

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 147
5347692

BETWEEN KEVIN RIX-TROTT
 Applicant

AND THE FREIGHT PEOPLE
 LIMITED
 Respondent

Member of Authority: James Crichton

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

Submissions Received: 16 March 2012 from the Applicant
 20 April 2012 from the Respondent

Determination: 1 May 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority issued a determination on the substantive matter on 16 February 2012. The Authority’s decision, in essence, was that Mr Rix-Trott’s application for personal grievance was successful but the Authority also made orders in respect of a loan made by The Freight People to Mr Rix-Trott.

[2] Costs were reserved.

The application for costs

[3] Mr Rix-Trott, through counsel, seeks an award of costs. \$2,000 is sought as a contribution to Mr Rix-Trott’s actual costs which are identified by counsel as “*significantly higher*”.

[4] Mr Rix-Trott’s submission seeks to deal with the semblance of balance between the parties. On the one hand, while Mr Rix-Trott was entirely successful in

his personal grievance, the Authority also directed that Mr Rix-Trott was to repay to The Freight People a loan that had been extant since the beginning of the employment relationship. Mr Rix-Trott suggests that the Authority ought to give him the credit for pushing ahead with the personal grievance, not just as a way of prosecuting his own claim but also as a way of resolving the loan issue between the parties.

[5] The suggestion that Mr Rix-Trott should take the credit for progressing the loan issue to a conclusion (albeit one that does not advantage him), is not necessarily borne out by the evidence that the Authority heard in the substantive investigation. Rather, the position seemed to be that Mr Rix-Trott was resistant to engaging with The Freight People in relation to the loan matter, although he made promises to meet with The Freight People to resolve the matter but failed to do so.

[6] Conversely, Mr Rix-Trott makes the important and entirely valid observation that, by reason of the dispute around the purported trial provision, it was necessary to seek the assistance of legal counsel. That point is well made; despite The Freight People's bona fides and what the Authority accepted was a genuine effort to comply with the law, the fact remained that there was no compliance and it is likely that that could only have been identified with the assistance of counsel acting for Mr Rix-Trott.

[7] Next, the Authority notes that Mr Rix-Trott makes the submission that he has incurred other cost in defending himself against various applications from The Freight People to resolve the loan issue, but that is not a proper matter to take into account in fixing costs in the Authority. If Mr Rix-Trott had honoured his obligations in the matter, he would have dealt with the loan issue at first blush, as indeed he promised to do before leaving the employment. He has only himself to blame for incurring costs in defending proceedings when he knew perfectly well that he was indebted to The Freight People for the money he had borrowed from it.

The response

[8] As the Authority has already indicated, The Freight People's response proceeds on the simple footing that costs should lie where they fall. The implication of this submission is that each party had some success before the Authority and, looked at in the round, there is some truth to that.

The law

[9] The relevant law on cost fixing in the Authority is well settled. The Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 provides an admirable summary of that jurisprudence.

[10] Relevant principles to be discerned from that judgment include the precepts that costs in the Authority will typically be modest, reflecting the non-adversarial environment, that costs would usually follow the event, and that it is appropriate for the Authority to apply a daily tariff in costs fixing. As Mr Rix-Trott has acknowledged in his submission, costs are also a discretionary remedy.

Determination

[11] Considering the application of perhaps the fundamental precept in cost fixing that costs usually should follow the event, the Authority considers that this is indeed a case where, looked at in the round, both parties can be seen to have had a measure of success. This was an employment relationship which did not work for either party. Both parties acted broadly in good faith and certainly there was no malice in the dismissal nor in the retention of the loan moneys. Both parties used their best endeavours to try to resolve matters, but in the result were not able to do so without the intervention of the Authority.

[12] Looked at exclusively on the basis of the general principle that costs should follow the event then, there is an argument for the view that, in the present case, as both parties had a victory of sorts, costs should lie where they fall.

[13] Furthermore, looking at the matter on the basis of the daily tariff, this was not a hearing which occupied a great many hours of hearing time. That being the position, the starting point in the present case would have to be even less than the \$2,000 Mr Rix-Trott is seeking, given that the investigation meeting lasted significantly less than a half day.

[14] In all the circumstances then, the Authority is not minded to make an order for costs in relation to the present matter. This is, in the Authority's view, a matter where costs should indeed lie where they fall. Having said that, the Authority would want to record that it was greatly assisted by Mr Farrands' involvement in the investigation

meeting and would not wish to be associated with the rather uncharitable observations which The Freight People made in respect of Mr Farrands' firm.

James Crichton
Member of the Employment Relations Authority