IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 72
5389858

BETWEEN	PETER GLENN LOCHEAD Applicant
A N D	CERES NEW ZEALAND LLC Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Moore, Advocate for Applicant Adam Gallagher, Counsel for Respondent
Investigation meeting:	14 March 2013
Submissions Received:	22 March 2013 from Applicant 28 March from Respondent
Date of Determination:	1 May 2013

DETERMINATION OF THE AUTHORITY

A. Mr Lochead did not raise a personal grievance of unjustified dismissal with his employer within 90 days of his dismissal.

B. Ceres New Zealand LLC did not consent impliedly to the late raising of the grievance.

C. The Authority will arrange a telephone conference to deal with the remaining claims in the statement of problem.

D. Costs are reserved until all matters have been determined.

Employment relationship problem

[1] The Authority is determining a preliminary issue whether Peter Lochead raised a personal grievance that he was unjustifiably dismissed within 90 days of the date of his dismissal or, in the alternative, whether emails from April to July 2012 between Mr Moore and the then Operations Manager at Ceres, Mark Frame amounted to implied consent to the grievance being raised out of time.

[2] Mr Lochead additionally claims that there were various breaches of contract on the part of Ceres New Zealand LLC (Ceres) and a breach of s.63A of the Employment Relations Act 2000. A $2,000 penalty is sought for each breach. These additional claims are not the subject of this preliminary determination and will regardless of the outcome require resolution.

[3] Ceres is an overseas American company, registered in New Zealand and carries on business in disaster relief, demolition and construction. Its principal place of business in New Zealand is Christchurch.

[4] The Authority discussed with counsel on the day of the investigation meeting, (a different member having conducted the telephone conference with the parties) whether an application to extend time on the basis of exceptional circumstances would be pursued. Mr Moore advised that it had been decided to advance what was considered to be Mr Lochead's strongest case. This determination will not therefore be dealing with an application to extend time on the basis of exceptional circumstances.

[5] Mr Lochead says that he raised his personal grievance that he was unjustifiably dismissed within 90 days of the termination of his employment on 10 January 2012. Ceres say that Mr Lochead did not raise his personal grievance for unjustified dismissal within the 90 day statutory timeframe from the date it is believed employment was terminated on 26 December 2011. It does not accept that correspondence from April to July 2012 amounts to implied consent to the grievance being raised outside of that period. It further objected to part of the series of emails

being before the Authority as the exchanges at that time from Mr Frame, were labelled *without prejudice*.

[6] Three days before the investigation meeting Mr Moore advised that he wanted to put the series of emails, including those labelled by Mr Frame without prejudice before the Authority. Given the very tight timeframe between notice that these emails were to be produced and the investigation meeting the Authority gave the emails to another member to reach a decision whether the email exchanges were protected by privilege. Mr Gallagher and Mr Moore both provided submissions to Member Michael Loftus. Member Loftus concluded that the emails were not privileged documents because *they were an expression of Ceres substantive position* and *there is no discussion of offers tendered in an attempt to resolve differences*. The Authority therefore considered them as part of its investigation.

[7] In order to deal with the prejudice to Ceres in the granting of an application for late production, time was allowed for Mr Gallagher to discuss the emails with Mr Frame on the day of the investigation meeting before Mr Frame gave his evidence and, although it has been agreed closing submissions would be given on the day of the investigation meeting, it was agreed further time would be given for written submissions to be provided.

Investigation process

[8] Two of the respondent witnesses, Earl Lutz III, the Equipment Manager for Ceres and David McIntyre, the Owner/Director of Ceres reside in America. By agreement their sworn evidence was taken by SKYPE on the day of the investigation meeting. Mr Gallagher was able to confirm through the United States Embassy in Wellington after providing the details of Messrs McIntyre and Lutz that in essence the Government of the United States did not object to them giving evidence as voluntary witnesses to the Authority.

[9] The Authority was also sent a document provided subsequently to Mr Gallagher through the United States Embassy that confirmed that the United States did not object to informal taking of testimony by private counsel from witnesses in the United States provided that the witness agreed to voluntarily give evidence. Both Mr Lutz and Mr McIntyre agreed voluntarily to give evidence and on that basis the Authority proceeded to take their evidence by SKYPE from America.

[10] Mr Lochead gave evidence in person at the investigation meeting as did Mr Frame.

The issues

[11] The issues for the Authority to determine are as follows:

- When does the 90 day timeframe run from, 26 December 2011 or 10 January 2012;
- Was there a personal grievance raised within 90 days of that date;
- If no personal grievance was raised within 90 days then was there implied consent to raise it outside of the statutory timeframe.

When does the 90 day period run from; 26 December 2011 or 10 January 2012?

[12] Mr Lochead was interviewed for work with Ceres in early September 2011 in Christchurch by Mr Frame. Mr Lochead advised Mr Frame that he suffered from chronic fatigue syndrome and had not had full time employment for some time. There was discussion about the need to assess Mr Lochead's capacity to undertake the work required by Ceres. The wage and time records support an initial two days unpaid work undertaken by Mr Lochead on 15 and 16 September 2011 with paid work commencing on 19 September 2011.

[13] There was some dispute as to when the written employment agreement was provided and when there was discussion about a trial period. For current purposes it is sufficient that I record that there was a written employment agreement signed on 3 October 2011.

[14] Mr Lochead's position is described in the employment agreement as a *Demolition Excavator Operator*. Clause 6 of the employment agreement contains a trial period expressed amongst other matters in sub clause 6.4 to constitute a trial period within the meaning of s67A (2) of the Employment Relations Act 2000.

[15] Mr Frame said that it became obvious that Mr Lochead's chronic fatigue syndrome was impacting on his ability to carry out the heavy duties required on site. He said that Mr Lochead was unable to step up to work the 55 hours per week that Ceres required of its staff on the demolition sites. Mr Lochead did not agree with that

although accepted that he was inexperienced in operating some of the heavy machinery. He described himself as working fulltime for Ceres until 15 November 2011 at which date Mr Lochead had about a week off work for a medical procedure. He says after that date he was not given any further work although made inquiries with Mr Frame about the availability of work. Mr Lochead returned in or about late November 2011 to receiving income from an invalids benefit.

[16] There was no specific mention in Mr Lochead's written statement of evidence about any discussions he had with Mr Frame about his contract expiring but in his oral evidence Mr Lochead did accept there was some discussion with Mr Frame about 26 December 2011 being the date his contract expired. There was some evidence about why the date of 26 December was chosen and whose suggestion that was. That is not relevant for current purposes. Mr Frame put the date for such discussion around 19 December 2011 and I find that is the best evidence before the Authority of a likely date discussions took place.

[17] Regardless of how the date of 26 December 2011 was arrived at, both Mr Lochead and Mr Frame agreed when they gave their evidence at the Authority investigation meeting that Mr Frame had also said something to Mr Lochead before 26 December along the lines that *we will have to look at renewing your contract.* Mr Frame said it was clear that this would only be on a casual basis but Mr Lochead said that any discussion about a casual contract only took place in the New Year.

[18] Ceres say that the calculation of 90 days for the raising of a grievance of unjustified dismissal runs from 26 December 2011 because that was the date Mr Lochead's employment agreement was to expire although there was from that time a possibility of casual work being available for Mr Lochead.

[19] Mr Lochead says that the first he knew that his employment had been terminated was when he received an email from Mr Frame on 10 January 2012 and it was that email that gave rise to his personal grievance that he was unjustifiably dismissed. The email provided:

> *Hi Peter,*
> *Further to our phone conversation I formally confirm the completion of your contract term as per s.6 of your employment contract.*
> *As discussed last year, your contract would not be renewed and Ceres would look at a casual agreement pending work availability which has not eventuated.*

> *Ceres would like to remain in contact with you in the future where we can mutually benefit from casual or occasional working agreements should work loads allow.*
>
> *Thank you for your service during the trial period and the additional agreed days of work that you were able to perform.*
>
> *Should you have any queries please do not hesitate to contact me.*

[20] Section 114(1) of the Employment Relations Act 2000 provides that:

> *(1) Every employee who wishes to raise a personal grievance must, subject to sub-sections (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.*

[21] There is evidence to support that Mr Lochead considered that the relationship between him and Ceres remained on foot after 26 December 2011 and believed that he would get continued work from Ceres. He had been told about the possibility of some work after the discussion in late December 2011 although that work was not carried out for a variety of reasons including aftershocks that closed the red zone. Mr Lochead had also made approaches to both the owner of the company Mr McIntyre and Mr Lutz to explore the possibility of him undertaking different work options than operating an excavator before 10 January 2012. Although there is a dispute as to whether there was a discussion about work with Mr McIntyre in late December, it is accepted that there was such discussions in early January 2012.

[22] I have also taken into account the wording of the email of 10 January 2012 in that it specifically states that it provides formal confirmation of the completion of Mr Lochead's contract term. It can be implied from that Mr Frame felt the need to put something in writing after the earlier discussions to make matters clear about the end of employment. Mr Lochead was also not paid anything by way of final pay including holiday pay until in or about 21 January and it was not until after 10 January 2012 that Mr Lochead returned equipment to Ceres.

[23] I find it was not until 10 January 2012 that it came to the notice of Mr Lochead that his employment with Ceres was terminated and that there would be no further

work available for him from Ceres. It is from 10 January 2012 therefore that the period of 90 days is to be calculated from.

Was there a personal grievance raised within 90 days of 10 January 2012?

[24] The period from 10 January 2012 within which a personal grievance is to be raised expired on 8 April 2012. Mr Lochead said he raised a personal grievance of unjustified dismissal with Mr McIntyre on or about 4 April 2012 within that 90 day period.

[25] In his written evidence Mr Lochead stated that in the following days (after 10 January 2012) *I went and saw Mark. I told him I wasn't happy with what had happened and that I should be given my job back.* In his oral evidence in response to questions from the Authority and Mr Gallagher, Mr Lochead said that *he did not raise anything with Mr Frame after the email [10 January 2012].* He said further in response to the reason he did not do this was that *he couldn't be bothered fighting it at the time.*

[26] Therefore the focus for the Authority is on the conversation that took place between Mr Lochead and Mr McIntyre in early April 2012 within the statutory time frame of 90 days and whether the conversation raised a personal grievance of unjustified dismissal.

[27] Mr Lochead said that the situation troubled him between 10 January and early April 2012. He said that on 3 April 2012 he showed up without notice at the Ceres office. He saw Mr McIntyre at the office but Mr McIntyre was on his way to a meeting and asked Mr Lochead to come back the next day. Mr Lochead said that he duly returned the following day to talk to Mr McIntyre and advised him that he was *pissed off with the way things went with his job, particularly after earlier discussions with Mr McIntyre.* In his written statement of evidence Mr Lochead said that he told Mr McIntyre he *wanted his job back*. In his oral evidence Mr Lochead said that he probably told him *he wanted a job.* Mr Lochead also said in his oral evidence further to the phrase he used that he was *pissed off* that he was *under the impression there was further work with Ceres.* Mr Lochead said that Mr McIntyre appeared to be very surprised to learn that Mr Lochead was not working at Ceres and advised him that he was under the impression that Mr Lochead had returned to work in January.

[28] Mr Lochead said that in addition he discussed some matters about concerns he had with management of the company but also some positive aspects about how he wanted to develop a career with Ceres and be more than just an operator. He said that he reminded Mr McIntyre that he had many other skills and lots of ideas about how certain engineering problems could be solved more efficiently. He said that Mr McIntyre seemed interested in his enthusiasm, skills and ideas and told Mr Lochead that he would *check with Earl* (Mr Lutz) *about work*.

[29] Mr Lochead said that the following day he telephoned Mr McIntyre to see how he got on Mr Lutz and was told that they had not discussed the matter. He said that he then telephoned back again the next day on or about 6 April and was advised that Mr McIntyre had spoken to Mr Lutz and that in light of the excavator accident in October 2011 in which Mr Lochead was involved there was no position for him.

[30] Mr McIntyre recalled he did see Mr Lochead in April 2012. He provided a second statement of evidence to address this as his earlier statement of evidence provided that he did not recall ever speaking with Mr Lochead in April 2012. In his second statement of evidence he stated that his personal assistant had reminded him that they had seen Mr Lochead briefly in April 2012. He said though that the conversation was just *passing pleasantries* and Mr Lochead's work situation was not discussed.

[31] Mr McIntyre said had no recollection of any conversation along the lines described by Mr Lochead in April and did not recall Mr Lochead setting up a meeting with him at that time. He said that he was unsure in April 2012 whether Mr Lochead was an employee or not of Ceres. He thought Mr Lutz was in the office in April 2012 and Mr Lochead was going to see him about whether there was any work. It was however established that Mr Lutz was actually in America at that time. Mr Lutz could not recall receiving any calls from Mr McIntyre in or about April regarding further work for Mr Lochead.

[32] Mr McIntyre said that some parts of the conversation Mr Lochead gave evidence about having with him in April 2012 sounded similar to a discussion he had had with Mr Lochead in January 2012. Mr McIntyre recalled in January 2012 Mr Lochead approached him and said he was looking for work. He said that Mr Lochead advised him that he had worked for Ceres as a machine operator but that did not work out and that he suffered from a medical condition that made it difficult for him to

work long hours. He recalled Mr Lochead advised he was a welder by trade and would be better suited to that type of work. Mr McIntyre said that as the owner of the business he did not get involved at the operations level. He said that he oversaw Ceres operations world wide and although he did keep up to date with operations around the world it was at an executive level. He said that he advised Mr Lochead in January 2012 that he did not get involved in hiring staff and suggested that he talk to Mr Lutz which Mr Lochead did. He said that it could have happened that he talked to Mr Lochead about an excavator accident but that discussion he could not recall.

[33] Mr Lochead said that as a result of his discussion with Mr McIntyre, particularly as it related to the excavator accident and other concerns that he had about health and safety he contacted the Labour Department. He was then advised by a person at the Labour Department that he had been dismissed outside of the 90 day period. He said that that was the first time he was aware that there was an issue around the termination of his employment.

[34] Shortly after that he contacted Mr Moore and on 11 April 2012 a few days later the email referred to at para. 19 of this determination was sent to Mr Frame.

[35] I conclude on the balance of probabilities it more likely that Mr Lochead had a conversation with Mr McIntyre in early April 2012 within the 90 day period notwithstanding what was said at that time could not be recalled by Mr McIntyre. Consistent with a conversation taking place and a level of dissatisfaction with the outcome that Mr Lochead gave evidence about he made a call to the Department of Labour a day or so later and instructed Mr Moore. Mr Moore refers to a discussion having taken place between Mr McIntyre and Mr Lochead in his email of 11 April 2012.

[36] It is not enough though that a conversation took place between Mr McIntyre and Mr Lochead. I need to consider whether a personal grievance that Mr Lochead was unjustifiably dismissed was raised in that conversation. In *Creedy v. Commissioner of Police* [2006] ERNZ 517 at para.[36] Chief Judge Colgan said amongst other matters:

> *It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. . ... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[37] In the Employment Court judgment in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v. Edmonds* {2008] ERNZ 139 at para.[51] Chief Judge Colgan stated amongst other matters:

> *Whether Mr Edmonds raised his grievance with his employer within 90 days of his dismissal is, in turn, determined by whether he made his employer aware that he alleged a personal grievance that he wanted the defendant to address or took reasonable steps to do so……*

[38] The questions that should then be asked to establish whether a grievance was raised are helpfully set out at para.[52] of the judgment:

> *Looking at it from the kura's point of view, can it said that it was both aware that Mr Edmonds considered that his dismissal was unjustified and that it had sufficient knowledge of relevant events to deal with that allegation, either in an attempt to settle the grievance or, if that was not possible, to take steps to defend its positions if Mr Edmonds' was to refer his grievance to the Employment Relations Authority for settlement.*

[39] A grievance can be raised orally and there is no requirement for any particular words to be used. The Authority needs to objectively determine whether Mr Lochead in his discussion with Mr McIntyre gave him enough information about his alleged grievance to enable Mr McIntyre to be able to respond to his grievance to a view to resolving it as soon as possible and without, in the first instance, the need for more formal steps to be taken - *Creedy*.

[40] Mr Lochead said that it was not until he had spoken with a person from the Department of Labour he became aware that there was an issue with the termination of his employment as it was outside of the 90 day period. The discussion with the person from the Department of Labour took place after his discussion with Mr McIntyre. I have considered that matter in assessing whether a grievance was raised by Mr Lochead on 4 April 2012.

[41] Mr Lochead said he explained his annoyance or unhappiness during his conversation with Mr McIntyre on 4 April 2012 about how things had gone with his job using the words *pissed off* to Mr McIntyre. I am not satisfied objectively assessed from the evidence that the unhappiness expressed by Mr Lochead to Mr McIntyre in

April 2012 was about the termination of his employment by Mr Frame. Rather the evidence of the oral discussion supports that it was directed at the fact that Mr Lochead had not been given further work as he believed he would have been following earlier discussions with Mr Lutz and Mr McIntyre. That conclusion is supported by Mr Lochead's own oral evidence that he was *under the impression* that there would be further work. In his written evidence Mr Lochead says that this impression was gained from earlier discussions he had had with Mr McIntyre. Mr Lochead in his written evidence described the conversation, or at least aspects of it, as similar to ones he had had previously had with Mr McIntyre and Mr Lutz. Those conversations were focussed on what work was available with Ceres. There is no evidence to support that on 4 April 2012 there was any mention of Mr Frame and his actions. For completeness Mr Frame was not in the office at the time of the discussion as he was on leave from 26 March 2012 until about 19 April 2012.

[42] I accept Mr Gallagher's submission that the conversation on 4 April 2012 with Mr McIntyre was focussed more on the future rather than about raising a past grievance. Mr Lochead accepted in oral evidence that he had more likely asked for *a job* rather than *his job* back. Mr Lochead also spoke to Mr McIntyre about his ability to do a range of work other than the operator work and that he could add value to Ceres with his skills. Objectively assessed I find that the conversation was largely focussed on Mr Lochead wanting work in the future with Ceres.

[43] In *Lynette Turner v Talley's Group Limited* [2013] NZEmpC 31 at para. [62] Chief Judge Colgan stated amongst other matters *a complaint that an employee has not been engaged or re-engaged in employment is, alone, not a personal grievance.*

[44] I do not find that the oral exchange that took place between Mr McIntyre and Mr Lochead on 4 April 2012 was sufficient under s 114(2) of the Employment Relations Act 2000 to constitute the raising of a personal grievance. I am not satisfied that Mr Lochead made Mr McIntyre aware that he considered the termination of his employment was unjustified so that Mr McIntyre was informed of the nature of the alleged grievance Mr Lochead wanted to be addressed. Mr Lochead clearly wanted work with Ceres but I am not satisfied that he identified what his specific concern or complaint with Ceres.

[45] I do not find that Mr Lochead's personal grievance was raised within 90 days of the date the action alleged to amount to a personal grievance came to Mr Lochead's attention.

If no personal grievance was raised within 90 days then was there implied consent to raise it outside of the statutory timeframe.

[46] Mr Moore submits that if the personal grievance was not raised within 90 days then there was implied consent to it being raised outside of that period by virtue of a series of emails sent between Mr Moore and Mr Frame that commenced on 11 April 2012. Consent by an employer under s 114(1) can be either express, or implied by conduct - Court of Appeal in *Commissioner of Police v Hawkins* [2009] 3 NZLR 381.

[47] In this case Mr Gallagher does not accept that a personal grievance was raised by Mr Moore on Mr Lochead's behalf until June 2012 after which Mr Frame sent an email to Mr Moore dated 28 June 2012 advising that there had been no formal notification of a personal grievance.

[48] The Court of Appeal in *Hawkins* endorsed the approach taken in earlier Employment Court cases of *Phillips v Net Tel Communications* [2002] 2 ERNZ 340 and the earlier decision in *Jacobsen Creative Services Ltd v Findlater* [1994] 1 ERNZ 35 in finding that the employers had impliedly consented to out of time grievances. The Court of Appeal stated at [23] that

> *Phillips and Jacobsen correctly recognise that whether what occurred constitutes consent must be a matter of fact and degree* and (at 24) held *However, the 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.*

[49] Mr Moore and Mr Gallagher also referred to two recent judgments of the Employment Court about implied consent in *Vulcan Steel Ltd v Wonnocott* [2013] NZEmpC 15 and *Turner*.

[50] Mr Moore submits that the Authority should not look at the emails of 11 April 2012 to 9 August 2012 in isolation but rather in their totality together with the conversations Mr Lochead had in January and April 2012. I do not agree with that submission in its entirety. The Authority can and should have regard to the emails in their totality. However having not found a personal grievance was raised within 90

days, the Authority is required under s 114(1) and s 114(2) of the Act as a first step to consider if, and when, a personal grievance was raised after the expiration of the 90 day period in order to then reach conclusions as to whether Ceres by its conduct from that time can be reasonably taken to have consented to an extension of time. That will require analysis of each of the various emails at least in the first instance.

[51] In Mr Moore's email of 11 April 2012, set out above in full in para. 19, an impression could be gained that Mr Lochead was unhappy with the end of his employment agreement. There was no specific reference to the events surrounding the *letting go* of Mr Lochead and no reference to any link between those events and any alleged personal grievance. There were no specifics to the complaint and it was not clear at least from that email how any compliant was to be addressed by Mr Frame except that there was a suggestion that *it be put right*. There was no advice that Mr Lochead was contemplating some legal action and it was a relatively informal email. I do not find that the email of 11 April 2012 raises a personal grievance under s 114(2) of the Act.

[52] There was some delay in Mr Frame responding to the 11 April 2012 email as he was overseas. On 13 April 2012 another Manager at Ceres, Danny Cooke emailed Mr Moore and suggested that Mr Lochead put in writing the issues for consideration so that Ceres could promptly respond on Mr Frame's return from overseas.

[53] No further issues were put by Mr Moore as suggested by Mr Cooke and he sent the same email he had sent on 11 April 2012 to Mr Frame on 30 April 2012. The first response was then sent by Mr Frame to Mr Moore on 2 May 2012. Mr Frame's email was headed without prejudice and set out the facts around the dismissal only.

[54] The next email in the series of emails was sent by Mr Moore to Mr Frame on 4 May 2012. He said in his email that he appreciated *the run-down* on how Mr Frame saw things. Mr Moore asked questions then about the welding work Mr Lochead was to do in the New Year and *why that fall through*. In a without prejudice email dated 4 May 2012 Mr Frame responded and said that Mr Lochead was not offered a position as a welder and that there had only been limited welding work carried out by a certified welding engineer who completed one repair.

[55] Mr Moore then sent a further email on 7 May 2012 and asked another question about welding. Mr Frame responded on 7 May 2012 and explained that welding was only one option discussed with Mr Lochead but that none of the options eventuated.

[56] Mr Moore then sent a further email on 9 May 2012 and said that he was confused about the issues regarding welding. In another email labelled without prejudice on 10 May Mr Frame responded to Mr Moore that Mr McIntyre had not arranged work for Mr Lochead in January but had discussed other options for Mr Lochead including labouring and other site duties. He mentioned two reasons for there being no work for Mr Lochead in December.

[57] On 10 May 2012 in another email to Mr Frame Mr Moore asked further questions about the welding and whether this was to be confirmed with the American CEO when he arrived. He set out his understanding that it was. He asked some further questions about why Mr Lochead was not working in December and whether it was because there was no work or there was but it was not offered. Mr Frame responded by email dated 14 May 2012 again labelled without prejudice and said that Mr Lochead's contract was completed during the 90 day review period and that Ceres consider the matter to be closed. He said that further to the claim that Peter was offered and had a contract confirmed he needed a copy of the offer to support the claim. He set out Mr McIntyre had not offered work and there was only discussion about possible options. He asked for confirmation about when Mr Lochead met the CEO of Ceres as the CEO has not visited since April 2012.

[58] The next email sent was from Mr Moore to Mr Frame on 17 May 2012 asking primarily how the 90 day trial period applied. There was no response. The next email from Mr Moore was sent on 23 May starting with the words *You've been such a conscientious correspondent up till now that I am surprised not to have heard back from you* and *It appears to me that Peter was dismissed after 90 days expired. Do you see it differently? Regardless of the legal technicalities and niceties, I would like to find some resolution to this problem with you. Are you open to that? Please let me know.*

[59] Mr Frame sent an email dated 23 May 2012 advising he was out of the office and would be back the following day. On Saturday 26 May 2012 Mr Moore sent a chase up style email to Mr Frame. On 28 May 2012 Mr Frame again in an email labelled without prejudice advised that he would need to review Mr Lochead's file

and employment agreement and come back to Mr Moore. He set out the belief of Ceres that the matter is resolved but that he would be happy to review this and provide a substantive response once he had done that.

[60] On 30 May in an email labelled without prejudice Mr Frame set out the circumstances surrounding the termination of employment. He asked Mr Moore in the email what was it that was proposed in terms of resolution stating that Ceres believes that there are no outstanding issues with Mr Moore's termination of employment. He stated that if Mr Lochead believes there are he asked for them to be recorded.

[61] I have already dealt with the reasons I have formed the view that the 11 April email did not raise a personal grievance. In the emails that followed Mr Moore I find was largely focused on seeking further information. He asked questions of Mr Frame about how the employment of Mr Lochead ended, what discussions there were about welding and other work with him, why that work did not eventuate and finally what relevance there was to the 90 day trial period. The closest email to putting anything specific to Mr Frame was the one sent on 23 March which stated *It appears to me that Peter was dismissed after 90 days expired. Do you see it differently?* I have considered objectively whether Mr Frame's response to that email dated 30 May can reasonably be taken to be consent to an extension of time to raise a personal grievance.

[62] I find that it is only when the 23 May email is read in conjunction with the 8 June email the details of which I will set out shortly that it is clear it is alleged that the 90 day trial period does not apply to Mr Lochead because his employment was terminated outside that period. The issue raised in the 23 May email by Mr Moore about the 90 day period is in the nature of a question rather than a settled position on which a grievance under the Act is raised on behalf of Mr Lochead. There is, I find, only an indication in the 23 May email that a grievance may be raised on the basis it appeared that the dismissal took place after the 90 day trial period had expired.

[63] I do not find that the 30 May email from Mr Frame can be reasonably regarded as implied consent to an extension of time. It was in response I find to a preliminary but not settled view as expressed by Mr Moore that the dismissal was after 90 days had expired. There was no reference to the dismissal being unjustified. I do not find that the 23 March 2012 email was sufficient to raise a personal grievance. If I am

wrong in that conclusion, the Authority needs to objectively consider if Mr Frame can reasonably be taken at that time to have consented to an extension of time. Mr Frame was not a solicitor or an experienced human resource manager who may have seen beyond the immediate view and question in the email of 23 May 2012. I do not find that Mr Frame on behalf of Ceres could reasonably be taken at that time to have consented to an extension of time.

[64] There is evidence to support that Mr Frame had advised Mr McIntyre in or about May 2012 that he *thought the company was being set up for a law suit* but not that a personal grievance had been raised. I accept Mr Gallagher's submission that this conversation was more consistent with a view that no grievance had yet at that time been raised.

[65] The next email from Mr Moore to Mr Frame was sent on 8 June 2012. I find that email raises a personal grievance. In response to Mr Frame's question about what the issues were regarding Mr Lochead's termination Mr Moore advised that *Legally, the most significant issue from my point of view is that his position was not terminated within the 90 day time frame permitted. For that and other reasons, the 90 day rule does not apply to his circumstances.* Mr Moore recorded there was a significant difference between his and Mr Frame's understanding of what happened and that he was not entirely sure what it would take to resolve this and was hoping Mr Frame may have some *creative suggestions*.

[66] Mr Moore sent a follow up email to Mr Frame on 18 June 2012 and asked whether there was a way forward or should he just go ahead and apply for mediation. On 20 June Mr Frame responded and advised he would be in touch shortly. Mr Moore then sent some further emails chasing up a response and suggesting mediation. On 26 June 2012 Mr Frame responded and advised Ceres saw the matter with Mr Lochead as closed and saw no useful purpose in mediation.

[67] In a further email to Mr Frame on 26 June 2012 Mr Moore mentions for the first time the possibility of filing proceedings in and involvement of the Employment Relations Authority. He mentions the Authority will "*compel mediation*" and that Ceres will automatically be liable for costs.

[68] Mr Frame then responded in an email dated 28 June 2012 not labelled without prejudice and says that he was not aware that Mr Moore had raised a personal

grievance on Mr Lochead's behalf. He states that the filing in the Authority might provide a little clarity about what the grievance is but he did not accept Ceres would be liable for legal costs as it has had no notification of a personal grievance. He asks for confirmation on when a grievance was raised. Mr Frame states that any issue in the Authority will be whether Mr Lochead has raised his personal grievance within the 90 day time limit.

[69] Mr Moore in a further email dated 30 June 2012 advises Mr Frame that he has raised a personal grievance as has Mr Lochead. Ceres advises in a further email dated 24 July 2012 that it is not prepared to go to mediation.

[70] It is useful to consider the facts in this case with the other Employment Court judgments. The facts of the *Hawkins* case were helpfully summarised at [24] of the *Vulcan* judgment by Chief Judge Colgan. They are that very shortly after promising to provide particulars of the grievance the employee's solicitor provided these to the employer. The employer responded asked for further particulars and clarification of some matters. There was not provided because the grievant was committed for trial on criminal charges connected with the event complained of. After a period of two years the grievant was discharged without conviction and the lawyer wrote again to the employer by letter providing the details requested. The parties attended mediation and proceeding were commenced in the Employment Relations Authority. For the first time the question whether the grievance had been raised out of time was taken up by the employer. In contrast in this case after refusing mediation and being advised of the prospect of proceedings in the Authority Mr Frame raised the issue that the grievance had not been raised in time.

[71] In *Findlater* there was correspondence about a grievance and the employer attended mediation. When the matter did not settle it lodged its notice of intention to defend and did not refer therein to a 90 day issue. Soon after though it raised a 90 day issue. In *Vulcan* although the employer declined to attend mediation it did so for reasons not associated with the time limitation issue but did engage in the grievance process to the extent that it responded comprehensively to the claims on their merits at a time when it was professionally represented and advised by both a human resources consultant and a barrister.

[72] I have considered whether there was implied consent. It is a matter of fact and degree – *Hawkins.* I have assessed the emails both in terms of whether they raised a

grievance and the responses to them. The facts in this case are that notwithstanding a series of emails between Mr Moore and Mr Frame I have not found that a personal grievance was raised until 8 June 2012. The other emails I have found were seeking further information and trying to gain an understanding about how Mr Lochead's employment ended. The email of 23 March 2012 provided a view about the dismissal being outside of the 90 day trial period time frame but I found that view was not presented in manner so as to present the basis of a personal grievance until 8 June 2012. I do not find that before it protested to the grievance having been raised within the required time frame Ceres could have been said to have responded comprehensively to Mr Lochead's claim on its merits because unlike the situation in *Turner* I am not satisfied that a personal grievance had been raised before the responses were given. The emails viewed as a whole reflect uncertainty on the part of Mr Frame about what Mr Lochead's issues actually were. After 8 June Mr Frame on behalf of Ceres declined mediation and then after a further email from Mr Moore referring to the possibility of lodging of proceeding Mr Frame raised the defence that the personal grievance had not been raised in time and that he was not aware that Mr Moore had raised a personal grievance on behalf of Mr Lochead.

[73] The delay on Mr Lochead's part in raising a personal grievance was longer than the delay in *Vulcan*. It was almost two months. Mr Frame was not professionally advised during the period of correspondence with Mr Lochead's advocate and I accept Mr Gallagher' submission that in all probability thought his preliminary communications in response to Mr Moore's emails were protected by virtue of the fact he had used the words without prejudice. As some as there was a suggestion of lodging of proceedings in circumstances where the raising of a personal grievance had been a little unclear and had followed a number of earlier emails raising questions Mr Frame immediately protested to such grievance having been raised within the required timeframe.

[74] I do not find in this case taking all the circumstances into account that Mr Frame conducted himself in a manner that he can reasonably be taken to have consented to an extension of time.

Determination

[75] I do not find that Mr Lochead's personal grievance was raised within time or that Ceres impliedly consented to the late raising of a grievance.

[76] The Authority will hold a further telephone conference to discuss how to proceed with the remaining issues before it.

Costs

[77] I reserve the issue of costs until all matters have been determined.

Helen Doyle
Member of the Employment Relations Authority