



# New Zealand Employment Relations Authority Decisions

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## Rowlands v EOS Services Limited (Christchurch) [2017] NZERA 1063; [2017] NZERA Christchurch 63 (28 April 2017)

Last Updated: 20 May 2017

### IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 63

3002578

BETWEEN LAUREN ROWLANDS First Applicant

JUERGEN HEINICKE-LINDT Second Applicant

ZENA CARROLL Third Applicant

AND EOS SERVICES LIMITED Respondent

Member of Authority: Christine Hickey

Representatives: Ms Rowlands and Mr Heinicke-Lindt in person

No appearance for the Respondent

Investigation meeting: 26 April 2017

Determination: 28 April 2017

#### DETERMINATION OF THE AUTHORITY

**A. Within 28 days of the date of this determination EOS Services Limited must pay Lauren Rowlands \$288.00 gross in unpaid wages, and 5% per annum interest on that amount from 16 November 2016 until it is paid in full.**

**B. Zena Carroll's claim is dismissed.**

**C. Within 28 days of the date of this determination EOS Services Limited must pay Juergen Heinicke-Lindt \$6,405.69 gross in unpaid wages, commission, bonuses and the filing fee.**

**D. Within 28 days of the date of this determination EOS Services Limited must pay Juergen Heinicke-Lindt \$1,241.27 net being payment for a phone and Kiwisaver contributions.**

**E. EOS Services Limited must pay 5% per annum interest on all sums due and payable to Juergen Heinicke-Lindt from 16 November 2016 until the full amount is paid.**

#### Employment relationship problem

[1] EOS Services Limited (EOS) employed the three applicants in November

2016, when it sold its business to another company and gave all employees notice that the business was being restructured.

[2] The three applicants claimed that they were not paid the correct amount for their contractual notice periods. Mr Heinicke-Lindt also has a number of other claims for money not paid to him.

[3] Ms Carroll did not appear at the investigation meeting. I have dismissed her claim for lack of evidence.

### **Procedural background**

[4] As at today's date, EOS remains on the NZ Companies Register. Despite the Statement of Problem and other communications, such as the Notice of Investigation Meeting being sent to the address for service<sup>1</sup> listed on the Companies Register, EOS has not contacted the Authority or participated in the proceedings at all.

[5] The Authority Officer has also sent all communications to two email addresses for the sole director of EOS, Rob Steel, who ran the business while the applicants were employed.

[6] In addition, the Authority Officer has attempted to contact Mr Steel on a mobile phone number on which Mr Steel has a voice mail message. Mr Steel has not responded to any of the contacts made by the Authority.

[7] I delayed the beginning of the investigation meeting for 10 minutes in case a representative of EOS was planning to attend but was running late. However, EOS

was not represented.

<sup>1</sup> Which is also the registered address.

[8] I proceeded to hear evidence and make my determination in EOS's absence as I am empowered to do under clause 12, of Schedule 2 of the [Employment Relations Act 2000](#) (the Act).

[9] Ms Rowland and Mr Heinicke-Lindt gave affirmed evidence and answered my questions.

### **Ms Rowland's claim**

[10] Ms Rowland provided a copy of her individual employment agreement (IEA)

and copies of her payslips and the letter she received terminating her employment.

[11] Clause 10 of Ms Rowland's IEA provides that if in the event of redundancy her employment is terminated she will be given one week's notice, or one week's base pay, in lieu of such notice.

[12] All employees were told in the afternoon of Monday, 7 November 2016 that EOS was selling its business and that their roles would cease to exist at 5 pm on Thursday, 10 November 2016. On 16 November 2016, Ms Rowlands received her final pay. She was paid up to and including Thursday, 10 November 2016. In other words, she was not given a week's notice or pay for a week in lieu of notice. EOS paid Ms Rowlands for Tuesday, 8 November, through to Thursday, 10 November only.

[13] Ms Rowlands was offered another role with the company that purchased EOS's business. However, I am satisfied that was not a comparable role because the pay structure was less favourable. Ms Rowlands did not accept the offered new role. Therefore, according to her IEA, EOS owes her a further two days of pay for Friday,

11 November and Monday, 14 November 2016.

[14] Ms Rowlands worked a 40-hour week, or 8 hours per day. She earned \$18.00 per hour. Therefore, EOS must pay Ms Rowlands 16 hours x \$18 = \$288.00 gross.

### *Notice period*

[15] In the event of redundancy, clause 12 of Mr Heinicke-Lindt's IEA provided that EOS had to give him four weeks' notice or one week base pay in lieu of such notice.

[16] The letter dated 7 November 2016 from EOS told Mr Heinicke-Lindt that his role, as sales manager, would be disestablished at 5 pm on Thursday, 10 November.

[17] It also stated that Mr Heinicke-Lindt "will be made redundant under Clause 13 of your employment agreement."

[18] Clause 13 was an employee protection provision that applied to restructuring, which included the redundancy of the sales manager's role. It meant that if the company taking over the business offered Mr Heinicke-Lindt employment on terms and conditions that were generally no less favourable he would not get any redundancy compensation or notice of his termination.

[19] Mr Heinicke-Lindt was offered a role with the new business. However, he was offered a role as an independent contractor and not as an employee. Therefore, Mr Heinicke-Lindt was not offered employment and that made him eligible for the notice period set out in clause 12 of his IEA.

[20] In Mr Heinicke-Lindt's final pay received on 16 November 2016, EOS paid

him up to and including Thursday, 10 November. Mr Heinicke-Lindt's base pay was

\$1,600.00 gross per week. He is entitled to a further three weeks of pay (\$4,800.00) plus two extra days of pay for Friday, 11 November and Monday, 14 November (\$1,600.00 divided by 5 = \$320.00 x 2 = \$640.00). EOS owes Mr Heinicke-Lindt a total of \$5,440.00 gross for his notice period.

[21] Mr Heinicke-Lindt has also claimed the employer contribution of 3% on the unpaid wages. Therefore, EOS also owes Mr Heinicke-Lindt (5,120 x 3% = \$153.60 less 30% tax =) \$107.52 net. Mr Heinicke-Lindt must pay that into his KiwiSaver account once he receives it.

[22] Clause 7 of Schedule A of Mr Heinicke-Lindt's IEA states:

The employer will provide the Employee with a fuel card (up to \$500 per month) for work purposes. The employee agrees to comply with the company's Fuel Card Policy.

[23] Clause 14 of his IEA provides:

During employment or upon termination for any reason you agree and hereby authorise the Company to deduct any over-payments, outstanding debts, damages or loss caused by you to Company or customer property, the value of any unreturned property, or a sum equivalent to the remaining notice period, if you fail to give the correct notice under this Agreement or money owed to the Company by you from your pay including, without limitation, final pay and/or holiday pay.

[24] EOS withheld \$44.25 from Mr Heinicke-Lindt's final pay because Mr Steel

calculated that Mr Heinicke-Lindt had spent \$3.88 over his petrol allowance of

\$500.00 in September 2016, \$2.98 under his October 2016 allowance and \$43.35 more than what Mr Steel considered he should have spent, on a pro rata basis, in November 2016.

[25] That was an unauthorised and therefore illegal deduction in breach of ss 4 and

5 of the [Wages Protection Act 1983](#). First, EOS did not have Mr Heinicke-Lindt's written consent to average out monthly fuel allowances and to deduct any "overspend" from his wages. Secondly, there is no contractual ability to pro rate the fuel allowance over a part of a month and claw back the rest. Mr Heinicke-Lindt was entitled to spend up to \$500.00 in November 2016 on the fuel card. He spend less than \$500.00 that month, as he was entitled to do and EOS was not entitled to claw any of that amount back. Therefore, EOS must pay Mr Heinicke-Lindt \$44.25 gross.

[26] However, Mr Heinicke-Lindt is not entitled to claim the difference between

\$500.00 and the amount of \$233.38 spent in November 2016 from EOS.

#### *Phone cost*

[27] Mr Heinicke-Lindt's IEA records his starting date of work as 16 May 2016. I am satisfied that he actually began work for EOS the week prior to that. I am satisfied that in lieu of being paid his weekly salary of \$1,600.00 Mr Steel agreed that EOS would pay the cost of a new mobile phone Mr Heinicke-Lindt wanted to purchase

from Spark. The contract Mr Heinicke-Lindt entered into with Spark was to pay off the cost of a \$999.00 phone through monthly instalments of \$41.65, over two years.

[28] EOS paid \$41.65 per month to Mr Heinicke-Lindt for 5 months, but has ceased paying those amounts since Mr Heinicke-Lindt stopped working for EOS. The balance owed on that phone at that time was \$790.95. I am satisfied that EOS should pay the amount outstanding to Mr Heinicke-Lindt, as part of his wages as agreed in May 2016.

#### *Commission and bonuses owed and withheld salary*

[29] On top of his salary, Mr Heinicke-Lindt was entitled to a \$200.00 commission per sale and a monthly bonus of 7.5% on all sales, less the commission.

[30] I am satisfied that for the four October sales, totalling \$13,574.00, he was not paid the 7.5% bonus of \$1018.05 - \$800.00 = \$218.05.

[31] I am also satisfied that Mr Heinicke-Lindt made on sale in November 2016 for the value of \$3,250.00. EOS has not paid him the commission or the 7.5% bonus for this. Therefore, EOS owes him \$243.75.

[32] In addition, EOS wrongly withheld \$388.08 from his final pay, which included amounts wrongly calculated as being overpaid for commission and bonuses.

[33] EOS owes Mr Heinicke-Lindt a total of \$849.88 gross in salary withheld wrongly, commission and bonuses.

## PAYE

[34] Mr Heinicke-Lindt's summary of earnings from the IRD for the year ended 31 March 2017 shows that EOS has not paid any PAYE on his salary earned in November 2016.

[35] EOS provided two payslips in November 2016 showing that it withheld \$1,978.81 in PAYE from Mr Heinicke-Lindt's pay. However, it appears EOS did not pay that to the IRD.

[36] I am satisfied that Mr Heinicke-Lindt has no responsibility for that amount not being paid. I am satisfied that he followed the non-payment up with the company but was told that the person in charge of making PAYE payments had been instructed not to pay the PAYE for November 2016 by Mr Steel.

*KiwiSaver payments – not paid to Mr Heinicke-Lindt's KiwiSaver account.*

[37] Mr Heinicke-Lindt's two payslips for November 2016 show that a total amount of \$201.55 in his employee contribution was withheld from his pay, and that EOS's total employer contribution was \$141.25.

[38] I am satisfied that the total of \$342.80 should have been credited to Mr Heinicke-Lindt's KiwiSaver account by EOS for November 2016. However, it has not been. Therefore, EOS owes Mr Heinicke-Lindt \$342.80, which he must pay into his KiwiSaver account once as receives it.

## Interest

[39] The applicants have claimed interest on the amounts owed. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the [Judicature Act 1908](#), which is currently 5% per annum<sup>2</sup>.

[40] In not paying its ex-employees as it should have done, EOS has deprived them of the money they should have had in November 2016. I consider it must pay interest on the outstanding amounts.

## Costs

[41] EOS must also reimburse Mr Heinicke-Lindt the \$71.56 it cost him to lodge this claim in the Authority.

Christine Hickey

Member of the Employment Relations Authority

[2 Judicature \(Prescribed Rate of Interest\) Order 2011](#)