

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 416/09
5156111

BETWEEN LISA MARIE KINGDOM
Applicant

AND ISIA HOLDINGS LTD
Respondent

Member of Authority: James Wilson

Representatives: Lisa Kingdom in person
 Angelic Murray, Director, for Isia Holdings

Investigation Meeting: 10 & 31 August 2009 at Auckland

Determination: 23 November 2009

DETERMINATION OF THE AUTHORITY

Lisa Kingdom's employment relationship problem

[1] Lisa Kingdom began working as a beauty therapist at the Isis Day Spa in November 2007. In March 2008 the business was purchased by the respondent, Isia Holdings Ltd (Isia) and the new owners offered Ms Kingdom a new employment agreement which incorporated her previous terms and conditions. In particular, under the heading times and hours of work, the employment agreement said:

4.1 One weeks notice in writing will be given by the employer to the employee of any alteration to the employee's hours of work, following consultation in good faith.

4.2 It is recognised there are times when the hours of work are flexible and the Employee may be required to make themselves available for work outside normal hours.

A letter to Ms Kingdom accompanying the employment agreement contained the following statement regarding Ms Kingdom's hours:

Your work hours are for a minimum of 35 hours a week and it is expected that you will be working 40 hours a week from Monday to Saturday each week.

Your standard work week hours will be as follows:

- a. Monday 8:30 am -- 2 pm*
- b. Tuesday 8:30 am- 3 pm*
- c. Wednesday -- 8:30 am- 3 pm*
- d. Thursday -- 8:30 am- 5 pm*
- e. Friday -- 8:30 am – 5 pm*
- f. Saturday -- 8:30 am - 4 pm (every second Saturday off)*

[2] Ms Kingdom says that the new owners were *fully aware* of her personal situation (being by herself with two children) when they agreed to this employment agreement, including her hours, days of work, duties and hourly rate. In particular Ms Kingdom says that Isia were aware that she was unable to work every Saturday because of her child care arrangements.

[3] In May 2008 Ms Kingdom was advised that because of the levels of business Isia were introducing new hours of operation and reducing her hours on Monday Tuesday and Wednesday with a new start time of 9:45 am on Monday and Tuesday and 9.15 on Wednesday. Ms Kingdom was, she says, unhappy with this change but felt she had no option but to accept the reduction.

[4] In July Ms Kingdom received a letter telling her that the Spa would no longer open on Mondays, again reducing her hours of work. She says that from October 2008 clients were not booked for her but for other therapists and her hours were slowly reduced. On 3 December 2008 Ms Kingdom received further, written, notification that her hours were to be further reduced, effective immediately.

[5] In the period leading up to Christmas 2008 there was some confusion, firstly regarding whether or not the Spa would be closed over the holiday period and then, when it was closed, what payment should be made to Ms Kingdom. This issue was eventually sorted out and Ms Kingdom acknowledges that she was eventually paid the correct amount.

[6] In a letter dated 10 January 2009, Isia advised Ms Kingdom that from the end of January they *required (her) to work every Saturday*. Ms Kingdom immediately responded that she was unable to work every Saturday and suggested that the parties attend mediation. In a letter sent to Angelic Murray, one of the Directors of Isia, on 19 January, Ms Kingdom set out a number of concerns and requested that Isia honour her employment agreement.

[7] Isia do not seem to have insisted, at the time, on their requirement that Ms Kingdom work every Saturday. However on 2 February 2009 Ms Kingdom was advised of another reduction in her hours. Then on 7 March, Ms Murray wrote to Ms Kingdom inviting her to a meeting to discuss a *proposed restructuring*.

[8] At the first meeting with Ms Kingdom to discuss the proposed restructuring the directors of Isia advised Ms Kingdom that it was necessary make changes to the business and that it would be necessary as part of the restructuring for her to change her hours of work and work every Saturday. At a second meeting, on 18 March 2009, Ms Kingdom advised that she was unable to accept the changed hours and was advised that the company had no choice but to make her role redundant. A letter dated 24 March confirmed that Ms Kingdom was to be made redundant and her last day of work at the spa would be 15 April 2009. For reasons which reflect the breakdown in the relationship between Ms Kingdom and her employers, but are not directly relevant to their claims in the Authority, Ms Kingdom finally left her employment on or about 31 March 2009.

Ms Kingdom's claims

[9] Ms Kingdom has raised two claims with the Authority. Her first claim is that her hours of work, as set out in her employment agreement, were reduced without proper consultation and without her agreement. She asks that the Authority order Isia

to pay her for the hours specified in her agreement. A second claim is that her dismissal was unjustified and in this regard she seeks to recover four weeks wages and compensation for the hurt and distress that both the unilateral alteration to her hours and her dismissal have caused her.

Isia's response

[10] In response to Ms Kingdom's claims Isia says, having sought legal advice, they believe that, in terms of the employment agreement they were entitled to reduce Ms Kingdom's hours of work and that, because of the pressures on the business they had no option but to do so. In the end, they say, trading conditions reached a point where they had no option but to restructure the business. As part of this restructuring it was, in their opinion necessary to alter Ms Kingdom's hours to ensure that a senior therapist was working every Saturday. The fact that Ms Kingdom was not able to accommodate this change in hours meant that her position (working only every second Saturday) was no longer required and Ms Kingdom was genuinely redundant.

Discussion

[11] Ms Kingdom's hours of work were clearly spelt out in her employment agreement. Read in isolation the statement in the employment agreement that:

...notice in writing will be given ...of any alteration to the employee's hours of work..

seems to imply that Isia could (after *consultation in good faith*) simply decrease Ms Kingdom's hours without her agreement. However, read as whole, I do not find that the agreement gives Isia that degree of flexibility. In context the clause would allow Isia to change the times at which Ms Kingdom worked, but the letter of appointment (which forms part of the employment agreement) stipulates *a minimum of 35 hours* and sets out *standard work week hours*. The parties agreed these details in addition to the employment agreement and in the light of it. The number of hours to be worked are a fundamental part of any employee's employment agreement and any reduction in hours is, unless agreed by the employee, tantamount to disestablishing of the position the employee holds i.e. making the position redundant. The option for Isia was to do what they eventually did -- follow through a consultation process with a view to restructuring Ms Kingdom's hours and, if she was unable to accept the new arrangements to declare her position redundant.

Determination

Reduction of working hours

[12] I accept that Isia genuinely believed that they were able to reduce Ms Kingdoms hours without her agreement. They were mistaken. Ms Kingdom is entitled to receive payment for the hours she would have worked had her hours not been reduced. Ms Kingdom has calculated this amount as \$8148 plus 8% holiday pay (\$887) on that amount.. This figure has not been directly disputed by Isia but I accept that they may wish to undertake their own calculation as to its accuracy. **Isia Holdings is to pay Ms Kingdom \$9035 less tax, or such other figure as is agreed between the parties, being the difference in wages actually paid to Ms Kingdom and the hours she would have worked had her hours not been reduced.** If the parties are unable to agree on the amount owing they may refer that matter back to me for final determination.

Redundancy

[13] Isia notified Ms Kingdom that they were considering restructuring the way they delivered their service and that this could effect her hours of work. After talking to her they reached the conclusion that it was necessary to have a senior therapist on duty most Saturdays and asked Ms Kingdom if she could undertake that role. Unfortunately, due to her personal circumstances Ms Kingdom was unable to do so and, as her old position was no longer required in the newly configured business, she was made redundant. Although the breakdown in the relationship between Ms Kingdom and her employer meant that the last few weeks of her employment were somewhat fraught (and she did not in the end work out her full 1 month's notice), I find that Ms Kingdom's dismissal was for genuine redundancy and (despite the fraught relationships) was carried out in a fair manner. In the words of section 103A of the Employment Relations Act, Isia's dismissal of Ms Kingdom, for reasons of genuine redundancy was *what fair and reasonable employer would have done in all the circumstances*. **Ms Kingdom's dismissal was justified and she does not have a personal grievance against Isia Holdings Ltd.** It follows that she is not entitled to the compensation she seeks in this regard.

Costs

[14] Neither party to these proceedings was externally represented. There is therefore no question of costs.

James Wilson

Member of the Employment Relations Authority