IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1414/84

BETWEEN	REFINERY CONSTRUCTORS JOINT VENTURE
	Plaintiffs
AND	THE AUCKLAND DISTRICT BOILERMAKERS' INDUSTRIAL UNION OF WORKERS
	First Defendant
AND	A. MACLEAN
	Second Defendant
AND	THE NEW ZEALAND ENGINEERS' INDUSTRIAL UNION OF WORKERS
	Third Defendant
AND	M. SWEENEY
	Fourth Defendant
AND	C. HOOPER
	Fifth Defendant
AND	THE NEW ZEALAND LABOURERS' INDUSTRIAL UNION OF WORKERS
	Sixth Defendant
AND	R. BIANCHI
	Seventh Defendant
AND	B. WIHONGI
	Eighth Defendant

Hearing: 17 December 1984

Counsel: M.D. Edwards for 3rd Defendant in support
G.P. Curry and R.L. Towner for Plaintiff to oppose

Judgment: 17 December 1984

(ORAL) JUDGMENT OF BARKER, J.

The application before the Court is for an interim injunction brought on behalf of the third defendant, the Engineers' Union, against the plaintiff, the Refinery Constructors Joint Venture. The interim injunction application arises from a counterclaim filed by the Engineers' Union in response to proceedings issued by the plaintiff against the Engineers' Union, plus certain officials of that union and certain other unions and union officials.

When granting an adjournment of the hearing last Thursday 13 December 1984, I expressed the hope that the plaintiff would see fit not to require workers to sign a document, promising to abide by the provisions of the Whangarei Refinery Expansion Project Disputes Act 1984 ("the Act") and the relevant industrial awards and site agreements.

This observation was made by me on the basis that I could not see that the signing by individual workers of such a document added anything to the legal rights of the employer. Nothing that has been said today, very eloquently by counel for the plaintiff, convinces me that the signing of a document by any worker adds anything to the plaintiff's rights; nor, for that matter, has it been shown that signing the document detracts anything from the rights of any individual worker. A worker who signs this document does not lose anything because he is merely stating what is obvious; that he, like any other citizen, must obey the law.

However, it seems that sweet reason has not prevailed between the parties; I therefore have to determine the application for interim injunction on legal principles.

The basis of the injunction by the union is to restrain the plaintiff from requiring workers to sign a re-employment application form containing the following provision:

> "I hereby certify that I am prepared to accept re-employment on the same conditions that existed afs at 27th November, 1984 and will continue that employment without exception as provided in my original contract of employment, the Collective Agreement and the Whangarei Refinery Expansion Project Disputes Act, 1984."

The relevant history is stated in purely neutral terms; on 28 November 1984, a significant number of the work force at Marsden Point walked off the job. It is said by the plaintiff - and it seems clear from a perusal of the Act - that such an action was <u>prima facie</u> contrary to s.2(3) of the Act and s.8 of the Act. What this rather unusual piece of legislation does, inter alia, is to engraft a number of conditions on to the contracts of service of each of the workers on the Marsden Point site. Each worker is required, as a statutory condition of employment, not to be a party to an illegal strike. S.8 requires 14 days' notice of strikes; it is common ground that there was not 14 days' notice of this strike; so that, <u>prima facie</u>, the walk-out on 28 November was illegal.

Mr Edwards points out that this legislation contains, in s.10, a provision giving the District Court full and exclusive jurisdiction to hear actions for the recovery of penalties under the Act in respect of alleged breaches. These rights presumably are in addition to any rights either at common law or under industrial law.

After these workers had walked off the job, the employers decided to offer them all re-employment, but only on condition that they sign a document of the sort referred to earlier. I am now advised from the Bar that since 28 November or thereabouts, a number of persons who have returned to the site and have signed the document. I am told that there are 2,365 workers on the site (including employees of subcontractors who are not in direct contractual relationship with the plaintiff). There are still at least 600 workers who have chosen not to sign the document and who are not at work as a result.

The basis on which Mr Edwards argued the case today was that the employment of these workers had not been properly terminated by the plaintiff in terms of the site agreement, which entitles an employer to dismiss a worker summarily, solely for serious misconduct. He submitted that the taking of industrial action should not be considered as serious misconduct, and that the usual requirements of a week's notice or a week's pay in lieu should have prevailed. Accordingly, he submitted that the employment contracts are still on foot and that it was therefore wrong for the employer to seek to engraft another condition on to the existing terms of contracts not lawfully terminated. He relied on various Australian and New Zealand authorities which can be readily distinguished on the facts.

There are several difficulties in the way of accepting the argument that there is a serious question to be tried. The pleadings of the third defendant, the Engineers' Union, admit the pleadings of the plaintiff that the workers were dismissed. Indeed, there is reference in the affidavit in support to workers who have been dismissed.

Indeed, it seemed a difficulty in the way of the plaintiff's injunction sought last week, namely, that it

had dismissed or purported to dismiss workers. I could see difficulty in issuing an injunction against the unions and union officials to stop them interfering with contractual relations if these contractual relations had been terminated for whatever reason. It is not illegal to advise against entering into a contract; it is only illegal to interfere with a contrace once it has been entered into. However, that is an aside.

The difficulty here is that the union in its pleading has admitted the dismissal. It seems to me clear law that, once an employer has dismissed an employee and the status of employer/employee is no longer current between them, the Court is thrown back on the well-known and long-established principle that a contract of personal service cannot be enforced by injunction. I think that is the case here.

I am not determining whether the workers were rightly or wrongly dismissed. If they were wrongly dismissed, the union and the workers themselves have their remedies. The union has clear rights under the Industrial Relations Act 1973 to ask the Arbitration Court not only to reinstate the workers, but to award them compensation for the time they were unlawfully put off work, and for their injured feelings. That is a procedure which only can be taken by a union; that procedure is open in the present case.

Alternatively, individual workers can bring action against the employer if they are so minded in respect of wrongful dismissal. The fact that these alternative remedies remain, provides further grounds for holding that the Court cannot, by injunction, compel performance of these contracts of personal service. This principle has normally been found in the case of an employer seeking to retain the services of an employee. I cannot see any difference in principle between an employee seeking an employer to employ him when the employer does not want to

do so and the reverse situation.

I do not wish it to be thought that, by coming to this view, I endorse in any way the action of the employer in requiring the workers to sign this document. I have indicated my personal view that the requirement seems rather pointless in that it adds nothing to the rights of the employer. It is clearly providing a psychological stumbling block for many of the workers; one would have thought that now that there is to be a committee of inquiry headed by a person of the experience of Dr Finlay Q.C., the parties should not take up polarised positions until at least the deliberations of that committee of inquiry have concluded.

However, those observations cannot affect the fairly clear legal situation. There are various other matters which cause me to hestitate and which prevent the issue of an injunction.

First, the interpretation of the site agreement is a matter within the exclusive jurisdiction of the Arbitration Court, under s.48 of the Industrial Relations Act 1973. In several cases, the Court of Appeal has emphasised that the Legislature has seen fit to give exclusive jurisdiction to the Arbitration Court in respect of the interpretation of awards and agreements. Earlier this year in Foodtown Supermarkets Limited v. Shop Assistants' Union, the Court of Appeal reiterated that view.

Secondly, the existence of other remedies which I have canvassed in an earlier context is a discretionary matter weighing against the grant of an injunction.

Thirdly, what the workers are being asked to do is not something which detracts from their rights at all. There is some merit in the submission that if a large number

have already signed the document, then it might be unfair to absolve the others from the requirement of signing when signing does not the worker at any disadvantage at all legally; he is merely stating that he will obey the law which is something which is incumbent on him at any rate. So that, in the exercise of my discretion, I would have found it difficult, had there been a serious question to be tried, to have stopped the employer from adding this additional term which really affects the workers little, if at all.

I have indicated that I think it unnecessary for the employer to insist on this term; however, equally, it causes no hardship at all to a worker to be asked to sign this document; I should have thought that the possibility of resuming work on the site for payment in accordance with the award etc. for those who take part, would provide some reason for an erarly return to work if at all possible. However, those are matters which are strictly outside my province.. I must decide the application purely from a legal basis.

Therefore, there is no justification for the issue of the injunction in this case.

The application must therefore be refused. Costs are reserved.

R.S. Barker J.

SOLICITORS:

Russell, McVeagh, McKenzie, Bartleet & Co., Auckland, for Plaintiff.

Dickson & Co., Auckland, for 3rd, 4th & 5th Defendants.