

1905
 May 8.

In the Matter of the Petition of Right of

WILLIAM ROBINSON.....SUPPLIANT ;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Intercolonial railway—Contract for services—Conditional increase of salary—Impossibility of performance of condition—Promises by Crown's officers—Liability.

H., while General Traffic Manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H's department of the railway at a salary of \$2,000 per annum. R. refused that amount, but signified his willingness to accept \$2,400. H., after obtaining the permission of the Minister of Railways to offer R. \$2,100 per annum wrote to him : "I would be prepared to alter the terms of my letter to read \$2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to \$2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely in September, 1898, the department offered to appoint R. as General Travelling Freight Agent of the Railway, with headquarters at Toronto ; and R. accepted the new office on the assurance contained in a letter from W., the then General Freight Agent of the railway, that "there is to be no change in the salary of the present position and the one in the West." R. entered upon his new duties on the 10th of October, 1898, and discharged the same until April 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than \$2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of \$2,400 from the 1st January, 1899, basing such claim upon H's letter of the 16th December, 1898, and W's letter mentioned.

Held, that even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had

resigned his position, and was no longer in the position to say whether R. had, or had not developed the traffic to his satisfaction ; and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway.

2. The fair meaning of W's promise that there would be no change in the salary on R's acceptance of his new office in the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, \$2,100.
3. That W. not having been shown to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the General Freight Agent of the Railway, and as such R's immediate superior officer.

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PETITION OF RIGHT for balance of salary alleged to be due to the suppliant in respect of an office sometime held by him on the Intercolonial Railway.

The facts of the case are stated in the reasons for judgment.

March 18th, 1905.

G. Bell, for the suppliant, contended that there was a definite contract made out upon the evidence whereby the Crown undertook to pay the suppliant a salary of \$2,400 per annum from the first January, 1899. The appointment was made by the Minister of Railways, and there was no necessity to have an order in council authorizing such appointment. Under sec. 3 of R.S.C., c 38 anything done by some one authorized by the Minister is to be treated as having been done by the Minister himself. The Minister authorized the appointment of the suppliant at a salary of \$2,400. The Minister has the charge and management of all government railways under sec. 6 of R.S.C., c. 37; and may make appointments for the purpose of carrying on the business of the railway without an order in council therefor. The Minister, after having had communication of Mr. Harris' letter offering the suppliant \$2,100, per annum with the promise of an increase to \$2,400

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in January, 1899, expressly ratifies one part of it and does not dissent from the remainder.

Again, it is not an executory contract; the claim is for services performed for the Crown and of which the Crown has had the benefit. In such a case in fairness and equity the Crown must pay the salary. *Hall v. The Queen*, (1).

F. H. Chrysler, K.C., for the respondent, contended that the only excess over the amount of \$2,000 per annum which the suppliant was entitled to was \$100; and he had been paid at the rate of \$2,100. The Minister did not agree, nor authorize any one to agree, to pay the suppliant \$2,400 per annum. Clearly there is no contract to bind the Crown for the higher amount.

Secondly, there is no analogy between the case where the Crown has taken the benefit of work and labor and materials supplied but not paid for, (*Hall v. The Queen* (2); *The Queen v. Henderson* (3)) and this case where there is a definite salary mentioned and paid to the suppliant and the court has not to concern itself with a *quantum meruit*.

Finally, the suppliant's whole course of conduct while in the employ of the railway is inconsistent with the claim he put forward after his retirement. He accepted a new position after Mr. Harris had left without putting forward any right to be paid \$2,400 per annum; and, furthermore, he accepted and received a salary of \$2,100 per annum.

Mr. Bell replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 8th, 1905,) delivered judgment.

The petition in this case is brought to recover the sum of one thousand two hundred and eighty seven

(1) 3 Ex. C.R. 373.

(2) 3 Ex. C.R. 373.

(3) 28 S. C. R. 425.

dollars and fifty cents alleged to be due to the suppliant as a balance of his salary as General Travelling Freight Agent of the Intercolonial Railway, with headquarters at Toronto. While occupying that position he was paid a salary of two thousand one hundred dollars per year, and he claims that under the circumstances, to be referred to, he was entitled to be paid a salary of two thousand four hundred dollars.

On the 20th of November, 1897, the Minister of Railways and Canals being "desirous of reorganizing the "Traffic Staff of the Intercolonial Railway with a view "of securing increased efficiency in the service" offered Mr. A. H. Harris, of Montreal, then an officer in the employ of the Grand Trunk Railway Company, the position of General Traffic Manager of the Intercolonial Railway upon the terms, among others, that Mr. Harris, as General Traffic Manager, should "be permitted to "exercise as much authority and have as much control "over rates, fares and arrangements respecting traffic "matters, and over the selection and government of "his staff in the traffic department of the railway as "is usual and customary in large railway corporations". There is nothing to show what the usual and customary authority and control of a general traffic manager of a large railway corporation is in respect of the selection and government of his staff; but from the fact that Mr. Harris, before making the contract on which the suppliant relies, asked and obtained the Minister's consent to offer the salary agreed upon, I infer that neither the Minister nor Mr. Harris understood such authority and control to include the power to make appointments to his staff and to fix the amount of salaries without reference to the Minister in whom by statute was vested the management, charge and direction of the railway. Mr. Harris, having accepted the appointment offered to him, wrote to the suppliant on

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the 7th of December, 1897, stating that he had been "intrusted by the Dominion Government with the re-organization on a commercial basis of the traffic department of its several lines of railway and that he could offer him an official appointment if he felt inclined to entertain the proposition". The suppliant was at the time general travelling freight agent of the Grand Trunk Railway Company for the States of Michigan, Indiana and Ohio, with residence at the city of Detroit. He had been in the employ of the company for some twenty-five years, having occupied for ten years the position he was then in. He was in receipt of a salary of one thousand eight hundred dollars per year, with good prospects of promotion. Upon receipt of Mr. Harris' letter he obtained leave of absence and went to Montreal where the matter was discussed between them. Mr. Harris offered him the position of division freight agent on the Intercolonial Railway, with headquarters at Saint John, N.B. at a salary of two thousand dollars per year. Nothing was then concluded and the matter was left in abeyance until the suppliant's return to Detroit. On the 11th of December, Mr. Harris renewed the offer by letter, stating that the suppliant's salary would be two thousand dollars per annum, to be increased from time to time should the development of business on the division under his charge, in Mr. Harris' judgment, warrant recognition, and assuming that his duties were efficiently performed that the appointment was guaranteed for a period of five years and to be continued thereafter on such terms as might be mutually agreed upon. To that offer the suppliant answered that he would not accept the position for less than two thousand four hundred dollars per year. Thereupon Mr. Harris sent to the Minister a copy of the letter of the 11th of December to the suppliant and the latter's reply thereto.

In the letter dated the 13th of December, accompanying these enclosures, Mr. Harris wrote to the Minister that he thought the suppliant might be induced to accept the appointment if the salary were made two thousand one hundred dollars a year, with a guarantee that if he increased the business to their satisfaction at the end of twelve months it would be made two thousand four hundred dollars; and he asked the Minister to answer by telegram "if he might go the extra \$100.00". In answer the Minister on the 16th of December sent a telegram stating that he was willing that Mr. Harris should offer the suppliant the extra one hundred dollars. Then on the same day Mr. Harris again wrote to the suppliant. Referring in his letter to that of the 11th of December, and the suppliant's reply, he made the following offer:—

"I would be prepared to alter the terms of my letter to read \$2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to \$2,400 on the 1st January, 1899." It will be observed that what Mr. Harris proposed to the Minister, and for which he may, I think, be taken to have had the Minister's implied authority, was that the increase of the suppliant's salary was to depend upon his increasing the business to their satisfaction, while the assurance given was that the increase would be given if the suppliant developed the traffic on his division to his, Harris', satisfaction. But I do not do more than refer to the difference in the terms used in the two communications, as I do not find it necessary to go into the question of Mr. Harris' authority to bind the Crown by the offer which he made to the suppliant. On the 18th of December the suppliant accepted Mr. Harris' offer as altered by his letter of the 16th. On the 23rd of that month Mr. Harris informed

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the Minister of the suppliant's acceptance; and on the 1st of January, 1898, he entered on the performance of the duties of his office. The policy that had been outlined when Mr. Harris accepted the position of general traffic manager of the Intercolonial Railway was to put the railway on a commercial or paying basis. That involved the withdrawal of certain concessions in rates, weights and otherwise that those who used the railway had theretofore been accustomed to. The policy proposed is said to have been distasteful to the people of the Lower Provinces, and Mr. Harris had either to admit that it was all wrong and go back to the old style and remain in the service of the Government operating the traffic department under old methods, or he had to retire from the service. He elected to do the latter and resigned his position. That happened in August or September of 1898.

On the 28th of September of that year Mr. J. J. Wallace, the general freight agent of the Intercolonial Railway wrote to the suppliant advising him that it had been decided to appoint him general travelling freight agent of the Intercolonial Railway, with headquarters at Toronto. On the 30th of that month the suppliant acknowledged the receipt of Mr. Wallace's communication, and expressed regret that he was asked to take a position of lower importance than the one he then filled. Then follows this statement:—" I presume, however, that the new arrangement is not to alter in any way my present contract " with the Government which you perhaps remember " is for five years at a fixed rate of remuneration;" and he concluded his letter by stating that he would be glad to hear from Mr. Wallace in regard to the matters mentioned in his letter, and to be advised if his understanding of the contract with the Govern-

ment was that held by the department. In Mr. Wallace's reply, dated the 1st of October, 1898, the following sentence occurs:—"There is to be no change in the salary of the present position and the one in the West." The suppliant took legal advice, and came to the conclusion that the promise that had been made to increase, in the contingency mentioned, his salary as division freight agent, would apply to the new position or appointment of general travelling freight agent, and he accepted the position. He entered on the duties of his office on the 10th of October, 1898, and remained in that position until April, 1903, when upon a reorganization of the traffic staff of the Intercolonial Railway, his services were dispensed with. On the 20th of January, 1900, he addressed a letter to Mr. Pottinger, the general manager of the Intercolonial Railway, which omitting the formal parts, was as follows:—

"DEAR SIR,—I take the liberty of submitting the enclosed comparative statement of tonnage forwarded from this territory for the year ending September 30th, 1899, (the expiration of my first year in Toronto) in which you will observe there is an increase of 12,107 tons over the corresponding period 1898, which I think you will admit is a creditable showing, more especially, as we had to contend with the St. John merchants' boycott, which operated against us to a considerable extent. My object in submitting this statement is to call your attention to the terms under which I accepted service with this railway, which has been evidently overlooked, but as you may not be familiar with the conditions of this contract I give below an extract from the late general traffic manager's letter dated December 16th, 1897.

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" I would be prepared to alter the terms of my letter
" to read \$2,100.00 with the assurance that should you,
" as I feel confident you can, develop the traffic on
" your division to my satisfaction your salary should
" be increased to \$2,400.00 on the 1st January, 1899."

" You will see from the above that I am entitled to
" an increase in salary to \$2,400.00 from 1st January,
" 1899, and my reason for not making application
" before was on account of not having in my posses-
" sion a complete record of my work in the lower pro-
" vinces. I have now, however, sufficient data show-
" ing an exceedingly large increase during the short
" time I was division freight agent, consequently I
" feel that I have been unfairly treated, as I accepted
" the appointment in good faith, and with the as-
" surance that the promises made would be carried
" out, instead of which my title of division freight
" agent was withdrawn, and I was compelled to ac-
" cept a subordinate position. As this has been detri-
" mental to my record I trust you will see that my
" title is restored and salary increased in accordance
" with the agreement."

Mr. Pottinger, on the 23rd of the same month, ac-
knowledged receipt of this communication, and stated
that he would have the matter looked into. Nothing
further was done; and the suppliant did not renew
his claim until after he had in September, 1902, been
informed that in view of the re-organisation of the
Intercolonial railway, referred to, it had been decided
to dispense with his services as general travelling
freight agent of the railway. The suppliant's work
was perfectly satisfactory to Mr. Harris during the
time that the latter was general traffic manager of the
Intercolonial railway, and there is nothing to suggest
that his services were at any time performed in a way

that would not commend them to the favourable consideration of his superior officers, and of the Minister.

Now, in the first place, it seems to me that the promise to increase his salary, on which the suppliant relies to support his petition, is one that is sometimes spoken of as an engagement or liability in honour, not in contract; one in which a confidence is reposed in the honour and good faith of the person making the assurance and which does not result in a contract enforceable in a court of law. (*Taylor v. Brewer* (1); *Roberts v. Smith* (2). But if the assurance given in this case should be thought to be more than that, then there is the difficulty that the contingency upon the happening of which the salary was to be increased has never in fact arisen. Before the time arrived when it could happen, two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. First, Mr. Harris had resigned his position as general traffic manager of the Intercolonial Railway, and was no longer in a position to say whether the suppliant had or had not developed the traffic on his division to the satisfaction of the former; and secondly, the suppliant had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway.

The suppliant meets the first difficulty with the contention that as the Crown accepted Mr. Harris' resignation of his office, thereby rendering the condition on which the increase depended incapable of performance, the promise to pay the increase in salary became absolute, and was no longer dependent on any condition; and for that contention he relies upon *Isbester v. The Queen* (3) decided by Mr.

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(1) 1 M. & S. 290.

(2) 4 H. & N. 315.

(3) 7 S. C. R. 696.

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Justice Fournier, sitting in this court. But that case is not, I think, applicable to the present case, and the learned judge's views are, it seems to me, expressed in terms that make against and not for the contention mentioned. In that case it was objected that the suppliant was not entitled to recover the amount for which his petition was brought, because he had not obtained the certificate of the chief engineer of the Intercolonial Railway, as provided by the 18th section of the Act 31st Victoria, chapter 13; but it was held that the certificate was not necessary as the effect of a later statute (37 Victoria, chapter 15) was to abolish the office of chief engineer of the Intercolonial Railway, and to repeal so much of the former Act as was inconsistent with the latter, by which all the powers and authorities of the commissioners for the construction and management of the railway were vested in the Minister of Public Works. As the condition relied upon as an answer to the suppliant's claim in that case was contained in the repealed statute and not in the contract made with the commissioners, it was held not to defeat the claim. "The 18th section of 31 Vic., ch. 13, which necessitates the certificate was not" the learned judge says "embodied as in other contracts in the agreement with the suppliant as a condition precedent imposed upon the contractor. Had the suppliant signed an agreement in which this provision was inserted, as it was generally in all the contracts passed by the commissioners, he would no doubt have been bound by it." In such a case, as in this, the petition could not be sustained unless the event occurred, on the happening of which alone the suppliant's right of action depended. (*Moffatt v. Laurie* (1).

Then with regard to the second difficulty mentioned, the suppliant contends that the effect of the letters that passed between Mr. Wallace and himself was to make the promise to increase his salary applicable to the office of general travelling freight agent of the Intercolonial Railway, that he accepted in October, 1898. But that contention cannot, it seems to me, be sustained. Mr. Wallace promised that there would be no change in his salary; but the fair meaning of that was, I think, that the suppliant would be paid the same amount of salary in the new position as that which he was then receiving. I do not think that Mr. Wallace intended to promise more than that, or that the correspondence, fairly construed, means more than that. But if it does, then the further difficulty arises, that Mr. Wallace has not been shown to have had any authority to bind the Crown by a promise to give any such increase of salary, and none is, I think, to be implied from the fact that he was at the time the general freight agent of the Intercolonial Railway, and as such, the suppliant's immediate superior officer.

The question of Mr. Harris' authority to bind the Crown by any such promise, made under the circumstances to which reference has been made, is also raised; but in the view I have taken of the case there is no occasion to consider that question.

There will be judgment for the Respondent.

Judgment accordingly.

Solicitor for the suppliant: *George Bell.*

Solicitors for the respondent: *Chrysler & Bethune.*

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