

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Shawn Ralph, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Canada Shipping Act, 2001, S.C. 2001, c. 26, section 87

Review Determination
Yves Villemaire

Decision: January 17, 2011

Citation: *Ralph v. Canada (Minister of Transport)*, 2011 TATCE 1 (review)

Heard at St. John's, Newfoundland and Labrador, on November 10, 2010

Held: The Minister of Transport did not prove, on the balance of probabilities, that the Applicant, Shawn Ralph, violated section 87 of the *Canada Shipping Act, 2001*. Consequently, the monetary penalty set out in the Notice of Violation of October 26, 2009 is cancelled.

I. BACKGROUND

[1] The Applicant, Shawn Ralph, is employed by Shaldon Entreprises Inc., the authorized representative of the F/V *Havre aux Maisons*, official number 804017.

[2] The Minister of Transport ("Minister") alleges that the F/V *Havre aux Maisons* was at sea on or about September 5, 2009, after being abandoned following a fire on board. Mr. Ralph was one of four persons rescued by the F/V *R.O. Venture* that was in the area at the time.

[3] The Minister alleges that Mr. Ralph was the Master of the F/V *Havre aux Maisons* at the time of the incident, without holding the required certificate of competency ("certificate") for that position. On October 26, 2009, a Notice of Violation ("Notice") was issued to Mr. Ralph for

contravening section 87 of the *Canada Shipping Act, 2001* ("Act"). A penalty of \$1 250 was assessed.

[4] Schedule A of the Notice provides as follows:

On or about September 5, 2009, at or near 49°19' N, 051°10' W in the province of Newfoundland and Labrador, Shawn A. Ralph was employed on board a Canadian vessel, namely, the M/V *Havre aux Maisons*, in a position in respect of which a certificate is required under Part 3 of the *Canada Shipping Act, 2001*, without holding that certificate, thereby contravening section 87 of that Act.

Penalty: \$1,250.00

[5] On November 30, 2009, Mr. Ralph filed a request for review of the Minister's decision with the Transportation Appeal Tribunal of Canada ("Tribunal").

II. STATUTES, REGULATIONS AND POLICIES

[6] Part 3 of the Act contains the requirements for marine personnel. Section 87 prescribes the holding of certificates for specified positions on board vessels:

87. Every person who is employed on board a Canadian vessel in a position in respect of which a certificate is required under this Part shall hold the certificate and comply with its terms and conditions.

[7] Section 100 of the Act provides for regulations specifying the types, classes and terms of certificates required on Canadian vessels:

100. The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes and provisions of this Part, including regulations

(a) specifying the positions that shall be occupied on board Canadian vessels, or classes of Canadian vessels, their minimum number and the types and classes of Canadian maritime documents that persons in those positions shall hold;

...

(f) specifying the terms and conditions of certificates of competency or other Canadian maritime documents issued under this Part;

...

[8] Paragraph 100(q) of the *Marine Personnel Regulations*, SOR/2007-115 ("MPR") describes the certificate that the Minister may issue.

100. The Minister may issue the following certificates:

...

(q) Fishing Master, Second Class

[9] Subsection 17(1) of the *Act* provides for the period of validity of certificates:

17. (1) Every Canadian maritime document is valid for the period specified by the Minister of Transport. The Minister may, on application made before a document expires and in the form and manner specified by the Minister, extend the period if the Minister is satisfied that it is not feasible to issue a new document before the document expires.

[10] Section 1.4(1)a) of the publication of Transport Canada entitled *The Examination and Certification of Seafarers* ("TP 2293E", revision 5) (Exhibit M-4) prescribes the period of validity of certificates:

1.4 Period of validity of certificates

1. Pursuant to Section 17 of the Act, the Minister has established the following periods of validity:

a) five years from the date of issue in the case of certificates or endorsements referred to in the *Marine Personnel Regulations*, paragraphs 100 (a) to (ff), (jj), (kk), (nn) to (qq), (yy) to (eee); 102(1)(c) to (g);

...

III. ELEMENTS TO BE PROVEN

[11] Based on the Notice, I identified the following elements to be proven by the Minister:

a) The F/V *Havre aux Maisons* was a Canadian vessel at the time of the incident on September 5, 2009.

b) The F/V *Havre aux Maisons* was on a voyage at the time of the incident.

c) Mr. Ralph was the Master of the F/V *Havre aux Maisons* at the time of the incident.

d) Mr. Ralph did not hold a Fishing Master, Second Class certificate at the time of the incident.

IV. EVIDENCE

A. Minister of Transport

(1) Leann Gillingham

[12] Leann Gillingham is a Senior Marine Inspector with Marine Safety, Transport Canada. She testified that her duties included those of a Marine Safety Inspector, Examiner of Master and Mates, Port State Control Officer, Casualty and Investigation Inspector/Investigator, Marine Occupational Health and Safety Officer, Pollution Prevention Officer and Officer for Investigation of Pleasure Crafts.

[13] Inspector Gillingham testified that, in her capacity as an Examiner of Masters and Mates, she was familiar with the examination and certification process. She explained that prior to the expiration of their certificates, the document holders would present themselves at a Marine Safety office, Transport Canada, to produce a) a proof that they had been at sea for 360 days in the last 5 years, and b) a valid medical certificate. She indicated that the examiner would accept a sea time testimonial completed by the owner, operator or the master. The testimonial indicates the name of the vessel on which the seafarer was employed and the number of days that the vessel was at sea. Inspector Gillingham indicated that, alternatively, the examiner would accept one testimonial per fishing season for a fishing vessel where the owner, operator or master would refer to a fishing log showing the number of days the vessel was at sea during that season. She added that this process was neither onerous nor cumbersome.

[14] Inspector Gillingham testified that, in her capacity as a Steamship Inspector, she was familiar with the Vessel Traffic Services ("VTS") of the Canadian Coast Guard ("CCG") and understood what casualty reports meant. She testified that the printout of an email of September 5, 2009 (Exhibit M-2) was a report from the VTS, indicating that the F/V *Havre aux Maisons* was in position 49°19.3' N, 051°10.1' W on September 5, 2009. She also stated that the document indicates that another vessel, the F/V *R.O. Venture*, advised that there was a vessel on fire two and a half miles south of their position.

[15] Inspector Gillingham testified that the F/V *Havre aux Maisons* was required to have on board a certified captain, and that Master Fishing, Second Class certificates were valid for five years in accordance with the *MPR*, Exhibits M-1, M-3, M-4). She also testified that Mr. Ralph had a Fishing Master, Second Class certificate, which was issued on August 12, 2004 and valid until August 11, 2009 (Exhibit M-5). She concluded that Mr. Ralph's certificate was invalid on September 5, 2009, at the time of the incident. Inspector Gillingham also testified that, at a certain period in time, Mr. Ralph would have had to visit a Marine Safety office, Transport Canada, to renew his certificate.

[16] In cross-examination, Mr. Ralph questioned whether a certificate would expire while at sea. Inspector Gillingham replied that it would not expire at sea as long as it was valid prior to departure; it would expire at the next port. Further, Mr. Ralph questioned the necessity of proving 360 days of sea service to renew a certificate. He suggested: "So, it's not 100 percent hard fact of so many days. You can be in part of the industry in other aspects of it and still be considered?" Inspector Gillingham explained that a person may be employed in specific positions within the marine industry, such as an instructor at a maritime college, and that, some of the time occupying these positions could be used towards the renewal of the certificate.

[17] Mr. Ralph also questioned how long it took to obtain a medical appointment, and he suggested that the limited number of physicians accredited to conduct medical exams created a difficulty in meeting the time limits allowed for certificate renewal. Inspector Gillingham testified that she was unaware of such an issue. She further indicated that, to her knowledge, there had not been any cases where candidates were restricted from obtaining proficiency certificates because they could not get a medical appointment. In re-examination, Inspector Gillingham explained that when candidates present themselves without holding a valid seafarer's medical certificate, they are asked to obtain one. When asked to provide an indication of the time it took for some candidates to return with the required document, she replied: "If they've showed up in the morning, I've had candidates come back that afternoon with a valid medical or the next day."

(2) Roger Bath

[18] Roger Bath is a professional Fish Harvester holding a Fishing Master, Class I certificate. He owns the 65 foot F/V *R.O. Venture*. He testified that on September 5, 2009, as Master of the *R.O. Venture*, he proceeded to rescue the crew of the F/V *Havre aux Maisons* after noticing smoke on the horizon and talking on VHF radio to the fishing vessels in the area. He indicated that on arrival on scene, he saw the F/V *Havre aux Maisons* on fire and that the crew had abandoned ship into a life raft. He embarked on his vessel the four occupants of the life raft, which included Mr. Ralph.

[19] Mr. Bath testified that he knew Mr. Ralph, as he said: "I've known Mr. Ralph at least 20 years, and ever since I've known him, he's been skipper of a fishing vessel". When asked who was in command of the F/V *Havre aux Maisons* on September 5, 2009, Mr. Bath replied: "I assumed it was Mr. Ralph". He further stated that when the CCG called his vessel, "They requested to speak to the captain of the vessel that was on fire." He testified that Mr. Ralph took the call.

[20] In cross-examination, Mr. Bath was asked to state specifically to whom the CCG asked to speak to when they called; was it to the captain or to one of the crew members of the F/V *Havre aux Maisons*? Mr. Bath replied: "I wouldn't be able to answer that completely for sure, but at the time, I think, they said captain." In response to my question for clarification, Mr. Bath reiterated his answer: "*I can't remember if they said captain or crew member, but I - I'm pretty sure said, like, to speak to the captain..*"

V. ARGUMENTS

A. Minister of Transport

[21] The Minister's representative states that the Minister has been very specific with respect to the period of validity for certificates to people in position of responsibility on board vessels, and that pursuant to section 17 of the *Act*, that period was five years. He concludes on the basis of the evidence presented, that Mr. Ralph's certificate expired on August 11, 2009 and was therefore invalid on September 5, 2009, at the time of the incident.

[22] The Minister's representative contends that the onus was on Mr. Ralph to ensure at all times that the documents required for the safe operation of his enterprise were valid, and that claiming it was time consuming does not hold water. He points out that a period of almost four weeks elapsed after the expiration of Mr. Ralph's certificate, and that within that period of time, he could have availed himself of the services provided by the numerous physicians accredited by Transport Canada. He further states that ". . . It's not a valid excuse to say, well, I couldn't get this or I couldn't get that, so I went on anyway. . . ."

[23] The Minister's representative states that he does not believe that Mr. Ralph's certificate expired while he was at sea, prior to the F/V *Havre aux Maisons*' return to port. He indicates that it would be impractical for such a vessel to be at sea for three and a half weeks. He states as follows:

. . . It stands to reason, a small fishing vessel, she can't carry enough fuel to stay at sea for 24 days, or it's not practical. The fishing industry in Newfoundland is not geared towards small vessels operating at sea for a month at a time. The catch would have to be brought to port. . . .

[24] The Minister's representative suggests that the CCG uses a hierarchal approach when calling to find out the status of a vessel and would therefore have asked the captain of the F/V *Havre aux Maisons* on September 5, 2009, as the captain can speak for his vessel. He contends that Mr. Bath had no recollection of the phrase "or a crew member", but he did have recollection of the word "captain". On that basis, the Minister is of the view that, on September 5, 2009, Mr. Ralph was at sea as the Master of the F/V *Havre aux Maisons* without holding a valid Canadian maritime document, as required by section 87 of the *Act*.

[25] The Minister's representative points out that Mr. Ralph was issued a Notice for \$1 250, which is the minimum penalty under the *Administrative Monetary Penalty Regulations*, SOR/2008-97, ("AMPR").

A. Applicant

[26] The Applicant argues that it was possible for his certificate to have expired while he was at sea and therefore remained valid. He argues that a vessel the size of the F/V *Havre aux Maisons* could stay at sea for long periods.

[27] The Applicant contends that because he answered the call from the CCG, it does not make him the Captain of the F/V *Havre aux Maisons*. He states that they were just trying to obtain information that everybody was fine from someone on the vessel at the time of the accident.

[28] Speaking in the third person, the Applicant further states: ". . . It's only circumstantial from a call from Coast Guard. There was nothing at the time proving that Mr. Ralph was the captain of this vessel at that time."

[29] The Applicant suggests that it may be easy for students from a nautical school to schedule a medical exam for the purpose of obtaining a certificate, but it is not necessarily the case for the

average seafarer. He argues: ". . . It's not so cut and dry . . .", as the Minister's representative or Inspector Gillingham claimed, " as going in, in the morning, and going in, in the afternoon with your medical certificate".

VI. EVIDENCE, LEGISLATION AND POLICY ANALYSIS

[30] Inspector Gillingham testified that the Vessel Registration Query System's document shows the F/V *Havre aux Maisons* to be a Canadian vessel (Exhibit M-1). As she is an experienced Sea Captain and a Senior Marine Inspector with Marine Safety, Transport Canada, I found Inspector Gillingham to be a credible witness. I accept the evidence presented by the Minister, and therefore conclude that the first element of the alleged violation against Mr. Ralph is proven on the balance of probabilities.

[31] Inspector Gillingham testified that the email of September 5, 2009, from the CCG (Exhibit M-2), shows the F/V *Havre aux Maisons* in position 49°19.3' N, 051°10.1' W on September 5, 2009, and that the F/V *R.O. Venture* advised that there was a vessel on fire two and a half miles south of their position. I accept this evidence that the F/V *Havre aux Maisons* was on a voyage, and therefore conclude that the second element of the alleged violation against Mr. Ralph is proven on the balance of probabilities.

[32] The Minister's representative contends that Mr. Ralph was the Master of the F/V *Havre aux Maisons* on September 5, 2009, when the vessel tragically caught fire and was declared a constructive total loss. Mr. Bath testified that on that day, as the Master of the F/V *R.O. Venture*, he rescued the four occupants of the F/V *Havre aux Maisons'* life raft, which included Mr. Ralph. He also testified that he has known Mr. Ralph, by saying: "I've known Mr. Ralph at least 20 years, and ever since I've known him he's been skipper of a fishing vessel".

[33] Mr. Bath first testified that the CCG requested to speak to the captain of the F/V *Havre aux Maisons*, and Mr. Ralph responded to the call. In cross-examination, however, when requested to indicate specifically if the CCG asked to speak to the captain or to anyone of the crew, Mr. Bath changed his testimony, indicating that he was unsure. Still, Mr. Bath ". . . assumed it was Mr. Ralph", who was the Master of the F/V *Havre aux Maisons* on September 5, 2009.

[34] I find Mr. Bath to be a credible witness. In view of his familiarity with the fishing industry and his personal knowledge of Mr. Ralph, his assumption appears to be a genuine deduction at the time. In addition, as pointed out by the Minister's representative, one would expect the CCG to attempt to speak to the captain of a distressed vessel to find out about its status. However, despite the fact that the parties agreed that Mr. Ralph answered the call, the evidence is still unclear as to whom the call from the CCG was actually addressed.

[35] Even if I accept the evidence submitted by the Minister that the call from the CCG was addressed to the captain of the vessel, this would not preclude the notion that Mr. Ralph could have answered the call as a member of the crew and provided the information requested by the authorities. It is probable, as argued by Mr. Ralph, that the CCG would have accepted any first hand information about the incident as ". . . they were just trying to get information that everybody was okay . . .". Therefore, having clearer evidence as to whether the CCG asked to

speak to the captain or to any member of the crew would not, in any case, get at the heart of the matter which is: Who was the master of the vessel on that day?

[36] However, accepting that Mr. Ralph was not the master also begs the question as to which of the other three survivors was in command during this last voyage of the F/V *Havre aux Maisons*. The absence of any evidence or argument on that point from either party is perplexing. Mr. Ralph argues: ". . . There was nothing at the time proving that Mr. Ralph was the captain of this vessel at that time." The only evidence at my disposal is the testimony of Mr. Bath, who assumed that Mr. Ralph was the captain because he had known him to be a skipper for at least 20 years. He also seemed to recall the CCG asking to speak to the captain of the F/V *Havre aux Maisons*. That Mr. Ralph has been master all these years does not lead me to conclude that he would knowingly take command of a vessel without holding the required certification. The Minister has not adduced sufficient evidence that Mr. Ralph was the Master of the ship on that voyage. The fact that Mr. Ralph answered a call that may have been addressed to the master of the vessel does, in the circumstances of this case, answer the question of command. Therefore, in the absence of more reliable evidence that Mr. Ralph was the Master of the F/V *Havre aux Maisons* on September 5, 2009, I conclude that the third element of the alleged violation against Mr. Ralph has not been proven on the balance of probabilities.

[37] Inspector Gillingham testified that the F/V *Havre aux Maisons* was required to have on board a captain with a Master Fishing Vessel, Second Class certificate in accordance with the *MPR*. Pursuant to subsection 17(1) of the Act (Exhibit M-3) and section 1.4(1)a) of TP 2293E (Exhibit M-4), the period of validity of these certificates is set at five years.

[38] Inspector Gillingham further testified that Mr. Ralph held a Fishing Master, Second Class certificate, which was issued on August 12, 2004, and was valid until August 11, 2009 (Exhibit M-5). She therefore concluded that Mr. Ralph's certificate was invalid on September 5, 2009, at the time of the incident.

[39] In cross-examination, Mr. Ralph questioned whether such a certificate would expire while at sea, and he was informed that it would only expire upon arrival at the next port. The Minister's representative argued that it would be impractical for such a fishing vessel to be at sea for three and a half weeks. Mr. Ralph claimed that staying at sea for long periods on small fishing vessel was possible and that his certificate could indeed have expired at sea. I do not find the Applicant's arguments convincing, and in the absence of further evidence to the contrary, I cannot accept that possibility on the balance of probabilities.

[40] Inspector Gillingham testified that for certificate renewal, an applicant has to present to an examiner a valid Transport Canada's medical certificate and that, at a certain period in time, Mr. Ralph would have had to go through this process. In cross-examination, Mr. Ralph suggested that given the limited number of physicians accredited to conduct medical exams for certificate renewal, it is difficult to schedule such appointments. I am inclined to believe that, in view of his experience, Mr. Ralph would have been aware of the expiration limit set on his certificate and would have been familiar with the Transport Canada's certificate renewal process. In my view, a difficulty in scheduling a medical appointment for certificate renewal does not in itself constitute a mitigating factor. The Applicant would have had to describe meaningful actions taken in an

effort to comply with the renewal requirements for me to consider rejecting the Minister's conclusion about the non-validity of the certificate. I therefore conclude that the fourth element of the alleged violation against Mr. Ralph has been proven on the balance of probabilities.

VII. DETERMINATION

[41] The Minister did not prove, on the balance of probabilities, that Mr. Ralph was employed on board a Canadian vessel without holding a required certificate, thereby contravening section 87 of the *Act*. Therefore, I dismiss the monetary penalty of \$1 250, as imposed by the Minister.

January 17, 2011

Yves Villemaire

Member