dalhousie it was very dark and he thought it was not safe to proceed, and that he consulted the pilot, who agreed with him that there were risk and danger. The plaintiff says on his cross-examination at page 40, as follows:

"Well when she was fastened he (meaning the pilot) was on the wharf and I was on the wharf and I said "Are we going?" He says: "I think we will try it," "so we went on landing the freight and after we landed "the freight it got very dark, overcast, and it was late, "flood tide, and those dredge moorings right in the "middle of the channel, so I met Peterson and said I "I think the best thing we can do is to wait until day- "light, we have a dark night, we have the flood tide, "there is very dangerous moorings, the harbour is full of "ships and we will get there early in the morning and "there will be no time lost,' and it was at the wharf, "passengers could take the train and go, it wasn't like "any place where passengers couldn't take the train.' "And Peterson said: "Yes, you are all right; that is "right, captain, I agree with you, there is risk, there is "danger," and I say, "I guided myself a little by the "message I got yesterday. Take no risk."

"The message he there refers to is one he had received on Wednesday, the previous day, at Paspbiac, a port of call on his way to Gaspé, and is as follows:

"Heavy gale and big sea at Grand River, better wait at Paspbiac and enquire at telegraph office state of

weather below before proceeding ; if weather does not moderate may possibly order you to Port Daniel and return to Campbellton ; take no risks and advise us fully what you do.

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" He says when he arrived at Port Daniel the weather was clear and he proceeded to Gaspé. I will refer to this telegram later.

Peterson, the pilot, was called by the defendant and in his direct examination as to the steamer not proceeding to Campbellton that night says as follows, at page 215 :

" Q. While moored at Dalhousie, or when coming into Dalhousie, at any time that evening, did Captain Pouliot consult you about bringing the steamship on to Campbellton ?—A. No, sir.

Q. Did you intimate to Captain Pouliot in any way that you approved of her being moored and staying at Dalhousie all night ?—A. No, sir.

Q. What sort of night was it ?—A. It was very dark.

Q. Would you consider it an unsafe night ?—A. I would say it would be. It wasn't very safe to come up.

Q. Had you been captain of the steamship in Captain Pouliot's place would you have brought the vessel up ?—A. Well, I couldn't say.

Q. What would you have done ?—A. I would have left the wharf and see if I couldn't get an anchor.

Q. To where you could get an anchor if you couldn't get through ?—A. Yes.

Q. Suppose you had been in Captain Pouliot's place and had received this order ? Objected to.—A. I would have left the wharf.

Q. You would have proceeded to bring the vessel to Campbellton ?—A. I might not have got to Campbellton.

Q. Would you have proceeded to bring the vessel on to Campbellton ?—A. I would."

On his cross-examination he says at p. 216 :

1905 "Q. I understand it was a very dark night at Campbellton?—A. Yes.

THE SHIP LADY EILEEN Q. And in your judgment it was not very safe to come up that night?—A. No, I would say it wasn't.

THE KING Q. Did Captain Pouliot tell you he didn't intend to come up that night? A. Well, he said it was too dark.

Reasons of Trial Judge. Q. And did you approve of that?—A. Well, yes. I think I did.

Q. You knew about these dredge moorings being in the channel, didn't you?—A. Yes.

Q. Did that constitute a source of danger in your opinion? A. Well, they would be."

On this re-examination he says as follows, at page 218;

Q. As to this dredging my learned friend has asked you about was that such a serious danger as would have prevented your bringing the ship up that night?—A. I say it would be on account of her buoys. I wouldn't like to try it.

Q. You would have thought the dredging buoys would have prevented you coming up?—A. Yes, you would say so, would you?—

Q. Even with this source of danger had you received the order Mr. Blair gave you, you would still have persisted in bringing the ship, or would you?

Objected to.

A. I would.

Q. Had you received such an order, even if there were one or two or a dozen dredging buoys in the channel what would you have done?—A. I would have left the wharf and brought the ship up as far as I could and anchored.

Q. You certainly would have proceeded?—A. Yes."

"The order referred to was a telegram sent by Blair, the manager to the plaintiff, at about half past ten in the evening, and after Blair had learned that plaintiff intended to wait in Dalhousie, and is as follows:—

'Leave Dalhousie at once. Do not lay in Dalhousie.
See that you follow these orders.'

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To that the plaintiff replied as follows :

Will leave Dalhousie daylight to-morrow, or whenever ^{Reasons of} Trial Judge,
I think proper."

CAPTAIN L. J. POULIOT."

"The plaintiff left Dalhousie at about a quarter to three, which was about daylight, and arrived in Campbellton about half past four or between that and five o'clock, but too late to deliver the mails to the train passing Campbellton that morning.

"I may say that when the plaintiff decided to remain over at Dalhousie he sent the mails to the railway station there, but the agent declined to receive them, or rather to be responsible for them, and they were taken back to the steamer. The plaintiff on his arrival in Campbellton was immediately dismissed by Mr. Blair, the manager, and it was for disobeying the order contained in the telegram of the night before that he was so dismissed.

"At the trial some evidence was given of conduct on the part of the plaintiff at other times, which on the argument it was claimed would warrant his dismissal I will, however, refer to these reasons later. The defendants claim that when the plaintiff was within reach of his owners he was obliged in any event to obey the orders they gave him, and they claim that the words in the contract "after which" (that is after he has arrived at Sydney) "he will subject and obedient to the orders of the managers of the said company continue in command of the steamship," &c., made it necessary for him to obey whatever orders they gave. I do not think these words carry the control of the managers or the company any farther than an ordinary simple contract of hiring would. The captain is always subject to the orders of his owners. The owners direct him as to the business of the ship and

1907 as to the way and manner in which it is to be engaged.

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Reasons of Trial Judge. the requisite skill and knowledge of seamanship to properly navigate her; and as master in charge of the ship he is charged with the safety of the ship and cargo and with the life and health of her passengers and crew.

"In this case the charge is that he remained in Dalhousie after discharging his cargo on the night of the 29th June until about a quarter to three in the morning of the 30th when he proceeded to Campbellton. He did this, as I have said, because he considered it unsafe to proceed.

"Under the evidence I think there was no *mala fides* on his part in not proceeding. There may have been an error in judgment, but that would not forfeit his wages. (See *The Atlantic* 7 L. T. Reps., p. 647.) I am not, however, prepared to say that there was even an error in judgment. The evidence, I think, disclosed that he had good reasons for not proceeding. The night at Dalhousie when he had finished loading was very dark, the plaintiff himself was not sufficiently familiar with the channel of the river between Dalhousie and Campbellton to undertake to navigate it on a dark night, and the pilot (who as I have said was appointed by the owners and was not a very competent pilot) agreed that it was not safe to proceed. Dredging operations were being carried on on the river between Dalhousie and Campbellton, and this the plaintiff thought added to the difficulties and danger of proceeding that night, and he accordingly decided to remain until daylight and at daylight he did proceed and arrived at Campbellton at or a little earlier than he had arrived on previous trips.

"The evidence does not show that he acted in bad faith or from any improper motives, or in collusion with anyone, or for any ulterior purpose; but I think it shows that he did

not proceed simply because he thought it unsafe to do so, and as I have said, acting thus *bona fide*, even if he made an error in judgment it would not make a forfeiture of wages already earned, or justify his dismissal.

"It is claimed, however, that as he was within easy reach of his owners that he should have communicated with them before deciding to remain, or at all events obeyed the direct order he received to proceed. It would, I think, have been a better course for him when he had decided to remain to have so informed his owners, but the fact that he did not do so, cannot, I think affect the result of this case. It is true that where a question arises as to the business or management of the ship the master must, if he is in a position to do so, communicate with his owners and must obey the orders received from them; but that cannot be the case where it is a matter of seamanship as to whether it is safe under the conditions of the weather to proceed or not. He, in that case must be the person to determine the question, always supposing he acts *bona fide* and in good faith. He as master is responsible, not only for the safety of the ship, but for the safety of the lives of the passengers and crew, and the owners by directing him to proceed cannot relieve him of that responsibility. Moreover the plaintiff was at Dalhousie and knew the conditions there and the state of the weather. Mr. Blair, who gave the order, was at Campbellton and did not know and could not know the conditions as they existed at Dalhousie. The evidence is that the night was clear at Campbellton, but it is also proved, and I think not contradicted, at all events it was proved to my satisfaction, that when the plaintiff had finished unloading it was very dark at Dalhousie.

"I have therefore come to the conclusion that there was no *mala fides* on the plaintiff's part in not proceeding but that he acted in good faith, honestly believing that

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1907 it was unsafe to proceed until daylight. It is true that

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the reply he sent to the telegram was not properly worded and was calculated without explanation to give offence.

Reasons of Trial Judge. The plaintiff says that he did not mean to give offence, he simp'y meant to say that he would leave when he thought it was safe, and he accordingly did not leave until daylight the next morning.

" I have given the evidence very careful consideration, and I think the action of the plaintiff in remaining over at Dalhousie did not warrant his dismissal. From the evidence I think it clearly appears that Mr. Blair thought that the reason for the plaintiff remaining at Dalhousie was in order to make it appear that Dalhousie was the proper terminal port for the steamer, and that that was the real cause for the dismissal. In this he was entirely wrong ; there is no evidence whatever to support it. The plaintiff appears to have had no interest whatever in Dalhousie, and although his own private opinion may have been that Dalhousie was the better terminal port, it did not in any way affect his judgment in remaining the few hours he did remain on the night of the 29th.

" The plaintiff had, on Wednesday on his way to Gaspé, received the telegram from Mr. Blair already referred to saying that there was a heavy gale and big sea at Grand River, and telling him to take no risks and advise fully ; but finding the weather was clear he proceeded to Gaspé. The telegram, however, was of itself a caution to him to take no risks, and when he was at Dalhousie and honestly thought and believed there was risk and danger in proceeding he very naturally remembered this telegram, and that the owners wished that he should take no risk ; and as he believed there was risk and danger, which belief was concurred in by his pilot, he did not venture to take the risk of proceeding.

" It is true that the pilot says that if he had received such an order as the plaintiff received he would have

proceeded as far as he could and then have anchored. If the plaintiff, however, honestly believed there was danger in proceeding I do not think that he was obliged to proceed in order to ascertain whether or not he could succeed.

It was his duty to act honestly and fairly and on his best judgment when in Dalhousie, and having done so and having shewn fair reasons for acting as he did I cannot think his dismissal for not proceeding is justified. As I have already said, I think from the evidence that Mr. Blair's real reason for dismissing him was an impression he had that the plaintiff was not acting *bona fide* and in good faith but that he desired to show that Dalhousie was the proper terminal port for the steamer, in which impression he was wrong.

" It was contended on the argument that the defendants might avail themselves of other reasons for his dismissal than those given at the trial, if other reasons existed, and I admit that they may do so. Some other reasons were urged on the argument which it was claimed would warrant the plaintiff's dismissal. From the evidence I do not think any of them would warrant a dismissal, but, even if they would have warranted it, the owners of the steamer knew of them at the time and by continuing him in command of the steamer waived them (1).

" The decree must be entered for the plaintiff, both for wages up to the time of his dismissal, and also for damages for wrongful dismissal.

" The plaintiff is in any event entitled to his wages up to the time of his dismissal. He was actually in command of the vessel up to that time, and no case can be found where under circumstances similar to these the master's wages have been forfeited. Even if he was guilty of an error of judgment his wages would not be forfeited.

(1) See the remarks of Sir R. Philimore in the *Roebuck*, 31 L. T. at p. 278.

1907 The *Roebuck* (1), which was cited by the defendant, when
THE SHIP looked at is an authority for this proposition. The mas-
LADY EILEEN ter in that case was deprived of his wages for five
v. months, but during that time he was navigating the ship
THE KING. against the orders of her owners and the court found
Reasons of that some intrigue was carried on between himself and
Trial Judge. another party which induced him to disobey his positive
 instructions and make the voyages complained of; but
 it was held that he did not thereby forfeit any other part
 of his wages.

"I think, also, he is entitled to damages for wrongful dismissal. By one of the provisions of the agreement of hiring it is provided that for the services during the season A.D.1905, one thousand and fifty dollars should be paid, irrespective of the length of the season, and I think the damages should be based on that part of the agreement, giving him a reasonable amount for the expenses he had to occur in consequence of the dismissal.

"The decree will be for twelve hundred dollars, made up as follows: Wages and expenses to time of dismissal, \$387 77; damages for wrongful dismissal, \$862.28.

"The defendant must also pay the cost of this action."

January 17th, 1907.

The appeal was heard at St. John, N.B.

L. A. Currey, K.C., and W. A. Mott, for the appellants;

J. D. Hazen, K.C., and W. H. Harrison, for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (April 8th, 1907) delivered judgment.

This is an appeal from a decree entered in the registry of the New Brunswick Admiralty District on the first day of October, 1906, whereby in an action for wages, disbursements, and for damages for the wrongful dis-

(1) 31 L. T. N. S. at p. 274.

missal of the plaintiff as master of the defendant ship, the learned Judge of the district pronounced the sum of twelve hundred dollars to be due to the plaintiff with costs, and condemned the ship *Lady Eileen* in the said sum and costs. Of this amount of twelve hundred dollars, the sum of three hundred and thirty-seven dollars and seventy-seven cents was awarded for wages that had accrued due and for expenses incurred before the plaintiff's dismissal ; and the sum of eight hundred and sixty-two dollars and twenty-three cents for damages for wrongful dismissal. With regard to the amount allowed for wages and disbursements, there is, I think, no doubt as to the plaintiff's right to recover. But it is argued that he ought not to have his costs because he did not deliver a statement of account before bringing the action. The costs, however, were in the discretion of the learned Judge, and he has seen fit to allow them, and I see no good reason for interfering with his exercise of his discretion.

With regard to the dismissal of the plaintiff, it is sought to be justified on the ground that he wilfully disobeyed a lawful order given to him on behalf of the owners of the ship. The disobedience is admitted, but in reply grounds of justification therefor are set up. The facts are fully and clearly stated in the reasons given by the learned Judge for the decree which was made, and it is unnecessary to repeat them here. He found that the plaintiff's disobedience of the order given to him was under the circumstances of the case justified, and that his dismissal was wrongful. That was a question for the consideration of the learned Judge, as a question of fact, and of the proper inferences to be drawn from facts. (Per Strong and Henry, JJ., in *Guilford v. Anglo-French Steamship Company* (1)).

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1907 I may add that in my opinion his finding was justified
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Judgment accordingly.

Solicitor for appellant : *W. A. Mott.*

Solicitors for respondent : *Hazen & Raymond.*