

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 10/06
WRC 16/05**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

BETWEEN BENJAMIN HARRY TIMMINS
Plaintiff

AND ASURE NEW ZEALAND LIMITED
Defendant

Hearing: 5, 6, 7, 8 and 9 December 2005
(Heard at Wellington)

Appearances: G A Paine and A Davison, Counsel for the Plaintiff
J M Appleyard and V E Donaghy, Counsel for the Defendant

Judgment: 29 June 2006

JUDGMENT OF JUDGE C M SHAW

[1] In 2001 Mr Timmins qualified as a meat inspector. He was employed by ASURE and worked at the AFFCO meat works at Imlay in Wanganui. He had a dispute with his employer about his employment status. He alleged he was a permanent full time inspector but ASURE says he was employed as a casual worker and able to work as a permanent seasonal meat inspector. This dispute was apparently settled at mediation in December 2001. A settlement agreement document was prepared.

[2] In addition, Mr Timmins raised allegations that ASURE had failed to comply with food safety regulations and that defective meat carcasses were being exported from New Zealand. Following mediation, he repeated these allegations to customers of AFFCO as well as the US Department of Agriculture. He was formally dismissed on 13 May 2002.

[3] In December 2004, Mr Timmins applied to the Employment Relations Authority for a compliance order and remedies for personal grievance. These proceedings have been removed by the Authority to the Court for hearing.

[4] In an amended statement of problem he makes two general allegations:

1. That ASURE has refused to comply with the agreed terms of settlement following the mediation on 21 December 2001. He seeks an order that ASURE is to comply with the record of settlement or that it be ordered to pay compensation to him for its failure to comply with the settlement agreement.
2. That events since the mediation conference have given rise to a further personal grievance which left him first unemployed and then dismissed. Part of this personal grievance was raised within 90 days after the events which gave rise to the grievance but the rest were not raised until December 2004, nearly 2 years later. He is seeking leave to bring that later grievance out of time. He also claims damages and legal costs for loss of income; general damages for humiliation, stress, etc; an award for loss of future income for 12 months; and damages for loss of capacity to work due to depression and post traumatic stress disorder.

[5] ASURE's amended statement in reply raises defences to these allegations.

1. The settlement never became unconditional and therefore cannot be complied with.
2. There is no jurisdiction to award compensation for a breach of a settlement.
3. It denies that its actions since the mediation gave rise to a personal grievance.
4. ASURE does not consent to a personal grievance being raised out of time and says that the exceptional circumstances in s115 of the Employment Relations Act 2000 have not been made out.

[6] By agreement, this hearing has been confined to the substantive merits of the case. Any question of remedies which arises is to be dealt with separately if necessary.

[7] This case has raised many issues of law and fact. Some of them are preliminary and others substantive. In essence they are:

1. Was the settlement agreement ever unconditional and therefore able to form the basis of a compliance order and or compensation?
2. What was Mr Timmins's employment status from 30 July 2001 to 13 May 2002?
3. Are there exceptional circumstances to warrant the Court granting Mr Timmins leave to bring a personal grievance outside of the 90-day statutory timeframe?
4. Were the actions of ASURE towards Mr Timmins after the settlement agreement, including dismissal, justified in the light of all the circumstances?

The facts

[8] ASURE is a State-owned enterprise (SOE) which provides meat inspection functions at freezing works and employs meat inspectors who undertake post-mortem inspection of meat products. This case concerns meat inspections at the AFFCO freezing works at Imlay, Wanganui.

Meat inspection services

[9] Meat inspection services, previously provided by the Ministry of Agriculture and Fisheries, was transferred to a new SOE, ASURE, in 1998. Its main function is the provision of meat inspection services to approximately 75 meat company sites around New Zealand including AFFCO's Imlay plant. Meat inspection is a food safety issue and involves assessing carcasses for diseases and defects. ASURE employs approximately 900 staff, but this fluctuates according to the time of the season and the requirements of the meat industry.

[10] Meat inspectors must hold a warrant which gives them certain powers conferred by legislation. To be issued with a statutory warrant, the meat inspector must be a person of appropriate character and integrity. They must have passed the

NZQA Certificate of Meat Inspection. Warrants were issued by the MAF Food Assurance Authority which is now known as the New Zealand Food Safety Authority (NZFSA).

[11] Anthony Zohrab is the director market access for the NZFSA which is responsible for overseeing compliance with standards for the primary processing and export of meat and other export food items. His evidence was that ASURE is required to surrender warrants for revocation whenever a meat inspector stops working for ASURE. The warrant itself states that the appointment as an inspector is valid until either the employee ceases employment with ASURE New Zealand Ltd or until it is revoked in writing. He said that the custom and practice is that ASURE returns the warrant to the NZFSA when the employee is no longer employed and a revocation is then issued.

[12] Meat inspectors have the power to retain, quarantine, sample, condemn, or otherwise treat any animal product or by-product which, in an inspector's opinion, is diseased or defective. They also police other matters including products that have not been processed, handled, or stored in accordance with the legislation. Meat inspectors identify defective carcasses by marking them with a brand or ticket. In the course of their inspection duties, meat inspectors are required to trim carcasses.

[13] A person who wishes to become a meat inspector must pass through a two-stage training process. The first is as a trainee meat inspector employed on a temporary basis. Once trained, there are at least three available types of work. The first and most sought after positions are permanent full time positions. These inspectors are paid a salary for 12 months of the year even though there may be some downtime during that 12 months.

[14] Next are permanent seasonal employees who work for a set time during the year for a minimum of 3 and a maximum of 9 months. The employment of these inspectors is dependent on the seasonal demand generated by the meat works.

[15] Permanent seasonal staff may also be offered casual work outside their seasonal contract. Usually this is offered to allow full time staff to take annual leave or to cope with unplanned-for surges in demand. The evidence established that it is usual for newly qualified meat inspectors to be offered a permanent seasonal contract

for the next season after qualification and, in the meantime, they are offered casual contracts for any work that is available.

[16] Permanent full time positions are generally advertised and casual and permanent seasonal inspectors can apply for those positions. On occasion, a permanent inspector's job will be filled by a permanent seasonal employee whose work has gone over the maximum 9 months allowed in the permanent seasonal agreement. Apart from those on permanent full time agreements, the work of all meat inspectors is subject to seasonal fluctuations.

[17] The meat industry in New Zealand is highly regulated by the NZFSA and the Animal Products Act 1999 and associated regulations and technical directives. A company such as ASURE has to be reliable in its quality control. Mr Robson, the national operations manager, said that ASURE has comprehensive procedures to comply with these regulatory requirements. It has detailed training procedures for its staff on meat inspection requirements which is NZQA recognised and approved by the NZFSA.

[18] Meat inspection work is subject to nine levels of audit which, as well as ASURE's own internal audits, include audits by the NZFSA verification agency, the NZFSA compliance investigation group, the US Department of Agriculture (USDA), and the EU and other countries.

[19] Mr Timmins has worked in the meat industry since about 1984. From 1996 to 2000 he was a knife-hand at the AFFCO plant in Wanganui. In 2000, with the intention of looking for a career and not just another job, he applied for a position with ASURE as a meat inspector. In November 2000 he was offered employment as a trainee inspector. He had declared the fact that he had convictions in the past which were considered by both ASURE and the NZFSA but did not preclude him from being issued with a warrant.

[20] As he was not a member of the PSA and not automatically covered by ASURE's collective agreement, Mr Timmins signed a trainee individual employment agreement. Clause 3.1 of that agreement provides:

Once you have an unrestricted Certificate of Competence ... this contract will terminate and subject to the availability of work, we will use our best endeavours to employ you as a permanent seasonal employee on a new Agreement.

[21] Mr Timmins completed his training in May 2001, received an unrestricted certificate of competence, and obtained a warrant to inspect sheep and lambs.

[22] He was then offered, and took up, employment as a casual meat inspector until the bobby calf season commenced at the end of July when he was offered a permanent seasonal position for the bobby calf season. Mr Timmins refused to sign the employment agreements offered by ASURE because he had concerns about a discrepancy in the pay rates. He said he was told by Mr Peter Walker, the then area manager for ASURE at the AFFCO Imlay plant in Wanganui, that he would only get back-pay if he signed this agreement. Mr Timmins was also concerned that the agreement he was being asked to sign only offered 3 months' work and he had understood that his position was to be permanent. He based this understanding on what he believes Mr Walker told him during his training. He recalls him saying that "*everyone here has a permanent position.*" Mr Walker gave evidence that seasonal contracts could eventuate into full time positions but denies telling Mr Timmins that he would get a permanent position.

[23] I am satisfied that Mr Timmins's understanding was based on comments made by Mr Walker and others which he misunderstood or misinterpreted. But, whatever was said about a permanent position could not and did not amount to a promise by ASURE that Mr Timmins would receive a permanent full time position as a meat inspector as soon as he had completed his training. This difference of view unfortunately led to Mr Timmins's continuing refusal to sign any employment agreements offered by ASURE. In spite of that, he was employed on an oral contract as a casual worker during the bobby calf season which ran from 19 July 2001 until 9 November 2001. At the end of that season he continued to do casual work while the permanent staff took annual leave. He was paid at the casual hourly rate during this time.

Workplace practice complaints

[24] As a result of what he observed in the course of his work as a meat inspector, Mr Timmins raised some concerns about some of the workplace practices at the AFFCO plant. He set these out in a letter to his immediate supervisor, Cindy Woon, dated 5 September 2001. It began with a report of an accident. He had cut a finger while performing his duties. He then raised a series of issues with her:

1. Health and safety issue about inspectors cutting themselves while performing non-mandatory tasks.
2. The attitude of some of AFFCO's trimmers who he accused of arrogance and lack of duty.
3. A lack of hygiene on the meat chains, the method of removing pleurisy from carcasses, and other contamination issues.
4. Occasions where company staff had been seen playing with the official tickets.

[25] He set out some suggestions of how to deal with these issues. A manager, Mark Inglis, heard about the letter in late September but it was not until 26 November that Joe Guthrie, the organisational development manager, responded to Mr Timmins on each of the issues.

[26] On 21 November 2001 Mr Timmins wrote to ASURE notifying his wish to file a personal grievance. This related to his claim for permanent employment. In the meantime, Mr Guthrie wrote to him on 26 November 2001. This letter was a comprehensive response to Mr Timmins about matters which had been raised to date. First, Mr Guthrie responded to the allegations made to Ms Woon. He apologised for the delay in responding then went through each of the complaints and responded to them. He then addressed issues raised with Mr Walker about whether Mr Timmins had ever been offered full time employment at the completion of training. Mr Guthrie denied that Mr Timmins was ever offered permanent full time employment and referred to section 3 of the individual employment agreement Mr Timmins had signed in November 2000. This had said that, once Mr Timmins had an unrestricted certificate of competence, subject to the availability of work ASURE would use its best endeavours to employ him as a permanent seasonal employee on a new agreement.

[27] Mr Guthrie noted that Mr Timmins had been offered a permanent seasonal contract in July 2001 but he did not accept it and since then had been working in a casual capacity at AFFCO Imlay. Mr Guthrie discussed the nature of casual employment including the fact that Mr Timmins was not guaranteed a minimum amount of casual work. Mr Guthrie then went through each of Mr Timmins's

specific requests including to be offered a permanent full time position and other issues relating to payment.

[28] On 4 December 2001 Mr Walker wrote to Mr Timmins to set out ASURE's position about his employment. The letter said:

Dear Ben

CASUAL EMPLOYMENT

I wish to clarify the conditions under which you may be offered any future casual work with ASURE New Zealand. After you had declined ASURE's offer of a permanent seasonal agreement, early in November this year I provided you with a casual individual employment agreement to sign. However to date you have not signed this agreement despite having a reasonable opportunity to consider it and obtain independent advice on it.

ASURE's standard policy is that to ensure certainty for all parties and in compliance with good faith and other statutory obligations, all casual employees must have a signed employment agreement to be offered work. In the future, in accordance with this policy ASURE will only offer you further casual work on the basis that you provide me with a signed copy of the casual individual employment agreement I have enclosed another copy of this agreement in case you no longer have the previous copy provided to you. You are reminded that you have a reasonably [sic] opportunity to seek independent advise [sic] on this agreement.

If you have any questions in relation to this matter, please contact me.

Yours sincerely

Peter Walker

Area Manager AFFCO South

[29] Mr Timmins sent a long e-mail to Mr Guthrie on 5 December 2001 setting out considerable detail about the allegations of workplace practices. A response was sent to Mr Timmins on 13 December by Jane Pearson, ASURE'S legal and compliance manager, although Mr Timmins sent an e-mail on that same day advising he had not had a response. Mr Guthrie wrote to Mr Timmins and told him that, due to the serious nature of the issues he had raised, he would get Mr Rod Mould, ASURE's acting account manager, to undertake preliminary investigations and that he would respond to his e-mail once that investigation had been undertaken.

[30] Mr Timmins responded by filing a personal grievance in the Employment Relations Authority seeking reinstatement. A mediation occurred on 21 December 2001 at which the parties agreed to settle the grievance. The terms of the settlement were set out in a settlement agreement which was signed off by the mediator.

[31] The material parts of the settlement for this case are that Mr Timmins's employment status was confirmed as a permanent seasonal meat inspector for the period of the AFFCO Imlay bobby calf season and outside of that agreement he would be offered work as a casual meat inspector from time to time. The settlement agreement was subject to employment agreements for both the permanent seasonal meat inspector position and the casual meat inspector position being signed by both parties.

[32] The settlement agreement was said to be in full and final settlement of all matters arising from Mr Timmins's employment with ASURE to date. The parties could discuss in good faith workplace issues that had arisen to date but clause 9 provided that no formal action or proceedings could be taken in future by either party in respect of such issues to date.

[33] Having agreed to that, there was concern at ASURE that clause 9 may preclude them from investigating earlier the workplace practice complaints made by Mr Timmins. For this reason, Jane Pearson sent Mr Timmins another e-mail on 24 December 2001 which attached the two proposed employment agreements for his signature and stated:

Hello Ben

At Friday's mediation I said I would work on the contracts when I returned to the office on Friday. I did not return until 4.45pm and my secretary did not have the opportunity to complete them until this morning. I have been out of the office until a short time ago and have only just reviewed them.

Attached a permanent seasonal agreement, and an individual agreement, for your review. You have a reasonable time to consider these and are entitled to take independent advice on them.

The agreement that we signed up last Friday states in clause 4 that it is subject to both agreements being signed up by both parties. You are advised that ASURE is now only prepared to sign both of these contracts if we both agree to vary the agreement reached last Friday by deleting clause 9 of the agreement. If this does not occur, ASURE will not sign up and the whole agreement is void and we are back where we started. We want to remove clause 9 because you have raised a number of serious issues about workplace and mandatory meat inspection practices (and in particular AFFCO's actions) that ASURE needs to fully investigate, and ASURE cannot be precluded from taking whatever action is necessary arising out of such investigation, which clause 9 might prevent it from doing.

I have tried to contact the mediator ... to advise him, but their officie [sic] is now closed.

If you are happy to agree to the deletion of clause 9 of the agreement we reached on Friday, please confirm this to Rod Mould.

If you are happy to sign the contracts, please sign them and fax them both today to Rod Mould on Rod will then contact you to confirm the working arrangements for this Thursday.

If you do not wish to agree to delete clause 9, or to sign the contracts today or have any queries please telephone Rod Mould on his mobile ...

[34] Although Mr Timmins wanted to return to work, he objected to signing the contracts and would not agree to delete clause 9 or amend it to say that it was in full and final settlement only of his contractual status.

[35] ASURE then reconsidered its position and on 26 December 2001 e-mailed Mr Timmins to tell him that he would be offered work between 27 December 2001 and 4 January 2002 without having to sign any employment agreements and without any commitments from either party, until Mr Timmins could discuss the issue with his lawyer. This included any commitments as to clause 9 of the settlement agreement. There were some continuing negotiations about the contents of the employment agreements. Mr Timmins worked some days over this time.

[36] On 4 January 2002, Jane Pearson advised Mr Timmins that ASURE intended to comply with the settlement agreement including clause 9. Some changes were made to the employment agreements in accordance with Mr Timmins's wishes. He had arranged with Mr Mould that he would attend work on Monday, 7 January 2002 to sign these before starting work on the nightshift. Although he attended, he refused to sign the employment agreements claiming that they were different, and did not work. He then negotiated some more changes to the casual agreement that he had been offered. On 9 January 2002 he arranged an appointment with Mr Mould to sign the agreements but when he arrived he did not sign them but took them away.

[37] There was a great deal more correspondence which resulted in Mr Timmins writing to ASURE on 10 January 2002 asking for compensation, damages, and loss of potential earnings, saying that his return to work had not occurred and further complications had arisen.

[38] On 23 January 2002, Mr Mould wrote to him and said that ASURE remained willing in good faith to seek to resolve the issue and wanted to involve the mediator to liaise between the parties to seek to resolve the current impasse. He pointed out that any delay in Mr Timmins returning to work had been caused solely by his

refusal to sign the employment agreements, even though ASURE had agreed during the negotiation process to change them for Mr Timmins. That letter also referred to the workplace practice issues which Mr Timmins had raised and which needed discussion pursuant to clause 9 of the agreement.

[39] In February 2002, Mr Timmins contacted Dr Zohrab raising allegations of non-compliance at the AFFCO Imlay plant. The matter was passed on to the director of compliance and investigation who arranged for Mr Dudley Morrison to investigate. Mr Morrison conducted an investigation. He interviewed Mr Timmins, visited the Imlay plant, and requested a written report from ASURE's senior management. The outcome of that investigation was set out in an e-mail from Mr Morrison to Dr Zohrab:

If (Mr Timmins) is not prepared to give dates and times and provide objective evidence we can do no more. My report will recommend that TZ tell this to Timmins. I can find no evidence to support the claimed non compliance issue, therefore not a MAF Food problem. We should leave it now as it is imperative we do not get caught in a dispute between a disgruntled ASURE employee and ASURE management.

[40] On 18 February 2002 Mr Mould wrote to Mr Timmins again. He had received no reply to earlier e-mails. His letter recapped the position to date following mediation. In spite of clause 4 of the settlement agreement requiring both parties to sign two individual employment agreements, this had not been fulfilled and therefore there was no agreement between Mr Timmins and ASURE. Mr Mould said that Mr Timmins had ignored attempts to contact him and to resolve his employment status and his workplace complaints and ASURE would not be contacting him again about either. It would proceed to investigate his allegations about AFFCO's conduct without his input.

[41] Mr Mould asked Mr Timmins to return all ASURE's documents including training materials as soon as possible. As Mr Timmins was no longer working for ASURE it was obliged to surrender his Certificate of Competency in Meat Inspection to MAF. In addition to these matters, Mr Mould raised an allegation of sexual harassment which had surfaced in 2000. Mr Mould said that ASURE would have implemented serious misconduct proceedings against Mr Timmins about that but he was not working for ASURE any longer. The letter set out the serious misconduct procedures for dealing with an allegation of sexual harassment and gave

notice to Mr Timmins that if he sought to return to work as an ASURE employee these procedures would be implemented.

[42] ASURE then sent Mr Timmins's original warrant and warrant card to MAF Food Assurance Authority and asked for a letter of revocation to be issued. The first letter on 22 February 2002 simply asked MAF to arrange for revocation of Mr Timmins's warrant as he was no longer working for ASURE.

[43] MAF requested further information on the reasons why revocation was sought and Mr Guthrie replied on 28 February 2002. The letter described in neutral terms Mr Timmins's employment since November 2002, his training, and ASURE's offer of permanent seasonal employment which he did not sign. It described how he continued to work on a daily basis throughout the bobby calf season and was then employed on a casual basis but had not been offered any more work after 4 December 2001 apart from 4 days over New Year 2002. It referred to the December 2001 personal grievance claim against ASURE. The letter concluded:

ASURE has not officially terminated Mr Timmins' employment, nor has Mr Timmins resigned. His exact past and future employment status with ASURE is potentially in dispute. However as he has not worked for ASURE since 4 January 2002, and at the time of writing to the best of my knowledge has not sought to reactivate his claims for continued employment with ASURE, we considered it prudent to arrange for revocation of his warrant.

[44] The warrant was revoked but Dr Zohrab said that if Mr Timmins had obtained work and applied for his licence the next day he would have got it. However, after that date other matters came to his attention and by the end of 2002 he had determined that Mr Timmins was not a fit and proper person to hold a meat inspector's licence.

[45] After taking legal advice, Mr Timmins decided to revive his earlier personal grievance. His new solicitor wrote to ASURE on 25 February 2002 requesting information which was sent on 28 February 2002. On 16 April 2002 Mr Timmins's solicitor wrote advising that Mr Timmins's earlier personal grievance claim was being revived and an amended statement of problem would be filed. The letter said that two matters would be added to the original claim. These were ASURE's threat to implement serious misconduct procedures about sexual harassment allegations and its decision to send his warrant and Certificate of Competency in for revocation. The letter said:

The writer has advised the Employment Relations Authority that the WEA 445/01 file should not be closed and that amended pleadings will be filed shortly.

[46] That did not happen. No further steps have been taken in relation to that personal grievance.

[47] On 13 March 2002, ASURE's quality manager, Ms Ward, wrote a report to MAF food about the investigation by ASURE into issues of compliance raised by Mr Timmins at the AFFCO Imlay plant. This set out the allegations and the steps taken by ASURE. She noted that on a number of occasions ASURE tried to contact Mr Timmins to discuss and clarify the allegations before she conducted the onsite investigation but he could not be contacted.

[48] The report went through each of the allegations and concluded that they reflected isolated incidents occurring in part through Mr Timmins's own making. The report said that Mr Timmins applied his authority as a meat inspector to an extreme degree, at times without discretion or objectivity, which had the effect of complicating and making difficult the relationship with AFFCO. It concluded that the allegations were about isolated incidents which had not been repeated and did not reflect deep-seated problems. It also noted that the relationship between AFFCO and ASURE inspectors had settled markedly since Mr Timmins had departed and both parties remarked on their current good working relationship. It is one of Mr Timmins's complaints that he was never shown a copy of this report so that he could comment on matters that were adverse to him.

[49] On 7 May 2002, as a result of new information, Mr Guthrie wrote to Mr Timmins advising him that he was now the subject of a serious misconduct disciplinary process. It also said:

On Friday 3 May 2002 further alleged conduct by you was brought to ASURE's attention, being conduct that ASURE considers to be serious misconduct. Given your personal grievance claim that you were a permanent full time employee, and ASURE's view that you were a permanent seasonal employee for the 15 week period of the bobby calf season and a casual employee outside of that period, (being what was agreed at mediation) your employment status with ASURE is currently unclear. Even though the issue of your employment status with ASURE has yet to be resolved, because of the seriousness of the latest alleged actions by you ASURE feels that it would be imprudent of it not to implement these alleged actions immediately. Therefore ASURE is now commencing a serious misconduct disciplinary process against you, should it be subsequently determined by a Court that you are still currently an employee of ASURE (which is arguable).

[50] The letter set out four allegations. As well as the sexual harassment claim, it alleged intentional interference with contractual relations between ASURE and AFFCO, and AFFCO and Marks and Spencer, defamation of ASURE and AFFCO, intimidation and harassment of ASURE's employees to the extent that they feared for their safety, and set out the facts in support of each of these allegations. The letter attached a trespass notice warning Mr Timmins off any premises occupied by ASURE including those at Wanganui and Christchurch.

[51] Mr Timmins did not respond to this letter and on 10 May 2002 Mr Guthrie wrote to him again with further allegations of forgery, injurious falsehood, deceit, and threatened breach of ASURE's intellectual property through the sending of e-mails purportedly from ASURE's executives to other ASURE executives during the period of 3 May and 6 May 2002.

[52] Mr Guthrie invited written comments on the allegations and a meeting if Mr Timmins wished. He was told that if no comments were received from him by 5pm on 13 May 2002 a decision would be made in his absence.

[53] No response was received and on 13 May 2002 Mr Guthrie formally dismissed Mr Timmins. The letter concluded:

On the assumption that you are still an employee (which is in itself debatable), you are now dismissed without notice with effect from the date of this letter on the grounds of serious misconduct. I believe this is the decision any fair and reasonable employer would reach in these circumstances.

[54] At the same time, ASURE and the Attorney-General applied to the High Court for an ex parte interim injunction against Mr Timmins which was granted on 14 May 2002. The High Court orders included prohibiting Mr Timmins from publishing or disseminating allegations about non-compliance of meat industry regulations by ASURE or AFFCO, disclosing the plaintiff's software codes, or publishing information using ASURE's name. Mr Timmins had leave to apply to have the injunction set aside. He has taken no steps in this regard.

[55] The reasons for the new allegations of serious misconduct and the application for the injunction were several. First, Mr Timmins's unsubstantiated complaints to Dr Zohrab in February had caused concerns about damage to New Zealand's meat trade; then, in early May 2002, Mr Guthrie had learned that Mr Timmins had contacted a meat inspector at AFFCO and told him that he was confident in toppling

the Imlay works and that he had targeted Marks and Spencer as Imlay's best customer.

[56] One of ASURE's informants wished to remain anonymous. He did not wish to upset Mr Timmins as he was afraid he could harm the informant or his family.

[57] In addition, on 4 May 2002, Mr Mould had received e-mails purporting to be from ASURE managers, Mr Pierson and Mr Robson. They alleged that ASURE was contravening US law and that the USDA and McDonalds were concerned about the quality of meat products coming from New Zealand. Mr Guthrie immediately suspected that these had in fact come from Mr Timmins. These e-mails can only be described as bizarre. They are headed in German "*Von einem kommen viele*" (for the common good) and are phrased in pseudo official language. One of them ended:

Asure and the Apple board have something in common. Apart from beginning with "A" they both have the same people making the same mistakes, which led, to them going belly up .. Eventually!! RUN ..Rob Mould.

This is just for starters!!!

My turn now. Enjoy.

[58] Mr Timmins said that he had not responded to ASURE's letters setting out the allegations because his lawyer had told the Employment Relations Authority he wanted to revive his grievance against ASURE and he didn't think he was allowed to discuss matters directly with the company. He relied on his lawyer to handle that but there was a breakdown in his relationship with her which, in September 2002, became the subject of a complaint to the Law Society.

[59] As for the new allegations, Mr Timmins told the Court he did not know of any contractual obligations between ASURE and AFFCO or AFFCO and Marks and Spencer (one of AFFCO's major customers) but he did accept that he had been in e-mail contact with Marks and Spencer in a series of e-mails which numbered less than ten and that he had spoken to a US Senator and the USDA, both in telephone calls and in e-mails.

[60] He said he was vocal about matters that he thought were serious concerns such as defective carcasses being exported. In total, he said he had directly contacted the NZFSA, Marks and Spencer, the USDA, MAF, OSH, and ACC to complain about food handling practices, the lack of an accident register, and levels of noise at AFFCO as well as a work related injury.

[61] Mr Timmins agreed that sending the e-mails did not help the situation between him and ASURE but felt powerless and had little choice and was acting out of extreme frustration and stress. He believes all statements he has made are true. He denies making negative comments about AFFCO except to being concerned that AFFCO might protect ASURE against his allegations.

[62] Mr Timmins has been suffering from ill-health for some time. His doctor said that he was first seen in November 2001 with symptoms of stress as a result of difficulties at work. Mr Timmins says he has been emotionally unable to work since about February 2002 and that his psychological troubles started at the beginning of 2002. He has been on medication since then and undertook some counselling in 2003. His counsellor gave evidence that, as at September 2003, he had been under tremendous stress over the last 2 years as a result of him dealing with a serious employment issue which was unresolved. He is suffering from probably significant depression or anxiety.

[63] Other medical reports show that, by November 2003, he was feeling better and had decided to focus on other matters which had a positive effect on him.

[64] In July 2004 the plaintiffs to the High Court injunction sought a writ of arrest against Mr Timmins as a result of him breaching the injunction.

[65] By 22 December 2004, the NZFSA had decided that, as a result of Mr Timmins's conduct, he would not be issued with a warrant to be a meat inspector if he were to apply.

[66] In December 2004, Mr Timmins lodged his statement of problem. In that he listed five separate reasons for seeking leave to raise his grievance out of time:

1. He was initially not aware of the 90-day time limit.
2. Stress.
3. That he was advised by the Authority that the Authority could not do anything further unless he filed a new application.
4. He was not aware he could have sought an order for compliance in relation to the 2001 mediated settlement agreement.
5. He was having difficulty contacting his legal advisor.

[67] An amended statement of problem was filed in which the ground that he was not aware of the 90-day time limit was removed.

[68] The High Court proceedings remain on foot and Mr Paine, counsel for Mr Timmins, advised that, in the light of that, his allegations of non-compliance with food safety standards would not be dealt with in detail in the present case.

Discussion of issues

1. Compliance with settlement agreement

[69] Ms Appleyard argued for the defendant that Mr Timmins's application for a compliance order had to overcome a number of insurmountable hurdles. The first of these is a preliminary issue of jurisdiction. She submitted that s187(1)(e) of the Employment Relations Act 2000 (the ERA) confers jurisdiction on the Court to hear matters removed from the Authority but makes no reference to the Court making orders for compliance. She compared this with s187(1)(a) which gives the Court exclusive jurisdiction to determine elections under the ERA or any other Act conferring jurisdiction on the Authority. She submitted that, because there was no express reference in s187(1)(e) to the Court exercising the jurisdiction of the Authority on removal, then it could not be taken to be so.

[70] The short answer to this is that s187(1)(g) expressly confers power to the Court to make compliance orders under s139. Although compliance orders are usually made by the Authority, the Court can order compliance in at least two situations: when it arises in the course of a challenge from an Authority determination, and upon removal of proceedings. I find that the Court does have the power to order compliance when it is hearing a matter which has been removed from the Authority.

[71] Given jurisdiction, Ms Appleyard submitted that the first major hurdle for Mr Timmins is to satisfy the Court that the settlement agreement was unconditional. Unless it were unconditional, there would be nothing to enforce. The agreement was subject to the two individual employment agreements being signed by both ASURE and Mr Timmins. Mr Timmins did not sign and therefore the settlement agreement never became unconditional.

[72] I accept Ms Appleyard's submission that, although ASURE made an attempt to have Mr Timmins agree to vary it by removing clause 9 and in doing so signalled an intention not to be bound by the settlement agreement, the removal of its objection to clause 9 some 2 days later amounted to an affirmation of the settlement agreement. ASURE followed up the performance of this by sending the employment

agreements to Mr Timmins with the amendments requested by him. I find, therefore, that ASURE was, apart from 2 days when it was attempting to have clause 9 removed, ready and willing to enter into and be bound by the settlement agreement.

[73] On the contrary, Mr Timmins failed to sign the employment agreements and thereby indicated that he would not be bound by the settlement agreement. Ms Appleyard argued that there had been no breach of the settlement agreement by ASURE and that it had taken all steps required by it.

[74] For Mr Timmins, Mr Paine argued that the settlement was agreed at the mediation where ASURE's representative must have had authority to bind ASURE and that, by raising the clause 9 issue and seeking to resile from the agreement, ASURE breached the terms of the agreed settlement.

[75] While this argument has superficial attraction, it can only succeed if the plain meaning of the words of the settlement agreement are ignored. I have no doubt that the people present at the mediation believed that they had reached an agreement and indeed they had but it was subject to certain matters occurring. Even after ASURE had raised and dropped the clause 9 issue, it and Mr Timmins remained in communication about the content of the employment agreements which he was to sign. Both parties appeared to be working towards making the settlement unconditional but Mr Timmins did not perform his side to ensure that this happened.

[76] I do not accept the submission that ASURE deliberately took actions to make a compliance order nugatory. Mr Timmins is responsible for not having an instrument upon which he can seek compliance. There can be no compliance order made with a settlement agreement that has not become unconditional.

[77] As a backup argument, Ms Appleyard submitted that, even if there had been a breach of the settlement agreement by ASURE, the Court could not exercise its jurisdiction to return Mr Timmins to work because this would be completely impractical. Mr Paine agreed with this submission saying that a compliance order would be futile in the circumstances because the good faith between the parties has been completely destroyed, he could not go to work in the face of the trespass order, and he no longer holds a meat inspector's warrant.

Decision on settlement agreement

[78] The purpose of the mediation and settlement was to resolve the issue about the type of employment that Mr Timmins was able to be offered. It arose out of the dispute that he had with ASURE about whether he could be made a permanent full time employee. This issue was to be resolved by employing Mr Timmins as a permanent seasonal meat inspector for the term of the AFFCO Imlay bobby calf season. The only aspect of that to be determined was the exact length of term which was to be specified by ASURE. The settlement agreement also provided that Mr Timmins would be offered work as a casual meat inspector from time to time for 3 to 4 days a week from the date of the settlement agreement until the start of the 2002 bobby calf season.

[79] The settlement agreement was subject to both of the employment agreements for the permanent seasonal meat inspector work and the casual work being signed by both parties. ASURE offered the employment agreements to Mr Timmins but he did not sign them. The settlement agreement remains conditional and unenforceable and he cannot seek a compliance order for breaches of it.

[80] Similarly, Mr Timmins's claim for compensation for alleged failure to comply with the settlement agreement has no foundation in the absence of an enforceable agreement.

2. What was Mr Timmins's employment status up to his dismissal?

[81] From November 2000 when he began his training, Mr Timmins was employed as a trainee casual. This was a fixed term agreement which lasted until the trainee received an unrestricted Certificate of Competence. Mr Paine argued that there was an issue as to whether that agreement was a fixed term agreement for genuine reasons based on reasonable grounds as required by s66(2)(a) of the ERA. Mr Paine accepted that the events of this case occurred before the amendments to the ERA in December 2004 which require that the employment agreement must state in writing the way in which the employment will end and the reasons for ending the employment in that way, and that the amendment does not apply in this case. However, he argued that Mr Timmins was never given information about the non-permanent nature of the work that would be offered to him at the end of his training.

[82] Mr Timmins's own evidence was that he understood the circumstances upon which he was employed as a trainee. He accepted that his initial trainee meat inspector contract expired on 21 May 2001 because of clause 3.1 and that ASURE's obligations after that were to use their best endeavours to employ him as a permanent seasonal employee on a new agreement subject to availability of work.

[83] From 22 May 2001 to 4 December 2001, Mr Timmins was employed on several casual engagements because, although he was offered a permanent seasonal position, he refused to sign the applicable employment agreement. These separate casual engagements were based on oral agreements only, again because Mr Timmins would not sign the employment agreements.

[84] I find that ASURE had no alternative but to employ Mr Timmins on a casual basis from July 2001. By accepting that work he accepted those terms and by failing to sign the permanent seasonal agreements lost the benefit of certainty that would have offered him.

[85] Ms Appleyard submitted that, generally speaking, casual work exhibits some or all of the following features:

- Each engagement is a separate engagement.
- The employee is commonly advised in respect of each engagement that work is available if they are willing and available and the employee is free to accept or reject the offer of employment.
- There is no expectation of ongoing employment.
- Because employers maintain pools of casual employees to cover peaks in workflows or the absence of permanent employees, when a casual employee ceases work through the expiry of the availability of work a dismissal does not arise.

[86] This was the situation for Mr Timmins. ASURE had work for him during the bobby calf season but following that only had work available to cover absent permanent seasonal workers.

[87] I accept Ms Appleyard's submission that at the time of mediation, because Mr Timmins had not signed any agreements at all, he was not an employee, he was a casual worker who had not been offered further casual work and, as he had not

signed the casual agreement offered on 4 December 2001, in fact he was not an employee at the time.

[88] In spite of this, and obviously because of its short-lived attempt to renegotiate the settlement agreement, ASURE offered Mr Timmins work up until 4 January 2002. Again, this was expressly casual work and expressly only to that date. I find that Mr Timmins had no ongoing expectation of employment, because he did not sign the employment agreements offered to him after 4 January 2002 pursuant to the settlement agreement.

[89] In reliance on *Varney v Tasman Regional Sports Trust*¹ Mr Paine submitted that when a fixed term employment agreement expires and the employment continues without any renegotiation, the employee works under an indeterminate employment agreement. The facts of this case are quite different. Mr Timmins's promised work ended on 4 January 2002. He did not work after that date, or even seek work with ASURE even when he went to Imlay on 7 January 2002 to collect the employment agreements.

[90] As was confirmed by the Court of Appeal in *Warwick Henderson Gallery Ltd v Weston*² an oral agreement of employment is enforceable even though the ERA requires employment agreements to be in writing. In this case, however, it is inarguable that any oral offers of employment expired on 4 January 2002.

[91] I accept the position of ASURE that Mr Timmins was not an employee from 4 January 2002 and the employment relationship between the parties came to an end at that time. I do not accept Mr Paine's submission that Mr Timmins did not consider himself to be working on a casual basis and that what he was working under was a unilateral imposition of terms of employment.

90-day issue

[92] Section 114 of the Employment Relations Act 2000 governs the time limits for raising a personal grievance. Unless an employer consents, a personal grievance cannot be raised after 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employer unless the delay in raising the personal grievance was occasioned by exceptional

¹ Unreported, Goddard CJ, 23 July 2004, CC 15/04

² Unreported, 14 November 2005, CA 80/04

circumstances. These include those specified in s115. Mr Paine submitted that three of these are relevant for this case:

- (a) *where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*
- (b) *where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or*
- (c) *where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; ...*

[93] The first question is what is the nature of the two personal grievances that Mr Timmins wishes to be heard?

(a) *Unjustifiable action*

[94] It is Mr Timmins's case that, following the settlement agreement, ASURE acted in a number of ways which gave rise to a further personal grievance which affected unjustifiably his employment to his disadvantage. In particular, he says that:

- ASURE reneged on the settlement agreement.
- On 18 February 2002 ASURE told him that it would resist any attempt for him to reactivate his personal grievance.
- His meat inspector's warrant had been submitted for revocation.
- The sexual harassment allegation was raised for a second time with notice that he would face serious misconduct procedures if he sought to return to work.

[95] In submissions, Mr Paine added complaints that ASURE had demanded the return of Mr Timmins's training materials and that ASURE had made an adverse report to the NZFSA without showing it to him for his comments.

(b) *Unjustified dismissal*

[96] This claim derives from the defendant's letter of 7 May 2002 which recorded the four allegations of serious misconduct followed by the dismissal letter of 13 May 2002.

[97] It is common ground that some of Mr Timmins's grievances were raised within the required 90 days. These are the original grievance which was the subject of the

mediation conference but has not been pursued by him; and the two matters raised by Mr Timmins's lawyer on 16 April 2002 which included ASURE's threat to implement serious misconduct procedures about the sexual harassment claims and its decision to send his warrant for revocation. All grievances other than these were not raised until December 2004, well out of time.

[98] Mr Paine submitted that there are three exceptional circumstances to justify leave for the latter grievances. First, that Mr Timmins suffers from a depressive illness which is related to the stress suffered through his employment issues. Second, that Mr Timmins's legal representative did not ensure that the grievance was raised within the required time. Finally, that Mr Timmins's employment agreement did not contain the explanation concerning the resolution of the employment relationship problems as required by the ERA. This allegation was made in the first statement of problem but not in the amended one. To avoid uncertainty, I treat this as if it is a live issue.

[99] Unfortunately, discussion of these elements is academic as it is clear that none of the grievances arose until after 4 January 2002. I do not accept that Mr Timmins was in some way prevented from signing the employment agreements offered to him from that day on. The evidence is that Mr Mould was prepared to make changes to the agreements to suit Mr Timmins but Mr Timmins was not willing to sign at that time. Mr Timmins is convinced that ASURE had a hidden agenda at the time and that it should have continued to employ him until all matters were sorted out.

[100] On the basis of the evidence given to the Court, I cannot accept that interpretation. Mr Mould was actively negotiating with him, offering employment agreements, and making arrangements for Mr Timmins to sign them and return to work. If Mr Timmins had signed the agreements in early January he could have immediately been returned to work. At that stage the historic sexual harassment allegations were not even known to ASURE's management. Although they wanted to discuss with him the workplace allegations he had raised, that was contemplated by clause 9 of the settlement agreement. If he had returned to work, his warrant would not have been sent for revocation as his failure to be employed was the only reason for revocation at that time. The requirement for the return of training materials was consistent with the end of the employment relationship but, again,

occurred after the employment relationship ended. None of this supports Mr Timmins's adverse views about ASURE's motives at that time.

[101] In reaching this decision I do not overlook the fact that from November 2001 Mr Timmins was very stressed to the point of needing medical attention. However, up to at least May 2002, he was still instructing his lawyer and corresponding with ASURE. The medical evidence was that his medical condition had settled by 2003 and yet it took him another year to file the grievance.

[102] I also acknowledge that there was a breakdown in Mr Timmins's relationship with his lawyer of the time, one that she acknowledged to Mr Timmins and the Law Society, but that breakdown did not occur until well after the employment relationship ended with contacts continuing between them at least until June 2002.

[103] Though it is alleged that Mr Timmins's employment agreement did not contain the mandatory information about raising grievances, the written agreements offered to him did contain a schedule with this information. Mr Timmins did not sign these offered agreements but he was plainly very familiar with the contents because he was negotiating for changes to them.

[104] In addition, the power for the Court to grant leave to raise a grievance out of time is discretionary. It would not be equitable to allow a person who refused to sign an agreement to then rely on the absence of a written requirement to gain discretionary relief.

[105] I conclude that even if Mr Timmins's grievances had occurred in the course of his employment there are no exceptional circumstances to justify the grant of leave to bring those out of time.

[106] It is unfortunate that the employment relationship between Mr Timmins and ASURE broke down in the way that it did. However, responsibility for that breakdown does not lie with ASURE. Mr Timmins was obviously a conscientious and diligent meat inspector and had every right to raise concerns about work practice which he observed so that these could be investigated and, if need be, resolved. Unfortunately, he was unable or unwilling to provide additional details about the allegations when requested by ASURE who then had to proceed to investigate the claims without any further input from Mr Timmins. Mr Timmins compounded the difficulties in the relationship by being unwilling or unable to sign any of the written

employment agreements that were offered to him by ASURE. That was entirely his prerogative but meant that his continuing employment was going to be problematic for so long as those employment agreements remained unsigned.

[107] I find that, in spite of difficulties with him, ASURE continued to employ Mr Timmins under oral agreements for a very generous period of time from July 2001 to the beginning of January 2002 and that he had ample warning that his employment could not continue unless he signed a written agreement. It was ASURE's entitlement, indeed obligation, to insist on this under s65 of the Employment Relations Act 2000.

[108] For all of these reasons, I find that ASURE did not act in a manner which disadvantaged Mr Timmins in the manner alleged nor was he dismissed. Rather, his casual employment ended on 4 January 2002 when he failed to sign his employment agreement.

[109] Mr Timmins's personal grievance is therefore dismissed.

Costs

[110] If the parties cannot agree costs the defendant is to file a memorandum of submissions 28 days after receipt of this judgment. The plaintiff will have 14 days to respond.

JUDGE

Judgment signed at 3.40pm on 29 June 2006

Solicitors: