

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 67  
3170642

BETWEEN                      KARA FINNIGAN  
   Applicant  
  
AND                                DOGHQ 2020 LIMITED  
   Respondent

Member of Authority:        Sarah Blick  
  
Representatives:              Danny Gelb, advocate for the Applicant  
   Eska Hartdegen, counsel for the Respondent  
  
Investigation Meeting:        15 November 2022 at Auckland  
  
Submissions received:        At the investigation meeting  
  
Determination:                14 February 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**What is the employment relationship problem?**

[1]     The applicant Kara Finnigan worked for DogHQ 2020 Limited (DogHQ) as a dog supervisor between July and December 2021. Her employment was interrupted by New Zealand moving into a COVID-19 lockdown from 17 August 2021. At that time Ms Finnigan’s employment was subject to a 90 day trial period. DogHQ was unable to operate until Alert Level 3 restrictions eased in October 2021 and upon its reopening, DogHQ asked Ms Finnigan if she would agree to extend her trial period for a further 90 days, which she agreed to. At the end of the extended trial period, DogHQ advised Ms Finnigan it was not continuing with her employment.

[2]     Ms Finnigan says she has a personal grievance for unjustified disadvantage on the basis DogHQ failed to advise her she had the right to seek independent advice about

the extension of her trial period. She also says she is not prevented from bringing a personal grievance in respect of her dismissal on the basis the trial period could not be extended under ss 67A and 67B of the Employment Relations Act 2000 (the Act). In terms of remedies, Ms Finnigan claims compensation for hurt and humiliation, loss of dignity and injury to feelings and reimbursement of lost wages.

[3] DogHQ says Ms Finnigan was not unjustifiably disadvantaged and is not able to bring a personal grievance in respect of her dismissal. DogHQ says the trial period was in fact suspended (rather than extended) during the lockdown period, and s 67B should be interpreted in a way that reflects the extraordinary situation New Zealand employers faced during the COVID-19 pandemic. In any event DogHQ denies Ms Finnigan was unjustifiably dismissed.

### **What has the Authority's process been?**

[4] Ms Finnigan and another former employee of DogHQ Tamsyn Weller gave evidence. DogHQ's director Ilse Snyman (Mrs Snyman) and her daughters Bianca and Inge Snyman, who both work in the company, gave evidence. A witness statement was also filed for another DogHQ employee Hayley Cargill, whose evidence was taken as read at the investigation meeting. All other witnesses attended the investigation meeting in person and answered questions under affirmation from the Authority and the representatives.

[5] As permitted by s 174E of the Act, this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but states findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **What are the issues?**

[6] The issues for investigation and determination are as follows:

- a. Was DogHQ entitled to rely on a trial period in ending Ms Finnigan's employment?
- b. If not, does Ms Finnigan have a personal grievance for unjustified dismissal?
- c. Was Ms Finnigan unjustifiably disadvantaged in her employment?

- d. If DogHQ's actions were not justified (in respect of unjustified disadvantage and/or unjustified dismissal) what if any remedies should be awarded, and are there any issues of contribution?
- e. Should either party contribute to the costs of representation of the other party?

## **What happened?**

### *Background*

[7] DogHQ operates two dog day care centres, one being based in Albany where Ms Finnigan worked. On its busiest days the Albany centre may care for up to 80 dogs, and says it has a ratio of between 15-20 dogs per staff member. The Albany centre has three dog yards which separates the dogs according to the size.

[8] DogHQ says in order to provide a safe environment for its customers' treasured pets, it is critical to ensure all staff employed have the necessary interest, temperament, empathy, aptitude and skill to care for the dogs. To assess the above requirements, new staff are given training during a trial period. Mrs Snyman says new staff are closely monitored and given further instruction, training, assistance and support as and when it is deemed necessary. She says the business uses a hands-on approach to training by raising problems with the staff member at the time things happen and showing them how to deal with the problem at hand.

### *Employment agreement*

[9] It is common ground Ms Finnigan signed an individual employment agreement with DogHQ on 14 July 2021, and Mrs Snyman signed it on behalf of DogHQ on 16 July 2021. Based on payslips provided by DogHQ, I am satisfied Ms Finnigan started work on or about 22 July 2021. While her employment agreement does not identify agreed hours of work, she worked between 20-25 hours per week.

[10] Ms Finnigan's employment agreement contained a trial period provision as follows:

The Employee will serve a trial period of 90 days from the commencement date of the Employee's employment. During this trial period, the Employer may terminate the Employee's employment by giving the Employee no less than 3

calendar days' written notice and the Employee will not be entitled to bring a personal grievance or other legal proceedings in respect of that dismissal.

*Before the lockdown*

[11] Mrs Snyman says not long after Ms Finnigan started working for DogHQ, she started to receive complaints from other staff members. This included that Ms Finnigan at times sat down in the dog yards she was supervising. Mrs Snyman says an absolute rule is when two or more dogs are playing, the supervisor in the yard may not sit down as dogs will crowd around and the situation can quickly escalate to being unsafe, with the potential for fights breaking out. Mrs Snyman says employees are given the centre's House and Yard Rules when they join the business on their first day during induction. The rules are also posted up in each yard and reflect the rule staff should not sit down while supervising the dogs. Mrs Snyman says Ms Finnigan was told not to sit while supervising in the yards.

[12] Mrs Snyman says she also received complaints about Ms Finnigan being on her mobile phone in the yard. Mrs Snyman also says it is a rule staff are not allowed to use their mobile phones while they are in a yard, because it creates a serious risk to both the staff and the dogs. She says this meant Ms Finnigan was neither paying attention to her charges nor was she taking care of them as required. Mrs Snyman says Ms Finnigan was "cautioned" about this.

[13] Mrs Snyman says Ms Finnigan was also in the habit of standing with her back to the dogs and chatting with Ms Weller. DogHQ further says Ms Finnigan had trouble preventing dogs not due to go home from exiting the yard gates at home time.

[14] On her part, Ms Finnigan says during her training period she was taught what she says were the basics in managing the dogs and their behaviour. She believes the training she was given was inadequate and cited understaffing as one of the causes.

[15] Ms Finnigan says if she felt confident with the dogs in her care, she would allow herself five minutes to sit down or write in the notebook about behaviour and concerns about the dogs - a task that must be done every day. She believed this was fine as long as all dogs were calm or sleeping. She acknowledges having multiple dogs surround her when she sat down but always made sure the dogs were calm, lying down and did

not exhibit aggressive behaviour. She says if they were, then she would not sit down unless they had previously been put in a crate or in time out.

[16] Ms Finnigan says she was given permission multiple times by Inge Snyman, who was on desk duty and in charge, to use her phone to take pictures and videos of dogs for DogHQ's social media accounts when it was quiet enough to do so. Rather than using her phone for business purposes, Inge Snyman says Ms Finnigan used it for personal use in the yard, which Ms Finnigan denies.

[17] Ms Finnigan says although she had been given permission to use her phone to take pictures and videos by Inge Snyman, she was also told by the facilities manager not to be on her phone while in the yard. Ms Finnigan felt it was unfair and was receiving mixed messages, because Mrs Snyman, Bianca Snyman and other staff members used their mobile phones while they were in the yards supervising.

[18] Finally, Ms Finnigan acknowledges there was one occasion on which she and another staff member (not Ms Weller) were reprimanded for speaking to each other between their respective yards, with their backs turned to their dogs. In relation to dogs exiting the yard gates when they were not due to leave at home time, Ms Finnigan says this did occur but it also happened to other staff members.

[19] There are no notes or records of any cautions or concerns raised.

### *Lockdown*

[20] Only a few weeks after Ms Finnigan started work, on 17 August 2021 New Zealand entered a COVID-19 Alert Level 4 lockdown. DogHQ was unable to operate until mid-October 2021, so Ms Finnigan did not work.

[21] DogHQ paid Ms Finnigan her usual wages, having applied for and received the COVID-19 government wage subsidy for its employees.

[22] Mrs Snyman says she felt Ms Finnigan had potential and decided to keep her on in order to allow Ms Finnigan further time to prove she could handle the dogs and do the job well, and show whether she really was interested in the role and wanted to continue in it. Mrs Snyman said one month was just too short a period to not give Ms Finnigan a further chance.

[23] Mrs Snyman gave evidence that she sought legal advice from an online service called “JustAnswer” about extending Ms Finnigan’s trial period. It seems “JustAnswer” purports to offer legal advice around the world on employment matters and contracts. Initially Mrs Snyman received advice from “Lisa”, whose profile said “Hi I am Lisa and I’ve been an attorney for 21 years”. Mrs Snyman says she received advice she could extend a trial period for a full 90 days. Ms Snyman believed then and still believes she was acting in good faith and that it was reasonable to afford Ms Finnigan further time to assess her ability to competently and safely carry out the role.

[24] Therefore, on 13 October 2021 Mrs Snyman emailed Ms Finnigan raising the extension of her trial period:

As part of your employment agreement we have agreed to a 90-day trial period. Unfortunately due to Covid lockdown we have missed the opportunity to assess your performance for this time.

Can you please let me know if you are agreeable to extend your 90 trial end date to 13 December 2021?

[25] Ms Finnigan responded by email nine minutes later saying “Yes that’s completely fine!”. Ms Finnigan clearly did not seek any advice on the extension of the trial period prior to agreeing to it.

#### *Return to work after lockdown*

[26] Shortly after agreeing to extend the trial period, Ms Finnigan returned to work for DogHQ. DogHQ says the issues it experienced with Ms Finnigan continued.

[27] Ms Finnigan says as far as she was concerned, there were no problems regarding how she acted in the yard with the dogs. She says nothing was ever brought to her attention about her not performing up to standard. She says she would always go out of her way to offer to stay, do extra cleaning when she could, and help where she was able to.

[28] While DogHQ says it instructed Ms Finnigan on a number of occasions about certain rules, it acknowledges this was never done in a formal way nor was the prospect of dismissal raised. There is no record of any instructions given.

[29] Ms Finnigan attended a DogHQ Christmas work do on 11 December 2021. The viability of her ongoing employment did not come up in conversation with Mrs Snyman or any other DogHQ staff. Ms Finnigan says she had no idea her employment was in jeopardy.

### *Dismissal*

[30] Ms Snyman says because Ms Finnigan did not show sufficient improvement in her handling of the dogs during the extended trial period and continued to not follow “reasonable instructions”, Ms Snyman decided to end the employment on 12 December 2021.

[31] On 12 December 2021 Ms Snyman emailed Ms Finnigan stating:

We have come to the end of your trial period and I regret to inform you that we have made the decision not to continue your employment beyond this point. Your last day at DogHQ will be Wednesday 15 December 2021 which includes your 3 day notice period.

[32] It is common ground Ms Finnigan initially responded by saying she did not want to work out the three day notice period, but later the same day, by email said she did want to work it out. Mrs Snyman says she did not see the email and worked the next day at Albany centre to cover Ms Finnigan’s shift. Ms Finnigan did not in the end return to work out her notice period.

[33] Mrs Snyman says given Ms Finnigan was spoken to about her conduct in the yard “repeatedly”, she should and could have foreseen that her employment was at risk due to poor performance and not carrying out instructions.

[34] A few days after the dismissal Ms Finnigan raised a personal grievance for unjustified disadvantage and unjustified dismissal through her advocate.

### **What is the relevant law on trial periods?**

[35] Section 63A(1) relevantly provides:

- (1) This section applies when bargaining for terms and conditions of employment in the following situations:...
- (e) in relation to the terms and conditions of an individual employment agreement (including any variations to that agreement) for an

- employee if no collective agreement covers the work done, or to be done, by the employee:
- (f) where a fixed term of employment, or probationary or trial period of employment, is proposed:

[36] Section 63A(2) states an employer must provide to the employee a copy of the intended agreement under discussion; advise the employee they are entitled to seek independent advice about the intended agreement; give the employee a reasonable opportunity to seek that advice; and consider any issues that the employee raises and respond to them.

[37] Section 67A of the Act provides an employment agreement entered by a ‘small-to-medium-sized’ employer and an employee who has not previously been employed by that employer may contain a 90 day trial provision. Section 67B of the Act sets out the effect of a s 67A trial provision in an employment agreement. Within the trial period an employer is able to give notice to the effected employee of termination of employment and the employee is unable to bring a personal grievance for unjustified dismissal or other legal proceedings in respect of the termination.

[38] Strict compliance with the requirements of s 67A is required. In *Smith v Stokes Valley Pharmacy (2009) Ltd* the court emphasised a strict approach was appropriate in light of the fact trial provisions remove longstanding employee protection and access to dispute resolution and justice. The clauses contain a balance of employee protective elements as well as facilitating hiring and firing.<sup>1</sup>

## **Discussion**

### **Was DogHQ entitled to rely on a trial period in ending Ms Finnigan’s employment?**

[39] For the reasons that follow, I find DogHQ was not entitled to rely on the trial period in ending Ms Finnigan’s employment.

[40] Firstly, I accept the trial provision entered into between the parties in July 2021 was valid when entered into, as the requirements of s 67A of the Act were met.

[41] Rather than advancing an argument that DogHQ and Ms Finnigan entered into an enforceable extension of the trial period, DogHQ submits the trial period was

---

<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [47-48].

“suspended” by the lockdown, and it remained suspended throughout the lockdown period. This was because Ms Finnigan was not working, and not practising or being trained. Counsel submitted the Authority should consider the trial period provisions in the Act in the context of the national threat the COVID-19 pandemic posed, and referred to judicial review decisions of the High Court addressing the lawfulness of an early lockdown period in 2020 and vaccination orders made under the COVID-19 Public Health Response Act 2020.<sup>2</sup> Counsel cited High Court comments relating to the reasonable and justified limit of rights in the context of the situation faced – being one of “unprecedented challenge and risk”.<sup>3</sup> DogHQ says the requirements of s 67A and s 67B should not be so strictly interpreted in light of the context of the pandemic, and that limits on the rights of employees under the trial provisions were justified.

[42] Taking into account the well-established authorities around trial periods, I find an alternative interpretation of s 67B which takes into account the COVID-19 lockdown is not open to me. Although lockdowns were not a foreseeable event (at least not prior to March 2020) had Parliament intended to allow the extension of trial periods by agreement or a suspension of them due to an unforeseen interruption in employment, it could have made this express in ss 67A or s67B. Further, it could also have done so at the time specific provisions relating to COVID-19 were inserted into the Act.<sup>4</sup> No such allowance has been made and ss 67A and s 67B tightly prescribe the circumstances under which trial provisions can be entered into and are enforceable. I accordingly do not accept the trial period was suspended.

[43] I acknowledge by the time the lockdown was announced on 17 August 2021, DogHQ only had a short period to train Ms Finnigan and assess her suitability for ongoing employment during the trial period. However, when DogHQ and Ms Finnigan agreed to extend the trial period in October 2021, Ms Finnigan was not a new employee. She had been “previously employed”, having started work on or about 22 July 2021, such that at least one of the cumulative requirements of s 67A was clearly not met.

[44] I accept, as submitted by Ms Finnigan’s advocate, the 90 days referred to in ss 67A and s67B relate to 90 calendar days, not 90 days or 90 shifts worked. Further, it is

---

<sup>2</sup> *Borrowdale v Director-General of Health* [2020] NZHC 2090; *GF v Minister of COVID-19 Response & Ors* [2021] NZHC 2526; *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716.

<sup>3</sup> *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [188].

<sup>4</sup> Noting Schedule 3A was inserted on 26 November 2021 by s 22 of the COVID-19 Response (Vaccinations) Legislation Act 2021 (2021 No 51).

clear Ms Finnigan remained employed throughout the lockdown period, and the clock on the 90 day period kept ticking throughout that time.

[45] In the circumstances this is all fatal to DogHQ's claim to reliance on that term. The only option open to DogHQ was to sufficiently manage Ms Finnigan's performance and make the consequences of non-performance clear to her. Accordingly, I find Ms Finnigan was entitled to bring a personal grievance claim in respect of her dismissal.

### **Does Ms Finnigan have a personal grievance for unjustified dismissal?**

#### *The test for justification*

[46] When the Authority considers justification for DogHQ's actions it does so by applying the test of justification in s 103A of the Act. In determining justification of actions, as in this matter, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of DogHQ and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.

[47] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. The Authority may take into account other factors as appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Finnigan being treated unfairly.

[48] During her employment Mrs Snyman, Bianca and Inge Snyman oversaw Ms Finnigan's work including directing her duties. They say they identified issues they saw as deficiencies and addressed these with her. DogHQ acknowledged it did not raise its concerns with Ms Finnigan in a formal way. While DogHQ may have addressed concerns about aspects of Ms Finnigan's performance, the Authority is not satisfied these concerns were communicated to Ms Finnigan in a way which made it clear to her DogHQ these were performance concerns (rather than ongoing training or instructions) or that her employment was in jeopardy as a result.

[49] I also note some of DogHQ's rules appeared to have been inconsistently applied and enforced, such as when and why mobile phones could be used at times in the dog yards. I also note management documents I was referred to, such as the House and Yard

rules, have been amended since Ms Finnigan was employed. They are therefore of little assistance to me.

[50] I find the dismissal does not meet any of the requirements of the statutory test for a justified dismissal. Likely due to DogHQ's mistaken belief it could rely on an extension to the trial period, it took no steps to comply with the four minimum procedural fairness requirements set out in s 103A(3) of the Act to address the situation. I find the defects in the process were not minor and they resulted in Ms Finnigan being treated unfairly. I am also satisfied DogHQ fell short of meeting the duty of good faith to be open and communicative about concerns which could put Ms Finnigan's employment in jeopardy.

[51] Ms Finnigan has established a personal grievance for unjustified dismissal. She is entitled to consideration of the remedies sought.

#### **Was Ms Finnigan unjustifiably disadvantaged in her employment?**

[52] Ms Finnigan says DogHQ failed to advise her she had the right to seek independent advice about extending the trial period. Ms Finnigan says at the time she thought DogHQ was a fair and reasonable employer and had no idea there were any issues relating to her conduct or performance at work. She says at the time she did not understand the full implications the request made by DogHQ could potentially have on her employment. Ms Finnigan says the failure to advise her of her entitlement to seek independent advice disadvantaged her.

[53] I find in asking Ms Finnigan about extending the trial period, DogHQ was bargaining for a variation to the existing employment agreement between them. As such, DogHQ was obliged to take the steps outlined in s 63A(2) of the Act, such as advising Ms Finnigan she could seek independent advice. I note Ms Finnigan was 21 years old at the time she was employed by DogHQ. Given her relatively young age and limited work experience, there was a clear inequality of bargaining power between the parties. In that context compliance with s 63A(2) was of particular importance.

[54] Although I have found the trial period could not lawfully be extended (such that the bargaining should not have even taken place) had DogHQ complied with s 63A(2), Ms Finnigan may have sought independent advice. She may have been alerted to the live issue of whether a trial period could be extended beyond 90 days, and may not have

agreed to the extension. I find DogHQ's failure to comply with s 63A(2) disadvantaged Ms Finnigan in her employment.

**What if any remedies should be awarded, and are there any issues of contribution?**

*Reimbursement of lost wages*

[55] Ms Finnigan seeks reimbursement of five weeks lost wages as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act.<sup>5</sup> She says she spent multiple days and weeks seeking employment via various job websites. Ms Finnigan completely re-wrote her CV and applied for over 10 jobs between Christmas and the New Year, before her best friend helped her obtain a short-term position at a café, which she started on 16 January 2022. I accept there was limited opportunity for Ms Finnigan to secure alternative work before Christmas and during the Christmas/New Year period. The Authority is satisfied Ms Finnigan is entitled to an award of five weeks' lost wages from the time of her dismissal until 16 January 2022. Calculated on Ms Finnigan's average hours per week following the lockdown period, this amounts to a total of \$2,211.30.

*Compensation*

[56] Ms Finnigan seeks compensation under s 123(1)(c)(i) of the Act in relation to her grievances. Her advocate says a global figure should be awarded between \$17,500 and \$20,000.

[57] Ms Finnigan says the dismissal impacted her confidence, health and caused a lot of stress and grief. She says the dismissal occurred at an extremely busy and expensive time of year, just prior to Christmas. She says having to look for a new job so close to Christmas and having no income during the holiday period was stressful and embarrassing as she had to borrow money from her parents.

[58] For these and other reasons provided, I accept Ms Finnigan was particularly impacted by the dismissal. I find a global award of \$18,000 compensation under s 123(1)(c)(i) of the Act is appropriate.

*Contribution*

---

<sup>5</sup> Ms Finnigan has not sought payment relating to her notice period.

[59] Section 124 of the Act states I must consider the extent to what, if any, Ms Finnigan's actions contributed to the situation giving rise to her personal grievance and then assess whether any remedy should be reduced. DogHQ referred to performance matters, but I am satisfied these were not sufficiently raised with Ms Finnigan to make it clear reasonable remedial steps had to be taken to ensure her ongoing employment. There are no deductions from the monetary remedies for reasons of contribution.

**What is the outcome?**

[60] DogHQ 2020 Limited is ordered to pay Kara Finnigan the following amounts within 28 days of the date of this determination:

- a. \$2,211.30 under s 123(1)(b); and
- b. \$18,000 under s 123(1)(c)(i) of the Act.

**Should either party contribute to the costs of representation of the other party?**

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do Ms Finnigan may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum DogHQ then has 14 days to lodge any reply memorandum.

Sarah Blick  
Member of the Employment Relations Authority