

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 117
5509587

BETWEEN CODY GEORGE LAWTON
 Applicant

AND APEX ELECTRONIC SERVICE
 CENTRE LIMITED (IN
 LIQUIDATION)
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Chris Lawton, representing the Applicant
 No appearance for Respondent

Investigation Meeting: 22 October 2014 at Whanganui

Determination: 19 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Cody Lawton was employed by Apex Electronic Service Centre Limited from 5 January 2010 to the date of his resignation, with immediate effect, on 1 July 2014. Mr Lawton claims that during his employment he suffered unjustifiable disadvantage and that his employer breached a number of its statutory obligations. He seeks remedies including recovery of wages and compensation.

[2] Apex Electronic Service Centre Limited (Apex) was ordered into liquidation on 17 September 2014. The High Court appointed as liquidators of the company Messrs Colin Owens and David Vance of Deloitte. After being made aware of a claim against Apex the liquidators agreed the applicant could continue the proceedings already commenced in the Employment Relations Authority to enable him to establish his claim, if any, in the liquidation.

[3] Messrs Owens and Vance informed the Authority that they would not be participating or defending the company in any of the proceedings. They noted the risk that there may be no recoveries made in the liquidation and therefore any award made against the company may go unsatisfied.

The Authority's investigation

[4] Apex did not take part in the investigation meeting, as had been indicated in advance in correspondence from the liquidators. In accordance with clause 12 of Schedule 2 to the Act I proceeded with the investigation, acting as fully in the matter as if the respondent had duly attended or been represented.

[5] In reaching this determination I have considered documents from Apex which were filed with its statement in reply to Mr Lawton's claims, and other documents from the employer supplied by Mr Lawton. However, in according weight to those documents, I have been mindful that they were not in the form of sworn affidavits and that they were unable to be tested by questioning and cross-examination.

[6] Mr Lawton acknowledged in the investigation meeting that he was aware he may not receive any material benefit from any award made in his favour. It was, however, important to him to proceed with his claims against Apex on the grounds of his reputation in the community which he believed had been adversely affected by the termination of his employment.

Background to Mr Lawton's resignation

[7] Mr Lawton commenced his employment with Apex as a school leaver on a Department of Work & Income job ops programme. This provided the employer the assistance of a wage subsidy for the first six months of his employment. He was employed on a fixed term employment agreement which was due to expire on 2 July 2010. However, Apex continued to employ him over the next four years.

[8] Mr Lawton gave evidence that he had initially felt welcomed within Apex and "*part of the family*". His employer seemed to be satisfied with his work, particularly as he was able to complete many jobs on his own after six months of employment. Mr Lawton said he enjoyed his job and took pride in his work. He completed an apprenticeship during his employment, qualifying as an electronic technician.

[9] From an early point in the relationship, Mr Lawton says a co-owner of the business led him to believe that he had a very good future with the company and that it was the owners' expectation and hope that he would one day own the company himself. Mr Lawton says it was because of this that he did not raise objections to working hours additional to his basic 40 hours per week. He estimates that over the course of his employment he worked at an average of 2 hours extra a week from the commencement of his employment. In his words, he felt he was investing in his future by doing so.

[10] Approximately two years into the employment relationship, Mr Lawton says he noticed a significant change in his employer's behaviour towards him and at times the owners became openly aggressive to him. This began to impact upon his health with the result that he took a number of days as sick leave. Mr Lawton says he tried to discuss the issues on many occasions without success. Issues of concern to him were the fact that he was feeling bullied, that he was frequently not getting a lunch hour and that he was working beyond his basic hours of work.

[11] Mr Lawton was also concerned about his wages. He was employed in 2010 on the minimum adult wage and the only pay increases he received during his employment were to reflect increases to the minimum wage. Mr Lawton was aware that he was being charged out for his services and proving extremely profitable in his view for the company.

[12] By the end of 2013, the situation had become serious to the extent that Mr Lawton was taking many days as sick leave. He says that after he completed his apprenticeship, Apex commenced employment agreement negotiations with him. However, he viewed the employment agreement offered by Apex as unreasonable and says Apex demonstrated an unwillingness to negotiate in a fair and reasonable manner. He attended meetings with his employer, sometimes accompanied by one or other of his parents as support person.

[13] During this process, Mr Lawton says he became aware that there were "*serious anomalies*" in both his sick and annual leave records. Wage and time records also showed discrepancies in KiwiSaver payments and wages.

[14] This eventually led to Mr Lawton's resignation by letter dated 1 July 2014. In that letter, Mr Lawton notified his employer of his belief that the workplace was an

unsafe environment for him to continue to work. He also notified his personal grievance for unjustified disadvantage and his claims for recovery of wages. Additionally Mr Lawton raised a number of other items such as his employer's failure to complete fair and reasonable wage reviews, its failure to supply clearly defined job descriptions and key performance indicators, his dissatisfaction with his employer's leave application process, his lack of a current employment agreement, and his objection to his employer's bullying behaviour.

Claims

[15] Mr Lawton makes the following claims:

- (a) Payment of lost wages as a result of his employer's failure to keep accurate records in relation to annual and sick leave. He claims 46 days of leave which he costs at \$5,216.40;
- (b) Payment of unpaid overtime based on 2 hours a week for the 4 $\frac{1}{3}$ years of his employment plus KiwiSaver which he costs at \$8,030.88;
- (c) Compensation for the lack of a yearly wage review and low wage paid to him throughout his employment based on 50c per hour for the duration of his employment. He costs this at \$4,435.20;
- (d) Compensation for unpaid work-related sick leave for the last four weeks of his employment for which he claims \$2,400;
- (e) Compensation for loss of future prospects both for his job and for the possibility of one day being an owner or part owner of Apex. He claims \$3,000 in respect of this;
- (f) Compensation for hurt and humiliation for which he claims \$10,000;
- (g) Reimbursement of apprenticeship costs for which he claims \$1,700;
- (h) Legal fees for which he claims \$6,000.

Issues

[16] The issues for the Authority to determine are whether there is merit in any or all of Mr Lawton's claims and, if so, what remedies are appropriate.

Was Mr Lawton unjustifiably disadvantaged in his employment by the actions of his employer?

[17] A number of Mr Lawton's claims overlap. His claim to have been disadvantaged in his employment stems from actions of his employer that he says gradually destroyed his trust and confidence in the company and made the workplace an unsafe environment for him.

[18] His claims include bullying by the employer, its actions relating to employment agreement negotiations and its failures with respect to wages and record keeping. Of those, there are provisions under the Employment Relations Act 2000 (the Act) and the Holidays Act 2003 to deal with wages, holiday pay and record keeping matters and I will deal with those matters separately.

[19] Mr Lawton says he experienced bullying in his employment from mid-2011 onwards. He described it as consisting of being shouted at by his employer; being the subject of unwarranted criticism of his work; nasty remarks and little digs on a daily basis.

[20] Mr Lawton did not raise a personal grievance in relation to bullying at the time these incidents occurred. It appears from notes of a meeting called by the Office Manager in November 2013 that Mr Lawton informed his employer he felt as though he was being bullied. He did not, however, raise a grievance at that time despite accusations subsequently made of man-handling and aggression.

[21] He raised his concerns over bullying again on 19 May 2014 during the course of ongoing discussions with his employer over a new employment agreement following the completion of his apprenticeship. Mr Lawton's parents were in attendance to support him. An employment consultant representing his employer at the time was also in attendance.

[22] Mr Lawton claims his employer became irate during the meeting, accusing him of lying, and shouting at his parents. Mr Lawton says this was a further instance of bullying and that he raised this with Apex within the statutory timeframe for raising a personal grievance.

[23] The May meeting followed correspondence between Apex and the Lawton family from March 2014 over the draft employment agreement proposed by the employer. The tenor of the Lawton's correspondence had been forthright. Examples

are found in their response to the first draft of the agreement, in which they included comments by an unnamed person suggesting that the draft "*could be seen as grounds for the basis of a constructive dismissal claim.*" Their response also cited other unnamed persons' responses to the draft as "*mean spirited*" and "*hostile*". Their response to the second draft commented negatively on, or requested changes to, all but 7 of the 24 clauses comprising the proposed agreement.

[24] With this as background to the meeting on 19 May 2014, it was to be expected that the meeting would be robust and challenging. I do not find, however, that it forms grounds for a personal grievance for unjustifiable action on the part of Apex that disadvantaged Mr Lawton in his employment.

[25] Mr Lawton also claims to have been disadvantaged by his employer's failure to complete annual wage reviews and by paying him low wages. He seeks compensation for this.

[26] Mr Lawton was originally employed on a fixed term employment agreement for a six month period. When his employment continued on after the expiry of the six months no new employment agreement was entered into by the parties. The effect of that is that his 2010 employment agreement continued on, in accordance with its terms, albeit as an agreement of indeterminate duration.¹

[27] The employment agreement, signed by Mr Lawton in December 2009, provided for remuneration to be paid by way of an hourly rate of \$12.50. It also provided for an annual review of wages. However the review clause specified that was no "*necessary entitlement*" to an increase in wages.

[28] Over the course of his four and a half years of employment Mr Lawton had five pay increases, some of which were directly related to increases to the minimum wage. His hourly pay rate was always at or above the level of the minimum wage, increasing from \$12.50 in January 2010 to \$15 from February 2014. For the majority of that time he was working towards his trade qualification.

[29] Mr Lawton believed himself to be worth to his employer more than his pay rate reflected. However I find he has not substantiated his claim to have been disadvantaged by Apex. For completion, I note my finding that Mr Lawton's claim to

¹ *Varney v Tasman Regional Sports Trust* NZEmpC CC 15/04.

have been paid less than the minimum wage at times during his employment is not upheld.

Is Mr Lawton owed payment for annual and/or sick leave?

[30] Mr Lawton claims Apex "*misappropriated*" his sick and annual leave during his employment. He queries the leave records supplied to him by his employer and says there are numerous discrepancies between those records and the leave noted on his payslips.

[31] I have examined and cross referenced the leave records and the Time Pay and Wage records. From my examination of those documents I find Mr Lawton was wrongly recorded as taking 11 days annual leave. Some of those days were clearly erroneous as they were deducted for Saturdays and Sundays when his working hours were between Monday and Friday. Other days were recorded against both Mr Lawton's sick leave and annual leave entitlements when they should have been recorded only against his sick leave.

[32] An examination of Mr Lawton's sick leave reveals that he had used all leave owing to him by the date of his resignation. He had been on sick leave for more than two weeks before he resigned and by my calculation he would have had 9 days unpaid leave if annual leave had not been used. By my best estimate Mr Lawton was entitled to be paid 37 days of annual leave at the date of termination of his employment.

[33] The onus is on an employer to keep accurate wage and time records and holiday records.² Where the records kept by Apex appear inaccurate or to have recorded both annual and sick leave debits for the same days, I have determined such instances in Mr Lawton's favour.

Was Mr Lawton underpaid wages during his employment?

[34] Mr Lawton was paid on the basis of a 40 hour week but says he invariably worked at least two hours more each week. He claims payment for the duration of his employment based on \$13.50 per hour which he has calculated to be his average hourly rate over the period. With KiwiSaver payments added he claims to be owed \$8,030.88.

² Section 130 of the Act and s. 81 of the Holidays Act.

[35] Mr Lawton has provided some evidence of certain days on which he worked outside normal hours. That evidence came from his mother, a customer for whom he provided services in the course of his employment, and an acknowledgement in a letter from the employment consultant formerly representing Apex.

[36] Mrs Lawton's evidence concerned a period of approximately four weeks in October 2013 when Mr Lawton's car was off the road and she was providing his transport to work and back at the start and finish of the day as well as lunchtimes. Three times during that month she said Mr Lawton did not get a lunch hour at all because of the demands of his work. Mrs Lawton also referred to "*often waiting for protracted periods outside Apex*" at the end of the day when Mr Lawton should have finished work at 5.30 p.m.

[37] Neville Proctor, a former customer who gave evidence on Mr Lawton's behalf said Mr Lawton had worked on his television sets during his employment with Apex and that some of those visits were after 5.30 p.m. He estimated the after-hours work to have occurred on three or four occasions.

[38] The employment consultant who responded on behalf of Apex to the claims Mr Lawton made in his letter of resignation of 1 July 2014 acknowledged that Mr Lawton had worked overtime on several occasions during the duration of his employment, not several times a week as Mr Lawton had claimed.

[39] From the evidence before me I have concluded that Mr Lawton was a conscientious employee who placed great value on customer service. This led him to work beyond his normal finishing time on some jobs that were assigned to him. It was clear from Mr Proctor's evidence, and the evidence of another customer, that it resulted in Mr Lawton being held in high regard for his work ethic and customer relations. I am not satisfied, however, that Mr Lawton's claim to have worked two additional hours per week over the duration of his employment can be sustained.

Is Mr Lawton entitled to reimbursement of apprenticeship costs?

[40] Mr Lawton seeks reimbursement of his apprenticeship costs of \$1,700 on the basis that his employer attempted to impose a "*bond*" on him based on those costs. This claim cannot be sustained. It is based on a clause in the draft employment agreement that was under negotiation between the parties before Mr Lawton's resignation. The clause, which was to apply to external training costs paid by the

employer, was not operative as the proposed employment agreement had not come into effect. Even if it had, the clause would not have applied to external training costs funded by Mr Lawton.

What compensation, if any, is appropriate?

[41] I have found Mr Lawton did not suffer disadvantage in his employment with regard to the bullying and lack of pay reviews he alleged. He has additionally claimed compensation for a number of employment-related matters including the stress he says he suffered in the last four weeks of his employment when he was on sick leave which he says was unpaid.

[42] Mr Lawton's payslips show that he was paid for his last four weeks of employment throughout the month of June 2014. Part of the period was paid as sick leave and the rest deducted from his annual leave entitlement. I have already dealt with the employer's failures in relation to sick and annual leave. There are no other remedies available to him.

[43] Mr Lawton also claims compensation for the loss of future prospects he says he suffered, both from the loss of his job and for the possibility of one day being a future owner of Apex. As Mr Lawton resigned and has not claimed to have been constructively dismissed, I reject his claim to be compensated for the loss of his job. Invoices supplied to the Authority by Mr Lawton show that he was taking advice on his employment situation from an experienced advocate in the months before his resignation and afterwards. I conclude it was a deliberate decision on his part not to claim a constructive dismissal and that his resignation was therefore voluntary.

[44] His claim for compensation in relation to the possibility of one day owing the business is based on comments from the Office Manager, both verbal and in writing. I find those comments were of an aspirational nature designed to encourage Mr Lawton and they implied no promise of future ownership. There is no case for compensation.

[45] Having rejected all of Mr Lawton's claims to have been disadvantaged in his employment he has no claim to the remedy of compensation for hurt and humiliation.

Costs

[46] Mr Lawton has claimed \$3366.16 in advocacy fees incurred post-mediation of this matter. He supplied invoices to the Authority to support his claim. I accept that he incurred costs in progressing this matter, although he was not represented by his advocate at the investigation meeting.

[47] As Mr Lawton has been successful in one of his claims, it is appropriate that a contribution to his costs be made using the well-known principles endorsed by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³. The investigation meeting lasted half a day. I find it appropriate to apply the Authority's tariff-based costs award, adjusted for the length of the hearing and the partial success of Mr Lawton's claims. Accordingly, I order Apex to contribute \$1,000 towards the costs incurred by Mr Lawton in bringing his claims. Additionally, Apex is to reimburse Mr Lawton the Authority filing fee.

Determination

[48] Apex Electronic Service Centre Limited (In Liquidation) is to pay Mr Lawton the sum of \$4,440 less PAYE, being payment for 37 days' annual leave owing to him at the date of his resignation calculated on the basis of \$15 an hour for an 8 hour day.

[49] Apex is also to pay Mr Lawton the sum of \$1,000 as a contribution to his advocacy costs and to reimburse him the Authority filing fee of \$71.56.

Trish MacKinnon

Member of the Employment Relations Authority

³ [2005] 1 ERNZ 808