

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 130
5345679

BETWEEN TINA LANE
 Applicant

A N D GATEWAY HOUSING
 TRUST
 Respondent

Member of Authority: David Appleton

Representatives: Heather McKinnon, Counsel for Applicant
 Kay Chapman, Advocate for Respondent

Investigation Meeting: Determined on the papers by consent

Submissions Received: 25 March 2013 from Applicant
 20 May 2013 from Respondent

Date of Determination: 28 June 2013

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

- A. The Applicant raised a personal grievance for unjustified dismissal within the statutory 90 day time limit but did not do so for unlawful discrimination.**
- B. The parties are directed to attend mediation before any substantive investigation meeting.**
- C. Costs are reserved**

Employment relationship problem

[1] Ms Lane claims that she suffered an unjustified disadvantage in her employment, direct discrimination by reason of disability and unjustified dismissal.

[2] The respondent resists the claims on a number of grounds, including that Ms Lane was a casual employee and that she did not raise personal grievances in

respect of unjustified dismissal and discrimination within the period of 90 days beginning with the date on which the actions alleged to amount to a personal grievance occurred or came to the notice of Ms Lane, whichever is the later, pursuant to s114 of the Employment Relations Act 2000 (“the Act”).

[3] This determination is confined to the issue of whether Ms Lane raised her personal grievances in respect of the alleged unjustified dismissal and alleged discrimination within the time limit specified by s114 of the Act.

Brief account of the key events

[4] The respondent is a registered charitable trust providing health and disability support services. Ms Lane was employed by the respondent from 20 May 2010 under an individual employment agreement which, in summary, provided that her position was that of casual reliever at Milton Court (one of the premises at which the respondent provided its services) and that she was employed as a casual employee only.

[5] During January and February 2011 Ms Lane believed that her rostered shift hours were tapering off. On 30 January 2011 she found that another support worker had been told to turn up for work on a day when she believed she had been rostered to work. On 3 March 2011 Ms Lane was asked by the respondent to deliver flyers around the central city advertising for more casual residential support workers. This disconcerted her as she believed that she had been experiencing a drop off in work at the respondent and did not understand why the respondent would want to hire more staff.

[6] On 17 March 2011 she had a conversation with Mr Sim Berger, a senior support worker and permanent member of staff, who told her that she was not being offered much work because other staff found her to be negative and that she brought her personal problems to work. She also inferred from an analogy he drew that he was calling her an *a**hole*.

[7] On 23 March 2011 she telephoned the respondent’s service manager, Ms Raisel Hollander, to discuss her conversation with Mr Berger. In her affidavit sworn in support of her application in these proceedings she deposes that, while she did not recall the exact content of the conversation with Ms Hollander, she was concerned

that there was a problem in her employment that was stopping the employer giving her work and she had not been told about it.

[8] On 29 March 2011 Ms Lane attended a meeting with Ms Hollander and another senior manager to discuss her concerns. Ms Lane was surprised that a member of staff (Mr Rees) from Te Ara Mahi (an organisation that assists people with mental illnesses to find employment) had been asked to attend the meeting as Ms Lane's support person, without her prior knowledge or approval. Ms Lane states that the meeting left matters unresolved.

[9] On 7 May 2011 Ms Lane telephoned Milton Court to enquire whether there was any work rostered for her. She was told by a staff member that a cross had been put by her name on the staff availability list. On 14 May 2011 Ms Lane went to Milton Court to photocopy the list and found that it had been replaced but that her name was at the bottom of the roster with new staff names preceding her name.

[10] On 23 May 2011 Ms Hollander wrote to Ms Lane telling her that she was required to follow the visitors' procedure to enter the office at Milton Court if she had not been rostered on to work a shift. It also stated that it was not appropriate for her to engage in conversations with staff on duty about her perceived lack of relieving work, nor to look through confidential paperwork without consent. The letter concluded by saying that her employment agreement with the respondent was for casual relieving and, as such, the respondent was under no obligation to offer her any employment as it was at the employer's discretion.

[11] By mid May 2011 Ms Lane realised that she had not received any requests to work since 17 March 2011 and so wrote a letter to Ms Hollander, which bore two dates – 19 May 2011 and 23 May 2011. Although the letter was probably written after Ms Hollander's letter of 23 May, Ms Lane's letter shall be referred to in this determination as the 19 May letter, to avoid confusion. Ms Lane's letter read as follows:

Dear Raisal

Thank you for your letter dated 23 May.

As my employment situation with Milton Court hasn't been resolved since our meeting on 29 March, I am inviting you to attend a meeting with myself and the mediation services of the Department of Labour, at a time convenient to us both.

I feel that my treatment by you and Sim Berger has become a personal issue, hence my failing to be offered work at Milton Court. Up until the time of our dispute, my work has been frequent and now I have been offered none at all. My last duty at Milton Court was on Thursday, 17 March, when Sim Berger and I had our unfortunate discussion.

Irrespective of being regarded as a "casual" employee, I have the right to be treated with the same respect as any other employee (as outlined by the Code of Good Faith). I feel that management have been in breach of this, and I would like to discuss the matter further with the hope of finding an appropriate resolution.

*Yours sincerely
Tina Lane*

[12] On 20 July 2011 the parties attended mediation although this did not resolve the issues between them. Ms Lane then met with an employment advocate, Ms Boyce, who wrote to the respondent on 15 August 2011. This letter expressly raised a personal grievance pursuant to s103(1)(b) of the Act, which relates to unjustified disadvantage. Ms Lane concedes that this grievance letter did not complain about discrimination or unjustified dismissal and, accordingly, the contents of this letter need not be replicated here.

[13] In the letter of 15 August 2011 Ms Boyce requested a full copy of Ms Lane's employment file from the respondent pursuant to the Privacy Act 1993. Ms Lane deposes in her affidavit that she picked the file up from Ms Boyce sometime between 21 September and 3 October 2011. In the employment file Ms Lane read some notes that she had been unaware of up to that point. One set of notes had been prepared by Mr Berger following his conversation with Ms Lane on 17 March 2011. As Ms Lane relies in part upon these notes to found her discrimination claim, it is necessary to replicate Mr Berger's notes in this determination. The notes are as follows:

Discussion with Tina Lane – prepared by Sim Berger SSW.

*10am – 11.00am
17 March 2011*

Tina has queried what had happen [sic] re: JA's placement at Milton Court. I agreed to take some time and bring her up to date on events.

I spent 5 minutes bringing Tina up to date and the discussion became difficult as she continuously interrupted with her opinions about JA's care.

Tina was critical of MC staff and the mental health system generally and at times she seemed upset. She specifically stated that in her

opinion Milton staff and MCT had treated J.A. unfairly. I agreed to her statement that part of a CSW role is to advocate for SUs and reminded her that she was an employee of GHT and therefore also bound by policies and procedures. Tina seemed to disagree that there was a need to work within the parameters of P&P. She instead began to argue about the authority of Case managers [sic] and accused MC staff of cowering to them as if they are “gods”.

I struggled to keep the conversation focused on the topic as Tina went on to talk about her own personal struggles and her need to work 20 hours between her 2 relieving jobs. Tina repeatedly asked if there where [sic] personal reasons why she was not getting work despite me pointing out that she had as much work as any other MC relievers over the last 2 weeks.

At her insistence I told her that some staff had commented that they found her difficult to work with because she usually was preoccupied and spent too much time talking about personal issues or attending to her private business. Tina disagreed with this. I also told her that the discussion we were having was also a good example as I had agreed to talk about JA’s placement and we had spent approx 40min talking about her problems when I had other work I needed to be doing. I pointed out that at times she seemed to struggle with professional boundaries. Although she denied this she repeatedly stated throughout the conversation that she sometimes felt re traumatized working at Milton court.

Through the conversation Tina shifted between displays of anger and tears. Tina denied she was feeling either of these. Tina also disputed the feedback I gave her and when I pointed out she disagreed, she disputed this. I also told her that I experienced her as unable to accept feedback and found she insisted on debating it rather than sit with it and give it due consideration. Tina became angry and stated that she has a right to stand up for herself.

I offered and [sic] analogy that if I walked down the street and I [sic] person told me I was an asshole, I would probably not think too much about it. If 10 people told me this I would reflect about what I was doing. Tina said she did not see the relevance of this analogy.

Tina left the room visibly upset and when I returned I apologised for anything I may have said to bring that about. I told her my intention was to offer her constructive feedback. Tina said she did not find it helpful and said she experienced my comments as personally attacking. Tina again stated how she felt “triggered” working at Milton court and wondered if it was the right job for her. I encouraged her to think about that.

I suggested that we end the conversation as it was unproductive and encouraged her to contact the service manager if she wished to pursue further.

Tina then spent some time writing in a personal diary before she composed herself enough to continue to work. She later said that she was not feeling well and went home before the completion of her shift.

I am disappointed that Tina felt my efforts were attacking, however I believe this would have been her experience regardless of how I approached the situation. While I can empathise with her personal struggles, a reasonable level of professionalism is expected and necessary as a GHT employee.

On further reflection it is my opinion that Tina is unsafe working at Milton Court in any capacity. Her current ability to maintain basic professional boundaries generally accepted as safe practice, has repeatedly proven unsatisfactory.

Her work efforts are generally unproductive and can at times be counterproductive.

[14] Ms Lane also refers in her affidavit to other notes on the file which she assumes have been written by Ms Hollander. She takes issue in her affidavit with these notes saying that they paint a picture of her *as being irrational and emotionally and/or mentally unbalanced*. It is understood that the notes referred to by Ms Lane are the following:

Overview

Tina Lane has a casual relieving contract with GHT in our residential adult mental health site. (Milton Court) – where we used her on a relieving basis quite frequently for a period of time because she was one of the relieving pool who had good availability. She now feels that Gateway Housing Trust is not acting in “good faith” by not offering her shifts and feels it has become a personal issue between herself, Raisal Hollander and Sim Berger (senior support worker).

She was employed with GHT knowing that she had been (and may be a current) mental health consumer. With that knowledge we hoped that she would be an empathetic support worker and be able to bring a different perspective to the team dynamics. However, her personal issues and how they impacted on her work became such an area of concern; we decided to only offer her shifts where she was not working solo. – as she was unable to maintain professional boundaries and staff had observed her issues impacting on the clients and how she interacted and responded to them. There were shifts where her work was of an adequate level, unfortunately, these were few and far between.

However it was recognised that even having her on shifts where there was someone else present – the situation did not improve and Tina’s work continued to be influenced by her personal problems and she was distracted by them during her shifts.

These issues were brought to her attention but Tina refused to accept that her significant issues were impacting on her workmates and the clients and their safety. – There had been a medication error for example when Tina forgot to administer medication for DKT (a resident) where rather than starting disciplinary action – we went through a review process with her and she re sat her medication certification.

Tina would also turn up at odd times, when she was not on shift, possibly looking for support, because she was having issues at home and it was not appropriate for her to be using this time to discuss her issues with the staff that were on duty working.

- *Verbal discussions were held with Tina about her work practice and her lack of ability to contain herself during her shifts. Tina did not accept these discussions as being helpful*
- *She has been unable to accept feedback and denies doing or saying anything that has been brought to her attention*
- *Talking on her personal mobile calls whilst working*
- *Talking to clients about the challenges of the mental health system*
- *Suggesting to clients that the medication they are on should be changed*
- *Her ongoing negative view of the mental health system and voicing this to residents*
- *She would also come into the office, when she wasn't on shift and hassle those that were working about her not getting enough hours, leaving those that were working feeling very uncomfortable – (names omitted).*

After assessing the level of risk and with ongoing issues about her inability to work within best practice guidelines it was decided not to use Tina Lane as a casual reliever at Milton. Her attitude and aptitude did not meet the requirements of the job.

It has been expressed to Tina on many occasions that we are not obligated to offer her work however she does not think this to be so and has requested mediation.

[15] Ms Lane deposes in her affidavit that, to her, the notes indicate a discriminatory approach to her. She also deposes that, after reading the notes, she believed that her employer discriminated against her in its treatment of her and in dismissing her. She deposes that the notes also highlighted that Ms Hollander's act in arranging for Mr Rees to support her at the meeting on 29 March 2011 was part of a wider discriminatory approach towards her and not an isolated incident or a supportive gesture.

[16] Ms Lane deposes that it was on seeing what was written on the file that she became aware that she really had been permanently dismissed and that there was no going back and resolving this with the employer. It was also clear to her, she says, that she had been discriminated against.

[17] Ms Lane deposes that, on or about 2 November 2011, Ms Boyce wrote another letter to Ms Chapman, who was acting for the respondent, raising an additional grievance of discrimination. The contents of this letter are as follows:

Dear Kay

Re: Tina Lane – Gateway Housing Trust Nelson

Thank you for the meeting today.

To confirm, our client's grievance raised in August 2011 is still in existence and our client has instructed us to formally advise you of an additional personal grievance, that is in breach of section 103(1)(c) Employment Relations Act 2000, unlawful discrimination based on disability and/or medical grounds.

Our client will be seeking remedies available to her pursuant to the statutory provisions of the Employment Relations Act 2000 and possibly those available to her under the Human Rights Act 2003. Our client has made no decision as to which course she will take in regard to the Human Rights issue.

Our client remains employed by Gateway Housing Trust Nelson and we refer you to clause 10.1 of her Individual Employment Agreement whereby either party can terminate the employment relationship with four hours notice which to date neither party has complied with.

We trust that your client would like to come to the discussion table in order to find a reasonable settlement to this matter.

We look forward to your response.

Yours faithfully

[18] Ms Lane deposes that she did not regard the state of her employment as continuing, despite what Ms Boyce has written in the letter, and that she did not approve the letter before Ms Boyce sent it. She states that Ms Boyce should have added Ms Lane's unjustified dismissal grievance to her letter dated 2 November 2011 for the sake of clarity.

[19] Ms Chapman replied on behalf of the respondent by way of a letter dated 8 November 2011, refusing to accept the raising of the discrimination grievance on the grounds that it had been raised outside of the 90 day time limit.

[20] Ms Lane deposed that her anxiety and depression worsened around this time and that she was quite inactive and unable to do very much for a period of time. She deposes that she eventually felt well enough to instruct her current counsel, Ms McKinnon of Zindels, who wrote a letter to the respondent dated 16 July 2012 confirming her disadvantage and dismissal grievances. Ms Chapman replied on 3 August 2012 denying unjustified disadvantage and dismissal.

Submissions in support of Ms Lane's application

[21] Counsel for Ms Lane submits that Ms Lane raised her personal grievance for unjustified dismissal along with her personal grievance for unjustified disadvantage in her letter to the respondent dated 19 May 2011. She states that this was within 90 days of the cessation of her employment on 17 March 2011. Ms McKinnon refers to the well-known requirement of specificity outlined in the Employment Court case of *Creedy v Commissioner of Police* [2006] ERNZ 517, at [36]. The relevant passage is as follows:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[22] Ms McKinnon submits that Ms Lane raised in her letter of 19 May that her employment had ceased, the date it ceased, that she thought such cessation was personally motivated and that she was unhappy about it. Ms McKinnon submits that Ms Lane took reasonable steps to raise the grievance within 90 days and did so with sufficient specificity to make the respondent employer aware of the nature of her grievance, in a way that the respondent was able to address it.

[23] Ms McKinnon also submits that a claim of unjustified disadvantage raised prior to dismissal may be treated as a claim of unjustified subsequent dismissal so long as the issues raised in the claim of unjustified disadvantage are the same issues that the employer must respond to in respect of the claim for unjustified dismissal. In making this submission Ms McKinnon refers to the Employment Court case of *Turner v Talleys Group Limited* [2013] NZEmpC 31. *Turner* dealt with the issue of whether a former employee of Talleys Group had raised her personal grievance for unjustified dismissal in time. Chief Judge Colgan referred in his judgment to s122 of the Employment Relations Act 2000 ("the Act") which states as follows:

[122] Nature of personal grievance may be found to be of different type to that alleged

Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.

[24] In *Turner*, Chief Judge Colgan found, at [74], that although Ms Turner's counsel raised a grievance alleging unjustified dismissal, by virtue of s122 it is permitted to be treated as another sort of grievance. Chief Judge said:

The plaintiff's complaint was essentially the same however it is categorised: she lost her employment unfairly.

[25] With respect to the allegation of discrimination, Ms McKinnon submits that Ms Lane only became aware of discrimination as a factor in the respondent's alleged treatment of her when she read her employment file at some point between 21 September and 3 October 2011. Ms McKinnon submits that the 90 day period should run from that point and that Ms Boyce raised Ms Lane's grievance in respect of discrimination by way of her letter dated 2 November 2011. Ms McKinnon relies on the words *came to the notice of the employee* in s114(1) of the Act.

The submissions of the respondent

[26] Ms Chapman concedes on behalf of the respondent that Ms Lane's letter of 19 May 2011 raised a personal grievance for disadvantage in her employment and that the respondent accepted that she had done so at the time. The respondent does not, however, accept that the letter dated 19 May 2011 raised a grievance for unjustified dismissal or a personal grievance for discrimination.

[27] The respondent also does not accept that any other steps were taken by Ms Lane to raise a personal grievance in respect of unjustified dismissal or discrimination within the statutory 90 day time limit.

[28] With respect to the point when time is said to have begun to run, for the purposes of calculating the 90 days time limit, Ms Chapman submits that the alleged actions giving rise to the personal grievances came to the attention of Ms Lane either on 17 March 2011, the date when Ms Lane had her conversation with Mr Berger and also the last day she was engaged to work or, at the latest, 29 March 2011, the date of the meeting.

[29] The respondent submits that there was nothing in the personnel file that came to the attention of Ms Lane in September or October 2011 of which she was not already aware. The respondent submits that there was nothing on the file that did not reflect discussions the respondent had previously had with the applicant. For example, the respondent asserts that the alleged discrimination that occurred due to the attendance of Mr Rees at the meeting on 29 March 2011 would have clearly come to the notice of Ms Lane at that meeting.

[30] Ms Chapman refers the Authority to several cases which emphasise the need for specificity in the raising of a personal grievance.

[31] Ms Chapman distinguishes *Turner*, cited above, submitting that there was no hidden agenda that only came to Ms Lane's notice at a later date, thereby shifting the start date for the 90 days time limit, unlike in *Turner*.

[32] Ms Chapman also submits that the evidence supports a finding that Ms Lane allowed the respondent to believe that only a disadvantage grievance had been raised and had taken no steps to correct that view. Ms Chapman submits that Ms Lane is therefore estopped from now saying that the 19 May letter also raised a further two grievances. Ms Chapman refers me to the Employment Court case of *Checkmate Precision Cutting Tools Limited v Tomo* [2013] NZEmpC 54, at [20] in which Her Honour Judge Inglis stated:

The underlying purpose of the doctrine of estoppel is to prevent a party from going back on his/her word (whether express or implied) when it would be unconscionable to do so. There must be clear words or conduct by one party which creates a belief or expectation in the other, and the party to whom the representation or promise was made must have relied on it to such an extent that it would be inequitable to allow the promisor to go back on his/her word.

[33] Ms Chapman submits that the respondent had, over a six month period, positive reinforcement that only the unjustified disadvantage personal grievance had been raised and was being pursued. She submits that, following that period, from her letter of 8 November 2011 (in which Ms Chapman did not consent to the raising of the additional personal grievance in relation to alleged discrimination) until 16 July 2012 (when Ms McKinnon wrote to the respondent referring to Ms Lane maintaining that she was unjustifiably dismissed) a period of eight months, the respondent was left believing that the applicant accepted the advice in the 8 November 2011 letter that the only personal grievance properly raised was the disadvantage personal grievance.

[34] Ms Chapman also points out that, in her letter of 8 November 2011 she stated that Ms Lane was not currently an employee of Gateway Housing Trust. Ms Chapman submits that, despite that repeated clear advice regarding the employment status, Ms Lane took no further steps to raise a personal grievance in respect of unjustified dismissal until the 16 July 2012 letter from Ms McKinnon.

[35] Ms Chapman concludes her submissions by stating that Ms Lane was employed under a casual arrangement and that, as such, it is open to the Authority to accept that the true nature of the relationship was that of casual reliever and that, accordingly, there was no dismissal and that no personal grievance in respect of unjustified dismissal can be raised.

The issues

[36] The Authority must consider the following issues:

- i. Whether Ms Lane raised a personal grievance of unjustified dismissal within the statutory time limit;
- ii. Whether Ms Lane raised a personal grievance of discrimination by reason of disability within the statutory time limit.

[37] By consent between the parties it has been agreed that the Authority would restrict itself solely to the two questions above. Whilst, on the face of it, the respondent appears to have a strong argument that Ms Lane was a casual employee, and therefore may not be able to take advantage of the statutory protection of unjustified dismissal, this is not an issue which Ms Lane has had the opportunity to make full submissions on. Accordingly, it is not considered in this determination.

The statutory framework

[38] Sub-sections 114(1) and(2) of the Act provide:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 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 employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address

Was a personal grievance for unjustified dismissal raised within the statutory time limit?

[39] It is my view that the contents of the letter from Ms Lane dated 19 May 2011 does satisfy the so-called *Creedy* tests, as referred to by Chief Judge Colgan in *Turner*. The tests were summarised at [61] in *Turner* as follows:

...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

[40] In respect of the first limb of the *Creedy* test as articulated in *Turner*, it must be the case that the employer comprehended that there was a grievance arising out of the letter of 19 May as Ms Chapman states in her submissions that the respondent accepted that Ms Lane has raised a disadvantage grievance in this letter. In any event, this is clear from the content and the tenor of the letter.

[41] With respect to the employer comprehending what the nature of the grievance is, I note in particular the following words from the 19 May letter:

I feel that my treatment by you and Sim Berger has become a personal issue, hence my failing to be offered work at Milton Court. Up until the time of our dispute, my work has been frequent and now I have been offered none at all. My last duty at Milton Court was on Thursday, 17 March, when Sim Berger and I had our unfortunate discussion.

[42] It is clear to me that the very nub of what Ms Lane complains about in her letter is not being given any work since 17 March 2011. Ms Lane did not know at the time of writing her letter that a decision had been made by the respondent on or shortly after 17 March 2011 that Ms Lane would not be given any further work. However, by 19 May (or 23 May, if that is when the letter was created) Ms Lane had reached the conclusion that this is likely to have been the case. I do not see how Ms Lane could have articulated any more clearly what her concern was. She stated

what she knew; that is, that since 17 March 2011 she had not been rostered on to work. This is what she complains about.

[43] In light of this, I am quite satisfied that Ms Lane is raising a grievance in her 19 May letter about not being given any further work. This is the essence of her unjustified dismissal claim and I am therefore satisfied that it has been stated as clearly as Ms Lane could have done so.

[44] Turning to the final limb of the *Creedy* test, Ms Lane states what she wants to be done about the matter. That is to say, she is inviting a meeting between herself and the respondent, mediated by the Mediation Services of the then Department of Labour. She also states in her brief but cogent letter that she would like to discuss the matter further with the hope of finding an appropriate resolution. Again, it is completely clear from this letter what Ms Lane wants; she wants to meet with her employer in order to resolve her concern that she has not been given any work since 17 March 2011.

[45] In light of the above, I am satisfied that the letter of 19 May 2011 written by Ms Lane to the respondent raises a personal grievance expressing concerns at not being given any work, that this amounts to a grievance of unjustified dismissal, and that it has been raised within 90 days of 17 March 2011.

[46] Addressing the estoppel argument raised by the respondent, I am not satisfied that the test articulated in *Checkmate Precision Cutting Tools Limited* above is satisfied in order for estoppel to be engaged in this case. In my view, the letter of 19 May 2011 from Ms Lane does not clearly raise a personal grievance of disadvantage alone. The word *disadvantage* is not used by Ms Lane and she is clearly, as noted above, complaining about not being given any further work. As noted above, that is the best she could have said in light of her state of knowledge at the time.

[47] The respondent's assertion that Ms Lane was only alleging a disadvantage claim, cannot be justified from the words used by Ms Lane in my view. The words used could be interpreted equally as a complaint about an unjustified dismissal. Furthermore, I believe it would be unconscionable for the Authority to allow a respondent to rely on the doctrine of estoppel when it is relying upon its own narrow interpretation of the words used by an employee.

Did Ms Lane raise a personal grievance in respect of discrimination by reason of disability within the statutory 90 day period?

[48] Ms Lane submits that she did not become aware of discrimination as a factor in the respondent's alleged treatment of her until she read the notes on her file at some time in the period between 21 September 2011 and 3 October 2011. The personal grievance was purportedly raised by way of Ms Boyce's letter dated 2 November 2011.

[49] This letter by Ms Boyce was certainly sent to the respondent within 90 days of the first date of the period during which Ms Lane says that she found out about discrimination as being a factor in her employment. However, I am not satisfied that the letter passes the *Creedy* tests. Ms Boyce's letter states that her client had instructed her to formally advise Ms Chapman (by then acting for the respondent) of an additional personal grievance, *that of a breach of section 103(1)(c) Employment Relations Act 2000, unlawful discrimination based on disability and/or medical grounds.*

[50] The letter certainly passes the first of the *Creedy* tests, namely that there was a grievance. This is stated expressly.

[51] However, I am not satisfied that the letter makes clear what the nature of the grievance is. Chief Judge Colgan stated in clear terms in *Creedy*, at [36] that:

It is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance ...

[52] This is exactly what Ms Boyce did. She simply stated that Ms Lane had a personal grievance for discrimination based on disability. She did not make clear what the nature of the disability was; nor did she state any facts that she relied upon in coming to the conclusion that her client had been discriminated against by reason of disability. No mention is made of the comments in the notes that Ms Lane now relies upon in her claim of discrimination.

[53] Ms Lane deposes that it was the contents of the notes on her personnel file that led her to conclude that she had been treated unlawfully by reason of her mental health (she states in her affidavit that *the notes paint a picture of me as being irrational and emotionally and so-called mentally unbalanced*). I do not accept that it

would be just to expect the respondent to simply infer from a statement of discrimination based on disability that this was what the personal grievance was about.

[54] Accordingly, I do not accept that Ms Boyce's letter of 2 November 2011 raised a valid personal grievance in respect of the allegation of discrimination. As Ms Lane does not claim to have raised a personal grievance about discrimination prior to 2 November 2011, there is no need for me to examine whether Ms Lane became aware of alleged discriminatory treatment prior to her reading of the notes in her personnel file.

[55] However, I note that Ms Boyce's letter of 2 November 2011 to Ms Chapman refers to a meeting that they had had that day. Ms Boyce has not sworn an affidavit on the contents of that meeting and nor has Ms Chapman. I therefore reserve on behalf of Ms Lane the right to revert to the Authority with evidence as to the contents of that meeting in the event that reference was made in it to issues which would wholly satisfy the *Creedy* tests. It is well accepted that a personal grievance may be raised orally, and by an agent of the grievant, provided that it satisfies the requirements summarised in *Creedy*.

Next steps

[56] It was agreed between the parties that, if the Authority found that a valid personal grievance had not been raised within the statutory period of 90 days, then Ms Lane would have the opportunity to argue, in the alternative, at an investigation meeting that exceptional circumstances occasioned the delay in raising the grievance and that, therefore, the Authority should give leave for the personal grievance to be considered out of time pursuant to s114(4) of the Act. Accordingly, Ms Lane will have that opportunity, as well as the opportunity to adduce evidence of the meeting of 2 November 2011 if she feels it would be helpful. Naturally, the respondent would also have the same right.

[57] At the same time, the Authority will consider at the investigation meeting whether Ms Lane was unjustifiably dismissed and unjustifiably disadvantaged in her employment.

[58] However, before an investigation meeting is to take place, I direct the parties to attend mediation to try to resolve all the matters between them. At that mediation

the parties should be mindful that, on the face of it, Ms Lane appears to have been engaged as a casual employee and that, if this were found to be the case at a subsequent investigation meeting, it would call into question the chances of her personal grievance of unjustified dismissal succeeding in any event. It may also adversely impact upon her disadvantage grievance, as well as upon any discrimination grievance if the Authority were to be ultimately satisfied that a valid grievance in that respect had been raised, or that exceptional circumstances prevailed that would persuade the Authority to accept it out of time.

Costs

[59] Costs are reserved. If the parties are unable to resolve the matter, including the issue of costs, at mediation then the issue of costs will be reserved until after the conclusion of the investigation meeting referred to above.

David Appleton
Member of the Employment Relations Authority