

QUEBEC ADMIRALTY DISTRICT

Montreal
1968
Oct. 8
Ottawa
Oct. 31

BETWEEN:

LE MARIN DENIS BARTHEDEMANDEUR;

AND

LE NAVIRE S/S FLORIDA }
ET AUTRES} DÉFENDEURS;

AND

PAUL E. NOËLAPPELÉ EN GARANTIE.

Admiralty—Breach of contract to employ seaman—Whether within Admiralty jurisdiction—Whether claim for damages or for wages—Quebec civil law—Admiralty Act, R.S.C. 1952, c. 1, s. 18(1)—Canada Shipping Act, R.S.C. 1952, c. 29, secs. 200, 214(2).

Plaintiff brought action on the Admiralty side alleging that he was engaged in Montreal in mid-April 1966 as second cook of the S.S. *Florida* at \$350 a month but was informed on December 15th that the ship would not sail that year, and he claimed \$700 plus interest from October 15th and in default of payment sale of the ship.

Held, on an interlocutory motion, the action was within the court's Admiralty jurisdiction.

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1. If regarded as an action for damages for breach of contract to employ plaintiff aboard defendant ship the action was indistinguishable in principle from an action for damages for breach of contract for wrongful dismissal and thus was within Admiralty jurisdiction in virtue of s. 18(1) of the Admiralty Act. *The Great Eastern* (1867) L.R. 1 A. & E. 384; *The Blessing* (1878) 3 P.D. 35; *The Ferret* (1883) 8 App. Cas. 329; *The Lady Eileen v. The King* (1907) 11 Ex. C.R. 87; *Roberts v. The Tartar* (1908) 11 Ex. C.R. 308; *The City of London* (1839) 1 W. Robinson's Admiralty R. 88, referred to.
2. If regarded as a claim for wages for work for which plaintiff held himself available (a claim based on s. 200 of the *Canada Shipping Act*) Admiralty jurisdiction arose under s. 214(2) of the *Canada Shipping Act*. (*Fraser v. North Shipping and Transportation Ltd.* 1968) 69 D.L.R. (2d) 596, referred to.) By the law of Quebec if plaintiff did not accept defendants' repudiation of the contract his claim for wages subsisted. *Simard v. The Canada Steamship Co.* [1916] Que. S.C. 105; *Furness Withy v. Recorder E. J. McManamy & Young et al* [1943] Que. S.C. 276, referred to.
3. Plaintiff's right to a maritime lien in respect of his claim should be dealt with at the trial if necessary when the precise nature of his claim was established.

APPLICATION.

Jean Carouzet for demandeur.

Raynold Langlois for défendeurs.

JACKETT P.:—On Tuesday, October 8, an application was made before me under Rule 72 of the Admiralty Rules¹ to have certain questions of law raised by the pleadings in this action decided forthwith.

The substantive allegations in the statement of claim read as follows:

1. En ou vers la mi-octobre 1966, il fut engagé par le Capitaine du S/S *Florida*, M. Paul Noël au bureau de placement des marins à Montréal pour servir en qualité de second cuisinier sur le défendeur, le navire S/S *Florida*, au salaire convenu de \$350.00 par mois;

2. Le Capitaine du défendeur lui ayant assuré que le navire S/S *Florida* devait prendre la mer huit à quinze jours après la date de son engagement, le demandeur se tint prêt et disponible à compter de son engagement à servir en qualité de second cuisinier sur le défendeur et il ne rechercha pas d'autres positions à partir de cette date;

3. Comme on lui avait dit qu'il devrait aller rejoindre le navire S/S *Florida* à Jacksonville aux États-Unis, le demandeur fit les démarches nécessaires auprès du consulat des États-Unis pour obtenir un visa de transit dans ce pays et produit sous la cote P-1 son passeport portant ledit visa à la page 13;

¹ 72. Either party may apply to the Court to decide forthwith any question of law raised by any pleading, and the Court shall thereupon make such order as to it shall seem fit.

4. N'ayant reçu aucune instruction quinze jours après son engagement, le demandeur téléphona au Capitaine Noël pour savoir ce qui se passait, mais celui-ci lui répondit de ne pas s'inquiéter que le départ du défendeur le S/S *Florida* était un peu retardé;

5. Huit ou dix jours après, le demandeur retéléphona au Capitaine du bateau défendeur et celui-ci lui re-affirma qu'il n'y avait pas lieu de s'inquiéter, qu'il ne s'agissait que d'un léger retard et qu'on allait le prévenir bientôt de son départ;

6. Finalement le demandeur, qui ne travaillait toujours pas dans l'attente de son départ en mer appela le Capitaine du bateau vers le 15 décembre 66 et celui-ci lui déclara alors que le bateau défendeur ne pourrait prendre la mer au cours de l'année 66, vue que la saison était trop avancée et que son départ était reporté au mois d'avril 1967;

7. Le demandeur a alors été obligé de chercher du travail et il a ainsi perdu deux mois de salaire à \$350 00, soit \$700 00, par la faute, l'incompétence, la négligence et l'incurie du bateau défendeur et de ses propriétaires, sa cargaison, son frêt et toutes autres personnes y intéressées;

8. Qu'en raison de cette faute et de cette incurie, le demandeur qui ne recevait aucun secours de l'assurance chômage, n'a pas cherché de travail pendant ces deux mois, comptant sur son emploi et ses salaires à bord du défendeur S/S *Florida* et il a dépensé le peu d'argent qu'il avait, se trouvait aux prises avec des difficultés financières inextricables;

9. Le défendeur étant par la suite revenu dans le port de Montréal, le demandeur a dû le faire arrêter pour sauvegarder ses droits et sa créance;

and the Prayer for Relief reads as follows:

PAR CES MOTIFS, PLAISE À CETTE HONORABLE COUR:

CONDAMNER le défendeur et ses propriétaires et ayant-droit à payer au demandeur la somme de \$700.00 avec intérêt depuis le 15 octobre 1966, date à laquelle l'engagement du demandeur aurait dû commencer, et aux dépens;

ET À DÉFAUT par le défendeur ou ses propriétaires ou ses ayant-droit de payer ces sommes, ORDONNER que le défendeur soit vendu en justice pour, sur le produit de la vente, être le demandeur payé par préférence, en principal, intérêts et frais.

The statement of defence reads in part as follows:

3. A tout événement, la Cour de l'Échiquier en Amirauté n'a pas juridiction pour entendre cette cause;

4. La réclamation du Demandeur si réclamation il y a, est de la nature d'une action en dommages et ne confère aucun lien maritime ou autre sur le navire;

The notice of the application under Rule 72 reads in part as follows:

Les questions de droit sur lesquelles la Cour sera appelée à statuer sont les suivantes:

1. La juridiction de la Cour de l'Échiquier en Amirauté dans cette affaire;
2. Le défaut de lien maritime du Demandeur dans cette cause.

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The statement of claim is ambiguous in that it is not clear whether it sets up a claim

- (a) for damages sustained by the plaintiff as a result of not being provided with employment on the defendant vessel pursuant to a contract that had been made with him to provide him with such employment,
- (b) for wages for a period at the commencement of his period of engagement as a seaman during which he held himself available for work although his employer did not put him to work, or
- (c) for one or other of those claims in the alternative.

Had an appropriate application been made, I should have been inclined to require the plaintiff to revise his statement of claim to remedy this ambiguity. That is not, however, the application with which I have to deal on this occasion.

Section 18 of the *Admiralty Act* reads in part as follows:

18. (1) The jurisdiction of the Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters are within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.

(2) Without restricting the generality of subsection (1) of this section, and subject to the provisions of subsection (3) thereof, section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925*, of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, in so far as it can, apply to and be applied by the Court, *mutatis mutandis*, as if that section of that Act had been by this Act re-enacted, with the word "Canada" substituted for the word "England", the words "Governor in Council" substituted for "His Majesty in Council", the words "Canada Shipping Act" (with the proper references to years of enactment and sections) substituted, except with relation to mortgages, for the words "Merchant Shipping Act" (and any equivalent references to years of enactment and sections) and with the words "or other judicial district" added to the words "body of a county", wherever in such section 22 to such *Supreme Court of Judicature (Consolidation) Act, 1925*, any of the indicated words of that Act appear.

(3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine

- (a) any claim
 - (i) arising out of an agreement relating to the use or hire of a ship,
 - (ii) relating to the carriage of goods in a ship, or
 - (iii) in tort in respect of goods carried in a ship,
- (b) any claim for necessaries supplied to a ship, or
- (c) any claim for general average contribution.

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(6) The Court on its Admiralty side has and shall exercise such other jurisdiction and execute such power and authority, in or relating to admiralty matters, as

- (a) heretofore have been conferred upon it by any Act of the Parliament of Canada, or

* * *

The only part of section 22 of the English statute set out in Schedule A to that Act to which any reference has been made by counsel reads as follows:

22. (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:

- (a) Jurisdiction to hear and determine any of the following questions or claims:

* * *

- (iv) Any claim for damage done by a ship;

* * *

- (viii) Any claim by a seaman of a ship for wages earned by him on board the ship, whether due under a special contract or otherwise, and any claim by the master of a ship for wages earned by him on board the ship and for disbursements made by him on account of the ship;

* * *

- (b) Any other jurisdiction formerly vested in the High Court of Admiralty;...

If, properly understood, the plaintiff's claim in this case is for damages sustained by him as a result of not being provided with employment on the defendant vessel pursuant to a contract that had been made with him to provide him with such employment, I cannot conceive of any interpretation of the words "damage done by a ship" that would comprehend such a claim nor can I conceive of any interpretations of the words "wages earned... on board the ship" that would embrace such a claim.

That is not, however, an end to the matter, in so far as the plaintiff's claim is to be regarded as one for damages, inasmuch as, by virtue of subsection (1) of section 18 of the *Admiralty Act*, the jurisdiction of the Court on its

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Admiralty side extends to "the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise".

It would seem to be clear that Admiralty jurisdiction in England has always extended to a claim by a seaman for compensation in the nature of damages for wrongful discharge before the term of his engagement has expired. See *The Great Eastern*², *The Blessing*³, and *The Ferret*⁴. This jurisdiction has been exercised by the Admiralty Court in Canada.

See *The Ship Lady Eileen v. The King*⁵ and *Roberts v. The Ship "Tartar"*⁶.

I cannot see any distinction in principle between an action for damages for breach of contract for wrongfully dismissing a seaman and an action for breach of contract based on a failure to provide a seaman with the work for which he has been engaged, and it would appear that Admiralty jurisdiction in England extends to such a case. See *The City of London*⁷.

My conclusion is, therefore, that if, properly considered, the plaintiff's claim is for damages sustained by him as a result of not being provided with employment on the defendant vessel pursuant to a contract that had been made with him to provide him with such employment, this Court has jurisdiction in the matter by virtue of subsection (1) of section 18 of the *Admiralty Act*.

I turn now to consider the question as to whether the Court has jurisdiction if, properly understood, the plaintiff's claim in this case is "for wages" for a period at the commencement of his period of employment as a seaman during which he held himself available for work although his employer did not put him to work.

The plaintiff's claim for "wages" would appear to be based upon section 200 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, which reads as follows:

200. A seaman's right to wages and provisions shall be taken to begin either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens.

² (1867) L.R. 1, A. & E. 384.

³ (1878) 3 P.D. 35.

⁴ (1883) 8 App. Cas. 329.

⁵ (1907) 11 Ex. C.R. 87.

⁶ (1908) 11 Ex. C.R. 308.

⁷ (1839) W. Robinson's Admiralty Reports, Vol. I, page 88.

This section makes it clear that a seaman's right to "wages" shall be taken to begin either when he actually commenced to work or "at the time specified in the agreement for his commencement of work or presence on board" whichever first happens.

In the case of a seaman's claim for wages, it would seem that the Court has jurisdiction, where the amount is in excess of \$250, as it is here, by virtue of section 214 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, which reads as follows:

214. (1) The Admiralty Court does not have jurisdiction to hear or determine any action, suit or proceeding instituted by or on behalf of any seaman or apprentice for the recovery of wages not exceeding two hundred and fifty dollars, except in the following cases:

- (a) where the owner of the ship is insolvent within the meaning of the *Bankruptcy Act*;
- (b) where the ship is under arrest or is sold by the authority of the Admiralty Court;
- (c) where any judge, magistrate or justices, acting under the authority of this Act, refers the claim to such court; or
- (d) where neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

(2) Except as provided by this Part no other court in Canada has jurisdiction to hear or determine any action, suit or proceeding instituted by or on behalf of any seaman or apprentice for the recovery of wages in any amount.

While subsection (2) of section 214 is not as explicit as it might be, the proper view would appear to be that that subsection confers on the Admiralty Court exclusive jurisdiction in respect of all claims by seamen "for the recovery of wages" to which subsection (1) of section 214 does not apply. See *Fraser v. North Shipping and Transportation Ltd.*⁸ per Hyde J. at page 597.

It seems clear that, according to the law applicable to such matters arising in the Province of Quebec, where there has been a breach of contract by an employer of a seaman, the contract of employment nevertheless subsists and can be made the subject of a claim for wages unless the employee has accepted the repudiation of the contract, in which case he is entitled to damages. See *Simard v. The Canada Steamship Company*⁹ and *Furness Withy v.*

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⁸ (1968) 69 D.L.R. (2d) 596.

⁹ [1916] 50 S.C. 105.

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*Recorder E. J. McManamy & Young et al.*¹⁰ If this be the general principle, it seems clear to me that that principle applies in a case where an employee has been engaged for a period and holds himself available for work from the commencement of the period, although he has never been set to work.

My conclusion is, therefore that if, properly understood, the plaintiff's claim in this case is "for wages" for a period at the commencement of his period of engagement as a seaman during which he held himself available for work although his employer did not put him to work, this Court has jurisdiction in the matter.

My decision on the first question of law raised by the application is therefore that the Exchequer Court of Canada on its Admiralty side has jurisdiction in this matter.

With reference to the second question of law raised by the application, namely, the question as to whether the plaintiff is entitled to a maritime lien in respect of his claim in this case, I have come to the conclusion that that question should not be decided on the pleadings, but should only be decided when the precise nature of the plaintiff's claim has been established. My judgment in respect of that question will therefore be that it be referred to the trial judge to be determined by him if, and to the extent that, it becomes necessary to decide it in order to dispose of the action.

The defendants will be ordered to pay to the plaintiff his costs of and arising out of the application under Rule 72.

¹⁰ [1943] five S.C. 276.