

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

5045362
CA 26/08

BETWEEN TERENCE JOHN FARRELL
 Applicant

AND AGE CONCERN
 MARLBOROUGH
 INCORPORATED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Terry Farrell in person
 Peter Zwart, Advocate for Respondent

Interview: 4 September 2007

Investigation Meeting: 7 November 2007 at Blenheim

Determination: 14 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Terry Farrell worked for Age Concern Marlborough Incorporated but was dismissed on 10 August 2006 for alleged serious misconduct.

[2] Mr Farrell lodged a statement of problem in which he asked the Authority to investigate his claim of *unjustified constructive dismissal* and *outstanding income owed*. Despite Mr Farrell's description of his grievance it was clear that ACMI had dismissed him. During a phone conference it was agreed that the Authority would investigate whether the dismissal was justified. The serious misconduct alleged is that Mr Farrell made amendments to ACMI's Constitution without authorisation and that there was a loss of trust and confidence in Mr Farrell arising from that conduct. It is also said that other events caused a breakdown in the working relationship, particularly with ACMI's chairperson (Geoffrey Powell).

[3] To resolve the problems it is necessary to first explain how ACMI came to be established and what arrangements were agreed as to Mr Farrell's employment. That background will be used to determine Mr Farrell's arrears claims. Next, I will explain how the society's Constitution came to be amended. There is a conflict in evidence between Mr Farrell and Mr Powell about that which must be resolved. Some Constitutional amendments were apparently only discovered in May 2006 giving rise to the first part of the alleged serious misconduct. I will also outline the difficulties between Mr Farrell and the Executive Committee (particularly the chairperson). Both issues were raised with Mr Farrell and it is necessary to explain the process by which ACMI came to its decision to dismiss him. I will then determine whether the dismissal was justified by applying the statutory definition of justification to the facts as found.

Establishing ACMI

[4] Mr Farrell was employed by a Nelson based society to help provide *Age Concern* services in Marlborough. That society made Mr Farrell redundant effective from 30 July 2005 and closed its Blenheim office. Mr Farrell and others organised a public meeting in Blenheim to promote the establishment of a replacement *Age Concern* society for Marlborough. The first meeting was on 12 July 2005 and a second meeting was held on 20 July 2005. From these meetings a committee, a chairperson and other officers were elected. Various steps were reported and proposed during the meetings to further the establishment of a society. Mr Farrell was selected as the Blenheim based field worker on the understanding that he would be paid when funding was established. He also joined ACMI as a member.

[5] By 26 July 2005 an application for incorporation of the society in the name of *Age Concern Marlborough Incorporated* including a Constitution had been received by the relevant government agency. Mr Farrell drafted the Constitution and he, Mr Powell and another person signed the documents that were sent for registration. The registration is referred to in the minutes of ACMI's meeting held on 17 August 2005.

[6] *Age Concern New Zealand Incorporated* is a federation of regionally based organisations working for the rights and wellbeing of older New Zealanders. ACMI wrote to the New Zealand society seeking affiliation. In response the New Zealand society said that affiliation was not available until March 2006 at the earliest and that ACMI had to stop using the title *Age Concern* until it did become affiliated. Mr

Powell contacted committee members and it was decided to change the name of ACMI to *Community Aged Services Marlborough Incorporated*.

[7] Mr Farrell had the existing Constitution on a computer file since he had compiled the first Constitution. He and Mr Powell spoke about the changes required. There is a sharp difference in evidence between them on the point. Mr Farrell's evidence is that he and Mr Powell were together at ACMI's office as he worked at the computer making appropriate amendments. Mr Powell's evidence is that he was not present when Mr Farrell made these changes. It is common ground that a printed version of the new Constitution was provided to Mr Powell. That document was signed on 12 September 2005 by Mr Farrell, Mr Powell and the Secretary. They also initialled each page. Mr Powell next made a statutory declaration before a deputy registrar at the District Court in Blenheim that the alterations to the rules of the society reflected in the new Constitution had been made in accordance with the rules of the society. Mr Powell sent the new Constitution and statutory declaration to the Registrar of Incorporated Societies who received that material on 15 September 2005.

[8] The July 2005 Constitution provided for its alteration as follows:

21. *ALTERATION TO CONSTITUTION AND RULES:*

The Constitution and Rules or any part thereof may be altered, added to or rescinded at any general meeting or a special general meeting of members PROVIDED THAT no such alteration, addition or rescission shall be made unless notice of motion providing for the same has been sent to members fourteen (14) clear days prior to the meeting and the resolution is carried by two-thirds of members present PROVIDED HOWEVER that any alterations, additions or rescissions to the Constitution and Rules of Age Concern do not change its charitable nature.

[9] No general or special meeting had been called nor had a notice of motion been given concerning the changes to the July Constitution. The Minutes of the next meeting of ACMI held on 19 October 2005 simply note correspondence to IRD advising of the name change and enclosing the *revised constitution*.

Mr Farrell's employment

[10] As early as July 2005 ACMI intended to begin paying Mr Farrell once it had secured funding. That funding was received in late October 2005. It is common ground that Mr Farrell was paid for 10 hours per week as of 5 October 2005 and 15 hours per week from February 2006.

[11] There is a signed employment agreement dated 28 November 2005. Clause 5 deals with hours of work. Clause 5.1 says that the hours of work are not less than fifteen per week but subject to availability of funding and negotiation. Clause 5.2 permits variation to the hours of work by agreement or by the employer following consultation subject to reasonableness and a ten hour per week minimum. Although not recorded in writing it was settled in October 2005 that Mr Farrell would initially be paid for 10 hours per week. Later there was agreement to increase those hours from 10 to 15 per week. The increase is recorded in Minutes of a meeting dated 8 February 2006.

[12] The first part of Mr Farrell's arrears claim is for pay from July to 5 October 2005. However, there is no reliable evidence of any agreement at the time for Mr Farrell to be paid between July 2005 and October 2005. The minutes of the 20 July 2005 meeting record *Plan Same conditions of employment for one year to be offered to fieldworkers subject to funding*. The funding stream commenced in October 2005 and the paid employment started then as well. The claim therefore fails.

[13] The second part of Mr Farrell's claim is for an extra 5 hours pay per week between 5 October 2005 and February 2006. Again there is no reliable evidence of any agreement at the time for Mr Farrell to be paid 15 hours per week during that period. The claim must fail.

[14] To some extent Mr Farrell's arrears claim is for payment now of accumulated hours worked by him in addition to the paid hours. The employment agreement includes a time in lieu provision permitting paid leave for hours worked over and above the contracted hours. However, that operated by agreement and there is no evidence of any such agreement that Mr Farrell would be entitled to paid leave and certainly no agreement that he would be entitled to a payment at the termination of his employment. Accordingly, this claim also fails.

[15] Having rejected Mr Farrell's arrears claims I will turn to the initial allegations of misconduct.

Changes to the Constitution

[16] Various difficulties arose between Mr Farrell and Mr Powell from late 2005, more of which later. However, in that context, in April 2006 Mr Farrell accused Mr Powell of making a false declaration being the declaration that accompanied the

registration of the September 2005 Constitution. Mr Farrell then went on pre-arranged leave for three weeks from 19 April 2006.

[17] Mr Powell's evidence is that ACMI became aware during Mr Farrell's leave that the changes to the Constitution registered in September 2005 were more extensive than just changing the name of the society wherever it appeared in the July Constitution. Stephanie Moses is a case worker with Marlborough Community Law and assisted with the establishment of ACMI. Her evidence is that she learnt from Shirley Thompson in about May 2006 about the additional changes to the Constitution. Ms Moses then produced an analysis setting out the changes. Mr Powell says that there was then an informal meeting to discuss matters.

[18] There are Minutes of a meeting of the society held on Thursday 4 May 2006. At that meeting a motion was carried *That the name Age Concern Marlborough Incorporated be changed to Community Aged Services Marlborough until further notice*. The meeting apparently lasted five minutes and no other business was conducted. This meeting was not convened in accordance with the rules in either the July or the September Constitution. It was intended to blunt Mr Farrell's criticism about Mr Powell's false declaration.

[19] Mr Farrell later became aware of the 4 May 2006 meeting. He referred to it in his report to the Executive Committee meeting on 24 May 2004. Mr Farrell left this meeting before it ended. After Mr Farrell left, Mr Powell offered to resign but others present persuaded him to remain.

[20] Meetings were convened on 14 June 2006. By that time, the New Zealand society had approved the use of the words *Age Concern* in the name of ACMI. The first meeting resolved to change the name back to *Age Concern Marlborough Incorporated* and to readopt the original Constitution. Mr Powell as chairperson prevented Mr Farrell from putting other resolutions and there was an angry exchange between the two men before Mr Farrell left. The first meeting was followed by another meeting. The forthcoming annual meeting was discussed, then issues concerning Mr Farrell were raised. By that time, some initial legal advice had been sought about the general situation with Mr Farrell and arrangements to obtain further advice were reported.

[21] The 14 June 2006 meetings were preceded and followed by correspondence between Mr Farrell and ACMI regarding a number of issues reflecting the tensions in the relationship.

[22] After further advice was obtained, ACMI's solicitor wrote to Mr Farrell on 30 June 2006. The letter says that the society properly resolved to change its name; that Mr Farrell was tasked with arranging the appropriate documentation; that the new Constitution contained unapproved alterations; and that Mr Farrell was either grossly negligent or had deliberately changed the rules without the knowledge or approval of others. These actions were said to potentially amount to serious misconduct. The letter also sets out various other issues about the relationship between Mr Farrell and ACMI. This letter initiated a disciplinary process.

The investigation

[23] Mr Farrell was required to attend a meeting on 6 July 2006 to respond to the serious misconduct allegations. That meeting was later deferred to 14 July 2006, then to 28 July 2006. Mr Farrell did not attend any meeting although he did respond in writing at least on some points.

[24] Following Mr Farrell's non attendance, ACMI's solicitor wrote to him on 4 August 2006 as follows:

1. Rules of Society – name change

- 1.1 *As set out in my letter to the Amalgamated Workers Union on 24 July 2006, you had as at July 2005, accepted employment with Age Concern Marlborough. This was conditional upon funding becoming available. Therefore in terms of the Employment Relations Act you were an employee, particularly as you were a person intending to work.*
- 1.2 *The only matter that you were authorised to do in regard to the Rules of the Society was to arrange for the Rules to be altered to show the altered name of the Society.*
- 1.3 *The Society now finds that the extensive changes to the Rules have been registered. Such changes to the Rules have been highlighted to you. None of these changes, with the exception of the name change, were authorised or discussed by the Committee or the members of the Society.*
- 1.4 *The only explanation that has been received from you as to why or how this occurred are in your letter of 10 July 2006 where you state that any changes were made to adopt a new Constitution for a completely new organisation. You state*

that there are typographical errors. You state that the mistakes are not deliberate.

1.5 *The Committee is not concerned with regard to typographical errors but is concerned in regard to significant changes that were placed in the document. The Chairman in signing the document and the declaration only checked the changes for the name change, no other change was discussed or authorised.*

1.6 *In the absence of any explanation the Committee views this as a deliberate step to alter the Rules without the recommendation of the Committee or the authority of the members.*

1.7 *As such these actions alone amount to serious misconduct. The employer cannot hold the degree of trust and confidence that he needs to have in you with such a serious occurrence.*

3. Conclusion

3.1 *In regard to the finding that you deliberately allowed the alteration of the Rules to be made, this has resulted in a finding that it was deliberate by you. This is a finding of Serious Misconduct.*

3.2 *Combined with the other issues to which no, or every little improvement has occurred since the letter of 30 June 2006, the Committee is of the view that it simply cannot work with you. Indeed it appears to be that you wish to operate this Society to the exclusion of the Committee. As stated that Committee has statutory obligations which it must adhere to and which it cannot abdicate to you or anybody else. There is a lack of trust and confidence in your ability to work with the Committee and the Chairperson and to this end the Committee's decision is that the termination of employment would be appropriate.*

3.3 *However, the Committee will not make that decision at this time as mediation has been agreed to and set for 10 August 2006. As you chose not to attend the meeting on 28 July 2006, there may be information which the Committee is unaware of which could be made available to mediation. Therefore it will make a final decision at that time.*

3.4 *However, these matters are being viewed extremely seriously.*

[25] Despite mediation, Mr Farrell and ACMI were not able to resolve their difficulties and his summary dismissal was confirmed in a letter dated 10 August 2006 from ACMI's solicitor.

Findings about changes to the Constitution

[26] To return to the point about who was involved in making changes to the Constitution, it was accepted in evidence by Mr Farrell that his claim at the investigation meeting that Mr Powell was present while changes were made on the computer had not been raised earlier by him. It was not mentioned in Mr Farrell's correspondence to the Executive Committee or the solicitor, nor was it mentioned by Mr Farrell when I interviewed him prior to the investigation meeting. If Mr Powell had been present while Mr Farrell made changes to the Constitution that would have been the simple defence to the allegation of misconduct. Taking Mr Powell's denial that he was present together with the circumstances of Mr Farrell's claim that he was, I find that Mr Powell was not present when Mr Farrell made the changes to the document that was sent to the Registrar of Incorporated Societies later by Mr Powell. I also accept Mr Powell's evidence that he did not actually know until May 2006 that the changes to the Constitution extended beyond removing references to *Age Concern*.

[27] Mr Powell is a competent person who is very experienced in leadership roles within voluntary organisations. He initialled every page of the September Constitution and his evidence, which I accept, is that he checked it for the required name changes. He did this at home with the printed copy that he later sent to the Registrar of Incorporated Societies. Many of the clauses in the July Constitution included reference to *Age Concern*. These references were mostly changed to *Community Aged Services Marlborough* in the September Constitution. It follows that Mr Powell must have looked at and read most clauses in the new Constitution. The clauses that Mr Powell must have read to check for name changes also include many of the amendments which are the substance of the complaint leading to Mr Farrell's dismissal. In short, Mr Powell should have noticed at least some of the additional changes.

[28] It is important to have regard to the nature of the unapproved changes in the Constitution. They reflect a re-editing or re-wording of the July Constitution with a range of effects from negligible to significant. At the significant end of the spectrum for example the Executive Committee's power to dispose of property without general meeting approval was capped at property valued below \$2,000.00 rather than

\$10,000.00. Some changes appear to be the result of mistakes made by Mr Farrell in this process of re-editing the July Constitution.

[29] I will now turn to the difficulties between Mr Farrell and ACMI as raised in the solicitor's letter of 30 June 2006.

Relationship problems

[30] The solicitor's letter identified several areas of complaint. First, Mr Farrell was cautioned not to continue training the person he wanted as a replacement for ACMI's other paid employee. The letter pointed out that employment decisions were for the Executive Committee. The context of this was an earlier disagreement with Mr Farrell about his replacement for a period of leave as well as Mr Farrell's attempts to have the Executive Committee increase his own hours of employment.

[31] A related issue arose from Mr Farrell's correspondence of 21 June 2006. In that letter he refers to his excessive workload and ACMI's failure to resolve this. He gave the example of the death of a person who could have been properly supported at that time if ACMI had increased paid staff hours. Mr Farrell described Mr Powell as having an *irresponsible manner ... who has continually dictated and manipulated the Committee so as to have decisions made that satisfies his own agenda ... and now threatens the safety of all our clients*. Reference was made to the likely effects if this became public. This caused ACMI via the solicitor's letter to caution Mr Farrell about his good faith obligations and his duty of confidentiality.

[32] The solicitor's letter mentioned the Committee's concern over the lack of proper reports and information. The letter pointed out the statutory and constitutional obligations of the Executive Committee regarding the affairs of the society. This was in response to Mr Farrell's apparent reluctance to cooperate with the Committee who he saw as improperly interfering with his day-to-day work. Mr Farrell was required to provide a key to allow Committee members to access the office in his absence. He was also required to provide the society's membership list. Both these issues had been the source of tension between Mr Farrell and ACMI.

[33] In the letter dated 4 August 2006 setting out reasons for a dismissal, ACMI said that it could no longer work with Mr Farrell because of its conclusion about the unauthorised rule changes and there being little or no improvement regarding these other issues referred to in its 30 June 2006 letter.

[34] In evidence Mr Powell said that Mr Farrell was dismissed for two reasons, the second being *the complete breakdown in the working relationship* He mentioned in evidence a number of matters not referred to in the solicitor's letters sent during the disciplinary investigation. In November 2005 some comment by Mr Farrell was reported in the local paper. That resulted in several complaints to and resignations from ACMI. This was raised at the December 2005 ACMI meeting. The Minutes record that there was *A strong discussion between Geoff and Terry*. The meeting resolved that Mr Farrell had to consult with Mr Powell before making any media comment. After the meeting Mr Farrell continued to press the point that his comments were justified and ACMI subsequently resolved to include his justification in its minutes.

[35] Mr Farrell considered that privacy concerns justified him limiting access to ACMI's office and membership database even in the face of specific written requests from ACMI.

[36] From these disagreements over specific issues, there had developed between Mr Powell and Mr Farrell something of a power struggle regarding the day to day affairs of ACMI.

Justification for the dismissal

[37] Whether the dismissal was justified must be determined objectively by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[38] Mr Farrell held strong opinions and his conduct was truculent when others did not agree with him, at least from around November 2005 over a range of issues. This provided the background for the serious misconduct allegation in respect of the September Constitution. However, I do not accept that a fair and reasonable employer would have concluded that Mr Farrell actions regarding the September 2005 constitution amounted to serious misconduct justifying his dismissal.

[39] At the time Mr Farrell was a person who was leading the establishment of ACMI, he was an active member of the society and he was a person intending to work in the sense that paid employment would start in due course once funding became available. As a matter of fact, the arrangement between Mr Farrell and Mr Powell

about changing the name of the society was much more connected to the first two roles than to Mr Farrell's future employment.

[40] Regarding dismissal for misconduct away from work, I am referred to *Murray v Attorney-General* [2002] 1 ERNZ 184. In that case the applicants were charged with and pleaded guilty to benefit fraud. The offences occurred before their employment with IRD, the charges were laid during the employment and the convictions entered shortly after the employment ended. IRD learnt of the charges and dismissed them for serious misconduct shortly before the convictions. It was not a case about false or misleading answers during pre-employment interviews. IRD was not able to rely on the benefit fraud as serious misconduct because *An employer cannot say, in reliance on some past or historical conduct, that that represents misconduct in employment.* The Court said that, to be a ground for summarily dismissing an employee, it *must be misconduct that occurred temporally while the employment contract was on foot although it need not have occurred literally during working hours.* Applying these principles to the present case, I accept that there remained a nexus with the employment arrangements.

[41] To justify dismissal, usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship: see *Northern Distribution Union v BP Oil Ltd* [1992] 3 ERNZ 483 (CA). That is a question of fact and degree in the particular circumstances.

[42] ACMI was still establishing itself in September 2005. In that context, Mr Farrell saw himself as still developing the constitutional framework for the society as evidenced by the tone of his initial response on 10 July 2006 to ACMI's solicitor. There was nothing underhand, misleading or deceptive about what Mr Farrell did and he thought he was acting in the interests of the society. It is fair to say that there was significant informality in the operation of the society at the time and later. As at September 2005, the informality is evidenced by the manner of the decision to change ACMI's name and Mr Powell's disregard for the content of his statutory declaration. As late as May 2006 Mr Powell and others were prepared to overlook constitutional requirements in favour of expediency. Certainly no-one had seen the need to refer to the constitution before then when exercising governance over the affairs of ACMI or the unapproved changes would have come to light sooner. At least on Mr Powell's part it is difficult to see that the informality arose out of ignorance.

[43] Given the informality which characterised the governance of ACMI, Mr Farrell's conduct in changing the constitution without prior approval could not have deeply impaired or been destructive of trust and confidence. By May 2006 there had arisen significant tension on other issues between Mr Farrell and Mr Powell in particular. What happened here was that Mr Powell seized on the unapproved constitutional changes to resolve the tension by dismissing Mr Farrell.

[44] I do not accept that the tension between Mr Farrell and Mr Powell (or others) was such as would justify dismissal on its own. I am referred to cases such as *NZ Fire Service Commission v Reid* [1998] 2 ERNZ 250. There the employment relationship had become *completely dysfunctional* with no or insufficient prospect of improvement. The employer had attempted to fix the problems but the employee rejected these attempts. The solicitor's letter of 30 June 2006 gives a good indication of the seriousness of the tensions as at that time. The issues apart from the unapproved changes to the Constitution were not said to constitute an allegation of serious misconduct or incompatibility justifying dismissal. They were matters of concern for discussion and resolution. Indeed a number of them were historical and had been resolved or were no longer relevant.

[45] Because Mr Farrell's actions regarding the Constitution and the tensions when assessed objectively could not amount to serious misconduct Mr Farrell was unjustifiably dismissed and therefore has a personal grievance.

Remedies

[46] Mr Farrell contributed to the situation giving rise to his grievance. He should have limited the September changes to the Constitution to those requested or discussed additional amendments with Mr Powell or others. In addition, Mr Farrell fuelled the tension with Mr Powell by his inflammatory language, truculent behaviour and an inability or unwillingness to distinguish his obligations as an employee from his rights as a member of ACMI. However, Mr Farrell is not to blame for the mischaracterisation of his conduct as amounting to serious misconduct nor can he be blamed for Mr Powell's reliance on that complaint to bring an end to the relationship and tension that had developed between the two men. Looked at in this light, it is appropriate to reduce any remedies by 50%.

[47] I accept that Mr Farrell is still angry because of his belief that Mr Powell orchestrated the dismissal. He has been excluded from work that was important to him and from participation in an organisation that he helped establish. However, any award must also reflect the circumstances of ACMI, an organisation with limited resources. Bearing that in mind and having regard to the reduction of remedies referred to above, I order Age Concern Marlborough Incorporated to pay compensation of \$2,500.00 to Mr Farrell.

[48] There is no claim for reimbursement of lost remuneration.

[49] I have already rejected Mr Farrell's arrears claims.

[50] Costs are reserved. Ordinarily, a person who is successful is entitled to an award of costs as a contribution to any legal costs incurred. However, Mr Farrell may not have engaged a professional representative so might not be entitled to any award. If there is a claim for costs by either party, that must be made in writing within 28 days with a copy provided to the other party who may then have 14 days to reply.

Philip Cheyne
Member of the Employment Relations Authority