

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Justine McDonald (Applicant)
AND Just Kids Limited trading as JK Kids Gear (Respondent)
REPRESENTATIVES Brent Climo, Advocate for Applicant
Sharon Brown, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 21 November 2005
DATE OF DETERMINATION 16 December 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Justine McDonald, commenced her employment on 16 October 2004 as a part time sales assistant in Just Kids Nelson store.

[2] Ms McDonald wanted to work a minimum of two days and a maximum of three days a week in the shop to fit in with her childcare arrangements. The time sheets reflect that it was not until December 2004 that Ms McDonald was working a fairly consistent pattern of Fridays and Sundays only. Prior to that Ms McDonald had been working hours spread across a number of days of the week.

[3] Ms McDonald says that she was unjustifiably constructively dismissed from her employment and seeks lost wages from 15 April 2005 until 20 October 2005 when she was able to secure alternative employment, compensation of \$3000.00 for humiliation and injury to feelings and costs.

[4] The respondent, Just Kids Limited trading as JK Kids Gear ("Just Kids") does not accept that Ms McDonald was unjustifiably constructively dismissed. It says that Ms McDonald was never guaranteed any days or hours of work and was required to be flexible in accordance with her individual employment agreement.

[5] Ms McDonald was asked by her store manager Christina Comyns on 18 March 2005 to work extended hours on a Friday from 8.30 am until 6.00 pm rather than her usual rostered hours from 9.00am until 4.30pm. Ms McDonald told Ms Comyns that the extended hours would not suit her childcare arrangements as her son's day care closed at 5.15pm. Ms McDonald was told that she was not able to be rostered for that day in the future if she did not work the extended hours. Ms McDonald tried to deal with the childcare issue by having her teenage daughter walk about

town with her two year old son until 6.00pm but did not feel happy with that arrangement long term.

[6] Ms McDonald was also told on 18 March 2005 that she would not be required to work Sunday 20 March as the new assistant manager would be having training. After 20 March Ms McDonald was not rostered on again for Sunday work. A casual employee worked the hours on Sunday that Ms McDonald would normally work.

[7] Ms McDonald wrote to the General Manager of Just Kids, Layla Sarraf-Dennis on 4 April 2005. Ms McDonald raised her concerns that she was rostered off on Sundays and said that she had *made it quite clear to the Store Manager that I was financially dependent on receiving two days pay a week and I strongly dispute that I ever said I do not want to work Sundays.* Ms McDonald also said in her letter about working the extended hours on Friday 1 April *I regret to inform that the hours of 8:30am – 6.00pm are totally unsuitable due to family commitments and I will be unable to work these hours in future. However, I am available to work my previous hours of 9:00am – 4:30pm.*

[8] On Friday 15 April 2005 Ms McDonald arrived at work and despite being rostered on was advised that she was not required that day. She was told by Ms Comyns to discuss the matter with Ms Sarraf-Dennis. Ms McDonald was unable to make telephone contact with Ms Sarraf-Dennis who is Auckland based although tried to call her several times. Ms McDonald carried on working in the store for the day but found it very uncomfortable. She did not return back to work after that date.

[9] Although Ms Sarraf-Dennis wrote a letter to Ms McDonald dated 12 April 2005 the evidence from Ms McDonald, which I accept, is that she did not receive the letter until a day after she raised a personal grievance by letter dated 19 April 2005.

[10] In her letter of 19 April 2005 to Ms Sarraf-Dennis, Ms McDonald wrote that she wanted to bring a personal grievance for unjustified disadvantage. She said this was because of a unilateral variation in her employment agreement on 18 March 2005 when she was advised that her Friday hours were changed and she was not required for work on Sunday 20 March 2005 and was thereafter not rostered for Sunday work. Ms McDonald wanted reinstatement of Sundays and reimbursement for lost wages.

[11] The letter from Ms Sarraf-Dennis which Ms McDonald received after she had written that letter is important because it sets out the reason why Just Kids say that they could not guarantee Ms McDonald any more work with the company. I shall set the contents of the letter out in full:

Dear Justine

Hours of Work/Inability to Roster You for Employment

Since a warning was issued to you by Regional Manager Dionne Baird partly in relation to closing the store early on 20 February, JK has become further concerned about your inability to work the hours required when rostered.

The Store Manager has informed you that it is a requirement that you be able to work a full shift within the store's opening hours when rostered. This is a requirement that we place on all staff, and the Company never enters into agreements with staff as to rostered hours that restrict the Company's ability to fully staff within store opening hours. This requirement comes from the needs of the business to have adequate staffing

cover in order to maximize sales opportunities and ensure loss prevention and staff safety.

You have written to me stating you are unable to work a full shift on a Friday due to child care requirements. I empathise that you have child care responsibilities, but the Company is not able to assist you with these when it compromises sales and security. Suggestions as to child care have been made to you, but you have indicated these do not suit your circumstances.

As you have advised us you are not able to be rostered for a full shift, regrettably we will not be able to roster you at all when store opening hours are longer than the hours of work you are available. This effectively means you will not be offered any further Friday shifts as you have indicated you are only available to work between the hours of 0900 – 1630.

In regard to Sunday work – since you commenced working for us on 6 December 2004, there have been seventeen Sundays, and you have worked eight of them. Because you requested on several occasions not to be rostered on a Sunday, a new employee who was willing to work on Sundays was employed some two months ago. Your employment agreement entitles you to neither a minimum number of rostered days, nor to specific days of work. You have not worked a pattern of Sundays to suggest that you have established a “right” to be rostered on these days and I reject your inference that you are so entitled.

The Company employees part-time Sales Associates making it clear that flexibility is required and that no promises of permanent hours are made. We cannot guarantee you any further work with the Company.

We believe it is appropriate that you transfer to a Casual Contract so that, should you so desire, you can be contacted to work hours that might randomly arise through unexpected absences or extra staffing requirements due to Sales. As a casual employee, you would have the ability to accept or decline work without penalty – which is not the case when you are employed as a permanent Sales Associate. If you would like to transfer to a Casual agreement please contact me.

Yours sincerely

Layla Sarraf-Dennis

[12] The individual employment agreement to which Ms McDonald was a party provided with respect to hours of work:

When you are required to work, the hours of work will normally be between the hours of 8.30am and 9.00pm Monday to Sunday inclusive.

Your actual hours of work will vary from week to week depending on the requirements of the company. However, this is not guaranteed, in some weeks there may be no work available.

You agree that you will be available to work outside of ordinary store opening hours for the purpose, for example, of receiving training, attending staff meetings or stock taking.

The company will give you as much notice as possible of the requirement to work and will pay you a minimum of two hours on each occasion you are required to work.

The Issues

[13] The main issue in this case is whether Ms McDonald was unjustifiably dismissed, actually or constructively, from her permanent part time sales assistant position with Just Kids. I need to determine whether Just Kids was able to not roster Ms McDonald for further work as a permanent sales assistant within the terms of the employment agreement.

[14] Ms McDonald was after December 2004 mainly working only on Fridays and Sundays. I have considered what led to her being rostered off for those days.

Sunday work

[15] Ms McDonald knew from looking at the rosters for the weeks ahead that she was not rostered on Sundays for the month of April 2005. That meant that she was only working on Fridays for that month. Ms McDonald had only been told why she would not be required on Sunday 20 March 2005 but was then not clear as to why she was no longer being rostered for Sunday work. I do not find that anyone told Ms McDonald before she received the letter from Ms Sarraf-Dennis that the reason she was not rostered was because she was unreliable about working on Sundays. Ms McDonald had made it clear in her letter to Ms Sarraf-Dennis on 4 April that she wanted to work on Sundays. Ms Comyns confirmed to me that she *felt it was known Justine did not particularly like working Sundays but she did say that she wanted to be rostered Sundays.*

[16] Ms McDonald had been given a written warning on 28 January when she had not turned up for her rostered shift on Sunday 23 January 2005 after she had applied for leave. My perusal of the time sheets after that date indicate on the occasions Ms McDonald did not work on Sundays it was for reasons of sickness, agreed leave or public holiday. On one occasion it appeared that Ms McDonald had managed to swap a shift with another employee. Ms McDonald did not accept, as stated in the letter of Ms Sarraf-Dennis, that she ever asked not to be rostered on for a Sunday.

[17] In terms of Sunday work I find that Ms McDonald was not rostered on from 20 March 2005 for reasons that were not put to her for explanation. There had been no further warning given to Ms McDonald since 28 January about failing to turn up for a rostered shift and it appeared to me that there were valid reasons why Ms McDonald did not work on occasional Sundays since 28 January 2005. Ms Sarraf-Dennis had not sought an explanation from Ms McDonald in any event for her absences. The hours of work provision in the employment agreement cannot apply in circumstances where there is a unilateral decision made by Just Kids not to roster Ms McDonald on Sundays again because of a view that she is unreliable. There should have been a fair process. In the absence of a fair process I do not find that the failure to roster Ms McDonald on Sundays is justifiable.

Friday Work

[18] The hours of work clause in the individual employment agreement provided that Just Kids could vary hours of work from week to week. When the extended Friday hours were put to Ms McDonald she raised the concerns about her childcare difficulties. Notwithstanding that, she did work the extended hours for two Fridays. Ms McDonald also wrote to Ms Sarraf-Dennis on 4 April 2005 about the difficulties with the extended hours but confirmed that she was available from 9.00 to 4.30pm.

[19] Without any further discussion Ms McDonald was advised on 15 April 2005 after turning up to work and finding another employee present that she was not required that day. She was also told that Ms Comyns was no longer involved and she had to telephone the general manager in Auckland.

[20] The letter from Ms Sarraf-Dennis made it clear that Ms McDonald would not be rostered on for any more Fridays. Without the Sunday work this meant that Ms McDonald would have no more work with Just Kids as a permanent part time sales person.

[21] I am not of the view that a fair and reasonable employer in these circumstances would have treated Ms McDonald in this way without any face to face meeting or consultation. Just Kids had demonstrated that they could be compassionate and understanding toward Ms McDonald in the past and knew that Ms McDonald was going through some difficult personal times at or around March.

[22] Ms Comyns may have found it difficult to talk to Ms McDonald but there still needed to be some sort of formal meeting or discussion before Ms McDonald was simply told she was not required on 15 April and that she should telephone Ms Sarraf-Dennis. I am satisfied that with a measure of good will on both sides and proper consultation Ms McDonald could in all likelihood have retained her Friday hours. I also think that there was a view that Ms McDonald was difficult and abrupt and that this unfortunately influenced the way she was dealt with. Ms McDonald was simply told she was not required and that was not justified within the terms of the individual employment agreement.

[23] Ms McDonald was actually dismissed by Just Kids when she was advised in a letter from the company that she received on or about 20 April 2005 that there was no guarantee of further work with the company and that she should consider a transfer to a casual contract.

DETERMINATION

[24] I find that Ms McDonald was dismissed from Just Kids by letter dated 12 April 2005 and that her dismissal was unjustified. Ms McDonald has a personal grievance and is entitled to remedies.

Remedies

Contribution

[25] I do not find that Ms McDonald contributed to her personal grievance. She attempted to resolve the issues with Just Kids.

Lost Wages

[26] Ms McDonald seeks reimbursement of lost wages for 28 weeks from 15 April 2005 until she found other part time employment at \$150.00 per week. I am satisfied that Ms Donald made extensive efforts to obtain part time work. Ms McDonald took her curriculum vitae around to many different retailers, formally applied with other retailers and distributed posters advertising for gardening work. She also approached supermarkets and subscribed to the Nelson Mail to access the situations vacant. With the difficulty in securing a child care placement in Nelson Ms McDonald continued to pay for her son's care on Fridays whilst unemployed.

[27] I have averaged out Ms McDonald's gross earnings from December 2004 because that is the time from which a clear pattern of Friday and Sunday work emerges. That is a period of 20 weeks. I arrive at an average gross weekly take home pay for those 20 weeks of \$132.00. Ms McDonald is entitled to that sum for a period of 28 weeks which is \$3696.00.

[28] Just Kids Limited trading as JK Kids Gear is to pay to Justine McDonald the sum of \$3696.00 gross as reimbursement of wages lost under section 123 (b) of the Employment Relations Act 2000.

Compensation

[29] Ms McDonald gave evidence of feeling used and discarded by Just Kids. She said that the way that she lost her job knocked her confidence and she felt quite depressed. She was hurt about turning up for work on 15 April to find another employee present and being told that she was not required. Ms McDonald said that she was disadvantaged financially and had to get grocery vouchers on occasions because of the loss of the extra income from Just Kids.

[30] I find that the claim for \$3000.00 is a reasonable one in the circumstances.

[31] Just Kids Limited trading as JK Kids Gear is to pay to Justine McDonald the sum of \$3000.00 without deduction as compensation for humiliation and loss of dignity under section 123 (c)(i) of the Employment Relations Act 2000.

Costs

[32] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority