

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
OFFICE**

**BETWEEN** Shirley Mackie (Applicant)  
**AND** The Order of St John Midland Regional Trust Board (Respondent)  
**REPRESENTATIVES** Tahu Weeks for Applicant  
Prue Dawson for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**DATE OF DETERMINATION** 04 April 2007

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

[1] Ms Mackie resigned from her employment as a Paramedic with The Order of St John Midland Regional Trust Board ("St John's") in April 2006. At the time she tendered her resignation Ms Mackie was under the care of her general practitioner for symptoms relating to stress, and was absent from work on sick leave.

[2] During her notice period Ms Mackie completed an Exit Interview questionnaire and forwarded that document, together with two additional documents to the Head Office of the Order of St John, St John's Auckland Regional HR Manager, and Mr Brent Nielsen, the Regional Operations Manager for the Respondent. Ms Mackie says that through the Exit Interview process she raised a personal grievance.

[3] St John's denies Ms Mackie raised a personal grievance and did not consent to her request to raise her grievance outside the 90 day period.

[4] This determination will deal with the following issues:

- Whether the Exit Interview form and additional documents raised a personal grievance; and
- If the answer to that is "no" I will then deal with an application from Ms Mackie to raise her personal grievance outside the statutory 90 day period.

[5] This matter is to be dealt with as a preliminary matter.

**Did the Exit Interview form and additional documents raise a personal grievance?**

[6] Section 114 of the Employment Relations Act deals with the raising of a personal grievance and requires the grievance to be raised within 90 days of the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee. A grievance is raised:

...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.

[7] Section 114(2) of the Act sets out the necessary elements of raising a grievance:

- an allegation of a personal grievance;
- made by the employee;
- known to the employer; and
- a desire by the employee to have the grievance addressed by the employer.

[8] An employer should be given sufficient information to enable it to address the grievance. The information, either provided orally or in writing, should allow it to respond to the grievance on its merits with a view to resolving it soon and informally, at least in the first instance (see *Creedy v Commissioner of Police*, unreported, 23 May 2006, AC 29/06, Colgan CJ; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60).

[9] The test is whether to an objective observer the communication was sufficient to elicit a response from the employer (*Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60).

[10] Ms Mackie worked as one of two paramedics on the Opotiki Ambulance station. Until June 2005 Ms Mackie had been sole charge of the Opotiki station as Station Manager. Following the change in manning to two paramedics, Ms Mackie was no longer the Manager, and she and Ms Tamara Lomas were considered to be equals with equal authority on the station. A consequential change saw Mr Wynne taking more responsibility for the supervision of the station, as Area Manager.

[11] On 24 April 2006 Ms Mackie attended her GP, Dr Wright. He provided Ms Mackie with a medical certificate which states Ms Mackie was not fit for work and that this would be ongoing.

[12] On 25 April 2006, Ms Mackie emailed Mr Nielsen giving two weeks notice of her intention to leave her employment. Mr Nielsen acknowledged Ms Mackie's resignation by email

the following day and offered to make arrangements to celebrate her service with an appropriate farewell function. Ms Mackie posted a copy of her letter of resignation together with a copy of the medical certificate dated 24 April 2006 to Mr Nielsen.

[13] Ms Mackie's resignation came a couple of weeks after she had met with Mr Nielsen and outlined for him, issues she had with Ms Lomas and decisions being made by Mr Wynne, which Ms Mackie believed was undermining her position. Mr Nielsen told me he listened to what Ms Mackie had to tell him, but was not convinced her role as a paramedic was being undermined.

[14] On 27 April 2006, via email, Ms Mackie asked Mr Nielsen if she could take some time to think about whether she wanted a farewell function and advised Mr Nielsen that while she believed St John had been the best employers she had ever had, she had some unresolved issues. Ms Mackie did not set out what those issues were, or whether she wanted the unresolved issues dealt with.

[15] Mr Nielsen, concerned about the statement on the medical certificate indicating Ms Mackie's condition was ongoing, took steps to seek legal advice as to any exposure St John's may have.

[16] In accordance with St John's procedures Mr Nielsen then emailed Ms Mackie and invited her to participate in an Exit Interview. In response, Ms Mackie advised Mr Nielsen she preferred to complete a written questionnaire rather than have a personal interview. Ms Mackie also advised Mr Nielsen that things were not ideal but she had a feeling of relief now that she had the "...monkey off [her] back."

[17] Exit Interviews are used by organisations to receive feedback on issues that are impacting on company operations. On 3 May 2006, Ms Mackie completed her Exit Interview form and sent it in to St John's. Attached to the form were two written statements intended by Ms Mackie to highlight previously eluded to issues she had with her manager, Mr Wynne.

[18] The Exit Interview form asked Ms Mackie to consider different aspects of her service with St John's and to provide comments where she felt it was appropriate. The form sets out six areas within which specific statements were made. Interviewees are then asked to indicate whether they agreed or disagreed with each statement.

[19] Ms Mackie disagreed or strongly disagreed with the following statements:

- My efforts and performance have been recognised and encouraged;
- I had adequate resources and equipment to do my role effectively;
- I have been satisfied by the training made available to me;
- I have felt safe in performing my role;
- I have had sufficient access to counselling and support services;
- I have felt free to raise any issues directly with my manager/supervisor;

- I received honest and constructive feedback about my performance;
- My Manager/supervisor has demonstrated the values of St John.

[20] The Exit Interview form also requests the interviewee to comment on aspects they least liked about St Johns, and also to provide any further comments including recommendations for the organisation.

[21] Ms Mackie attached two statements to her Exit Interview form which were intended to address the request for further comments and recommendations. In the first attached document, Ms Mackie states that she had been bullied by her supervisor, and that he appeared to go out of his way to provide negative feedback and to undermine her in her job and aspirations.

[22] As a recommendation Ms Mackie asked that her comments be taken into account and utilised by Management in their future management of staff issues.

[23] In the second attached document Ms Mackie sets out specific issues relating to her relationship with Mr Wynne including her view that Mr Wynne had eroded her confidence, failed to provide her with adequate support following some stressful work situations, and the low morale of the staff generally at the station. Ms Mackie is critical of St John's for not validating and for overlooking her concerns that she had been bullied by Mr Wynne. There is no request for redress in the documents attached to the Exit Interview form.

[24] Ms Mackie says that the Exit Interview form together with the two attached documents, raised her personal grievance with St John's and she expected some acknowledgement from St John's but that was not forthcoming.

[25] Mr Nielsen read the document and concluded the issues were ones that he previously had been over with Ms Mackie during her employment and there was nothing new being raised. He told me after he read the documents; he filed them on her personal file without any further action. Mr Nielsen said he did not agree with Ms Mackie's assertion in the documents, that she had been bullied by her supervisor. He says that he reached that conclusion based on his own information that Ms Mackie's relationship with Mr Wynne did not deteriorate until Mr Wynne entered into a personal relationship with Ms Mackie's best friend. Ms Mackie confirmed this at the investigation meeting. Mr Nielsen also told me he did not consider the decisions Mr Wynne made about matters raised at the Opotiki Station undermined Ms Mackie's authority. What had occurred, he said, was Ms Mackie and Ms Lomas disagreed about some matters at the station, and Ms Lomas had sought advice and approval from Mr Wynne. Mr Nielsen considered that was an appropriate way to deal with matters. Ms Mackie was also entitled to seek such advice and approvals.

[26] I find that Ms Mackie's correspondence does not raise a personal grievance. The form and attachments were for the purpose of providing feedback to the organisation to assist it to make improvements in its operations. While Ms Mackie lists the issues she had experienced in the final couple of years of her employment, the information fell short of alleging a personal grievance existed. Neither was there anything contained within the documents indicating a desire by Ms Mackie to have her issues addressed, with the exception that she recommended St John utilise the information in the future management of staff issues.

[27] Further, I am not satisfied that Ms Mackie intended the documents to raise a personal grievance at the time they were completed. It was Ms Mackie's evidence that at the time she resigned from her employment she discussed with both her union delegate and her doctor about whether she should pursue a personal grievance.

[28] Ms Mackie told me the union offered to pursue a grievance on her behalf but she felt having the union take that action would cause her a conflict, as she had always been of the view that she could work with the management of St John's to adequately resolve any issues she had.

[29] Ms Newton told me she rang Ms Mackie at the end of July, while she [Ms Newton] was on annual leave, as she was aware the 90 day period during which Ms Mackie had to raise her grievance was coming to an end. During that telephone discussion Ms Newton asked Ms Mackie if she wanted the union to pursue a personal grievance. Ms Mackie told Ms Newton not to pursue a personal grievance as she could not cope with it and given that the result could not be guaranteed she would not proceed.

[30] Also, after discussing the subject of taking a personal grievance with her doctor, Dr Wright advised against her doing that on the basis that her health would deteriorate if she took on a personal grievance case.

[31] Further, during a telephone conversation on 17 November 2006 between Ms Mackie and St John's HR Manager, Ms Vanessa Woodcock, Ms Mackie advised Ms Woodcock that even though she was outside the 90-days, she would be prepared to go through a personal grievance.

[32] On 1 December 2006, following legal advice, Ms Mackie instructed her lawyer to write to St John's seeking the consent of the organisation to raise her personal grievance outside the 90 day period. Mr Weeks, on behalf of his client states:

There is a timeframe of 90 days (since the grievance arose) to lodge a PG. That time frame has passed. There are however, two exceptions that allow a PG to be raised outside the 90 day timeframe – they are:

1. You (the employer) can consent to the PG being raised outside of the timeframe; and
2. A successful application to the Employment Relations Authority allowing the same.

...

Please let us know within 7 days if you consent to the PG being raised outside of the 90 day time frame. We note, if you do not consent we have instructions to make an application to the authority for leave to have the grievance raised outside the time frame.

[33] St John's did not consent to Ms Mackie raising a personal grievance outside the 90-day period and advised Mr Weeks of that decision.

### **Delay in raising the personal grievance**

[34] Section 114 of the Employment Relations Act 2000 (the Act) provides in part:-

- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority -
  - (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
  - (b) considers it is just to do so.
- (5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

[35] Ms Mackie seeks leave of the Authority to raise her grievance outside the 90-day period pursuant to section 114(3) of the Act. Her position is that leave should be granted on the basis of exceptional circumstances that apply in her situation.

[36] If I am to determine this aspect of Ms Mackie's application in her favour then I must be satisfied:

- That exceptional circumstances exist; and
- That those circumstances occasioned the delay in raising the grievance; and
- That, as the Authority Member determining this matter, I consider it just to grant leave to proceed.

[37] Section 115 sets out some examples of situations which constitute exceptional circumstances. In *Telecom New Zealand Limited v Morgan* [2004] 2 ERNZ 9 the Employment Court considered the application of s.115(a) and said:

...Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissal or other matters giving rise to grievances. If anything, it is arguable that Parliament has made the "exceptional circumstances" test a more difficult one to satisfy, at least where circumstances such as those here are relied on.

[38] The Court has also held, in relation to s.115(b):

...[t]he requirement now is for the employee to make reasonable arrangements to have the grievance raised on his or her behalf. If the employee has not made such reasonable arrangements to have the grievance raised this will not constitute circumstances for the purposes of s.115(b).

[39] Ms Mackie says her circumstances fall to be determined in a general sense as being exceptional circumstance. The Court of Appeal in *Wilkins & Field Ltd v. Fortune* [1998] 2 ERNZ 70 held that exceptional circumstances are circumstances ...which are unusual, outside the common run, perhaps something more than special and less than extraordinary.

[40] I am not satisfied Ms Mackie's circumstances fall into the category of exceptional. Ms Mackie was unhappy in her working situation as a result of her perception she was being bullied by her manager and because she was not getting on with her colleague. She raised these issues with Mr Nielsen on several occasions during her employment and had reasonable access to regular peer support. Peer support is a free support mechanism provided by St John's for its employees. Peer Support provides access to assistance for employees who are under duress from issues arising from their job, employment, or family situation.

[41] Prior to resigning her employment in 2006, Ms Mackie had one period of sick leave for a stress related condition. Ms Mackie sought the assistance of her general practitioner in April 2006, who put Ms Mackie on indefinite sick leave. Ms Mackie relies on the advice from her doctor not to pursue a personal grievance, to meet the test of exceptional circumstances under the Act.

[42] On 2 September 2006 Ms Mackie wrote to Ms Woodcock advising her that she [Ms Mackie] had resigned her position in April and had received no acknowledgement of her Exit Interview forms and documents. Ms Mackie writes:

... I have not heard back from any representative of St John acknowledging my correspondence, leaving me concerned that I have not been acknowledged. Even now I feel it is an outrage that I find myself out of my job when I was at the peak of my service to St John, and surviving on a sickness benefit for stress related symptoms after a stand down period from WINZ of 13 weeks on no income only because I could no longer go on with the area manager's abuse. I would be grateful if you would peruse my case and offer me some options.

[43] Coincidentally, and concurrently with her letter to St John's, complaints about Mr Wynne were being received by St John's from other employees based in Opotiki. As part of the process of investigating those complaints, and having received Ms Mackie's letter of 2 September, Ms Woodcock invited Ms Mackie to a meeting where Ms Mackie was provided with the opportunity to discuss the issues raised in her exit interview form and documents. At that meeting, Ms Woodcock asked Ms Mackie if there was anything St John could do for her. For the first time Ms Mackie requested financial compensation for the loss of her earnings for 13 weeks.

[44] Following that meeting, and after giving some further thought as to what St John's could do for her, Ms Mackie wrote to Ms Woodcock and set out her conclusions that Mr Wynne was a serial bully. Ms Mackie thanked Ms Woodcock for giving herself and the other crew

members at Opotiki a listening ear and advised Ms Woodcock that after their meeting on 12 October she had the best sleep she had for a long time. Ms Mackie did not seek further communication from Ms Woodcock in her letter and in deed wished Ms Woodcock well and concluded by thanking her once again for listening.

[45] It was also around this time that Ms Mackie showed improvement in her medical condition to the extent that Dr Wright no longer had concerns about Ms Mackie's health if she was to pursue a personal grievance.

[46] Following her letter of 12 October Ms Mackie contacted Ms Woodcock on 17 November 2006. During this discussion Ms Mackie acknowledged she was outside the 90-day time period for raising her grievance but might pursue it anyway. Ms Woodcock acknowledged Ms Mackie's request for financial compensation but advised that she was unable to commit to anything.

[47] Following these communications, Mr Weeks was instructed to write to St John's seeking consent to having Ms Mackie's grievance raised outside the 90-day period.

[48] I am satisfied that Ms Mackie's situation does not meet the test for leave to be granted. While I accept the advice Ms Mackie received from her doctor not to pursue a personal grievance contributed to her delay in raising her grievance, I do not accept that this was the entire cause of her delay.

[49] Just prior to the 90-day period expiring, the union delegate rang Ms Mackie and offered for the union to take a personal grievance on her behalf. Ms Mackie's reason for not wanting to take that course of action was not health related. Rather it had to do with her personal ideology that she could not do this to management. Ms Mackie told me that she had always tried to work things through with management, that she was very pro-management and didn't want the union taking a personal grievance for her as she found that distasteful.

[50] For all the foregoing reasons I am unable to find that there are exceptional circumstances within the meaning of section 114 which occasioned the delay in raising a personal grievance. Ms Mackie's application for leave to raise her personal grievance out of time is declined.

### **Costs**

[51] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. Ms Mackie was in receipt of legal aid which will limit the respondent's ability to seek a contribution to costs. If the parties fail to reach agreement on

the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority