

Background Facts and Evidence

[2] Ms Kissick was employed by the Company, from 1st December 2008, as a beauty therapist, at the Company's business, trading as Lashes The Beauty Spot ("the business"). Ms Kissick had worked for the previous owners of the business since October 2007. Consistent with the new ownership of the business, Ms Kissick was provided with an employment agreement that she signed on 27th January 2009. Relevant to the matters to be determined by the Authority are the following terms of the agreement:

5. **YOUR NORMAL (ORDINARY) HOURS OF WORK**

Your normal hours of work will be 37.5 hours per week

Due to the nature of the employer's business, hours of work vary dependent on customer bookings, opening hours and staff requirements. It is recognised there are times where the hours of work must be flexible to meet the needs of clients and you may be required to make yourself available for work outside of your contracted hours. Where a downturn in the business results in an insufficient amount of work, the employer may consult with affected employees and subsequently reduce the number of [sic] employee's ordinary hours as an alternative to redundancy or staff reductions. You will be paid your normal hourly rate prorated for the actual hours worked. The employer will endeavour to reinstate the original hours as soon as possible.

Full time employees shall have first option on all available work.

10. **ENDING THE EMPLOYMENT RELATIONSHIP**

Termination of Employment by LASHES THE BEAUTY SPOT

Lashes The Beauty Spot may terminate your employment at its option.

Examples of reasons why Lashes The Beauty Spot may terminate your employment include (but are not limited to):

- a. Redundancy
- b.
- c.
- d.
- e.

When Lashes The Beauty Spot terminates your employment it must do so by giving you not less than 1 month's notice in writing, unless otherwise provided for in this agreement. Lashes The Beauty Spot may at its sole discretion elect to make payment to you in lieu of all or part of such notice.

[3] One of the directors of the Company, Ms Dearne Berry, worked within the business and Ms Kissick was accountable to her. Due to family commitments, Ms Berry was unable to attend the investigation meeting, but she has provided written statements in response to the witness statements produced by Ms Kissick. In addition to Ms Kissick, there were two other full time employees, Ms Pryor, also a beauty

therapist, and Ms Young, who worked as a nail technician. There were three other employees working part-time.

[4] The evidence of Ms Kissick is that initially she had a good working relationship with Ms Berry. But there was an incident that occurred on 13th January 2009 that Ms Kissick believes was the beginning of a “*significant deterioration*” of the relationship. Ms Kissick says that she had an agreement with Ms Berry that she could take some product from the business to use in applying makeup to a bride prior to her wedding on Saturday, 10th January 2009. Ms Kissick says that on Tuesday, 13th January, Ms Berry; “*aggressively and with a raised voice said that it was unacceptable to take the clinic’s property.*” It seems that upon the intervention of Ms Pryor, who reminded Ms Berry that she had given permission for Ms Kissick to use the product in question, Ms Berry left the matter. Ms Kissick attests that she felt “*indignant and embarrassed*” by the incident and felt that Ms Berry did not treat her the same as other employees from this point on. Ms Kissick received a wage increase of 50 cents an hour in March 2009. Ms Kissick says that the increase was following a review by Mr Berry, but Ms Berry states that the increase in wages was as a result of Ms Kissick undertaking the role of acting manager in the absence of the salon manager, Ms Pryor. Ms Kissick attests that being made acting manager suggested that she was considered to be of value to her employers.

[5] There was an incident on Saturday 14th March 2009. Ms Kissick was alone at the shop, after the other staff member working that day, had left. Ms Kissick was shutting up the shop when she was surprised by three men. One of the men was hiding in a dark room while another tried to distract her with a sale. The third man was standing guard outside the shop. Ms Kissick says that the men behaved in an erratic, intimidating and frightening manner. Ms Kissick shouted at the men and they left, she then locked the shop and called the police. Ms Kissick attests that she phoned Ms Berry about the incident and left a message. As Ms Kissick was not at work again until Tuesday of the next week, she left a reminder note about the incident in the day book, along with the report file number relating to her contact with the police. Ms Kissick says that the matter of the incident was never discussed with her by Ms Berry despite a visit from the police on Wednesday 18th March, and there did not appear to be any reassessment of the security arrangements for the shop. Ms Kissick says that

she was concerned about her safety and unsure about her value as an employee due to the general lack of concern about her safety following the intrusion on 14th March.

[6] Ms Berry says that because she was at sea over the weekend of the intrusion and unable to be contacted by phone, she did not become aware of the incident until Monday 16th March when she saw the entry in the day book. Ms Berry also contacted the police that day to discuss the situation. Ms Berry states that she also attempted to contact Ms Kissick but received no response to her calls.

[7] The evidence of Ms Kissick is that initially she felt she coped well with the incident but as time passed she had trouble with sleeping, anxiety and concentration and began to suffer from migraines. Ms Kissick says that she was led to believe by Ms Berry that she had to take annual leave rather than sick leave when she was ill as she didn't qualify for sick leave with her new employer. But Ms Berry states that this is not correct as all employees transferred to the new business with no break in service, and indeed, Ms Kissick took sick leave. Ms Kissick also says that she didn't receive any EAP assistance even though her employer had some expertise in this field. Ms Berry says that on 1st January 2009, the business launched their Employee Assistance Programme and training was provided to all staff on 3rd February 2009. Ms Berry also says that the business adopted a self-referral EAP model which enabled all employees to access the Employee Assistance Programme "24/7" for any issue, without having to obtain permission to attend. Ms Berry states that Ms Kissick could have accessed the EAP if she had wished to.

The circumstances leading to redundancy

[8] Ms Kissick says that on 17th March 2009, she was told by Ms Berry that she had to improve her re-booking of clients and the retail sales. Ms Kissick says that Ms Berry told her that: "*You aren't of any value to me; you're not bringing in any money.*" Ms Kissick was given some brief details of billable hours for each week of March. The overall context of what was actually said to Ms Kissick is unclear but it appears that as Ms Kissick was being paid for 37.5 hours each week, and the billable hours only averaged around 19, then some improvement was required to make the role of Ms Kissick viable. There are file notes prepared by Ms Berry in regard to a "Meeting held with Kyran on Tuesday 17th March 2009."

The notes record that the performance of Ms Kissick for the month of February was discussed, including the level of re-bookings and retail sales compared with Ms Pryor. It is also recorded that Ms Kissick was shown “graphed statistics” but she denies this. The notes of Ms Berry record that Ms Kissick could check her statistics with “Hairlink” whenever she wished to. Ms Kissick denies that she was told this.

[9] There was a further meeting between Ms Kissick and Ms Berry on 7th April 2009. The notes of the meeting, prepared by Ms Berry, record that there was a discussion about Ms Kissick’s performance relating to the number of clients, rebooking statistics and product sales. Ms Berry reiterated that the performance of Ms Kissick was “well down in comparison to the other therapist.” Ms Berry records that: “I told Kyran that in the present current recession climate the salon could not continue to support two therapists at the present levels.”

The notes record that Miss Kissick was again shown the statistical results relating to a comparison between the two beauty therapists. Also recorded by Ms Berry is:

Informed Kyran that due to the recession and the financial impact that was having on the salon, I was going to have to reduce her hours in accordance with Section 5 of her Contract of Employment. I said that while this was not the outcome I would have preferred, I felt it was much better than making her redundant.

And further:

I informed Kyran her hours would be reduced from 37.5 to 25 hours per week. The change would be effective from 14 April 2009.

I informed Kyran that if the financial performance of the salon improved, I would have no hesitation in reinstating her hours.

[10] Ms Kissick says that she was surprised by the sudden cutback of her hours of work and told Ms Berry that while she understood why the business needed to make changes, she was unhappy with the decision and wanted to discuss it further with Ms Berry as she was worried that she wouldn’t be able to meet her living expenses. Ms Kissick attests that she informed Ms Berry that: “*I wasn’t accepting or agreeing to anything, requested we discuss it further, and she said ‘there is nothing to discuss and it doesn’t matter if you agree or not really.’*” Ms Kissick says that despite not agreeing about the reduction in her hours of work, they were changed on the work roster by the time she went into work the next day. A letter from Ms Berry, dated 7th April 2009, confirms that as of 14th April 2009, Ms Kissick’s hours of work would be reduced to 25 per week. The days and hours of work are set out in the letter.

[11] The further evidence of Ms Kissick is that on 9th April 2009, she was told by Ms Berry that the previous owner (Ms Baker) had attended the salon and had complained that Ms Kissick had failed to greet her. Ms Kissick was instructed to treat Ms Baker with the same respect as other clients. Ms Kissick says that Ms Berry told her that: *“If you are not careful you won’t just be having your hours cut back, you’ll be out of a job too.”* Ms Kissick says that she gave an explanation as to why she had not greeted Ms Baker but this was dismissed by Ms Berry.

[12] Ms Kissick decided to raise her concerns about the reduction in her hours of work and Ms Berry’s *“treatment”* of her. In a letter dated 9th April 2009, among other things, Ms Kissick expressed her unhappiness about the reduction in her hours of work, being threatened with dismissal and being *“yelled and shouted at”* by Ms Berry. Ms Kissick proposed that a meeting take place to discuss the issues. Ms Berry responded via a comprehensive letter dated 15th April. In regard to the reduction in working hours, Ms Berry informs that the decrease in the billable hours is not the fault of Ms Kissick but is due to the lack of disposable income for clients in the current economic circumstances. Ms Kissick is provided with data setting out the monthly billable hours as a percentage of hours available for paid work. In summary, Ms Berry informs that due to; *“the company’s degraded financial performance”* the reduction in the work hours *“is not negotiable.”*

[13] Ms Berry also provided a comprehensive explanation in regard to:

- The reduction of hours for Ms Kissick as compared with other staff.
- Staff training.
- The discussions on 9th April 2009 and Ms Kissick’s perception that she had been threatened with dismissal and the requirement for customer service excellence.
- Commission (Incentive Payments).

Ms Berry indicated that she would be happy to attend a meeting with Ms Kissick and her representative at a mutually convenient time.

[14] There was an exchange of correspondence between Ms Berry and Ms Kissick’s representative, Dr Martin Round, regarding arranging a meeting. In the meantime, via letter from Ms Berry, dated 3rd May 2009, Ms Kissick (along with

other employees) was invited to attend a meeting on 5th May 2009. The letter informed that:

The financial performance of Lashes continues to give cause for concern. Since purchasing Lashes on 1 December 2008, I have now a considerable [sic] better understanding of the income streams, the work required to maintain those streams and the impact that the present monetary crisis is having on our business overall. The salon can no longer operate and expect to survive on its existing cost structure. We are no different from many small businesses in New Zealand today.

While taking no action is an option, it is my intention to confront the situation and lead Lashes into a positive future. I request you to attend an important meeting to be held of all permanent employees of Lashes The Beauty Spot on Tuesday 5 May at 12pm (midday) at the salon.

The meeting relates to the future business and direction of Lashes The Beauty Spot. I will clear the diary so that all permanent employees are able to attend. I am happy that you bring a support person or representative to the meeting if you so wish. The meeting should take about 15 minutes.

[15] At the meeting on 5th May, employees were issued with a comprehensive two page information paper, which set out in some detail, the following (paraphrased as relevant to Ms Kissick):

- (a) Lashes audited financial year end result to 31 March 2009, places it in a negative situation. April 2009 month end result demonstrates a similar result. It would be irresponsible of the Directors to continue trading without taking action to reverse this situation.
- (b) That Lashes has a future but not in its present form.
- (c) From 1 December 2008 to 14 April 2009, Lashes had approximately 300 paid hours per month available to manage Lashes “Beauty Therapy” income stream. The statistics for that period reveal that only 39% of paid hours were billable.
- (d) In an attempt to address the imbalance, on 13 April 2009 the Directors reduced the number of paid hours from approximately 300 hours to 250 hours per month. Unfortunately the statistics for the period 13 April to 30 April 2009 reveal that only 42.4% of paid hours were billable. There is still a significant imbalance between paid hours and billable hours.
- (e) Current ‘rebooking’ statistics and our ‘new client’ statistics do not demonstrate that the imbalance can be easily fixed in the short term.

The letter concluded that the key area identified for change: “is the ‘beauty therapy’ income stream. The significant difference between the total paid hours and the total billable hours cannot be sustained and must be addressed.”

The employees were informed that the purpose of the meeting was to canvas ideas and suggestions in terms of moving the business forward and that their input; “is vitally important to the decision making process.”¹ A consultative timetable was set out with the final step being to have individual meetings with staff on 15th May 2009.

[16] A meeting took place between Ms Kissick (represented by Dr Round), and Mr and Ms Berry on 13th May to discuss the issues that Ms Kissick had earlier raised on 9th April. It appears that the meeting was not productive. There was a further meeting on 15th May. Ms Kissick was informed that her position was made redundant, effective immediately with payment in lieu of notice. There was no entitlement to redundancy compensation but it was agreed that the weekly hours paid would be reinstated to 37.5 for the purpose of calculating Ms Kissick’s final pay. It also transpired that Ms Kissick would be reimbursed in full for the reduction to her hours of work, the effect being, that there has been no loss of income in regard to the reduction in working hours.

Analysis and Conclusions

[17] In assessing Ms Kissick’s claim of unjustified disadvantage and unjustified dismissal, the test that the Authority must apply is the same. It is provided by s.103A of the Employment Relations Act 2000 (“the Act”), whereby the Authority must objectively consider whether the employer’s actions and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the respective actions occurred.

(a) The unjustified disadvantage claim

[18] In regard to the reduction in the working hours of Ms Kissick, I conclude that the manner in which this was implemented was not how a fair and reasonable employer would have the acted. While clause 5 of the employment agreement allows the employer to reduce the employee’s ordinary hours of work, as an alternative to redundancy, the provisions of this clause, while somewhat ambiguous, also allude to a requirement to consult with the employee before “subsequently” reducing the working hours. The meaning of consultation has been considered in an employment law setting on many occasions. Particularly useful are the findings of the Chief Judge of the

¹ Ms Kissick did provide some suggestions pertaining to how the business could be improved.

Employment Court in *Communication & Energy Workers Union Inc v Telecom New Zealand Ltd* [1993] 2 ERNZ 429 at 455-456, where he noted certain propositions approved by the Court of Appeal.² In summary, consultation does not require agreement but on the other hand, it clearly requires more than mere prior notification. Also there must be sufficiently precise information given to enable the person being consulted to state a view together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally. Particularly relevant to the circumstances of Ms Kissick is that:

Consulting involves the statement of a proposal not yet finally decided upon, listening to what other have to say, considering their responses, and then deciding what will be done.

[19] The Authority is cognisant of the fact that the employer in this case was a very small operation and it is not expected to have be able to have access to the same resources as a large corporation, such as the two referred to in the above cases. Nonetheless, it is clear that Mr Berry, in particular, has sufficient knowledge of employment relations matters to have made sure that Ms Kissick was consulted in an appropriate manner, reasonably consistent with the principles set out above. Clearly this didn't happen. Rather, Ms Kissick was simply presented with a *fiat accompli* in that her hours of work were to be reduced, regardless of the entitlement of Ms Kissick to be consulted and to have some input into the decision. While I accept, that given the overall evidence, Ms Berry probably had very few options available to her, apart from making the position of Ms Kissick redundant, as eventually happened, that did not give rise to an entitlement to reduce the hours of work, on a unilateral basis, albeit some notice was given.

[20] I find that Ms Kissick has a personal grievance in that a condition of her employment was affected to her disadvantage by an unjustified action by her employer. The disadvantage is that her hours of work, and consequent income, were unilaterally, and hence unjustifiably, reduced without the consultation required under the relevant terms (clause 5) of the employment agreement.

² *Wellington International Airport Ltd v Air NZ Ltd* [1993] 1 NZLR 671.

Remedies

[21] As provided by s.123(1) of the Act, where the Authority determines that an employee has a personal grievance, it may, in settling the grievance, provide various remedies, including reimbursement of wages and compensation for humiliation, loss of dignity, and injury to the feelings of the employee. As Ms Kissick has acknowledged, she has been fully reimbursed for the loss of income she incurred as a result of the reduction in her working hours, hence there is no entitlement to reimbursement of wages. Ms Kissick says that she was humiliated by the suddenness of the decision to reduce her hours of work and clearly she was concerned about the effect on her income and ability to meet her normal expenses. Conversely, Mr Berry, for the Company, has explained that the business has ceased trading and there are no residual funds. Indeed, as I pointed out to Ms Kissick and her representative at the beginning of the investigation meeting, that it appears that any remedy that may come the way of Ms Kissick could be difficult to obtain. Nonetheless, Ms Kissick and her representative chose to continue with the proceedings. And to his credit, Mr Berry participated fully.

Given that the business was obviously in financial trouble at the time that Ms Kissick's hours were reduced, and the evidence points to there being little or no residual funds in the business (or the Company), a minimal award of compensation is warranted. In all the circumstances I conclude that a sum of \$500 is appropriate. An order will follow.

(b) The unjustified dismissal claim

[22] Ms Kissick says that the redundancy of her position was not genuine and that the loss of her employment was motivated by a dislike of her by Ms Berry, and that she raised a personal grievance regarding the reduction in her hours of work. Looking at the overall evidence, while it appears that there was some conflict between the two women, when one takes into account the financial position of the business, the overall configuration of the small number of staff, and the income derived from the work of Ms Kissick compared with the cost of continuing to keep her in employment, one can only conclude that the redundancy was for genuine financial reasons.

[23] I also find that Ms Kissick, along with other staff would have, or should have been aware that the business was in financial difficulties and some form of

reorganisation was going to take place. While it is advanced by Ms Kissick that she was never fully aware that redundancy was a possibility, I do not accept this. Indeed, it should have been clear from all of the discussions that took place with her, leading up to her hours of work being reduced, and subsequently, that her employment was tenuous. I find that Mr and Mrs Berry, as the directors of the Company, did all that was reasonably possible in the circumstances to ensure that Ms Kissick, and the other staff knew that the business was in difficulty and reductions would be required. Indeed, the final outcome was that the business ceased trading on 30th April 2010. Ms Kissick says that there was some part-time work available that should have been offered to her. Mr Berry denies this and in the absence of tangible proof, the proposition advanced by Ms Kissick remains speculative at best.

Determination

[24] For the reasons set out above, I find that:

(a) Ms Kissick has a personal grievance in that she was unjustifiably disadvantaged in her employment by the failure of her employer to fairly and reasonably consult with her about the reduction in her hours of work as required under the relevant terms of the employment agreement. Pursuant to s.123(1)(c)(i) of the Act, Companies For You Limited is ordered to pay to Ms Kissick the sum of \$500.

(b) The redundancy of Ms Kissick's position was for genuine financial reasons and the overall process adopted by the Company was fair and reasonable in the circumstances. Ms Kissick does not have a personal grievance.

Costs

[25] Given the overall circumstances, including the apparent financial position of the Company, and the limited success pertaining to Ms Kissick's claims, a moderate award of costs is warranted. Companies For You Limited is ordered to pay to Ms Kissick the sum of \$300, plus the application fee paid to the Authority of \$70: a total of \$370.

K J Anderson
Member of the Employment Relations Authority