
CANADA / JUDGMENT

Coutlee v. Apex Granite & Tile Inc.

2020 BCSC 315

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

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2020 BCSC 315 Coutlee v. Apex Granite & Tile Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Coutlee v. Apex Granite & Tile Inc.,

2020 BCSC 315

Date: 20200305

Docket: S1812955

Registry: Vancouver

Between:

Joe Coutlee

Plaintiff

And

Apex Granite & Tile Inc.

Defendant

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Plaintiff:

J. Leung

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Counsel for the Defendant:

N. Mulholland

Place and Dates of Trial:

Vancouver, B.C.

November 18-22 & 25, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2020

Table of Contents

INTRODUCTION. 3

Issues. 3

Factual Background. 4

The Plaintiff 4

The Plaintiff's description of the incident of August 10, 2018. 8

Cross examination of the Plaintiff 10

Myles Dawson. 13

The Defendant's witnesses. 14

Mike Bordt 14

Paul Hulme. 19

Vic Kahn. 20

Jason Statham.. 20

Analysis. 23

Dismissal or Resignation. 23

Constructive Dismissal 27

Conclusion. 30

INTRODUCTION

- [1] This is an action for wrongful dismissal. Mr. Coutlee, (the "Plaintiff"), is a 60-year-old tile setter of long experience. He came to British Columbia from Alberta seeking to turn his fortunes around when the economic climate in Alberta became difficult. He had had a number of jobs in Alberta, and before that, in Ontario.

- [2] The Plaintiff was able to find employment with the defendant, Apex Granite and Tile Inc., where he began on May 4, 2017 according to his Record of Employment ("ROE"). His last day of work with Apex was August 17, 2018. He worked with Apex for a period of approximately 15.5 months.
- [3] Apex is a leader in the area of tile and granite installation in the construction sector. As a subcontractor, it performs mostly commercial work on buildings such as community centres, swimming pools, and apartment buildings.
- [4] Apex has difficulty in finding qualified tradespeople to perform its work. Consequently, to meet its commitments it is always looking for workers.
- [5] The Plaintiff demanded the highest rate for his services, \$45 per hour, to reflect his experience and, according to him, his superior expertise.
- [6] Apex agreed to meet his demand and paid him \$45 per hour during the time he was employed with Apex.
- [7] His full-time employment was not guaranteed but Apex tries to give its employees 40 hours of work a week as long as it has work to provide and the worker's skills are suitable for a particular job site.
- [8] On August 17, 2018, the Plaintiff was asked to leave the job site on which he was working.

Issues

- [9] The issues to be determined at trial are:

- When the Plaintiff was asked to leave the job site, was he suspended or terminated?
- If he was suspended, did the Plaintiff subsequently resign by asking for his ROE?
- In the alternative, by ordering the Plaintiff off the work site, did the defendant constructively dismiss the Plaintiff?
- If he were terminated unjustly, to what damages would the Plaintiff be entitled?
- If he were terminated unjustly, would the Plaintiff be entitled to punitive or aggravated damages due to the manner of his dismissal?

Factual Background

The Plaintiff

- [10] Apex employed the Plaintiff on several projects including the ParQ Hotel and casino in downtown Vancouver, a pool complex on Minoru in Richmond, a Burnaby pool project, a residential display suite, and another pool complex in South Langley. This may not be a complete list of the projects the Plaintiff worked on but gives a picture of the kind of work performed by Apex.

- [11] Despite his protestations that he was an ideal "A-Team" employee, the Plaintiff took time off whenever he felt he needed to. He missed days due to his seasonal allergies--he initially said 5 continuous days and then a day here and there, he took days off due to cold and flu, when his back hurt, when he had not slept well, and likely missed at least 10 days of work in the course of a year. He "booked off" from a job when it was predicted to be raining the next day. His absenteeism was never written up but his admissions contradict his own report that he had a very good attendance record.
- [12] For example, he stated he had been "laid off" for three weeks during his employment. He then agreed that the time off had likely been due to his allergies for which he had not received treatment.
- [13] He agreed in cross-examination that he could have missed even more than 4-5 weeks of work as well as more than 10 days just for lack of sleep.
- [14] This would explain the possible gaps in hours in his time sheets that he has attempted to attribute to disciplinary suspensions.
- [15] Some of his text messages advising his supervisor that he would not be in to work are exhibits in this proceeding.
- [16] The Plaintiff agreed in cross-examination that it was important to his employer that employees turn up for work because the day- to-day work is performed as a team.
- [17] He also recalled that towards the end of his employment, in August 2018, he was missing work due to stress resulting from his difficult finances. His wife wanted to go to Korea to see her sick mother and he could not contribute to her air fare. With his living expenses, he could not keep up his insurance. His car insurance lapsed for non-payment.
- [18] Since he commuted to the work sites to which he was assigned by Apex, without insurance he could not drive his car. I assume his lack of insurance meant he missed more days of work and that is why he discussed the lapse in his car insurance in the context of absenteeism.
- [19] While he did have insurance, it was Alberta insurance and he drove his 2010 Dodge Journey with Alberta plates for two years in B.C. He was aware that to do so did not comply with the law but he justified it as it was cheaper and in any event, his wife took care of the insurance.
- [20] I note as well that when the Plaintiff did obtain insurance, it was for driving for pleasure only. When it was pointed out to him in cross-examination that he was in breach of his insurance policy by driving to and from work every day while not insured for daily commuting, he argued that he was not doing anything wrong because he was not delivering goods, he was just going back and forth for work. He refused to acknowledge his breach.

- [21] The Plaintiff was in such straitened circumstances that he did not have medical coverage in B.C. Hence, he did not go to a doctor for his various health problems. Instead he consulted his daughter, a graduate student in nursing.
- [22] As at the time of trial, the Plaintiff had yet to obtain medical coverage in BC and had not investigated whether he qualified for premium assistance.
- [23] He agreed that had he worked full-time, at \$45 per hour, he would have been able to earn approximately \$90,000 per year.
- [24] There are a number of different supervisors who work for Apex. In his direct evidence, the Plaintiff stated he had problems with all four of the supervisors with whom he worked.
- [25] The Plaintiff claimed all the supervisors treated him badly and that he would never work for Apex again even if he were offered \$1,000 an hour.
- [26] In fact, before the incident of August 10, 2018 when he was told to leave the site, he testified he was already looking for other employment.
- [27] The Plaintiff generally believed that he knew the tiling trade better than his supervisors and on occasion, when given instructions about a tiling job, the Plaintiff felt he not only understood the requirements of the job better than his supervisor, but told the supervisor how to do the job the Plaintiff's way.
- [28] Unfortunately, this point of view resulted in situations where the Plaintiff did not install tiles according to the chalk guidelines on the floor, or where he put the wrong slope on tiles down to a swimming pool drain. Such occurrences were not treated as disciplinary situations but either the Plaintiff or other employees had to re-do the unsatisfactory work.
- [29] The residential display suite is a good example of such behaviour. The Plaintiff was offered an opportunity to do some piece work as a contractor. After he had done the job, the client/head contractor complained about the shoddy work. Two other employees of Apex were assigned to rip out the work the Plaintiff had done and re-do it.
- [30] The Plaintiff was asked if he had good relationships with the other employees on site. He responded that he got along well with the other employees and only had one fight with another employee where they cursed each other and he was told to go home.
- [31] He did not allege he had been fired when sent home on that occasion.
- [32] The Plaintiff also said he had been sent home three other times for disciplinary reasons for as much as a week at a time. If these occasions occurred, he did not allege termination. However, his time sheets do not bear out such disciplinary suspensions.

- [33] He states he was also sent home from a site supervised by Paul Hulme because of an issue with tile he had installed incorrectly. He did not allege on this occasion that he had been terminated and in evidence, suggested that he had left voluntarily after Mr. Hulme yelled at him.
- [34] Jason Statham, a supervisor for Apex, issued him a "Notice of Non-Compliance" for leaving the site without permission. The Plaintiff signed the Notice but now claims it was signed under duress.
- [35] Another issue between the Plaintiff and Apex arose when he carried some boxes of tiles in his car. The Plaintiff's version is that he was required to transport 12 boxes of tiles to a job site at Vancouver International Airport from the shop in Surrey. He had to clear out a number of his own tools from the back of his SUV to make room for them. He asserts that the boxes were very heavy and caused the destruction of his suspension and struts and made his tires collapse inwards causing them to suffer excessive wear. He demanded the cost of repair from his supervisor as he said the weight of the tiles had caused the damage. The supervisor, Mike Bordt said he gave the Plaintiff \$500 towards the repairs in the interests of compromise. Mr. Bordt thought the matter was settled. The total bill was around \$2,200 and the Plaintiff claims he received a total of \$300 from Apex towards it.
- [36] The bill included the cost of an oil change, new filter and oil.
- [37] But the SUV was 8 years old, and had travelled many miles, including the trip from Alberta to BC carrying the Plaintiff's heavy tools, including a water saw, as well as his and his roommate's clothes and personal effects. There was no expert evidence as to the amount of general wear and tear on the vehicle or the actual cause of the problems. Loading the boxes of tiles may have been the coup de grace, but Mr. Bordt did not accept that carrying 8-10 boxes of tiles on a short journey would cause such widespread damage to the Plaintiff's vehicle and tires.
- [38] The mechanic who performed the repairs to the Plaintiff's vehicle was not called as a witness. There is a copy of an invoice but without the witness and an explanation of the itemized repairs, I could not admit the mechanic's comments as evidence in his absence. I dismiss this claim by the Plaintiff for the balance of the cost of repairs to his car.
- [39] Generally, I found the Plaintiff lacked credibility and where his evidence differs from that of other witnesses, I prefer the evidence of other witnesses except where noted otherwise.

The Plaintiff's description of the incident of August 10, 2018

- [40] On this day, the Plaintiff was working on a Burnaby job site. He was removing tiles.
- [41] Mike Bordt arrived at the site and asked to speak to the Plaintiff.

- [42] According to the Plaintiff, he told Mr. Bordt that he would only speak to him if he were offering the Plaintiff a raise or about his job performance. However, if Mr. Bordt wanted to discuss the incident where the Plaintiff alleged Mr. Bordt called him names in front of a group of his fellow employees, the Plaintiff would not speak to him because he had been advised not to.
- [43] Again, in the Plaintiff's version of events, Mr. Bordt responded first with a comment that if he refused to talk to management, he was a danger on the site and then with a direction that he take his tools and get off the site. When the Plaintiff demanded to know if he had been fired or laid off, Mr. Bordt responded once more with the direction to take his tools and get off the site as he was a safety risk.
- [44] The Plaintiff agreed that Mr. Bordt had never said he was fired.
- [45] After the Plaintiff had left the site, Mr. Bordt instructed Jason Statham to prepare a Notice of Non-Compliance for the Plaintiff to sign on his return to work.
- [46] As he left the site, the Plaintiff told his fellow employees he had been fired. He says he then expected to receive a ROE with his final paycheque within three days. However, when he received his cheque at the regular time for it and not in advance, it was not accompanied by this document.
- [47] The Plaintiff texted Apex and demanded he be provided with his ROE so he could apply for employment insurance.
- [48] According to Apex, this was the first the office knew the Plaintiff took the position he had been fired.
- [49] The file from Service Canada, including any submissions by the Plaintiff, was not produced.
- [50] The Plaintiff says that his application for employment insurance was refused as he was found to have voluntarily left his employment. He states that he appealed, was again refused but that the refusal was overturned by the commission.
- [51] In the absence of documents from Service Canada, I have no idea what information the Plaintiff supplied to change the position of Service Canada. I am unable to take into consideration the assertion that Service Canada ultimately accepted that Apex dismissed Mr. Coutlee.
- [52] Apex was not given any copies of this documentation.

Cross examination of the Plaintiff

- [53] In cross-examination, the Plaintiff was evasive, argumentative and sarcastic.
- [54] He referred to counsel for the defendant with a sarcastic tone as "My friend".

- [55] He attempted to qualify answers he had given on discovery with responses such as: "Well, my answer was technically true" or by saying, "I must have misunderstood the question."
- [56] When asked if he understood that other employees of Apex had negative comments to make about him, he said that anyone who disagreed with his version of his history with Apex was a liar.
- [57] He described an altercation with Vic Kahn when Mr. Kahn was lead hand on a pool site. The Plaintiff said he found it funny that Mr. Kahn was lead hand because he was totally unqualified, in the Plaintiff's opinion. He told of Mr. Kahn trying to "make peace with him" and refusing a direction from Mr. Kahn about the area in which he was to work because there were other trades on site. He also alleged a safety violation by Mr. Kahn that allowed him to refuse the particular assignment he was given but he agreed he had never reported this to Apex.
- [58] In any event, on this occasion, he swore at Mr. Kahn, told him to "Get away from him" and generally indicated complete lack of respect for his authority. He was sent home from the site, again without indicating he took it as a termination.
- [59] The Plaintiff also claimed in cross-examination that he had been "short paid" on all his pay cheques. He had no explanation for and no evidence of this allegation. Without any evidence to support him, he claimed that his timesheets and pay stubs were forged because they did not indicate any of the long breaks in hours during which he said he had lost three weeks of work for disciplinary suspensions.
- [60] He claims to have gone to the "labour board" with his complaint but there was no evidence to support this allegation other than his own assertion and, in any event, he would have been directed to the Employment Standards Branch rather than the Labour Board.
- [61] Another complaint that he was left only partly paid was for the shoddy work he performed on the demonstration suite. He says that he invoiced for \$5,332.50 but did not get a cheque for that amount. When presented with his answer on discovery that he was paid for the invoice, he attempted to dodge his admission.
- [62] I reject the allegation that he was not paid for the hours he worked and that he was left unpaid for the invoice he rendered to Apex. Any claim to that effect is dismissed.
- [63] He stated that Mr. Bordt and all the supervisors "singled him out" for unfair treatment but agreed that regular attendance was important for the team work required on a job site. He also agreed that it could be unsafe to fail to follow directions from a supervisor on site.
- [64] In his discovery, in which he agreed the answers he gave were true, he agreed as well that he had refused to speak to his boss, Mr. Bordt, about a workplace issue and that was the reason Mr. Bordt was upset with him.

- [65] With respect to his claim that he had been laid off for three weeks, he stated that his allergies, for which he had not received treatment, resulted in missing, at minimum, 10 days of work and indicated that he resented being pushed to attend work whether or not he was sick.
- [66] In addition to the 10 days he missed for allergies, he stated that he missed at least another 10 days for lack of sleep.
- [67] He also stated that he was missing work towards the end of August 2018 due to stress from his money problems. So these absences were not disciplinary, they were due to his health issues.
- [68] Although he received Employment Insurance benefits for eight months after the end of his job with Apex, he did not declare the approximately seven days he worked, first at Willowbrook Mall for four days and then for another employer whom he called "Darien" for three days. He accepted work with Bido in June 2019.
- [69] He justified his failure to declare this income because he was struggling to make ends meet. He said he would have been living on the street had he declared this income. He did not consider this omission as dishonest.
- [70] His evidence on mitigation efforts he had made was vague and unhelpful. Considering that he was involved in a lawsuit against his former employers and had an obligation to prove he had made mitigation efforts, he made no effort to keep records of any applications he had made. When asked about such efforts, he repeated a number of times that the information was on his phone and so he had no paper records. However, he could not provide names of employers to whom he had spoken, he did not make "cold calls" at job sites with one exception, and he had no documents indicating any reply he had ever received from an application he had made.
- [71] His unsupported statement was that he had 35 jobs listed on his phone, five or six which were from Kijiji or Craigslist.
- [72] The print-outs he did have were copies from the internet of advertisements for tile setters. These were provided to show he had looked at the internet for suitable positions.
- [73] However, he said that he could not say that he had applied for any of these positions, some 91, found in the book of documents.
- [74] Although at trial he attempted to resile from his answer, he admitted that he had said in discovery he had begun looking for work before he left his employment with Apex. He started at Willowbrook the week after he left Apex.
- [75] The Plaintiff agreed he had "bad-mouthed" Mike Bordt to other employees many times. He called Mr. Bordt a thief who had stolen wages from him and refused him reasonable reimbursement for his car repairs.

Myles Dawson

- [76] Mr. Dawson is 23 years old and has worked for Apex since May 2017. He continues to work for Apex.
- [77] He came to BC from Alberta with the Plaintiff in the Plaintiff's vehicle along with his and the Plaintiff's tools and personal effects.
- [78] He has shared an apartment with the Plaintiff since his arrival in BC.
- [79] He is happy working for Apex and finds it mostly a respectful workplace. However, he is clear that the language used at the workplace is routinely full of obscenities and profanities. As he said, "That's just how they talk."
- [80] He recalled the incident with the boxes of tiles as involving maybe 4-5 boxes of tile. His estimate of their weight was that they could be 30-40 pounds per box.
- [81] He recalls Mr. Bordt directing them to take the boxes of tiles and he assisted the Plaintiff to unload the tools the Plaintiff routinely kept where his back seat had been removed to put the boxes in the Plaintiff's Dodge Journey.
- [82] He described the tools as having quite a bit of weight.
- [83] At the end of that same day, he saw the tires on the Dodge Journey angling in.
- [84] Mr. Dawson did not witness the August 17, 2018 incident after which the Plaintiff left the Apex worksite.
- [85] He would travel to the worksites with the Plaintiff or take the bus. He stated that it is his obligation to travel to the assigned worksite.
- [86] He described the South Langley worksite as requiring one hour of travel to reach and then about one and a half hours to return. This answer contrasts with the Plaintiff's assertion that it took him four hours to travel home from this job site, causing him to suffer back pain as a result.
- [87] Mr. Dawson said that Apex generally paid careful attention to safety issues but there was the odd incident in which problems occurred.
- [88] He did not see the Plaintiff bullied by supervisors. Neither did he witness the Plaintiff being requested to take a pay cut.
- [89] Mr. Bordt did talk to Mr. Dawson about giving him a raise if he moved out of the Plaintiff's apartment and said that the Plaintiff was a loser and an asshole.
- [90] Mr. Dawson recalled Jason Statham screaming at the Plaintiff for installing tiles with the wrong slope at the Minoru site. They had to be pulled out and replaced and although Jason Statham had said the Plaintiff would have to do the repair work for free, it did not happen that way.

[91] Mr. Dawson was the only additional witness called by the Plaintiff.

The Defendant's witnesses

Mike Bordt

[92] Mr. Bordt is the operations manager for Apex. He described Apex as a family business started by his father and uncle. He grew up in the business.

[93] He described Apex as the largest such operation in Western Canada with job sites all over B.C. on large industrial projects. As with most companies involved in construction, while Apex is what is known as a finishing company, it is busy when the economy is good.

[94] Apex currently has between 90 to 120 employees and hires more when workers are needed. Conversely, when work slows down, employees are laid off.

[95] Mr. Bordt met the Plaintiff in 2017 and hired him for the ParQ Casino project. He was supervising on this project and needed more workers. He explained that he was desperate for workers at this point. The job was a demanding one with high quality performance required by the client.

[96] In the business Apex performs, reputation is key to being rehired on new jobs.

[97] He said that the Plaintiff took Apex's need for workers as a way to leverage his wages. He believes that the Plaintiff asked for wages at the top end because he stated he had lengthy experience as a tile setter. As a result, Mr. Bordt agreed that he would pay the Plaintiff \$45 per hour.

[98] He hired Myles Dawson at the same time that he hired the Plaintiff.

[99] He told the Plaintiff of the importance of timely and regular attendance on the job.

[100] From the beginning, the Plaintiff had an attendance problem. He blamed his absenteeism on insomnia, allergies, a sore back from driving, and quarreling with his wife kept him up.

[101] The Plaintiff was also often tardy and this interrupted the process of giving instructions to the crew of 20-30 employees. The Plaintiff always had a justification for his tardiness such as he had to get gas for his car, he slept in, he was not feeling well, the traffic was bad. He was late at least twice a month by 10 to 45 minutes.

[102] Mr. Bordt spoke to the Plaintiff every time he was late but did not take disciplinary steps against him. Mr. Bordt reminded the Plaintiff of the consequences of tardiness and non-attendance in the big picture of the operation. He did this for every employee who was late.

[103] With the Plaintiff, Mr. Bordt did not yell at him but tried to make clear how the team was affected by the Plaintiff's behaviour.

[104] After the ParQ job, the Plaintiff spent some time on the Minoru site and then was moved to a swimming pool project in South Langley known as W.C. Blair.

- [105] The W.C. Blair project required that Apex focus employees on the job. There would have been 25-40 employees on the job that ran seven days a week.
- [106] Paul Hulme was the supervisor.
- [107] Mr. Hulme reported the Plaintiff appeared resentful about being sent to the South Langley site because it required a long commute. At that project the Plaintiff was late, talked back, showed an uncooperative attitude, would not listen to instructions and acted as a know-it-all.
- [108] Mr. Bordt challenged the Plaintiff about his attitude after receiving complaints from Mr. Statham and Mr. Hulme. The Plaintiff had many excuses including blaming others who did not know what they were doing as opposed to his 40 years of experience.
- [109] The need for employees on site was great and Apex was still looking for employees so rather than punish the Plaintiff, Mr. Bordt tried to explain to him and educate him.
- [110] The Plaintiff was moved from site to site. There may have been a brief hiatus in his work when the Plaintiff refused to commute to W.C. Blair. Mr. Bordt had to find another site for him to work on.
- [111] Apex does its best to provide full-time work to its employees. However, the Plaintiff presented a particular problem because he could not get along with certain employees and the resulting altercations caused safety problems. The site to which the Plaintiff would be sent would require some discernment about the employees with whom he could work.
- [112] The Plaintiff was never asked to take a pay cut and his pay stubs do not reveal any reduction in his wages. However, he was challenged about his sloppy work and lack of productivity because he was being paid at the highest hourly rate and his productivity did not merit his wage.
- [113] Although the Plaintiff complained about his supervisors and his commute, he did not complain to Mr. Bordt about any Apex safety issues on the site.
- [114] The invoice for the work on the show suite was paid. If it had been revised downwards, there would have been a revised invoice.
- [115] Until this lawsuit, the Plaintiff never alleged he was underpaid for this invoice. He continued to work for Apex for another year after the show suite problem so had plenty of opportunities to raise the issue.
- [116] On August 17, 2018, Mr. Bordt went to the Minoru site to talk to the Plaintiff. He had learned that the Plaintiff had tried to contact Mr. Bordt's father who is no longer involved in the company. He walked around the site with Jason Statham, the supervisor, and left his dealings with the Plaintiff last.

- [117] Mr. Bordt tried to talk to the Plaintiff. His tone was civil. The Plaintiff was alone at the time as Mr. Bordt asked if they could have a chat. The Plaintiff responded with "I refuse to talk to you." Mr. Bordt tried a number of times but the Plaintiff continued to refuse to talk to him. He made it clear the Plaintiff had to talk to him and that it became a safety risk if he refused to take directions from a supervisor. Mr. Bordt said he would have to suspend him if he refused to speak with his supervisor. The Plaintiff jumped up from where he had been working and said "Am I fired?" Mr. Bordt said "No, I want to talk to you but if you won't talk to me you are suspended and you can pack up your tools and get off the site."
- [118] The Plaintiff asked again if he had been fired and Mr. Bordt said "No."
- [119] Mr. Bordt tried once more to talk to the Plaintiff but he took his tools and left. As he left the site the Plaintiff was complaining loudly to others nearby that he was very upset.
- [120] Mr. Bordt assumed the Plaintiff would cool off and call for his next assignment. He was getting married August 28, 2018 and was on his honeymoon when the Plaintiff called for his ROE a couple of weeks after this incident.
- [121] He agreed he had not tried to call the Plaintiff.
- [122] With respect to the Plaintiff's efforts to contact him after the August 17, 2018 incident, Mr. Bordt said that as far as he knew, the Plaintiff only called Apex about obtaining his ROE. He took this as an indication the Plaintiff had resigned.
- [123] The Record of Employment was dated September 5, 2018 and was mailed to Mr. Coutlee.
- [124] The claim for Employment Insurance went to the Apex accounting office. No one in the office was contacted by Service Canada after the initial claim came in and the Service Canada file was not produced by the Plaintiff.
- [125] Mr. Bordt directed Jason Statham to prepare a Notice of non-compliance with respect to the Plaintiff's refusal to speak to him. The Plaintiff left the site before he could be asked to sign it but it was Mr. Bordt's intention to have the Plaintiff sign it before he could return to work.
- [126] He had Mr. Statham prepare this document with an understanding that the Plaintiff would return to work. At that point, Minoru was his place of work.
- [127] Since the Plaintiff did not come back to the Minoru site after August 17, 2018, the Notice of non-compliance was sent to the Apex office. It was mailed to the Plaintiff along with the ROE the Plaintiff requested.

Paul Hulme

- [128] Mr. Hulme is currently a 16-year employee with Apex but in total time, he has worked for Apex for 23 years.
- [129] He is a foreman for Apex and worked with the Plaintiff at the W.C. Blair project.

- [130] He set the Plaintiff up on the show suite job with drawings to act as the Plaintiff's instructions on the job. He learned from the contractor that the Plaintiff had not followed instructions and had lost the drawings.
- [131] The Plaintiff explained that he had not followed the drawings to do the tiling in line with the walls but had decided he would offset them because he thought they would be better done his way. Mr. Hulme directed him to redo them properly. The Plaintiff was unhappy because he had to redo the work on his own time.
- [132] The contractor called again about the Plaintiff's work. Mr. Hulme went back to the apartment to check on the tiles placed on the walls. He explained that tiles placed on a flat wall should be smooth with no corners sticking up. Where there are corners sticking up instead of lying flat, this is called "lippage", a default which refers to an uneven surface of a floor or wall that occurs when tiles are not laid to a uniform level.
- [133] Mr. Hulme noted lippage and chips in the tiles on the wall and was aware that the work would require repair in order for Apex to receive payment. The Plaintiff was not asked to repair this work but Mr. Hulme and Pete, another employee, fixed the holes and replaced tiles where necessary. It took two days to do the repairs.
- [134] Mr. Hulme also had problems with the Plaintiff on the W.C. Blair site when the Plaintiff failed to follow the tiling lines as instructed and ended up about one-half inch off the line. He referred to this as a "Dutchman", a colloquial term for a serious foul up as the tiles would not be even at the designated meeting point. When Mr. Hulme pointed this out to the Plaintiff, he would not listen. The Plaintiff lost his temper and walked off the job. Mr. Hulme did not have the Plaintiff on any other site after this.

Vic Kahn

- [135] Mr. Kahn is a self-employed tiler with 10 years in the industry. He worked for Apex for about 18 months. He encountered the Plaintiff on the McPherson pool project in Burnaby where Mr. Kahn was the lead hand of a small group of employees. He said the work went well until he directed his group to restrict their work that day to one particular area so as not to interfere with a concrete crew coming in.
- [136] Mr. Kahn came back from another job to find the Plaintiff working in an area the concrete crew had cleaned up the day before. When he went to query the Plaintiff he began by asking how he was doing. The Plaintiff replied with "How the f--- do you think I'm doing? How would you like it if I told you how and where to work?"
- [137] Mr. Kahn was surprised by this reaction and pointed out that he had only instructed the Plaintiff about where to work. The Plaintiff answered with
- "So are you going to hold my d---- while I pee?"

[138] Mr. Kahn tried once more to figure out the actual problem between them and asked if everything was OK. When the Plaintiff again responded with an obscenity, Mr. Kahn sent him home.

[139] The Plaintiff did not treat this suspension as a termination.

Jason Statham

[140] Mr. Statham has been in the construction industry for 15 years and with Apex on and off for 12 years. For the last 3 years, he has been a supervisor.

[141] He met the Plaintiff for the first time on the ParQ job site. He recalled that on the first day on the job the Plaintiff asked him if Apex would supply his tools. When he was told no, he became confrontational and made faces at Mr. Statham.

[142] On another occasion, he had to defuse an argument between the Plaintiff and another employee.

[143] Mr. Statham raised with the Plaintiff that his work did not meet his expectations. The Plaintiff responded with "I don't care. I get paid by the hour and it is what it is."

[144] When Mr. Statham was supervising at the Minoru pool site, He had a heated discussion with the Plaintiff over the tiles he had incorrectly installed. When Mr. Statham told him to fix it, the Plaintiff became angry. Mr. Statham pointed out that the Plaintiff had wasted the company's money and the Plaintiff once again said he did not care because he was paid by the hour.

[145] Mr. Statham raised the issue of the Plaintiff's productivity only to be met with the Plaintiff reacting as if it were a personal attack. However, while the Plaintiff was not installing as much as he should have been at his level of experience and wage, his wages were never reduced.

[146] Mr. Statham prepared both Notices of Non-Compliance given to the Plaintiff. He prepared the first, dated February 8, 2018, when the Plaintiff walked off the W.C. Blair job site without informing anyone.

[147] Mr. Statham prepared this Notice, notwithstanding the fact it had happened on Mr. Hulme's job, because the Plaintiff would not be returning to the W.C. Blair job site.

[148] The Plaintiff signed the February Notice reluctantly but he was not threatened to force his signature. He signed the same day as the Notice is dated.

[149] The second Notice of Non-Compliance is dated August 17, 2018 and was prepared to be given to the Plaintiff for signature on his return to work. As he did not return to work, it was not given to him. The Notice partly states:

Employee was sent home. Until he made contact with management to resolve the issue and return to work.

This is notification that the future non-compliance will result in further disciplinary action up to and/or including termination.

[150] Mr. Statham's version of the August 17, 2018 incident is, in most respects, similar to that of Mr. Bordt. He was not immediately beside Mr. Bordt and the Plaintiff when the exchange occurred but he heard some of it. However, Mr. Statham did not appear to remember the exact words that were spoken.

[151] In cross-examination, he agreed that the Plaintiff tried to qualify his refusal to talk to Mr. Bordt by limiting his defiance to not talking about Mr. Bordt "bad-mouthing" him and by saying he had been advised not to talk to Mr. Bordt. However, he would talk to Mr. Bordt about a raise.

[152] He recalled that Mr. Bordt asked again to talk to him and the Plaintiff refused. At that point, Mr. Bordt told him to pack up his tools and go home until this was resolved because he was a safety risk.

[153] He recalled as well that the Plaintiff asked if he was fired and Mr. Bordt answered "No".

[154] He is very clear in his recollection that the Plaintiff was not told he was fired. He thought the Plaintiff would be back in a couple of days.

[155] He agreed that he had not contacted the Plaintiff to tell him to report for work. He was unaware if anyone else had called the Plaintiff.

[156] His final contact with the Plaintiff was on August 24, 2018 when the Plaintiff texted him to complain that he should have had his pay cheque before the regular time. Mr. Statham told him he would have it "Along with everyone else's".

[157] The Plaintiff responded with a threat of the delay of the cheque just being more help for his lawsuit and taking him to the Labour Board and when Mr. Statham responded with "Don't threaten me Joe", the Plaintiff answered that "That's not a threat it's a promise."

[158] After rejoinders that amounted to insults, the texts stopped and Mr. Statham did not hear from him again.

[159] The next Mr. Statham heard from the Plaintiff was that he had asked for his Record of Employment, a choice Mr. Statham considered a quit.

Analysis

Dismissal or Resignation

[160] The central issue requiring determination in this case is whether the actions of the Plaintiff amounted to resignation, or the employer's actions amounted to dismissal. Resignation has both an objective and a subjective component. A resignation must be clear and unequivocal, in that it must objectively reflect an intention to resign: *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 at paras. 36-37. In *Beggs*, the Court of Appeal quoted the following articulation of the law on resignation from the text *David Harris, Wrongful Dismissal*, loose-leaf (consulted on 12 January 2011), (Toronto: Thomson Canada Ltd. 1989) at pages 3-4, 3-5 and 3-9:

The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempted retraction, of his or her "resignation."

[Emphasis in original.]

[161] *Beggs* also states that the test for a dismissal, or termination, is purely objective: "A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal" (at para. 36).

[162] The dispute of August 17, 2018 ended with a clear denial at the time by Mr. Bordt that the Plaintiff's employment had been terminated. In the absence of strong evidence to the contrary, this clear denial makes it difficult for the Plaintiff to meet his burden to prove he was dismissed.

[163] The Plaintiff argues the defendant's case to prove resignation relies solely on the Plaintiff's request to Mr. Statham for his ROE, which is not a clear and unequivocal expression of an intent to resign. He cites the case of *Beggs* in support of this argument. In *Beggs*, the Court of Appeal upheld a decision by Madam Justice Morrison in which she held that the act of asking an employer for an ROE did not constitute a clear and unequivocal intention to resign. The Plaintiff further argues that on the contrary, the defendant's refusal to allow the Plaintiff to work and giving him no indication of when he could expect to return to work, frustrated the contract of employment and resulted in a dismissal.

[164] Whether words or actions amount to a resignation must be determined contextually, with reference to the surrounding circumstances: *Bishop v. Rexel Canada Electric Inc.*, 2016 BCSC 2351 at para. 16. In *Beggs*, the trial judge was aware of the particularly vulnerable position of Ms. *Beggs* relative to the employer, including that her home had just burned down resulting in her losing substantially all of her possessions. Ms. *Beggs* had telephoned

the employer saying she was unsure when she could return to work due to this difficult predicament. Moreover, her employer had already prepared the ROE indicating Ms. Beggs had quit, prior to her request for it. In those circumstances, it is understandable how a judge found that a Plaintiff's request for an ROE did not constitute a clear and unequivocal intention to resign.

- [165] In the Plaintiff's case, the Notice of Non-Compliance was prepared by Apex under the assumption that the Plaintiff would otherwise be speaking with his supervisors at Apex in order to mend relations with them, as had occurred in the past. This is clear from Mr. Statham's comment in the Notice of Non-Compliance of August 17, 2018, which clearly stated that the Plaintiff's suspension would end when "he made contact with management to resolve the issue and return to work." The view expressed in the Notice decisively negates any assertion that, objectively viewed, the acts of Apex clearly and unequivocally amounted to a dismissal.
- [166] The case of *Almack v. Dr. Michael E. Pezim Inc.*, 2004 BCSC 647, is apposite here. In *Almack*, the Plaintiff, Ms. Almack, was a medical assistant for Dr. Pezim, the defendant. In her first stint with Dr. Pezim, she was employed for eight years after which Dr. Pezim decided to leave the medical profession. When Dr. Pezim wrapped up his practice, Ms. Almack was given three months' notice plus six months' salary.
- [167] Dr. Pezim reopened the clinic four years later in 2001, and invited Ms. Almack to resume her post. In 2003, Ms. Almack took a week off for surgery even though the surgery had been cancelled. When she returned, the parties were involved in a dispute after which Ms. Almack left her keys at her desk and did not return to work. Ms. Almack claimed she was dismissed, but Dr. Pezim argued it was only after Ms. Almack left foul messages on the answering machine that he and other employees realized Ms. Almack had left his practice.
- [168] In the course of arriving at her decision, Madam Justice Satanove noted that Ms. Almack and Dr. Pezim were involved in many such arguments in the past (at para. 4). In light of those routine arguments and Ms. Almack's employment history with Dr. Pezim, it was unreasonable for Ms. Almack to assume that this particular dispute was a clear and unequivocal dismissal (at para. 22). Ultimately, Satanove J. found:
- [23] Whether it was reasonable for the defendant to conclude that the Plaintiff had quit is also determined by applying an objective test. On the defendant's evidence, neither Dr. Pezim, Ms. Kuhn, nor Ms. Sutton believed that the Plaintiff had quit until she left the rude and vulgar messages on the office answering machine. It is my opinion that at that juncture the defendant was entitled to accept the Plaintiff's repudiation of her employment contract (*Assouline*, *supra*).
- [169] Ms. Almack's conduct in leaving the rude and vulgar messages is what justified Dr. Pezim's assumption that she clearly and unequivocally intended to end her employment with him.

- [170] The defendant rightly notes that an important circumstance in determining the effect of the ROE is that the construction finishing trades involve employees regularly joining and leaving work. Apex argues that in these circumstances, a request for an ROE should be seen as an indication of the employee's intention to resign. The Plaintiff's fluid career and his time at Apex reflect this feature of the industry.
- [171] Similar to Ms. Almack, the Plaintiff was involved in multiple arguments with management. After least two of these instances, namely the dispute at the W.C. Blair job site and the quarrel with Mr. Kahn at the McPherson pool project, he was asked to go home, but he took neither of these to be a dismissal. Furthermore, in the past, when he had disputes, he had always been the one to re-initiate contact with Apex, which is reflected in the Notice of Non-Compliance of August 17, 2018.
- [172] As well, in none of these past instances did the Plaintiff make the request for an ROE. This casts serious doubt on the Plaintiff's assertion that since an ROE would be needed for employment insurance on any type of interruption of work, having asked for an ROE cannot be seen as a clear and unequivocal expression of his intent to resign.
- [173] In arguing that the Plaintiff did not resign, the Plaintiff's counsel states that the evidence shows it was the normal course for Apex management to contact employees and inform them of when and where to report to work. As I have described earlier, the Plaintiff's attendance at work was increasingly irregular towards the end of his employment at Apex. Moreover, Mr. Bordt testified that the Plaintiff did not get along with all of Apex's employees and would not take orders from all Apex supervisors, therefore assigning his shifts would also need to account for these added problems. These circumstances made information about his availability and intention to work something the Plaintiff controlled, making the normal course of conduct by Apex management to be irrelevant since the Plaintiff himself did not abide by the normal course of conduct. Apex tolerated this difficult behaviour because there was ample demand for workers with the Plaintiff's skills.
- [174] In this context, it is reasonable to conclude that the responsibility to make inquiries about his employment with Apex lay with the Plaintiff. This is contrary to the Plaintiff's argument that it was Apex that failed to inquire as to the reason the Plaintiff requested his ROE. If, at any stage after August 17, 2018, the Plaintiff had merely attempted to clarify the status of his employment, it is probable he would have continued his employment with Apex. Apex would have informed him that he was simply suspended due to non-compliance, which is clear from the Notice of Non-Compliance of August 17, 2018.
- [175] In the absence of such a clarification and due to his past dealings with Apex, a reasonable employer in Apex's position would see Mr. Coutlee's request for an ROE as a clear and unequivocal expression of his voluntary intent to resign.

Constructive Dismissal

[176] The Plaintiff submits that even if he resigned voluntarily, the resignation came in response to a unilateral change of a term of the contract by Apex. He argues he did not agree to such a change and ultimately treated the contract as repudiated by the defendant, which entitles him to damages for wrongful dismissal. The leading case on constructive dismissal is *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 24, which described it as:

Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

[177] In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, the Court refined the test from *Farber* to make it a structured inquiry. The test developed in *Potter* is helpfully summarized by Mr. Justice G.C. Weatherill in *Rampre v. Okanagan Halfway House Society*, 2018 BCSC 992 at para. 64:

Constructive dismissal engages a two pronged test:

- i. Was there a unilateral change by the employer that firstly, constituted a breach of the employment contract and secondly, substantially altered an essential term of the contract? This is an objective test: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 34, 37 [*Potter*]; and
- ii. Did the employer engage in a course of conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract?: *Potter* at para. 42.

I add that in *Potter* at para. 35, the Court preferred the term "substantial" alteration of an essential term of contract as opposed to "fundamental" breach since the latter terminology has taken significance in the context of exclusionary clauses.

[178] The Plaintiff's argument is that the following actions are examples of unilateral and fundamental changes by Apex to the contract, which viewed objectively show that Apex no longer intended to be bound by the terms of the contract.

- a) decisions on two occasions to bypass the defendant's normal write-up system and instruct his supervisors to prepare notices of non-compliance for the Plaintiff;
- b) repeated discussions forcing to justify his hourly wage;

- c) repeated attempts to have the Plaintiff reduce his hourly wage;
- d) failure to attempt to contact the Plaintiff to invite him back to work after August 17, 2018;
- e) failure to clarify why the Plaintiff was requesting a ROE a week or two after being dismissed;
- f) failing to schedule or attempting to schedule the Plaintiff for shifts after informing him to go home and take his tools;
- g) refusal to pay for the Plaintiff's vehicle repair (despite instructing him to fix his vehicle); and
- h) failure to provide the Plaintiff with full-time work on multiple occasions.

[179] In response, the defendant argues that even if these claims are taken at face value, none of them rises to the level of establishing a clear and unequivocal repudiation of an essential term of the Plaintiff's employment contract. I note that the standard of "clear and unequivocal" is not to be applied in the context of constructive dismissal as it is when differentiating a dismissal from a resignation. Potter prefers the language of substantial alteration to an essential term of the contract, and that is the test I will apply.

[180] The Plaintiff's argument is that the defendant's actions listed above taken together show intent not to be bound by the contract. Regardless, none of the actions listed by the Plaintiff, by themselves or taken together, meets the first branch of the test for constructive dismissal from Potter. While some of the terms, particularly the hourly wage, are indeed essential terms, I am unable to find that mere discussions of wage matters rises to the level of breaching a contractual term, particularly when the Plaintiff's job performance did not justify his relatively high wage. There is no evidence that the Plaintiff's wages were ever unilaterally decreased by Apex.

[181] Furthermore, I am not aware of any term of the employment contract, express or implied, guaranteeing the Plaintiff full-time work. Even if Apex failed to provide him with full-time hours, this cannot be seen as a substantial change in the employment contract given the nature of the industry, and given that the Plaintiff's health issues and disputes with management repeatedly prevented him from attending work at particular sites. Lastly, if there was any term requiring the defendant to repay the Plaintiff for damage to his car incurred while undertaking work-related activities, Apex has fulfilled its obligation under that term.

[182] I have already discussed that failing to enquire further about the Plaintiff's request for an ROE and failing to schedule the Plaintiff for shifts after August 17, 2018, were justified given the circumstances, and therefore cannot be seen as a breach of the employment contract.

[183] As a result, the Plaintiff has not met his burden to establish that a term of the employment contract was unilaterally changed by Apex such that it amounted to a breach of the contract. Therefore, the Plaintiff has failed to show that he was constructively dismissed.

Conclusion

[184] The Plaintiff voluntarily resigned his position and was not constructively dismissed by Apex. This answers all the issues at trial.

[185] I will conclude by adapting Satanove J.'s words from Almack. It is unfortunate that the Plaintiff left his employment with Apex despite Apex's willingness to continue working with him, however "It is improper for judges to generously assuage the pain employees suffer when they part ways with their employer, absent a basis in law for doing so": Almack at para. 24. Since the Plaintiff has established no such basis in law, his action is dismissed with costs to the defendant.

"Russell J."

The Honourable Madam Justice Russell

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