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## Dias v Logical Systems Limited t/a Toobee (Christchurch) [2017] NZERA 1020; [2017] NZERA Christchurch 20 (1 February 2017)

## New Zealand Employment Relations Authority

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## Dias v Logical Systems Limited t/a Toobee (Christchurch) [2017] NZERA 1020 (1 February 2017); [2017] NZERA Christchurch 20

Last Updated: 6 March 2017

**IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH**

[2017] NZERA Christchurch 20  
5607093

BETWEEN MAHAMARAKKALAGE PRIYANJITH INDRAMAL AUGUSTINE DIAS Applicant

A N D LOGICAL SYSTEMS LIMITED

t/a YOOBEE Respondent

Member of Authority:	Helen Doyle	
Representatives:	Leo Wenborn, Advocate for Applicant	
	Kesar Singh, Counsel and Lawrence Sami, Advocate for Respondent	
Investigation Meeting:	27 October 2016 at Christchurch	
Submissions Received:	3 November 2016, from the Applicant Additional information 4 November 2016 Applicant No submissions from the Respondent	from the
Date of Determination:	1 February 2017	

**DETERMINATION OF THE AUTHORITY**

**A Logical Systems Limited did not breach its employment agreement with Mahamarakkalage Priyanjith Indramal Augustine Dias when it reduced his fortnightly payments from the pay period ending 21**

**September 2014.**

**B Personal grievance claims for unjustified actions causing disadvantage were not raised within the statutory timeframe and/or if it could be said they were raised were not made out.**

**C Logical Systems Limited is to pay to Mahamarakkalage**

**Priyanjith Indramal Augustine Dias the following sums:**

**(a) Commission in the sum of \$1050. Leave is reserved for Mr Wenborn to return to the Authority within 7 working days if a commission payment of \$350 showing as paid in the pay record summary was not in fact paid.**

**(b) Holiday pay in the sum of \$1777.60 gross.**

**(c) Interest is awarded on the holiday pay from 19 April 2015 until the date of payment at 5% per annum under s 87(3) of the [Judicature Act 1908](#).**

**(d) Interest is awarded on the commission from 5 February**

**2016 until the date of payment at 5% per annum under s 87 (3) of the [Judicature Act 1908](#).**

**D The counterclaims are not made out and are dismissed. E Costs are reserved and a timetable set.**

### **Employment relationship problem**

[1] Mahamarakkalage Priyanjith Dias says his salary was reduced without prior negotiation or consultation and this was an unjustified action that disadvantaged him. He says further that in reliance on an agreement on or about 8 December 2014 between him and the National Service Manager, Shaneel Naidu, to reinstate his salary to the original level he turned down a job offer. When he was then told that his payments would not be reinstated to the original level he says that this led to his decision to resign from his employment on or about 19 April 2015 although he does not allege an unjustified dismissal. Mr Dias further claims that he is owed commission payments and holiday pay.

[2] Mr Dias seeks reimbursement of salary in the sum of \$2,584.48 gross, unpaid annual leave in the sum of \$1,776.92 gross, unpaid commissions in the sum of \$1,500, loss of potential income with the other employer in the sum of \$2,925, compensation in the sum of \$10,000 and reimbursement of legal costs.

[3] Logical Systems Limited (Logical Systems) is a duly incorporated company having its registered office in Auckland. It undertakes the business of computer

retailing. Logical Systems does not accept that Mr Dias has a personal grievance or is owed any money. It says that Mr Dias was in fact overpaid from February 2014 until

8 September 2014 in the sum of \$4,469.23 and for the period 8 September 2014 to 15

April 2015 in the sum \$2,234.50. It does not accept that it owes him any further commission payment or holiday payment. Logical Systems seems to have relied on the alleged over- payment as a set off for at least the holiday pay aspect of the claim.

### **The issues**

[4] The issues for the Authority to determine in this matter are as follows:

- (a) Was the adjustment of payments to Mr Dias on the basis of the hours he worked a breach of his employment agreement;
- (b) Was there an unconditional agreement reached on 8 December 2014 to increase his salary back to \$42,000;
- (c) If there was, did Mr Dias rely on that agreement and turn down other employment and suffer loss as a result;
- (d) Did Mr Dias raise a personal grievance within the statutory time frame about a failure to consult when his salary payment was adjusted to reflect that he worked 36 rather than 40 hours a week and in respect of the alleged breach of the agreement;
- (e) If Mr Dias did raise a personal grievance then was there an unjustified action that disadvantaged him and if so what remedies is he entitled to;
- (f) Is Mr Dias owed reimbursement of money for holiday pay, commissions and underpayment of salary;
- (g) Is the counterclaim by Logical Systems made out for reimbursement of the sums of \$4469.23 and \$2,234.50 for overpayments?

### **The background against which these issues are to be assessed**

[5] Mr Dias worked in 2012/2013 for Yoobee Limited (Yoobee), a division of the Renaissance Group of Companies (Renaissance Group). He resigned from his employment and purchased a mowing/gardening business.

[6] In or about January 2014, Mr Dias was contacted by Benjamin Gillett who was at that time the store manager at Yoobee's Blenheim Road store in Christchurch. Mr Gillett needed to find an Apple technician as one of the service leaders at the store was leaving. He talked to Mr Dias about returning to the store. Mr Dias explained that he had purchased a business but would be prepared to return to work four days' a week for Yoobee. Negotiation took place about the salary level. Mr Dias was aware that the current incumbent of the position was paid \$40,000 per annum and he wanted to be paid that same salary but for four rather than five days of work. Mr Dias recalled Mr Gillett prepared the paperwork but he provided a copy of his curriculum vitae. He said he was "*pretty much being given the job straightaway*". He started work a few days later on 3 February 2014 for Yoobee. Mr Gillett explained that he sent a recruitment request up to the Head Office to authorise the appointment and for an employment agreement to be prepared. He said that the offer was approved by the General Manager and it is in line with the agreement that Mr Dias now relies on.

[7] An employment agreement was signed between Mr Dias and Yoobee on 3

February 2014 which was the date of commencement of employment. From the time that Mr Dias commenced employment with Yoobee, he undertook four days' work per week and was paid a \$40,000 salary.

[8] Clause 6 in the employment agreement is an hours of work clause and it provides:

The employee's normal working hours are 40 hours rostered Monday to Sunday. However, in order to perform the job effectively, the employee may be required to work additional hours as appropriate.

[9] Clause 2.1 provides of the employment agreement provides:

The terms and conditions contained herein override and supersede any previous terms and conditions of employment whether written or implied.

[10] Mr Dias provided a copy of the recruitment request document Mr Gillett says was completed at the time he was appointed to replace the existing service manager dated 30 January 2014. The recruitment request is in two main parts separated by a series of broken lines. The first part of the form is about authorisation to recruit for the position. The second part is about the employment agreement details to be forwarded to Human Resources. It is in the second rather than first part of the form that there is reference to the hours of work as 36 hours. The recruitment form provided by Mr Dias with the statement of problem was somewhat different to that he

provided with his statement of evidence. Mr Dias said that the formatting may have contributed to that.

[11] Both documents provided by Mr Dias were signed by the General Manager of Yoobee but not by the Chief Executive Officer (CEO). Mr Gillett said that this was in accordance with what usually happened. That does not seem to address the statement at the top of the form that it must be signed by the CEO prior to any job offer being made. The foot of the form is somewhat confusing. It could suggest the form only needs to be signed by the CEO if there is a new position but equally, and in my view more likely, it means that a business case needs to be signed off additionally by the CEO in the event of a new position.

[12] Logical Systems maintain there was some doubt about the authenticity of the recruitment request document. I was provided with a copy of the recruitment request it says was extracted from the Yoobee internal files that does not have either the General Manager's or CEO's signature. I offered to follow the matter of the authenticity of the form up because it was clearly important to Logical Systems. Although it was agreed that Mr Singh or Mr Sami would give me information about who I could contact from Renaissance Group about the matter the information was not forthcoming. I have not therefore been able to follow up as I had anticipated.

[13] By itself the recruitment form, an internal document, may not be the most persuasive evidence about what was offered and agreed. In any event clause 2 of the employment agreement provides its terms and conditions override previous terms and conditions. Mr Dias said that he did not carefully read the employment agreement before signing it.

[14] On a day to day basis I accept that from 3 February 2014 Mr Dias worked four days a week at Yoobee and did not work Fridays. He was paid a salary of \$40,000. He had the support of his manager Mr Gillett in working those reduced hours for his salary. The matter may well have rested there but for the sale of the Yoobee business.

[15] On 5 March 2014 some four weeks or so after Mr Dias had commenced his employment; Mr Dias was formally advised by letter that Renaissance Corporation had sold its Yoobee retail business to Logical Systems effective from 6 March 2014, the following day. Yoobee advised that Logical Systems would offer employment on the same terms as Mr Dias had enjoyed with Yoobee and entitlements such as holidays and sick leave would be carried across, with employment being treated as

continuous. My impression of the evidence is that whilst this letter formalised the sale there had been some verbal discussion about it earlier and it was not a surprise to Mr Dias.

[16] There was also on the same date a letter from the Managing Director of Logical Systems, Daven Naidu, of a generic nature. The letter provided to Mr Dias confirmed that if he chose he could continue his employment with Logical Systems in the same position he currently held and that the employment would not alter his current contract terms or conditions, pay schedules, wage rate, salary or commission.

[17] Mr Dias duly accepted the offer of employment with Logical Systems and became an employee of that company from 6 March 2014. There was no new employment agreement entered into at that time. There was a subsequent written schedule amendment signed by the parties on or about 30 July 2014 noting the new parties to the employment agreement and an increase at the end of July 2014 to Mr Dias's base salary to \$42,000. I also note that although Mr Dias had been paid monthly by Yoobee there was a change to fortnightly payments shortly after Logical Systems became his employer.

[18] I accept from the evidence that Logical Systems was in all likelihood unaware that Mr Dias was not working 40 hours a week over five days. The timesheets would not have assisted because the selection I was provided with from the Blenheim Road store had the word salary beside Mr Dias's name for each day Monday to Friday.

[19] Mr Gillett was unavailable in August 2014 and another store manager, Bryce Beattie filled in the timesheets for the Blenheim Road store for the week's ending 10 and 24 August 2014. Mr Beattie only wrote the word salary for Monday to Thursday, when Mr Dias was working and for the fortnightly period Mr Dias was paid for 64 hours for the fortnight ending 24 August 2014 instead of his usual eighty hours.

[20] On 1 September 2014 Mr Dias sent an email to Mr Gillett and the Financial Controller at Logical Systems, Sophie Wei, advising he had received less pay for two weeks work than he normally would have. Ms Wei emailed by response that there was only 8 working days recorded on the timesheet. Mr Gillett emailed Ms Wei on 3

February 2014, and advised that Mr Dias was on a salary and not an hourly rate and asked that she adjust his payment. He did not explain at least in the emails about the days or hours Mr Dias worked or why. In his oral evidence he said that he may have discussed this by telephone with Ms Wei. Ms Wei agreed to adjust the pay to reflect

\$42,000 in the next pay run but explained that she had been processing the payroll relying on the timesheet.

[21] The payment was subsequently adjusted in the next pay run. Matters then came to a head when Shaneel Naidu carried out some investigation including telephoning the Blenheim Road store on a Friday and asking for Mr Dias. He was advised on doing so that Mr Dias did not work Fridays. He sent an email to his management team about the matter. Mr Dias says that his salary was changed from the fortnightly pay period ending 21 September 2014 to reflect the hours he worked without consultation.

[22] I find that there must have been some discussion with Mr Dias and Mr Gillett before that occurred and some agreement of sorts moving forward even if Mr Dias was unhappy about the change. Firstly the payments from the fortnight ending 21 September 2014 are made on the basis of 36 hours worked a week. Normally hours worked are based on store opening hours which are 8 hours per day and for four days would have been a total of 32 hours. Mr Dias must have explained the agreement was that he worked 36 hour per week.

[23] The second reason I find it is likely there was some discussion is the time sheet entries. When Mr Gillett returned to the store in late August 2014 and once again assumed the obligation to ensure time sheets for his store were completed he continued for the weeks ending 31 August, 6 September and 14 September 2014 to simply write salary Monday to Friday for Mr Dias's time sheets. For the week ending

21 September 2014 Mr Gillett put 9 hours worked by Mr Dias for each of the days Monday to Thursday. For completeness I

accept that Mr Dias could have worked 40 hours per week but this would however have necessitated him working on a Friday which did not work with his business commitments.

[24] Mr Dias said that he became disillusioned with his employment at Logical Systems and he looked for another role. On 7 December 2014 he said he was offered an IT position at a High School and he advised his resignation to Mr Gillett.

[25] Mr Dias said Mr Naidu visited Christchurch and spoke to him and Mr Gillett about what it would take to make him stay. Mr Naidu said that Mr Dias told him the new position was \$42,000 for four days at \$25 per hour. In his oral evidence Mr Dias said that the offer from the school had been for 20 hours fixed at \$25 per hour with more hours available on a flexible basis. Although he claimed loss of potential

income of \$2584.48 because he turned down the position, in fact even with his payment on the basis of 36 hours at a lower hourly rate he was better off financially at Logical Systems.

[26] Mr Dias says that he was made an offer to restore the previous salary arrangement of 36 working hours per week for the salary of \$42,000, payment of his cell phone account and a contribution to medical insurance. Mr Naidu did recall a discussion but he could only clearly recall discussion about the salary and said that he made it clear that was subject to approval from the managing director which he thought would have been unlikely. He said he regarded Mr Dias highly as an employee and did want to try to keep him if he could. Mr Dias said that he was left with *“the impression”* that he would be put back to his salary although he understood that Mr Naidu was to go to Head Office about the matter as did Mr Gillett who was also party to the conversation. Mr Dias says that he turned down the job that he had been accepted which caused him a degree of embarrassment. He raised the issue when he continued to be paid on the basis of 36 hours with Ms Wei on 14 January

2015. He says on 6 February 2014 Mr Naidu in an email rescinded the agreement.

[27] Mr Naidu did not accept that what was discussed on 8 December 2014 was in the nature of a binding agreement. Mr Naidu said that he was not authorised by the managing director to increase Mr Dias’s salary and he advised Mr Gillett the following day on 9 December that the earlier decision of September stood. Mr Gillett said that he could not recall that conversation.

[28] Mr Dias resigned from Logical Systems on 17 April 2015.

### **Was there a breach of Mr Dias’s employment agreement when his salary**

#### **payments were reduced?**

[29] Mr Dias’s employment agreement provides that his normal working hours are

40 hours per week rostered Monday to Sunday. He accepts that he was not working

40 hours per week.

[30] I do not find that it is a breach of his employment agreement for Logical Systems to require him to work 40 hours a week for his salary. Mr Dias did not and could not agree to that because he operated a business on Fridays. In those circumstances his salary was paid to reflect the number of hours he worked. Salary has to be read in conjunction with the hours of work clause in the employment

agreement. I do not find that Mr Dias is entitled to recover the amount he seeks for underpayment of salary.

**Was there an unconditional agreement reached on 8 December 2014 that Mr**

**Dias would be paid \$42,000?**

[31] I find that any proposal on 8 December 2014 was on the balance of probabilities conditional on the approval of the Managing Director and that this was advised at the meeting. I do not find this approval was given. An unconditional agreement was not reached on 8 December 2014 to reinstate the salary level in the employment agreement whilst Mr Dias worked 36 hours per week. Further I have not found for reasons set out that Mr Dias suffered a loss by turning down his offer of new employment and remaining at Logical Systems where his guaranteed hours were in excess of those in the new role even if he suffered some embarrassment in turning down the new job.

**Did Mr Dias raise a personal grievance that there was a failure to consult before any change was made to his payments or that there was a breach of the agreement to be paid his full salary amount?**

[32] I could not be satisfied that Mr Dias raised a personal grievance with Logical Systems within the statutory time frame about a failure to consult before a change was made to his salary. Even if he had I am satisfied that there was some discussion with him about the change to his payments each fortnight in or about September 2014 for reasons I have already set out. There is no evidence to support he raised any further issue about that until January 2015 when his concern was focused on the agreement he said he reached with Mr Naidu.

[33] Mr Dias did send an email on 14 January 2015 to Ms Wei saying that he had been promised that he would be paid again as salary. Mr Naidu responded to this on 6

February and said that if Mr Dias was not working 40 hours per week then he would get paid for the hours he was working. In respect of any grievance for the breach of an agreement I have not found that there was an unconditional agreement to return Mr Dias to his full salary notwithstanding that he was not working 40 hours per week.

[34] The communication that Logical Systems was not happy to reinstate the salary level was perhaps not as clear as it could be but I do not find that the actions of

Logical Systems were unjustified as there was no unconditional agreement. A

personal grievance about the discussion on 8 December 2014 is not made out.

**Is Mr Dias entitled to commission?**

[35] Mr Dias was entitled under his employment agreement to a base salary and

10% of monthly gross salary upon the service location meeting 90% CSAT goal for the month and 10% of monthly gross salary paid only upon the service location meeting 165% Service Excellence score for the month. The evidence supported that Mr Dias and other employees had not been paid commission for November 2014 because an iPhone had gone missing. There was no evidence that Mr Dias had anything to do with that missing iPhone. Mr Naidu said that the commission for November was \$700 and for December was \$350 because payment was made but at a lower amount. Apple then investigated and agreed that all requirements were met a few months later and made payment which was not paid to Mr Dias in his final pay but would have been \$350.

[36] I am not satisfied of any reason Mr Dias should not be paid his commissions as claimed.

[37] Mr Dias says that he is owed \$1500 for commissions but Mr Naidu says that commissions should be \$1050 made up of \$700 for November and \$350 for December 2014.

[38] Mr Naidu's calculation as to what is owed seems to be supported by the summary of pay records showing Mr Dias received \$350 as commission in his final pay. My only reservation is that on the final pay slip the sum of \$350 is not shown as having been paid. I will give Mr Wenborn 7 working days to confirm that the \$350 shown as paid for commission in the last pay was in fact received by Mr Dias failing which he can return to the Authority.

[39] Logical Systems Limited is ordered to pay to Mahamarakkalage Priyanjith Indramal Augustine Dias the sum of \$1050 for unpaid commission due and owing. Leave is reserved for Mr Wenborn to return to the Authority if necessary about the \$350 commission payment.

### **Holiday Pay**

[40] There was agreement that holiday pay has not been paid. It should not have been withheld by the company. Mr Dias is entitled to be paid annual leave as set out on his final payslip for 88 hours at \$20.20 per hour. That is the sum of \$1777.60 gross.

[41] Logical Systems Limited is to pay to Mahamarakkalage Priyanjith Indramal

Augustine Dias the sum of \$1777.60 gross being holiday pay.

### **Interest**

[42] I order interest is payable on the holiday pay of \$1777.60 gross from the date of 19 April 2015 to the date of payment in accordance with clause 11 of the second schedule to the [Employment Relations Act 2000](#) at the rate of 5% per annum under s 87(3) of the [Judicature Act 1908](#).

[43] I order interest is payable on the commission amount of \$1050 from the date that the statement of problem was lodged on 5 February 2016 to the date of payment in accordance with clause 11 of the second schedule to the [Employment Relations Act 2000](#) at the rate of 5% per annum under s 87(3) of the [Judicature Act 1908](#).

### **Counterclaim**

[44] There are two components to the counterclaim. The first is that Mr Dias did not work the number of hours in his employment agreement but was paid up to mid- September his full salary. The second is that whilst his payments were reduced to reflect 36 hours worked per week in fact he only worked 32 hours per week.

[45] I find that Mr Dias genuinely believed that he had an agreement with Yoobee and with his store manager to work reduced hours for his full salary. His actions and his explanations I find were consistent with that. There was not, I find, any issue of a lack of good faith in not making Logical Systems aware of the arrangement earlier. I find it simply did not occur to him to do so.

[46] Mr Naidu accepted that when he found out that Mr Dias was not working 40 hours per week he agreed not to pursue the matter of any reimbursement and the parties moved forward then with payments to Mr Dias reflecting the reduced number of hours.

[47] I find that Mr Dias is entitled to rely on that agreement and Logical Systems are not entitled to pursue reimbursement.

[48] In respect of the second component of the counterclaim I heard from Mr Beattie who had been present in the store between August and September 2014 and said Mr Dias was working about 8 hours per day. He said that he did not know how Mr Dias could work in excess of that number of hours because of the store opening and closing hours. Mr Dias and he was supported in this by Mr Gillet, said that he worked through lunch breaks and later in the day to undertake his 9 hour days. He said there was a difference between the retail staff and the service staff and that the service staff could still carry on working after the retail staff went home.

[49] I found that the weight I could place on Mr Beattie's evidence was essentially limited to the period in August 2014 when Mr Gillett was away from the store. I could not be satisfied as I would need to be that Mr Dias only worked 32 hours per week for the entire period of his employment with Logical Systems.

[50] A third claim that Mr Dias's claim caused inconvenience and business loss for

\$100,000 was not pursued.

[51] The counterclaims I find are not made out and are dismissed.

## **Costs**

[52] I reserve the issue of costs. Mr Wenborn has until 13 February 2017 to lodge and serve submission as to costs and Mr Sami and Mr Singh until 27 February to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority