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## Fox v Atlas Quarries Limited (Auckland) [2007] NZERA 186 (28 August 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 265/07 5052265

BETWEEN GRAHAM FOX

Applicant

AND ATLAS QUARRIES LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

Determination:

Leon Robinson

Applicant In Person

James Turner for Respondent

17 April 2007

7 May 2007 1 June 2007 12 June 2007

28 August 2007

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant Mr Graham Fox ("Mr Fox") asks the Authority to investigate the way in which his employment with the respondent Atlas Quarries Limited ("Atlas") ended. He says he was forced out of his employment by Atlas. Atlas says Mr Fox resigned voluntarily from his employment. Mr Fox and Atlas were not able to resolve their differences at mediation.

#### The issues

[2] The situation Mr Fox alleges is known as a constructive dismissal. In determining the merits of this application, I consider these issues:-

(i) Did Mr Fox resign?;

(ii) Was Mr Fox's resignation caused by a breach of duty on the part of Atlas?;

(iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

#### A resignation?

[3] Mr Fox's last day at work was Tuesday 18 July 2006. Mr Fox told his supervisor Mr Lorne Tito ("Mr Tito") that he was sick and that he was going home. Mr Fox did not appear physically unwell to Mr Tito. Mr Fox shook Mr Tito's hand and Mr Tito asked him what was happening. Mr Fox said "you'll soon find out." Mr Tito asked if Mr Fox was coming back or whether he

would be back tomorrow. Mr Fox repeated again "you'll find out soon enough." Mr Fox then left.

[4] A few days later Mr Fox sent Mr Tito a medical certificate which advised that Mr Fox was not fit for work and would be away from work for a period. Mr Tito communicated the situation to Atlas General Manager Mr Gary Olsen ("Mr Olsen"). Thereafter, only Mr Olsen remained in contact with Mr Fox.

[5] Mr Olsen telephoned Mr Fox a number of times thereafter. When he spoke to Mr Fox on 10 August 2006, Mr Fox advised that he would not be returning to work. He did not tell Mr Olsen the reasons why he was not returning. Mr Olsen told Mr Fox he would be away for two weeks overseas and if he wished, they could discuss the matter further. There was no further discussion between them.

[6] Mr Fox subsequently provided a letter dated 7 September 2006 to Mr Olsen. That advice stated :-

*Dear Garry,*

*I am writing this to inform you of several personal grievances that occurred while I was employed at Atlas Quarries as batcher, you will be aware of most of them, I was delaying the writing of this letter because on the 24/8/06 you told me that you would call me back to discuss me quitting, but you never did.*

- 1. 1. In regards to the position of concrete plant manager which I applied for you told me to prepare a report on how I was going to achieve the goals that I had set down and when I did this you told me that I would never get the job because I had spoken to Steve Collie about it, also you told me that the job does not exist at Maungaturoto. Which is untrue according to the board of Atlas.*
- 2. 2. No support from you as general manager in regard to running the concrete plant, staff issues, supplying of legal employment contracts.*
- 3. 3. On many occasions not being paid for time worked, time that I was clocked in for.*
- 4. 4. On an occasion that I was called a dumb employee on my pay slip.*
- 5. 5. In about April of this year you threatened me with my employment at Atlas and was going to give me a written warning on a trumped up charge, you didn 't give me one, you just caused a immeasurable amount of stress to me and my family.*
- 6. 6. At several meetings you accused me of sabotaging the concrete plant, undermining team moral and you indicated to me that you were going to shut the plant because of me.*
- 7. 7. The failure to control contractor Keith Christian in his attitude, foul mouth, aggressive*

*and damaging behaviour towards me on several occasions.*

*8. Failure to control quarry manager Bill Weston - Arnold in respect of constantly using offensive language directed at me when all I was doing was my job, and discussing personal employment details with other staff members about me.*

*The pressure and stress that was placed on me indirectly by you through Bill Weston-Arnold*

*and Keith Christian caused emotional distress to myself and my family, I had to go to the*

*doctors with the symptoms of insomnia and anxiety I was diagnosed with stress and depression,*

*I am currently on medication for the above as I am unable to cope.*

*I have been nothing but a loyal and dutiful employee to Atlas in the 5 years that I have worked there.*

*In regards to remedying the above grievances I think that financial compensation should be negotiated by mediation between us on the following basis loss of income, stress caused, pay deficiency, withdrawing plant managers job offer.*

*Please respond to this letter within seven days to the above address, failure to do so will result in further action being taken.*

*Yours sincerely [7] Mr Olsen replied by a letter dated 15 September 2006 as follows:-*

*Dear Graham*

*RESIGNATION FROM EMPLOYMENT*

*I note your letter of 7 September 2006 to me as manager of Atlas Quarries Limited. When you resigned from your employment*

with Atlas over the telephone on 10 August 2006 you said you were not coming back to work at all. I offered you the chance to catch up with me if you wanted to, but told you that I was going away overseas on business matters for two weeks. I only returned to New Zealand on 29 August 2006 and unfortunately I was ill and have had some time away from work. I had intended to call you but your letter has now overtaken events.

I am surprised that you claim you have had several personal grievances while at Atlas. I was not aware of any such grievances. You did not raise any matters with me when I called you (on 3 occasions) to inquire about your health following your absence on sick leave from 18 July 2006. You indicated to me that you were off work on sick leave due to some issues and stress at home, and you then resigned and without prior notice. In response to your points I point out the following:

1. There has never been any position offered by Atlas as "concrete plant manager ". I recall that you put yourself forward for such a role in 2005 when you were working as a batcher and reporting to your supervisor Mr Lorne Tito. I believe you spoke independently to Mr Steven Collie, director. Steven confirmed to me that there was no such role on offer. Had such role existed then there would have been an interview and appointment process.
2. You were employed by Atlas under an employment agreement dated 24 January 2006. At all times you have been able to speak to me (as we have done) regarding your role and employment. In particular I have had to speak with you on a number of occasions regarding your poor relationship and inter-action with other staff, and also with customers and clients.
3. I do not understand your allegation and you have never raised any issue of unpaid wages with me, (nor are any details supplied). You were paid according to your times at work and rate. If you can supply more details of your claim then I will follow this up with the wages clerk.
4. You personally were never called a "dumb employee " on your pay slip. I recall that in 2005 some of the pay slips had short anecdotes or jokes noted on them, and these were sent to all employees, however that practice was stopped.
5. I believe you are referring to a meeting in early April 2006 where I met with you and

other staff members regarding issues that had arisen. Atlas had to respond to complaints from staff, customers and clients regarding your conduct and performance, and we spoke about this together with your supervisor and other employees. Although you were given a formal oral warning, no other disciplinary action was taken.

6. As stated in point 5 above there were matters to address with you. At no time did I indicate that I was going to shut the plant because of you and the plant continues to run and in a harmonious work environment with a good team morale.
7. You never complained to me regarding Keith Christian, who is not an employee of Atlas. I understand that communications between you both were unsatisfactory, and that Lorne Tito actually spoke with Keith to attempt to reconcile matters between you. Keith also complained to Atlas about your poor manner and rude language to him.
8. You again never complained to me regarding Mr Weston-Arnold. As a manager of Atlas he was required to speak with you from time to time regarding your role, work matters and manner.
9. I was concerned when you took a period of sick leave however you did not indicate that this was due to your employment and your medical certificates did not indicate it was work-related. You never raised any matters with me when I called you, or when you said you were leaving the employment of Atlas.

I hope that this reply addresses the points you make. Having regard to the points made above Atlas has no obligation to pay you compensation and it declines to do so. It will resist any formal claim and it will investigate the possibility of a claim against yourself. Atlas and I hope that you will direct your resources to your new endeavours and we wish you well for the future. Yours sincerely Gary Olsen General Manager Atlas Quarries Ltd

**[8] I find that Mr Fox resigned from his employment when he told Mr Olsen over the telephone on 10 August 2006 that he would not be returning to work. The first issue is answered in the affirmative that Mr Fox did resign.**

**Was Mr Fox's resignation caused by a breach of duty on the part of Atlas?**

[9] Both parties owe to each other a duty of good faith. That duty is imposed on the parties by [section 4](#) of the [Employment Relations Act 2000](#). The duty of good faith is wider in scope than the implied mutual obligation of trust and confidence.

[10] Mr Fox proffers to the Authority an extended historical narrative of largely unparticularised complaints over the entire course of his relationship with Atlas since April 2001. I find that Mr Fox's letter of 7 September 2006 was the first and only occasion he raised a personal grievance with his employer. I shall regard that advice as informative of the allegations of personal grievance. Mr Fox says that he was forced out of his job by Atlas.

*Concrete plant manager*

[11] There was no application process for a concrete plant manager because there was no actual vacancy. Mr Fox's own evidence is that in about June/July 2005 Mr Olsen told Mr Fox there was going to be managers in place for every department. In November 2005 Mr Fox submitted to Mr Olsen an employment agreement as an application for a position as concrete plant manager. He complains that he did not hear anything from Mr Olsen until January 2006 when he says Mr Olsen told him that he would never get the position because he had gone to see Mr Steve Collie about it and that there was no such vacancy anyway. Mr Fox did not pursue a personal grievance in respect of anything related to this incident. He says he was unhappy with Mr Olsen but concedes to the Authority he did not pursue the matter. He formally raised the matter for this first time in his advice of 7 September 2006 but that of course is well out of time. Because he had not raised it, his employer could not address it. As a grievance on its own, it is out of time. Mr Fox is not entitled to pursue the matter now and it would be unfair to permit him to do so.

#### *No support from Mr Olsen*

[12] Mr Fox alleges against Mr Olsen "*no support from you as general manager in regard to running the concrete plant, staff issues, supplying of legal employment contracts*".

[13] Mr Fox offers only scant detail of this bare allegation and it is denied by Mr Olsen. It is clear however, that Mr Fox did not raise this issue with Mr Olsen. He explains his grievance this way:-

*/ had very little support from management when dealing with matters that arose within the concrete plant. So I learnt to deal with them myself, i.e. Customers, staffing problems, ordering materials dealing with company engineer designing and implementing systems to run the plant in a more efficient manner. All this was done with no help from management.*

[14] When I asked Mr Fox for the detail of this allegation, he said simply that Mr Olsen gave him no support. He said he told Mr Olsen about one Mr Brian Collins ("Mr Collins"). Mr Collins would be "half cut", was a "pain in the ass", and had damaged trucks. Mr Fox also said Mr Olsen did not help him with slumps going out. He also complains that he told Mr Olsen that one Mr Joe Ratima ("Mr Ratima") was late to work. He says Mr Olsen did nothing about Mr Ratima or Mr Collins. These are all historical allegations, unspecified and never formally raised with Atlas as personal grievances. The lack of detail is problematic but even so, Mr Fox is out of time and is not permitted to pursue these matters.

#### *Time work not paid.*

[15] This allegation is properly the subject of a claim for wage arrears. Whether or not it was true, the matter was never formally raised with Atlas as a personal grievance.

#### *Pay slip*

[16] Mr Fox complains about an occasion where his pay slip had been endorsed with a notation "dumb employee". It was a computer generated endorsement which he says occurred on 26 March 2006 but Mr Olsen says was in 2005. It was Mr Olsen's wife who had endorsed the pay slips this way - not only Mr Fox's payslip but other payslips in the run. According to Mr Olsen the incident was a joke which Mr Fox obviously did not find funny. Mr Fox complained to his supervisor Mr Lorne Tito ("Mr Tito") and left a message with Ms Sue Bragg to inform Mr Olsen that he did not approve. That was the end of the matter and the full extent of Mr Fox's complaint. Mr Fox complains he never received an apology. Irrespective of its merits, it too is pursued out of time.

#### *Trumped up charge and threatened employment*

[17] Mr Fox complains that in April 2006 Ms Olsen threatened his employment and was going to give Mr Fox a written warning on a "trumped up charge" and even though no warning was issued it caused Mr Fox immeasurable stress to him and his family.

[18] There had been a complaint about Mr Fox. Mr Olsen said he wanted to see Mr Fox and told him the matter concerned his future employment. Mr Fox says that was a threat. Atlas was perfectly entitled to investigate the complaint concerning Mr Fox and quite rightly, informed Mr Fox the nature of the matter was serious in terms of implications for his employment. There was nothing improper about this. Irrespective of its merits, this matter too is raised out of time.

*At several meetings you accused me of sabotaging the concrete plant, undermining team moral and you indicated to me that you were going to shut the plant because of me.*

[19] Mr Fox says that at several meetings he has had with Mr Olsen, Mr Olsen has implied that it was Mr Fox's fault that there was a lack of morale amongst the staff. Mr Fox says it is actually Mr Olsen who is the cause of poor staff morale because Mr Olsen was not a good manager. He gives examples of Mr Olsen being a poor manager - when asked a question, Mr Olsen stares blankly at a block in the wall for about a minute not saying a word, and then just walks off or else he says he would get back to the person and never does, or else he says in front of others what business is that of yours Graham?.

[20] Mr Fox says this is the sort of behaviour that undermines team morale. He speaks of Mr Olsen in quite derogatory terms and says that he has no leadership skills, and can't or won't make decisions when necessary. He repeats he had no support from Mr Olsen in relation to staff and job issues. He also says Mr Olsen also stated that he was thinking of closing the plant

implying that it would be Mr Fox's fault and also that there would be personnel changes which Mr Fox took to mean that he (Mr Fox) would not longer be employed. When pressed for particulars, Mr Fox tells the Authority of one meeting on 24 August 2005. That is a very long time ago. Mr Olsen denies the allegations Mr Fox makes.

[21] It seems clear however that Mr Fox has for a very long time held very negative and disrespectful opinions about his manager Mr Olsen. I conclude that these allegations are imprecise and vague. They also appear to be historical. I am not persuaded that the allegations are made out.

*The failure to control contractor Keith Christian in his attitude, foul mouth, aggressive and damaging behaviour towards me on several occasions.*

[22] Mr Fox tells the Authority of an incident "in the middle of 2004". He says that Mr Keith Christian ("Mr Christian") was using an air operated rattle gun which was very loud. He says he asked Mr Christian to stop because the noise was too loud. Mr Christian obliged. About an hour or so before the end of the work day however, Mr Christian started using the rattle gun again. Mr Fox says he complained to Ms Bragg and when Ms Bragg asked Mr Christian to stop, Mr Christian swore at her and refused to stop. Mr Fox says that that he then disconnected the airline and Mr Christian became angry and agitated and told him to "fuck off" and threatened to kick Mr Fox's head in. Mr Fox unplugged the airline again and he says Mr Christian again threatened physical violence. Mr Fox says he was very upset by Mr Christian's actions and he told Ms Bragg that he would leave if Mr Christian started up again. He said he rant the plant manager and told him that he (Mr Fox) was leaving because of Mr Christian's attitude. Mr Fox left and says he was quite shaken by the threats of violence Mr Christian made against him. Mr Fox says that night he had problems sleeping and was stressed out. He saw his doctor and was given a medical certificate.

[23] Next he refers to June 2005 when he says Mr Christian told Mr Fox's team "don't listen to Fox he's not the boss I am, making mistake after mistake like he usually does". Mr Fox says Mr Christian said "You're out of here Fox" and "you're gonna be down the road Fox" in front of other workers. Mr Fox complains too that Mr Christian told Mr Fox he did not trust Mr Fox's

judgement.

[24] Mr Fox refers to another day where Mr Christian asked Mr Fox to shovel out under the loading belt. Mr Fox says that he told Mr Christian to "go fuck yourself" and when Mr Christian asked what he had said Mr Fox repeated it again. The matter was referred to Mr Olsen and Mr Fox says that Mr Olsen accused him of sabotaging the concrete plant. He says he was hurt by that remark. The following day he says he told Mr Olsen that if Mr Christian was going to be his boss he would take Mr Olsen to court.

[25] Mr Fox also refers to the "middle of May" 2005 where other staff told him, in the presence of the quarry manager, of comments Mr Christian had allegedly said about Mr Fox, that Mr Fox was an "arsehole" and that Mr Christian was going to "smash" Mr Fox.

[26] Mr Fox also refers to "Monday the 10th" when Mr Christian said Mr Fox was going to be out of the batching plant, that he was not going to be the batcher anymore and was not going to be trained on it. Mr Fox says Mr Christian also said that he would have smashed Mr Fox's head in.

[27] Mr Fox says these last few examples were dealt with by Mr Tito. He says that he "put in" a number of complaints about Mr Christian but nothing ever happened to Mr Christian and he was never advised of the outcome. Mr Tito says he asked Mr Fox to try to get along with Mr Keith, and if he had any complaint to raise the matter with him ("Mr Tito"). Mr Tito says the complaints he did hear from Mr Fox were all hearsay or assumptions and he never personally heard Mr Christian abuse Mr Fox at all. Quite the contrary, he gives evidence of hearing Mr Fox abuse Mr Christian calling him a "fucking useless maintenance man" and yelling further abuse.

[28] These allegations are all historical. Mr Fox is not entitled to raise them out of time. I find that Mr Tito dealt with Mr Fox's complaint about Mr Christian. I find there was no breach of duty owed to Mr Fox.

*Failure to control quarry manager Bill Weston - Arnold in respect of constantly using offensive language directed at me when all I was doing was my job, and discussing personal employment details with other staff members about me.*

[29] Mr Fox refers to a situation where Mr Weston abused him because of steps Mr Fox took as safety officer in relation to exploding pipes.

[30] He says that at the "beginning of June" 2005 his friend told him he was going to get a payout because Hamish the trainee quarry manager had told his friend so. Mr Fox also says that Mr Christian had said that Mr Steve Collie had told Mr Olsen to "pay Mr Fox out".

### ***A course of conduct to force Mr Fox out?***

[31] I conclude that each of the above specified alleged breach of duties are so imprecise and vague as to be incapable of determination and moreover, are historical and out of time so as to be inactionable in isolation. I am not persuaded that each

of the separate allegations on their own constitute breaches of duty sufficiently serious and reasonably foreseeable as to be causative of Mr Fox's resignation.

[32] But I am mindful that Mr Fox does not allege that each of those allegations separately has such an effect. He submits that Atlas embarked upon a course of conduct designed to coerce him to resign. I now give consideration as to whether the same alleged grounds could be considered collectively a course of conduct designed to force Mr Fox out of his job as he principally contends.

[33] Mr Olsen says Mr Fox was "not the easiest of employees to manage". He states that Mr Fox responded well to being managed by Mr Tito but unfortunately friction and tension seemed to follow Mr Fox around. He says that he had occasion to remind Mr Fox that Mr Weston-Arnold was the quarry manager and should be treated and respected accordingly. He also says he had no personal problem with Mr Fox and cannot understand why Mr Fox has any reason to dislike him or attack him. He and Mr Fox did have a discussion between them aimed at improving their relationship. Mr Fox agreed to improve his behaviour and relations.

[34] In a similar vein, Mr Tito says that Mr Fox was "trying" and often "difficult" with others. He says he had several informal discussions with Mr Fox regarding Mr Fox's attitude and moodiness around the workplace which caused disruption and issues for others. He says Mr Fox would only do things his (Mr Fox's) own way without any compromise. He reports hearing Mr Fox say "I am going to screw this company over" and that he had "three or four reasons for taking the company to Court". He says Mr Fox always seemed to have some grizzle regarding something and that he thought Mr Fox was strange. He says there were always communication problems with Mr Fox. He says Mr Fox's complaining could "wear you down" and that he constantly bad-mouthed Mr Christian referring to him as a "fucking tosser". Mr Tito says that Mr Fox for some unknown reason simply had it in for Mr Christian, Mr Weston-Arnold and Mr Olsen but ventures an opinion

that Mr Fox was simply jealous they were managers.

[35] I find Mr Tito a particular persuasive witness and I rely principally on his evidence in assessing where the merits of matters lie in this case. I agree with Mr Tito and find that Mr Fox was simply someone who could not take to being told what to do by a supervisor or manager and preferred to do things his own way. From what I observed of Mr Fox's interaction with others at the investigation meeting, I regard Mr Tito's assessment most likely correct.

[36] I consider the many but vague and largely historical allegations Mr Fox raises are disparate and unconnected. There is no common connection linking them and I am not persuaded of his claim that there was a deliberate course of conduct by Atlas aimed at forcing Mr Fox out of his job. I find there was no such course of conduct by Atlas. Quite the contrary, I find that Atlas sought to retain Mr Fox in his employment.

#### **A reasonably foreseeable substantial risk of resignation?**

[37] I have found there was no breach of duty owed to Mr Fox. In any event, I do not consider any of the alleged breaches if established, were reasonably foreseeable as constituting a substantial risk of resignation.

#### **Determination**

**[38] For the all the above reasons I find that Mr Fox was not unjustifiably constructively dismissed. There will be no formal orders.**

#### **Costs**

[39] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Turner is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Fox is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson

**Member of Employment Relations Authority**