

# ECLI:NL:CBB:2015:19

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| Case number                | AWB 13/119   |
| Fields of law              | Administrative law                                     |
| Special characteristics    | Appeal   |
| Indication of the contents | Section 55a Maritime Crews Act (now the Seafarers Act) |

Tribunal upholds the judgment of the Maritime Disciplinary Court that the captain of a tug boat did not act contrary to the duty of care to be observed by a good seaman in respect of his crew and the ship

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## Ruling

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ruling

### TRADE AND INDUSTRY APPEALS TRIBUNAL

case number: 13/119  
20450

**Ruling of the three-judge section of 3 February 2015 in the appeal of:**

**[name 1], at [place 1], appellant,**

**against the ruling of the Maritime Disciplinary Court of the Netherlands (the disciplinary court) of 15 January, pronounced regarding a complaint submitted by the appellant on 18 May 2011 against [name 2], the person concerned**

(represented by: L.M. Schat).

**Course of the proceedings on appeal**

The appellant has lodged an appeal against the ruling of the disciplinary court of 13 January 2013, number 2011.K1 ([www.tuchtcollegevoordescheepvaart.nl](http://www.tuchtcollegevoordescheepvaart.nl)).

The person concerned has given a written response to the statement of appeal.

**The court hearing was held on 30 September 2014.**

**The appellant appeared at the hearing. The person concerned appeared, represented by his lawyer.**

### **The basis of the appeal**

- 1.1 For a detailed account of the course of the proceedings and the facts and circumstances at issue - to the extent that they have not been challenged - reference is made to the content of the challenged ruling of the disciplinary court, which is deemed to be inserted here. The Tribunal will confine itself to the following.
- 1.2 During the relevant period the appellant and the person concerned were employed as chief engineer and captain respectively on board the tug boat [name 3] ([name 3]), which at the time belonged to [name 4] ([name 4]). On 12 November 2010 the [name 3] provided assistance to the freighter [name 5] ([name 5]), which had suffered engine problems in the North Sea, a few hours' sailing time from IJmuiden and was adrift. On that date there was a strong SSW wind, force 7 to 8 Beaufort, and there was a considerable swell. Following the arrival of the [name 3], the person concerned approached the [name 5] on the windward side, sailing astern. To attach the towing cable between the [name 3] and the [name 5], he decided to manually attach a messenger to a heaving line and pass it to [name 5] rather than making use of the line casting device that was present on [name 3]. The tow connection was made and the [name 5] was towed to the port of IJmuiden.  
When the [name 3] left port the appellant was in the engine room.  
He went to the bridge at the time that the [name 3] approached the [name 5]. The appellant made photographic and video recordings of the salvage operation.
- 1.3 The complaint of 16 May 2011, filed on 18 May 2011, concerns the actions of the person concerned when securing the [name 3] to [name 5] on 12 November 2010.
- 1.4 A preliminary investigation was instituted by the disciplinary court. In that context, the appellant, the person concerned and the expert appointed by the disciplinary court, L.M. Leusink, captain, were heard at a hearing on 18 January 2012. On 8 February 2012 the disciplinary court heard the chief mate [name 6] (mate) at the offices of [name 4] at [place 2]. Records were made of the court session of 18 January 2012 and the hearing on 8 February 2012. After concluding the preliminary investigation the presiding judge of the disciplinary court rejected the appellant's complaint in its ruling of 11 May 2012. In his letter of 25 May 2012 the appellant challenged the presiding judge's ruling, as a result of which it was set aside. The disciplinary court subsequently held a further session on 20 November 2012. At this hearing the expert appointed by the disciplinary court, C. Pronk (Pronk), retired captain, was heard.

## **Ruling of the disciplinary court**

- 2.1 The complaint laid down in the ruling of the disciplinary court, the wording of which is not disputed by the parties, is (in summarised form) that the person concerned, through his lack of expertise and probably through a serious lack of experience on towage/salvage operations, placed the lives of the crews of his own vessel, the [name 3] as well as that of the vessel that was adrift and being salvaged, in serious danger. The appellant accuses the person concerned of making the towage connection with a heaving line rather than making use of the line casting device that was kept on board.
- 2.2 In the challenged ruling of the disciplinary court, the complaint was dismissed. Where relevant here, the disciplinary court found that it could not be said that failing to use the line casting device was contrary to good seamanship in view of the statements of the person concerned, the expert Pronk and the chief mate.

## **Judgment of the dispute on appeal.**

- 3.1 In accordance with Section 55a (1) of the Maritime Crews Act, as worded at the time in question, the captain and the ship's officers are subject to disciplinary rules with regard to any act or omission contrary to the care expected of a good seaman in respect of the persons on board, the vessel, the cargo, the environment and shipping.
- 3.2 In view of the statement made by the appellant at the hearing, the appeal exclusive concerns the assessment of the complaint that the person concerned acted contrary to good seamanship by failing to use the line casting device. He has argued that there was no consultation about the use of a heaving line or the line casting device and that the line casting device must always be used in situations involving bad weather and high waves, as was the case on 12 November 2012.
- 3.3 The Appeals Tribunal notes first and foremost that in disciplinary proceedings such as these it is a matter for the complainant to justify his complaint and provide supporting evidence showing that the captain concerned and/or ship's officers can be held accountable for their actions under disciplinary law.
- 3.4 With regard to the allegation that there was no consultation about the use of a heaving line or the line casting device, the appellant has made reference to the video recordings that he made. He claims that it can be seen and heard that the person concerned, during radio contact with the coastguard, says that he has arrived at the scene and will assess the situation and that as soon as the conversation ends, he approaches the [name 5], sailing astern.  
The person concerned has explained that he consulted with this chief and second mates and the boatswain at three points in time: in the seaport before leaving port, whilst underway and just before reaching [name 5]. According to the person concerned, the appellant was not present during these consultations.
- 3.5. Since the person concerned has repudiated the claims of the appellant, and his viewpoint is confirmed by the statement of the chief mate, to the effect that the person concerned consulted with him, the second mate and the boatswain on the navigation and rescue plan before [name 3] left port and one hour and 40 minutes before the [name 3] arrived at the [name 5],

the appeals tribunal finds that a plausible case has been made that the consultation took place, taking account of the fact that it cannot be ruled out that the appellant did not have the opportunity to see that the consultation took place. The video recordings made by the appellant do not in any event convincingly show that there was no consultation.

- 3.6 The appellant has expressed the following view with regard to the claim that the line casting device should always be used in situations involving bad weather and high ways, as was the case on 12 November 2010. The line casting device makes it possible to throw a line with a length of 220 metres, which does away with the need to sail close to a drifting vessel to make a connection. A heaving line only has a length of 25 metres, which means that it has to be thrown from a short distance, with all the risks of a collision that involves, especially in weather conditions such as those on 12 November 2010 and with a ship adrift. Furthermore, in this case it was necessary to throw the line upwards from the open quarterdeck to the [name 5], with the waves coming over the quarterdeck. According to the appellant the line casting device can be used to cast a line from the upper deck so that the crew members do not have to stand on the open quarterdeck.
- 3.7 According to the person concerned, the line casting device is used mainly in emergencies. In his view, this was not the case on 12 November 2010. His decision not to use the line casting device was based on the fact that the crew did not have any experience with using it. By way of explanation, the person concerned argued at the hearing that although all seafarers are trained to use the line casting device, this training is given in groups and not all of the participants are given the opportunity to shoot the line casting device themselves. On the other hand, the crew members on board the [name 3] were very experienced in the use of the heaving line because it was part of their day-to-day work, under all weather conditions, to use the heaving line to make connections to transfer anchors to crane vessels, work islands and drilling platforms, for example. The person concerned has also pointed out that, if a line had been cast from the upper deck to the [name 5] with the line casting device, the crew would have had to work on the open quarterdeck to attach the line to the towing cable. Viewed in that light the person concerned regards the use of the line casting device as not being without its dangers since it is not a precision device and the line is shot using a firework rocket.
- 3.8 The Appeals Tribunal sees no cause to challenge the reasoning of the person concerned as to why he exclusively used a heaving line in this situation. The Appeals Tribunal has also taken the statement of the expert Pronk into account. Pronk has viewed the video records and has answered the question of whether he would have used the line casting device in this situation 'no'. In his opinion the line casting device should only be used if all else fails. The appellant has challenged the viewpoint of Pronk on appeal, but has not provided any objective information or a point of view of another expert that could support his position that the person should have used the line casting device in the situation that arose. The mere reference to others, including captains, who support his claim is not sufficient. Account has also been taken of the fact that the viewpoint of Pronk is based on his many years of practical experience as a captain in the tug service. The chief mate has also stated that the weather and other conditions on 12 November 2010 were such that they were able to work and that the crew of the [name 3] had a lot of experience with using the heaving line. He also takes the view that in this case the use of the heaving line was the best way of making the connection with the [name 5]. He answered the question of whether the line casting device should be used as a last resort in the affirmative.

3.9 In view of the above, the Appeals Tribunal shares the finding of the Disciplinary Court that the person concerned did not act contrary to the principles of good seamanship. The appellant's grounds for appeal therefore fail and the appeal must be dismissed.

## **Decision**

The Appeals Tribunal dismisses the appeal.

This ruling was delivered by J.L.W. Aerts, LL.M., W.A.J. van Lierop, LL.M. and M.M. Smorenburg, LL.M., in the presence of P.M. Okyay-Bloem, LL.M., clerk of the court.

The decision was pronounced in public session on 3 February 2015.

Signed J.L.W. Aerts signed P.M. Okyay-Bloem