

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Benjamin Harry Timmins (Applicant)  
**AND** Asure New Zealand Limited (Respondent)

**REPRESENTATIVES** A Davison for Applicant  
V Donaghy for Respondent

**MEMBER OF AUTHORITY** G J Wood

**INVESTIGATION** By way of submissions received by 4 April 2005

**MEETING**

**DATE OF** 9 May 2005

**DETERMINATION**

**DETERMINATION OF THE AUTHORITY**

**Introduction**

1. The substance of this employment relationship problem is the alleged failure of the respondent (Asure) to comply with terms of settlement reached with Mr Timmins (who was a meat inspector for Asure) with the assistance of a mediator. Mr Timmins seeks compliance with or compensation for Asure's alleged failure to comply with the settlement, in addition to claiming personal grievances over subsequent disputed actions. These personal grievances were not raised within the required 90 day period.
2. What must be determined at this point is an application from Mr Timmins seeking to have the whole of the employment relationship problem between the parties removed to the Employment Court pursuant to s.178 of the Act. Mr Timmins relies on the six grounds considered below which he considers constitute important questions of law under s.178(2)(a) of the Act.

**1) Does a mediated settlement preclude common law actions?**

3. Mr Timmins seeks compliance with the alleged failed settlement, and in the alternative compensation. Compliance may in fact be impossible due to the actions of the New Zealand Food Safety Authority, which has indicated that it will not issue him with a warrant to be a meat inspector/official assessor. Therefore if he is able to make out his disputed claim that an unconditional settlement was reached, compensation may be the only appropriate remedy available to him. In this context I accept that an important question of law is likely to arise other than incidentally. The important question of law is, whether the mediated settlement precludes any action be taken in common law, and if not, whether such a claim can be made through the Employment Relations Authority or through the Courts of general civil jurisdiction.
4. I am unaware of any decisions by the Courts over this matter, which is potentially further complicated by the provisions of s.149 (3) (ab), as inserted by the Employment Relations Amendment Act 2004. Whether the decision under the Employment Contracts Act 1991 of *Tucker v Cerissi Leather Ltd* [1995] 2 ERNZ 11 is of application to this set of facts may also be pertinent. Clearly, such an issue has potential implications for a wide range of employees and therefore meets the test of an important question of law as set out in *Baking Trades Union v. Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305.

**2) When was the applicant's employment terminated, and by whom?**

5. I accept Asure's submissions that these are questions of fact and not questions of law.

**3) Can an employer refuse to allow an employee to work, but pursue disciplinary procedures at the same time?**

6. I accept that that is a question of law, and that this case involves the application of rules relating to temporary employees and the obligations of both parties in this regard. It is therefore an important question of law as it could affect a large number of employees. I also accept that, given that it relates to one of the core issues in Mr Timmins' grievances, i.e. issues that took place after the alleged termination of his employment, then it is likely to arise other than incidentally.

**4) Can the applicant approach potential witnesses because of the High Court injunction?**

7. There is no important question of law here as the injunction clearly states that it shall not prevent Mr Timmins from pursuing any personal grievance in the Employment Relations Authority. The matter therefore appears clear on its face. In any event, this is a matter that only arises incidentally in this case and is of a preliminary nature only.

**5) Can an employee revisit disciplinary action?**

8. This issue is no more than an adjunct to the major claims of Mr Timmins. Furthermore, I do not accept that an important question of law arises here. The law of condonation is exceptionally clear.

**6) Asure's alleged failure to fulfil health and safety obligations**

9. I do not accept that any question of law is likely to arise other than incidentally in respect of Asure's actions over health and safety issues. In essence, these are matters of fact and can be determined by the fact finding body. In any event the impact of health and safety issues on employment relationship problems has been well traversed in a number of determinations by the Courts.

**Overall discretion**

10. Two important questions of law have been determined by me. However, I do not accept that the stark conflicts of evidence would necessarily be more appropriately dealt with in an adversarial setting. Rather, it is implicit in the framework of the legislation that it is the Authority that is normally to determine matters in the first instance. The Authority has a wide discretion and broad flexibility to be able to easily deal with the stark conflicts in evidence. The same issues arise in respect of the claim that the nature, length and complexity of the case is beyond lower level judicial intervention. The Authority is quite capable of handling even a most complex, difficult and lengthy case within its jurisdiction. This also applies to the claim that the parties' conduct has been so poor that only a Court can deal with the matter.

11. In a case of this nature, I do not accept that rights of appeal are of great importance, particularly as Mr Timmins is on legal aid. What is important is to have the matter finally determined. In this regard there is ample evidence to conclude that both parties are determined to pursue the resolution of this matter, whatever the cost to time and resources.
12. There is no presumption that just because important questions of law have arisen that removal must follow. However, the novelty in terms of questions of law and the relative complexity of this matter are factors promoting the removal of this implication. I further note that there is no urgency in this matter, so the benefit that the Authority may well have in being able to determine the matter before the Court is not of great significance.
13. Overall, I determine that, on balance, the interests of justice favour the matter being removed to the Court.

### **90 day issue**

14. It would be possible, as Asure submits, for the Authority to determine the 90 day issue before considering an application for removal, as none of the important questions of law directly relate to the 90 day issue. However, it is possible that the important questions of law may impact indirectly on the 90 day issue as questions set out above may be relevant to the justice of the case should Mr Timmins be able to make out exceptional circumstances. Furthermore, the issue of compliance or compensation over the original (disputed) settlement remains. I therefore decline to pursue that option in this case.

### **Mediation**

15. Mediation should ordinarily be considered before application for removal. However, in the particular circumstances of this case, given that this matter is able to be dealt with on the papers, I consider it appropriate for mediation not to be pursued at this point, as, since the matter is to be removed, the Court can and will consider the issue of mediation now that it has the matter under its own jurisdiction. No opportunity for mediation will therefore be lost.

**Conclusion**

16. In conclusion I order the removal of the whole of the employment relationship problems between Benjamin Harry Timmins and Asure New Zealand Limited (WEA 476/04) to the Employment Court for the Court to hear and determine without the Authority investigating the matter.

**G J Wood**  
**Member of Employment Relations Authority**