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*Oct. 22, 23
*Dec. 12

FRED M. BROWN (PLAINTIFF).....APPELLANT;

AND

CANADA BISCUIT COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Master and servant—Contract—Trial—Action for damages for alleged wrongful refusal by employer to permit employee to perform duties for which he was employed—General verdict for plaintiff—Trial judge's charge to jury—Alleged misdirection—Objection on appeal that specific questions not put to jury—Sufficiency of evidence to support verdict.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), setting aside the verdict for the plaintiff at the trial, and granting a new trial.

The plaintiff claimed damages in the amount of the compensation which would have been payable by the defendant to him for his services (calculated at the rate of $5,000 per year from October 19, 1929, to April 1, 1931), had the defendant not wrongfully refused, as alleged, to permit him to perform the duties of Chief of Factory Planning Division of the defendant's Moncton plant, as set out in a certain agreement or contract of employment dated April 3, 1928. At the trial the jury found a general verdict for the plaintiff for $7,261.40, and judgment was entered for him for that sum. The Appeal Division set aside the verdict and ordered a new trial, it being of opinion that there was misdirection in the trial judge's charge to the jury, that the verdict was against the weight of evidence, and that specific questions should have been put to the jury. The plaintiff appealed to this Court.

After hearing arguments of counsel, this Court reserved judgment and on a subsequent day delivered judgment allowing the appeal and restoring the judgment at trial, with costs throughout. Reasons for judgment were delivered by Duff C.J. and by Cannon J. (with whom Crocket, Hughes and Maclean (*ad hoc*) JJ. concurred. Duff C.J. in his reasons also expressed concurrence with Cannon J.).

*PRESENT:—Duff C.J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

(1) 8 M.P.R. 102; [1934] 3 D.L.R. 216.

Duff C.J. was of opinion that the issue for the jury was stated in the trial judge's charge clearly and with substantial accuracy; that, while an isolated sentence here and there might, if separated from its context, convey a false impression, the charge as a whole could not operate unfairly to the defendant's prejudice; this view being fortified by the fact that no exception was taken by counsel at the trial. He was also of opinion that the evidence was not insufficient to support the verdict. As to the objection that specific questions should have been put to the jury, he pointed out that the matter was one peculiarly for the judgment of the trial judge; it did not appear that counsel suggested that specific questions should be addressed to the jury; the trial judge might well have considered the course he adopted as the more just and convenient one. He concluded as follows:

"Having reached the conclusion that there was no substantial misdirection, that the issue for their decision was adequately put before the jury, and that there was evidence upon which they might reasonably determine that issue as they did (and the learned trial judge having exercised the discretion with which the law invests him as to the form in which the jury was to be asked to express this finding), the appellant could not properly be deprived of the verdict he has obtained, because I might think that, if I had been in his place, I might have considered it convenient to submit specific questions; unless, at all events, it plainly appeared that, because of the course taken by the trial judge, the respondents had suffered some substantial wrong or prejudice."

Cannon J., after dealing with the facts and the evidence at length, and discussing the trial judge's charge to the jury, expressed the opinion that the trial judge had not misdirected the jury; that the trial judge was entitled to use his discretion about putting specific questions to the jury under ss. 41 and 42 of the New Brunswick *Judicature Act;* that his charge explained clearly to the jury upon what findings of fact they could find generally for either plaintiff or defendant. He pointed out that it did not appear that counsel for defendant required the judge to submit specific questions. As to non-direction, in the absence of a request by counsel to the judge to add to his

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charge, Cannon J. referred to *B.C. Electric Ry. Co.* v. *Key* (1), and held that, under the circumstances of this case, a new trial for non-direction should not be granted, as the interests of substantial justice did not require it, quoting from the judgment of Lord Morris in *Seaton* v. *Burnand* (2). Upon the verdict and the evidence he concluded as follows:

"We cannot reach the conclusion that the verdict of the jury was unreasonable or against the weight of the evidence, although we might have reached a different view if we had been members of the jury. There was sufficient evidence, written and verbal, to justify the verdict, and we cannot substitute ourselves for the jury in what by law is their exclusive realm. There was testimony as to the exact scope of the appellant's duties brought by both sides, and the jury were entitled to believe the appellant; they had sufficient evidence before them to find that the duties as defined in Walker's letter were not those of the Chief of the Planning department and constituted a breach of the contract by the respondent. The jury also must have found, under the judge's directions, that at all times the appellant was willing to perform his duties and that, instead of being called upon to do so, he was wrongfully refused the right to perform them."

Appeal allowed with costs.

O. M. Biggar K.C. and *H. T. Reilly* for the appellant.

James Friel K.C. and *P. J. Hughes K.C.* for the respondent.

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(1) [1932] Can. S.C.R. 106, at 108, 110, 111.

(2) [1900] A.C. 135, at 145.