No. 1655/85

DISTRICT COURT OF ONTARIO

B E T W E E N

KENNETH GEORGE ROBERTS,

Plaintiff,

- and -

DRESSER INDUSTRIES CANADA, LTD.,

Defendant.

No. 1643/85

DISTRICT COURT OF ONTARIO

B E T W E E N :

BARRY DESMOND QUINN,

Plaintiff,

- and -

DRESSER INDUSTRIES CANADA, LTD.,

Defendant.

No. 1640/85

DISTRICT COURT OF ONTARIO

B E T W E E N :

IAN PAUL WINNARD,

Plaintiff,

- and -

DRESSER INDUSTRIES CANADA, LTD.,

Defendant,

No. 1644/85

DISTRICT COURT OF ONTARIO

B E T W E E N

GORDON MICHAEL PROCTOR,

Plaintiff

- and –

DRESSER INDUSTRIES CANADA, LTD.,

Defendant.

No. 1649/85

DISTRICT COURT OF ONTARIO

B E T W E E N :

PHILIP DOUGLAS JOHNSTON,

Plaintiff,

- and –

DRESSER INDUSTRIES CANADA, LTD.,

Defendant.

No.1645/85

DISTRICT COURT OF ONTARIO

B E T W E E N :

GEOFFREY ROBERTS,

Plaintiff,

- and -

DRESSER INDUSTRIES CANADA, LTD.,

Defendant.

MARC J. SOMERVILLE, ESQ., Q.C. and IAN S. CAMPBELL, ESQ., for the Plaintiffs.
THOMAS A. STEFANIK, ESQ., and PETER M. WHALER, ESQ., for the Defendants.

REASONS FOR JUDGMENT

THE HONOURABLE D. F. MOSSOP

These are actions in which the individual plaintiffs claim damages for breach of a hiring contract and/or damages for negligent misrepresentation.

FACTS

Each of the plaintiffs was at the time of commencement of his relationship with the defendant resident in the United Kingdom and was trained and experienced in the trades of sheet metal, plating and welding. The plaintiffs ranged in age from twenty-eight to forty years of age, were married and all but Mr. Winnard had one to three children. Each of the plaintiffs owned his own home in England. The work experience of the plaintiffs in their trades ranged from seven to eighteen years and their tenure with their last employer in England varied from five to nine years and I find as a fact that their employment with their then employer was secure.

The defendant is part of the world-wide operations of Dresser Industries Inc., which was a manufacturing and service operation in over 150 countries employing in 1981 about 55,000 people. The plant of the defendant in Cambridge, Ontario, was

the largest of four Ontario plants. In 1978 and 1979 the defendant began manufacturing mobile drilling and work over rigs for the oil and gas industry in its Cartridge plant and subsequently the Industrial Products Division of Dresser Canada Inc., in Cambridge was given by its parent company exclusive world-wide production of what are called "work over rigs" which apparently are used to increase production from existing wells.

In early 1981, Mr. James Adams, the Director of Human Resources for the defendant was instructed to embark upon a major recruitment drive for skilled workmen in order to cope with the production objectives of the defendant. There apparently being a dearth of skilled tradesmen in Canada the defendant obtained Immigration Department approval to recruit workmen with the desired skills in the United Kingdom. As a result the defendant on March 5, 1981 placed advertisements in five national newspapers in the United Kingdom inviting interested persons to obtain application forms through Ontario Hose in London, England. It appears that 586 applications were received and of these approximately 100 applicants were interviewed in England by Mr. Adams and Mr. Bernie Jones, sometimes together and other times separately. All of the plaintiffs were interviewed with three of the wives of the plaintiffs being present at the interview.

It is apparent from the nature of the interviews as testified to by the plaintiffs and Messrs. Adams and Jones that, entirely apart from ensuring that the interviewees had the necessary technical skills and qualifications, the content of the interview related as well to the commitment of the applicant to the defendant and the commitment of the family unit to establishing roots in Canada. As well the representatives of the defendant explained that if the applicant remained in the employ of the company for one year he would receive reimbursement of his airfare to Canada up to $600.00 and if he remained in the employ of the defendant for two years his wife's airfare to the extent of $600.00 would be reimbursed. Each of the plaintiffs was sometime

during the interview verbally offered employment and each accepted the offer. Each applicant was then advised that he would receive a letter confirming the offer and did so while still in England. This letter set out the rate of pay, hours of work, the commencement date (subsequently extended) and the provisions for reimbursement of air fare. There is in the letter no mention as to the anticipated length of employment. None of the plaintiffs questioned any provision in this letter or any omission from it.

Each plaintiff and his family eventually arrived in Canada and commenced work for the defendant. At some time after their arrival in Canada each plaintiff received a copy of the collective agreement in force in the plant and each plaintiff signed a membership card in the union.

In April of 1982 the defendant began laying off employees due to sudden cancellations of existing orders for rigs under construction. The basic reason for this downturn in production was that rather than world shortage of oil predicted by experts in the field, by early 1982 if was realized that there was indeed a surplus of oil. The situation was compounded by the fact that a number of manufacturers had entered into the production of drilling rigs.

As a result of these market forces the plaintiffs were all terminated more or less on the basis of seniority as provided in the collective agreement in the period from April 5 to May 31, 1982. The plaintiffs were each given severance pay as provided for in the collective agreement. Further each plaintiff, despite the fact that their period of employment was considerably less than one year, was reimbursed the sum of $600.00 for airfare on the anniversary date of their commencement of employment.

Upon termination, the plaintiffs, Quinn, Winnard and Proctor, searched for work unsuccessfully for an average of about four weeks and then returned to England with their families. The plaintiff, Ken Roberts, remained in Canada for about two years during which period he had full time employment for about twelve months. The other two plaintiffs, Geoffrey Roberts and Philip Johnston remained in Canada.

SECURITY OF EMPLOYMENT

Each of the plaintiffs testified that during their interview with Mr. Adams and/or Mr. Jones they enquired as to the tenure of their employment. Their evidence as to the information they received on this subject by one or other of the interviewors differs considerably from that testified to by Mr. Adams and Mr. Jones.

Mr. Adams categorically denied that he ever indicated to any of the applicants he interviewed any estimate as to how long the job with Dresser Canada Inc. might last. He stated that "In 30 odd years in this business, I have never predicted the lifetime of a job. It's impossible. We told them it was a permanent position." Mr. Adams testified that he had interviewed potential employees of the defendant in the United Kingdom previously and had never made any prediction as to the security of the preferred employment. Mr. Adams testified that any discussion of security of tenure in which he was involved was limited to advising that it was a "permanent" job as distinguished from a "contract" job for a specific period of time. Indeed Mr. Adams testified that with the applicants he interviewed it appeared their primary priority was to "get to Canada" and that they were not concerned with the security of the job. Mr. Adams testified that he went to lengths to explain the seniority system in Canada which differed somewhat from the use of seniority in the United Kingdom. He also testified that he explained to the applicants that there would be a probation period before the employment became permanent and that it was after the probation period was completed that the employee must join the union.

Mr. Jones admitted in his evidence that he has no specific recollection of any of the interviews he conducted of the plaintiffs. He testified that he could not recall any of the applicants enquiring about the length of time they would be working for the defendant. He went on to state that the permanency of the job did not really come out in any of the conversation to which he was a party. Mr. Jones denied having

promised any of the applicants work for specified periods of time such as two, three or five to ten years. On the other hand, Mr. Jones admitted that it never crossed his mind that there was any possibility of the applicants being laid off within the next two years although the possibility of a lay off did not seem of great concern to tne interviewees. He further stated that he expected the applicants to be with the company after a two-year period because the air fare reimbursement arrangement was predicated upon that fact. When it was suggested to him that implicit in that is the belief by the interviewees that they would be with the company for two years he admitted that the applicants could so interpret it.

Mr. Jones acknowledged that before, the hiring process began he was supplied with what is called a "build schedule" which is a breakdown of the number of rigs to be produced each month and the manhours of work required to sustain that production. It was on the basis of this schedule that Mr. Adams and he would decide their hiring requirements. He testified that he is certain they had a build schedule for the balance of 1981 and 1982 but he could not recall if it extended further into the future. From this schedule, he acknowledged that he was quite confident that they had work for the successful applicants for the balance of 1981 and 1982 and that he would impart that confidence to the applicants. When asked if he would wouldn't advise the applicants that the defendant had orders for the next two years he replied that he did not recall imparting that to them and followed that up by saying that we don't specify the time.

On the other hand, each of the plaintiffs testified that they were indeed greatly concerned with security of employment since they each had secure employment in their existing positions. While it is true that each of the plaintiffs had ambitions to advance themselves and their families and felt this ambition could be promoted more readily in Canada it is evident that they were not prepared to sacrifice some measure of security to feed that ambition.

KENNETH GEORGE ROBERTS

Mr. Ken Roberts was interviewed by Mr. Adams. Mr. Adams testified that having seen Mr. Roberts at the trial he was one of the few whose interview he recalled since he seemed different in that he was older than the others, likeable, a good family man, established with his own home and that he "didn't appear under any threat of losing his job". Mr. Adams throughout his evidence dealing with this interview seemed to infer that this applicant would have done anything to get to Canada and that his only interest during the interview was to achieve that end. Indeed Mr. Adams testified that this applicant told him that he had applied to emigrate previously and had been turned down and that he would have come to Canada even without a job. Mr. Roberts denied telling Mr. Adams that he had applied previously to emigrate to Canada or that he had indeed applied. On this point Mr. Adams was referred to his examination for discovery held on June 7, 1984 when at Question 112 he was asked if he had any specific recollection of the dialogue between he and Mr. Roberts and he replied "Yes, I have some vague recollection because Mr. Roberts appeared different than the —- most of the applicants I'd seen. He was established." At Question 114 referring to the dialogue with Mr. Roberts, Mr. Adams stated "I can remember specific parts where...as to the question as to why...I do believe, I'm not sure, but I do believe Mr. Roberts had already made application to emigrate to Canada...". In fairness to Mr. Adams I do repeat that he testified having seen Mr. Roberts at the trial refreshed his memory of the interview. Mr. Roberts did insert on his application that he would like to emigrate to Canada but at trial he indicated that emigration and a job with the defendant went together.

In any event, Mr. Roberts testified that security of employment was of major importance to him so he asked Mr. Adams about the continuity of the work and was told that there was two years' work on the books with the possibility of five years' work.

BARRY DESMOND QUINN

Mr. Quinn was interviewed by Mr. Jones. Mr. Quinn testified that he asked if there would be any redundancies (which, in the United Kingdom, equates with lay-offs in Canada) in the near future and was told the order books were full for the next five years and that "we are taking on, not laying off". He further testified that Mr. Jones commented that the company would not go to the expense of recruiting in Britain unless it had good prospects for the future. Mr. Quinn admitted that when he saw the advertisement soliciting applications for employment he concluded that a position with the defendant would be a secure one because it was a big firm and it was in oil, that industry being in "a bit of a boom" in England. Mr. Quinn testified that he was told that the plant was unionized but he was not given a copy of the collective agreement nor was he advised there was a probationary period. He says that he was not told of the seniority system at the plant which was last in, first out, which differed from the system he knew in England.

IAN PAUL WINNARD

Mr. Winnard states that he was interviewed by Mr. Jones in the presence of Mrs. Winnard. From the advertisement Mr. Winnard too equated security with the size of the company and thought it would be a good company to work for as he might go higher in a big company. However, he felt he could find out more about the company during the interview. Mr. Winnard testifies that when he asked Mr. Jones how much work the plant had he was told there was lots of work for many years and that the work should last for at least ten years. Mr. Winnard testified that when Mr. Jones advised that his air fares would be paid after one or two years this led him to believe his employment was guaranteed for at least two years.

GORDON MICHAEL PROCTOR

Mr. Proctor was interviewed by Mr. Jones in the presence of Mrs. Proctor. He testified that when he saw the advertisement he thought it was an opportunity to better himself. Mr. Proctor

stated that he asked Mr, Jones how much work Dresser had and was told it had orders for five years on the books. He testified that he asked that question of Mr. Jones because he had heard of lay-offs in Canada. He went on to state that Mr. Jones told him there was plenty of overtime available and everything was booming and that the oil rig industry was very good. There is no doubt that Mr. Proctor was somewhat attracted to the job offer because it involved an opportunity to move to Canada where he believed the opportunities were better for he and his family. He was told his air fare would be reimbursed after a two-year period of employment.

PHILIP DOUGLAS JOHNSTON

Mr. Johnston was interviewed by Mr. Jones in the presence of Mrs. Johnston. Mr. Johnston frankly admitted that he had sought to emigrate from England before he saw the advertisement inviting job applications. He had previously applied for jobs in Canada, Australia and South Africa. He explained that the unemployment situation in England was such that young persons were having difficulty finding jobs after leaving school. He was also looking for his own advancement although he had no fears for his own employment in England. Mr. and Mrs. Johnston were searching for a position outside England which would be secure for a minimum three-year period which would given them time to adjust and permit them to get back on their feet financially from the cost of moving.

During the interview Mr. Johnston says he asked Mr. Jones about the permanency of the job because he realized he needed money coming in to get back on his feet from the relocation. He testified that Mr. Jones said the company looks good, that the order books are filled for about three years and "we are looking at five years because we are getting more orders every day". There was no indication from Mr. Jones that the orders could be cancelled. On cross examination Mr. Johnston was not so certain that Mr. Jones had mentioned three years of orders although he was more or less sure that figure was mentioned although on examination for discovery he testified Mr. Jones

told him that they had "four to five years' work now and are getting more work every day". Mr. Johnston testified he was told about the air fare reimbursement after one and two years' of employment.

GEOFFREY ROBERTS

Mr. Roberts was interviewed by Mr. Jones and though Mrs. Roberts travelled to the interview she was not present during it. Mr. Roberts testified that during the interview Mr. Jones offered him a job and that he told Mr. Jones he would not accept the job provisionally but he would have to talk it over with his wife which he did before accepting the offer. It was then Mr. Roberts asked if the job was going to be long term and was told by Mr. Jones that there was a job for at least two years, that their order books were filled up and there were lots of rigs to get out. Mr. Roberts was also advised of the air fare reimbursement arrangements.

CONCLUSIONS ON THE EVIDENCE RE INTERVIEWS

After reviewing all of the evidence as to the interviews I have concluded that the evidence of the plaintiffs as to the assurances given them regarding security of employment is credible. It is inconceivable to me that these six intelligent men would be prepared to give up the stability of the life they and their families had in the United Kingdom to emigrate to Canada without some assurance of a job which had some degree of permanence attached to it. To deny that some assurance was given and that the only comment made by the representatives of the defendant on the topic was that the job was "permanent" rather than "contract" does not in my opinion meet the test of reasonableness. Nor in my view would the use of the word "permanent" in the context in which it was stated to be used here imply in the mind of the listener a job of indefinite duration.

In fairness I must point out that Mr. Jones testified he had no specific recollection of the interviews which he conducted of five of the plaintiffs and was relying on giving his evidence on the general format of the approximately fifty interviews he conducted. Yet when asked if any applicants asked about the length of time they would work for Dresser Mr. Jones replied that he could not recall such a question. Similarly when asked if any applicants asked if it was a permanent job Mr. Jones

replied in the negative and concluded that it wasn't really brought out in any of the conversations. Indeed he indicated that the issue raised the most in the interviews was the difference in holiday time between Canada and the United Kingdom. To suggest that persons who were going to make such a dramatic change in lifestyle and invest so much capital in such a change would not enquire as to the security or lack thereof in their new employment does indeed test one's credulity.

Mr. Adams too denies that in his interview with Mr. Ken Roberts, the only plaintiff he did interview, there was any assurance of any period of job security. He testified that any discussion of security consisted of him being asked if the company had lots of work in the shop to which he answered "yes" or that "we are busy". To accept that such an answer would satisfy the justifiable curiosity of a mature man with some eighteen years of experience in the work force who was contemplating a move to another country at great expense is just incomprehensible and I cannot accept the evidence of Mr. Adams that such a simple answer to such a simple question ended the conversation on the topic of security of employment.

I am persuaded that there were assurances by both Mr. Adams and Mr. Jones of security of employment for a reasonable period of time which coupled with other evidence justifiably led the plaintiffs to believe would be no less than two years. That other evidence consists of the undertaking, both oral and written, to reimburse to the extent of $1,200.00 the air fare of applicants and their wives on the second anniversary of their employment with the company. Implicit in this undertaking is the fact that the company expected the applicants to be with the company for the two-year period and it would be consistent that the interviewers would give some assurances related to security of employment for at least that period. It must be remembered that Mr. Adams and Mr. Jones had the task of recruiting sixty skilled tradesmen from Great Britain to move to Canada and that there was considerable urgency in completing that undertaking as evidenced by the unrealistic starting dates orginally imposed

on the applicants. It is also not unimportant to note that the recruitment of sixty tradesmen was no easy task since the employment of the required number was not achieved. It is therefore not unnatural to conclude that some subtle or even explicit salesmanship would be employed in the recruitment process. Both Mr. Adams and Mr. Jones, having seen the build schedule for 1981 and 1982, knew the manpower requirements for the immediate future. At the time of the interviews I am satisfied that both these men held an honest and justifiable belief that their employer had ample work in the future and it would be unnatural not to express that confidence in any discussion of security of employment.

Counsel for the defendant raises the question that those wives of the plaintiffs who attended the interviews were not called to corroborate their husband's evidence and therefore I should draw the conclusion that their evidence would be adverse to the position of the plaintiffs. I do not perceive that if a party does not call every witness who was present at an event or transaction merely to corroborate other evidence that the Court can or should draw the inference that the tenor of the evidence of the missing witness would adversely effect the case of the plaintiff who failed to call the witness. The authorities on the point speak of failure to call a "material witness". Failure to call a corroborating witness is dealt with in Wigmore on Evidence, Volume 2, Page 202:

> "...it seems plain that possible witnesses whose testimony would be for any reason comparatively unimportant, or cumulative, or inferior to what is already utilized, might be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. In other words, put somewhat more strongly, there is a general limitation (depending for its application on the facts of each case) that the inference cannot be fairly drawn except from the non-production of witnesses whose testimony would be superior in respect to the fact proved."

There is nothing to suggest that the evidence of the wives as to the contents of the interviews would be anything more than corroborative of that of their spouses. It could

hardly be described as "superior" since the husbands with their experience in the nature of the work involved in the potential job would know better what topics were important to them in the discussion.

I think the cases cited by counsel for the defendant on the topic of failure to call a witness illustrate the difference between a "material" witness and one who would be merely corroborative "cumulative". In Levesque et al v. Comeau et al [1970] S.C.R. 1010, the plaintiff complained of deafness arising from a motor vehicle accident and although she had consulted several doctors and undergone different examinations, the only expert called as a witness for her was a doctor who had examined her more than a year after the accident and after the several doctors had seen her. Obviously the missing experts were material on the issue of causal connection of the deafness to the accident and the inference had to be drawn that their evidence would adversely affect her case. Similarly in Lynch & Co. v. United States Fidelity and Guarantee Co.; Cooper, Third Party, [1971] 1 O.R. 28 the plaintiff company failed to call as a witness the senior partner of the plaintiff firm and the person who hired the employee of the plaintiff whose alleged defalcations were the subject matter of the law suit. The missing witness was also the principal spokesman for the firm in dealing with the errors of the employee. Obviously he was a "material witness" who would give superior evidence on at least some of the issues involved in the action.

So I conclude that the failure of the plaintiffs to call the wives present at the interview does not compel me to draw the inference that their testimony would be adverse to that o£ their husbands.

The defence also questions the credibility of the plaintiffs on the basis that one of them conceded at trial that he had discussed his evidence with the other five plaintiffs prior to the trial. I fail to understand this submission. Indeed I would be more inclined to doubt that plaintiff's credibility had he denied any such discussion. If the defence is suggesting

the plaintiffs were then tailoring their evidence to some degree of conformity for the trial, they have failed miserably in achieving that purpose. The plaintiffs have substantially differed in their recollections as to the period of time they allege they were told that work would be available. The range was from two to five or ten years. They also do not agree on the other portions of the discussions. Mr. Winnard states that he was told about the period of probation. The other plaintiffs deny that they were told. I cannot conclude that the credibility of the plaintiffs was suspect because of any pre-trial discussions between them.

I also find as a fact that none of the plaintiffs was advised by the representatives of the defendant that there was in existence an agreement in writing between the union and the defendant that set out the terms of employment and was binding upon all members of the union as well as the signatories to the agreement. I am satisfied that had this been disclosed, one at least of the applicants would have wanted to see it. It is also clear from the evidence of Mr. Adams that a copy of the collective agreement was not made available to any of the plaintiffs until they had completed their probationary period.

Finally in short I find as a fact that during the interviews there was some representation that there would be security of employment for some reasonable period of time which the plaintiffs were justified in assuming to be at least two years and that the plaintiffs relied upon such representation in making their decision to accept the job offer and emigrate to Canada.

STATUTE OF FRAUDS

The defence submits that if the position of the plaintiffs, that they had a contract of employment for a minimum of two years is accepted, then such contract must be in writing under Section 4 of the Statute of Frauds, R.S.O. 1980, Chapter 481. I point out that in none of the Statements of defence in these five actions is the Statute of Frauds pleaded as it must be where, as here, one of the parties is seeking to enforce the

contract against the other: Kent v. Ellis (1900) 31 S.C.R. 110 at 121.

DEFENDANT'S CONTRACTUAL

It is the position of the plaintiffs that at the time of the interviews in Great Britain there was an oral offer of employment by the defendant to each individual plaintiff on the terms discussed during the interviews and that such offer was accepted by each plaintiff during the interview or in one case shortly thereafter when that plaintiff discussed it with his wife. The consideration for the contract was the promise of each plaintiff to work for the defendant and the agreement of the defendant to employ each plaintiff when he arrived in Canada. Therefore it is submitted by the plaintiff that there were individual contracts of employment between each plaintiff and the defendant arrived at as part of the interview process.

Perhaps the first point to be determined is whether the discussions in England and the decisions taken by both sides to those discussions constitute a contract and if so whether the representation or assurance as to security of employment for a minimum two-year period formed part of such contract.

Certainly all the elements of a contract were present. There was an offer of employment with such things as hourly rate, hours of work, shift work, necessity of joining a union, union dues commencement date, air fare reimbursement and security of employment. The offer was accepted orally by each of the plaintiffs and both parties then proceeded to act on the basis of the agreement. The defendant confirmed some of the provisions of the contract by letter but such letter did not contain all of the terms of the contract discussed. For example, part of the contract was that the defendant would pay the expense of putting up each plaintiff and his family in a motel for a period of one week on their arrival in Cambridge. That was not in the letter. The necessity of joining the union was not in the letter. The requirement of shift work was not in the letter. And the assurance as to security of employment for a minimum period of two years was not in the letter. The letter purports

to make a "firm offer of employment" but it is sadly lacking in the details of such employment. The effective contract was the oral contract made at the time of the interview.

The next problem to be considered is whether what I have been describing in a non-legal sense as a "representation" or "assurance" relating to security of employment is a "representation in the legal sense or a term of the oral contract. Counsel have referred me to Anson's Law of Contracts, 24th Edition, Page 125 where the tests to be applied are summarized as follows:

> "First, they [the Courts] may have regard to the time which elapsed between the time of making the statement and the final manifestation of the agreement; if the interval is a long one, this points to a representation. Secondly, they may consider the importance of this statement in the minds of the parties; a statement which is important is likely to be classed as a term of the contract. Thirdly, if a statement was followed by the execution of a formal contract in writing, it will probably be regarded as a representation should it not be incorporated in the written document. Finally, where the maker of the statement is vis-a-vis the other party, in a better position to ascertain the accuracy of the statement, the Courts will tend to regard it as a contractual term.
>
> But all of these factors are at best only secondary guides and they are subsidiary to the main test of contractual intention, that is whether there is evidence of an intention by one or both parties that there should be a contractual liability in respect of the accuracy of the statement."

I am of the view that applying those tests the assurance regarding security of employment for at least two years must be classified as a term of the contract. It is apparent from the evidence of each of the plaintiffs and by the application of common sense that tenure of employment for a reasonable length of time was vital to the decision to give up stable employment, to sell their homes, to incur the expense of moving and to dislocate their families and themselves to a strange land. At no time before moving to Canada were they made aware or have the opportunity of learning what the collective agreement had to say about termination

EFFECT OF COLLECTIVE AGREEMENT

There is now no question that individual contracts

of employment cannot coexist with a collective agreement where the individual contracts address, expressly or by clear implicaticion the same matters dealt with in the collective agreement; Bourne v. Otis Elevator Co. Ltd. (1984), 45 O.K. (2d) 321 (H.C.J.) and McGavin Toastmaster Ltd, v. Ainscough et al (1975) 54 D.L.R. (3d) 1 (S.C.C.) although it is interesting to note Laskin, C.J.C. at Page 8 quoted from the decision of Judson, J. in C.P.R. Company v. Zambri [1962] S.C.R. 609 as follows:

> "When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship. Conversely, when there is a collective agreement in effect, it is difficult to see how there can be anything left outside except possibly the act of hiring."

The next step was in General Motors of Canada v. Pierre Brunet et al [1977] 2 S.C.R. 537 where it was made clear that the Courts do not have jurisdiction to enforce the terms of a collective agreement since to hold otherwise would be to ignore a legislative enactment similar to that contained in Section 44 of the Ontario Labour Relations Act, R.S.O. 1980, Chapter 228 as amended which provides for final and binding settlement by arbitration of all differences between employer and employees arising from interpretation, application, administration or alleged violation of the collective agreement. But Pigeon, J. for the Court did say at page 548:

> "It is important to note that the rights which plaintiff wishes to exercise derive exclusively from the agreement."

The defendant relies heavily upon the recent decision of the Supreme Court of Canada in St. Anne-Nackawic Pulp & Paper Co. Ltd, v. Canadian Paperworkers Union, Local 219, (1986) 28 D.L.R. (4th) 1 (S.C.C.). In that case the employer brought action in the civil courts for damages arising out of a strike. At pages 8 - 10 Estey, J. for the Court noted that there are a significant number of decisions doubting the jurisdiciton of the Courts to hear claims based on the interpretation or application of collective agreements containing provision for binding arbitration. The earlier cases appear to establish

two exceptions to this principle:

> "first the courts have held in a number of cases to have jurisdiction in a case where, although the claim depends entirely upon a right created by the terms of a collective agreement, the court is not required, in enforcing the right, to interpret the agreement and secondly, where the claim can be characterized as arising solely under the common law, and not under the collective agreement. At page 11 of the decision, the Court states as follows:
>
> 'If there were nothing more than the collective agreement between bargaining agent and employer, the Courts might still have applied the common law to its enforcement at the suit of the bargaining agent or the employer. The collective agreement embodies a holding out, a reliance, a consent and undertaking to perform, mutual consideration passing between the parties, and other elements of contract which would expose the parties to enforcement in the traditional courts. There would be, of course, a basic difficulty as to the status of the absent third party; the employee, and perhaps the absence of an identifiable benefit in the bargaining agent. All this is overcome by the statute, and the question whether worthwhile enforcement could only be realized at common law, is therefore, of theoretical interest only. The missing elements are the status of the members of the bargaining unit and the appropriate forum. The Legislature created the status of the parties in a process founded upon a solution to labour relations in a wholly new and statutory framework at the centre of which stands a new forum, the contract arbitration tribunal. Furthermore, the structure embodies a new form of the triangular contract with but two signatories, a statutory dissolution to the disability of the common law in the field of third party rights. These are but some of the components in the all-embracing legislative programme for the establishment and furtherance of labour relations.'"

The Court goes on at pages 11 and 12 to indicate that the problem raised by an attempt to escape the contract tribunal so as to seek enforcement in the courts of rights arising under a collective agreement negotiated within the framework of a

collective bargaining regime, solely on the grounds that the agreement does not explicitly address the jurisdictional question, is a '...profound difficulty '.

At page 13, the Court concludes as follows:

> "From the above survey of the cases, a general consensus is evident. The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement. Nor can the courts properly decide questions which might have arisen under the common law of master and servant in the absence of a collective bargaining regime if the collective agreement by which the parties to the action are bound makes provision for the matters in issue, whether or not it explicitly provides a procedure and forum for enforcement. There is, therefore, little practical scope left to the second general exception identified above."

There is no doubt therefore that any claims for damages arising out of rights created by a collective agreement must proceed by way of arbitration and that any question which might have arisen under the common law of master and servant and which are dealt with in the collective agreement, either expressly or by implication, must be dealt with by arbitration and not by the courts.

That point the plaintiffs concede. But what they do argue is that their claims do not arise out of rights created by the collective agreement since they were not members of the bargaining unit and therefore not governed by its terms both as to rights and obligations nor were they even aware at the time the contract of hire was made that there was a collective agreement in existence. It was never suggested to them that the contract of hiring was to be subject to the terms of the collective agreement. These are not claims for wrongful dismissal. These are claims for damages arising from the terms of individual contracts, one of such terms being that they would have steady employment for a minimum period of two years.

In C.P.R. Company v. Zambri (Supra) Mr. Justice Judson may have displayed the perspicacity to envisage the facts of these cases when he said:

> "Conversely, when there is a collective agreement in effect, it is difficult to see

how there can be anything left outside, except possibly the act of hiring." (emphasis mine)

The possibility of that exclusion existing has, so far as I know, never been the subject of negative judicial comment and if it does exist, as I believe, it should surely be applicable to and be resorted to in this case.

I therefore conclude that recourse may be had to the Courts on the facts of this case even though the plaintiffs did by statute become subject to the terms of a collective agreement subsequently but well after the formation of the individual contracts for hire. I therefore hold that the defendant in each instance breached the contract of employment by terminating the employment of each individual prior to two years from the date of commencement of employment and that the defendant is liable for all lawful damages suffered by each plaintiff as a consequence of that breach.

Having arrived at that conclusion I do not think it necessary to address the issue of promissory estoppel.

DEFENDANT'S LIABILITY IN TORT

The plaintiffs have also founded their respective actions on the tort of negligent misrepresentation alleging that inter alia the defendant's representatives were negligent in providing the plaintiffs with unqualified and inaccurate assurances as to the length of employment they could expect.

While there is no doubt in my mind that the representatives did speak of the future in somewhat glowing terms the question is whether they were negligent in doing so. I have been favoured with the evidence of Dr. Harvey Schwartz, who has impressive qualifications as an economist and who prepared a chronological report of the world petroleum market and the United States market for drilling rigs from 1978 to 1982. The gist of his evidence was that there is a relationship in the demand for oil rigs as the price of oil goes up. Dr. Schwartz points out that with the world events such as the Iran revolution, the Iran-Iraq war and the actions of OPEC countries the spot price of oil increased from early 1978 when it was in the range of U.S. 12.70 a barrel until at the end of 1980 it was around U.S.

$32.00 and at that time the prices began to decline. But according to Dr. Schwartz the boom in construction of drilling rigs continuec despite the apparent surpluses of oil and indeed in 1980 and 1981 there were shortages in the drilling rig market. There was an expectation in both the oil industry and the drilling rig manufacturing industry, strongly supported by conditions facing the industries, that the boom experienced in both industries would not be short lived. Any downturn that might occur was viewed as being only temporary since the underlying strength of the industry would soon lead to a resumption of high drilling rates. Dr. Schwartz reports that when a downturn did occur in December, 1981, most industry spokesmen were caught by surprise and they assumed that it would soon be rectified. That assumption unfortunately was not realized.

There is no doubt that during the period of the boom some experts were warning of a coming, decline in the drill rig manufacturing sector but the majority of experts predicted a temporary lull.

Mr. Adams indicated that it was not until March, 1982 that the defendant began receiving stop work orders on rigs already in the manufacturing process so this supports the suggestion of Dr. Schwartz that even with the downturn in oil producing in December, 1981, the situation was thought to be temporary by the majority of both the oil and the drill rig industry.

Accepting those market fluctuations I cannot see that the officers of the defendant were negligent in that they did not harken to the few accurate voices of doom. So in my view the optomistic representations given to the plaintiffs at the time of hiring were a reflection of the consensus of the oil and drill rig industry and that optomism did not begin to diminish until after the plaintiffs arrived in Canada and began their employment. I cannot find those representations, honestly believed at the time made, a belief shared by most experts in the field,could constitute negligent misrepresentation. Given my finding on the defendant's alleged tortious conduct I need not address the issue of contributory negligence on the part of the plaintiffs.

DAMAGES

Since I have concluded that there was no tortious liability on the defendant I need only consider in assessing damages the principles of assessment which flow from liability for breach of contract. Such damages should be assessed on such basis as would provide for the plaintiff as he would have been provided for had the contract been performed. As I have held that the contract agreed upon was for employment for at least two years the major head of damage for each plaintiff would be the wages he would have earned over the two-year period from his commencement of employment less monies earned by him during such two-year period. The plaintiffs however would not be entitled to recover loss of income after the two-year period since at that point in time the defendant would have fulfilled its contractual obligation.

It is conceded on behalf of the plaintiffs that they cannot recover the expenses they incurred in moving to Canada since this was required in order to perform the contract on their part and to reimburse them their loss of wages and such expenses would constitute double compensation.

On the other hand the defendant submits that when each plaintiff sold his home in England he did so at *a* substantial profit over what it had cost him to buy and that therefore the quantum of his profit should be set off against the damages awarded him for loss of wages and other special damages. I see no logical reason why the defendant should be given any credit for the increased values of the properties probably the result of inflation but certainly not resulting from any action or investment by the defendant. It must also be borne in mind that each plaintiff subsequently purchased a residence in England or Canada at the then current inflated price so any profit realized on such sales is illusory and not real. Therefore I reject the suggestion of set off as against all plaintiffs against whom it has been raised.

KENNETH GEORGE ROBERTS

There is no dispute that over the two-year period

of guaranteed employment Mr. Roberts suffered a wage loss of $1,671.59. After he was laid off by the defendant the plaintiff obtained employment in Sarnia, Ontario from May 19, 1982 through the balance of the two-year period. He claims expenses incurred in finding this employment and in moving to Sarnia of $1,483.77 which I accept as being recoverable as a successful attempt to mitigate his damages.

He also claims that from June 13, 1983 to September 20, 1983 he had only occasional employment and for that reason he and his family returned to England in September, 1983 at a cost of $6,107.79 and this is claimed. But the contract I have found guaranteed only a two-year period of employment and the plaintiff has been awarded his lost income over that period. It is immaterial whether he had to return to England to mitigate his losses after the two-year period. Therefore I make no allowance for the costs of relocating back to England. I assess the special damages for Kenneth George Roberts at $3,155.36.

BARRY DESMOND QUINN

This plaintiff learned of his impending wage loss on May 10, 1982 and was actually laid off on May 31, 1982. Mr. Quinn testifies that before he was laid off he made efforts to obtain employment in Canada without success so he and his family decided to return to England. Within two weeks of his return he obtained employment and later was able to return to the employment he had before joining the defendant.

Mr. Quinn's wage loss over the two-year period was the sum of $12,244.96. Although the sum of $1,296.00 is included in that figure on the ground that he would have received a benefit from the defendant of $54.00 a month for O.H.I.P. premiums, the defendant takes the position that the plaintiff on his return to England would not be required to pay O.H.I.P. premiums. I think there is some validity in this submission since I cannot assume that the plaintiff would have to provide medical protection for himself and his family at his own expense on his return to England. So I will deduct fifteen months of premiums at $54.00 a month or $810.00, - making a total wage loss of $11,434.96.

In addition Mr. Quinn claims his expenses in returning his family, the family's personal effects to England and his solicitors' fees on the purchase of a home in England. I see no reason why these should not be allowed. They were incurred by this plaintiff in order to mitigate his losses and were damages flowing directly from the defendant's breach of contract related to the security of employment. These expenses amount to $3,472.65 so that this plaintiff's special damages amount to $14,907.61.

IAN PAUL WINNARD

The wage loss claimed for this plaintiff is $18,532.18 but again reducing the claim by the O.H.I.P. payments for roughly fifteen and one-half months makes a total wage loss of $17,695.18.

Mr. Winnard was laid off on May 10, 1982 although he realized before that date that he would be laid off and had been searching for employment in Canada without success. He returned to England with his wife shortly after he was terminated and thereafter obtained employment with his previous employer. After being employed there for almost six and one-half months he was terminated partially because he had lost his seniority by taking employment with the defendant and had to find other work. His hourly rate in England was considerably below that which he earned with the defendant. His expenses incidential to returning to England and buying a home total $3,644.28 so Mr. Winnard has special damages of $21,339.46.

GORDON MICHAEL PROCTOR

The wage loss for this plaintiff after deducting the O.K.I.P. premium benefit for fifteen and one-half months would be $5,915.40.

Mr. Proctor was laid off on May 10, 1982 and looked for employment in a number of locations in Southwestern Ontario without success so he and his family decided to return to England where he obtained a job with his previous employer. His expenses for relocating to England are $4,428.24 but unlike his co-plaintiffs who returned to the United Kingdom he has not produced receipts or other documentation to verify these expenses. The majority of these expenses appear to be in line with the expenses of

his co-plaintiffs who returned to England. But his air fare for he, his wife and one child is claimed at $2,100.00. It is interesting to note that the plaintiff Kenneth Roberts returned his wife, two children and himself to England at a cost of $1,050.4 two years later. *I* think a fair allowance for air fare would therefore be $1,000.00 thereby reducing his expenses for relocating to $3,328.24. Therefore the special damages for Mr. Proctor are assessed at $9,243.64.

PHILIP DOUGLAS JOHNSTON

This plaintiff commenced employment with the defendant on November 23, 1981 and was terminated on April 5, 1982. He remained in Canada and still lives in Canada. So at the time of his termination there was nineteen and one-half months remaining on his twenty-four month employment period. For 327 days of that nineteen and one-half months he was unemployed so he has therefore lost about eleven months of O.H.I.P. premium benefits. There is no evidence about O.K.I.P. benefits for the eight and one-half months he was employed so I must draw the inference that he received that employment benefit equal to what he enjoyed while with the defendant. Therefore from his wage loss of $16,933.00 should be deducted eight and one-half months at $54.00 a month making his special damages a total of $16,474.00.

GEOFFREY ROBERTS

This plaintiff began working for the defendant on December 9, 1981 and was terminated on April 23, 1982. Mr. Roberts remained and still resides in Canada so his allowable loss relates solely to loss of wages which he claims at $15,861.12. Again I must presume that his other employers after his termination provided O.H.I.P premium benefits so he should be entitled to the loss of such benefits during periods of unemployment which totalled during the two-year period 147 days or about five months. So he can be presumed to have received O.H.I.P. premium benefits for the fourteen and one-half months he worked following his termination by the defendant of $783.00 thereby reducing his wage loss to $15,078.12 and his special damages will be assessed at that figure.

PUNITIVE DAMAGES

I do not see this to be a case for an award of punitive damages to the plaintiffs. Apart from the imprudent remarks of the plant superintendent after the lay-offs there is no high handed, malicious conduct showing a contempt of the rights of these plaintiffs. As to the remarks attributed to the plant superintendent the condemned conduct related to verbal disparagement of the plaintiffs directed to them and not third parties and while they perhaps could be the subject matter of another action in tort they are not such a circumstance of aggravation as to attract a punitive award being very transitory in nature. While it is alleged that Mr. Neudeck made threats of blacklisting the plaintiffs there is no evidence that he took any steps in that regard.

It is submitted that the defendant failed to attempt to find places for the plaintiffs in the organization of the defendant and complaint is made as to how insensitive the defendant was as to the position of the plaintiffs when termination became inevitable. *I* merely point out that the defendant was a party to a collective agreement which constrained any discretion in the manner or priority of termination.

The major thrust of the argument for punitive damages relates to the promises made at the time of hiring. As I have indicated in dealing with the alleged tortious conduct of the plaintiff I am satisfied that at the time of hiring the representation as to security of employment were not deliberately falsified in order to attract recruits. The representations were made based upon the best information available to the defendant which information was accepted as genuine by the vast majority of knowledgeable persons in the industry.

JUDGMENTS

There will therefore be judgment for the plaintiffs as follows:

KENNETH GEORGE ROBERTS	$ 3,155.36
BARRY DESMOND QUINN	14,907.61
IAN PAUL WINNARD	21,339.46

GORDON MICHAEL PROCTOR	9,243.64
PHILIP DOUGLAS JOHNSTON	16,474.00
GEOFFREY ROBERTS	15,078.12

Counsel may speak to me re pre-judgment interest and costs if they are unable to agree.

DATED at Kitchener, Ontario, this 31st day of August, 1987.

DF Moore

DISTRICT COURT JUDGE