

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 55
5347692

BETWEEN KEVIN RIX-TROTT
 Applicant

AND THE FREIGHT PEOPLE
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Nick Farrands, Counsel for Applicant
 Robert Macintyre, Advocate for Respondent

Investigation Meeting: 20 December 2011 at Auckland

Determination: 16 February 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Rix-Trott) alleges that he was both unjustifiably dismissed from his employment and suffered disadvantage as a consequence of unjustified actions of his employer (The Freight People). All of Mr Rix-Trott's claims are rejected by The Freight People which contends that Mr Rix-Trott was employed pursuant to a properly constituted trial period in terms of s.67A of the Employment Relations Act 2000 (the Act) and was dismissed from his employment for poor performance in terms of that trial period.

[2] Mr Rix-Trott was, at the time he joined The Freight People, a senior and experienced salesperson in another role. As a consequence of informal discussions in late 2010, the parties entered into a document dated 19 November 2010 which postulated a start date in the employment for Mr Rix-Trott of late February 2011. Mr Rix-Trott maintains that this first document was an employment agreement. The Authority is not satisfied this is the case. First, and most fundamentally, the

document is conditional upon a number of matters and is expressed to be an offer. Further, there is a lack of precision about the terms of the employment which encourage the Authority in the view that this is, as it states, an offer to be employed rather than the terms under which the employment is to take place.

[3] As part of that initial 19 November 2010 document (the 19 November document), The Freight People had made provision to assist Mr Rix-Trott in the purchase of a suitable vehicle. The relevant provision is as follows:

No company vehicle is on offer, (our company policy is no one has one!). However, to better enable a purchase of a suitable vehicle, TFP will contribute by way of salary two months in advance, i.e. \$10k at start, \$5k per month thereafter.

[4] Mr Rix-Trott commenced in the employment on 21 February 2011 and an employment agreement dated 22 February 2011 was signed. The 22 February agreement repeats the themes from the 19 November document, including a reference to the trial period and further particulars in respect of the nature of the duties. In addition, there is a new provision in relation to the finance for the vehicle.

[5] On 7 February 2011, Mr Rix-Trott had purchased a vehicle registering the same in his own name and using as payment the \$10,000 referred to in the 19 November document together with an additional \$1,500 from his own resources.

[6] In the 22 February agreement, the following clause appears:

TFP have contributed by way of an upon demand loan (amounting to two months salary in advance), the sum of \$10,000 (this amount hereby acknowledged and receipted) to enable Kevin to purchase a suitable motor vehicle, being a VW Passat registered AHL118, upon which TFP have a registered security interest (PPSR), which is agreed as being valid whilst this advance remains outstanding.

[7] The evidence presented to the Authority by The Freight People indicates that, within a matter of weeks, it had a developing anxiety about the efficacy of Mr Rix-Trott's work. It was a consequence of that developing problem that The Freight People asked Mr Rix-Trott to attend a meeting on 25 March 2011 at a café called Zinc. According to The Freight People, that meeting was an attempt by it to change the relationship for the better and, amongst other things, to require from Mr Rix-Trott a regular sales and marketing report on a weekly basis. In the company's work records relating to Mr Rix-Trott, a copy of which has been provided to the Authority, the 25 March meeting is referred to as the "first warning meeting". The Freight

People maintain that there had been previous discussions between Mr Rix-Trott and its operational manager about the lack of progress that Mr Rix-Trott was making which were a precursor to the first warning meeting. Although the Authority did not hear evidence from the operational manager to the effect that these discussions took place, the other evidence before the Authority, including Mr Rix-Trott's own responses, suggest that there was a developing consensus within The Freight People that Mr Rix-Trott's employment was "*not working out*" and the Authority considers it more likely than not that there were in fact continuing discussions about Mr Rix-Trott's performance for much of the short employment. The Authority inclines to this view because the evidence was very clear from both parties that, in effect, this was a brand new role being trialled to see if someone with Mr Rix-Trott's experience could add value to the business.

[8] The evidence given by the witnesses provided to the Authority by The Freight People suggested that despite the discussion between the parties on 25 March 2011, there was no tangible improvement.

[9] Accordingly, The Freight People convened another meeting on 4 April 2011 at which its evidence is the purpose of the meeting was to terminate the employment relationship. Indeed, Mr Macintyre told the Authority that Mr Rix-Trott was given notice of the termination of the employment on 4 April 2011 and that the loan that had been advanced by The Freight People to Mr Rix-Trott for the purposes of assisting in the purchase of his motor vehicle, was also called up. Mr Macintyre's evidence was that Mr Rix-Trott "*begged*" him not to bring the employment relationship to an end, claiming that he was "*moments away from a big deal*".

[10] There is dispute between the parties as to whether the outcome of this meeting was resolved on that day (4 April 2011) or two days later on 6 April 2011 and at whose initiative, but the short point is that, as a consequence of the parties' engagement at around this time, yet another document was signed, this one styled an addendum. The addendum is dated 11 April 2011 and because its terms are so important to the employment relationship problem and the allegations and counter-allegations made, it is appropriate for the Authority to set the terms of it out in full:

*ADDENDUM TO EMPLOYMENT CONTRACT DATED
22 FEBRUARY 2011*

As a result of our meeting held at Zinc Café on 4 April and our further discussions and meetings at our offices on 6 April, the parties to the above contract hereby mutually agree to the following changes:

1. *Effective 4 April 2011, the agreed annual salary shall be amended to \$30,000 per annum; ...*
2. *Kevin undertakes to reliably tender DAILY email reports on all/any sales call activity he is involved with. This report shall name the contact, contact numbers, and quantify the prospects of freight volumes, and indicate what stage his dealings are at with the prospective clients.*
3. *This addendum records that notice was given on Monday 4 April, requesting repayment of the “upon demand” loan extended to Kevin to enable him to purchase his vehicle registered AHL 118. The notice requires the full sum of \$10,000 to be repaid in full.*
4. *The 90 day probationary period review date remains on or before the 20th of May 2011.*
5. *This addendum is to be read in conjunction with the original employment contract dated 22 February 2011.*
6. *The parties both acknowledge that before signing this agreement they have had a reasonable opportunity to seek legal, technical and other advice or information and that they have either obtained that information, or have foregone that opportunity on their own accord.*

[11] The document concludes with the signature of Mr Rix-Trott and of Mr Macintyre for The Freight People together with the date of signature being 11 April 2011.

[12] Mr Rix-Trott alleges that he was bullied into agreeing to the terms of the addendum and in particular the dramatic 50% reduction in his remuneration. Mr Rix-Trott also denies that he was given the opportunity to “*seek legal, technical and other advice or information*” before signing the addendum. Mr Rix-Trott told the Authority that he was presented with a fait accompli concerning the addendum and told that, if he did not sign it, he would not be paid at all. He says that he initially refused to sign it and it was not signed until 11 April 2011 which is some five days after the last date that the parties seem to agree there may have been discussions. Mr Rix-Trott says that it was on that date (11 April 2011) that he was told that if he did not sign it on that date he would not be paid that night.

[13] The Freight People has a different recollection of these events. Mr Macintyre's evidence is that, first it was Mr Rix-Trott's suggestion that the salary be reduced by 50% in order to enable him to keep working in anticipation of his continuing belief that a big deal was just around the corner. Mr Macintyre told the Authority that The Freight People had told Mr Rix-Trott on 4 April that it could not continue him in the employment, but he had pleaded with it not to terminate the engagement and that he had suggested the employment relationship be continued but on the basis of a 50% reduction in the applicable salary. It is common ground that it was The Freight People which insisted on calling up the loan made to assist Mr Rix-Trott to purchase his vehicle. The Freight People also maintained, in its evidence, that Mr Rix-Trott was mistaken in his evidence that it had insisted on the execution of the addendum on 11 April in order for him to continue to be paid. The evidence from The Freight People was that there was a payroll run due that day and the administrative people simply needed to know what rate of pay (if any) Mr Rix-Trott was to receive for that pay period.

[14] By email dated 6 May 2011, The Freight People terminated the employment of Mr Rix-Trott, impliedly relying on the trial period, giving Mr Rix-Trott two weeks' notice and also seeking repayment of the \$10,000 advance for the purchase of the car. A personal grievance was promptly raised by Mr Rix-Trott's advisers and the matter proceeded to the Authority in the usual way.

Issues

[15] It will be convenient if the Authority considers the following questions:

- (a) Was the employment subject to a trial period;
- (b) Was there a loan to Mr Rix-Trott from The Freight People;
- (c) Was Mr Rix-Trott disadvantaged by unjustifiable actions; and
- (d) Was Mr Rix-Trott unjustifiably dismissed?

Was the employment subject to a trial period?

[16] The law in respect of trial periods is set out in the Act at ss.67A and 67B. In essence, those sections provide that the parties to the employment agreement can agree to a trial period of not more than 90 days provided the employee is a person

who has not been employed by the employer before and provided that the trial provision is a written provision that either states “*or is to the effect, that*” the employee is to serve a trial period. Further, the written provision must say that, during the trial period, the employee may be dismissed and, if that happens, the employee may not bring a personal grievance or other legal proceedings in respect of that dismissal.

[17] However, the two sections preserve the right of employees covered by such a provision in an employment agreement to bring a personal grievance in respect of the other grounds for grievance and the provision is clear that in all other respects save for two further exceptions which the Authority refers to shortly, the employee enjoys the same rights as any other employee. The two further exceptions relate to the employer’s obligations in respect of s.4(1A)(c) and the employer’s obligation under s.120 of the Act. Section 4(1A)(c) of the Act refers to the usual requirement that an employer proposing to make a decision to disadvantage the employment of an employee must provide information to the employee and allow comment on it. Section 120 is the statutory requirement to provide an explanation for a dismissal post facto, if sought.

[18] In the Employment Court decision in *Smith v. Stokes Valley Pharmacy (2009) Ltd* [2010] NZEMPC 111, His Honour Chief Judge Colgan carefully assessed the trial period provisions in the Act. The Court made clear that, given that the effect of the trial period legislation was to deprive affected employees of a legal right to access justice, the provisions must be strictly interpreted. In particular, at para.[83] of the judgment, the Court held:

The new sections ... provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.

[19] It follows that the Authority’s obligation is to apply the law as the law is articulated by the Employment Court. The first of the cumulative steps Chief Judge Colgan refers to requires reference in the employment agreement to a written provision for a specified period not exceeding 90 days. That provision satisfactorily exists in the three documents which bear on the employment relationship. In the 19 November document, there is reference to “*90 day stand down period*”, in the

22 February agreement there is a rather less precise reference to “*a trial probationary period of three months*” and in the addendum there is a reference to “*the 90 day probationary period*”.

[20] However, even if the Authority was to be satisfied that the cumulative effect of these three references to the statutory provision was to create a written provision to the effect that there was a trial period not exceeding 90 days, the next cumulative step required, and the one after, are neither of them made out. Section 67A(2)(b), being the second of three parts of the statutory definition of “*trial provision*”, requires written provision that The Freight People could dismiss Mr Rix-Trott during the trial provision. There is no such stipulation in any of the documents before the Authority.

[21] Nor is the third element present either. That third element is provided for in s.67A(2)(c) which sets out that where the employer dismisses the employee during the trial period, “*the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal*”.

[22] The definition of “*trial provision*” in s.67A(2) contains, as the Authority notes, three elements. Those elements are conjunctive rather than disjunctive and applying *Smith*, the law is that those requirements must be “*complied with cumulatively*”. In the present case, the documentation before the Authority discloses only the existence of the first requirement, namely the reliance on the 90 day period itself. Neither of the other elements to the definition are present and it follows that The Freight People’s reliance on the trial period cannot stand.

[23] The Authority finds that the trial period referred to in the documentation provided to it by The Freight People does not comply with New Zealand law and is therefore a nullity. It follows that Mr Rix-Trott was not employed on a probationary period of employment and, in consequence, he can raise a personal grievance in relation to the circumstances of his dismissal.

Was there a loan to Mr Rix-Trott from The Freight People?

[24] The Authority is satisfied that Mr Rix-Trott was loaned the amount of \$10,000 to assist him in purchasing a motor vehicle, that at the time of the investigation meeting that loan remained unpaid and that The Freight People had a proper legal security over the vehicle to secure the indebtedness and that its legal charge was noted in the insurance that Mr Rix-Trott arranged for the motor vehicle.

[25] It is plain also on the evidence that the vehicle is registered in the name of Mr Rix-Trott and at the time the investigation meeting took place, the vehicle remained in Mr Rix-Trott's possession. The Freight People, in its evidence to the Authority, was adamant it did not want the vehicle; it simply wanted its money back. There had been a number of attempts made by agents of The Freight People to seize the vehicle and, at the time the matter came before the Authority, these various attempts had all been rebuffed by Mr Rix-Trott.

[26] In terms of the employment agreement of 22 February 2011, there is a clear and specific provision which refers to the advance of the money and the way in which the advance is recorded. It is in the following terms:

TFP [The Freight People] have contributed by way of an upon demand loan (amounting to two months' salary, in advance), the sum of \$10,000 (this amount hereby acknowledged and receipted) to enable Kevin to purchase suitable motor vehicle, being a VW Passat registered AHL 118, upon which TFP have a registered security interest (PPSR), which is agreed is being valid whilst the amount remains outstanding.

[27] The Act gives the Authority jurisdiction to consider disputes about the interpretation of employment agreements together with any action arising from or related to the employment relationship. The relevant provision is in the employment agreement. In consequence, it forms part of the employment relationship and the Authority can, from the evidence, discern the intentions of the parties.

[28] The sum is described as a loan in both the employment agreement and the addendum. What is more, it is described as an "upon demand" loan, that is to say, payment is due and owing immediately demand is made. It is plain that The Freight People sought repayment; they made demand at the meeting with Mr Rix-Trott on 4 April 2011, again in the addendum of 11 April 2011 and then, after the employment relationship ended, they made a number of attempts to address the issue many of them legally misguided because they sought to "repossess" the vehicle when they had no title to it. Nonetheless, their intent was clear enough; they wanted their money out. In evidence to the Authority, witnesses for The Freight People made it plain they did not want the car; they wanted their money. Even Mr Rix-Trott seemed to understand the position. The unchallenged evidence of The Freight People was that Mr Rix-Trott offered to repay the money in full on 19 May 2011 when he indicated to The Freight

People that he would repay the amount in full at 3 pm the following day. However, for whatever reason, Mr Rix-Trott did not keep the appointment.

[29] The question the Authority must address is what the parties intended if or when the employment relationship came to an end. This was a loan made by the employer to the employee for the specific purpose of assisting the employee to purchase a vehicle to enable him better fulfil his duties to the employer. It seems plain that there would have been no loan if there had been no employment. On that footing then, the Authority is drawn to conclude that there is an implied term of the loan advance, that it was to be repaid at the conclusion of the employment. This view of matters is given credence by the upon demand nature of the advance, the purpose of the advance, the apparent acceptance of the parties and the commercial reality that The Freight People cannot have intended to leave the loan monies unredeemed, if Mr Rix-Trott was no longer in the employment. The whole point of the advance was to facilitate the employment. When the employment ended, so should the advance.

[30] It follows from the foregoing paragraphs that the Authority's considered view is that it can make a determination in relation to the car loan, for the reasons just advanced.

Was Mr Rix-Trott disadvantaged by unjustifiable actions?

[31] Mr Rix-Trott says that he suffered disadvantage because of unjustified actions taken against him by The Freight People. Specifically, he alleges that it failed to provide administrative support and failed to allow reasonable follow up of opportunities for new clients that might have been introduced to the business as a consequence of Mr Rix-Trott's efforts. In addition, although not specifically pleaded as a disadvantage grievance, Mr Rix-Trott makes various general complaints about being bullied. This is particularly in respect of the suggestion that he was forced to sign the addendum and was not given a reasonable opportunity to obtain advice on the employment agreement either.

[32] The Authority's considered view is that none of these allegations can be made out. The Authority did not find Mr Rix-Trott a particularly persuasive witness. The Authority preferred the evidence of The Freight People on Mr Rix-Trott's performance. Mr Rix-Trott's contention that, in effect, the failure to secure clients was a function of The Freight People's default, is not made out on the evidence and

the Authority prefers the view that The Freight People itself advanced, namely that Mr Rix-Trott was the architect of his own misfortune. It was clear on the evidence that the appointment was experimental and the evidence of The Freight People was that Mr Rix-Trott generated not one single new client as a consequence of his involvement; in the Authority's opinion, there was no need for administrative support from The Freight People because there was nothing to administratively support nor, on the evidence, was there anything for anybody to follow up based on Mr Rix-Trott's activities.

[33] As to the allegation that Mr Rix-Trott was bullied into signing the employment agreement and the addendum, dealing with the employment agreement first, the evidence the Authority heard was that the agreement was provided to Mr Rix-Trott on the first day of his paid employment which was 21 February 2011, that he took the agreement away to consider it overnight and brought it back the following morning and signed it. The Authority was not persuaded that there was any element of impropriety in relation to that sequence.

[34] Concerning the addendum, the Authority has already made clear that it preferred the evidence of The Freight People to the effect that the changes to the employment relationship which were effected by the addendum were initiated not by The Freight People but by Mr Rix-Trott and on that footing Mr Rix-Trott's suggestion that he was under some duress in signing the addendum also, is rejected.

[35] The Authority is not persuaded then that Mr Rix-Trott has suffered disadvantage as a consequence of unjustified actions of the employer. The Authority's view is that the employer has not taken actions which are unjustified and the Authority is also not satisfied that Mr Rix-Trott suffered any disadvantage.

Was Mr Rix-Trott unjustifiably dismissed?

[36] The Authority has no hesitation in finding that Mr Rix-Trott was unjustifiably dismissed. This follows inexorably from the Authority's earlier conclusion that the employment was, in truth, not subject to a trial period within the meaning of the statute.

[37] The employment ended with an email dated 6 May 2011 from Mr Whiteman of The Freight People which simply brings the employment to an end on two weeks' notice and seeks repayment of the cash advance for the car.

[38] Quite clearly, that does not comply with the good faith obligations of the employer terminating employment in an open environment. Of course, the Authority accepts that The Freight People believed (erroneously) that Mr Rix-Trott was in truth employed on a trial period and the means of termination reflected that belief.

[39] Nonetheless, the dismissal is plainly unjustified for procedural deficiency and a lack of substantive justification as well.

Determination

[40] Mr Rix-Trott is entitled to have remedies considered in relation to his unjustified dismissal but the Authority must first assess whether Mr Rix-Trott has contributed in any way to the behaviour giving rise to the grievance: s.124 applied.

[41] The Authority is satisfied that Mr Rix-Trott is blameless in relation to the unjustified dismissal. There may well be issues between him and The Freight People in respect of his performance, but The Freight People ought to have dealt with that by managing his performance or, of course, by having a trial period that complied with the law.

[42] The Authority notes that this was an employment of short duration and notes also that it is common ground that The Freight People was “*taking a punt*” on whether the employment would work out. However, the employee has been unjustifiably dismissed and the evidence the Authority heard makes it clear that he has lost remuneration as a consequence of the dismissal.

[43] There is a further issue about a claim from The Freight People for the repayment of personal fuel costs incurred by Mr Rix-Trott; the Authority was satisfied that Mr Rix-Trott ought to reimburse The Freight People for the total amount of \$340.

[44] The Authority awards Mr Rix-Trott the following sums to remedy his personal grievance:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$3,000;

(b) A contribution to lost wages in the sum of \$7,500 gross.

[45] The Authority declares that Mr Rix-Trott is indebted to The Freight People in the sum of \$10,340 being the aggregate of the loan amount advanced to him by The Freight People together with the reimbursement of the personal fuel bill Mr Rix-Trott incurred during the employment.

[46] The parties are directed to engage with each other and resolve the practical application of this determination.

Costs

[47] Costs are reserved.

James Crichton

Member of the Employment Relations Authority