

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 21/10
5274308

BETWEEN	BRIDGET and MACFARLANE Applicants	GORDON
AND	CALLERY LIMITED Respondent	HOLDINGS

Member of Authority: James Crichton

Representatives: Jonny Sanders, Advocate for Applicants
Gavin Molloy, Advocate for Respondent

Investigation Meeting: 27 January 2010 at Hokitika

Determination: 3 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (Mr and Mrs Macfarlane or the Macfarlanes) were employed from 7 April 2008 down to 25 September 2008 when their respective resignations took effect. The Macfarlanes say they were constructively dismissed from their employment. That allegation is vehemently denied by the respondent employer (Callery).

[2] The parties were put in touch with each other by Ms Kate Duthie who was an employee of Callery but also a long time friend of Mrs Macfarlane. Mr Macfarlane has a landscape gardening background and Callery's development at Franz Josef Glacier required landscape gardening expertise. The Macfarlanes contacted Callery and one of the directors, Mr Molloy, met with the Macfarlanes at their home in Christchurch to discuss a possible employment relationship.

[3] Individual employment agreements were eventually signed on 24 February 2008 and arrangements made for the Macfarlanes to relocate to Franz Josef Glacier.

Removal expenses from Christchurch to Franz Joseph Glacier were met by Callery. When the Macfarlanes arrived at the West Coast en route to Franz Joseph Glacier, they made arrangements to meet with the other director of Callery, Mr Lindsay Smith, and this meeting took place in Hokitika. During the course of that meeting, the Macfarlanes sought further assistance from Callery to enable them to establish themselves in their new environment. Mr Smith undertook to consider the matter and in the result arranged the deposit of \$500 into each of the Macfarlanes' bank accounts. The status of those payments became an issue between the parties at the termination of the employment.

[4] Mr Macfarlane maintained that one of the reasons he and his wife accepted the position was because Mr Molloy had indicated that if the relationship prospered, the Macfarlanes would be assisted to buy a section in the development and that that assistance might amount to 50% of the purchase price. Mr Molloy agreed that the parties had discussed that principle when employment had first been discussed, but denied that Callery's contribution was to be 50%. He said that if the relationship had prospered, Callery would have been prepared to assist the Macfarlanes to purchase by effectively writing down the total price by a percentage amount for each year of service and he indicated that the maximum write down he would contemplate (or indeed spoke of with the Macfarlanes) would be 30%, not 50%.

[5] It seems that during the employment, there was always tension about the structure of the workplace's management. Mr Molloy was the governing on site director of Callery. Mr Macfarlane was designated foreman by his employment agreement. I set out below the relevant provision from his agreement in full:

3. *POSITION*

- (a) *You are employed as foreman with a range of landscape gardening duties for CHL and any other ancillary duties required in connection with the business of CHL.*
- (b) *You will be in charge of and responsible for the landscaping team and landscaping design for Franz Josef Alpine Resort and other locations as directed by CHL.*
- (c) *You will oversee the set up and building of the nursery and purchasing of plant stock, ensuring the smooth running of the landscaping division for CHL.*
- (d) *You shall work alongside the director of CHL in decision-making regarding the choice and purchase of machinery, tools, equipment, wet weather and safety gear needed to carry out duties.*

[6] Mr Molloy expected to have total control of the operation and did not expect to be engaging with Mr Macfarlane in respect of strategic management issues. Mr Macfarlane expected a larger role in those issues (as they affected the landscaping operation) than he was actually allowed. Mr Molloy said that at no time during the employment did Mr Macfarlane raise his disquiet about that issue. Mr Macfarlane says that at no time did Mr Molloy make it clear that his expectation of the foreman role was significantly less fulsome than Mr Macfarlane's expectations.

[7] Mr Macfarlane claimed that Mr Molloy consistently called him by someone else's name; Mr Molloy said that it had happened once by accident and subsequently was done in a joking way as a sort of running gag. No offence was intended Mr Molloy said, and he was unaware any was taken.

[8] Mrs Macfarlane accuses Mr Molloy of soliciting her to enter a wet teeshirt competition; Mr Molloy vehemently denies the allegation and says that all that happened was that there was reference to a wet teeshirt competition taking place in the town and that everyone from the workplace was going. Again, Mr Molloy indicated in his evidence that if he had done what he is accused of doing by Mrs Macfarlane, he would have expected Mr Macfarlane (as a newly married husband) to confront him immediately but that did not happen.

[9] There was also a dispute about training issues. The Macfarlanes indicated at appointment that they were not particularly experienced with heavy plant and would require training. Their evidence was that the training was inadequate. Callery disagrees and gave evidence that Mr Molloy had personally instructed each staff member (including the Macfarlanes) and was satisfied with the driving ability of all staff (including the Macfarlanes). Callery then arranged for all of the staff to obtain the relevant qualification to drive the necessary equipment and this qualification was obtained from the local Polytechnic at Callery's expense. All staff passed, including the Macfarlanes. However, Mr Macfarlane says that the test imposed by the Polytechnic was on a level piece of hard standing in Greymouth which was a far cry from the physical environment in which he and Mrs Macfarlane were required to work at the site at Franz Joseph Glacier.

[10] The employment relationship problems came to a head after Mr Macfarlane punctured a tyre on the Callery front end loader. This event happened on 16 September 2008 and according to Mr Molloy was caused by Mr Macfarlane

driving over a tree stump. Mr Molloy's evidence is that Mr Macfarlane compounded the damage by then proceeding to drive the steadily flattening tyre back to the depot, a distance of some 500 or 600 metres. The effect of that was to ruin the inner tube as well as the tyre itself. Mr Macfarlane said that the tyre itself was already effectively past its use by date so the alleged loss was more apparent than real. Mr Molloy agreed that the tyre in question was worn, but did not agree that it was unserviceable; he had already ordered new tyres for the machine but in order to fit those tyres, the machine of course had to be decommissioned for a period and he was waiting for an appropriate opportunity to do that. The effect of the puncture was to force him to make the change because the machine was unserviceable without an operational tyre.

[11] According to the Macfarlanes' evidence, when they returned to the workplace the day after the puncture, Mr Molloy was angry with Mr Macfarlane for getting the puncture, referred to him as a *clumsy bastard*, and there was a vigorous altercation between the two men which ended with Mr Molloy telling Mr Macfarlane to take the women staff members (including Mrs Macfarlane) and collect tussocks. Mr Molloy says that Mr Macfarlane disobeyed his specific instructions on this point because Mrs Macfarlane was instructed by her husband to do something else and Mr Macfarlane was actually obtaining the tussocks from a different place from the one that Mr Molloy wanted them taken from. Mr Macfarlane said that he deployed his wife to work alone because she was crying and upset by Mr Molloy's behaviour and that he did not know which particular area to obtain the tussocks from having not done it before.

[12] Mr Molloy, having established that his instructions were not being followed, then pursued Mr Macfarlane and there was a further altercation. Mr Molloy emphasised in no uncertain terms that he was in charge and that he made decisions about what was to happen. Later on, Mr Macfarlane confronted Mr Molloy and taxed him for losing his temper. Mr Molloy responded by saying that he was in charge and he made the decisions, but Mr Macfarlane alleges that Mr Molloy then refused to discuss the matter further and indicated that there would be a meeting about it the following day.

[13] Mr Molloy says that Mr Macfarlane turned up for work early the following day which was Friday, 19 September 2008 and asked to meet with him alone. Mr Macfarlane sought to deal with his unhappiness about Mr Molloy's intemperate

responses of the previous day while Mr Molloy sought to raise with Mr Macfarlane aspects about Mr Macfarlane's performance which Mr Molloy sought improvement in. Mr Molloy's evidence is that Mr Macfarlane sought to deflect blame for his inadequacies onto other staff. Mr Molloy was unhappy with that approach and indicated that he wished to bring all the staff in to the meeting so that the whole matter could be aired and ventilated.

[14] Mr Macfarlane's evidence was that he tried to get Mr Molloy to confirm that Mr Molloy had a personal issue with Mr Macfarlane but that Mr Molloy denied that (as he did at the investigation meeting). The discussion appears (by both accounts) to have been unhelpful and intemperate, and critically, according to Mr Macfarlane, ended with Mr Molloy indicating that he was going to appoint someone else (Mr Healey) to be foreman in place of Mr Macfarlane. Mr Molloy denies he made this statement then, or later.

[15] It is common ground that Mr Molloy then got the rest of the staff in and then tried to get Mr Macfarlane to say to the staff what Mr Molloy says Mr Macfarlane told him personally about the staff. Mr Macfarlane declined to confirm that he had issues with the staff, but did seek to explain his position. Mr Molloy told everyone that he intended that Mr Healey become foreman, but Mr Molloy was very clear in questioning from me that at no time did he contemplate that Mr Macfarlane was being relieved of his duties, only that another foreman was being created to deal with the construction issues which were not part of Mr Macfarlane's area of expertise and not contemplated in the span of duties in his employment agreement either.

[16] Both Mr and Mrs Macfarlane were adamant that there was no mention from Mr Molloy that Mr Macfarlane was to remain as foreman and that the clear implication from his words was that Mr Macfarlane's foreman's position had been disestablished. Affidavit evidence was produced from another former staff member who also confirmed that that was her view. Conversely, Mr Molloy was absolutely adamant that he was creating another foreman, not disestablishing the existing one.

[17] Mr and Mrs Macfarlane took the view that Mr Macfarlane's position had become untenable as a consequence of what they described as a working environment that was *tense, threatening and fear-filled*. They thought about matters over the following weekend and Monday of the next working week, and then on Tuesday, 23 September 2008, presented Mr Molloy with two resignation letters (one for each of

them) dated the previous day. In the result, the appropriate notice period of the employment agreement was not worked and the Macfarlanes left the employment two days later. A personal grievance was promptly raised shortly thereafter in respect of both of them.

Issues

[18] The fundamental question for the Authority is whether Mr or Mrs Macfarlane have proved their claim that they have each of them been constructively dismissed. The Macfarlanes' joint claim is effectively treated as one for the purposes of this determination as although there are two employment relationships involved, the basis for the constructive dismissal is in each case the same factual matrix. Accordingly, as Mr and Mrs Macfarlane's two claims are inextricably intertwined, I have chosen to deal with them together. Notwithstanding that, it is conceivable that the result could be different for each; Mrs Macfarlane's basis for constructive dismissal is simply that it would have been untenable for her to continue in the employment given that her husband was no longer there.

[19] Aside entirely from the fundamental question of whether a constructive dismissal has been proved in relation to one or both of the Macfarlanes, there is a range of other matters on which there is disputation between the parties. Of necessity, I have had to form a view about those other matters as well and, to some extent, those other questions inform the fundamental issue of whether a constructive dismissal has been made out.

[20] It will be convenient for the Authority to consider first of all the period of the employment up to the incident with the loader tyre puncture and then look at the issues around that incident.

The early employment

[21] It became absolutely apparent from my questioning of the witnesses at the investigation meeting that Mr Molloy and Mr Macfarlane had fundamentally different views about the nature of Mr Macfarlane's role. For his part, Mr Macfarlane pointed to the relevant clause in his employment agreement which I set out in full at para.5 of the determination above. Mr Macfarlane says that that provision makes clear that he is in charge of the landscape gardening responsibilities at the development (including

the purchase of plants and the establishment of a nursery) and that the staff working in the landscaping area would report to Mr Macfarlane.

[22] It seems to me that this all true, as far as it goes, but the reality is that the total number of full time staff was four and Mr Molloy, the governing director of the employer, was physically present on the site for much of the time and was very much in charge of the whole project. Indeed it was Mr Molloy's vision that was the central feature of the employer's development of the Franz Joseph Glacier site. From Mr Molloy's perspective then, his evidence was that *he made the decisions if he was physically present* and when pressed by me, Mr Molloy confirmed that he saw Mr Macfarlane active as a foreman in a practical sense only when he (Mr Molloy) was not physically present.

[23] There is, of course, a fundamental difference in these points of view. For Mr Macfarlane, he thought that his employment agreement effectively gave him a decision-making role in the management of this whole complex, at least so far as the landscape gardening activities were concerned and the staff associated with that area. For Mr Molloy, Mr Macfarlane was simply a *go to* person for staff involved in landscaping work if Mr Molloy was not present to make the decision or decisions.

[24] The employment agreement is perhaps not particularly artfully worded. Given the total size of the workforce engaged by Callery and the obvious hands on involvement of Mr Molloy, the concept of having a foreman with anything other than a minimalist role must be called into question. Mr Molloy chose to emphasise that Mr Macfarlane was paid a foreman's rate (that is, he was paid a higher hourly rate than the other workers) but for Mr Molloy, that higher hourly rate did not translate into any genuine management responsibility.

[25] Mr Macfarlane, on the other hand, no doubt used to working in enterprises with larger staff, imagined that being foreman carried with it some level of professional responsibility. But from Mr Molloy's evidence, that was never in contemplation.

[26] Of course, both parties say that their interpretation of the nature of the relationship is consistent with the terms of the employment agreement and sadly I agree. As I say, the agreement is not artfully worded (at least in relation to this

particular provision) and it is, in my opinion, capable of being construed to allow both interpretations.

[27] On the face of it, the ability of these two principal protagonists to communicate with each other adequately must be open to question. Mr Molloy was adamant in questioning from me that he had made it clear to Mr Macfarlane just what the nature of the role was; that is, Mr Molloy claimed to have told Mr Macfarlane that he (Mr Molloy) was always in charge and that Mr Macfarlane's only authority for decision-making purposes was when Mr Molloy was not physically present. Mr Macfarlane was equally adamant that he never got that message. I reluctantly conclude that both men are telling the truth. The whole employment relationship is littered with examples of one party advising the other of a particular matter and the other not getting that message. Yet I am satisfied with the bona fides of both men; as I say, I do not think either of them are mistaken in the evidence they gave. It was simply that, for whatever reason, they had an inability to communicate with each other in a genuinely meaningful way.

[28] By way of further illustration of this conundrum, I note the argument between the two men about whether Mr Macfarlane had ever complained about the nature of his role. Mr Molloy was adamant that Mr Macfarlane had never complained and that the first he (Mr Molloy) knew of the alleged difficulties was when he read the statement of problem. But Mr Macfarlane is equally adamant that he took the opportunity on more than one occasion to line Mr Molloy up and endeavour to convey to him what was going wrong in the relationship from his perspective.

[29] In any event, looking at the plain words of the relevant clause in Mr Macfarlane's employment agreement, it seems to me to provide first for Mr Macfarlane to be designated a foreman, although importantly he has no title in a structural sense as such. He is said to be responsible for *a range of landscape gardening duties and any other ancillary duties required in connection with the business*. There is no suggestion about how that *range* or *other ancillary duties* is to be determined.

[30] Then the provision goes on to say that the foreman is in charge of *the landscaping team and landscaping design*. But with a total staff of four (including Mr and Mrs Macfarlane) it seems axiomatic that the leadership role is relatively limited, especially when one of his *staff* is his wife. The inclusion of landscaping

design in this second clause is one area where there seems to have been limited disputation where Mr Macfarlane had a free hand and where his work was roundly applauded. Similarly, the following subclause relating to the build up of the nursery, is another area where there does not seem to have been disputation on the evidence before the Authority.

[31] Finally, the final subclause refers to *working alongside the director ... in decision-making regarding the choice and purchase of machinery* Again, this seems a very narrow window in which the director (Mr Molloy) and the foreman (Mr Macfarlane) would have an engagement. Nowhere in the clause or indeed elsewhere in the employment agreement is it made explicit that Mr Molloy is a hands on director whose vision the whole project is and who would be making day-to-day decisions on all matters. Obviously, the agreement would have been more satisfactory and created less difficulty for both parties if there had been a clearer explanation of both parties' roles and of the relationship the one to the other. In particular, an employment agreement of this type in a new project such as this, ought, in my opinion, to have a clear job description attached to it which delineates the authority of the incumbent, his or her reporting lines, and the operational expectations of the role. Mr Molloy's evidence (which I accept) was that he discussed those matters in a general way with Mr Macfarlane when the pair of them met before the employment relationship commenced. However, I also accept Mr Macfarlane's evidence that he did not understand the structure of the employment in the way that Mr Molloy is certain he explained it.

[32] In my opinion, both parties should have been alert to the risk that they were talking past each other and both should have been more insistent on careful documentation of what was contemplated. Having said that, I accept without reservation that both Mr Molloy and Mr Macfarlane are fundamentally practical hardworking people who tend to want to resolve differences orally rather than by writing, but the reality is that without adequate record of what was said or what was intended by words used, misunderstandings of the sort generated here can develop a life of their own.

[33] The short point is that Mr Macfarlane's evidence was that he and his wife were keen on the challenge offered by this new role, saw it as an opportunity for them to get started both on the home ownership ladder and in the first of their joint

enterprises, having just commenced their married life together, but that the experience quickly soured when they realised that the employment relationship they thought they were embarking upon was not in fact what they had contemplated at all. Mr Macfarlane in particular clearly had difficulty accepting the appropriateness of direction from Mr Molloy on matters that Mr Macfarlane frankly considered himself to have greater expertise at. For his part, Mr Molloy of course simply regarded Mr Macfarlane as insubordinate and unwilling to follow directions of the employer made legitimately for the greater overall good of the enterprise.

[34] Once the relationship began to sour for the Macfarlanes (and Mrs Macfarlane was naturally supportive of her husband), it seems to me that it was inevitable that the relationship would reach a tipping point at which the confusion over roles would be resolved one way or the other.

The punctured tyre incident and its aftermath

[35] That tipping point was the response to the punctured tyre incident which I have already described earlier in this determination. It is clear from Mr Molloy's response and his confirmation at my investigation meeting that he was angry about the tyre incident and he made that perfectly clear at the time. He tried to deal with his own anger by sending Mr Macfarlane away to attend to other duties so that the two of them had some personal space, but of course that plan backfired when Mr Molloy became aware that Mr Macfarlane was not doing precisely what Mr Molloy had wanted him to do so there followed a further confrontation between the two men around Mr Macfarlane's alleged failure to follow lawful instruction.

[36] Of course, these successive outbursts between Mr Molloy and Mr Macfarlane (and my sense of it is that Mr Macfarlane was very much the recipient of the outbursts rather than a participant in any equal sense) led to steadily increasing tension in the workplace and unhappiness for Mr and particularly Mrs Macfarlane. Mrs Macfarlane was naturally anxious about the effect these altercations were having on her husband and was herself much affected by Mr Molloy's bad temper. Certainly after the first outburst, Mrs Macfarlane was in tears and her husband gave her a job to do by herself which he hoped would enable her to compose herself. Mr Molloy was disgruntled about that decision as well and regarded that as part of the insubordination because he had asked Mr Macfarlane to take all of the landscaping staff (which included Mrs Macfarlane) and do something else (namely collecting the tussocks).

[37] At the end of that day, there was a further intemperate exchange between Mr Molloy and Mr Macfarlane in which Mr Molloy indicated that the matter would be dealt with the following day, again seeking to put distance between himself and Mr Macfarlane and to deny Mr Macfarlane the opportunity of talking about it at the time. I am satisfied that Mr Molloy was doing this not as a means of avoiding ventilating the issue but as a means of giving him time to be apart from Mr Macfarlane who clearly had irritated him significantly. My judgment is that Mr Molloy knows that he has an uncertain temper and that when he is in that frame of mind he seeks to deflect the negative consequences by removing the irritant insofar as that is possible. By Mr Macfarlane's continued insistence on trying to deal with the matter on the spot, Mr Molloy would say that Mr Macfarlane was effectively exacerbating the problem.

[38] The following morning there was a discussion, as I have already noted, between the two principal protagonists, and then an all staff discussion. The only aspect of that period that I wish to traverse is the fundamental question of whether Mr Molloy acted so as to disestablish Mr Macfarlane's foremanship, or not. I am satisfied on the evidence before me that Mr Macfarlane may well have thought that the creation of a new foreman in Mr Healey was effectively demoting him, but I am satisfied that Mr Molloy intended no such thing. I do not accept Mr Macfarlane's evidence that Mr Molloy told him in the private meeting on that final day that he was appointing someone else to be foreman and that Mr Macfarlane was entitled to understand that as a demotion. I am satisfied on the evidence before the Authority that Mr Molloy intended to create a new foreman but not to disestablish the old one; that Mr Molloy intended the new foreman (Mr Healey) would be responsible for construction and that Mr Macfarlane would continue to be responsible for the landscaping.

[39] In the end, the basis of the Macfarlanes' claim for constructive dismissal rests on Mr Macfarlane's intemperate behaviour after the puncture of the loader tyre and the allegation that Mr Molloy somehow disestablished or demoted Mr Macfarlane at the meeting with all the staff on 19 September 2008. I accept that Mr Molloy was angry at the damage to the loader and that he sounded off extensively once the puncture became known to him. On the face of it, Mr Molloy has an uncertain temper but, as I have indicated above, I think he has sufficient insight to endeavour to manage

his own behaviour by trying to separate himself from the source of his anger to give him time to cool down.

[40] However, I am completely unmoved by the contention that the creation of a new foreman somehow demotes Mr Macfarlane and the role that he held as foreman. I think in the context of a series of unpleasant exchanges with Mr Molloy, it is easy to understand how the Macfarlanes would have reached the conclusion that they did, and that other staff who were also affected by Mr Molloy's display of poor humour might also have concluded that Mr Molloy was doing away with Mr Macfarlane's foreman role. But I am satisfied that that is not what happened, and equally I am satisfied that a reasonable observer looking at the facts dispassionately would not be able to conclude that Mr Macfarlane's role was disestablished.

[41] It follows that the only basis on which I think the Macfarlanes are able to allege that a constructive dismissal occurred is on the basis of Mr Molloy's bad temper. When Mr and Mrs Macfarlane attended on Mr Molloy and presented him with their resignations, they had spent the previous three days thinking about the issue and deciding what to do. They saw Mr Molloy on 23 September 2008 and presented him with their two resignations dated the previous day which they had taken off from work. Mr Molloy gave evidence before the Authority that he endeavoured to talk them out of resigning their positions and that he continued to have work for them to do and wished them to remain in the employment, but he says they were adamant they wished to go and on that basis he felt there was nothing else he could do. It was put to him by the Macfarlanes' advocate that he ought to have addressed the various issues listed in Mr Macfarlane's letter of resignation but Mr Molloy's view was that Mr Macfarlane wanted to go and there was little point in him trying to deal with those matters after the horse had bolted.

[42] It seems to me on the evidence before the Authority that the only basis in law on which the Macfarlanes can base their claim is the belief that Mr Molloy's display of ill temper at the end of the employment relationship was so significant as to create a breach of duty so great as to allow for resignation as a likely consequence. I do not accept that equation. I think Mr Molloy is a practical hardworking person who has probably been used to getting his own way in his own projects and his ill temper when things go wrong, while no doubt a character flaw, is not so great an impediment as to preclude successful employment relationships. No doubt it would have been better if

Mr Molloy had not exploded about the punctured tyre, but I do not see it as a foreseeable consequence of his behaviour that the Macfarlanes would promptly tender their resignations. Had I been satisfied that the final staff meeting undermined and belittled Mr Macfarlane (as he claimed), my conclusion on the constructive dismissal may have been different, but, on the footing that the only ground for complaint is Mr Molloy's temper, I am not persuaded that a constructive dismissal is made out.

[43] I had thought it might assist my investigation to talk by telephone to some other parties who may have witnessed significant event. In the event, I am satisfied that, after mature reflection, the issues I needed to decide were able to be addressed by making judgments about the evidence of the principal protagonists. Accordingly no further contacts have been required to be made.

Costs

[44] Normally I would reserve the question of costs. However, in the present case, Callery was not legally represented and the Macfarlanes had representation, although they were unsuccessful in their claim. It seems appropriate in the circumstances to direct that costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority