

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Clive Harris (Applicant)
AND Atlas Concrete Limited (Respondent)
REPRESENTATIVES Stephen Corlett, Counsel for Applicant
James Turner, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 9 August 2005
SUBMISSIONS 30 August 2005; 20 September 2005
DATE OF DETERMINATION 19 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The respondent first employed Mr Harris as a sales representative in 1987. At that time it was a family business run by Mr Melville Collie and his sons, Graham, Stephen and Wayne. Over the years the business prospered and grew and it is not in dispute that Mr Harris made a big contribution to that growth. By 2003 he had become “Sales Director” and held a seat on the Board of the respondent’s holding company, Atlas Resources Ltd.
- [2] In 2003 a number of changes occurred within the Atlas Group, of which both the respondent and Atlas Resources Ltd were a part. Mr Melville Collie, who was by now into his eighties, stepped aside from all active roles in the Group apart from that of Director of Atlas Resources Ltd. Wayne Collie sold his shareholding, and for the first time an investor from outside the family bought into the business. This was Holcim (New Zealand) Ltd a multinational involved in the concrete business worldwide.
- [3] At the insistence of the new shareholder, an independent Chairperson (David Sixton) was appointed to the Board and Mr Graham Collie took over the role of CEO and Managing Director. The new shareholder also insisted that the Group review and improve its management structure and governance, by introducing regular management meetings and reporting arrangements.
- [4] Mr Harris continued in his existing roles although a new employment agreement was presented to him in April 2004. Although it was never executed, the parties accept that it was an accurate reflection of what was agreed orally.

[5] Mr Graham Collie took up his position in about December 2003. After this (according to Mr Harris) Mr Graham Collie “took it upon himself to get involved with issues that severely affected my ability to perform my job as I had done” What Mr Harris describes as the last straw came on 12 August 2004 when, after a discussion about the effects of changes within the company, Mr Collie is alleged to have told Mr Harris “if you don’t like it you can fuck off.”

[6] Immediately after this incident Mr Harris was set to take two weeks leave for a holiday to Australia. He did so as planned but before he went away he saw his doctor, who pronounced him unfit for work at that time. When he returned from his holiday he went back to his doctor and was told to take another two weeks off work. In total Mr Harris was off for four weeks from the 12 August. Initially the first two weeks were treated as annual leave but after his return from Australia Mr Harris advised the respondent that he was unwell and the respondent recorded the entire four weeks as sick leave.

[7] On 6 September 2004 Mr Harris gave notice of his resignation from both his sales position and from his seat on the Board. In his notice of resignation of his employment he stated:

“Unfortunately over the last 8 Months or so, due to company restructuring, relationships have been somewhat strained.

During this time I feel that my health has suffered detrimentally, to the point where I can no longer give 100% of myself to the role. Anything less that this is just not acceptable to me personally.

I would like to wish Atlas Concrete the very best for the future and to say thank you to all the staff for their support and friendship during my term of employment.”

[8] Although it was not mentioned in the statement of problem Mr Corlett has argued in submissions that prior to his resignation Mr Harris was suffering from workplace stress caused by an excessive workload and unreasonable demands on him.

[9] Mr Harris worked out the balance of his notice period and left on 1 October after a farewell function had been held for him at the respondent’s Takapuna office. The applicant’s wife, Sheree Harris said in her statement to the Authority:

“Since Clive left Atlas he has been feeling very depressed. After a while he came to realise that what had happened to him just was not fair. It was at this point that I persuaded Clive to go and seek legal advice.”

Issues for determination

[10] Mr Harris now says that this resignation amounted to a constructive dismissal and/or that Mr Harris was disadvantaged by:

- Mr Graham Collie’s conduct in undermining the applicant’s position and unilaterally changing his responsibilities, and/or
- Mr Graham Collie’s conduct at a meeting on 12 August when he failed to consider Mr Harris’s concerns and gave him an ultimatum that he should resign, and/or
- The failure by Atlas Concrete Ltd to provide Mr Harris with a safe working environment.

[11] Separately, it is argued, these actions amount to breaches of the duties of trust and fair dealing and to provide a safe workplace. Together it is alleged they amount to a course of conduct with the purpose of coercing a resignation.

[12] The issues for determination are therefore:

- i. Does any of the conduct complained of amount to a breach of duty by the employer?
- ii. If so, has there been a fundamental breach or has there been a course of conduct with the purpose of coercing a resignation?
- iii. Was Mr Harris's resignation a result of that conduct?

(i) Does the conduct complained of amount to a breach of duty?

Undermining and unilateral changes to duties

[13] Mr Harris provided several examples of this as follows.

[14] On or about 27 February 2004 Mr Harris, Steven Collie and Melville Collie took it upon themselves to order six new trucks from Isuzu, at a total cost to the respondent of almost a million dollars. Graham Collie was overseas at the time and was not informed about this order. When he came back, he cancelled it. He told me the respondent had a truck purchase programme by which it reviewed its needs on an annual basis. Pursuant to this, there was already an order in place for six trucks and there had been no discussion about ordering a further six. Mr Harris told me that the termination of the order embarrassed him and that he was concerned that the supplier would perceive him as "*no longer being able to deliver.*"

In my view, this example simply shows that Mr Harris and his fellow directors failed to have due regard for the authority of the CEO. Any embarrassment associated with the cancellation was something they brought upon themselves. There was no breach of duty by the employer.

[15] Mr Harris told me that some of the sales representatives in his team reported to him that Graham Collie had informed them that they were not to take instructions from Mr Harris but from him. This had purportedly happened at a sales meeting that Mr Harris did not attend. I heard no first hand evidence of this meeting except from Mr Collie, who denied what Mr Harris alleged but told me that he could recall that he confirmed certain changes to the pricing structure. These changes did not have the support of Mr Harris or his team but had been approved by the Board.

In the absence of any first hand evidence to contradict what Mr Collie told me, I accept what I consider to be his reasonable response to this allegation. No breach of duty has been made out here.

[16] Mr Harris also told me about two other incidents that happened at sales meetings when he was present. At one, he said, a representative asked if he and others could obtain credit card privileges to which Mr Harris replied that this was not company policy. Mr Collie then told the representative that he would look into the matter. Mr Harris felt that he had been contradicted in front of his subordinates and that this destroyed the trust and confidence he had in Mr Collie to support him.

There is no breach in relation to the credit card incident. Once Mr Harris had explained current policy it was entirely open to Mr Collie to tell the team that he would consider their request to change the policy.

Mr Harris also said that at another meeting Mr Collie belittled him in front of his team by describing him as a “drama queen.”

Mr Collie’s evidence was that he could not recall this comment. I have concluded on balance that he did say something of this sort, and I consider it inappropriate. I do not however consider it so serious as to amount to a breach of duty.

[17] Mr Harris also had a number of concerns about the implementation of the new pricing structure, which involved increased prices and reduced discounts. Mr Harris gave me three examples but one I have disregarded because it occurred on 29 September. This was well after Mr Harris had resigned and so cannot have contributed to the decision to resign.

[18] Of the other two, the first related to changes to the pricing for a big ongoing job for a public sector client. Mr Harris said that the client spoke directly to Mr Collie about this and that he was not told about the arrangements until later. He said this wasted his time and made him look foolish, although Mr Harris did not raise this issue with Mr Collie at the time. Mr Collie did not dispute that he spoke to this client about the changes to pricing but told me that he was not sure why he and not Mr Harris dealt with this client. He said he thought it was because Mr Harris was away at the time.

Whatever the reason Mr Collie involved himself in this matter it was unfortunate that he did not keep Mr Harris informed of what was happening. It is unsurprising that Mr Harris became concerned about being left “out of the loop.” At the time however Mr Collie did not know how Mr Harris felt and so missed any opportunity there might have been to explain his actions or to rectify any misstep he may have made. Once again I do not consider Mr Collie’s actions amount to a breach of duty by the employer.

[19] The other example also involves a situation in which Mr Harris believes that Mr Collie excluded him from a meeting with a client at which pricing was discussed. Graham Collie denied this, telling me that he spoke with the client in question about operational matters only (such as truck times) and did not discuss pricing or other matters within Mr Harris’s area of responsibility. Mr Harris does not believe this but could give me no evidence to back up his view.

In the absence of any first hand evidence to contradict what Mr Collie has said I accept his response. The assertion made by the applicant has not been made out.

[20] The final example also concerns something about which Mr Harris has no first hand knowledge and which Mr Collie told me he could not remember. Earlier in the year Mr Harris had told a local sports club that the respondent would sponsor the artwork for its brochure. However he said that the accountant had told him that when the account arrived, Mr Collie instructed him not to pay it. Mr Collie had no recollection of this and told me that he could not even say why something of this sort would have come to his attention. He said that if Mr Harris had approved it already it would have just been paid automatically on presentation of the account. (Neither party sought to have the accountant give evidence.)

In the absence of any first hand evidence to contradict what Mr Collie told me, I again conclude that the applicant has failed to make out that what he alleges happened at all.

Conduct of 12 August

- [21] On 12 August Graham Collie, David Sixton, the Group accountant and an accountant from Holcim (New Zealand) Ltd were meeting to discuss a report from the respondent's auditors. Mr Melville Collie joined the meeting unannounced and raised concerns. He then went and brought Mr Harris in, calling on him to speak. Mr Harris says he made some remark to the effect that "*people were not happy*" and that he felt there should be more discussion amongst directors before decisions were made.
- [22] Mr Sixton told me that Mr Melville Collie's interruption of their meeting was accepted out of respect for him, but he considered it very unprofessional for Mr Harris to take up his invitation to speak in front of an outsider. Graham Collie told me he was very frustrated at this point. In response to what Mr Harris had said, Graham Collie says he responded "*if they don't like it then they can fuck off.*" Mr Harris recalls that Mr Collie actually said "*if you don't like it you can fuck off*" but this is strenuously denied.
- [23] I have decided that I prefer Mr Collie's version of events. Given that Mr Harris's own comment was about people generally, I consider it more likely that Mr Collie responded in the same vein, although Mr Harris may well have taken himself to be included in the scope of what Mr Collie said.
- [24] I was told that this work environment is a "robust" one where coarse language is not uncommon. I accept this, and accept that unless such language is directed at an individual, it will not normally constitute a breach of duty. In this case, given the way in which Mr Melville Collie had interrupted the meeting it was not surprising that Graham Collie was, as he puts it, "frustrated." **In these circumstances, and because I have found that the language was not directed at Mr Harris personally, I cannot find that there has been a breach of duty by the respondent to Mr Harris.**

Workplace stress

- [25] There were no particulars in the statement of problem of a claim of workplace stress, and Mr Harris himself told me that this was not for him the key issue (that being Mr Graham Collie's conduct). However, some aspects of the evidence pointed to the likelihood that towards the end of his employment, Mr Harris was not coping with his job. First of all, there is the reference to health issues in the letter of resignation. In his last year of employment he took high levels of sick leave and co-workers told me that they sometimes found him slow to deal with matters that required his attention. Mr Harris's replacement told me that when he took up Mr Harris's role he found the workload heavy and an assistant was taken on to help him.
- [26] On the basis of this evidence Mr Corlett has argued in submissions that there has been a breach of the duty to provide safe working conditions. I have concluded that I can not determine this claim because the respondent was not on notice of it when preparing for the investigation meeting. It follows that the applicant has leave to continue to pursue this aspect of his claim should he wish. However I note that there was no evidence that Mr Harris told anyone the nature of his health problems and on the basis of what I have heard I am not satisfied that it was reasonably foreseeable to the respondent that the working conditions would cause Mr Harris harm.

Has there been a fundamental breach or alternatively a course of conduct to coerce a resignation?

[27] There have been no breaches at all let alone a fundamental breach. Nor was there any evidence to support the allegation that there was a course of conduct by Mr Collie to coerce a resignation.

Was Mr Harris's resignation a result of such conduct?

[28] It is very unfortunate for Mr Harris that his long and diligent service with the respondent did not end on a happier note. It was clear that he found it difficult adapting to the significant changes which were facing the respondent and struggled to cope with the fact that Wayne and Melville Collie, with whom he had worked closely and well for so many years, were no longer involved in running the business. Combined with his difficulties managing his work these changes do appear to have caused the dismissal but they do not amount to breaches of duty.

[29] **There was no constructive dismissal and no unjustified action to Mr Harris's disadvantage. I can do nothing more to assist him with his employment problem.**

Costs

[30] I leave it to the parties to discuss this issue between themselves. If they cannot resolve it they should provide me with submissions within 28 days of the date of this determination.

Y S Oldfield
Member of Employment Relations Authority