**IN THE EMPLOYMENT COURT**
**CHRISTCHURCH**

**[2013] NZEmpC 31**
**CRC 30/12**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | LYNETTE TURNER<br>Plaintiff |
| AND | TALLEY'S GROUP LIMITED<br>Defendant |

Hearing: 11 and 12 February 2013
And by further written memoranda filed on 18 February and 1 March 2013
(Heard at Nelson)

Appearances: Anjela Sharma, counsel for plaintiff
Maree Kirk, counsel for defendant

Judgment: 12 March 2013

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**CHIEF JUDGE G L COLGAN**

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[1] The issues for decision in this challenge by hearing de novo from a determination[1] of the Employment Relations Authority are:

- Whether Lynette Turner's personal grievance was raised with Talley's Group Limited (Talley's) within time;

- if not, whether Talley's consented impliedly to the late raising of the grievance;

- if not, whether Mrs Turner should have leave to have her grievance dealt with on its merits.

[1] [2012] NZERA Christchurch 162.

## The Employment Relations Authority's determination

[2] This was issued on 3 August 2012 after an investigation meeting held two days previously. The Authority concluded that Mrs Turner ceased to be employed by Talley's at the end of a fish processing season on 14 July 2011. It found that in late June 2011 Mrs Turner was advised that she would not be offered employment for the new (2011-2012) hoki fish processing season because Talley's proposed to reduce the size of its workforce of which she had been a part. Mrs Turner disagreed with and challenged Talley's' decision asserting that staff with less experience, particularly processing hoki, had been employed for the forthcoming season.

[3] The Authority determined that the 90 day period that Mrs Turner had within which to raise a grievance (unjustified dismissal) in these circumstances expired on 11 October 2011. It held that the grievance was not raised with the employer until 27 October, and she was therefore out of time. It considered the issue but concluded that Talley's did not agree impliedly to the late raising of the grievance because Talley's did not entertain the claim or participate in attempts to resolve it. The Authority, although saying that no formal application had been made to it under s 114(4) for leave to have her grievance dealt with on its merits, concluded that leave would not have been granted in any event because there were no exceptional circumstances shown by Mrs Turner.

[4] Because this challenge to those determinations by the Authority is by hearing de novo, there is no need to say more about the Authority's findings or reasoning. The Authority did, however, allow Mrs Turner to pursue her claims affecting annual leave entitlements and payments for these, the same limitations rules not applying. It subsequently allowed Talley's costs of $1,750.

## Relevant facts

[5] Talley's process a number of different sorts of fish over different seasons each year at its factory in Motueka. These include swimming fish species such as hoki, and shellfish including mussels and scallops. Processing of the different sorts

of fish takes place at Motueka although in different parts of the plant according to the nature of the processing work.

[6] Mrs Turner began work for Talley's in 2001, initially as an employee on night shifts processing marinated mussels. Although then styled a "casual", she worked a regular 40 hour week of night shifts for about three years, more latterly in the "fish shed" where what I have described as swimming fish are processed. In about 2004 Mrs Turner transferred to day shift work in the fish shed, continuing to undertake full 40 hour weeks of work. Her work rotated between the different types of processing work according to the season.

[7] With the exception of a period of several months in 2009 (with which I deal shortly), she worked at the Talley's plant more or less continuously, that is doing 40 hour working weeks with some additional Saturday work to meet seasonal demands.

[8] Over the course of each year Mrs Turner was engaged sequentially in processing mussels, scallops and fish (including hoki) although, as already mentioned, for some of that time she was also engaged in out of season fish processing. Mrs Turner's account of these events, not contradicted, was that she would transit between each sort of work by being told by a supervisor to go, for example, from the fish factory to the half shell mussel opening line and appropriately different equipment (principally knives) would be provided by the company at these changeover times.

[9] Coincidentally with each of these product type changes, Mrs Turner was presented with a new employment agreement prepared by the company which she was asked to and did sign. She regarded that as a necessary but relatively insignificant formality of these changes. There were no collective agreements (and no union presence) at the Motueka plant. Although the series of agreements signed each year by Mrs Turner were said to be individual employment agreements as defined in the Act, they were in fact identical generic agreements applicable to everyone in the relevant workforce and in which only one page contained individually applicable details including the employee's "status" to which I will return later in this judgment.

[10] In December 2008 Mrs Turner suffered the loss of her husband in a motor vehicle collision. Talley's sympathetically allowed her time off work to deal with this tragic event. During that period, also, Mrs Turner was advised that she was scheduled to undergo a major surgical procedure and when she brought this to the notice of her supervisor, she was told to take as much time off as she needed. That was, as I have said, a sympathetic and responsible way of dealing with these two significant events affecting her life and reflected her lengthy employment history at Talley's and no doubt its mutually satisfactory nature.

[11] Mrs Turner was paid until late January 2009 and although the company now says that she resigned her employment at that point, I consider it more probable that she took indeterminate unpaid leave which was an arrangement consistent with the company's sympathetic approach to her circumstances. That categorisation of her absence until July 2009 is also consistent with the way in which Mrs Turner said she returned to work. She did not apply for employment again: rather, she returned and took up where she had left off.

[12] Talley's has, however, subsequently and adamantly insisted that she resigned and was re-employed from scratch in July 2009 without the benefits of her accrued long service which included an increased hourly rate of pay.

[13] Resolution of these different accounts of this event is important only to determine the length of the continuity of her employment at Talley's affecting Mrs Turner's expectations of a continuation of that historical pattern of engagement. So, for that purpose I conclude that with a break of about six months, which consisted of paid and then unpaid leave, Mrs Turner is entitled to assert a continuity of employment with Talley's of about 10 years.

[14] In the year before her dismissal Mrs Turner signed three "seasonal" agreements. The first covered work as a fish processor in the fish shed and its term was between 26 April 2010 and 25 April 2011. In fact Mrs Turner's fish processing work continued beyond the end date of that agreement, albeit on Saturdays, until her employment ended.

[15] The second seasonal agreement Mrs Turner had was for scallop opening for the 2010 season. Mrs Turner's final and, for the purposes of this case most significant, "seasonal" agreement covering the last year of her employment was for work in the half shell mussel shed at the Motueka plant. That agreement's term was said to be from 18 October 2010 to 9 October 2011. There is, however, a dispute about the meaning of this stated "term" and I will return to determine it later in the judgment.

[16] These and similar previous employment agreement arrangements saw Mrs Turner again work all year on a full-time 40 hour week basis, albeit in different particular fish processing areas as Talley's directed.

[17] In accordance with that pattern of work, in mid-2011 Talley's invited its staff to put their names forward to work during the hoki fish processing season. Mrs Turner had done so over the past 10 years, wished to continue to work the next hoki season, and expected to do so. She was, however, not selected and took up her concern about this with a number of supervisory staff. She met with Talley's' personnel manager, Gregory Cox, about this on 28 or 29 June 2011. At the end of the meeting Mr Cox confirmed that Mrs Turner would not have ongoing employment.

[18] At about the same time, however, she saw an advertisement in a local newspaper for vacancies at the Talley's Motueka plant for processing staff for the 2011 hoki season. On 15 July 2011 Mrs Turner lodged an employment application despite not having been accepted as an existing staff member.

[19] The plaintiff remained working in the half shell mussel shed and in the fish factory until 14 July 2011 when her employment ceased. Her written application for work in response to the newspaper advertisement was declined without reasons.

[20] That cessation of her employment was at Talley's' initiative rather than Mrs Turner's. She wished to continue to be employed continuously as she had been previously. It says that her employment ceased because the "season" for which she was employed ceased, as was contemplated by her employment agreement and she

was not entitled to either a continuation of that employment or new employment with the company under a further agreement.

[21] Dissatisfied about her employment having been ended by Talley's and by its refusal to engage or re-engage her for the forthcoming hoki processing season, Mrs Turner sought expert advice about her situation. Mrs Turner consulted first with Atataniu (Tui) Hammond of the Nelson Bays Community Law Service where he is a "law worker". She first consulted Mr Hammond on 11 July 2011, before her employment ended three days later but when she was well aware that it would do so.

[22] Mrs Turner was concerned about two matters. The first was her ability to obtain a social welfare benefit to provide some replacement income for that which she had lost from Talley's. Her second concern was what she perceived to be the injustice of her dismissal. Mr Hammond recommended that Talley's be asked to provide a letter to Mrs Turner confirming the fact and circumstances of her dismissal. This would have had the dual purpose of providing evidence in support of her benefit application and providing a foundation for a challenge to the ending of her employment. Mr Hammond wrote to Mr Cox of Talley's on 25 July 2011 accordingly. Mr Cox replied in writing to Mr Hammond two days later, on 27 July 2011. So far as the request for the reasons for termination of her employment was concerned, Mr Cox responded:

> … she was employed for the ½ shell mussel season and continued working in that season until it ended a couple of weeks ago. …
> …
> As to employment for the 2011 Hoki season, Lynette applied for a position in the Hoki season and was not successful. The reason for this is primarily her poor attitude towards her supervisors and Manager.
>
> Finally, while Lynette has been associated with Talley's for approximately 10 years, she terminated her own employment in January 2009 and then reapplied for work in July 2009. She has then applied for work in subsequent seasons (eg scallops, mussels and Hoki) and up to now been successful with each application. There is no guarantee that any employee will move from one season to another.

[23] By early August, having met and conferred again with Mrs Turner, Mr Hammond concluded that he could not assist her further given his limited role at a community law centre. He did, however, recommend to Mrs Turner that she seek the

advice of an employment law specialist and provided her with a list of four names and contact details.

[24] Mrs Turner then made contact with one of the four people recommended to her by Mr Hammond, Shayne Boyce, who is not a lawyer but practises as an employment law advocate. Ms Boyce is also a "lead provider" for legally aided grievants. Mrs Turner first made contact with Ms Boyce in early to mid-August 2011 by telephone. Ms Boyce was unable to meet with Mrs Turner but the plaintiff sent Ms Boyce a number of relevant documents. There was a further telephone discussion between Mrs Turner and Ms Boyce on 31 August 2011 following a number of increasingly anxious calls to, and voice messages left for, Ms Boyce by Mrs Turner. The two women then spoke again in mid-September 2011 at which time Ms Boyce told Mrs Turner that she did not "have a case" because she was a seasonal worker. On 19 September 2011 Ms Boyce returned Mrs Turner's papers to her by courier.

[25] Finally, Mrs Turner attempted to telephone her present lawyer, Ms Sharma, on 26 September 2011. She was first able to speak with Ms Sharma on Thursday 29 September 2011 but was unable to meet with her until 25 October 2011 because of the lawyer's commitments. There were, however, some telephone and email communications between Mrs Turner and Ms Sharma in mid-October 2011 during which Ms Sharma conveyed some preliminary views about the complexity of Mrs Turner's situation and sought more time to consider it.

[26] As a result of Mrs Turner's meeting with Ms Sharma on 25 October 2011, Ms Sharma wrote to Talley's by letter dated 27 October 2011 raising a personal grievance on behalf of the plaintiff.

## The relevant employment agreement provisions

[27] Her Talley's Motueka Half Shell Mussel (T 1.5) Individual Employment Agreement was entered into by Mrs Turner on or about 1 November 2010, the date on which she signed the agreement.

[28] Clause 1.2 "(Term)" provided at 1.2.1:

> The terms and conditions of this agreement shall operate from the first day of the pay period commencing on or after the 18th October 2010 and shall remain in force until the 9th October 2011.

[29] Among the "Definitions" at cl 1.5 of the agreement was the definition of "Seasonal Employee" which the company says was Mrs Turner's status. This was defined as:

> an employee who is engaged for a particular season or period of time. A Seasonal employee who works beyond the season or agreement date becomes a Casual employee.

[30] "Casual Employee" was defined as:

> an employee who only works when specifically asked ie on an irregular or on-call basis. Casual employees may work over a number of months without a change in status. Written confirmation from the employer is required before a casual employee becomes a Seasonal or Full Time employee.

[31] Not entirely helpfully, the employer filled in the employee category for Mrs Turner on the signature page[2] of the agreement by handwriting alongside the printed reference to "(Status, ie; Casual)" the words "2010 Summer Season".

[32] Clause 6.8 "Special Clauses relating to Casual/Part Time/Seasonal Employees" provided materially:

> 6.8.1 Casual employees are employed to meet operational requirements and have no guarantee of work for any period unless given notice of any minimum period in writing. When the employer requires the employee the employer will contact the employee and advise the employee of the availability of work and starting time. If the employee elects to accept such work the employee shall commence work at the nominated starting time and shall work on an hourly basis until notified that they are to finish. A finish time may be nominated by the employer at the commencement of employment or during employment. Each day of employment shall be a separate contract of employment but shall be on the same terms as are set out herein during the currency of this agreement.

[2] The only individualised page of an otherwise generic individual employment agreement.

## What is "seasonal employment"?

[33] Whether what Talley's describes as "seasonal employment" is what is known in employment law as fixed term employment, is a fundamental issue in the case. This issue has not been addressed previously, at least in this Court or on appeal from it, in relation to the fish processing industry. Talley's claims that the employment of Mrs Turner was of a "seasonal" nature rather than of indefinite duration, but was not "fixed term" employment. It says this means that it expired and ceased coincidentally with the end of the season and was not, in law, a dismissal at the initiative of the employer that is challengeable by personal grievance. It says that Mrs Turner's real complaint is that she was not re-engaged for the next fish processing season but that this does not constitute a personal grievance.

[34] The position is, however, affected by statute and has been so since Parliament made express provision for "fixed term" employment in s 66 of the Employment Relations Act 2000 (the Act). This section does not prohibit fixed term employment, but allows parties to agree to it so long as certain minimum statutory conditions are satisfied. So-called 'seasonal employment' may arguably fall within the statutory definition of fixed term employment under either s 66(1)(b) or (c), that is that an employee's employment will end on the occurrence of a specified event (the end of a season) or at the conclusion of a specified project (the processing of a species of fish for that season). In these circumstances, subs (2) requires that to have such an agreement with an employee, the employer must have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way, and advise the employee of when or how his or her employment will end, and the reasons for his or her employment ending in that way. Subsection (3) sets out three specific (but non-exhaustive) examples of circumstances that are not such genuine reasons. Subsection (4) requires an employee's employment agreement to state in writing the way in which the employment will end and the reasons for it ending in that way. Sections 5 and 6 address the consequences of failure to comply with s 4.

[35] ‘Seasonal employment’ is not unknown in New Zealand. Cases in the meat processing industry which has long been seasonal, have always involved the application of provisions of collective agreements to the circumstances of individuals’ employment. In this case, however, there are no applicable collective agreement provisions: Mrs Turner’s employment was subject only to an individual agreement or agreements with Talley’s. There is no union presence at Talley’s Motueka plant and therefore no collective agreement to cover employees there. Section 66 (in its opening words) appears not to apply to collective agreements so that such collective arrangements, and the cases about them, in the meat industry may be distinguishable.

[36] The Act assumes that employment agreements will be of indefinite duration unless they are specifically for a fixed term. That accords with employment arrangements generally in practice. In the case of fixed term employment, the Act specifies that certain minimum requirements be present if the fixed term nature of the employment agreement is to be valid. These requirements are relatively generous in the sense that most conceivable employment arrangements which are genuinely not indefinite in their duration will be able to come within the definition of a fixed term agreement in s 66 and will therefore be able to be lawful.

## Was employment on a fixed term agreement or fixed term agreements?

[37] A number of the issues for determination in this case turn on the decision of this preliminary issue. Mrs Turner was, at the time her employment ended on 14 July 2011, employed pursuant to the Talley’s Motueka Half Shell Mussel (T 1.5) Individual Employment Agreement (2010 to 2011). Because, up until that time also, the evidence establishes that Mrs Turner was undertaking fish processing on Saturdays, it is at least very arguable that she was also engaged under the terms of an expired individual agreement, the Talley’s Fish Shed Individual (T 1.5) Employment Agreement (2010-2011). For the purposes of the decision in this case, it does not much matter whether Mrs Turner’s terms and conditions of employment were set by one or two individual agreements and although these are substantially, they are not completely, identical.

[38] Each agreement either corresponds, or does not, with the definition of a fixed term agreement in s 66 of the Act. Clause 1.2 ("Term") of the Half Shell Mussel agreement provided: "The terms and conditions of this agreement shall operate from the first day of the pay period commencing on or after the 18th October 2010 and shall remain in force until the 9th October 2011." Clause 1.2.1 of the Fish Shed agreement provided: "This agreement shall operate from the first day of the pay period commencing on or after 26th April 2010 and shall remain in force until the 24th April 2011."

[39] Although the defendant insists that its employment agreements are "seasonal" rather than "fixed term" agreements, the former is not a term of art and is not the subject of express exemption from the presumption of indefinite employment in the legislation. Rather, seasonal agreements, including seasonal agreements in the particular environment of the fish processing industry, can come within the definition of a fixed term agreement under s 66. So, even if, as the defendant says, its agreements with Mrs Turner were "seasonal" employment agreements, I conclude they nevertheless meet the definition of a fixed term agreement in the Act and are therefore governed by s 66.

[40] The "Term" clauses of the agreements at 1.2 indicate the application of s 66(1)(a), that is that they provide that the employment of the employee will end at the close of a specified date.

[41] I do not accept the defendant's argument that this clause does not mean what it clearly appears to mean but, rather, that it was intended by the parties to refer to the period during which the terms and conditions of the employment would not be reviewed by the employer. Not only is such an interpretation at odds with the plain words used by the defendant (invoking the contra proferentem rule of interpretation) but if the defendant's interpretation were to be accepted, this would seem to indicate an intention that the individual agreement with Mrs Turner was not for the season but was one of indefinite duration but during which the terms and conditions might be reviewed. The "Term" clauses of the agreement purport to provide for its commencement and cessation dates which, in the case of the latter provision in the

latest agreement, bore no resemblance to the actual or reasonably contemplated end of the half shell mussel season.

[42] But even if, as the defendant says, the duration of each individual agreement was for a shorter period (the "season"), that too is met by s 66(1). The ending of a particular fish type season was either "the occurrence of a specific event" under s 66(1)(b) or was "the conclusion of a specified project" under s 66(1)(c). The specified event under s 66(1)(b) was the end of the fish-type processing season. The "specified project" under s 66(1)(c) was the processing of the product of that season. The seasonal nature of the processing of fish products falls more naturally within the definitions under s 66(1)(b), that is the occurrence of a specified event. Mrs Turner's agreements were fixed term agreements governed by s 66 of the Act.

**Was s 66 complied with?**

[43] Having found that Mrs Turner's agreement or agreements at the time of her dismissal were fixed term agreements under s 66, it is next necessary to determine whether the requirements of that section were met to validate the fixed term nature of them.

[44] The first element requiring compliance is set out in s 66(2). That is, the employer must have a genuine reason or reasons, based on reasonable grounds, for specifying that the employment of the employee is to end in the way that it does specify it. Although I accept that fish processing is seasonal in the sense that the duration of the work depends upon the provision of raw materials which is seasonal, the history of Mrs Turner's employment in practice tends to cast doubt, in her case at least, on whether there were genuine and reasonable grounds for requiring her employment to be for a series of fixed terms.

[45] Despite the seasonality of the supply of different fish products to the factory, the evidence establishes that, for practical purposes, Mrs Turner was able to be employed on those different tasks but continuously throughout each year over a long period. She was not laid off at the end of each season and re-engaged, either later or even immediately, to work on another product. As work on one product wound

down, she was reallocated to other work in the factory and then told that henceforth she would be working on a full-time basis on another seasonal product and this pattern was repeated over the course of each year of a number of years.

[46] I am not satisfied in these circumstances that Talley's had genuine reasons, based on reasonable grounds, for specifying that Mrs Turner's employment was to end at the end of the specified period or even at the conclusion of a fish-type season.

[47] Next I deal with the second requirement under s 66(2), that the employer advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way. Although the defendant's case was that all relevant staff (including Mrs Turner) knew that their work was seasonal and would end, the statute addresses not an employee's knowledge but, rather, the requirement of advice by the employer. The written agreements did not give that advice, at least clearly. There is no evidence that Mrs Turner was so advised orally and, again, the history of her employment in practice of an almost seamless transition between seasonal tasks over a year, providing full-time employment, is inimical to advice to her of when her employment would end and the reasons for that. This statutory requirement has not been made out by Talley's in Mrs Turner's case.

[48] Moving to subs (4), the evidence of non-compliance by Talley's is clear and irrefutable. The relevant agreements do not state in writing the way in which Mrs Turner's employment under each agreement was to end and the reasons for ending the employment in that way. For fixed term employment to be lawful, that requirement must be met and it follows that the absence of compliance in this instance means that Mrs Turner's employment was not for fixed terms or at least her employment which terminated on 14 July 2011 was not for a fixed term.

[49] For reasons set out previously, the law presumes that, in these circumstances, the employment was of indefinite duration so that its termination, which was at the initiative of the employer, was a dismissal and not the expiry of an agreed fixed term. The defendant did not attempt to argue its individual agreements' compliance with the requirements of subs (4): rather, it reiterated its position that these could not be

categorised as fixed term agreements so that subs (4) was not in issue. So non-compliance by Talley's with s 66 is explicable, but not excusable.

[50] Finally, and for the sake of completeness, I record the effect of s 66(5) that the failure of compliance with subs (4) means that non-fixed term aspects of the employment agreements survive. Pursuant to subs (6), Mrs Turner having elected to treat the fixed term as ineffective, it is not open to the defendant to treat the ending of her employment as an agreed expiry and not a dismissal.

[51] Mrs Turner's employment agreement did not comply with s 66 as it should have. As a fixed term agreement as defined in the statute, it was required to specify the way in which it would end (s 66(4)(a)) and the reasons for the employment ending in that way (s 66(4)(b)). The agreement did neither. The closest that it might be said to have come to doing so in Mrs Turner's case was cl 6.8.2 of the employment agreement. It provided that, as a seasonal employee, she was not "guaranteed any length of employment as work depends on seasonal requirements". Nor did the following sentence of cl 6.8.2 meet the requirements of s 66(4):

> Where more than one employee has been employed for a task then as the need for employees to complete the task diminishes, employees shall cease to be employed at the discretion of the employer.

[52] This did not either state the way in which the employment would end or certainly the reasons for it ending in that way.

[53] Although I understand the position in which Talley's finds itself attempting to accommodate its employment relations with the seasonal nature of its business, it is not open to the defendant to ignore or otherwise place itself outside the statutory arrangements that Parliament has determined should apply to fixed term employment as those are defined. Talley's was and is bound to comply with s 66 and, in particular, to meet the minimum statutory requirements for fixed term employment.

[54] It failed to do so. That, in turn, caused Mrs Turner's employment to be employment of indefinite duration.

[55] Nor is the position saved for Talley's by the provision in her employment agreement that if she continued to work beyond the end of the season, she was deemed to be a casual employee. That is because the failure to adhere to the requirements of a fixed term agreement means that Mrs Turner's employment did not cease at the end of the season. It follows, also, that her complaint could not have been that she was not engaged again by Talley's because the consequence of her employment being of indefinite duration is that her true complaint is that she was dismissed unjustifiably.

## Consequence of non-compliance with s 66

[56] The categorisation of the employment arrangements as being of indefinite duration is not the end of the matter however. The cessation of Mrs Turner's employment on 14 July 2011 was at the employer's initiative (she very clearly wished to continue working for Talley's), so that it was a dismissal. To that extent, Mrs Turner was correct in so categorising the termination of her employment.

[57] There is, nevertheless, still the matter of the 90 day period which must be addressed because even assuming, as I do, that Mrs Turner's employment ended by dismissal on 14 July 2011, there remains the contested question whether she raised a personal grievance relating to that dismissal within 90 days of its occurrence and of which she was aware at that time.

## Was the grievance raised in time?

[58] Did Mrs Turner raise her personal grievance within 90 days of her employment ending? It is common ground that this occurred on 14 July 2011. Was the plaintiff's grievance raised with the employer before 11 October 2011 when the 90 day period expired?

[59] If Mrs Turner's grievance was that she was dismissed unjustifiably, then I agree with the Authority that it was raised after the expiry of 90 days from the date of her dismissal of which she was aware at the time.

[60] Although it was argued for Mrs Turner that, individually and collectively, her dispute about, and challenge to, Mr Cox's advice of 28 or 29 June 2011 and the various written correspondence that passed between Messrs Hammond and Cox constituted the raising of a personal grievance within time, that cannot be so.

[61] I agree with the Authority that a grievance was not raised within this period and reject the plaintiff's case that it was. The raising of a grievance must be the bringing to the employer's notice of the employee's wish to challenge as unjustified one or more of the events defined in the statute as a grievance to a sufficient degree that the employer can comprehend that there is a grievance, the nature of it, and how the employee wishes that to be dealt with. These are what might be called the *Creedy* tests.[3]

[62] At best from Mrs Turner's point of view, all that occurred before 11 October 2011 was her expression of dissatisfaction that she would not be engaged in hoki processing for that season, her wish to be told why that was so, and her wish to have sufficient information provided by the employer to support the provision of a social welfare benefit in these circumstances. A complaint that an employee has not been engaged or re-engaged in employment is, alone, not a personal grievance.

[63] Although Ms Sharma's letter to Talley's of 27 October 2011 raised an unjustified dismissal grievance, this was late by a fortnight or so. This ground of challenge by Mrs Turner to the Authority's determination cannot be sustained and is dismissed.

## An unjustified disadvantage grievance?

[64] Her dismissal on 14 July is not, however, the only discernable grievance that Mrs Turner has. She may be said to have a grievance for unjustified disadvantage in employment of which she could only have become aware for the first time after her employment ceased, and following which her grievance was probably raised before the expiry of the 90 days. I will explain.

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[3] *Creedy v Commissioner of Police* [2006] ERNZ 517.

[65] As the hearing of the challenge progressed, there emerged the possibility of another potential personal grievance which counsel told me had been addressed in the Employment Relations Authority's investigation but which is alluded to only peripherally, if at all, in its determination.

[66] Nevertheless, s 122 of the Act permits the Court (or the Authority) to treat a grievance categorised in one way as another sort of grievance. In such circumstances, of course, the parties must be given an opportunity to address that possibility and its implications as was done in the course of the hearing before me.

[67] Following what was, in effect, a continuous course of employment of about 10 years, Mrs Turner had a reasonable expectation that her employment would continue in the absence of a good and genuine reason why it should not. When she was notified in late June 2011 that she was not included in the list of employees to be working in the forthcoming hoki season, she complained to Mr Cox and sought an explanation of this. Mr Cox explained that there would be fewer jobs at the plant and that he had to give priority to the continued employment of a number of "full-time" employees in other departments. Although still unhappy that she was shortly to lose her longstanding employment and continuing to be dissatisfied, Mrs Turner took Mr Cox's explanations at face value. She knew of nothing that might contradict the truth of that explanation.

[68] In fact, although unknown to Mrs Turner, Mr Cox had an ulterior motive for ceasing, or not continuing, her employment. He believed that she was not performing as expected and, in particular, her relationships with her supervisors were not going well. Rather than confront Mrs Turner with that issue as his real reason for discontinuing her longstanding employment, Mr Cox believed that her employment was seasonal and would soon cease. The easiest way to deal with the situation was simply to not renew her employment after it ceased as he believed it would at the end of the half shell mussel season. Whilst that may have been an effective strategy if Mrs Turner was engaged under a lawful fixed term or "seasonal" agreement, it was a flawed one if she was an employee of an indefinite duration as I have now concluded she was.

[69] Mr Cox misled Mrs Turner about his real reasons behind the termination of her employment. This was in breach of Talley's obligations of trust, confidence and fair dealing, and also of statutory good faith obligations under s 4 of the Act. By concealing his real reasons, Mr Cox deprived Mrs Turner of the ability to contest allegations that were serious enough to result in the end of longstanding employment. Section 4 required Talley's to deal honestly and openly with its employee about the matter of its intention to end her employment but it did not do so. Its bad faith precluded Mrs Turner from knowing of and challenging the real reasons for the ending of her employment. In this sense, Talley's disadvantaged Mrs Turner unjustifiably in her employment. This occurred, of course, on 28 or 29 June 2011 while she was still in employment.

[70] It is important to note, also, that at no time until after her employment ceased in 2011 was there any suggestion to her of poor performance or other adverse event or events affecting Mrs Turner at work for Talley's. On its case, and had there been any such concern on Talley's' part, it could and probably would have declined to engage her on the next of several notional re-engagements that happened during each year of her employment. It is also inherently unlikely, but certainly not impossible, that only after 10 years of satisfactory employment that Talley's first expressed a concern about Mrs Turner's dealings with her supervisors.

[71] Talley's says that Mrs Turner had a "poor attitude toward her supervisors and Manager". Although that was Talley's' reason for not renewing her employment in 2011, as it perceived itself entitled to, it is not clear whether this may have amounted to substantive grounds for her justifiable dismissal. In any event, the company elected not to address that issue during Mrs Turner's employment but to deal with it by not offering her a further period of employment as it purported to do. Had Talley's treated Mrs Turner as an employee of indefinite duration as I have determined she was, it would have had to deal with that situation as an issue of performance or misconduct in accordance with the relevant tests under the applicable version of s 103A of the Act if it was to have justified its dismissal of her, or any disadvantage to her, in her employment.

[72] Although this unjustified disadvantage occurred on 28 or 29 June 2011, Mrs Turner was unaware of it until later when Mr Cox disclosed his real hand in the letter of 27 July 2011 to Mr Hammond of the Community Law Service. Under s 114(1) of the Act, the 90 day period for raising a grievance began on the date on which the action alleged to amount to a personal grievance came to Mrs Turner's notice.

[73] The evidence is less than clear about what happened in this regard after Mr Cox sent his letter of 27 July 2011 to Mr Hammond. Making the best I can of the evidence and drawing inferences open to the Court, it is probable that Mr Cox's letter was received by Mr Hammond on 28 or 29 July 2011, a Thursday or a Friday. Mrs Turner's uncontradicted evidence is that she arranged to have a meeting with Mr Hammond on 1 August 2011 which was the following Monday. Although Mrs Turner cannot now clearly recall what prompted that meeting, I conclude that it was then that Mr Cox's revelations about his real reasons for not wanting Mrs Turner at Talley's were revealed to her through Mr Hammond. It follows, in my conclusion, that the 90 day period which Mrs Turner had to raise a personal grievance began to run on 1 August 2011. By my calculation, the 90 day period therefore expired on Saturday 29 October 2011.

[74] Ms Sharma's letter of 27 October 2011 raised a personal grievance with Talley's on Mrs Turner's behalf. There is an absence of evidence about how this letter was sent and when it was received. Again, making the best I can of the evidence and drawing inferences open to the Court, the letter appears to have been sent to Talley's' post office box in Motueka. Assuming that it was posted on the day it was written (27 October 2011 which was a Thursday), the letter would probably have been received by Talley's in its post office box on either Friday 28 October 2011 or Saturday 29 October 2011. That being so, I find that a grievance was probably raised with Talley's within the 90 days of it coming to Mrs Turner's notice, albeit barely. So Mrs Turner raised a grievance within time. Even although it alleged unjustified dismissal, s 122 permits it to be treated as another sort of grievance. The plaintiff's complaint was essentially the same however it is categorised: she lost her employment unfairly.

[75] If I am wrong about that, the raising of the grievance would only have been a matter of a day or so late, which will be a relevant circumstance in considering whether leave should be granted to allow Mrs Turner to have the merits of her grievance or grievances adjudicated on.

**Implied consent to a late grievance raising?**

[76] What is now categorised as Mrs Turner's disadvantage grievance does not need to be considered under this head because it was raised within time. However, her unjustified dismissal grievance was raised out of time, so this next question is applicable to it. I conclude, contrary to the Authority's determination, that Talley's did consent impliedly to the late raising of Mrs Turner's dismissal grievance.

[77] The additional relevant facts are these. Mrs Turner's grievance was raised in Ms Sharma's letter of 27 October 2011. There had, however, been a number of previous communications about the termination of Mrs Turner's employment between her previous representative or representatives and Talley's. The 27 October 2011 letter was by no means the first indication of her dissatisfaction with the circumstances in which her employment had ended. The 27 October 2011 letter did not come as a bolt from the blue for Talley's: it was the logical successor to Mrs Turner's earlier expressions of dissatisfaction about her loss of work.

[78] Talley's is a relatively large-scale operation with commensurate human relations and employment resources. It responded to Ms Sharma formally and after due consideration through its experienced Personnel Manager, Mr Cox. Mr Cox's reply was by letter to Ms Sharma dated 8 November 2011. It addressed the grievance in some detail albeit denying its merits. Mr Cox declined to entertain Mrs Turner's grievance saying that Talley's considered that she had not been dismissed unjustifiably. Talley's initially ignored, then later declined, Ms Sharma's invitation to attempt to resolve the grievance by mediation. There was no mention in Mr Cox's letter of the lateness of the raising of the plaintiff's grievance and Mrs Turner was entitled to assume, in these circumstances, that there was no problem with any delay.

[79] In view of Talley's' refusal to engage informally (in the sense of attempting to resolve the grievance without recourse to the Employment Relations Authority), a personal grievance case was lodged with the Authority and served on Talley's. It was not until more than four months after the grievance had been raised in October 2011 that Talley's, in its formal statement in reply filed in the Authority, asserted that the grievance had not been raised within the statutory 90 days.

[80] The cases show that whether consent to the late raising of a grievance can be implied will be a matter of fact and degree: *Jacobsen Creative Surfaces Ltd v Findlater*,[4] *Phillips v Net Tel Communications*[5] and *Commissioner of Police v Hawkins*.[6] At [24] the Court of Appeal in *Hawkins* concluded that whether an employer has consented to the raising of a personal grievance out of time turns on whether the employer "… so conducted himself that he can reasonably be taken to have consented to an extension of time." The Court of Appeal also noted:

> The real issue is not whether, in formal terms, the Commissioner "turned his mind" to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[81] And, at [25] of *Hawkins*, the Court wrote: "Whether it is seen as an implied consent, or what would reasonably be regarded by the objective observer, the result is the same: the claim is not out of time."

[82] Although participation in the informal elements of the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, that is not the test. In this case, the employer declined to participate in the grievance resolution process (initially by going to mediation or to otherwise engage with the merits of the grievance) for reasons not including or associated with the time limitation issue. The employer did, nevertheless, engage with Mrs Turner in the grievance resolution process to the extent that it responded comprehensively to her claims on their merits through its knowledgeable and experienced human resources practitioner who must have been aware of the requirement for a grievance to be raised within 90 days.

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[4] [1994] 1 ERNZ 35.
[5] [2002] 2 ERNZ 340.
[6] [2009] 3 NZLR 381 (CA) at 389.

[83] For these reasons, I conclude that Talley's consented impliedly to the late raising of a grievance by the plaintiff.

## Leave to raise grievance out of time?

[84] If I am wrong about implied consent, there remains the question whether leave should be granted to Mrs Turner to have her grievance dealt with on its merits after it was raised out of time.

[85] Although at first glance it may appear that this is a case of alleged extraordinary circumstances under s 115(b) of the Act, that is not so. Mrs Turner did not take any steps, let alone sufficient ones, to have an agent raise a grievance on her behalf before 11 October 2011 and, therefore, no agent could be said to have failed to do so. Rather, Mrs Turner took what I conclude were timely and reasonable steps to ascertain from knowledgeable persons what her rights were after her dismissal. In the first instance, these were assessed to be sufficiently complex that she was referred to someone with more expertise. In that second instance, a cursory consideration of the position caused Mrs Turner to be advised that there was nothing that could be done for her to challenge her dismissal because she was a "seasonal employee". By this time the 90 day period was fast expiring and when Mrs Turner was able to instruct a lawyer, to receive advice that her dismissal was challengeable, and to raise a grievance, that period had expired.

[86] Section 114 of the Act makes it clear that the examples of exceptional circumstances set out in s 115 are just that, only statutory examples. It is not an exhaustive list of the exceptional circumstances that may arise for consideration under s 115. However, as the Supreme Court noted in *Creedy v Commissioner of Police*,[7] where failure to raise a grievance within time is attributable to professional delay or incompetence, the statutory test under s 115(b) will be influential in determining whether there was otherwise such a failure to cause the circumstances to be exceptional.

[7] [2008] 3 NZLR 7; [2008] ERNZ 109 (SC) .

[87] It is first necessary to define what Parliament meant by setting the standard of "exceptional" in relation to circumstances. That has been defined authoritatively by the Supreme Court as being the exception rather than the rule, unusual as opposed to extraordinary.[8]

[88] Were the relevant events of the 90 days after 14 July 2011, which saw no grievance raised by 11 October 2011, exceptional?

[89] There are three identifiable phases of activity (or inactivity) during that 90 day period which need to be examined separately. They can be identified by reference to each of the three organisations or people Mrs Turner approached for assistance during that period.

[90] I deal, first, with her approach to the Nelson Bays Community Law Service and its Mr Hammond. He had experience of people in Mrs Turner's circumstances. Mr Hammond was aware of the need to raise a grievance within 90 days if this was warranted and of the need to obtain further information from Talley's specifying why it had dismissed Mrs Turner. He was also conscious of Mrs Turner's wish and need to get benefit assistance. Appropriately, his strategy was to combine those two requirements in the one exercise of seeking written confirmation from Talley's of the reasons for dismissal. Mr Hammond acted promptly and appropriately on this and received a prompt response from the defendant.

[91] Commensurate with the nature of a community legal advice centre and his own limitations, Mr Hammond concluded appropriately that Mrs Turner needed expert professional advice and provided her with the names and contact details of four people whom he believed would be able to provide this for her.

[92] The Nelson Bays Community Law Service and Mr Hammond acted reasonably and properly but, more importantly for the purpose of this case, unexceptionally in their dealings with Mrs Turner. They both ensured that her entitlement to raise a grievance within the 90 day period, and her ability to do so,

[8] *Creedy* at [31]-[32].

remained intact. There was nothing exceptional about the circumstances during the period of their involvement in Mrs Turner's case.

[93] Next comes the involvement of the person selected from Mr Hammond's list by Mrs Turner, Ms Boyce, who practises as an employment advocate. Ms Boyce is not a lawyer or an employment lawyer in particular, but holds herself out as an advocate including one who can advise people in Mrs Turner's circumstances and assist them.

[94] Ms Boyce declined Mrs Turner's request to meet with her although this would be usual as a preliminary step to the engagement of an employment advocate in these circumstances. Ms Boyce said she was too busy to meet with Mrs Turner but agreed to consider the plaintiff's circumstances if sent relevant documents. Although there was some controversy about how Ms Boyce obtained these, that is really immaterial to the fact that some documents about Mrs Turner's pertinent dealings with Talley's came into Ms Boyce's possession. Despite a number of attempts by Mrs Turner to speak with Ms Boyce by telephone, she was unable to do so and there was no meeting between them. Ms Boyce's evidence was that Mrs Turner was never engaged as a client and so, I infer, no fee arrangement was entered into between the two and Ms Boyce simply provided preliminary advice about whether it was worthwhile for Mrs Turner to take the matter further. Ms Boyce advised Mrs Turner that, because she was a "seasonal" employee, she did not have a claim against Talley's and returned those documents that she had considered to Mrs Turner by courier on 19 September 2011.

[95] Unlike the circumstances of her dealings with Mr Hammond and the Nelson Bays Community Law Service, I conclude that Mrs Turner's dealings with Ms Boyce were exceptional as the statute defines these. Although it was unexceptional that Ms Boyce asked Mrs Turner to send her copies of relevant documents before proffering advice, it was exceptional and indeed, in my assessment, extraordinary that Ms Boyce reached her conclusions about Mrs Turner's situation and conveyed these to the plaintiff without any discussion with her, even by telephone, let alone in person as Mrs Turner wished. Accepting Ms Boyce's evidence that she was so busy that she could not discuss relevant events with Mrs Turner, even by telephone, it was

extraordinary that Ms Boyce made her assessment that Mrs Turner had no case and so advised the plaintiff rather than referring her to someone else who was able to undertake an appropriate investigation of the plaintiff's circumstances before advising her. Had Ms Boyce either made arrangements to meet and interview Mrs Turner or, alternatively, to refer her to someone who could do so, she or another advocate would have ascertained a number of relevant facts not discernible from the documents alone. These would have included that Mrs Turner had been employed more or less continuously with Talley's for a number of years and that she disputed Talley's' assertion that she was uncooperative or disruptive with her supervisors and management, being the reason belatedly stated by Mr Cox that she was not re-engaged for the 2011-2012 hoki season.

[96] Those circumstances of the interactions and relationship between Mrs Turner and Ms Boyce are extraordinary and occurred within the 90 day period. They were crucial to the delay in raising Mrs Turner's grievance.

[97] Finally, because Mrs Turner got in touch with Ms Sharma within the 90 day period, albeit at the very end of it, it is necessary also to assess the significance of those events. Ms Sharma was unable to meet with Mrs Turner or otherwise consider her issues immediately the plaintiff got in touch with the lawyer. That was because of a combination of the lawyer's work commitments and having to deal with a burst water pipe in her home. It was, nevertheless, reasonably promptly after first making contact with Mrs Sharma, that Mrs Turner instructed her lawyer to raise a personal grievance and this was done at the end of October 2011. There was nothing exceptional about this third part of the saga.

[98] The delay in raising a grievance was attributable principally, if not wholly, to what I concluded were the extraordinary circumstances of that part of the 90 day period when Mrs Turner was attempting to obtain advice from Ms Boyce. The circumstances of this significant period were exceptional and, in turn, caused the delay to be exceptional.

## Is it just to grant leave?

[99] I have concluded that it is for a number of reasons. Talley's has not asserted, or certainly established, that it is prejudiced by the delay in raising a grievance. Mrs Turner has a strongly arguable case of unjustified disadvantage in, and dismissal from, longstanding employment. The plaintiff was misled by her employer about its true reasons for her employment not being continued or renewed. No blame can really be attributed to Mrs Turner for the delays that occurred. She relied on others whom she expected reasonably to assist her.

[100] In all these circumstances, I conclude that it is just to grant leave under s 114(4) of the Act.

## Result of challenge

[101] Mrs Turner's challenge to the Authority's determination succeeds and the determination is set aside. This judgment stands in its place.[9] I have concluded that Mrs Turner raised her personal grievance or grievances within the time for doing so. Alternatively, if she did not, I have concluded that the defendant consented impliedly to the raising of the grievance or grievances out of time. Alternatively, even if there may not have been implied consent, I would allow Mrs Turner leave to raise her grievance after the expiration of that period on the grounds that the delay in raising the personal grievance was occasioned by exceptional circumstances and that it is just to do so.

[102] It follows that the Authority's costs determination issued on 17 October 2012[10] must likewise be set aside. The arrangements directed by the Court as a condition of staying execution of the costs order[11] are now set aside also. Money paid by Mrs Turner to Talley's following that determination must now be refunded to her.

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[9] Section 183(2).
[10] [2012] NZERA Christchurch 226.
[11] [2012] NZEmpC 213 at [9].

[103] Mrs Turner is entitled to a contribution to her costs in the Authority and to costs on this challenge. The amounts of these costs awards are reserved and, if they cannot be dealt with between the parties directly, may be sought by Mrs Turner by written memorandum filed in due course.

## Where to from here?

[104] The case raises yet another interesting issue. As the Authority recorded[12] in its first determination, Mrs Turner's statement of problem filed in the Authority deals not only with her personal grievance or grievances, but also with the claim to unpaid holiday pay. There are no limitations questions arising in that second part of the claim which awaits investigation by the Authority.[13] Absent that extant aspect of Mrs Turner's claim, case law[14] would have dictated that the merits of her grievance would now be for hearing and judgment in this Court. It would, however, be undesirable for parts of Mrs Turner's claim to be before the Authority and other parts of it before the Court. Counsel agree on that at least.

[105] Ms Sharma has signalled her client's intention, in the circumstances now pertaining, to apply for leave to remove the arrears parts of the claims from the Authority to the Court to be dealt with in the same hearing as the personal grievance or grievances. That would be one way of avoiding the difficulties of related proceedings in two jurisdictions contemporaneously.

[106] The matter does not require immediate decision, however, because, as I indicated to counsel in court if the judgment was in Mrs Turner's favour, this would seem to be an appropriate case for settlement by mediation. Talley's has so far resisted any suggestion that there should be mediation but the landscape has now changed significantly and s 188 of the Act requires the Court to direct the parties to mediation or further mediation unless one or more of the limited grounds for exemption exist. They do not and so there is a direction to prompt mediation with a

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[12] At [18].
[13] A reference in the Authority's costs determination ([2012] NZERA Christchurch 226) at para [8] to its primary determination deciding "the matter in its entirety" must be wrong and counsel confirmed that holiday pay claims remain extant before the Authority.
[14] *Abernethy v Dynea (No1)* [2007] ERNZ 271.

view to settling all outstanding issues between the parties[15]. If that is unavailing, then Ms Sharma should apply to the Court for directions about the resumption of the case.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Tuesday 12 March 2013

[15] In addition, s 114(5) mandates this where leave is granted