

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 378
5384194**

BETWEEN

NADINE STEELE
Applicant

AND

BARKERS PARK LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Alan Taylor, Advocate for Applicant
Paul Diver, Advocate for Respondent

Investigation Meeting: 18 September 2012 At Rotorua

Submissions received: 18 September 2012 from Applicant and Respondent

Determination: 19 October 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Nadine Steele, was employed by the Respondent, Barkers Park Limited (Barkers Park) as K9 Manager until her employment ended on 6 January 2012. Ms Steele claims that she was unjustifiably dismissed.

[2] Ms Steele also claims that she has been unjustifiably disadvantaged in her employment by Barkers Park, and that Barkers Park breached the duty of good faith which it owed her.

[3] Barkers Park denies that Ms Steele was unjustifiably dismissed and claims that she voluntarily resigned her employment.

[4] Barkers Park further denies that Ms Steele was unjustifiably disadvantaged in her employment or that it breached the duty of good faith which it owed to her.

Issues

[5] The issues for determination are whether:

- Ms Steele was unjustifiably dismissed or whether she resigned from her employment with Barkers Park
- Ms Steele was unjustifiably disadvantaged by use of the company vehicle being no longer available to her
- Ms Steele was unjustifiably disadvantaged by the decision to contract out public dog training
- Ms Steele was unjustifiably disadvantaged by Barkers Park failing to fully investigate matters of a disciplinary nature involving her
- Barkers Park breached the duty of good faith it owed Ms Steele.

Background Facts

[6] Ms Steele was initially employed by NZ Magpie Limited (Magpie) as a part-time Dog Trainer with the Kiwi Dog Ranch project in February 2011. The Kiwi Dog Ranch project consisted of a number of employees, including Ms Steele, who had been tasked with raising and training a pack of dogs to take part in a commercially viable dog show. In June 2011 Ms Steele was appointed as Department Manager following the departure of the previous incumbent.

[7] Magpie owned a large site in Rotorua where the Kiwi Ranch project was based and in June 2011 Mr Rob Kent was employed by Magpie to advise on the refurbishment of buildings located on the site.

[8] Mr Kent said that through his meetings with Magpie's management team, he became aware that Magpie had been financially supporting the Kiwi Dog Ranch project on the understanding that there would be a dog show set up and operating viably within a matter of months. The dog show was known at that stage as 'Dogs of the World' (DOTW).

[9] On 15 August 2011 Mr Kent said he was appointed by Magpie to investigate what was happening with the Kiwi Dog Ranch project and he had subsequently reported back to Magpie that it was unlikely the project would succeed in the expected time frame as the dogs were all young puppies and too young to train.

[10] Mr Kent said he had been instructed by Magpie to close the Kiwi Dog Ranch project and had been asked to advise on how the property could best be utilised to achieve financial viability.

[11] As a result Mr Kent said he had devised the Barkers Park concept, comprising a canine supermarket, a grooming salon, dog training centre, dog day-care centre and boarding kennels, and a bistro/café, which would comprise a development as a total “dog world” in three stages. Mr Kent said this concept had been agreed by Magpie and Barkers Park had been formed with himself appointed as CEO.

[12] Mr Kent said that the DOTW show would be included in the Barkers Park concept if it was to shown to be a viable financial proposition. Mr Kent said that all the existing Kiwi Dog Ranch project employees were offered new employment with Barkers Park. This included Ms Steele who was offered a new individual employment agreement (the Employment Agreement) during an interview on 22 August 2011.

[13] Mr Kent said he had advised Ms Steele during the interview that she would have three months in which to prove that the DOTW show using some of the dogs was feasible.

[14] Mr Kent also said that because Ms Steele had told him 6-8 dogs would be the required number for the DOTW show, he had instructed her to reduce the existing 12 dogs down to 6-8 with the surplus dogs being re-homed. In the event that the DOTW show would not be proven to be a financially viable proposition within the three month period as discussed, Mr Kent said he had advised Ms Steele that the rest of the dogs would also be re-homed.

[15] Ms Steele denied that there had been any discussion between herself and Mr Kent on 22 August 2011, explaining that the Employment Agreement had been provided to her and she had signed it on 30 August 2011 and returned it to Mr Kent.

[16] Ms Steele also denied that she had been asked to provide a viability report on the DOTW show within three months. However I am inclined to prefer Mr Kent’s evidence on

this point which is supported by the fact that in August 2011 Ms Steele produced a report headed 'Canine Department Overview' in which she had written:

OUR GOAL IS TO PRESENT A TRAINING PROGRESS REPORT IN 3 MONTHS TO SECURE THE SHOW'S INCLUSION IN THE CURRENT PRODUCT.

[17] Further, in the minutes of the Canine Department Meeting held on 9 September 2011 Ms Steele is recorded as saying:

Foundation training – we've got 12 dogs on site, we need them at the highest level of socialisation and obedience etc.

If DOTW doesn't go a head(sic), we need to structure them into the company. That's why we're not doing trick training, starting on agility.

[18] Ms Steele said that in accordance with the terms of employment set out in her Employment Agreement she was required to work a full-time 40 hours week between Monday to Sunday, and additional hours: "as may be required to effectively manage the K9 Department." The K9 employees, including Ms Steele, worked on a rostered week basis.

September 2011

[19] Mr Kent said on 5 September 2011 the Barkers Park Administrator had received an email message from Mr Simon Goodall of Dog Guru Limited (Dog Guru), a company which specialised in the training of dogs owned by members of the public . The email made an enquiry about Dog Guru hiring the Barkers Park facility for dog training classes for dogs owned by members of the public as it was thinking of opening a branch in Rotorua.

[20] Mr Kent said he had forwarded this email to Ms Steele that same day asking her if she knew Mr Goodall and his organisation, and asking her to discuss the matter with him prior to any approach being made to Mr Goodall.

[21] Mr Kent said that he and Ms Steele had subsequently discussed the approach by Mr Goodall and reached the view that sub-contracting the public training of dogs to Dog Guru would be good for the Barkers Park operation. Accordingly Mr Kent had commenced discussions with Dog Guru and had reached the decision to contract out the training of dogs owned by members of the public to Dog Guru.

[22] At a staff meeting on 30 September 2011 Mr Kent said he had announced Barker Park's decision to subcontract public dog training to Dog Guru and had informed the

employees that, with the concurrence of Mr Goodall, any Barkers Park employee who wanted to apply for the position of Dog Guru trainer based at Barkers Park was welcome to do so.

[23] Mr Kent confirmed that he had not discussed the final decision to sub-contract the training of dogs owned by members of the public with Ms Steele prior to making the decision, however they had discussed it in principle prior to the final decision being taken.

[24] Mr Kent also explained that although the Schedule to her Employment Agreement set out her duties as including: "Principal Trainer (dogs & handlers), this referred to the training of the Barkers Park dog pack and not to the training of dogs owned by members of the public . On this basis Mr Kent said that he did not accept that he had to formally consult with Ms Steele prior to making the decision.

October 2011

[25] Mr Kent said that on 3 and 4 October 2011 he had received three email applications from employees interested in the Dog Guru trainer position and these had been forwarded to Mr Goodall on 5 October 2011. One of these applications was from Ms Steele.

[26] In the covering email to Mr Goodall dated 5 October 2011, Mr Kent had written:

Please find attached brief notes from the three barkers park employees you may like to consider for your Dog Guru trainer role.

...

I am very happy to look at Dog Guru being THE dog training services based at Barkers Park, and envisage that whoever you have on as Dog Guru trainer would be based full-time here, on your payroll, ...

[27] Mr Goodall had responded to this email the same day. In that email Mr Goodall had addressed the contacting and interviewing of the applicants, but had not advised Mr Kent that the position as Dog Guru trainer was not a full-time position.

[28] On 6 October 2011 Mr Kent said he had appointed Mr Eric Scott as night watchman and cleaner for Barkers Park. Mr Kent said that this had been at Ms Steele's instigation as she had previously worked with Mr Scott when he had been employed on the Kiwi Dog Ranch project. As Mr Scott was to live in a cottage on the Barkers Park property, Mr Kent said he had explained to Ms Steele that there was no longer a requirement that she be on call.

[29] Mr Kent said he had also explained to Ms Steele at this meeting that Magpie had offered Barkers Park the option of purchasing and using the Magpie company vehicle which

Ms Steele had been using, however Barkers Park did not wish to purchase it because it was in poor repair.

[30] Ms Steele said that as the vehicle was no longer available, and she still needed to transport dogs for Barkers Park, she had purchased her own vehicle. Ms Steele confirmed at the Investigation Meeting that she had been aware that in the situation in which the vehicle was no longer available to her, she could claim for bus fares, or for taxi charges, but that she had not done so.

[31] Mr Kent said that there had been no requirement or expectation that Ms Steele would purchase her own vehicle, and that other employees were able and willing to transport dogs to the veterinary practices as required.

[32] Mr Kent further observed that Ms Steele had been provided with a company fuel card, and when she had lost this, he had given her a Barkers Park bank card to buy petrol for her private vehicle, which to his knowledge she had done on at least one occasion. Ms Steele confirmed this was the case at the Investigation Meeting.

[33] On 18 October 2011 Mr Kent said Ms Steele had informed him that she had changed her mind in relation to her application in respect of the Dog Guru trainer position as she preferred the challenge of seeing the DOTW show through to fruition.

[34] Ms Steele explained that although she had initially been interested in the Dog Guru position, she had withdrawn her application when she had realised that the position was not a management position and the terms and conditions of employment were lower than those she enjoyed in her position with Barkers Park.

November 2011

[35] Between October and early November 2011 Mr Kent said that the employees had been busily engaged in cleaning and repairing the site for the Barkers Park opening. As a 'thank you' for their efforts, Mr Kent said Barkers Park had taken the employees to see the renowned dog trainer Cesar Milan's show in Hamilton on 13 November 2011. Ms Steele had been included in this outing.

[36] On 21 November 2011 Mr Kent said he had received an email from Ms Steele querying amongst other matters why she had not been paid for the day she had attended the Cesar Milan show. Mr Kent said he had checked and realised that Ms Steele had changed the staff roster for herself to work that day, although this had not been necessary as another

employee had offered to stay behind and look after the dogs. However Mr Kent said he had subsequently paid Ms Steele for the day as she had requested.

[37] Ms Steele said she had announced at the staff meeting on 22 November 2011 that she had decided to allow her application for the Dog Guru trainer position to proceed. Ms Steele explained that she had made this decision on the basis that the decision by Barkers Park to subcontract the dog training part of the operation was unlikely to be rescinded.

[38] Mr Kent said he had acknowledged Ms Steele's announcement at the meeting and confirmed that Barkers Park would assist her with her application to Dog Guru. Mr Kent had confirmed this in a letter dated 22 November 2011 which had addressed the queries Ms Steele had raised in her email of 21 November and which had stated:

The viability of an educational show

I would like a detailed written feasibility report from you on what is involved, the financial costs, income that can be expected, and what you consider will be the benefits that this will bring the company, and in what time frame. Please complete this as soon as you are able.

If an educational show is not going to be an economically viable proposition, then the company does not require a dog pack beyond our short-term requirement stated above, and there is no requirement for the company to incur the expense of a dog trainer

Your future role and your contract

...

My personal advice would be to accept the Dog Guru trainer role if it is offered to you, rather than face the distinct possibility of only handler management duties shortly being available, which I would have difficulty justifying your existing salary on. Should such a scenario eventuate, and you be unsuccessful in obtaining the position with Simon's Dog Guru team, and you do not wish to take the other roles that we are able to offer you, then the Restructuring and Redundancy provisions of your contract, clause 15 would apply, and we will do our best to assist you.

Whilst no decision has, or can yet be made, I am giving you this advanced knowledge in light of your application to seek employment with Dog Guru, and in advance of your discussions with Simon, so that you are as informed as possible.

[39] Mr Kent said that on 30 November 2011 Mr Goodall interviewed Ms Steele at Barkers Park. and on that day he approved Ms Steele taking annual leave in advance of her entitlement on 1, 2. 5. 6 and 7 December 2011 even though this coincided with the opening of the newly refurbished Barkers Park complex.

[40] Mr Kent said on 8 December 2011 Ms Steele had met with him and had asked whether she could undertake both her role at Barkers Park and her new position at Dog Guru. Ms Steele said that her intention during the meeting had been to clarify Mr Kent's willingness for her to perform both roles because the Dog Guru trainer position was not a full-time position.

[41] During the meeting Mr Kent said that his understanding had been that Ms Steele had wanted to keep her full-time job at Barkers Park and also work full-time as the Dog Guru trainer. Mr Kent said he had advised Ms Steele that this was not possible and she needed to choose for which company she would prefer to work.

[42] Mr Kent said that at no time during the meeting had Ms Steele advised him that the position with Dog Guru was not a full-time position.

[43] Mr Kent stated that at the conclusion of the meeting Ms Steele had asked how her transition to Dog Guru would take place as there were already Dog Guru bookings being received, and he had advised her that he would do all he could to assist her.

[44] Mr Kent said Ms Steele had asked if she could continue to use the K9 Manager's office in response to which he had advised that he would speak to Mr Goodall and see if he wished to rent an office at Barkers Park. Mr Kent stated that Ms Steele had then asked him for an 'exit payment' of \$10,000.00.

[45] Ms Steele confirmed at the Investigation Meeting that she had made the 'exit payment' request for \$10,000 on the basis that she had wanted to cover the additional expenses she had incurred in purchasing a private vehicle, to clear debt, to focus on the growing work-load with Dog Guru, and to grow her own business..

[46] Mr Kent said he had agreed to check Ms Steel's Employment Agreement in response to the 'exit package' request, and agreed to meet with her on 12 December 2011.

[47] At the meeting on 12 December 2011 Mr Kent said he had advised Ms Steele that the Employment Agreement contained no proviso for an 'exit payment', and he had given Ms Steele a letter which was dated that same day and started with the following sentence:

"I acknowledge your advice on Thursday (8th) that you have been successful in gaining full-time employment with Simon Goodall's Dog

Guru training establishment. Congratulations! We wish you every success in this role, to which you are well suited.

[48] The letter continued to address how Barkers Park could “*best smooth your transition over to Dog Guru*”, stating:

I have had some thought as how we can best smooth your transition over to Dog Guru. ...

To assist you in this regard...

Instead of the required 21 day notice period that you would normally have to attend work at Barkers Park, we will accept a 28 day notice period from you, effective from Monday 12th December '11 (taking you through the Christmas/New Year period on full pay), without requiring you to work in this period for Barkers Park, except

- a) To prepare a detailed report on each of the Barkers Park dog pack members, including their source,*
- b) Completion of the report you have been preparing on the viability of an Educational Show using the dog pack members.*

[49] Mr Kent said that there had been discussion with Ms Steele about the content of the letter and he had the impression that she had been pleased at being provided with a paid leave of absence so that she could immediately commence working for Dog Guru.

[50] Mr Kent stated that prior to Ms Steele leaving the Barkers Park premises on 12 December 2011, he had given her a list of all the enquiries Barkers Park had received from customers who had expressed an interest in Dog Guru training.

[51] Following Ms Steele’s departure on 12 December 2011, Mr Kent said he had received reports from various Barkers Park employees that a number of items were missing from the Canine Department, including ownership papers, registration tag, the remainder of a packet of Drontal worming tablets and records of the Beagle dog ‘Bailey’, dog crates and an expensive Canadian Dog Safety Educational training system.

[52] On 24 December 2011 Mr Kent said he had received a letter from Ms Kirsty Lang of Equitable Employment Solutions Ltd dated 22 December 2011 advising that she was acting for Ms Steele, who was raising a personal grievance against Barkers Park for unjustifiable dismissal and unjustifiable disadvantage.

[53] Mr Kent said he had been shocked to receive this letter and had written to Ms Steele on the same day. In the letter dated 24 December 2011 Mr Kent had requested the return of the Barkers Park property and completion of the reports which had been requested.

[54] On that same date, 24 December 2011, Mr Kent had received from Ms Steele the 'Barkers Park Pack Report' dated 12 December 2011, which concluded:

I thank you for your support in my new role of on site Dog Guru trainer and look forward to working with you in the future.

[55] Mr Kent said Ms Steele had attended the Barkers Park complex and stated that she did not have the rest of the packet of the Drontal worming tablets. Mr Kent said that it was subsequently reported to him by an employee that on leaving his office, Ms Steel had abused another Barkers Park employee in front of other employees and a customer, who had later telephoned him in relation to this incident.

[56] Mr Kent said that on 27 December 2011 he had written to Ms Steele advising her of the serious allegations against her, but stating that because she had chosen to leave her employment with Barkers Park voluntarily, he did not intend to carry out a full investigation.

[57] On 29 December 2011 Mr Kent said Ms Steele had returned all the items listed in the letter of 27 December 2011 excluding the Drontal tablets but including the return of the dog Bailey, who was found to be suffering from a serious rash and needed veterinary treatment. As a result of the condition of the dog, Mr Kent said he had refused to allow Ms Steele to keep the dog as she had requested.

[58] There had been no disciplinary action taken against Ms Steele as a result of the complaints which had been made.

[59] On 20 March 2012 the parties attended mediation but this had not resolved the issues.

Determination

Was Ms Steele unjustifiably dismissed or did she resign from her employment with Barkers Park?

[60] On 8 December 2011 when Ms Steele met with Mr Kent he had been aware that she had been interviewed at Barkers Park by Mr Goodall on 30 November 2011.

[61] Mr Kent stated that his understanding at the meeting on 8 December 2011 had been that Ms Steele was resigning her employment with Barkers Park as she had been offered, and had accepted, a full-time position with Dog Guru. Ms Steele stated that she had not resigned her employment at Barkers Park and that her intention at the meeting had been to clarify that she intended to perform both roles.

[62] It is clear that Mr Kent understood the role at Dog Guru to have been a full-time position from the email interchange he had had with Mr Goodall on 5 October 2011. It was based upon this understanding that he had rejected Ms Steel's suggestion at the meeting on 8 December 2011 that she carry out both roles.

[63] Mr Kent said that at no time during the meeting did Ms Steele inform him that the Dog Guru trainer position was not a full-time position. Ms Steele's evidence was that she had done so.

[64] On balance I prefer Mr Kent's evidence that at the meeting on 8 December 2011 he understood Ms Steele to be resigning her employment with Barkers Park and accepting a full-time position with Dog Guru. This is on the basis of the following:

- Ms Steele admitted during the Investigation Meeting that prior to the meeting on 8 December 2011 she had emailed Mr Goodall confirming that she would send the written employment agreement from Dog Guru back to him. However Ms Steele had not provided a copy of this written employment agreement to Mr Kent, either at the meeting on 8 December 2011, or subsequently. Had she done so, this might have confirmed her assertion that she had told Mr Kent that the role with Dog Guru was not full-time employment.
- Mr Kent's evidence that it was Ms Steele who raised the issue of her being able to effect a smooth transition from working at Barkers Park to Dog Guru at the meeting is supported by the reference to this issue in Mr Kent's letter to Ms Steele dated 12 December 2011.
- Ms Steele agreed that she had raised a request for an exit package at the interview on 8 December 2011, which also supports Mr Kent's evidence that she had resigned her employment at Barkers Park.

- Mr Kent's letter to Ms Steele offered her a 28 day notice period from 12 December 2011. In accordance with this advice, Ms Steele included the following passages, all making direct reference to the fact that Ms Steele had resigned her employment with Barkers Park:

I acknowledge your advice on Thursday (8th) that you have been successful in gaining full-time employment with Simon Goodall's Dog Guru training establishment. Congratulations! We wish you every success in this role, to which you are well suited.

Technically you are leaving employment with Barkers Park.

Your final day with Barkers Park will be Saturday 6 January 2011.

- Following receipt of this letter, Ms Steele did not make any indication to Barkers Park that she had not resigned, she did not request to attend for work during the notice period and did not in fact attend Barkers Park for work, and continued to receive her salary payment until 6 January 2012.
- In the 'Barkers Park Pack Report' dated 12 December 2011, Ms Steele made specific reference to her new role as Dog Guru trainer. and thanked Mr Kent for his support, which adds weight to the conclusion that Ms Steele left her employment with Barkers Park willingly and voluntarily.

[65] I have considered whether Ms Steele had any grounds for considering that her employment with Barkers Park was being terminated on the basis of redundancy, or that Barkers Park failed to fulfil any good faith requirements towards in respect of this.

[66] I am unable to conclude on the evidence that that was the case. I find that the advice provided by Mr Kent in the letter dated 22 November 2011 as to the viability of the DOTW show and the implications for Ms Steele's ongoing employment made it clear that: "no decision has, or can be made". As such, there was no requirement under s4(c) (i) and (ii) of the Act to provide Ms Steele with information or to consult with her.

[67] Moreover at the time Ms Steele's employment ended on 6 January 2011, the viability study of the DOTW show had not been concluded, and consequently there were no grounds on which to base a decision as to Ms Steele's ongoing employment.

[68] In all these circumstances, I determine that Ms Steele was not unjustifiably dismissed by Barkers Park, but that she voluntarily resigned from her employment.

Was Ms Steele unjustifiably disadvantaged by use of the company vehicle being no longer available to her?

[69] Ms Steele is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[70] The elements of s103 (1) (b) are:

- An action
- The action was unjustifiable
- The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[71] Ms Steele was employed subject to an Employment Agreement which she confirmed she had received on 22 August 2011. Ms Steele signed the Employment Agreement on 30 August 2011, and therefore had had ample time in which to seek legal advice on the contents.

[72] The Schedule to the Employment Agreement made reference to the company vehicle stating:

The Employee shall have use of a company vehicle (if available and not required for other company business) to travel to/from work as the K9 Manager is effectively "on-call" 24 hours a day in the event of emergencies.

In the event that a company vehicle is not available, the Employer shall meet the cost of bus fares to/from work (or a taxi in the event of work-related emergency) provided proper GST receipts are obtained by the Employee.

[73] I find that the Employment Agreement made specific provision for the situation in which the company vehicle was not available to Ms Steele, however she had not made any

applications for refunds of bus or taxi fares in accordance with these provisions. Moreover Barkers Park, despite there being no requirement on its part for Ms Steele to have a private vehicle, had refunded her personal petrol costs.

[74] In this situation, I find there was no unjustifiable action impacting Ms Steele's terms and conditions of employment to her disadvantage.

[75] I determine that Ms Steele has not suffered unjustifiable disadvantage in respect of use of the company vehicle being no longer available to her.

Was Ms Steele unjustifiably disadvantaged by the decision to contract out the training of dogs owned by members of the public?

[76] Barkers Park made the decision to sub-contract out the training of dogs owned by members of the public to Dog Guru with effect from October 2011 and Mr Kent had announced this decision to the Barkers Park employees on 30 September 2011.

[77] The Schedule to Ms Steele's Employment Agreement itemised Ms Steele's duties and included: "*Principal Trainer (Dogs & handlers)*", however Ms Steele said she had not been consulted about the decision prior to it having been made.

[78] Mr Kent explained that he had consulted Ms Steele about the proposal to sub-contract out the training of dogs owned by members of the public to Dog Guru, but agreed he had not consulted Ms Steele before making the final decision. Mr Kent said this had been on the basis that Ms Steele's duties as the principle trainer related to the Barkers Park dogs only and she did not carry out any training of dogs owned by members of the public, accordingly there was no requirement that he do so.

[79] I find that there is no evidence that Ms Steele's employment had involved the training of dogs owned by members of the public. The Canine Department Overview report dated August 2011 only refers to the tasks related to the Barkers Park dogs and makes no reference to the training of any dogs owned by members of the public. Additionally the focus of the Canine department as represented in the other documentation submitted in evidence, appears to be focussed on the training of the dogs for the projected DOTW show.

[80] Moreover this view is supported by the statement in Ms Steele's letter of application for the Dog Guru trainer role was forwarded by email by Mr Kent to Mr Goodall on 5 October 2011. In that application letter Ms Steele had written:

My interest in furthering my knowledge and skill base will be an asset all parties concerned and as I have a passion to focus on passing on the skills I have to the public sector.

[81] As Ms Steele's role did not involve her in the training of dogs owned by members of the public, I find that she was not disadvantaged by either the decision to subcontract what was essentially a new business venture, to Dog Guru, or by not having been consulted about the final decision.

Was Ms Steele unjustifiably disadvantaged by Barkers Park failing to fully investigate matters of a disciplinary nature involving her?

[82] At the time Mr Kent wrote to Ms Steele on 24 December 2011 concerning the disciplinary complaints which involved her, she had, I have found, resigned. Moreover at the relevant time Ms Steele was no longer required to carry out tasks for Barkers Park on site.

[83] There was no full investigation of the complaints undertaken, however no disciplinary action had been taken against Ms Steele.

[84] I find that not carrying out an investigation into matters of a potentially serious disciplinary nature might constitute an unjustifiable action, however there is no evidence that Ms Steele's terms and conditions of employment were affected to her disadvantage as there was no formal disciplinary action taken, and she continued to be paid until the conclusion of the extended notice period provided by Barkers Park on 6 January 2012.

[85] In these circumstances I determine that Ms Steele has not suffered unjustifiable disadvantage in respect of Barkers Park failing to fully investigate matters of a disciplinary nature involving her..

Did Barkers Park breach the duty of good faith it owed Ms Steele?

[86] The duty of good faith is set out in s4 of the Act and states:

4 Parties to employment relationship to deal with each other in good faith

(1.) *The parties to an employment relationship specified in subsection (2) –*

- (a.) *Must deal with each other in good faith; and*
- (b.) *Without limiting paragraph (a), must not, whether directly or indirectly, do anything –*

- (i) *To mislead or deceive each other; or*
- (ii) *That is likely to mislead or deceive the other.*

(1A) *The Duty of good faith in subsection (1) –*

- (i) *Is wider in scope that the implied mutual obligations of trust and confidence, and*
- (ii) *Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*

[87] Ms Steele claims that Barkers Park breached the duty of good faith it owed her by failing to engage with her about the restructuring of the operation i.e. the decision to sub-contract the training of dogs owned by members of the public, by failing to respond appropriately to, or deal appropriately with the personal grievance she subsequently raised, and by reacting to the personal grievance by taking punitive action against her.

[88] I have already disposed of the first issue raised as a breach of good faith. I observe however that the advice provided by Mr Kent in the letter dated 22 November 2011 to Ms Steele that the future of the dog pack was uncertain did accord with the good faith requirement to be ‘*communicative*’.

[89] In regard to the second issue, the personal grievance was raised by letter from Equitable Employment Solutions Limited dated 22 December 2011. In that letter it was alleged that Ms Steele had been unjustifiably dismissed and unjustifiably disadvantaged in employment. I have found that Ms Steele was not unjustifiably dismissed or unjustifiably disadvantaged in her employment.

[90] In regard to the third issue, given that by the date the personal grievance was raised Ms Steele was no longer carrying out work for Barkers Park other than the two reports which had been requested, the potential for punitive action against her was limited. In respect of the disciplinary complaints which had been made against her I have found that Ms Steele’s terms and conditions of employment were not affected to her disadvantage, and there is no evidence of punitive action being taken against her.

[91] I determine that Barkers Park did not breach the duty of good faith it owed Ms Steele.

Costs

[92] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson

Member of the Employment Relations Authority